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**Reform of the EU rules applicable to State aid in the form of public service
compensation**

COMMISSION STAFF WORKING PAPER

IMPACT ASSESSMENT

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TABLE OF CONTENTS

1.	Procedural Issues and Consultation of Interested Parties	7
1.1.	Identification	7
1.2.	Organisation and timing.....	8
1.3.	Previous steps in the revision process, including Member States and public consultations	8
1.4.	Impact Assessment Board review and opinion	10
2.	Problem definition.....	11
2.1.	Background	11
2.1.1.	What are SGEIs?.....	11
2.1.2.	What is the economic importance of SGEIs?	12
2.1.3.	What is the social importance of SGEIs?.....	13
2.1.4.	Current legal framework applicable to SGEIs	14
2.1.4.1.	Why does the specific nature of SGEIs require public compensation?	14
2.1.4.2.	Why to apply State aid control to compensation for SGEIs (economic justification)?	14
2.1.4.3.	Why to apply State aid control to compensation for SGEIs (legal justification)?	15
2.1.4.4.	Why is there a need to have specific rules for SGEIs?	15
2.1.4.5.	Key determinants of State aid compatibility for SGEIs.....	17
2.2.	Description of the general problems raised by the current rules and examples from some sectors.....	17
2.3.	How would the problem evolve, all things being equal?	22
2.4.	What is the EU's right/obligation to act (legal basis)?	23
3.	Objectives.....	25
3.1.	General objectives	25
3.2.	Specific objectives	25
4.	Policy Options.....	26
4.1.	Options relating to clarification of the rules	27
4.1.1.	No policy change.....	27

4.1.2.	Continue current action and develop cooperation with the Member States.....	28
4.1.3.	Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance	29
4.2.	Options relating to simplification for small, local SGEIs.....	30
4.2.1.	No policy change.....	30
4.2.2.	Increase the ceiling of the general de minimis regulation.....	30
4.2.3.	Adopt a specific de minimis rule for small, local SGEIs.....	31
4.2.4.	Very simplified compatibility conditions for small, local SGEIs.....	31
4.3.	Options relating to the scope of the Decision	32
4.3.1.	No policy change.....	32
4.3.2.	Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds of the Decision	32
4.3.3.	Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision.....	33
4.4.	Options relating to increasing competition considerations for large commercial SGEIs	33
4.4.1.	No policy change.....	33
4.4.2.	Test of compliance with public procurement rules and overcompensation test	33
4.4.3.	Test of compliance with public procurement rules, necessity test and overcompensation test	34
4.4.4.	Test of compliance with public procurement rules, overcompensation test and competition test limited to most serious competition distortions.....	35
4.4.5.	Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions.....	35
4.5.	Options relating to increasing efficiency considerations for large commercial SGEIs.....	35
4.5.1.	No change.....	35
4.5.2.	Incentivise efficiency	36
4.5.3.	Introduction of an efficiency test	36
5.	Analysis of Impacts.....	37
5.1.	Impacts of options relating to clarification of the rules	37

5.1.1.	No policy change.....	37
5.1.2.	Continue current action and develop cooperation with the Member States.....	38
5.1.3.	Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance	39
5.2.	Impacts of options relating to simplification for small, local SGEIs.....	40
5.2.1.	No policy change.....	40
5.2.2.	Increase the ceiling of the general de minimis regulation.....	41
5.2.3.	Adopt a specific de minimis rule for small, local SGEIs (based on 107(1) TFEU) ..	42
5.2.4.	Very simplified compatibility conditions for small, local SGEIs.....	45
5.3.	Impacts of options relating to the scope of the Decision	46
5.3.1.	No policy change.....	46
5.3.2.	Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds of the Decision	47
5.3.3.	Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision	48
5.4.	Impacts of options relating to increasing competition considerations for large commercial SGEIs	49
5.4.1.	No policy change.....	49
5.4.2.	Test of compliance with public procurement rules and overcompensation test	50
5.4.3.	Test of compliance with public procurement rules, necessity test and overcompensation test	51
5.4.4.	Test of compliance with public procurement rules, overcompensation test and competition test limited to the most serious competition distortions.....	52
5.4.5.	Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions.....	52
5.5.	Impacts of options relating to increasing efficiency considerations for large commercial SGEIs	52
5.5.1.	No policy change.....	52
5.5.2.	Incentivise efficiency	53
5.5.3.	Impose efficiency test	54

- 6. Comparing the Options 55
 - 6.1. Clarification of the rules..... 55
 - 6.2. Simplification for small, local SGEIs 56
 - 6.3. Scope of the Decision..... 57
 - 6.4. Increasing competition considerations for large commercial SGEIs 58
 - 6.5. Increasing efficiency considerations for large commercial SGEIs 59
 - 6.6. Overall package of the most appropriate policy options..... 60
- 7. Monitoring and Evaluation 60

Introduction

This Impact Assessment will explore the need and options to review the existing State aid rules applicable to services of general economic interest (SGEI).

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Identification

The State aid rules for SGEI are contained in a series of legal instruments adopted in 2005 (often referred to as the post-Altmark or SGEI Package). These instruments seek to clarify the application of the Treaty's State aid provisions (in particular Articles 106, 107 and 108 TFEU) to SGEI.

The two most important elements of the Package are:

- a Decision¹ which provides that public service compensation payments – below certain thresholds and fulfilling certain conditions – are considered compatible with Article 106(2) TFEU and are exempted from the obligation to notify under Article 108 TFEU;
- a Community Framework for State aid in the form of public service compensation². The Framework explains the Commission's approach as regards cases that fall outside the scope of the Decision and must therefore be notified and examined on an individual basis. For such cases, the SGEI Framework establishes the conditions under which the Commission considers them compatible with the internal market.

The SGEI Framework expires on 28 November 2011, while the Decision continues to apply.

The revision of the 2005 Package is part of the Commission's Work Programme for 2011³.

It was also mentioned in President Barroso's letter accompanying his State of the Union address to the European Parliament⁴.

¹ Commission Decision (EC) No 842/2005 of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) of the Treaty on the Functioning of the European Union] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p.67

² Community Framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4

³ Annex 1 of Commission Communication COM(2010) 623, Commission Work Programme 2011, 27.10.2010, p. 4.

1.2. Organisation and timing

The project has been led by Directorate General for Competition.

The chronology of the project is presented in Annex 1.

All services of the European Commission were invited to be part of the Steering Group for this Impact Assessment and a number of them actively participated to several meetings, namely the Directorate General for Competition, the Secretariat General, the Legal Service, the Directorate General for Enterprise and Industry, the Directorate General for Employment, Social Affairs and Inclusion, the Directorate General for Mobility and Transport, the Directorate General for Environment, the Directorate General for Information Society and Media, the Directorate General for Internal Market and Services, the Directorate General for Regional Policy, and the Directorate General for Health and Consumers.

This Group met on 16 December 2010, 17 February 2011, 14 July 2011 and on 4 October 2011.

1.3. Previous steps in the revision process, including Member States and public consultations

- Member States and Stakeholders' Consultations

On the basis of Articles 8 and 9 of the 2005 Decision, a Member State reporting exercise was conducted in 2008 and 2009⁵ and a general stakeholders' consultation in 2010⁶. The stakeholders' consultation has generated contributions from a large number of different organizations involved in the provision and commissioning of SGEI.

Overall, the consultation confirmed that the existing legal instruments were a necessary and appropriate response in the light of the Altmark ruling. However, the consultation also showed that there is scope for improvement. In particular, there is a need for clearer, simpler and more effective instruments to ensure an easier application of their rules and hence to promote a more efficient delivery of high quality SGEI, to the benefit of EU citizens.

In October 2011, a second public consultation was carried out by the Commission on the legislative proposal for the reform of State aid rules for SGEIs. The overall outcome of the public consultations carried out in 2010 and 2011 is presented in Annex 2.

- The SGEI Report

⁴ Press Release Memo/10/393 of 7 September 2010, *Letter by President Barroso to the Members of the European Parliament*

⁵ Member States reports: http://ec.europa.eu/competition/consultations/2010_sgei/reports.html

⁶ Public consultation on State aid rules on Services of General Economic Interest
http://ec.europa.eu/competition/consultations/2010_sgei/index_en.html

In March 2011, DG Competition published a detailed report⁷ analysing the operation of the SGEI Package since its adoption in 2005 across a wide range of sectors and the outcome of the consultations. The sectors covered included transport, energy, waste and water services, postal services, financial services, public service broadcasting, broadband, healthcare, and social services and services organised by local authorities. This is the main source of information, which gives a good overview of the positive contribution of the 2005 SGEI package, but also of the various problems encountered in different sectors. For each of the above-mentioned sectors, the analysis contains three main parts: a description of the size of the sector and structural particularities, the regulatory framework that applies, and the Commission's decision-making practice.

- The SGEI Communication

The SGEI Report was made public at the same time as a Commission Communication⁸ setting out the broad political objectives of the reform. The Communication also explained why the appropriate legal basis for the reform is Article 106 TFEU. The changes introduced by the Lisbon Treaty, most notably Article 14 TFEU and Protocol 26, are provisions that ought to be taken into account, but Article 14 explicitly provides that it only applies without prejudice to the State aid rules.

As regards the core principles of the new rules, the Communication first of all stated its intention to provide additional clarity concerning the basic concepts which are relevant for the application of the State aid rules (e.g. the notion of economic activity and undertaking; the definition of SGEI; the notion of effect on trade; and the application of the four Altmark requirements determining the non-existence of State aid).

Second, it stated that it would seek to adopt a more diversified and proportionate approach under which the degree of State aid scrutiny is even better linked than under the current regime to the nature and scope of the services provided. Two possible consequences of this diversified approach were mentioned:

- First, this approach should lead to a simplification of the State aid rules for services organised at a local level with a limited effect on trade between Member States and for certain types of social services. The Commission would generally seek to ensure that the administrative burden put on the public authorities concerned is proportionate to the impact of the measure on competition in the internal market.

⁷ Commission Staff Working Paper SEC(2011) 397 of 23 March 2011 on *The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation* http://ec.europa.eu/competition/state_aid/legislation/sgei_report_en.pdf

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2011) 146 final of 23 March 2011 on the *Reform of the EU State Aid rules on Services of General Economic Interest* http://ec.europa.eu/competition/state_aid/legislation/sgei_communication_en.pdf

- The second consequence of this approach is that for large-scale commercial SGEI activity with a clear EU wide dimension, greater emphasis should be placed on competition scrutiny and on the efficiency of the aid. This should avoid that the costs compensated by the State are excessively high due to the inefficiency of the provider.
- Recent Exchanges with Stakeholders

Following the publication of the Communication and the Report in March 2011, Vice President Almunia and DG Competition have engaged in an extensive dialogue with different stakeholders to discuss the practical implementation of these high level principles. This has included discussions with other institutions, such as the European Parliament, the European Economic and Social Committee⁹, and the Committee of the Regions¹⁰. The relevant reports / opinions from the European Parliament are:

- Draft Report of the Committee on Economic and Monetary Affairs¹¹ (lead Committee), Rapporteur Peter Simon;
- Draft Opinion of the Committee on the Internal Market and Consumer Protection¹², Rapporteur António Fernando Correia De Campos;
- Draft Opinion of the Committee on Industry, Research and Energy¹³, Rapporteur Gunnar Hökmark.

Other stakeholders that submitted their opinions on the March Communication included the German Bundesrat, the Italian Parliament, as well as the French authorities. These exchanges have confirmed the broad principles the Commission is basing its reform on.

1.4. Impact Assessment Board review and opinion

Following the examination and the recommendations of the Impact Assessment Board, the draft version of 13 October 2011 was amended in order to include a number of improvements on the following issues: briefly presenting key compatibility determinants of State aid compatibility, a more detailed presentation of administrative burdens, a clarification of the issues related to social services, a better explanation of the interaction between State aid and public procurement rules, a reinforced justification of the

⁹ Opinion of the EESC on the Reform of the EU State aid rules on Services of General Economic Interest COM (2011) 146 final – Cote CESE: TEN/455 Session plénière de juin 2011 – Rapporteur: Mr Raymond Hencks

¹⁰ Opinion of the CoR on the Reform of the State aid rules on Services of General Economic Interest COM (2011) 146 final – CdR 7/2011 Session plénière de juin/juillet 2011 – Rapporteur: Mr Karl-Heinz Lambertz

¹¹ http://www.europarl.europa.eu/meetdocs/2009_2014/documents/econ/pr/875/875217/875217en.pdf

¹² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-469.871+01+DOC+PDF+V0//EN&language=EN>

¹³

[http://www.europarl.europa.eu/RegData/commissions/itre/projet_avis/2011/469885/ITRE_PA\(2011\)469885_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/itre/projet_avis/2011/469885/ITRE_PA(2011)469885_EN.pdf)

elimination of the turnover threshold under the Decision, strengthened arguments regarding the introduction of efficiency considerations for large commercial SGEIs, assessment of an overall package of the most appropriate policy options, a more extensive presentation of the stakeholders' views following the public consultations of 2010 and 2011, and additional data where possible (e.g. examples of models for incentivising efficiency, an annex on the cases dealt with by the Commission). Other more technical comments provided directly to DG COMP were taken into account to the highest extent possible.

2. PROBLEM DEFINITION

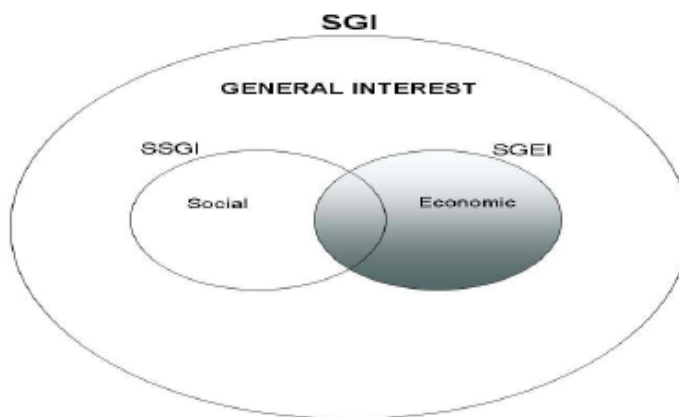
2.1. Background

2.1.1. *What are SGEIs?*

Services of general interest (SGIs) are services that public authorities classify as being of general interest and therefore subject to specific public service obligations. Public services, generally identified in the Treaties as services of general economic interest (SGEI), are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. As suggested by their name, unlike other SGIs, SGEIs are of an economic nature.

Economic activity can be contrasted with the exercise of State prerogatives on the one hand and purely social activities on the other hand. Since it may often be difficult to distinguish between the economic and non-economic activities, the following diagram provides a useful tool for a better understanding.¹⁴

Figure 1. Services of general interest (SGIs)



Source: SGEI Communication

¹⁴ It merely illustrates the different concepts and does not seek to represent the respective size of the economic and non-economic sectors.

Moreover, the Court of Justice has clarified in several cases¹⁵ that any activity consisting in offering goods and services on a market is an economic activity.

SGEIs range from large commercial services (network industries such as postal services, energy supply, electronic communication services or public transport services) to a wide range of health and social services¹⁶ (e.g. care services for elderly and disabled persons).

The Lisbon Treaty recognises the essential role of the public services. They occupy a vital role in the shared values of the Union¹⁷. They promote social and territorial cohesion, foster the well-being of people across the EU and make an important contribution to Europe's economic development, as well as to the Member States' economic performance and competitiveness. The importance of public services has been underlined by the economic and financial crisis: the crisis has not only affected many people across the EU, but also made them more dependent on high quality public services.

