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CORRIGENDUM:

Annule et remplace le document SWD(2013)53 final du 15.02.2013

Concerne : correction 4 notes en bas de page (12,132,157,167) ainsi que questions 75,106,166,169,173,199 et 228;

Utilisation correcte du terme 'not exceeding' dans le document complet.

COMMISSION STAFF WORKING DOCUMENT

Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest

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

1 INTRODUCTION

A number of questions have been raised by public authorities in the Member States, citizens, civil society organisations and other stakeholders on the **application of the EU rules, notably those on State aid, public procurement and the internal market, to services of general interest** and, in particular, to **social services of general interest (SSGIs)**. These questions concern the impact of these rules on the ways these services can be organised and financed by public authorities in the Member States, on the modalities of selection of the service providers, in case the provision is outsourced, and, more generally, on the regulatory framework concerning i.a. the types of providers or the access to and the quality of the services¹.

As for the questions on **State aid rules**, they concern in the first place the precise conditions under which compensation for public service obligations constitutes State Aid, and secondly the conditions under which State Aid may be regarded as compatible with the Treaty on the Functioning of the European Union (TFEU). Clarification concerning the obligation to notify such aid to the Commission is also sought.

In its judgment in *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)*², the Court of Justice of the European Union (the Court) held that public service compensation did not constitute State Aid within the meaning of Article 107 of the TFEU provided that four cumulative criteria were met³.

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

However, the Commission Regulation of 25 April 2012 on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing services of general economic interest⁴ (hereinafter: ‘the SGEI *de minimis* Regulation’) stipulates the conditions under which aid granted to undertakings for the provision of SGEIs will be deemed not to meet all the conditions of Article 107(1) TFEU. Therefore, public service

¹ For the analysis of these questions, in relation to social services, see the First and Second Biennial Reports on social services of general interest, SEC(2008) 2179 of 2 July 2008, and SEC(2010) 1284 of 22 October 2010.

² Case C-280/00 *Altmark* [2003] ECR I-7747.

³ For further details, see the answer provided to question 61.

⁴ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

compensation falling within the scope of the SGEI *de minimis* Regulation is deemed not to constitute State Aid.

Where public service compensation constitutes State Aid, Article 106 TFEU and, for land transport, Article 93 TFEU allow the Commission to declare compensation for SGEIs compatible with the internal market. The Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State Aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs⁵ (hereinafter: ‘the Decision’) and, for land transport, Regulation (EC) No 1370/2007 of the European Parliament and of the Council⁶ (hereinafter: ‘Regulation 1370/2007’) specify the conditions under which certain compensation arrangements are compatible with Article 106(2) and Article 93 respectively and are not subject to the prior notification requirement of Article 108(3) TFEU. Any other public service compensation must be notified to the Commission, which will assess its compatibility on the basis of the European Union framework for State Aid in the form of public service compensation (2011)⁷ (hereinafter: ‘the Framework’) and, for land transport, Regulation 1370/2007.

The *Altmark* judgment, the Decision and the Framework have made a significant contribution to clarifying and simplifying the applicable rules. Nonetheless, governments and stakeholders have raised a number of questions about the practical application of the legal framework to specific cases. While reviewing the Decision and the Framework in 2011, the Commission therefore adopted an explicative Communication⁸ (hereinafter: ‘the Communication’) clarifying the key concepts of State Aid relevant to SGEIs. In order to simplify further, the Commission supplemented the State Aid package for SGEIs with the SGEI *de minimis* Regulation.

The present guide seeks to provide specific clarification on certain issues that have been raised by public authorities in the Member States, service users and providers and other stakeholders. The section on State aid has been revised, compared to the 2010 version of the Guide⁹ following the adoption of the new package of State aid rules for SGEIs. The questions and answers it contains refer specifically to social services of general economic interest and to transport, but they also apply to SGEIs in general.

As for the questions on the **application of the EU rules on public procurement, they focus in particular on SSGIs** and relate to the conditions under which public procurement rules apply to SSGIs, the scope of the rules and how the rules allow the specific features of SSGIs to be taken into account.

⁵ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3.

⁶ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

⁷ Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15.

⁸ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4.

⁹ Commission Staff Working Document SEC(2010) 1545 final of 7 December 2010.

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

The rules on public procurement/concessions apply only if a public authority decides to entrust the provision of a service to a third party against remuneration.

Against this background, if a contracting authority or entity decides to award a public service or a service contract, the contract will fall within the scope of Directive 2004/18/EC or Directive 2004/17/EC only if the relevant threshold amounts for the application of the Directive are met¹⁰. However, social services and health contracts are not subject to all the provisions of Directive 2004/18/EC or Directive 2004/17/EC¹¹; they are subject only to a very limited number of them¹², and to the fundamental principles of EU law, such as the requirement to treat all economic operators in an equal and non-discriminatory manner and the principle of transparency.

Public service and service contracts¹³ whose value is below the application thresholds of the Public Procurement Directives and service concessions (regardless of their amount) fall outside the scope of the Public Procurement Directives and are subject only to the fundamental principles of the TFEU (non-discrimination, equal treatment, transparency, etc.) in so far as the contracts have a certain cross-border interest. In the absence of a certain cross-border interest, the contracts also fall outside the scope of the TFEU¹⁴.

This guide seeks to provide greater clarification as to the conditions and arrangements for applying the rules on public procurement to SSGIs, by addressing all the issues raised most frequently in questions, such as the provision of services by an in-house organisation or as part of cooperation between public authorities, public-private sector partnerships, service concessions and the scope of the fundamental principles of the TFEU.

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

¹⁰ Article 7 of Directive 2004/18/EC.

¹¹ Social services and health services are among the services listed in Annex II B to Directive 2004/18/EC. Contracts for such services are subject only to a limited number of provisions of the Directive (on the distinction between the services listed in Annexes II A and II B, see Articles 20 and 21 of Directive 2004/18/EC). Annex II B also includes an explicit reference to social services and health services. The codes referred to therein may be consulted on the DG Internal Market website at www.simap.europa.eu.

¹² The technical specifications must be laid down at the start of the procurement process, and the results of the tendering process must be published, as required by Article 21 of Directive 2004/18/EC read in conjunction with Articles 23 and 35(4) of Directive 2004/18/EC.

¹³ Irrespective of the nature of the services.

¹⁴ See Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006), OJ L 8.2006, C 179, page 2.

The Commission has adopted its proposal for new public procurement rules on 20.12.2011¹⁵. It is planned to update the public procurement section of this guide once the new public procurement rules have been adopted in order to bring it in line with the new provisions.

As for the answers to questions concerning the **application of the internal market rules**¹⁶, they focus mainly on SSGIs: these services are covered by the internal market rules laid down in the TFEU where they constitute an 'economic activity' within the meaning of the Court's case law on the interpretation of those provisions. Certain SSGIs may also be covered by the Services Directive.

The answers given on this matter are intended to clarify the options available to the Member States for determining how these services are to be provided in order to guarantee their accessibility and quality, and therefore take account of the specific nature of SGEIs, and of SSGIs in particular, whenever those rules are applied. This document also makes it clear that the Services Directive contains provisions that recognise and take account of the specific features of social services that have not been excluded from the scope of the Directive.

The application of EU rules to SGEI and, in particular to SSGI, and more generally the debate on SGEI has been the object of various Commission initiatives¹⁷ and, most recently, of the Communication "A Quality Framework for Services of General Interest in Europe"¹⁸ (hereinafter 'the Commission Quality Framework') adopted the same day as the new State aid package and the Commission's proposals on Public Procurement and Concessions.

2 CONCEPT OF SGEI

1. *What is a service of general interest (SGI)?*

Protocol No 26 to the TFEU concerns SGIs, but does not define the concept. The Commission has clarified the concept in its Quality Framework (p. 3), where it explains that they are services that public authorities of the Member States at national, regional or local level classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities (see the definition of SGEI below) and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may however be subject to other general Treaty rules, such as the principle of non-discrimination.

¹⁵ Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/0896 final; Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM/2011/0895 final; Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM/2011/0897 final.

¹⁶ "Internal market rules" refers to the rules in the TFEU on the freedom of establishment and the freedom to provide services (Articles 49 and 56 TFEU) and in the Services Directive.

¹⁷ See i.a. the White paper on Services of General Interest (COM(2004) 374 of 12 May 2004), the Communication on social services of general interest "Implementing the Community Lisbon programme: Social services of general interest in the European Union" (COM(2006) 177 of 26 April 2006) and the Communication on "Services of general interest, including social services of general interest: a new European commitment" (COM(2007) 725 final of 20 November 2007).

¹⁸ COM(2011) 900 final of 20.12.2011.

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

The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation. The Commission has clarified in its Quality Framework that SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.

The Court has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities¹⁹.

The concept may apply to different situations and terms, depending on the Member States, and EU law does not create any obligation to designate formally a task or a service as being of general economic interest, except when such obligation is laid out in Union legislation (e.g. universal service in the postal and telecommunication sectors). If the content of an SGEI – i.e. public service obligations – is clearly identified, it is not necessary for the service in question to be designated 'SGEI'. The same is true of the concept of social services of general interest (SSGIs) that are economic in nature.