The nature and size of the market concerned can be estimated with data from the study commissioned in the framework of the "Mapping of the Public Services" project, managed by CEEP¹⁸. The data are from 2006, but are believed to be still relevant in 2010 because of slow movements in the relevant trends. These aggregated statistics, however, have some limitations, because they refer to services of general interest (SGIs) of both an economic and non-economic nature. We have excluded from our analysis the sectors of public administration and education, which are of non-economic nature. However, some of the remaining sectors for which we report the data might not be purely economic. For example, in research and development or in health and social works it is likely that non-economic SGIs are included. We present below the main statistics.

2.1.2. *What is the economic importance of SGEIs?*

The direct contribution of SGEIs to the GDP is of great importance. It can be expressed as value-added for the services of economic nature, or on the basis of expenditure for health and social services. Statistics show that this expenditure in health and social services accounts for as high as 9,4% of GDP. The sectors of infrastructure networks have a contribution of 4,8% of GDP, while research and recruitment have a contribution of 0,9% of GDP. However, it is unclear how much of the sector of research and recruitment concerns SGEIs and how much non-economic SGIs. In any case, using these

¹⁵ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, paragraph 75

¹⁶ For a description of social services of general interest see the Commission Communication COM(2006) 177 final of 26 April 2006 on *Implementing the Community Lisbon programme: Social services of general interest in the European Union*

¹⁷ Article 1 of Protocol 26 to the Treaties

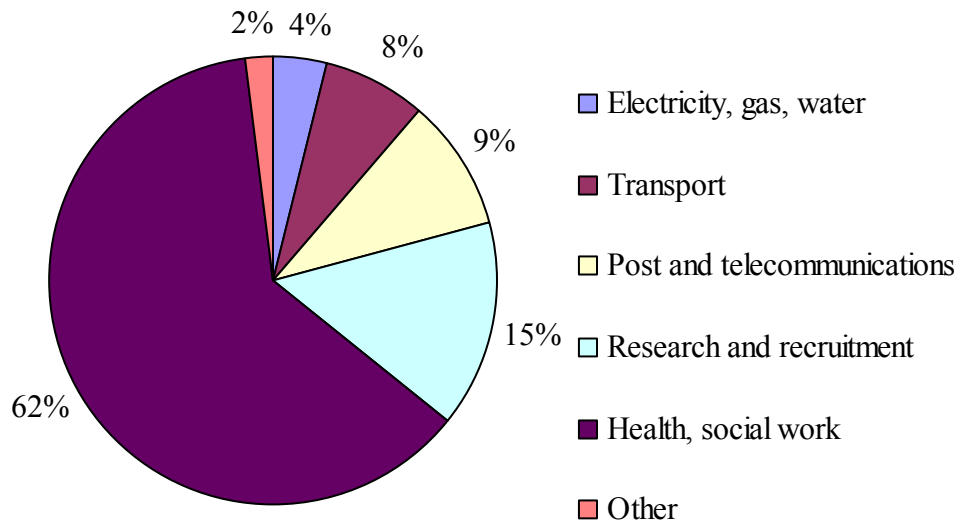
¹⁸ Bauby, P. and Similie (Popa), M.M. (2010), *Public Services in the European Union & in the 27 Member States. Statistics, Organisation and Regulations*, Study commissioned in the framework of the "Mapping of the Public Services" project managed by the CEEP, with the support of the European Commission

statistics, the average direct contribution of SGEI providers to the EU GDP can be estimated at around 15%. Moreover, there are important investments carried out by SGEI providers. For example, in the sectors of infrastructure networks and research, investments were of more than 150 billion Euros, which accounted for 6,4% of total EU investment. These investments are above average in the 10 Member States from Central and Eastern Europe, most likely because of the modernisation period they undergo.

2.1.3. What is the social importance of SGEIs?

Other relevant statistics refer to the number of people employed (depicted in Figure 1) and to the number of enterprises providing SGEIs. Regarding employment, health and social services are of particular importance as they employ 20,6 million people, which accounts for 62% of total SGEIs, as depicted in Figure 1, and for 9,6% of the workforce at EU level. The sectors of infrastructure networks (i.e. electricity, gas, water, transport, post and telecommunications) were considered to be the core SGEIs more than 20 years ago, but now they account altogether for only 21% of employees in total SGEIs, and for an average of 3,4% of EU jobs.

Figure 2. Persons employed by SGEIs sectors (% of total SGEIs)



Source: Bauby, P. and Similie (Popa), M.M. (2010), *Public Services in the European Union & in the 27 Member States. Statistics, Organisation and Regulations*

As far as the number of enterprises providing SGEIs is concerned, the data available covers only the sectors of infrastructure networks and research and recruitment. In these sectors, there are more than 500.000 providers at EU level, of which almost 60% are part of the transport sector. In contrast, the number of providers of SGEIs is significantly

lower in the sectors of electricity, gas and water¹⁹. For more statistics and full datasets on SGIs, please see Annex 3 based on the study entitled "Mapping of the Public Services" by CEEP. For more detailed statistics on the sectors of healthcare and social services, please see Annex 4.

2.1.4. *Current legal framework applicable to SGEIs*

2.1.4.1. Why does the specific nature of SGEIs require public compensation?

Generally speaking, SGEIs are services that may not be provided by the market alone, or may be provided on terms considered to be unsatisfactory from a social point of view. The intervention from the State may become necessary either through regulation or subsidies or both. Market prices might not reflect the real costs and benefits of public services to society ("externalities"). An example is the provision of utilities such as electricity, water or postal services, in remote areas: although the cost of providing those services might exceed the willingness of the users to pay the service, this cost might be below its benefits to society when taking into consideration the cost of urban congestion and benefits of territorial cohesion.

In addition to the economic benefits which cannot be captured by the public service provider, SGEIs might be considered necessary by a Member State to provide its population with a safety net and to ensure a certain level of social and territorial cohesion even though the economic benefits of the SGEI to the whole society might not cover its costs. For instance, it might be the case that the benefits to the whole society of a shelter for persons in need do not cover its costs. However, the public authority can consider that offering such a shelter is part of its responsibility to ensure a certain level of protection to every citizen.

In summary, public service compensation might be needed because the cost of providing such a service might exceed the user's ability or willingness to pay for it, whereas the economic benefits to the whole society of this service exceed its costs or/and whereas providing this service is considered to be desirable by the public authority on the basis of political and social considerations.

2.1.4.2. Why to apply State aid control to compensation for SGEIs (economic justification)?

SGEIs are by nature economic and are therefore provided on a market. State intervention in a market, even in order to render a service to the society, alters the market mechanism by crowding-out private initiative and can be a source of distortions, unless properly regulated. Competition distortions are harmful and detrimental to users in the long run.

¹⁹ The reported statistics for the water sector are lower than in reality, as there is a large number of local operators in many countries.

State aid control shall ensure that public service compensations are necessary and proportionate to the objective pursued so as to avoid distortions of competition and trade contrary to the interest of the Union.

2.1.4.3. Why to apply State aid control to compensation for SGEIs (legal justification)?

The SGEI Communication represents a good starting point in explaining the structure and role of public services in the EU "architecture". Public services are generally identified in the Treaties as SGEI. Their essential role has been recognised by Article 14 of the TFEU, as well as Protocol 26.

According to Protocol 26, the shared values of the Union include, in particular, "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights," as well as "the wide discretion of national, regional and local authorities in providing, commissioning and organising [SGEIs]." This means that there is no universal definition of an SGEI that applies for all EU Member States and that Member States have broad discretion in defining these services. Therefore, the new SGEI package needs to address this problem because of the need for legal certainty.

Under Article 14 TFEU, both the Union and the Member States are given the mandate, each within their respective powers and competences, to ensure the proper operation of such services. It must be noted in this context, however, that Article 14 TFEU explicitly provides that it applies without prejudice to the competition rules.

State aid rules only apply to activities that are "economic" in nature. It is thus important to underline that EU competition rules apply only to those services of general interest (SGIs) of an economic nature, i.e. SGEIs.

2.1.4.4. Why is there a need to have specific rules for SGEIs?

The Court of Justice, in its *Altmark* judgment of 24 July 2003²⁰, provided further clarification regarding the conditions under which public service compensation might not constitute State aid owing to the absence of any advantage.

According to the Court,

'Where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty [now Article 107(1) TFEU]. However, for such compensation to escape qualification as State aid in a particular case, a number of conditions must be satisfied.

²⁰ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747

... First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. ...

... Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. ... Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty [now Article 107(1) TFEU].

... Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit ...

... Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations²¹.

Until the Altmark ruling, uncertainties existed as to the qualification under the State aid rules of compensation granted to public services providers to offset the additional costs incurred as a result of the entrustment of a public service mission to them. As highlighted above, the Altmark ruling set the conditions under which such compensations should be considered aid-free.

The Altmark ruling made apparent that many public compensations to SGEI providers do indeed fall under the notion of State aid. It was therefore crucial to provide a clear Commission approach as to the compatibility assessment of State aid in the field of SGEI compensation. Since it appeared to be very difficult for most of the public service compensations granted to fulfil the four Altmark criteria, it was essential to provide for legal certainty for those measures. Introducing the set of specific rules for SGEIs in 2005 increased legal certainty and allowed for public service compensation that represented aid either to be block exempted from notification if it fell within the scope of the Decision, or to undergo scrutiny and possibly be declared compatible if it met the criteria laid down in the Framework. Today, the necessity for a clear Commission approach to measures that are not considered aid-free under the Altmark judgment remains.

²¹ Ibidem, paragraphs 87-93

2.1.4.5. Key determinants of State aid compatibility for SGEIs

Where a measure is not considered aid-free under the Altmark judgment or under the general de minimis Regulation²², its compatibility with the internal market has to be assessed. Article 106(2) TFEU states that undertakings entrusted with the operation of an SGEI or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the provision of the particular task assigned to them. Article 106(2) sets therefore the basic principles for compatibility, in particular the following:

- Firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking.
- Secondly, the entrustment must relate to an SGEI.
- Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end.
- Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the European Union.

According to the case-law on the interpretation of Article 106(2) TFEU, an act or the acts of entrustment must specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned. As further explained in Recital (9) of the 2005 Decision, the costs to be borne by the undertaking concerned should also be specified in order to ensure that the amount of compensation can be properly calculated and checked. As already mentioned under point 3 above, Article 106(2) TFEU requires that compensation does not exceed what is necessary to cover the costs incurred by the undertaking in discharging the public service obligations, account being taken of the relevant receipts and a reasonable profit. This should be understood as referring to the actual costs incurred by the undertaking concerned.

2.2. Description of the general problems raised by the current rules and examples from some sectors

As described in detail by the SGEI Report, the consultation exercise conducted by the Commission has highlighted that Member States and stakeholders generally consider that the 2005 SGEI Package has made a useful contribution to the overall objective of legal certainty following the Altmark ruling. Moreover, the SGEI Decision contributed to a reduction in the administrative burden that was incurred in connection with the notification obligation for SGEI compensations. The Commission's own experience with

²² Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, Official Journal L 379 of 28.12.2006

the 2005 SGEI package was also generally positive, since it provided clarification and increased legal certainty.

However, the consultation has also shown that the application of the 2005 SGEI package has raised certain difficulties, which were also acknowledged by the Commission.

- Incorrect / insufficient application of the rules

Even though many comments from the stakeholders concern the provisions of the 2005 package itself, there is also a general view that some of the key concepts underlying these rules are not sufficiently clear. This concerns, for example, the notion of economic activity under State aid rules, the question of which services can genuinely be regarded as SGEI, the notion of effect on trade between Member States and the conditions imposed by the Court of Justice in the Altmark judgement. One of the points raised with respect to the Altmark criteria, for instance, concerns the interplay between State aid and public procurement law: stakeholders wonder under what conditions public procurement procedures can be considered to meet the 4th Altmark criterion for the attribution of the service to the least cost to the society. The public consultation has shown that the lack of clarity on the interplay of the two closely related sets of rules causes uncertainties for public authorities. It has also shown that the State aid rules applicable to SGEIs are in many cases either incorrectly or insufficiently implemented. Annex 5 presents broad statistics on the cases dealt with by the Commission, by type of case and by sector.

The main drivers behind this problem revolve around the difficulty in understanding the key concepts. For example, Cyprus, Germany and France insist in their Member State reports on the lack of clarity regarding the notion of affectation of trade. Similar difficulties were highlighted in the stakeholder consultation. According to the SGEI report, social services and local services which have been brought to the attention of the Commission as a complaint, (pre)notification, or questions include: "recreational activities (e.g. swimming pools, zoos, sports centres, youth clubs), educational and cultural activities for children and adults (e.g. child care, libraries, learning centres, museums), counselling for persons in difficult social situations, shelter for homeless persons, community centres, local town/concert halls." While these are often believed by some stakeholders not to have any impact on trade in the internal market, the legal uncertainty is likely to lead to a lack of proper implementation.

Another example concerns the specific sector of financial services that are SGEIs, where the problems that occur most often are of a relatively different nature, as mentioned in the SGEI report: "the complexity of financial services lies in the fact that identifying the correct costs, revenue and reasonable profit associated with SGEI is very difficult."²³ An

²³

For example, SGEIs entrusted to banks are usually provided through the banks' normal distribution networks. Thus, the proper allocation of costs to the SGEI requires identifying both the specific costs related to the SGEI and the proportion of overheads that it consumes. The complex operations of banks allied to the fact that the SGEI are usually provided nationwide means that the cost structure of the whole bank generally needs to be analysed. With regards to revenues, an important part of the business model of banks is cross selling, hence, banks might in practice sell extra products to some people who use the SGEI,

additional relevant example is that of complaints indicating possible misunderstandings of the conditions laid down in the SGEI Decision, as in the case of health services.

Furthermore, it appears from the analysis of the Member States' reports that they sometimes grant "public service compensation" to services which probably do not actually constitute SGEI. Examples of such "compensations" concern: innovation services for SMEs, consultancy services to undertakings, extension and renovation of terminal buildings and core airport services in the catchment area of the airports, and promotion of touristic regions. As a consequence, these "compensations" may constitute illegal and incompatible State aid.

This evidence emphasises the two main drivers behind the implementation problem, i.e. difficulty in understanding the rules and insufficient knowledge of the rules. The first is believed to have its source in some differences across Member States with regards to terminology, semantic confusion and different traditions that have led to misunderstandings in the discussions at European level. The second might have low awareness as an underlying cause, but it could be tackled at the same time as the first. The Committee of the Regions believes that "one of the reasons for the low level of implementation of the 2005 Commission Decision by local and regional authorities, besides the ensuing transaction costs, is the difficulty of defining local situations in terms of the EU concepts and terminology used in the Decision."²⁴

- Administrative burden too heavy for small SGEIs and for social services

Another key problem concerns the excessively high administrative burden for small SGEIs. The problem drivers mentioned before can also lie behind this issue, since both contracting authorities and undertakings sometimes incur large costs from consulting external experts in order to clarify the rules. Additionally, this problem can also be driven by the extent to which different sectors are affected by the current rules, in the sense that these are too uniform. In this case, they are too complex for small SGEIs. (The fact that they are not sufficiently fine-tuned for larger SGEIs will be discussed in relation to the following problem.)

Regarding the high administrative burden that some authorities have to deal with, an empirical study on the impact of EU Public Procurement and State Aid law on SGEI at municipal level in North Rhine-Westphalia in Germany²⁵ is illustrative of this problem in certain sectors. The study is based on a questionnaire sent in 2008 to all municipalities

thus generating additional revenue. Finally, the appropriate level of reasonable profit allowed is difficult to establish in financial SGEIs.

²⁴ Opinion of the CoR on the Reform of the State aid rules on Services of General Economic Interest COM (2011) 146 final – CdR 7/2011 Session plénière de juin/juillet 2011 – Rapporteur: Mr Karl-Heinz Lambertz

²⁵ Bogumil, J, Pielow, J-C, Ebbinghaus, J, Gerber, S, and Kohrmeyer, M (2010), *Die Gestaltung kommunaler Daseinsvorsorge im Europäischen Binnenmarkt – empirische Untersuchung zu den Auswirkungen des europäischen Beihilfe- und Vergaberechts insbesondere im Abwasser- und Krankenhaussektor sowie in der Abfallentsorgung*, Im Auftrag des Ministers für Bundesangelegenheiten, Europa und Medien des Landes Nordrhein-Westfalen, Düsseldorf

in North Rhine-Westphalia with more than 30000 inhabitants (130 in total), and on qualitative expert interviews, and it focuses on 3 main areas: waste disposal, sewage disposal and hospitals. Almost all municipalities that replied to the State aid questions consider the administrative burden associated with the clarification of State aid law requirements as very high or rather high (92%), and 90% do the same with regard to the administrative burden associated with the implementation of the State aid rules. Regarding the sources of information used to clarify State aid questions it is interesting to see that, although 72 % uses their own experts, 70% of the municipalities also used external lawyers or consultants. As a result, the financial costs to clarify State aid questions are considered by 77% as very high or rather high.

As with the Commission's decision making practice, the comments and concerns expressed by stakeholders to some extent depend on the sectors concerned. The questionnaire reveals that stakeholders plead for a more differentiated approach with regard to the scope of the Decision that will take into account proportionality according to the sectors concerned. For certain types of activities (in particular for social services and small scale services), many stakeholders consider the existing framework as being insufficiently flexible, thus imposing high administrative costs. The Member States also believe that the obligation to write a detailed act of entrustment, to amend it in case of modification of the task, to define the criteria of compensation in advance and to check regularly overcompensation, which are required under the 2005 Decision, are cumbersome for the limited amount of aid granted by local authorities. A more detailed analysis of the sources of administrative burdens is presented in Annex 6.

This is particularly important in light of the fact that social services and local services play an important role for social cohesion at local and regional level, and are often believed to have only a limited impact on the intra-community trade. Furthermore, some stakeholders argue that, even if social services are provided in an economic environment, they are driven by purely social objectives, and this should be taken into account by the State aid rules. It is important to note that there are very diverse social services. Even if most of them are small and local, there are also more sizeable social sectors that require major investments and do not fall under the scope of the 2005 Decision, thus having to apply the (more complex) conditions of the Framework and to notify the aid. Therefore, this can lead to considerable administrative burden that is not justified in light of the social nature and policy objectives of such services. In conclusion, for this particular type of SGIs, there is a dual set of criteria that has to be considered, as the problems affecting social SGEIs are related to both their size and the nature of their objectives.

- Distortions of competition on the market

Apart from distortions caused by the lack of proper implementation of the existing rules, it has appeared that, even where the current rules for State aid for SGEIs are complied with, there is still room for some distortions of competition on the market. This comes firstly from the fact that the rules are too uniform, as pointed out in the SGEI Communication: "The current Package applies in a more or less uniform way to a very

wide range of economic sectors and actors." Therefore, in relation to the problem of distortions of competition on the market, reference can be made to the main drivers.

To begin with, the current rules are not sufficiently fine-tuned for large SGEIs. There is a general feeling among stakeholders that the existing rules withdraw a large number of relatively sizeable compensation measures from State aid scrutiny, especially in some sectors such as water management.

A search in the European public procurement journal, Tenders Electronic Daily (TED), can provide some factual evidence. Irrespective of the qualification as SGEI and/or the qualification as aid, these data can be indicative of the size of the market. For example, in 2011 there were three service contracts of less than 30 million EUR awarded for drinking-water distribution in important European cities. Taken in chronological order, the contract awarded by Ayuntamiento de Bilbao in Spain has a value of 18.990.746 EUR; that awarded by SIAEP de la région de Nort-sur-Erdre in Nantes, France has a value of 21.056.918 EUR; and that awarded by Giunta regionale della Campania in Italy has a value of 17.824.173,07 EUR²⁶. These are all large SGEI contracts that fall within the scope of the Decision even though they have the potential to distort competition on the market, since they provide services in large European cities. Moreover, the example of the contract awarded by SIAEP du Ségala in Baraqueville, France for the operation of water supplies has a value of 25.950.000 EUR²⁷. Since the total value of the contract was initially estimated by the contracting authority at 30 million EUR, and in case that this would qualify as SGEI, it may be the case that the contract was specially designed to fall within the scope of the Decision.

Furthermore, distortion of competition on the market may arise because the current rules are limited to checking the absence of overcompensation, which in certain cases is not sufficient to ensure fair competition and good allocation of resources. A simple overcompensation test as foreseen by the present rules falls short of providing incentives to public services providers to improve the quality of their services; it penalises the most efficient operators, it often comes at the cost of crowding out private initiatives, and it tends to favour incumbents over newcomers. Moreover distortions of competition may arise when entrustment of an SGEI hinders the effective enforcement of sectoral EU legislation aimed at safeguarding the proper functioning of the internal market.

While this section has so far dealt with situations where distortions of competition are not taken into account to a sufficient degree, there are also cases that affect competition on the internal market to no appreciable extent and where the rules should take better account of this fact. Small local services might have no or an extremely limited influence of trade between Member States. 9 Member States (Cyprus, Germany, Denmark, Finland, France, Luxembourg, Italy, Sweden and United Kingdom) pointed out in their reports that the Commission should take better account of services of a

²⁶ Contract award notices 2011/S 10-014513 of 15 January 2011; 2011/S 38-061648 of 24 February 2011; and 2011/S 162-267385 of 25 August 2011

²⁷ Contract award notice 2010/S 7-007309 of 12 January 2010

purely local character, in particular those of a social nature, and there extremely limited effect on competition and trade between Member States.

- **Inefficient delivery of Services of General Economic Interest**

A final key problem is the inefficient delivery of SGEIs. This is particularly important because of the nature of these services that should ensure an efficient allocation of public resources. The Commission's objective is to ensure that Member States only implement State aid that contributes to an objective of common interest, is well designed and proportionate and does not distort competition and trade between Member States. The evaluation the Commission has carried out on the application of the present rules has shown that in certain cases, full compensation based on the incurred costs could lead to maintain afloat inefficient providers at the detriment of more efficient competitors.

Furthermore, it is often emphasised that the current SGEI package does not give enough consideration to the efficient delivery of the services concerned. As a matter of fact, with the current approach for overcompensation, efficiency gains are not stimulated in any way and it may sometimes be the case that the public service compensation is awarded to an undertaking that does not ensure an efficient and qualitative delivery of the service, distorting the market at the expense of other more efficient competitors.

For example, in the field of press delivery the Commission has received complaints alleging that the full compensation of a single operator such as the post office was driving out competitors, which in fact would have been able to provide the same service at a lower cost.

2.3. How would the problem evolve, all things being equal?

This impact assessment uses as a baseline scenario the continuation of the substantive rules under the present State aid package for SGEIs. For the Decision, this means that it remains unchanged and that it continues to apply. For the Framework, it means that it would be prolonged beyond its expiry date, which is in November 2011.

Another possibility would be to use as a baseline scenario the continuation of the Decision and the expiry of the Framework, but this approach is clearly less suitable. In the first place, the situation when the Framework expires would be unclear: would the Commission still apply the same conditions as under the expired Framework or apply different rules? Consequently, this approach would not provide for a clear baseline scenario. Moreover, this baseline scenario would leave the substantive rules of the Decision unchanged while replacing the substantive rules of the Framework, although both texts are closely related. For those reasons, it was considered that the continuation of the Framework should be taken as baseline scenario since this provides for a consistent baseline scenario for all policy instruments.

Regarding the evolution of the situation under the baseline scenario, it is likely that the current problems that were identified would persist, or even aggravate. Given the overall view of Member States and stakeholders, the baseline scenario would lead to general

dissatisfaction, as it would not consider their requests and suggestions. Most likely, none of the problems previously mentioned would be resolved under the baseline scenario. Rules would continue to be incorrectly and/or insufficiently applied, problems would continue to arise for certain sectors in which the administrative burden remains too high, while distortions of competition and lack of efficiency would not be taken into account.

2.4. What is the EU's right/obligation to act (legal basis)?

Regarding EU's right/obligation to act, the legal basis consists of Articles 106, 107 and 108 TFEU. Under these Articles, public funding of SGEIs which does not escape the qualification of State aid under the Altmark jurisprudence²⁸ and fulfils the criteria of Article 107(1) TFEU is subject to State aid control. As mentioned above, only compensation for public services of an economic nature, i.e. SGEIs, is subject to State aid control.

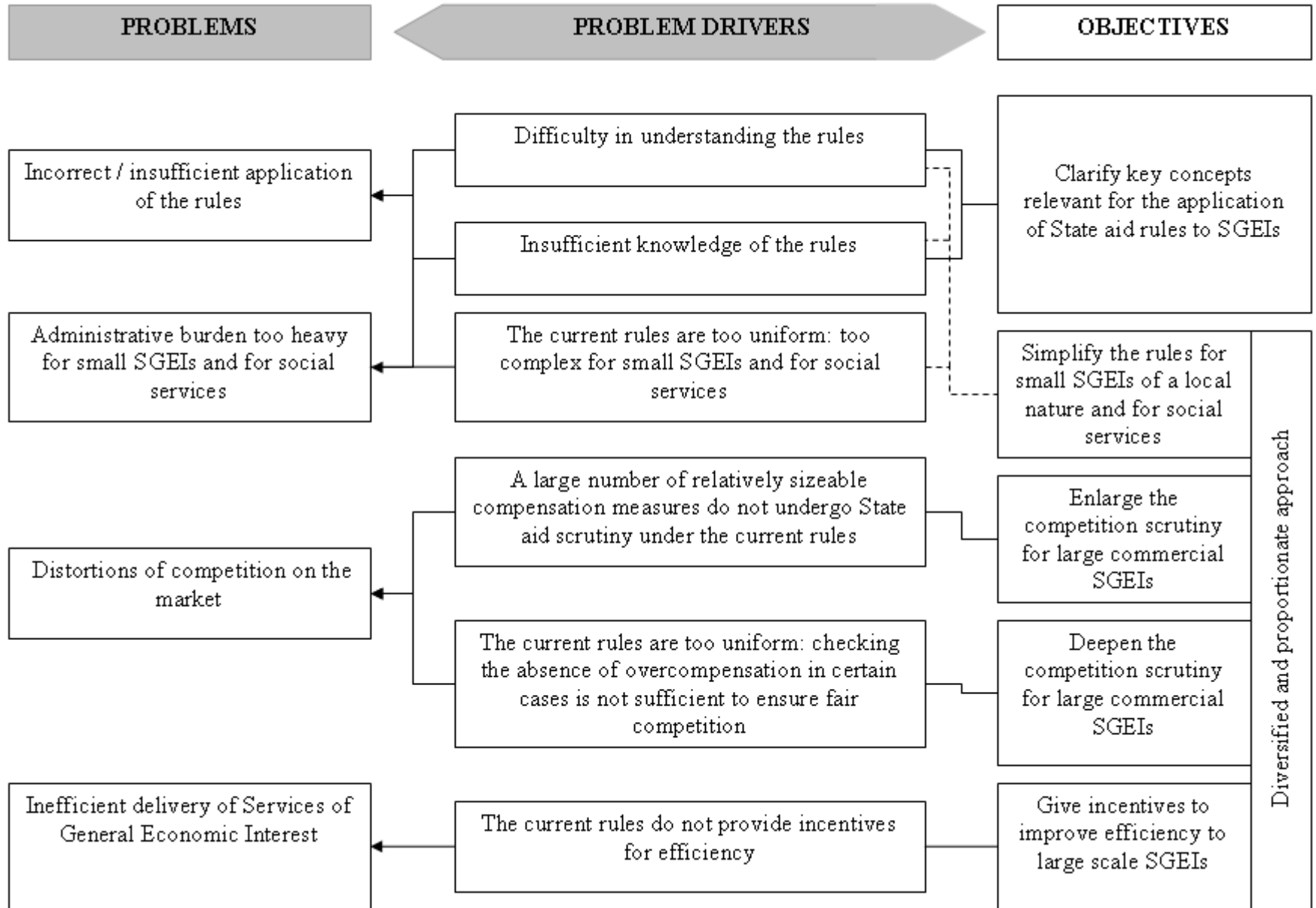
Article 106(2) provides: "*undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*".

Article 108 TFEU sets out the procedural rules on State aid control, in particular the obligation of Member States to notify State aid measures to the Commission before they are implemented. Since the TFEU reserves to the Commission the exclusive competence of controlling the conformity of public service compensation with competition rules, EU action is not subject to a subsidiarity test.

As regards legal instruments that can be adopted by the Commission in the field of State aid rules for SGEIs, the Commission faces certain legal constraints. Most notably, the notion of aid under Article 107(1) TFEU is defined by primary EU law as interpreted by the Courts. Therefore, the Commission can only give guidance as to the interpretation of the case law in non-binding legal instruments. As regards the exclusion of measures from the notion of aid under the de minimis concept, the Commission is required to act by means of a Commission regulation (cf. Article 108(3) TFEU in conjunction with Article 2 of Council Regulation No. 994/98 (EC)).

In order to better justify the following section on the objectives of the reform of State aid rules for SGEIs, the figure below gives an overview of how these are linked to the problems and the drivers behind them, as previously analysed in Section 2.2.

²⁸ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747



3. OBJECTIVES

EU State aid control is aimed at ensuring that "Member States only implement State aid that contributes to an objective of common interest, is well designed and proportionate and does not distort competition and trade between Member States."²⁹

As mentioned above, the 2005 Package could be improved in order to better achieve this goal and facilitate a better application of the EU State aid rules.

In light of the replies to the consultation and of its own experience, the Commission has defined the objectives for the review of the SGEI package in its Communication adopted last March³⁰.

3.1. General objectives

The **overall objective of the reform of the State aid rules for SGEI** is to boost the contribution that SGEIs can make to the wider EU economic recovery. Member States need, in fact, to guarantee certain services at affordable conditions to its population and in particular vulnerable consumers (e.g. hospitals, education, social services, but also communications, energy or transport). National, regional and local authorities are responsible and enjoy a large discretion in providing, commissioning and organising SGEI. At the same time, however, an efficient allocation of public resources for SGEI is key to ensuring the competitiveness of the EU and economic cohesion between the Member States. Since State aid and public procurement law pursue similar objectives in this respect, more coherence between those two closely related sets of rules would be desirable and a better alignment of the rules, as well as consistency between this reform and the on-going public procurement reform, are key. Efficient and high quality public services support and underpin growth and jobs across the EU. Social services, in particular, also help to mitigate the social impact of the crisis.

3.2. Specific objectives

Given the problems outlined in Section 2 above, the specific objectives identified for the new State aid package are the following, as explained in the March Communication:

- **Clarification:** where possible, the Commission should evaluate the possibility of providing additional clarity on a number of key concepts relevant for the application of the State aid rules to SGEIs, including the scope of those rules and the conditions for the approval of SGEI aid by the Commission.