3. *What is a social service of general interest (SSGI)?*

The concept of SSGI is not defined in the TFEU or in secondary legislation. The Communication *Implementing the Community Lisbon programme: Social services of general interest in the European Union*²⁰ identified two main groups of SSGIs in addition to health services:

- statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability;
- other essential services provided directly to the person. These services that play a prevention and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. In the first place, they offer assistance to persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the people concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate people with long-term health or disability problems. Fourthly, they also include social housing, which provides

¹⁹ Cases C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link A/S* [1997] ECR I-4449, paragraph 53; and Case C-266/96, *Corsica Ferries France SA* [1998] ECR I-3949, paragraph 45.

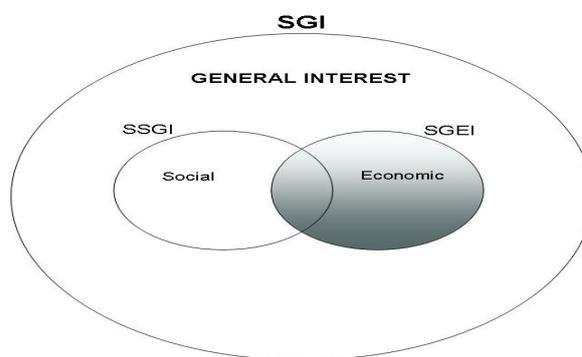
²⁰ COM(2006) 177 final, 26 April 2006.

housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all four of these dimensions.

The Commission Quality Framework (p. 3 and 4) has also referred to this description.

Moreover, the Communication on *Services of general interest, including social services of general interest: a new European commitment*²¹ highlighted the objectives and the organisational principles which characterise SSGIs.

As these two communications make clear, SSGIs may be of an economic or non-economic nature, depending on the activity involved. The fact that an activity is termed ‘social’ is not of itself enough²² for it to avoid being regarded as an ‘economic activity’ within the meaning of the Court’s case law. SSGIs that are economic in nature are SGEIs (see the answer to question 2).



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

Yes. As explained in the Communication²³, public authorities in the Member States, whether at national, regional or local level, depending on the allocation of powers between them under national law, have considerable discretion when it comes to defining what they regard as services of general economic interest²⁴ (on the concept of SGEI, see the answer to question 2). The only limits are those imposed by EU law (see the answer to question 6) and manifest error of assessment (see the answer to question 7).

5. Can the Commission provide a list of criteria for the public authorities to use in determining whether a service is of general interest?

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

²¹ COM(2007) 725 final, 20 November 2007.

²² Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paragraph 118; Case C-218/00 *INAIL* [2002] ECR I-691, paragraph 37; and Case C-355/00 *Freskot* [2003] I-5263.

²³ See paragraph 46 of the Communication.

²⁴ Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraphs 166-169; Case T-309/04 *TV2* [2008] ECR II-2935, paragraphs 113 *et seq.*

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

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

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

Yes. In sectors which have been harmonised at Union level²⁵, and where objectives of general interest have been taken into account²⁶, the Member States' discretion cannot contradict the rules governing such harmonisation. Furthermore, Member States' discretion remains always subject to a control of manifest error.

Sectors harmonised at Union level:

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

7. Are there examples of manifest error of assessment by the Member States when defining SGEIs?

As explained in paragraph 46 of the Communication, the freedom of the Member States to define SGEIs is subject to review by the Commission and the Union's courts to check for manifest errors of assessment²⁷.

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

Examples:

- Port operations, i.e. the loading, unloading, transshipment, storage and movement

²⁵ For example, telecommunications and the postal and energy sectors have been harmonised at Union level. See Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51 (as amended by Directive 2009/136/EC, OJ L 337, 18.12.2009, p. 11); Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14 (as amended by Directives 2002/39/EC, OJ L 176, 5.7.2002, p. 21 and 2008/06/EC, OJ L 52, 27.2.2008, p. 3); Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, OJ L 211, 14.8.2009, p. 55.

²⁶ Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, paragraph 45.

²⁷ Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraphs 165 *et seq.* Moreover, the Member States' discretion cannot be exercised in the face of the applicable harmonisation rules – see the answer to question 6.

in general of goods or any equipment in national ports, are not necessarily services of general economic interest, which exhibit special characteristics as compared with the general economic interest of other economic activities²⁸.

- Activities consisting in advertising, e-commerce, the use of premium-rate telephone numbers in prize games, sponsoring or merchandising. Including them in the ambit of audio-visual public service is a manifest error of assessment²⁹.
- Disposal of animal corpses, being only in the interest of the economic operators that benefit from it. These operators should bear the costs of disposing the waste that they have caused ("polluter pays principle")³⁰.
- Production and marketing of products listed in Annex I of the TFEU³¹.
- Broadband limited to business parks, thus not benefitting the population at large³².

8. *Is it possible to regard certain financial services as SGEIs?*

Yes. Certain financial services, such as the universal banking service, may be regarded as SGEIs. The Commission has already accepted such definitions from the Member States on a number of occasions³³ and has issued a Recommendation on access to basic banking services³⁴ (see also the Commission Quality Framework, p. 10).

9. *Can the construction of infrastructure as such qualify as SGEI?*

²⁸ Case C-179/90, *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 53; and Joined Cases C-34/01 to C38/01 *Enirisorse* [2003] I-14243, paragraphs 33-34.

²⁹ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257, 27.10.2009, p. 1.

³⁰ Commission decision concerning State aid No SA.25051 – Germany – Association for disposal of dead animal bodies, OJ L 236, 1.9.2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:236:0001:0034:EN:PDF>. See also Case C-126/01 *Ministère de l'Economie, des Finances et de l'Industrie v GEMO* [2003] I-13769.

³¹ Commission decision concerning State aid No C 28/1998 – Italy – Centrale del Latte di Roma, OJ L 265, 19.10.2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:265:0015:0028:EN:PDF>.

³² Commission decisions concerning State aid No N 890/2006 – France – SICOVAL, http://ec.europa.eu/competition/state_aid/cases/218142/218142_723454_30_2.pdf; State aid No. N 284/2005 – Ireland – Metropolitan Area Networks, http://ec.europa.eu/competition/state_aid/cases/199656/199656_581678_68_2.pdf.

³³ Commission decisions concerning state aid No N 514/2001 – United Kingdom - Modernisation of the UK benefit payment system and provision of access to universal banking services through post offices, OJ C 186, 6.8.2003, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_n514_01 state aid No N 244/2003 - United Kingdom - Credit Union Provision of Access to Basic Financial Services, OJ C 223, 10.9.2005, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N244_2003; state aid No C 49/2006 — Italy — Poste Italiane — distribution of postal savings certificates, OJ L 189, 21.7.2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:189:0003:0037:EN:PDF>; state aid No N 642/2005 — Sweden — Posten AB, OJ C 291, 5.12.2007, http://ec.europa.eu/competition/state_aid/register/ii/doc/N-642-2005-WLWL-en-22.11.2006.pdf; state aid No N 650/2001 – Ireland – An Post, OJ C 43, 27.2.2007, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N650_2001

³⁴ Commission Recommendation on access to a basic payment account (C(2011)4977).

The construction of infrastructure that is linked to the public service obligation and is, therefore, necessary for its provision can qualify as cost linked to the provision of an SGEI (cf. Article 5(3)(d) of the Decision).

For example, as explained in paragraph 49 of the Communication, setting up broadband infrastructure in a given territory can be an SGEI if there is insufficient infrastructure availability and investors cannot provide adequate broadband coverage. This is normally the case in rural areas, as opposed to metropolitan areas already served by the market. Such public service compensation can be granted if the conditions of the Broadband Guidelines are complied with³⁵.

Another example concerns postal services. In the case of Hellenic (Greek) Post (ELTA)³⁶, the Greek authorities defined the SGEI as a set of different services, including the postal universal service. The Commission verified that the authorities had not overcompensated the Greek Post for the net cost of providing the SGEI, including the depreciation costs of a new modernised infrastructure. Thus, the Greek Post was able to modernise its infrastructure and to improve the quality of the public service, in order to satisfy the requirements established by Directive 2002/39/EC³⁷.

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

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

On the other hand, the State may wish to participate in the financing of such activity, but that would constitute State Aid to the undertaking in question. Such participation may be perfectly compatible with EU law, for example under the Community framework for State Aid for research and development and innovation³⁸ or the general block exemption Regulation³⁹ for aid to employment, training or SMEs, depending on the intended purpose of the public intervention (support for research, development of employment or training, SMEs, etc.).

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

³⁵ Communication from the Commission – Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p. 7.

³⁶ Commission Decision on state aid SA.32562 - Greece – Aid to the Hellenic Post, OJ C 99, 3.4.2012, http://ec.europa.eu/eu_law/state_aids/comp-2011/sa32562-2011n.pdf.

³⁷ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L 176, 5.7.2002, p. 21.

³⁸ Community framework for state aid for research and development and innovation, OJ C 323, 30.12.2006, p. 1.

³⁹ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (Articles 107 and 108 TFEU), OJ L 214, 9.8.2008, p. 3.

11. *Can a public authority classify a service as SGEI if a similar service is already provided by other operators in the market that are not entrusted with an SGEI?*

Member States have a wide margin of discretion when it comes to defining SGEIs (see the answer to question 4).