The clarification objective is the result of a persistent complaint from stakeholders, Member States and other institutional players, such as the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, that some of the basic notions underlying the State aid rules for SGEIs are not sufficiently

²⁹ COM(2011) 146 final of 23 March 2011

³⁰ Ibidem, part 4.2

clear. The need for clarification has also been confirmed by the Commission's experience in cases and contacts with stakeholders. The following issues are most frequently raised as requiring clarification:

- the basic definitions;
 - the concepts of undertaking and economic activity;
 - the basic concepts of the notion of aid, such as those of state resources and effect on trade;
 - the scope of the Member States' discretion in defining an SGEI;
 - the requirement of an entrustment act;
 - how to exclude overcompensation through a tendering procedure and, in particular, when compliance with public procurement rules satisfies the 3rd and 4th Altmark criteria; and
 - how to exclude overcompensation in the absence of a tendering procedure.
- **Diversified and proportionate approach:** experience with the current rules has shown that the Commission should explore ways to offer a more diversified and proportionate response to the different types of SGEIs. Such an approach aims to make the degree of State aid scrutiny dependent on the nature and scope of the services provided. One element of this strategy could be to *simplify the application of the rules for certain types of small-scale public services of a local nature with a limited impact on trade between Member States and for certain types of social services*. At the same time, the Commission could *take greater account of efficiency and competition considerations in the treatment of large scale commercial services with a clear EU-wide dimension*.

As mentioned in the March Communication, the proposed diversified and proportionate approach would also seek to ensure that the administrative burden put on the public authorities concerned is proportionate to the impact that the measure has on competition in the internal market.

This approach should also make compliance easier for national, regional and local authorities, and promote the efficient delivery of SGEIs fostering a smart, sustainable and inclusive economy.

4. POLICY OPTIONS

To answer the problems identified earlier, and in response to the suggestions generated by the wide consultation several changes could be considered to the existing State aid rules for SGEIs. This has led to a range of policy options being identified. Given the legal framework described above (section 2.1., 4th bullet point), it is evident that it is not an option for the EU to refrain from any action whatsoever in the field of State aid control for SGEIs.

As explained above (section 2.3), this Impact Assessment uses the continuation of the substantive rules of the 2005 package as the baseline scenario, i.e. it assumes the prolongation of the framework beyond its expiry date. This baseline scenario is also referred to as the "no policy change"-option. This baseline scenario will represent the benchmark against which the policy options will be compared.

Section 4 is organised in five main groups of options relating to the following issues to be addressed: clarification of the rules, simplification for small local SGEIs, the scope of the Decision regarding social SGEIs and large-scale commercial SGEIs, increased competition considerations for large commercial SGEIs and increased efficiency considerations for large commercial SGEIs. The relationship between the objectives and the groups of options is depicted in Table 1 below.

Table 1. Relationship between the objectives and the groups of options

Objectives		Group of policy options
Clarify key concepts relevant for the application of State aid rules to SGEI		4.1. Options relating to clarification of the rules
Diversified and proportionate approach	Simplify the rules for small SGEIs of a local nature	4.2. Options relating to simplification for small, local SGEIs
	Simplify the rules for social services	4.3. Options relating to the scope of the Decision
	Enlarge the competition scrutiny for large commercial SGEIs	
	Deepen the competition scrutiny for large commercial SGEIs	4.4. Options relating to increasing competition considerations for large commercial SGEIs
	Give incentives to improve efficiency to large-scale SGEIs	4.5. Options relating to increasing efficiency considerations for large commercial SGEIs

4.1. Options relating to clarification of the rules

4.1.1. No policy change

This scenario would consist in continuing the current policy without any change. This would mean continuing to answer some of the questions raised by the citizens and stakeholders on the application of the EU rules to SGEIs through the interactive information system (IIS).

The creation of the IIS was announced by the Commission in November 2007³¹, with the aim of handling questions on the application of Community law to services of general interest (SGIs). It is currently available in English, French and German, and consists of two elements:

- Replies to individual questions, regarding Community law relevant to SGIs;
- Guide on Services of General Economic Interest³² which is a list of frequently asked questions, which will be updated on a regular basis. The next update could be done once the Commission has gained experience with the application of the new compatibility rules and a sufficient number of questions have been received through the IIS. The timing to update the Guide would also have to take into account the revision of the internal market rules.

4.1.2. *Continue current action and develop cooperation with the Member States*

In addition to the IIS, cooperation of the Commission with the Member States could be developed, in order to reach out to local communities. For example, certain Member States have improved the implementation of the rules by adopting general guidelines or more specific guidelines to help local communities to design public service contracts in compliance with State aid rules and, sometimes, with EU and national public procurement rules. If more resources would be devoted to such actions, in addition to the actions to be taken under the baseline scenario in 4.1.1., the Commission could help other Member States to develop such guidelines.

The public consultation reveals the awareness of stakeholders of guidance papers on the implementation of the Decision and Framework prepared by the national authorities³³ of a large part of EU-15 Member States – Belgium, Germany, Greece, Spain, Finland, France, Italy, Netherlands and United Kingdom, as well as Norway.

In the United Kingdom, there is comprehensive guidance³⁴ and training to public authorities who may wish to provide public service compensation.

In Germany, as stated in the Member State report, several papers were produced in order to facilitate the correct application of the Altmark package.³⁵

³¹ Communication COM(2007) 725 final of 20 November 2007, *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* {COM(2007) 724 final}{SEC(2007) 1514}{SEC(2007) 1515}{SEC(2007) 1516}

³² Commission Staff Working Document COM(2010) 1545 final of 7 December 2010, *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* http://ec.europa.eu/services_general_interest/docs/guide_eu_rules_procurement_en.pdf

³³ Question 39 of the questionnaire: "Are you aware of any guidance paper on the implementation of the Decision and Framework prepared by the authorities in your country?"

³⁴ UK Guidance may be found here: <http://www.bis.gov.uk/files/file53292.pdf>

³⁵ First, the Conference of Ministers of Interior of the different Länder adopted a Guidance paper on the implementation of the Altmark package (Annex 1 of the Member State report - http://ec.europa.eu/competition/consultations/2010_sgei/de_1_de.pdf), which was sent to all the Länder, municipalities and public service providers already since 2006. This paper also includes a model "act of entrustment", which can be found in Annex 8 of the Member State report – Model act of entrustment with explanations, formulated by the *Landkreistag* of Baden-Württemberg, later implemented by the

The evidence proves that this kind of action has been already pursued by some Member States, which represent an example for what others can achieve, possibly also with help from the Commission.

Additionally, it could also be envisaged to develop training actions of national and local administrations in cooperation with other DGs (e.g. DG EMPL, DG MARKT). The Commission could consider hiring an external consultant with which it could develop the training in such a manner so as to help administrations (at regional, municipal and local level) to know and understand the rules. Such an action was initiated by DG EMPL (i.e. a training organised in Lille in France) and was welcomed.

4.1.3. *Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance*

To address the difficulties encountered in the application of the rules, the Commission could clarify certain key concepts as regards State aid control of public service compensation by adopting an interpretative Communication, in parallel with the actions outlined in the previous option. Since the Commission is bound by the Treaty and its interpretation by the Courts, the Commission would need to closely align its Communication with the case law. However, it could serve as a single and concise reference document. Insofar as there is scope for interpretation, the Commission could explain how it interprets the law.

The Commission could also give guidance on aspects that have not been dealt with by the Courts so far. In addition to the close alignment with the case law by the Courts, the Commission would refer to a large extent to its prior decisions, thus highlighting its approach to certain issues that can bring clarity to similar situations as well.

The Commission would on the one hand focus on those elements of the general definition of State aid under Article 107(1) TFEU that are most relevant in this field and, on the other hand, deal with specific concepts of State aid control for services of general economic interest.

Examples for the first category include the concept of economic activity or the notion of effect on trade. The distinction between economic and non-economic services is a core question for the application of the State aid rules to an activity. Examples where

Deutscher Landkreistag (14 October 2007) - http://ec.europa.eu/competition/consultations/2010_sgei/de_8_de.pdf. Moreover, the umbrella organisations for local authorities, jointly with the Conference of the Ministers of the Interior, have been provided with a handout. In addition, the Ministry for the Economy and for Energy of the Land of North Rhine-Westphalia, jointly with the umbrella organisations for local authorities, has published guidelines which contain as an annex the list of Frequently Asked Questions published by the Commission. This guide can be found in Annex 2 of the Member State report - http://ec.europa.eu/competition/consultations/2010_sgei/de_2_de.pdf Another working and orientation paper on the application of European State aid law to social services was formulated by a working group at the *Deutscher Verein für öffentliche und private Fürsorge e. V.* (German Association for Public and Private Welfare), with the participation of the federal states, the municipalities and the Federal Government (Annex 3 of the Member State report - http://ec.europa.eu/competition/consultations/2010_sgei/de_3_de.pdf).

a careful distinction has to be made between "economic" and "non-economic" activities include social security schemes or education. Given the strong local differences and possible developments over time, it is not possible to draw the distinction between economic and non-economic activities once and for all. The Commission could, however, list criteria that are relevant for the distinction.

Examples of the second category would be the scope Member States' discretion in defining an SGEI and the Commission's check for manifest errors of assessment and the interpretation of the different criteria under the Altmark jurisprudence – in particular the characteristics a tender should fulfil to be considered as Altmark conform and how to demonstrate that an undertaking is well-run and well equipped in the meaning of the 4th Altmark criterion. As regards tendering, a key issue is to clarify the interplay between public procurement rules and State aid rules in this respect. The Communication would remain within the scope of the jurisprudence of the Court, but could clarify the effect of compliance with public procurement rules under Altmark insofar as the Court's jurisprudence leaves room for interpretation. The Communication also has to take into account the fact that the public procurement rules are being reformed at the same time and needs to ensure coherence both with the current and possible future regimes, as far as feasible.

The Communication may also provide further clarification and guidance regarding the notion of reasonable profit, in order to better correspond to the practice of the public authorities when deciding over the budget to allocate to a SGEI.

4.2. Options relating to simplification for small, local SGEIs

4.2.1. No policy change

This option would mean that compensation of up to 30 million EUR paid to undertakings with an annual turnover below 100 million EUR is declared compatible and block-exempted by the Decision when certain basic conditions are fulfilled (basically an entrustment act and the absence of overcompensation). For social housing and hospitals, there are no thresholds. In addition, compensation amounts of up to 200.000 EUR over a three-year period per undertaking would continue to fall under the de minimis Regulation and therefore not be considered State aid.

Given the block-exemption under the Decision, this option would be based on the consideration that further simplification would not be warranted. Even though a few Member States' reports present some data in regards to aid covered by the Decision, these are very limited and refer only to certain SGEIs (hospitals and social housing most of the times). This is because of the difficulty of gathering data from the local or regional authorities, since these compensations are exempted from notification.

4.2.2. Increase the ceiling of the general de minimis regulation

This option would be to increase the ceiling of the general de minimis Regulation which applies to all types of public funding to undertakings, i.e. is not limited to SGEIs. Under the de minimis concept, measures below a certain amount are deemed not to constitute State aid because they do not affect trade between Member States and/or do not distort or threaten to distort competition. The general de minimis ceiling currently amounts to 200.000 EUR over three years.

Suggestions from stakeholders referred to an increase to 500.000 EUR over three years, while the Committee of Regions proposed 800.000 EUR per year specifically for public service compensation, in light of the fact that this corresponds to the average net operating costs of a local public service, excluding a reasonable profit, for an association with 20 to 25 employees³⁶. In order not to exclude contributions of a significant amount that might affect trade between Member States, however, this Impact Assessment considers the option of increasing the current ceiling to 500.000 EUR over a period of three years.

4.2.3. *Adopt a specific de minimis rule for small, local SGEIs*

An alternative option consists of adopting a specific de minimis Regulation for small local SGEIs. As explained, under the de minimis concept, measures are excluded from the notion of aid on the basis that they are below certain thresholds where there is no effect on trade and/or no distortion or threat of distortion of competition.

A specific de minimis threshold for SGEIs would require precise conditions for eligibility. As suggested by the European Parliament, these could refer to the combined indices of size of municipality, amount of compensation payment and level of turnover of the undertaking entrusted with the operation of the service.

The following parameters could be considered, either individually or in a certain combination:

- Regarding the size of municipality, the number of inhabitants of the granting authority, e.g. local authorities representing less than 10.000 inhabitants; these municipalities are small, therefore the services they procure have mainly a local character; moreover, having regard to the size of the services, the administrative requirements can be disproportionate.
- Regarding the compensation amount, e.g. a maximum of 150.000 EUR per year; this amount of compensation has to cover in any case the costs imposed by the existence of a public service obligation and is therefore low enough to ensure a low risk of overcompensation and, consequently, a lack of distortion of competition.
- Regarding the turnover of the undertaking, e.g. a maximum of 5 million EUR; the size of these undertakings is such as it is unlikely that compensation offered to them would have a significant impact on trade in the internal market.

4.2.4. *Very simplified compatibility conditions for small, local SGEIs*

The fourth option regarding simplification for small SGEIs of a local nature would be to provide for very simplified compatibility conditions for this particular category of SGEIs. These conditions can be part of the Decision (based on Article 106(2) TFEU) and can consist of, for example, lifting the overcompensation test and basically only requiring the entrustment with an SGEI.

³⁶ This figure corresponds to the average annual compensation received by a local social centre in France.

4.3. Options relating to the scope of the Decision

4.3.1. *No policy change*

No policy change means that only hospitals and social housing would continue to be covered by the Decision regardless of the compensation size. Public compensations for other social services and for commercial services will continue to be covered if they respect the ceilings, i.e. are lower than 30 million EUR and provided to undertakings with an annual turnover of less than 100 million EUR.

4.3.2. *Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds of the Decision*

This option involves the extension of the scope of the Decision as regards the application without any thresholds to certain social services. The limitation to hospitals and social housing has frequently been criticised by stakeholders and Member States. They considered that a limitation of the compensation size would not be justified for any type of social service. An extension of this list has also been suggested in the Monti Report³⁷ and the idea of simplification for social SGEIs has also received support from the European Parliament, the European Economic and Social Committee and the Committee of Regions.

The main problem regarding this option relates to the definition of social services, thus, to the question which types of social services should be covered and how these services could be defined in a clear and comprehensive way in a directly applicable exemption Decision. A list can be drawn up based on consultation of the relevant services of the Commission and on existing legislation³⁸, while at the same time taking into account the scope of application and the purpose of State aid rules. A possibility would be to cover in the Decision all services meeting essential social needs as regards access to health care, childcare, access to the labour market, social housing and the care and social inclusion of vulnerable groups. This list would offer a fairly comprehensive coverage of the different SGEI activities in the social services sector.

To achieve as much legal certainty as possible, the list of social services that benefit from the application of the decision regardless of the amount of compensation should be exhaustive. However, such a list can have a very broad scope of application and cover the most important areas of social services. It can also change over time, so, although the list is exhaustive, it can leave the necessary flexibility to include services that are addressed to those groups of society that need them most.

At the same time, the thresholds of 30 million EUR for the public service compensation and 100 million EUR for the turnover of the undertaking would be maintained outside of the social services field.

³⁷ Monti, M. (2010), *A New Strategy for the Single Market, At the Service of Europe's Economy and Society*, Report to the President of the European Commission, José Manuel Barroso, http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

³⁸ For example, Directive 2006/123/EC of 12 December 2006 on services in the internal market

4.3.3. *Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision*

This option would be identical with the previous option as to certain social services, which would fall under the Decision regardless of the amount of compensation and the annual turnover. However, unlike the previous option, the thresholds of the Decision would be adapted to the fact that a large number of SGEIs is now exempted in any event and that, therefore, the kinds of SGEIs for which the thresholds apply has been reduced. More specifically, this option would lower the compensation threshold to 15 million EUR instead of 30 million EUR, while the threshold for the turnover of the undertaking would be eliminated. There are two main reasons underlying the elimination of this threshold. First, this threshold has sometimes given rise to difficulties in the application of the block exemption, in particular as regards group structures, for which identifying the legal entity which must be considered relevant for the application of State aid rules might be problematic. Therefore, this threshold might have led to cases in which group structures could not benefit from the Decision. Secondly, this threshold can lead to possible difference in treatment between undertakings of different sizes, even where the impact on competition was the same. Even if a large undertaking would probably have more possibilities of competing on other markets, the requirement for separation of accounts can alleviate the concern of possible cross-subsidisation.