However, where there are other undertakings operating under normal market conditions, not entrusted with an SGEI, who already provide or can provide a service satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest as defined by the State, the Commission considers that it would not be appropriate to attach a public service obligation to such a service⁴⁰. Therefore, it is even more important that the Member States clearly specify the characteristics of the service in question, in particular the conditions for its provision and its target group. If a service is already provided by the market, albeit under conditions that are considered unsatisfactory by the Member State concerned, for instance because the market cannot provide it with the level of quality or at a price that public authorities might consider as being in the public interest (for example because transport fares are too expensive for low-income families), such a service can qualify as SGEI. This service must be offered on a non-discriminatory basis.

When the service is not already provided by the market, the question of whether it can be provided by the market is for the Member State to decide, while the Commission can only check for manifest error.

12. *Can a service be defined as SGEI if the market would be able to provide it in the near future?*

Where the classification of a service as SGEI is otherwise justified, the mere fact that the market may be able to provide it in the future would in principle not prevent a Member State from defining the service currently as an SGEI. However, in cases where it is clear that the market will be able to provide the service within a short time under the conditions (including price, quality, continuity and access to it) desired by the Member State, the public authorities should reduce the entrustment period accordingly and monitor the evolution of the market in order to be able to decide whether a new entrustment is still needed when the previous one expires. If the market is still failing to provide the service at the end of the entrustment period, and the Member State considers that the service still qualifies as an SGEI, a new entrustment compliant with Article 106 TFEU is possible.

As regards the question of whether it is clear that the market will be able to provide a particular service in the foreseeable future, the Commission's task is limited to checking for manifest errors in the Member State's assessment.

13. *If a childcare provider, operating on market terms and not entrusted with the provision of an SGEI, gets into difficulties and risks going bankrupt, can the Member State at that moment entrust it with an SGEI in order to ensure continuity of the service (assuming there is a lack of other childcare providers in that area that could provide the service)?*

⁴⁰ Case C-205/99 *Analir* [2001] ECR I-1271, p. 71. See also paragraph 48 of the Communication.

With respect to childcare it should first of all be noted that under certain conditions the provision of this service can be considered as not involving an economic activity⁴¹. Where childcare services constitute an economic activity, they are often defined as an SGEI. A Member State can entrust a childcare provider with the provision of an SGEI if the public service obligation is clearly defined, and the entrustment is compliant with State Aid rules. It is possible that in a certain area, while often childcare providers are entrusted with an SGEI to provide childcare services at lower than market rates, others offer childcare services at market rates. If a childcare provider that has been operating on market terms risks going bankrupt and there are not sufficient alternative providers that could immediately step in, the Member State can entrust that provider with an SGEI under the Decision⁴², so as to ensure the continuity of the service (i.e. a sufficient number of childcare places). In such a specific situation related to capacity problems, however, the public authorities should consider limiting the duration of the SGEI entrustment to the time necessary to allow potential other market operators to take over the service at market terms.

Since no public service obligation has been entrusted to the childcare provider before, the SGEI compensation can in principle only cover future SGEI costs and has to be calculated on the basis of the parameters outlined in the entrustment act in accordance with the Decision.

As regards losses from the past, if the service provider cannot find private funding, these could be covered by rescue and restructuring aid, if the conditions of the R&R Guidelines⁴³ are fulfilled.

3 THE NEW STATE AID SGEI PACKAGE

3.1 Overview of the new State Aid SGEI package

14. *What instruments does the new State Aid SGEI package consist of?*

The State Aid SGEI package consists of four instruments applicable to all authorities (national, regional, local) that grant compensation for the provision of SGEIs:

- The **Communication** clarifies basic concepts of State Aid which are relevant to SGEIs, such as the notions of aid, SGEI, economic activity, the relation between public procurement and State Aid rules, etc.
- The **SGEI *de minimis* Regulation** provides that SGEI compensation not exceeding EUR 500 000 over any period of three fiscal years does not fall under State Aid scrutiny.
- The revised **Decision** exempts Member States from the obligation to notify public service compensation to the Commission, if the compatibility conditions of the Decision are fulfilled.

⁴¹ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁴² Since homes for the elderly fall under the scope of application of the Decision (Article 2(1)(c)) irrespective of the amount of compensation, the SGEI Framework is not applicable.

⁴³ Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2.

- The revised **Framework** sets out the rules for assessing SGEI compensation that constitutes State Aid and is not exempted from notification by the Decision. Those cases have to be notified to the Commission and may be declared compatible if they meet the criteria of the Framework.

15. *What is the purpose of the SGEI Communication?*

The Communication gives a comprehensive and practical overview of the EU State Aid concepts relevant to SGEIs and provides explanations of key issues in a single document. It summarises the most relevant case law of the EU Courts and the Commission's decision-making practice. It aims at facilitating the application of State Aid rules for national, regional and local authorities as well as public service providers. The Commission has sought to provide as much clarity as possible on key concepts, such as the notion of economic activity, effect on trade or SGEI, as well as on the relation between State Aid and public procurement rules.

16. *What is the SGEI de minimis Regulation?*

Under the SGEI *de minimis* Regulation, public funding of SGEIs not exceeding EUR 500 000, granted over any period of three fiscal years, is not considered as State Aid. This is because the amount is so small that it can be deemed not to have an impact on cross-border trade or competition. Since the measures are not considered as State Aid, there is no obligation to ***notify them in advance to the Commission.***

17. *What is the Decision about?*

The Decision specifies the conditions under which compensation to companies for the provision of public services is compatible with the EU State Aid rules and does not have to be notified to the Commission in advance.

18. *What is the Framework about?*

The Framework specifies the conditions under which public service compensation not covered by the Decision is compatible with the EU State Aid rules. Such compensation will have to be notified to the Commission due to the higher risk of distortion of competition, so that the Commission can make an in-depth assessment and decide whether the measure in question is compatible with the internal market.

19. *What are the respective objectives of the Decision and the Framework? What are the differences between the two?*

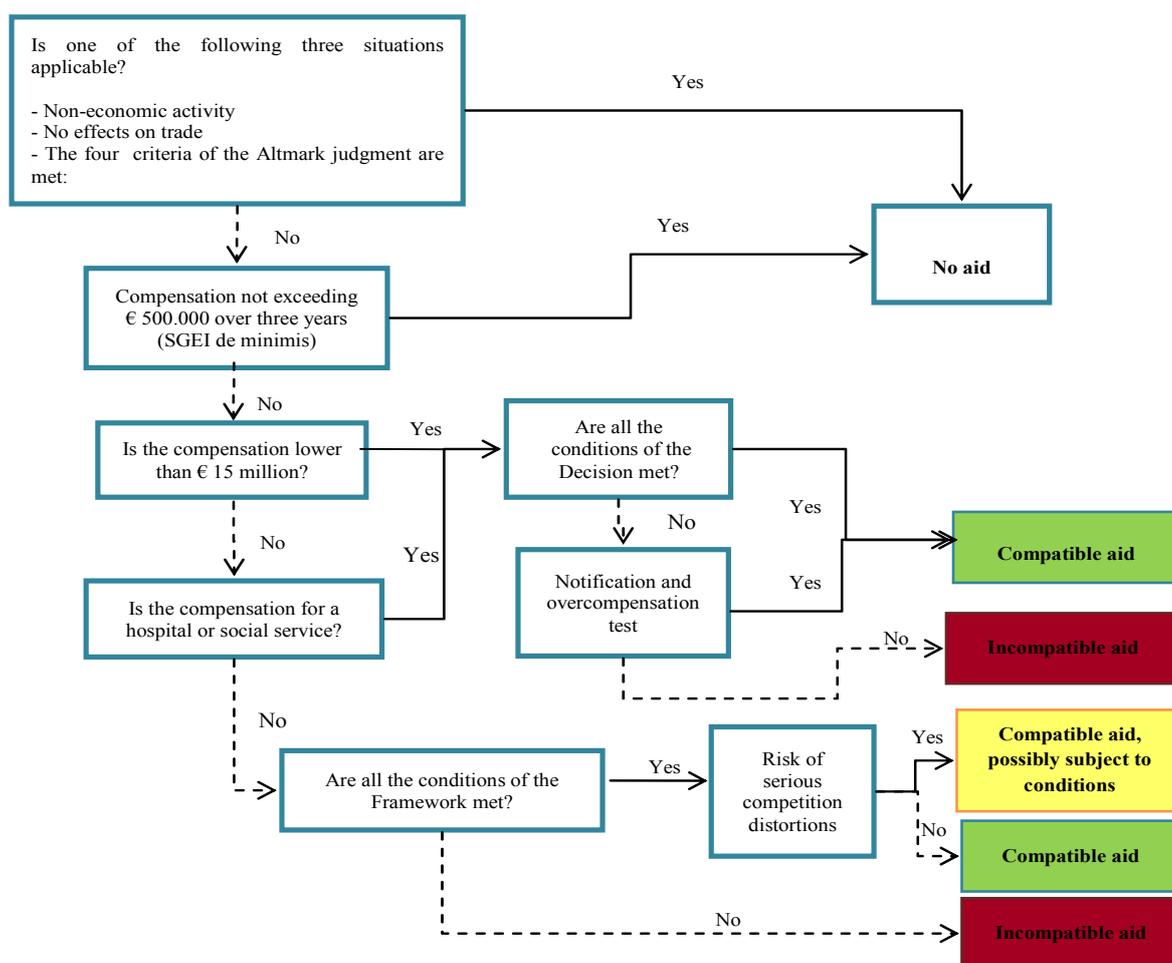
Both texts specify the conditions under which public service compensation constituting State Aid is compatible with the TFEU.

The most important difference lies in the fact that public service compensation covered by the Decision **does not need to be notified** to the Commission. Once the criteria of the Decision are met, the Member State concerned may grant the compensation without delay. However, when the conditions set out in the Decision are not met, the compensation would fall under the Framework. This means that it must be notified in advance to the Commission so that it can check whether the State Aid concerned is compatible with the TFEU.

In addition, given that cases falling under the Framework are typically large cases that could potentially create more significant distortions of competition, the compatibility conditions are generally stricter than under the Decision. For more details on compatibility conditions, see section 3.5.2.

20. What are the logical steps of the analysis for public service compensation?

The graph below outlines the main steps to be followed for determining which instrument of the SGEI package may apply to public service compensation.



21. How can legal certainty be provided to SGEI providers? What if they do not know whether the compensation falls under the Decision, the Framework or the SGEI de minimis Regulation?

The State aid SGEI package and the Commission’s decisions applying the Framework are published in the Official Journal and on the internet. The responsibility for making sure that any compensation for an SGEI is in compliance with the State Aid rules lies with the national authorities that entrust an undertaking with the provision of the SGEI. Where aid is granted under the Decision, the entrustment act must make reference to the

Decision, so that the SGEI provider is informed about the legal basis and can check compliance with the Decision. If the entrustment act does not make reference to the Decision, the SGEI provider can ask the entrusting authority on what legal basis the aid is granted and check that, where the aid falls under the Framework, it is covered by an approval decision by the Commission.

22. *Are there any legal obligations for SGEI providers?*

The SGEI package does not impose any specific obligations on SGEI providers. The public authority entrusting the provider with the SGEI has to ensure that State Aid rules are respected. However, the conditions necessary to ensure that the compensation granted is in line with the State Aid rules should be reflected in the entrustment act so that the provider is fully aware of them. The provider ultimately bears the risk of having to reimburse the compensation if it is granted in violation of the State Aid rules.

23. *Does the SGEI package establish the right of undertakings to receive aid in the form of public service compensation?*

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

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

3.2 Communication

3.2.1 *When do the State Aid rules apply and what are the consequences?*

24. *When do the State Aid rules laid down in the TFEU apply to the organisation and financing of SGEIs?*

The State aid rules apply only to ‘undertakings’. This concept covers any entity engaged in an economic activity, regardless of the entity’s legal status or the way in which it is financed⁴⁴. In particular, it is irrelevant whether the entity is set up to generate profits or not (Communication para. 9).

25. *When does an activity qualify as ‘economic’ within the meaning of the competition rules?*

Any activity consisting in offering goods and/or services in a given market is an economic activity within the meaning of the competition rules⁴⁵ (see Communication para. 11). In this context, the fact that the activity in question is termed ‘social’ or is

⁴⁴ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

⁴⁵ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; and *Pavlov*.

carried on by a non-profit operator is not in itself enough⁴⁶ to avoid classification as an economic activity.

The Communication provides both general guidance on the concept of economic activity as developed by the European courts (para. 9 et seq.) and more specific guidance in respect of exercise of public powers (para. 16), social security (para. 17 et seq.), health care (para. 21 et seq.) and education (para. 26 et seq.).

Importantly, whether a market exists for a certain service depends on the organisation of the activity by the Member State concerned and can therefore differ from one Member State to another and may also change over time (para. 12). The specific sectoral guidance offered for four sectors (see preceding paragraph) therefore does not seek to establish a list of economic and non-economic services, but rather to give examples of the elements that play a role in determining whether a particular service can be considered as economic.

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

- Employment procurement activity carried on by public employment agencies⁴⁷.
- Optional insurance schemes operating according to the capitalisation principle, even where they are managed by non-profit organisations⁴⁸; the capitalisation principle means that the insurance benefits depend solely on the amount of contributions paid by the recipients and the financial returns on the investments made.
- Emergency transport services and patient transport services⁴⁹.
- Services such as the carrying out of customs formalities, relating in particular to the import, export and transit of goods, as well as other complementary services such as services in the monetary, commercial and tax fields, which customs agents offer by taking on the related financial risks⁵⁰.
- The provision by legal entities, set up by employers or trade union organisations and authorised by the State, of assistance to employees and employers related to the completion of income tax returns, and other related advice⁵¹.
- The management of transport infrastructure⁵².
- Medical services provided either in a hospital environment or elsewhere⁵³. However, public hospitals can also exercise a non-economic activity (see Communication para. 22).

⁴⁶ *Pavlov*, paragraph 118; Case C-218/00 *INAIL* [2002] ECR I-691, paragraph 37; and Case C-355/00 *Freskot* [2003] ECR I-5263.

⁴⁷ Case C-41/90 *Höffner and Elser* [1991] ECR I-1979, paragraph 21.

⁴⁸ Case C-244/94 *FFSA* [1995] ECR I-4013, paragraphs 17-22; Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 80-87.

⁴⁹ Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 20.

⁵⁰ Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 37.

⁵¹ Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 63.

⁵² Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297.

- Housing at lower rents; see the decision practice on the provision of general mortgage funds, affordable housing schemes intended to provide low-cost housing, rental subsidy schemes and grant schemes for elderly and disabled persons, as well as socially disadvantaged households⁵⁴.
- The provision of infrastructure ancillary to social housing, such as roads, shops, playgrounds, places of recreation, parks, allotments, open spaces, sites for places of worship, factories, schools, offices and other buildings or land and such other works and services, which is needed to ensure a good environment for social housing⁵⁵.

On the concept of economic activity within the meaning of the TFEU rules on the internal market, see the answer to question 223.

26. *May members of a liberal profession constitute ‘undertakings’ within the meaning of the competition rules?*

Yes. The Court of Justice has taken the view that medical specialists may provide, in their capacity as self-employed economic operators, services in a market, namely the market in specialist medical services, and thus constitute undertakings. The fact that they provide complex and technical services and the fact that the practice of their profession is regulated cannot alter that conclusion⁵⁶.

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

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

- Activities related to the exercise of state prerogatives

Activities linked to the exercise of state prerogatives by the State itself, or by authorities functioning within the limits of their public authority, do not constitute economic activities for the purposes of the competition rules. This exception is limited to those activities that intrinsically form part of the prerogatives of official authority and are performed by the State, i.e. for which the Member State concerned has not decided to introduce market mechanisms (Communication para. 16). In this context, it is irrelevant whether the State is acting directly through a body forming part of the State administration or by way of a separate body on which it has conferred special or exclusive rights⁵⁷.

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

⁵⁴ Commission Decision on state aid No N 89/2004 - Ireland - Guarantee in favour of the Housing Financing Agency, Social housing schemes funded by the HFA, OJ C 131, 28.5.2005, http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_N89_2004

⁵⁵ Commission Decision in case N 395/05 - Ireland – Loan guarantee for social infrastructure schemes funded by the Housing Finance Agency (HFA), OJ C 77, 5.4.2007, http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_N395_2005

⁵⁶ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

⁵⁷ Case 118/85 *Commission v Italian Republic* [1987] ECR 2599, paragraphs 7 and 8.

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

- Activities related to the army or the police.
- The maintenance and improvement of air navigation safety⁵⁸, security⁵⁹, air traffic control, maritime traffic control and safety⁶⁰.
- Anti-pollution surveillance⁶¹ is a task in the public interest that forms part of the essential functions of the State as regards protection of the environment in maritime areas.
- The organisation, financing and enforcement of prison sentences in order to ensure the operation of the penal system⁶².

- Certain activities of a purely social nature

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

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

- The management under the control of the State of compulsory social security schemes pursuing an exclusively social objective, functioning according to the principle of solidarity, offering insurance benefits independently of contributions and of the earning of the insured person⁶³. See para. 17 *et seq.* of the Communication on the factors distinguishing economic from non-economic social security schemes.
- The provision of childcare and public education financed as a general rule by the public purse and carrying out a public service task in the social, cultural and

⁵⁸ Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 27; Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

⁵⁹ Commission Decisions in case N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001, OJ C 148, 25.6.2003, and in case N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian sector, OJ C 284, 21.11.2002,

http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_N438_2002

⁶⁰ Commission Decision in case N 438/02 of 16 October 2002, Belgium – Aid to port authorities, OJ C 284, 21.11.2002,

http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_N438_2002

⁶¹ Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

⁶² Commission Decision in case N140/2006 – Lithuania – Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-140-2006-WLWL-en-19.7.2006.pdf.

⁶³ Case C-159/91 *Poucet et Pistre* [1993] ECR I-637; Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraphs 43-48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraphs 51-55.

⁶⁴ Case 263/86 *Humbel* [1988] ECR 5365, paragraph 18; Case C-318/05 *Commission v Germany* [2007], ECR I-06957, paragraphs 74-75, and Commission Decisions concerning state aid Nos N 118/00 – Public grants to professional sports clubs, OJ C 333, 28.11.2001, p. 6, http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_N118_2000, NN 54/2006 – Prerov Logistics College, OJ C 291, 30.11.2006, p. 18 http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-54-2006-WLWL-EN-8.11.2006.pdf; Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁶⁵ Case T-319/99, *FENIN*.

educational fields directed towards the population⁶⁴. See para. 26 *et seq.* of the Communication on the factors distinguishing economic from non-economic activities in the area of education.