4.4. Options relating to increasing competition considerations for large commercial SGEIs

4.4.1. *No policy change*

Under the current approach, compatibility is assessed mainly through an overcompensation test, according to which the amount of compensation is limited to what is necessary to cover the costs incurred in discharging the public service obligations. However, it is legally possible to take better into account competition considerations through other means, but they are not applied under the current rules. First, the Commission does not check compliance with tendering and transparency rules to assess compatibility. Second, the Commission does not assess the necessity of an aid, i.e. it does not assess whether the measure could be structured in a way that it fulfils the Altmark criteria and thus does not constitute State aid.

4.4.2. *Test of compliance with public procurement rules and overcompensation test*

When entrusting a provider with an SGEI, authorities are not only subject to the State aid rules, but they also have to comply with requirements of competitive tendering and transparency under internal market rules. Such rules can either stem directly from the Treaty or be specified in secondary legislation, most importantly the EU Procurement Directives.³⁹

³⁹ For example, the Postal Services Directive in Article 7(2) stipulates that Member States may, but are not obliged to ensure the provision of universal postal services by procuring such services in accordance with applicable EU Public Procurement Directives. In this case, rules deriving directly from the Treaty would apply.

Based on the current State aid rules, the Commission has generally treated State aid law and public procurement law as distinct legal regimes and not analysed whether the authority in question has complied with these tendering obligations before an authority can obtain State aid clearance.⁴⁰

Therefore, this option, while maintaining the overcompensation test, also envisages the introduction of a test for compliance with public procurement rules, hence tightening the compatibility conditions for large SGEIs under the new Framework. The requirement under the Framework to comply with public procurement rules applies insofar as the service concerned is subject to public procurement rules. Therefore, services like post which are not subject to the public procurement directives would be subject, if this is the case, only to the general principles of the treaties (transparency, non-discrimination, equality of treatment, proportionality).

According to this option, State aid clearance under Article 106(2) TFEU would be given only when the authority in question has complied with any applicable tendering requirements, be they as a result of the Public Procurement Directives or of the Treaty. If public procurement rules are complied with, the aid must then pass the overcompensation test in order to be declared compatible.

4.4.3. *Test of compliance with public procurement rules, necessity test and overcompensation test*

Under this option, in addition to the measures mentioned in Option 4.4.2, the Commission would check whether the aid is necessary to obtain the Member State's objective.

Article 106(2) TFEU provides derogation to the general competition rules only to the extent aid is necessary for the provision of the SGEI. Such derogation is however subject to the requirement that trade should not be affected to an extent contrary to the interest of the EU. The new SGEI Framework could therefore provide that the necessity of the proposed compensation measure will be examined in the compatibility assessment. Depending on how such a test is structured, it would allow the Commission to conduct an in-depth economic assessment of the compensation measure.

Under this option, the Commission would also examine whether an aid was necessary. It would analyse whether it would have been possible for the Member State to avoid the granting of State aid, for instance by designing the measure in a way that the compensation does not constitute aid under the Altmark jurisprudence. The Commission would also examine whether it would have been possible to ensure the provision of the service in a less distortive way, such as compensation for the

⁴⁰ Public Procurement rules also play an important role for the notion of aid because tendering procedures are mentioned in part 1 of the 4th Altmark criterion. Compliance with public procurement rules therefore in many situations already excludes that there is State aid. However, this does not mean that there is no room for an additional compatibility requirement as to the respect of public procurement rules because it applies for example in a situation where public procurement rules are not complied with. In this situation, the test of compliance with public procurement rules means that the aid is incompatible with the internal market.

final users instead of the undertaking. Only if there were no other less distortive instruments, the overcompensation test would be carried out.

4.4.4. Test of compliance with public procurement rules, overcompensation test and competition test limited to most serious competition distortions

In addition to the measures mentioned in Option 4.4.2, the Commission would conduct an in-depth assessment of the impacts on competition for measures that have the potential to create serious distortions of competition in the internal market⁴¹. The justification for such an approach is rooted in Article 106(2) TFEU, and in particular in its last sentence, which requires that the limitation to the application of competition rules allowed for by Article 106(2) TFEU finds a limit in situations where the development of trade is affected to such an extent to be contrary to the interests of the Union. This option is more limited than option 4.4.3., as it does not go as far as a necessity test, but only provides a competition test. Moreover, it concerns only the most serious cases.

Such cases might refer to any of the following situations: foreclosure of SGEI markets, bundling of tasks that might limit competition, an excessive duration of the underlying contract, the fact that the operator benefits from far-reaching special or exclusive rights sheltering from the effects of competition, the existence of a network of similar agreements in the same geographic market and/or the use of the SGEI exception to extend its reach beyond what is required by the public service remit with a view to outbidding competitors or for protectionist reasons.

In the cases of serious distortions of competition being likely, the Commission will assess whether the distortions can be remedied by conditions or by commitments by the Member State. It could, for example, result in a decision under which the aid is only authorised subject to a reduction of the proposed contract duration or a limitation of the exclusive rights granted to the provider in question.

4.4.5. Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions

This option would entail all the measures previously mentioned, i.e. overcompensation test, compliance with public procurement rules, necessity test and an additional assessment for cases that raise serious competition concerns. This option would represent the most rigorous approach to check compatibility conditions for large SGEIs under the Framework.

4.5. Options relating to increasing efficiency considerations for large commercial SGEIs

4.5.1. No change

The current version of the Framework envisages that Member States can introduce incentive criteria relating, among other things, to the quality of the service provided

⁴¹ For instance, a test will be carried out to assess whether the SGEI does not hinder the effective enforcement of EU legislation aimed at safeguarding the proper functioning of the internal market and aiming at the development of competition.

and gains in productive efficiency. However, the compatibility of State aid has so far been independent of any efficiency consideration. In fact, aid has been declared compatible for any amount of the net costs, irrespective of whether these costs could be avoided by increasing efficiency in the way the services are provided.

4.5.2. *Incentivise efficiency*

One option would be to require the Member States to provide for efficiency incentives for large service providers⁴² unless the Member State can duly justify that the use of such incentives is not feasible or appropriate. The justification for this option stems from the fact that compensation of inefficiency constitutes aid which distorts competition. A compensation which offsets costs that are not necessary prevents more efficient service providers to effectively compete. When the market is able to assess the quality of the service and appropriate regulatory requirements exist for the non-observable features (such as security), incentives to become more efficient in the delivery of the service promote services of a better quality for the consumers at a lower cost for the tax payers.

Under this option, the Member State would have the possibility to design the compensation schemes itself, but the Commission could also give guidance and examples of how to include such efficiency incentives in the compensation scheme. Any efficiency gains would have to be achieved only without prejudice to the quality of the service provided.

The requirement to introduce efficiency incentives does not amount to the Commission itself testing the efficiency of the provider, nor does it imply that the SGEI provider should comply with the fourth Altmark criterion. An inefficient undertaking could also meet the requirements, provided that it achieves efficiency gains in accordance with the pre-defined efficiency incentive mechanism, over the duration of its contract.

4.5.3. *Introduction of an efficiency test*

This option would mean the introduction of an efficiency test, which would evaluate whether the undertaking is sufficiently efficient. The efficiency test would be identical with the test performed under the 2nd leg of the 4th Altmark criterion.⁴³ The new framework would need to clearly explain the methodology for the efficiency assessment. Under this option, in case the compensation would be based on the costs of an efficient provider, the fourth Altmark criterion would be complied with. This means that, if the other Altmark criteria are also fulfilled, the compensation would be no aid. On the contrary, in case the Member State would not have been able to demonstrate the efficiency of the provider, the aid would be incompatible.

⁴² Efficiency considerations for small SGEIs would lead to high administrative burdens and would be against the objective of simplification which is pursued for these services.

⁴³ This would mean that compensation beyond the amount required by an efficient undertaking would not be declared compatible, which indeed is a possible policy choice.

5. ANALYSIS OF IMPACTS

This section will present the impacts of the options outlined in the preceding chapter.

The main stakeholders in the area of State aid to SGEIs are the public authorities, the undertakings and their possible competitors on the market (i.e. alternative providers of SGEIs), employees and the final consumers.

It is evident that the different options have important direct economic and social impacts. The impacts on administrative burden and on competition in the internal market are particularly important. It has to be emphasized that, in many respects, the different impacts are interdependent. In particular the impacts on competition described below are inextricably linked with social impacts because a less competitive market will result in higher prices or lower quality and will – at least indirectly – be extremely detrimental to consumers as users of SGEIs in all Member States. Regarding the potential environmental impacts, if any, these would be very indirect and probably negligible; they would in any event be limited to the options that concern the sectors of water, energy and waste management. Nevertheless, the reform of the State aid rules for SGEIs does not have an effect on the environment as such.

5.1. Impacts of options relating to clarification of the rules

5.1.1. *No policy change*

The baseline scenario is equivalent to continuing the current policy, i.e. continuing the interactive information system (IIS), which consists of replies to individual questions and the Guide on SGEIs.

According to the public consultation⁴⁴, 37% of the stakeholders that replied to the relevant question were aware of the existence of the IIS, and almost half did not answer, which may be either because of their unawareness or unwillingness to answer. By questioning whether they were satisfied with the service provided through the IIS in instances where they submitted a question, the consultation revealed that a large majority of the respondents (85%) did not use the service (answered “not applicable”). This provides clear evidence that the service has problems reaching its target group. Additionally, more than 40% of the stakeholders that replied found the Guide useful, while almost half chose not to answer this question⁴⁵. This would provide a reasonable incentive to update the Guide.

Updating the Guide would have a clear positive impact, since it would take into account additional questions regarding issues that have not been addressed so far; however, it might only provide answers to specific questions, without giving a general guidance and straightforward clarification of key concepts, as requested by

⁴⁴ Question 41 of the questionnaire: "Are you aware of the existence of the Interactive Information Service through which questions regarding the application of Community rules to SGEI/SSGI can be answered?"

Question 42 of the questionnaire: "In instances where you submitted a question to the Interactive Information Service, were you satisfied with the service provided?"

⁴⁵ Question 40 of the questionnaire: "Do you find useful the Commission staff working document on the frequently asked questions on the application of State aid rules to SGEI?"

both Member States and other stakeholders that responded to the public consultation. Furthermore, no succinct explanation is given in the Guide in order to provide a clear overview of the main concepts related to the EU State aid rules for SGEIs.

Even though the IIS will continue to be helpful in answering certain questions of the citizens and stakeholders regarding the application of the EU rules to SGEIs, this would be of limited value, as acknowledged by some Member States. For example, the Permanent Representation of the United Kingdom highlighted that "there is some awareness of the Interactive Information Service, but it is unclear whether it has been used". Additionally, not being able to address certain key questions would have a significant negative impact of maintaining the current legal and practical uncertainties and thus the incorrect and insufficient implementation of the rules. Furthermore, maintaining this line of action without any other improvement means that authorities, as well as undertakings, would have to clarify certain issues by looking at the cases of the Court on a case-by-case basis. This would thus translate into a time- and resource-consuming process and fail to achieve the objective of clarification in an efficient manner.

5.1.2. Continue current action and develop cooperation with the Member States

Apart from the IIS, additional information and guidance could be provided through developed cooperation with the Member States, which would partly fulfil the objective of clarification of EU State aid rules for SGEIs.

Cooperation with Member States would have a direct impact on budgets, as it would translate into increased costs and increased use of resources in the Member States for various actions, such as the development of guidelines (on designing public service contracts, for example) and training actions.

For the development of model public service contracts, the Commission could offer to help Member States by checking these contracts and making certain suggestions and best-practice recommendations based on the examples of the Member States that already developed such guidelines. However, several replies to the public consultation revealed that, even if this course of action would be useful, it would certainly not be sufficient. The guidelines would be very specific, which translates into a limited impact on the correct and uniform application of EU State aid rules. Even if detailed statistics would be available from the Member States that currently use such guidelines, the positive impact of this option could not be quantified and not even approximated, because it would be difficult to assess whether it is this particular action or something else that contributes to a better application of the rules. Nevertheless, evidence shows that this line of action was insufficient, as a number of fundamental questions remains, the Member States guidance is not always correct, and implementation of the rules remains unsatisfactory, even in the countries concerned.

Regarding the organisation of trainings at national level, an immediate positive impact would be that clarification is directly facilitated for various authorities in the Member States. Trainings should be organised in such a way that a balanced distribution of economic and social resources is ensured at the level of regional and local authorities. Alternatively, dissemination at these levels would have to be guaranteed, but this is unlikely to occur because of the large number of possible

granting authorities. Even if all authorities would be reached, there is a risk that information that reaches them will not always cover the same amount of issues. Thus, in practice, trainings would have a limited scope, as well as limited coverage; therefore, such action would be de facto unequal. Moreover, training actions are very resource-intensive and, in a situation of budget constraints, Member States and regional and local authorities may not be in a position to sufficiently invest for such actions to have a significant effect.

5.1.3. Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance

If a Commission Communication is adopted in parallel with the actions outlined in the previous option, this would have a direct impact in the sense that it would give a clearer overview of the EU State aid concepts relevant for SGEIs and a better understanding of key issues in a single, comprehensive document. Including references to the jurisprudence of the Court and to the Commission's decision-making practice would improve legal certainty, which is requested by Member States and by the majority of stakeholders that replied to the public consultation.

For example, clarifying the notion of SGEI, the notion of economic activity and consequently the notion of undertaking would already help to address the problems of roughly half of the Member States⁴⁶, as it can be concluded from the Member State reports.

Making the concept of "effect on trade" clearer would eliminate some situations in which stakeholders wrongly assume that in certain regions the provision of public services does not affect at all, or in any significant way, intra-Community trade⁴⁷ or competition because of lack of competitors (as in rescue services and public waste disposal).

Moreover, the public consultation reveals that certain stakeholders encounter difficulties with the classification of the compensation in various categories⁴⁸ because of the lack of clear definitions of key concepts such as SGEIs and economic activity (this is a general remark, since certain SGEIs are organised in a very different manner across the EU).

⁴⁶ Notion of SGEI: Czech Republic, Denmark, Greece, Spain, Finland, Hungary, Ireland, Netherlands, Portugal, Slovenia and United Kingdom

Notion of economic activity: Cyprus, Czech Republic, Germany, Denmark, Finland, France, Italy, United Kingdom; similar concerns expressed by: Belgium, Greece, Luxembourg, Netherlands, Sweden, Slovenia

⁴⁷ Question 37 of the questionnaire: "Do you consider that in your sector/region, the provision of public services does not affect at all, or in any significant way, intra-Community trade?"

⁴⁸ Question 28 of the questionnaire: "Please explain if you have faced difficulties with the classification of the compensations in the following categories: compensation of less than EUR 30 million per year granted to undertakings with less than EUR 100 million turnover; compensation granted to hospitals; compensation to social housing undertakings; compensation for air links to islands with less than 300.000 passengers per year; compensation for maritime links to islands with less than 300.000 passengers per year; compensation for airports with less than 1.000.000 passengers per year; compensation for ports with less than 300.000 passengers per year"

As mentioned above, the impact of clarifying such key concepts in a Communication would be that of facilitating the correct application of the rules⁴⁹. The added value as compared to the previous options is also that a Communication would be more transparent, more visible and better accessible than individual actions (IIS, FAQ Guide, training, ad hoc initiatives). Moreover, a Commission Communication would be adopted by the College of Commissioners, thus having higher legitimacy. This would also translate into a more uniform application of the rules, since all Member States, including also national courts, will be able to refer to the Communication. Therefore, although this option implies adding a new instrument to the package, this would not mean that its application would become heavier. On the contrary, by reducing the need to use external consultants or to look at Court cases and Commission decisions on an individual basis, the Communication would make the basic concepts transparent and easily accessible, and thereby the process faster and less expensive.