- The organisation of public hospitals which are an integral part of a national health service and are almost entirely based on the principle of solidarity, funded directly from social security contributions and other State resources, and which provide their services free of charge to affiliated persons on the basis of universal coverage⁶⁵. See para. 21 *et seq.* of the Communication on the factors distinguishing economic from non-economic activities in the area of health care.

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

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

29. *The Communication provides specific guidance on the distinction between economic and non-economic activity for four areas. Are all activities outside those four areas always economic?*

No. The Communication offers guidance on when an activity is economic and when it is non-economic and builds on the case law of the European courts. In addition to the general principles (para. 9 *et seq.*), the Communication provides more specific guidance for certain areas, such as health care and education, and lists relevant factors for the test of whether a specific activity is economic.

Neither the examples given in the specific sections (such as the examples of areas that intrinsically form part of the exercise of public powers in para. 16) nor the selection of areas for which more specific guidance is provided suggest that these are exhaustive examples. This can be seen from the wording of the Communication, where in particular para. 14 clearly states that no exhaustive list can be drawn up. It is a consequence of the fact that the notion of economic activity can change over time (see following question 30). For activities that are not specifically referred to, the general principles contained in para. 9 *et seq.* provide guidance on whether an activity is economic or not.

30. *Can classification as economic or non-economic change over time?*

Yes. The classification of an activity may depend on the way in which the activity is organised in a Member State and it can change over time due to policy decisions on the way in which the activity is organised or as a result of market developments (Communication para. 12).

31. *May the TFEU rules on State Aid apply to non-profit service providers?*

Yes. The mere fact that an entity is non-profit-making does not mean that the activities which it carries on are not of an economic nature⁶⁶. The legal status of an entity

⁶⁶ Joined Cases 209/78 to 215/78 and 218/79 *Van Landewyck* [1980] ECR 3125 and Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21.

providing SSGIs does not affect the nature of the activity concerned. The relevant criterion is whether the entity pursues an economic activity (Communication para. 9).

For example, a non-profit association or a charitable organisation pursuing an economic activity will constitute an ‘undertaking’ only for that specific activity (Communication para. 9, last subparagraph). The competition rules will not apply to their non-economic activities.

Example:

The provision of emergency transport services and patient transport services by non-profit organisations may constitute an economic activity. Public service obligations may make the services provided by such organisations less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic⁶⁷.

32. *Is it possible for a public authority to prefer some kinds of organisations (e.g. public/for profit/not for profit organisations) as the provider of an SGEI?*

State aid rules do not impose specific criteria for the choice of the provider but they apply equally to public and private undertakings. Therefore, State aid rules in principle do not prevent Member States from giving preference to some types of providers. However, public authorities can be bound by other areas of EU law, such as in particular the rules on public procurement, the rules on the internal market or sectoral rules, such as those in the field of transport. When EU public procurement rules are applicable, compliance with the specific requirements of these rules is also a condition for the compatibility of the aid in cases covered by the Framework (para. 19 of the Framework). On this issue, as far as public procurement and internal market rules are concerned, see sections 4 and 6, in particular questions 209 and 227.

33. *Are social action centres which provide SSGIs (such as services for elderly and disabled people) subject to the State Aid rules?*

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

If a centre of this type runs a meals-on-wheels or home care service, for instance, and the same services could be provided by other service providers, whether public or private, then the centre is supplying services in a market and is thus performing an economic activity within the meaning of the competition rules (see the answer to question 25).

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

34. *Does the distribution of vouchers by a municipality to certain categories of individual users to enable them to obtain SGEIs constitute State Aid?*

⁶⁷ Case C-475/99 *Glöckner* [2001] ECR I-8089, paragraph 21.

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

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

If there is, for instance, a risk that the assistance provided may not fulfil its social purpose if it is paid directly to the beneficiary, a social organisation may decide to pay some or all of it to the party providing the service concerned (e.g. a social housing landlord or a school canteen for children).

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

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

In the field of State Aid law, the effect on trade does not depend on the local or regional character of the service supplied, or on the scale of the activity concerned. The relatively small amount of aid provided or the relatively small size of the entity which receives it do not in themselves rule out the possibility that trade between Member States might be affected⁶⁸. Even a small amount of aid can boost the services supplied by one service provider, thereby making it more difficult for other European companies to supply the same services on the local market.

However, on the basis of its own experience, the Commission has established ceilings up to which it believes that aid will not affect trade or competition. For instance, aid for the provision of an SGEI not exceeding a ceiling of EUR 500 000 over any period of three years is, under the SGEI *de minimis* Regulation, deemed not to affect trade between Member States and/or not to distort or threaten to distort competition and therefore does not fall under Article 107(1) of the TFEU. Furthermore, under the general *de minimis* Regulation (Regulation 1998/2006) aid not exceeding a ceiling of EUR 200 000 (EUR 100 000 for undertakings active in the road transport sector) is deemed not to affect trade between Member States⁶⁹.

Moreover, in certain cases there is indeed no effect on trade due to the local character of the service. The Communication provides examples of decisions taken by the

⁶⁸ Cases T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraphs 48 to 50, C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 81-82 and C-172/03 *Heiser* [2005] ECR I-1627, paragraphs 32-33.

⁶⁹ 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.

Commission (para. 40), concerning for example swimming pools to be used predominantly by the local population⁷⁰ and local museums unlikely to attract cross-border visitors⁷¹ (for more detail see question 38 below).

General example of effect on trade between Member States

Subsidies payable to Dutch service stations located near the German border, as a result of an increase in national fuel prices following a rise in excise duties in the Netherlands, affected trade between Member States, since their purpose was to mitigate the disparity between the level of excise duties payable in the Netherlands and the amount of excise duty levied on light oils in Germany⁷².

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

Public subsidies for running regular coach services in the municipality of Stendal, Germany, paid to a company which provided only local or regional transport and did not provide any transport services outside its country of origin, could have an impact on trade between Member States⁷³.

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

Even if an operator providing a specific SGEI (as in the case of specialised medical care or ambulance services) is the only operator within a region or local community because there are no others there, this does not rule out the possibility of operators from other Member States being interested in providing the SGEI in question. This means that one cannot rule out the possibility of there being a potential impact on trade between Member States⁷⁴. Moreover, the regional operator could be active or plan to operate in other regions.

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

Yes. The Commission has taken a number of decisions on State Aid whereby measures designed to fund local services (irrespective of whether the latter are SGEIs, SSGIs of an economic nature or purely commercial services) have been deemed not to affect trade between Member States (see also Communication para. 40):

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

- In the case of the Dorsten swimming pool⁷⁵, it was considered that an annual subsidy for the construction and operation of a public swimming pool in Dorsten which would be used only by the local population could not affect trade between

⁷⁰ Commission Decision N 258/00, OJ C 172, 16.6.2001, p. 16.

⁷¹ Commission Decision N 630/03, OJ C 275, 8.12.2005, p. 3.

⁷² Commission Decision 1999/705/EC of 20 July 1999, OJ L 280, 30.10.1999, p. 87 confirmed by ECJ Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163.

⁷³ ECJ, *Altmark trans and Regierungspräsidium Magdeburg*, cited above, paragraph 77.

⁷⁴ ECJ, *Altmark trans and Regierungspräsidium Magdeburg*, cited above, paragraph 78 et seq.

⁷⁵ Commission Decision in case N 258/2000 – Germany – Leisure Pool Dorsten, IP/001509 of 21.12.2000, OJ C 172, 16.6.2001, p. 16
http://ec.europa.eu/competition/elojade/iseff/case_details.cfm?proc_code=3_N258_2000

Member States.

- In the case of the Irish hospitals⁷⁶, the view taken was that a system of capital allowances aiming at the creation of facilities for relatively small local public hospitals, serving a local hospital market with clear undercapacity, could not attract investment or customers from other Member States and could not, therefore, affect trade between Member States.
- In the case of service areas in Tenerife⁷⁷, it was considered that subsidies granted for the construction by local road haulage associations of municipal service areas for their members could not affect trade between Member States, as they were for local use only.
- In the case of local museums in Sardinia⁷⁸, the view taken was that funding museum-related projects of a limited size and budget would not affect trade between Member States, as – except in the case of a few major museums of international repute – people from other Member States were not liable to cross borders for the primary purpose of visiting these museums.
- It was ruled that funding for Basque theatrical productions⁷⁹ did not affect trade between Member States because these were small-scale productions put on by local micro-enterprises or small companies, their potential audience was restricted to a specific geographic and linguistic region, and they could not attract cross-border tourism.
- In a case concerning funding for a centre promoting the Cypriot culture and heritage conservation in Nicosia (Cyprus)⁸⁰, the Commission found that the local character and the geographical position of the centre together with the nature of the activity exclude any effect on trade between Member States.
- The Commission considered that support to build a medium- and long-term mental health care unit in the northeast of Portugal⁸¹ does not affect trade between Member States because of the limited capacity of the unit (50 beds) that will almost entirely be used for the provision of services to residents of the area and because of the lack of interest of other entities to provide such services in this

⁷⁶ Commission Decision in case N 543/2001 – Ireland – Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N543_2001

⁷⁷ Commission Decision in case NN 29/02 – Spain - Aid for installation of service areas in Tenerife, OJ C 110, 8.5.2003, p. 13, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_NN29_2002

⁷⁸ Commission Decision in Case N 630/2003 – Italy – Local museums - Sardinia, OJ C 275, 8.12.2005, p 3, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N630_2003

⁷⁹ Commission Decision in case N 257/2007 – Spain – Grants for theatrical productions in the Basque country, OJ C 173, 26.7.2007, p. 2.

⁸⁰ Commission Decision in case SA.34466 – Cyprus – Centre for Visual Arts and Research, decision of 7.11.2012 (not yet published).

⁸¹ Commission Decision in case SA.34576 – Portugal – Jean Piaget / Northeast medium- and long-term continuing care unit, decision of 7.11.2012 (not yet published).

⁸² Commission Decision in case SA.33243 – Portugal – Jornal de Madeira, decision of 7.11.2012 (not yet published).

⁸³ Commission Decision in case SA.34404 – The Netherlands – Purchase of land for relocating riding school, decision of 7.11.2012, OJ C 370, 30.11.2012, p.2.

region.

- In a case concerning funding to a newspaper publisher publishing a daily newspaper in Madeira⁸² the Commission concluded that there was no effect on trade. There are only two daily newspapers published in Madeira, none of which is published by a company from another Member State. Both publishers are not active in any other market where there is any competition with companies from other Member States.
- The Commission found that the sale of land by a Dutch municipality to a riding school⁸³ cannot have any effect on trade, even if sold at a lower than market price, because of the manifestly local character of the riding school.

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

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

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

No. The fact that the competition rules apply does not mean that public authorities are required to ensure that there are a large number of service providers on the market. Nor does it mean that public authorities are obliged to abolish any special or exclusive rights already granted to service providers which are necessary for and proportionate to the performance of the SGEIs concerned. The public authorities can grant such rights provided that they do not go beyond what is necessary to enable service providers to carry out their task of providing services of general interest under economically acceptable conditions⁸⁴. Similarly, the public authorities are not under any obligation to privatise providers of SGEIs (see also Communication para. 37).

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

Public service compensation provided by a public authority to a service provider may constitute State Aid if the criteria established by the Court of Justice in its Altmark ruling are not cumulatively met (see the answers to the questions in section 3.2.3) and if the other State Aid⁸⁵ criteria are met. Nevertheless, the fact that public service compensation constitutes State Aid does not in itself mean that it is not permissible, as it may be compatible with the TFEU.

42. *Do the State Aid rules impose a specific organisational model on the public authorities as regards SGEIs?*

No. The public authorities have considerable discretion as regards the way in which they choose to manage the SGEIs which they put in place. Under the State Aid rules, the public authorities can organise and finance their SGEIs as they see fit, provided that the compensation they provide in this context does not go beyond what is necessary to

⁸⁴ Cases C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14-16, C-67/96 *Albany* [1999] ECR I-5751, paragraph 107.

⁸⁵ That is, 1) the transfer of resources and imputability to the State, 2) effect on trade between Member States and distortion of competition, and 3) the selective nature of the measure in question.

ensure that the SGEIs are performed under economically acceptable conditions, in accordance with Article 106(2) of the TFEU.

43. *Can the financial sums granted in connection with the transfer of powers between public bodies in the context of decentralisation be classified as State Aid?*

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

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

44. *Does funding an in-house body — within the meaning of the rules on public procurement — which provides SGEIs imply ruling out the application of the State Aid rules?*

No. The term ‘in-house’ is used in public procurement law, while the State Aid rules fall under competition law. Whether or not the competition rules, and in particular the State Aid rules, are applicable depends not on the legal status or the nature of the body providing SGEIs, but on the ‘economic’ character of the activity performed by that body (Communication para. 9). According to settled case law, any activity that consists in supplying goods and/or services in a particular market is an economic activity within the meaning of the competition rules (for examples of economic activities within the meaning of the competition rules, see the answer to question 25). Consequently, if the public funding of an economic activity performed by an in-house body within the meaning of the rules on public contracts meets the conditions laid down in Article 107(1) of the TFEU⁸⁶ and does not meet all the conditions set out in the *Altmark* judgment (for these conditions, see the answer to question 61), the State Aid rules are applicable (see Communication paras. 13 and 37).

In this context, it should be borne in mind that when financial transfers are made within state structures (from the state to regions, or from a department to municipalities, for example), purely in line with the transfer of public powers and in a way that does not relate to any economic activity, there is no transfer of state resources to an undertaking, which means there is no State Aid (see question 43).

45. *What are the consequences if compensation for an SGEI is indeed deemed to be State Aid?*

The fact that public service compensation constitutes State Aid **does not mean that such compensation is forbidden**. This compensation is compatible with the TFEU when the conditions specified in the Decision⁸⁷ or the Framework⁸⁸ are met⁸⁹.

⁸⁶ That is, 1) economic advantage 2) effect on trade between Member States and distortion of competition, and 3) the selective nature of the measure in question.

⁸⁷ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.

3.2.2 *Entrustment act*

46. *What is the objective of an ‘act of entrustment’?*

An act of entrustment (see Communication para. 51 et seq.) is the act which entrusts the provision of an SGEI to the undertaking concerned and spells out the nature of the task as well as the scope and the general operational conditions of the SGEI. A public service assignment is necessary in order to define the obligations of the undertaking and of the State. In the absence of such an act, the specific task of the undertaking is unknown and fair compensation cannot be determined.

47. *What types of acts of entrustment are considered to be adequate?*

An entrustment in the sense of Article 106(2) TFEU and in the sense of the Altmark judgment only requires that the act of entrustment take the form of one or more acts having binding legal force under national law. The specific form of the act (or acts) may be determined by each Member State, depending among other things on its political and/or administrative organisation.

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

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

It should be noted that under the State Aid rules the requirements in respect of an act of entrustment are rather basic: this does not exclude the possibility that Member States’ authorities may add more detail to the act of entrustment, such as, for example, quality requirements. However, certain elements have to be specified in the entrustment act, such as the content and the duration of the obligation, the parameters for calculating, controlling and reviewing the compensation and arrangements for avoiding and recovering any overcompensation (Communication para. 52). Where State Aid for an SGEI is granted under the Decision or the Framework, the requirements for the entrustment act are set out explicitly and with additional details in Art. 4 and para. 16 respectively (i.e.: the undertaking and, where applicable, the territory concerned; the nature of any exclusive rights assigned to the undertaking by the granting authority; a description of the compensation mechanisms; reference to the Decision).

Approval or authorisation given by a public authority to a service provider, authorising the provision of certain services, does not correspond to the notion of act of entrustment. This is because it does not create an obligation for the operator to provide the services

⁸⁸ Communication from the Commission: European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15.

⁸⁹ In the land transport sector this compatibility is governed by Regulation 1370/2007. As regards air and maritime transport, this compatibility can be assessed on the basis of the Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, Commission Communication 94/C 350/07 on the application of Articles 92 and 93 of the Treaty in the aviation sector, OJ C 350, 10.12.1994, p. 5, or the Community guidelines on state aid to maritime transport, OJ C 13, 17.1.2004. The SGEI Decision and Framework also apply to air and maritime transport.

concerned, but just allows it to exercise an economic activity by offering certain services in a market. An example could be the authorisation given to an operator to open a childcare centre or a centre for elderly people based only on the operator's compliance with public health, safety or quality rules.

Examples of acts of entrustment:

- Concession contract⁹⁰ and public service contract
- Ministerial programme contracts⁹¹
- Ministerial instructions⁹²
- Laws⁹³ and Acts⁹⁴
- Yearly or multiannual performance contracts⁹⁵
- Legislative decrees⁹⁶ and any kind of regulatory decisions, as well as municipal decisions or acts.

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

The competition rules apply to services of general interest that are economic in nature (as regards the concept of economic activity for the purposes of the competition rules, see the answer to question 25). The fact that the activity in question may be called 'social' is not of itself enough to avoid classification as an 'economic activity' within the meaning of these rules. Thus, entrustment being one of the necessary conditions for public service compensation to be compatible with the Treaty, it is mandatory for operators that are responsible for SGEIs, including SSGIs of an economic nature.

49. *Which authorities are entitled to entrust a company with an SGEI? Do municipal authorities have this competence?*

It is a question of national law which authorities are entitled to entrust a company with an SGEI. EU law does not set any requirements in this respect. In general, any authority

⁹⁰ Commission Decision in case N 562/05 - Italy - Proroga della durata della concessione della Società Italiana del Traforo del Monte Bianco (SITMN), OJ C 90, 25.4.2007, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N562_2005

⁹¹ Commission Decision in case NN 51/06 - Italy - Poste Italiane SpA: compensation by the Member State for universal postal service obligations 2000-2005, OJ C 291, 30.11.2006, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_NN51_2006

⁹² Commission Decision in case N 166/05 - UK - Government rural network support funding to Post Office Limited, OJ C 141, 16.6.2006, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N166_2005

⁹³ Judgment of the Court of First Instance in Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-741, paragraphs 182 and 183. Commission Decision in case NN 8/07 – Spain – Finanziamento de las medidas de reducción de plantilla de RTVE, OJ C 109, 15.5.2007, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-8-2007-WL.WL-7.3.2007.pdf.