5.2. Impacts of options relating to simplification for small, local SGEIs

5.2.1. No policy change

No policy change would result in the maintenance of the current administrative requirements. However the public consultation showed that such requirements are often too high having regard to the relatively small nature of service. The smallness can either refer to the service, to the provider or to the local authority. Where this is the case, the administrative requirements are not correctly and fully applied, leading to an incorrect application of State aid rules and principles. The smallness may also make it unfeasible to conceive an efficient enforcement mechanism either at the Community or at the national level.

Since aid measures covered by the Decision are exempted from the obligation of notification, data regarding this aid at EU level is very scarce. Member States often explain that it is not always possible to provide such data for the purpose of the reporting exercise, since they have difficulties themselves to collect it from the local or regional authorities.

As presented in Annex 6, small SGEIs either incur the simple requirements relevant to the general de minimis Regulation, if the compensation is smaller than 200.000 EUR over 3 years, or a much higher burden stemming from checking compliance with Altmark or from applying the Decision.

While a precise quantification of the administrative burden is not possible for lack of data, the evidence submitted during the consultation suggests that this is not trivial for small and local public services providers and local authorities. As described by the Brussels-based Joint Office of the European Offices of the Bavarian, Baden and Saxon communes, the administrative burden comes from too detailed monitoring systems that are too costly with respect to the value of the service rendered, the need for external accounting and legal advice, with the risk of avoiding a project from the start or discontinuing services. This has an implicit negative effect for citizens as

⁴⁹ However, such clarification can be provided only within the constraints of the jurisprudence.

beneficiaries, for jobs in the organisations concerned and, consequently, might lead to a loss of capital and a threat to know-how in the communes.

5.2.2. *Increase the ceiling of the general de minimis regulation*

Our experience so far shows that a threshold of 200.000 EUR per beneficiary over a period of three fiscal years is too low for SGEIs and that an increase of this threshold would be reasonable, due to the local nature and the very limited effect of these services on intra-community trade. A direct positive impact would be the reduction of the administrative burden for those SGEIs which receive public service compensations between 200.000 and 500.000 EUR. They would no longer need to check compliance with the Altmark criteria or fulfil the conditions of the Decision, but rather fall under the general de minimis Regulation, consequently having less obligations as described in Annex 6.

However, this increase in the ceiling of the general de minimis Regulation would not be justified for other sectors / areas within the scope of EU State aid rules. It would mainly have a negative impact on competition and would create distortions, since relevant state aid cases other than SGEIs would be overlooked. While the number of individual cases with an aid amount in the range of 200.000 – 500.000 EUR dealt with by the Commission is relatively low⁵⁰, a much larger number of cases currently allowed on the basis of their compliance with the criteria of the State aid guidelines and the block exemption regulation would escape any form of control. These measures in particular will not any longer be subject to the compatibility conditions set by the GBER and the guidelines so as to make sure that they pursue objectives of common European interest such as research, regional development, environmental protection, and do not distort competition too much.

The impact of an increase in the ceiling may however be larger, since the authorities might give more money under the de minimis, since amounts below this increased threshold will not be considered aid. In addition, they might decrease the amounts given in some cases so that they fall under the threshold of the Regulation, e.g. instead of giving an aid of 550.000 EUR, they would probably lower the sum to just below 500.000 EUR, so that it is not considered to constitute aid. This would have a negative impact on the cohesion between Member States, because measures will be given within budget constraints. Consequently, some Member States might have more possibilities than others to give such measures that fall under the de minimis Regulation.

Moreover, it is doubtful whether such a general increase would be legally feasible since there is no certainty that all cases covered by such a higher ceiling would still be small enough so that they do not affect trade or distort competition. In any event, this would have the impact of creating legal uncertainty, because a lack of effect on trade could not be guaranteed for all cases and all sectors.

⁵⁰ Approximately 3% of all cases.

5.2.3. *Adopt a specific de minimis rule for small, local SGEIs (based on 107(1) TFEU)*

The core principles behind the option of adopting a specific de minimis rule for SGEIs are the lack of an effect on trade and avoidance of competition distortions.

This option was developed based on the idea that it would not affect the rules that apply to other State aids, covered by the general de minimis Regulation. This is particularly important because, based on our experience, 200.000 EUR per beneficiary over a period of three fiscal years is a reasonably safe threshold and a further increase could not be justified even by inflation, as was the case for the previous increase.

By contrast, a higher de minimis threshold for SGEIs can be justified to the extent that trade between Member States is affected to a lesser extent, due to the small size of municipalities and undertakings concerned, as well as to the local character of services and lower risk of overcompensation.

In order to ensure that none of the measures covered by the specific de minimis rule affects trade or distorts competition, a combination of several conditions would appear to be appropriate. Indeed, the local nature of the services, which is the justification for the lack of effect on trade or distortion of competition, can best be expressed through certain parameters. These conditions should ensure that the specific de minimis rule is legally well-founded and guarantee that the application of the rule is limited to genuinely small cases. In that respect, based on the experience with the general de minimis rule and with SGEI cases, it was found that the parameters chosen to fulfil this purpose should be linked to the nature of the undertakings and of the granting authority, and to the amount of compensation.

The choice of these parameters is based on a number of indicators: the nature of the undertakings and of the granting authority, the nature of the market, the nature of the services provided, low risk of overcompensation, non-affectation of intra-Community trade and high administrative burden.

Taking into account these elements, it was found that the following criteria might be appropriate to meet the objectives set: the size of the granting authority (e.g. 10.000 inhabitants) the amount of the compensation (e.g. 150.000 EUR per year) and the size of the beneficiary (e.g. 5 million EUR turnover). These criteria could be considered all together, or in any other combination. Given their inter-dependence, the modification of one parameter (e.g. an increase in the amount per year), could be reflected in parallel in a strengthening of other parameters, in order to avoid that cases where the local nature of the service is no longer ensured could be covered.

Small municipalities and small undertakings

First, it is important to note that the compensation relevant for the specific de minimis Regulation would typically relate to the subset of small services provided at local level, partly in view of the nature of the undertakings. These would be small undertakings, with a turnover of less than 5 million EUR, which would be given compensation exclusively for the provision of SGEIs. Additionally, the services would be provided on local markets, where the granting authorities represent municipalities of less than 10.000 inhabitants. This means that both the granting

authorities and the undertakings have limited financial resources, which makes it difficult for them to cover the costs for the procedure of compatibility check. The administrative burden would therefore be too high compared to the small compensation amounts that are granted in such cases.

As mentioned in the public consultation by the Permanent Representation of Italy, the number of resident population which will use the service in a determined territory would be suitable to evaluate the affection of intra-community trade. The threshold of 10.000 inhabitants for the size of municipalities is considered reasonable, as in 2010 in half of the Member States⁵¹, approximately 87% of municipalities have less than 10.000 inhabitants.⁵² This reflects the fact that there will be a positive impact for a large majority of municipalities at EU level, if the other two thresholds are met, in case that the three criteria are considered all together. The statistics by Member State can be found in Annex 7.

The threshold of 10.000 inhabitants is low enough to exclude large authorities that can attract potential providers from a wide geographical area. At the same time, it is set high enough in order to allow for a significant number of municipalities to fall under the scope of application so that they can benefit from the simplification. In spite of the fact that, in different Member States, a different percentage of the municipalities falls under this uniform threshold, it seems appropriate that this is based on the size of the authority because it must ensure that the authority that grants the compensation is small.

As far as the size of the undertaking is concerned, an indicative example can be that of enterprises operating in the post and telecommunications sectors in 2004. There were approximately 5.000 enterprises with an average size of 20 employees. The average turnover of these enterprises was of 4.643.978 EUR. In the sectors of collection, purification and distribution of water, there were 1.300 enterprises with an average size of 23 employees and an average turnover of approximately 3 million EUR⁵³. Even if data are from 2004, they might not be too different because of slow movements in SGEI trends. This evidence shows that there are, even in certain very competitive sectors, a number of companies which would fall under the threshold of 5 million EUR for the annual turnover.

Local character of services and lower risk of overcompensation

Within these constraints, public service compensation is not likely to affect trade within the Community and distort competition in the internal market. In fact, it is likely that, when the three criteria are simultaneously fulfilled, within the scope of the regulation would fall neither a large public service provider nor a provider

⁵¹ Bulgaria, Czech Republic, Germany, Estonia, Greece, Finland, France, Latvia, Luxembourg, Hungary, Malta, Poland, Slovenia, Slovakia

⁵² Based on data from the following sources: EUROSTAT; data on Germany are for 2009 and are taken from the Stastical Yearbook 2010 for the federal Republic of Germany including "International Tables", page 40; data on France are taken from: Direction Générale des Collectivités Locales, Ministère de l'Intérieur de l'Outre-Mer et des Collectivités Territoriales, Les chiffres-clés des collectivités locales 2010, page 40.

⁵³ Statistics are based on data from Eurostat for enterprises with 10 to 49 employees. However, the data are aggregated to the level of broad NACE sectors. Therefore, there are caveats related to the impossibility of providing accurate statistics for the SGEI sectors.

involved in sectors most relevant for the internal market, such as scale network industries, like post, telecom, broadcasting, broadband, transport, etc. The nature itself of the relevant services and of the providers could be regarded as sufficient insurance of this limited impact on trade. As emphasised in the opinion of the Committee of Regions, objective criteria which in principle offset any risk of affecting intra-Community trade include the limited territorial or geographical remit of certain operators, as well as their limited functional scope.

The stakeholders also mention that local services that are provided by local or regional authorities mainly for social rather than commercial purposes do not have an impact on the internal market. The specificities of the type of services provided have to be taken into account, as well as the difference between State aid that is granted to a normal company and that falls under the general *de minimis* Regulation, and State aid that would fall under the specific SGEI *de minimis* Regulation.

Under the general *de minimis* Regulation, the undertaking can be granted an aid without any obligation, while under the specific SGEI *de minimis* Regulation the money that is given is tied to the provision of a service. The undertakings are, in such cases, public service providers that have a fundamental role of operating in the public interest, and that incur a public service cost for the provision of the relevant service. In this case, the amount of money that is given to the undertaking has to cover a specific cost which is incurred because of the public service obligation. Therefore, delineation is necessary between small local SGEIs as public service providers, and the other services covered by the general *de minimis* rule, rather than increasing the overall ceiling, which could not be justified for sectors other than SGEIs.

An additional justification for this option relies on the particularly high administrative burden for small local SGEIs. A specific *de minimis* Regulation for small local SGEIs would acknowledge the lack of (or negligible) effect on trade and categorise the compensation as non-aid. Even though the specific Regulation should require an entrustment in order to ensure that the compensation is granted for a SGEI, it would still make compliance with the rules easier for national, regional and local authorities. As in the case of the previous option, the SGEIs which receive public service compensations below the *de minimis* threshold would no longer need to check compliance with the Altmark criteria or fulfil the conditions of the Decision, which lead to high burdens as described in Annex 6. Therefore, a direct positive impact of this option would be the elimination of unnecessary administrative burdens, which was required by many of the Member States and stakeholders replying to the consultation. As previously mentioned, this is of great importance, especially in light of the fact that the administrative burden put on the public authorities concerned should be proportionate to the impact that the measure has on competition in the internal market. The stakeholders often mention the difficulties encountered by various actors, e.g. difficulty for authorities to manage their scarce human and financial resources. As previously mentioned, the threshold of 10.000 inhabitants for the size of the municipalities would lead to a relief from administrative burden for a large majority of municipalities at EU level.

As far as the choice of instrument is concerned, although the option of a specific *de minimis* rule adds another element to the previous package, it does not create any additional burden, but leads to simplification. Furthermore, as explained by the

alternative options, this is the only option that allows achieving a genuine simplification in a legally solid way, for small, local SGEI.

Taking all these aspects into account, a specific SGEI de minimis Regulation would properly address the relevant problems encountered and would fulfil the objective of simplification for small local SGEIs.

5.2.4. *Very simplified compatibility conditions for small, local SGEIs*

Unlike the previous option of a specific de minimis Regulation, which would lead to the classification of the compensation as non-aid, this option would mean that the measure would still be classified as aid. If the relevant simplified conditions are fulfilled, this aid can be declared compatible. As previously mentioned, this scenario would also have little negative effect on competition in the internal market, since small, local SGEIs have no or a very limited effect on trade.

Regarding the simplifications of the compatibility conditions, there seems to be limited scope for simplification since the requirements under the Decision are already limited. The only approach possible under this option is lifting the overcompensation test and basically only requiring the entrustment with an SGEI.

There is serious doubt, however, whether from a legal point of view it is possible to treat aid that does not meet an overcompensation test as compatible with the internal market. It is established case law that State aid measures have to be proportionate and, in particular, that the aid cannot exceed what is necessary to achieve the objective pursued by the measure. This requirement can be derived directly from Article 107(3) and Article 106(2) TFEU. Compensating an undertaking in excess of the costs incurred, including a reasonable profit, evidently exceeds the necessary compensation for the performance of the service. Even if one could consider the margin of discretion of the Commission for the compatibility assessment so wide as to also allow for disregarding – in clearly defined situations – the proportionality criterion, this option would be incoherent with the Commission's approach in general as regards compatibility assessments, as opposed to the previous solution that is fully in line with the Commission's general approach.

If this option were pursued despite the serious legal concern and the concerns regarding a coherent system of compatibility assessments, it would entail the following impacts.

First, it would lead to some decrease in the administrative burden of small municipalities. Nevertheless, if they grant compensations that constitute aid, they would still have to check its compatibility. The view of stakeholders is that this would require good legal knowledge and economic studies, which equates with the need of local authorities and / or providers of small local SGEIs (such as non-profit organisations for example) to hire external consultants. This means that the administrative burden on small authorities, as well as on undertakings, would remain quite high. Furthermore, since entrustment with an SGEI would still be required, the entrustment act has to specify, according to Article 4 of the Decision, "the parameters for calculating, controlling and reviewing the compensation," as well as "the arrangements for avoiding and repaying overcompensation". These requirements

might increase the legal uncertainty and confusion for both public authorities and undertakings.

The answers to the public consultation show that there is a certain degree of lack of awareness and difficulty in designing an entrustment act at the moment. When asked whether the legal instruments contain all elements required by Article 4 of the Decision⁵⁴, almost half of the respondents did not provide an answer, while roughly 20% state that none of the elements are included in the legal instruments they are aware of. This reveals the fact that, if only the entrustment act would be required, some authorities and undertakings might still encounter difficulties.

Second, there would be a possible negative impact on alternative providers (i.e. competition at local and/or regional level), as there would no longer be any requirements to avoid overcompensation. Such overcompensation might create distortions by giving the beneficiary an advantage over its competitors.

Overall, the design of a specific entrustment act for small, local SGEIs and possible overcompensation might cancel the savings from reduced administrative burden. Therefore, this option would not be suitable to fully achieve the simplification objective.

5.3. Impacts of options relating to the scope of the Decision

5.3.1. No policy change

Under this option, only hospitals and social housing would continue to be covered by the decision regardless of the compensation size and the annual turnover. However, comments from the stakeholders and the experience of the Commission show that current thresholds are too high for certain sectors, and too low for others. Therefore, the key impact of such an option would be general dissatisfaction from different public service operators because of applying too uniform scrutiny, without considering the specificities of different sectors, such as social services on one hand, and large commercial services on the other hand.