⁹⁴ Commission Decision in case N 395/05 – Ireland – Loan guarantees for social infrastructure schemes funded by the Housing Finance Agency (HFA), OJ C 77, 5.4.2007, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N395_2005

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

⁹⁶ See the judgment of the Court (Third Chamber) in Case C-451/03 *Servizi Ausiliari Dottori Commercialisti v Giuseppe Calafiori* [2006] ECR I-2941.

that has the competence to define and finance an SGEI would also have the competence to entrust an undertaking with the provision of this SGEI.

50. *Can the SGEI provider itself, who often has specific knowledge, define the content of the entrustment act?*

In certain Member States, it is not uncommon for providers to develop and propose services that are then discussed with and financed by the public authorities. The concept of entrustment act under Article 106(2) TFEU and EU State Aid law in general does not contain any limitation on the involvement of the provider in drawing up the entrustment act. However, the ultimate decision whether to entrust the provider has to come from the public authority. This requirement can be satisfied, for instance, by approving the proposal of the provider (Communication para. 53; see on this issue also question 59).

51. *Does the concept of act of entrustment within the meaning of Article 106(2) TFEU and of the SGEI package correspond to the concept of ‘provider mandated by the State’ within the meaning of Article 2(2)(j) of the Services Directive?*

No. The concept of act of entrustment within the meaning of Article 106(2) TFEU and the SGEI package and that of ‘provider mandated by the State’ referred to in Article 2(2)(j) of the Services Directive are two matching concepts, in that they presuppose the existence of an obligation for the SGEI provider to provide the service. The existence of an obligation to provide is an essential element of both concepts.

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

Thus, under the SGEI package, the act of entrustment corresponds to the act that entrusts an undertaking with providing an SGEI. In this case, besides establishing an obligation to provide the service, as indicated above, the act of entrustment must also define, inter alia, the nature and duration of the public service obligations, the entities entrusted with providing the services, the compensation calculation parameters, and the safeguards for avoiding overcompensation (see also questions 46 and 47).

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

Consequently, an operator receiving an act of entrustment within the meaning of the SGEI package will also be regarded as ‘mandated’ within the meaning of the Services Directive. Under the State Aid rules, the act of entrustment will require, of course, compliance with additional conditions, relating in particular to the mechanisms implemented in order to ensure that the aid received does not exceed the costs incurred by the service provider.

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

A decision by a regional public authority, with binding legal force under national law, that defines (a) the nature and duration of the public service obligations, (b) the undertaking or undertakings entrusted with these obligations and the territory concerned, (c) the nature of any exclusive or special rights granted to the undertaking(s), (d) the parameters for calculating, controlling and reviewing the compensation, and (e) the arrangements for avoiding and repaying any overcompensation may constitute an act of entrustment within the meaning of the Decision (see also question 47 above).

Such a decision, constituting an act of entrustment within the meaning of the State Aid rules, also constitutes an act mandating the provider within the meaning of the Services Directive because it creates an obligation on the undertaking(s) in question to provide the service.

On the other hand, if the decision in question imposes an obligation to provide the service but does not include the elements mentioned above, it constitutes an act mandating the provider within the meaning of the Services Directive but not an act of entrustment within the meaning of the SGEI package.

As regards the application of the Services Directive, see section 7.

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

From the point of view of the State Aid rules, there is no template act of entrustment; this act must be adapted to the national law of the Member State concerned, under which it must establish the obligation of the selected provider to provide the service. Thus, the question whether an act of entrustment within the meaning of the SGEI package, adopted by a 'lead' public authority such as a region, is also valid for other authorities (for instance a municipality or another region) is a matter of national law.

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

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

As a general rule, once an act of entrustment establishes the conditions set out in para. 52 of the Communication, the chosen form of legal act and the number of public authorities concerned do not influence its nature as an act of entrustment within the meaning of the SGEI package.

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

No. It is not necessary to adopt several acts of entrustment, each corresponding to one particular SGEI or service provider. Nevertheless, the act of entrustment must indicate the nature, duration and other necessary details of each public service obligation imposed on each operator by the public authority. It is not necessary to specify each individual service if the content and scope of each SGEI are sufficiently precise.

55. *Should the act of entrustment specify a ‘task’ or ‘specific activities’ to be performed?*

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

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

It is also up to the public authorities, as well as being in their best interest, to make it clear how SGEI tasks are to be performed, for instance by specifying quality requirements.

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

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

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

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

The elements that have to be included in an act of entrustment for the purposes of the State Aid rules do not in any way limit the discretion public authorities have in defining and organising their SGEIs. Member States and public bodies have a wide margin of discretion when it comes to defining the public service tasks they want to put in place,

and the precise/highly detailed services which form part of these tasks do not necessarily have to be specified⁹⁷.

Public authorities can go beyond the basic act of entrustment requirements and specify criteria that they want to set for the purpose of improving the performance of the undertakings entrusted with SGEIs.

Examples:

- Where a public authority wants to set up a centre or home assistance service for elderly people, it will be sufficient to specify in the act of entrustment that the provider of the SSGI has been entrusted with the task of setting up a centre that will provide the assistance needed, taking into account the multiplicity of needs, in particular where necessary at the medical, psychological and social level or, in the case of assistance at home, services such as medical care, meal delivery, home cleaning services, etc.
- Where a public authority wants to set up a support centre for young unemployed people, it will be sufficient to specify that the service provider has been entrusted with the task of organising a support service for unemployed youth which will provide the necessary training but will also include other services directly related to the effective reintegration of the persons being assisted.

57. *At the end of an entrustment period, can the same SGEI be entrusted to the same company again?*

Yes. The same provider can subsequently be entrusted with the same SGEI. This is also true if the Decision or the Framework apply, which set specific limits as regards the entrustment period duration.

If the entrustment consists in a public contract or concession and the EU public procurement rules apply, the public authority must organise in principle a new tender procedure, which is of course open also to the existing provider.

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

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

There are two options:

- The public authority may include in the act of entrustment an *ex post* correction mechanism which will allow for periodic revision of the task entrusted⁹⁸.

⁹⁷ It should be noted that the wide margin of discretion Member States have in defining their public service tasks is always subject to control for manifest error by the Commission and the Court of Justice (see in detail questions 6 and 7 above).

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

Example:

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

As indicated above, the municipality could make an estimation of such additional services from its prior experience in the field, or define *ex post* correction mechanisms for such needs. For instance, if the initial act of entrustment consists of a public contract, the estimation of additional services will generally take the form of an option for possible additional services indicated in the initial tender.

The municipality could also in principle update the act of entrustment if it becomes clear that a specific service was not envisaged and could be supplied by the same body. However, if the initial act of entrustment consisted of a public contract or a concession and the initial tender did not envisage an option for additional services, the contracting authority would not be able to modify the public contract or concession during its performance (see in this respect the answer to question 205 below), but would need to organise in principle a new tender procedure, this tender being of course open also to the provider of the initial services.

59. Does the requirement of an act of entrustment limit the autonomy and freedom of initiative of the service providers?

No. The requirement related to an act of entrustment does not limit the autonomy and freedom of initiative of entities which provide social services in any way at all. They are entirely free to take the initiative in developing or improving such services and to make proposals to public authorities.

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

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

In so far as a provider is assigned an SGEI at national level on the basis of an act of entrustment complying with the requirements as set out in para. 52 of the

⁹⁸ On this point see the Commission Decision in cases N 541/04 and N 542/04 – The Netherlands – Risk equalisation system and retention of reserves, OJ C 324, 21.12.2005, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N541_2004 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N542_2004

Communication, local branches of the provider may set priorities within the limits of the conditions laid down in the act of entrustment.

3.2.3 Aid-free compensation under the *Altmark* ruling

61. *What does the Court state in the Altmark ruling?*

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

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

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

- The finance provided for a scheme promoting investments to ensure security of electricity supply in Ireland was not considered to be State Aid;
 - The provision of new electricity reserve generation capacity to cope with electricity demand at any time of the year, including in peak periods, was deemed to be an SGEI.
 - Moreover, the open, transparent and non-discriminatory competitive procedure had been organised in such a way as to guarantee that all of the other three conditions set out in the *Altmark* decision were met⁹⁹.
- Subsidies financing broadband infrastructure in France were not deemed to be aid because:
 - Universal access to broadband (and high-speed broadband) infrastructure for the whole country was an SGEI.
 - Specific parameters predefined the amount of compensation in the concession contract.

⁹⁹ Commission Decision in case N 475/2003 – Ireland - Public service obligation in respect of new electricity generation capacity for security of supply, OJ C 34, 7.2.2004, p. 8.