Therefore, the main negative impact for many cases of social SGEIs would be the unnecessary administrative burden. For those sizeable social SGEIs that do not fall under the scope of the Decision and have to be notified and scrutinised according to the Framework, the burden remains relatively high, as detailed in Annex 6. As far as large-scale commercial SGEIs are concerned, many important cases would escape control, which might lead to a certain degree of competition distortion.

More generally speaking, in the long term, the above-mentioned problem of dissatisfaction would lead to less acceptance of, thus less compliance with the rules.

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Question 9 of the questionnaire: "Do the legal instruments, of which you may be aware, contain all the elements required by Article 4 of the Decision, such as (i) the nature and duration of the public service obligations, (ii) the undertaking(s) and territory concerned, (iii) the nature of any exclusive or special rights assigned to the undertakings, (iv) the parameters for calculating, controlling and reviewing the compensation, (v) the arrangements for avoiding and repaying any overcompensation?"

5.3.2. *Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds of the Decision*

A direct impact of enlarging the scope of social services covered by the decision regardless of the compensation size would be that these are no longer notified, thus would escape control by the Commission. The impact may be limited, since under the current rules, it is likely that a large part of the compensations for social SGEIs are in any event not notified, as they do not exceed the thresholds for notification and thus fall under the scope of the Decision. However, for those compensations that would not be covered, such a block exemption would be welcomed.

This option would address the request to better take into account the importance of these services, stemming from the principles of solidarity and social protection. The approach would further facilitate the provision of services that truly serve social needs of society, such as the need for protection of the most vulnerable sections of the public.

Moreover, the Bundesrat of Germany⁵⁵ requests this exemption by analogy with the arrangements for hospitals and social housing in order to create clarity and legal certainty. Aligning the conditions for social services with those for hospitals and social housing would lead to rules that are easier to apply.

Most importantly, there would be less administrative burden for the authorities granting the aid for social services, as they would no longer have to undergo the process of notifying these measures to the Commission. This would be good, since stakeholders mention various problems for providers of social services, such as difficulty in separating economic activities from other activities and the additional cost of separating accounts, complex process for calculating costs, problems determining a reasonable profit, impossibility of qualifying the social value added of many SSGIs.

With the application of the decision to a large number of social services without any compensation and turnover thresholds, there is less justification to continue to exempt from notification all SGEIs that receive compensation of up to 30 million EUR. The threshold of 30 million EUR was set at a relatively high level to particularly exempt a large percentage of social SGEIs. Now that these services can benefit from the application of the Decision regardless of the compensation, it is unjustified to continue the lenient approach from which now mainly commercial SGEIs would benefit that can have a considerable effect on competition. Taking into account both this argument and the fact that experience has shown that the thresholds are too high for SGEIs not qualifying as social services, the maintenance of the thresholds would have a significant negative impact, leading to competition distortions.

However, no relevant data is available because there are no notification obligations of these compensations under the current rules. As pointed out in the Member State

⁵⁵ Resolution of the Bundesrat from May 2011 (177/11) on the Communication regarding the Reform of the EU State Aid Rules on SGEI COM(2011) 146 final

report of Germany, the key element of the Decision is the exemption itself from obligations to notify the Commission if the requirements of the Decision are fulfilled, thus extensive enquiries would counteract the pursued objective of simplified administration. Thus, no summary statistics or estimates can be provided.

5.3.3. Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision

This option would have the same impacts as the previous one with respect to social services. However, it would take into account the need to scrutinise more state aid cases for large commercial SGEIs, which are overlooked under the current rules. A number of stakeholders and business representatives (e.g. Business Europe), have pointed out during the public consultation, that the thresholds are already very high and allow Member States not to notify most of their SGEI operations, assuming that those operations comply with the Decision's conditions. Once the de minimis ceilings and the exemption of social services are taken into consideration, maintaining the threshold of 30 million EUR will fall short of the objective of a more targeted assessment across different SGEIs, with a greater emphasis on the ones that carry a greater potential for distortion.

This option would therefore distinguish more clearly between different types of services, while addressing the risk of creating distortions of competition in the internal market, which is particularly high in sectors characterised by large scale commercial activity with an EU wide dimension where operators may be entrusted with public service obligations.

The Commission's experience so far leads to believe that 15 million EUR is a significant amount of compensation that deserves scrutiny. As shown in Section 2.2, important cases within this range might be overlooked, especially for certain sectors⁵⁶. Eliminating the second threshold is justified by the idea that taking into account the turnover would lead to an unjustified difference in treatment between possible undertakings of different sizes, while the compensation level is the main criterion that should apply for the scope of the Decision. As this instrument refers to exemption from the obligation to notify the aid, repealing the turnover threshold would give equal opportunities of using the Decision to all possible undertakings, regardless of their size. As the decision of a public authority to grant an aid could sometimes be influenced by the possibility of applying the Decision, eliminating the turnover threshold might also have a positive impact to the extent that it would increase the choice between different potential service providers. Therefore, this would be coherent with the overall policy objective of increasing competition for large SGEI providers.

All in all, this option is designed so that it accounts for the situations in which there might be a significant risk of creating distortions of competition in the internal market. A direct impact that is expected under this option is an increase in the

⁵⁶ Typical sectors would include water management (for which specific examples are given) waste management, district heating, electricity distribution etc. For example, in Romania, where compensation can be given to cover the tariff differential between the price for the generation, transport, distribution and supply of heat and the local heat invoicing prices, the value of such a compensation to a single company could reach 17,4 million EUR (2006).

number of notifications received, since cases that were exempted so far from the notification obligation would now come to the attention of the Commission. However, such an effect is counterbalanced by the fact that all social SGEIs that fulfil the conditions of the Decision will be exempted from notification.

The SGEI report issued in March 2011 reveals that some sectors, "like the postal services sector, have been the subject of many decisions (15 for the postal sector) and others, such as waste and water services, less, which may be due to the fact that the services provided are often local in nature and may fall within the thresholds below which there is no need for a notification." The report also mentions the fact that, in the sectors of waste and water services, in case the local area concerned is a major city or a broader agglomeration, it is likely that the contracts concerned are typically worth dozens of millions of Euros per year.

It is, therefore, realistic to assume that a lowering of the threshold to EUR 15 million would bring more important cases to the attention of the Commission. It can be the case of highly concentrated sectors and sectors that are operated by multi-national companies, such as the waste and water treatment sectors, as mentioned by the report. Moreover, certain stakeholders⁵⁷ mentioned in the public consultation that in France, in general, public or quasi-public ("in-house") providers of SGEIs in the sectors of sanitation, water and waste management or district heating do not exceed the current threshold of EUR 30 million.

A scrutiny of these large, commercial SGEIs would have a significant positive impact of avoiding distortions of competition in the internal market, while ensuring high quality public services, as well as an efficient allocation of resources.

5.4. Impacts of options relating to increasing competition considerations for large commercial SGEIs

5.4.1. No policy change

This option would mean that no additional measures – apart from an overcompensation test – would be taken in order to increase competition considerations for large commercial SGEIs. In particular, it would mean that compliance with public procurement rules would not be checked and that even serious distortions of competition could not be taken into account.

This option would provide for relatively low administrative costs because only the overcompensation test would need to be performed. This option would also be relatively easy to administer and thus create a certain degree of legal certainty since the Commission has already gained experience with this test.

However, under this option measures would be declared compatible with State aid law despite the fact that they do not comply with tendering obligations mandated by the EU. This would mean that the assessment under State aid law would be entirely independent from the assessment under public procurement law.

⁵⁷ For example, Veolia Environment, France

In addition, declaring as compatible those measures that violate public procurement rules appears contradictory to the public perception and the approach of the Commission might be regarded as inconsistent, in particular because both State aid rules and public procurement rules have as objective to avoid distortions of competition in the internal market, create a level playing field and allow providers to perform their services without obstacles between different Member States. It would also be hard for the public to understand such situation, since the Commission has considerable discretion in its compatibility assessment. Given this discretion, there are no obvious reasons why public procurement rules should not be taken into account.

Perceiving the Commission's scrutiny in the State aid field as inconsistent can lead, in the long-term, to serious compliance problems with the State aid rules because of a lower degree of acceptance of the State aid framework and its objectives. This perceived lack of coherence has already been pointed out by many stakeholders.

This would ensure consistency with both the current and the future public procurement rules, as the assessment does not depend on the specific features of the public procurement regime but on the key policy objectives pursued by public procurement law as such.

Moreover, the lack of a more sophisticated analysis of the effects on competition can lead to the compatibility of aid measures that have severe negative consequences on competition in the internal market. Instead of taking into account the full economic effects of the measure, the Commission's assessment would continue to be confined to a mere overcompensation test. In addition to the apparent negative impacts on competition, the Commission's approach would appear inconsistent because it would deviate significantly from its general commitment to a "more economic analysis".

5.4.2. Test of compliance with public procurement rules and overcompensation test

Under this option, the negative impacts described above because of the missing check of compliance with public procurement rules would be avoided. At the same time, it would increase neither legal uncertainty nor administrative burden because no new requirement is created, as the test refers to already existing requirements.

In addition, compliance with public procurement rules would be reinforced. A greater degree of compliance with public procurement rules would lead to less distortions of competition and a more efficient use of public resources. 37,3% of the respondents to an online consultation conducted by DG MARKT declared that they were aware of concessions awarded without any publication or transparency, in particular in the sectors of water distribution, waste-water and waste treatment, and energy. Similarly, an important number of undertakings interrogated in the context of the targeted consultation of the business community (44% of those who answered the relevant question) confirmed that they were aware of such awards, often quoting specific cases. Finally, this approach would allow a more coherent application of State aid and public procurement rules. As described in the preceding section, coherence between State aid and public procurement rules would be ensured for both current and future public procurement rules.

However, the negative impacts of not performing a more sophisticated analysis of the effects on competition in the internal market – even in very serious cases – would persist, because in some circumstances a procurement procedure may not give rise to a sufficient open and genuine competition, e.g. due to existing intellectual property rights or necessary infrastructure.

5.4.3. *Test of compliance with public procurement rules, necessity test and overcompensation test*

Under this option, the negative impacts of not checking compliance with public procurement rules would be avoided. Also distortions of competition would be limited because the Commission would conduct a strict necessity test, verifying in particular whether the same results could be achieved without granting of State aid or with less distortive aid measures, i.e. a counterfactual scenario.⁵⁸

On the positive side, this option would better achieve the objective to limit State aid granted to the minimum necessary (not only from the perspective of the provider but also from the Member State's perspective) and would thus contribute to securing a level playing field. In particular, it would lead to the elimination of such situations in which aid is granted even if the same objectives could be achieved by an aid-free measure. This would contribute to the efficient allocation of resources and to ensuring the economic cohesion of the Member States.

However, this option would require Member States to tender out most of their in-house contracts. This is due to the fact that, if measures can be taken so that all Altmark criteria are fulfilled and thus there is no State aid, there would be no reason for Member States to opt for a measure that constitutes State aid. However, public procurement rules do not apply to in-house activity. It would be questionable to interfere with this clear policy choice and introduce a tendering requirement for in-house activities through State aid rules.

In addition, this option would bring along high administrative costs. A full-fledged analysis of the necessity of an aid measure needs to identify as precisely as possible the alternative situation in the absence of the aid (counterfactual scenario) and provide a thorough analysis of the impacts on competition of both the actual scenario and the counterfactual scenario. This analysis is extremely burdensome and suffers, at the same time, from a high degree of uncertainty because of the large number of assertions that have to be made in order to perform the counterfactual analysis. Performing a counterfactual analysis is very difficult in practice, mainly because of data unavailability.

While such a cumbersome analysis might be justified in some cases, the requirement of this analysis for all cases in which the thresholds of the Decision are exceeded is not appropriate. While the fact that the thresholds are exceeded typically does mean that there are more serious competition concerns and thus a notification to the

⁵⁸ Here, counterfactual scenario refers to the situation in the absence of aid. It does not refer to the situation without the public service obligation. The notion of the counterfactual scenario in this context (as used by this Impact Assessment) is without prejudice to understanding and application of this concept within the scope of Annex I of the Postal Services Directive and Annex IV of the Universal Service Directive as amended by the Citizens Rights Directive.

Commission is warranted, the measures falling under the framework show a large variety as regards their distortive effects. To what extent the measure distorts competition on particular markets depends on the market structure and the particularity of the competitive situation on that market. Therefore, requiring such a sophisticated analysis in all cases would be disproportionate and would constitute an inefficient use of administrative resources both in Member States (who would have to present the counterfactual scenarios in their notifications) and in the Commission (who would have to assess the scenarios presented).

5.4.4. Test of compliance with public procurement rules, overcompensation test and competition test limited to the most serious competition distortions

This option avoids the negative impacts of not checking for compliance with public procurement law and it would also allow the Commission to conduct an in-depth analysis in cases that raise serious competition concerns.

In addition, it would not have the negative impacts of the full necessity test performed in all cases. In contrast, it would restrict the in-depth analysis of the effects on competition to those cases that show prima facie that serious distortions of competition are likely. Therefore, this option closely adjusts the administrative costs to the competition concerns and leads to an efficient use of administrative resources. It also leaves more flexibility because it would not prescribe a strict necessity test, including the assessment of counterfactual scenarios.

The Commission has gained considerable experience with providing for different levels of scrutiny depending on the potential distortive effects on competition under its guidelines and frameworks, and in particular providing for a more thorough level of scrutiny only for those cases that warrant the effort. The Commission experience with the application of those guidelines and frameworks confirms that this approach is promising in terms of both avoiding distortions of competition and efficient use of resources to a uniform standard for all cases.

On the negative side, this option creates a certain degree of legal uncertainty because a clear delineation of the cases in which the in-depth economic assessment will be performed is not possible.

5.4.5. Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions

This option, as opposed to the preceding option does not avoid the negative impacts of the necessity test and thus leads to disproportionate administrative costs in a number of cases.

5.5. Impacts of options relating to increasing efficiency considerations for large commercial SGEIs

5.5.1. No policy change

This option means that the current rules will not be changed in order to increase efficiency considerations.

Under this option, the main positive impact is that the rules are relatively easy to apply and that, to the extent Member States and stakeholders already know the rules, they would not have to adapt to the new rules. However, the downside is that this option would not address the problem that public service compensations are often given to inefficient undertakings at the expense of society without any incentive to improve their efficiency. Therefore, this situation cannot lead to more efficient spending of public money, better allocation of resources and improved competitiveness of public service providers.

5.5.2. *Incentivise efficiency*

Requiring the inclusion of efficiency incentives in the compensation scheme is an option that directly addresses the need to improve the efficiency of the providers of SGEI benefiting from State aid, so that public money is well-spent, as well as the need to provide sustainable public services. Efficiency in the provision of the service is also likely to reduce distortions of competition across services providers within the single market.

Such efficiency incentives have to be carefully designed, which might raise some difficulty. As emphasized by some stakeholders⁵⁹, if the incentives are not correctly designed, the provider of the service might trade-off quality in order to achieve efficiency, which will be detrimental to the consumers. This could be problematic particularly in the case of social services that contribute to a social policy objective, in which case the quality of the provision should be placed on an equal rank of importance to value for money. However, if social services fall under the exemption decision, this problem would not occur. Moreover, this option would specifically mention that any efficiency gains can be achieved only without prejudice to quality.

Therefore, this option would lead to a certain increase in competition, due to an increase in the efficiency of all providers, including inefficient ones. Since the current Framework does not take into account how the costs incurred by the provider of SGEI compare to those of a well-run undertaking, it may sometimes be the case that inefficient providers are given State aid, so this measure would at least result in some increase in their efficiency. Incentivising efficiency is particularly welcome in certain sectors where there is a low choice of providers and low level of competition, such as energy and water management. For example, the SGEI Report published in March 2011 highlights that the electricity and gas markets remain mostly national in scope, and that regional monopolies are often present in these sectors.

Moreover, this option respects the discretionary power of Member States with regard to the provision, commissioning and organisation of SGEIs and it also offers a high degree of flexibility for designing the incentives. Member States can adapt this exercise to the specific context, sector, and type of provider, while, at the same time, promote the efficient delivery of SGEIs. For example, a sharing of the efficiency gains seems appropriate, as it would ensure that both the undertaking and the Member State benefit from this approach. Under this approach, the Commission itself does not check the efficiency of the SGEI providers, but only requires Member States to give SGEI providers incentives to improve their efficiency. This type of

⁵⁹ CEDAG Belgium – Comité européen des associations d'intérêt général

requirement is fully in line with the Commission's role and competence to adopt incompatibility rules for State aid.

Compulsory efficiency incentives avoid maintaining afloat inefficient providers and create a positive dynamic towards an efficient provision of public services for the benefit of both the service user and the tax payer. This option leads to a positive impact for tax payers, since their money would be spent more efficiently for the provision of services that are in their interest. Such an efficient allocation of public resources for SGEIs contributes to the more general objectives of increased competitiveness at the EU level and of economic cohesion between Member States. As also emphasized by the European Parliament, this is an important issue since people need quality, accessible and efficient SGEIs to overcome the economic and social effects of the crisis.

As there are several cases in which this option has been already implemented by some Member States and has proved successful, these can provide useful examples for other authorities who consider developing such efficiency incentives. The Hungarian State Aid Monitoring Office⁶⁰ mentions that local public transport and district heating are examples of sectors in Hungary where the calculation of compensation has taken into account the efficiency of the provider. Another case mentioned in the public consultation is that of water supply and sewage systems in Czech Republic, where "the operator of infrastructure of water supply and sewerage received incentives to a more rapid reduction of water losses through a possibility to obtain a higher reasonable profit." Furthermore, case C 41/2008⁶¹ concerning Danish railways is an example where the compensation system has been devised such as to incite the beneficiary to increase its productivity. Finally, Frérot (2009)⁶² provides additional examples in the water and sanitation sector of the Output-Based Aid model⁶³ and of remuneration of the operator based on performance⁶⁴, which are already being implemented.

5.5.3. *Impose efficiency test*

Under such an option, there would normally be no scope for "compatible aid" for SGEIs. Indeed, if the compensation is based on the costs of an efficient provider, the fourth Altmark criterion would be complied with. Consequently, if the other Altmark conditions are also met, the compensation would be "no aid". On the contrary, in

⁶⁰ Question 22 of the questionnaire: "Has the calculation of the reasonable profit in your specific case taken account of the productivity gains achieved by the provider? If yes, please explain and, where appropriate, provide examples where the calculation of the compensation has taken into account the efficiency of the provider"

⁶¹ Case C 41/2008, Public service contracts between the Danish Government and Danske Statbaner (OJ L 7, 11.01.2011, pp. 1-39)

⁶² Frérot, Antoine (2009), *L'eau – Pour une culture de la responsabilité*, Éditions Autrement Frontières
⁶³ Ibidem p. 125-126 – This approach is implemented by the World Bank and ties the payment of subventions to the effective realisation of objectives. This type of financing exists since early 2000, but it was only recently applied to water and sanitation.

⁶⁴ Ibidem, p. 153 – In this case, which was implemented in a city of 1,1 million inhabitants, the remuneration consists of a fixed part and of a variable part. The amount of the latter depends on the required performance, and a series of indicators were defined in order to evaluate the performance. These indicators are tied to key areas such as the quality of the water, the protection of the environment, asset management or investment adjustments. This system of indicators and variable remuneration incites the operator to improve its performance.

case the Member State would not have been able to demonstrate the efficiency of the provider, the aid would not be allowed.

According to Business Europe's reply to the public consultation, an efficiency analysis would have a positive impact on trade between Member States, as it might eliminate possible distortions of competition. Without such analysis, State aid that is not based on a reasonable cost of supply may be allowed, which eliminates the incentives for public authorities to use tenders. The introduction of an efficiency test might lead to more tendering (which is likely to have been avoided before), and, therefore, to increased opportunities for potentially more competitive providers across the EU to deliver high quality SGEIs at the best price. Additionally, this option would encourage public authorities to give greater consideration to optimising cost effectiveness in the provision of SGEI.

On the other hand, the German Bundesrat raises the problem of limiting the discretion of Member States if greater emphasis is placed on quality and efficiency aspects. They argue that these aspects fundamentally do not fall within the Commission's competence, which has its basis in the competitiveness chapter of the TFEU. The Bundesrat also argues that compliance with the first three Altmark criteria alone usually rules out any distortions on competition.

On balance, this option may be considered to impact too much on Member States' discretionary power to define the scope of their mission of general interest, to determine whether non-measurable tasks give rise to additional costs, to choose the provider and to assess the quality of the service.

In addition, this option may give rise to new administrative costs. Therefore, it would lead to an increased administrative burden and both Member States and undertakings would spend their resources in trying to prove to the Commission the efficiency of the provider, rather than spending them on developing measures that can lead to an increase in efficiency.

6. COMPARING THE OPTIONS

Having presented the impacts of each option for the different topics that are subject to the revision of the rules, a comparison of the various options can be done by assessing their effectiveness, efficiency and coherence with the objectives identified.

Effectiveness refers to the extent to which options achieve the objective. Efficiency refers to the extent to which the objective can be achieved for a given level of resources / at least cost (cost-effectiveness). Coherence refers to the extent to which options are coherent with the overarching objectives of EU policy.

6.1. Clarification of the rules

Three options are analysed in relation with the objective of clarification of the rules. Because of the limited value of the Interactive Information System (option 1) that is currently offering guidance regarding the application of the rules, it is clear that additional measures need to be taken in order to achieve the objective of clarification. Option 2 proposes the continuation of IIS, together with the development of cooperation with Member States. Option 3 is the most complete

option, as it envisages the adoption of a Commission Communication, in addition to the measures under option 2.

Option 3 is therefore believed to be not only the most effective, but also the most efficient in achieving the objective of clarification. Being a point of reference to the Member States and to any stakeholders aiming to better understand the key concepts behind State aid rules for SGEIs, the Communication would reduce extra expenses that might be otherwise incurred. Unlike the other options, it would also provide more legal certainty, which is needed in this area. By facilitating the correct application of the rules, it can also be implied that there will be a positive impact on competition, thus achieving coherence with the overarching objectives of EU policy.

Table 2. Comparison of the options relating to clarification of the rules

Options	Effectiveness	Efficiency	Coherence
1. No policy change	0	0	0
2. Continue current action and develop cooperation with the Member States	+	+	+
3. Adopt a Commission Communication, while providing additional information and guidance	++	++	+

Magnitude: ++ strongly positive; + positive; -- strongly negative; - negative; +/- both positive and negative; = marginal/neutral; ? uncertain; 0 baseline scenario

6.2. Simplification for small, local SGEIs

Option 1 argues for no policy change, which means that small, local SGEIs can only benefit from the block exemption under the existing thresholds of the Decision, if the compensation exceeds the threshold under the general de minimis Regulation. Option 1 would fail to achieve the objective of simplification for small, local SGEIs, since the considerable administrative burden for these would prevail. Therefore, three alternatives were presented: increasing the ceiling of the general de minimis Regulation (option 2), adopting a specific de minimis rule for small, local SGEIs (option 3) and having very simplified compatibility conditions for small, local SGEIs (option 4).

Options 2 and 3 would both be effective in achieving the objective of simplification, while this is not so obvious for option 4, because this would only equate with lifting the overcompensation test. The rules of the current Decision are already limited, which greatly restricts the scope for simplification under this option. Moreover, it is relatively unclear whether this would lead to a reduction of the administrative burden.

Most importantly, option 4 would raise serious legal concerns and would be incoherent with the Commission's general approach to compatibility assessments.

As regards the comparison of options 2 and 3, option 2 may not be as efficient as option 3 and is not tailored narrowly enough, which may raise certain legal

difficulties and which makes it less coherent with the EU policy objective of avoiding distortions of competition in the internal market. On the other hand, option 3 avoids the over-inclusiveness by only extending the threshold for SGEIs and is, therefore, the preferred option.

Table 3. Comparison of the options relating to simplification for small, local SGEIs

Options	Effectiveness	Efficiency	Coherence
1. No policy change	0	0	0
2. Increase the ceiling of the general de minimis Regulation	++	-	?
3. Adopt a specific de minimis rule for small, local SGEIs	++	++	+
4. Very simplified compatibility conditions for small, local SGEIs	+	=	-

Magnitude: ++ strongly positive; + positive; -- strongly negative; - negative; +/- both positive and negative; = marginal/neutral; ? uncertain; 0 baseline scenario

6.3. Scope of the Decision

The options referring to the scope of the Decision aim at a more diversified and proportionate approach. This can be achieved by simplifying the rules for social SGEIs on one hand, and by ensuring more scrutiny for large commercial SGEIs.

Option 1, which presents the baseline scenario and its impacts, leads to two main problems for the two types of SGEI providers that are concerned: first, in the case of social SGEIs it means high administrative burdens, and second, in the case of large-scale commercial SGEIs, it poses a significant threat to competition, as important cases are currently overlooked.

The other two options are quite different from the point of view of the extent to which they achieve the objective in an effective way. While option 2 addresses only partly the objective of a more diversified and proportionate approach by simplifying the rules for social SGEIs, option 3 proves to be more effective by also addressing to a certain extent the need for an increased scrutiny for larger commercial SGEIs. Option 3 distinguishes more clearly than option 2 between different types of SGEIs. Therefore, the risk of competition distortions on the market is lower, meaning that consumers are better protected. Consequently, this option also proves to be more coherent with the overarching objectives of EU policy.

Table 4. Comparison of the options relating to the scope of the Decision

Options	Effectiveness	Efficiency	Coherence
1. No policy change	0	0	0

2. Enlarge the scope of social services regardless of a compensation and turnover threshold, without changing the thresholds of the Decision	+/-	+	+/-
3. Enlarge the scope of social services regardless of a compensation and turnover threshold, while changing the thresholds of the Decision	++	+	++

Magnitude: ++ strongly positive; + positive; -- strongly negative; - negative; +/- both positive and negative; = marginal/neutral; ? uncertain; 0 baseline scenario

6.4. Increasing competition considerations for large commercial SGEIs

Another aspect analysed in this report is the possibility of increasing competition considerations for large commercial SGEIs. The five options which are assessed represent different combinations of various tests that contribute to the objective of a more thorough scrutiny. These tests are the following: the overcompensation test, a test of compliance with public procurement rules, a necessity test, and a competition test for the most serious competition distortions.

As explained in detail in section 5, the necessity test is the most far-reaching option. It would raise two main problems that would affect coherence and efficiency. First, it may de facto require Member States to tender out most of their in-house contracts, which is not an obligation under the current public procurement rules. Second, it would bring along high administrative costs and may not always be feasible because of the difficult type of assessment it would involve.

On the other hand, testing compliance with Public Procurement rules would ensure coherence with other EU policies, especially those concerning the internal market. It would ensure coherence both with the current public procurement rules and modified public procurement rules. Coherence also comes from a more differentiated approach. Additionally, performing a competition test for the most serious competition distortions and suggesting possible amendments in order to approve the aid is coherent with the general State aid regime and efficient and effective in limiting distortions of competition in the internal market.

Therefore, a combination of all tests except for the necessity test (option 4) is the most effective, efficient and coherent approach.

Table 5. Comparison of the options relating to increasing competition considerations for large commercial SGEIs

Options	Effectiveness	Efficiency	Coherence
1. No policy change	0	0	0
2. Test of compliance with public procurement rules and overcompensation test	+	+	+

3. Test of compliance with public procurement rules, necessity test and overcompensation test	+	-	+/-
4. Test of compliance with public procurement rules, overcompensation test and competition test limited to the most serious competition distortions	++	+	+
5. Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to the most serious competition distortions	++	-	+/-

Magnitude: ++ strongly positive; + positive; -- strongly negative; - negative; +/- both positive and negative; = marginal/neutral; ? uncertain; 0 baseline scenario

6.5. Increasing efficiency considerations for large commercial SGEIs

Finally, the possibilities of increasing efficiency considerations are analysed. Under the baseline scenario, even though rules are easier to apply compared to the other two options, efficiency is neither ensured, nor stimulated.

As to the comparison between options 2 and 3, option 2 is more effective and efficient in achieving the objective of increased efficiency considerations for large commercial SGEIs, since it offers a very balanced approach. It respects most the discretion of Member States, while being the easiest to implement. Encouraging efficiency through incentives (option 2) would free public financial resources, while the introduction of an efficiency test (option 3) might have the negative impact of increasing administrative costs and significantly limit Member States' discretion.

Furthermore, the main positive impact of option 2 is its contribution to the sustainability of public services, as it would provide incentives for private undertakings to manage public services in the most efficient and responsible manner. Therefore, this option is also coherent with the more general EU policy objectives.

Table 6. Comparison of the options relating to increasing efficiency considerations for large commercial SGEIs

Options	Effectiveness	Efficiency	Coherence
1. No policy change	0	0	0
2. Incentivise efficiency	+	++	++
3. Introduction of an efficiency test	+	-	?

Magnitude: ++ strongly positive; + positive; -- strongly negative; - negative; +/- both positive and negative; = marginal/neutral; ? uncertain; 0 baseline scenario

6.6. Overall package of the most appropriate policy options

From the five tables above, one can identify a possible package of policy options that score best in terms of effectiveness, efficiency and coherence, as described in the beginning of this Section. Compared to the baseline scenario and to other alternatives, this package would be the most suitable to achieve the objectives of clarification, simplification and diversified approach. First, a Communication, together with additional information and guidance, would be the most effective and efficient way of clarifying key concepts related to the rules. The specific de minimis regulation and the exemption of social services under the Decision would clearly simplify the application of the rules for those SGEIs which incur most problems with regard to the application of the rules, either because of their size and/or their nature. Moreover, lowering of the threshold of the Decision and the new competition and efficiency considerations would ensure more thorough scrutiny for compensation to large commercial SGEIs, which is likely to lead to greater distortions of competition on the internal market. This choice of options would ensure a coherent package, as well as consistency with the overarching objectives of EU State aid policy.

7. MONITORING AND EVALUATION

For State aid measures not exempted from the notification requirement, the Commission receives detailed information in the notification. For measures falling under the de minimis Regulation and the Decision, the Member States are under an obligation to record all the information regarding the measure. The decision contains an obligation for Member States to provide a report every two years. This report does not only include the total amount of aid, but also the distribution over different sectors and whether the application of the decision has in certain sectors given rise to difficulties or complaints. For compensation measures falling under the Framework, the respective Member State has to publish for each aid measure certain core information, in particular the content and duration of the public service obligation and the amount of aid granted to the undertaking on a yearly basis.

The Commission publishes important data on State aid in its "Scoreboard" on State aid. Data on trade, employment and productivity can be derived from Eurostat data. Other more specific information on the impact of the new package can be prepared by ad hoc studies or can be part of the reporting requirements linked to the authorisation of State aid.

The Commission will continuously monitor the developments in the field of SGEI and evaluate on a regular basis the impact of the changed package. It will in particular focus on the ability of the new package to meet the objectives outlined in section 3 above.

Indicators of the success of the new package include the trend in the number of complaints submitted to the Commission, the number of Commission decisions appealed before the European Courts and the number of decisions annulled by the Courts. In particular, as regards measures falling under the Framework, it is the Commission itself that will apply the text in its decisions. It is, therefore, in an excellent position to monitor and evaluate the functioning of the rules and whether the objectives pursued by the packages are fulfilled.