- There was no risk of overcompensation, as the parameters for calculating compensation were precisely defined in the operators’ business plans, which were based on the specific data provided by the public authority itself. Another reason why there was no risk of overcompensation was the fact that the public authority had required the operators who were to provide the service to set up an *ad hoc* company for that purpose, which would guarantee the neutrality of the service provider concerned; moreover, there were better-fortune clauses in case profits were to rise above a given level.
- The needs of the project and what the candidates had to offer were analysed in depth and in detail. Moreover, the procedure chosen enabled the most efficient candidate offering the service at least cost to the community to be selected¹⁰⁰.
- In the Dorsal case, the Commission considered that the fourth Altmark criterion was met because a thorough comparative analysis of the specific needs of the project and the candidates’ tenders as well as the competitive procedure itself enabled compensation to be estimated on the basis of the costs that would be incurred by a well-run and adequately equipped undertaking¹⁰¹.
- The Commission found that the rated fees paid by ‘Cassa Depositi e Prestiti’ – a state-controlled financial body – to ‘Poste Italiane’ were not considered to be State Aid:
- The distribution of postal savings books was deemed to be an SGEI.
- The market fee was an appropriate estimate of the level of costs that would be incurred by a typical, well-run and adequately equipped undertaking in the same sector, taking into account receipts and a reasonable profit from discharging its obligations. The fourth *Altmark* criterion was thus met¹⁰².

62. *Can a public authority escape the application of the State Aid rules by organising a tender, without checking whether all the criteria of the Altmark judgment are met?*

No. The Court of Justice’s *Altmark* judgment sets out four cumulative conditions that have to be fulfilled in order for compensation for the provision of an SGEI not to constitute State Aid. This being said, the contract and the tender documents can contain all necessary specifications so as to ensure compliance with the other 3 conditions.

63. *Why should the provision of an SGEI be compensated according to the ‘least cost to the community’ criterion? Would this not lead to the provision of a poor-quality service?*

¹⁰⁰ Commission Decision in case N 381/2004 – France – Setting up of a high speed infrastructure in Pyrénées-Atlantiques, OJ C 162, 2.7.2005, p. 5 and the Commission Decision on aid N 331/2008 – France – High-speed broadband in the Hauts-de-Seine Department, http://ec.europa.eu/eu_law/state_aids/comp-2008/n331-08.pdf.

¹⁰¹ Commission Decision in case N 382/2004 – France – Setting up of a high-speed infrastructure in the Limousin region (Dorsal), OJ C 230, 2.7.2005, p. 5, http://ec.europa.eu/competition/state_aid/cases/164637/164637_509484_51_2.pdf.

¹⁰² Commission Decision in case C 49/06 – Poste Italiane – Banco Posta – Remuneration paid for the distribution of postal savings financial products, OJ C 31, 13.2.2007.

The requirement of a public procurement procedure that allows for the provision of a service at the ‘least cost to the community’ has been set out by the Court of Justice in the Altmark judgment. The Communication clarifies that ‘least cost to the community’ is broader than lowest price and that a public procurement procedure does not necessarily have to entail the lowest price as the award criterion in order to fulfil the first alternative of the fourth Altmark criterion. Para. 67 of the Communication states that the ‘most economically advantageous offer’ can also be used, provided that the award criteria are closely related to the subject matter of the service to be provided and allow for the most economically advantageous offer to match the value of the market. This criterion allows a range of elements to be taken into account, including quality considerations (in addition to those provided in the technical specifications and the selection criteria) and social and environmental criteria, but the criteria have to be defined in advance in such a way as to allow for effective competition.

Furthermore, it should be noted that compensation not fulfilling the fourth Altmark criterion, and thus constituting State Aid, may still be compatible with Article 106 TFEU and exempted from notification under the Decision or approved by the Commission upon notification on the basis of the Framework.

64. *Can you give an example of a situation where a clawback mechanism (as mentioned in para. 67 of the Communication) would be appropriate?*

A clawback mechanism is a provision that requires the provider to pay back compensation under certain circumstances. When it is difficult to foresee the revenues that will be earned from the provision of a service, a clawback mechanism in the entrustment act can be an appropriate tool to reduce the risk that the provider is overcompensated (i.e. receiving compensation beyond net costs including a reasonable profit, taking account of the risks involved).

It should be noted that in cases where the provider assumes a high risk (e.g. certain types of concession contracts), the level of revenues can vary from negative (losses) to higher than usual. This does not automatically mean that in the latter case the provider would be overcompensated, as long as the level of profit is still reasonable in relation to the risk level. Member States could in such cases, however, also include a clawback clause in the compensation mechanism in order to put a cap on the maximum profit that will be paid.

65. *What is an open procedure, in the sense of paragraph 66 of the Communication?*

The open procedure referred to in paragraph 66 of the Communication means a public procurement procedure whereby any interested economic operator may submit a tender, as defined in Article 1(11)(a) of Directive 2004/18/EC and Article 1(9)(a) of Directive 2004/17/EC.

66. *What is a restricted procedure in the sense of paragraph 66 of the Communication?*

The restricted procedure referred to in paragraph 66 of the Communication means a public procurement procedure in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority or entity may submit a tender, as defined in Article 1(11)(b) of Directive 2004/18/EC and Article 1(9)(b) of Directive 2004/17/EC.

In restricted procedures for public contracts covered by Directive 2004/18/EC, contracting authorities may limit the number of suitable candidates they will invite to

tender, provided a sufficient number of suitable candidates is available. The contracting authorities have also to indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite (which must be at least five) and, where appropriate, the maximum number. In any event the number of candidates invited must be sufficient to ensure genuine competition. The contracting authorities must invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels of ability fail to match the minimum number, the contracting authority may continue the procedure by inviting any candidate(s) with the required capabilities. The contracting authority may not include in the context of the same procedure other economic operators who did not request to participate, or candidates who do not have the required capabilities (see Article 44(3) of Directive 2004/18/EC).

Similar rules exist for restricted procedures for contracts in the utilities sectors covered by Directive 2004/17/EC (see Article 54 of Directive 2004/17/EC).

67. *Why is the negotiated procedure considered to fulfil the fourth Altmark criterion only in exceptional circumstances?*

The negotiated procedure with prior publication (as defined in Article 30 of Directive 2004/18 EC) involves negotiation with the potential providers of the SGEI and therefore confers a too wide discretion upon the public authority and may also restrict the participation of interested potential providers. For these reasons, it can only meet the first alternative of the fourth Altmark criterion in exceptional circumstances¹⁰³.

As for the negotiated procedure without prior publication (as defined in Article 31 of Directive 2004/18/EC), it does not involve the prior publication of a contract notice and therefore does not provide enough safeguards as regards publicity and transparency to attract all potentially interested providers. It therefore cannot ensure the selection of the provider able to provide the service ‘at the least cost to the community’ (Communication para. 66).

However, it should be noted that compensation not fulfilling the fourth Altmark criterion, and thus constituting State Aid, may still be compatible with Article 106 TFEU and exempted from notification under the Decision or approved by the Commission upon notification on the basis of the Framework.

68. *If only one bid is submitted, is that tender never deemed sufficient to ensure the provision of the service at the least cost to the community or can there also be cases where the tender may still be sufficient?*

The Communication (para. 68) sets out the general principle that a procedure where only one bid is submitted is, in principle, insufficient to ensure compliance with the first alternative of the fourth Altmark criterion. However, it does not mean that there cannot be cases where, due to particularly strong safeguards in the design of the procedure, also a procedure where one bid is submitted can be sufficient to ensure the provision of the service at ‘the least cost to the community’. In these situations, however, Member States are advised to notify the measure, if the measure is not exempted under the Decision.

¹⁰³ See Commission Decision N 381/04 — France, Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques, and Commission Decision 382/04 — France, Mise en place d’une infrastructure haut débit sur le territoire de la région Limousin (DORSAL).

69. What is the interplay between national public procurement rules and State Aid law? Can EU State Aid law lead to an obligation to always apply public procurement rules if a provider is entrusted with an SGEI?

Outside the scope of EU public procurement law, it is up to the Member States to set out the conditions under which national public procurement rules should apply. A Member State is free to design the scope of application of its national public procurement law in such a way that those rules in practice always apply if a provider is entrusted with an SGEI. If a Member States thus links EU State Aid law and public procurement law, however, that is an autonomous decision of the Member State and not a consequence of the application of EU law.

70. What happens if the scope of application of public procurement procedures that contain a negotiation element is changed in the currently ongoing reform of the EU public procurement rules?

The Communication explicitly states that the guidance is provided for the procedures and award criteria as defined in the EU public procurement directives currently in force. As long as the legislative process for the design of future public procurement rules is ongoing and the texts that would be adopted are not yet known, the Communication cannot give guidance as to whether any procedure that differs in scope from those foreseen in the Directives in force can ensure the provision of the service at ‘the least cost to the community’.

71. What exactly does ‘generally accepted market remuneration’ mean? Can one expert opinion be sufficient to prove it?

The Communication states that generally accepted market remuneration provides the best benchmark for the amount of compensation that an efficient undertaking requires (second alternative of the fourth *Altmark* criterion). Generally accepted market remuneration requires that the services are indeed comparable in all respects and is therefore a rather strict concept. The Communication does not go into detail about how the existence of generally accepted market remuneration can be proven because this depends on all the particularities of each individual situation, in particular on the evidence and methodology used in the expert opinion, its quality and representativeness and how recent it is. A general statement that one expert opinion is sufficient evidence to establish generally accepted market remuneration is therefore not possible.

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

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

Examples of Commission practice as regards reference costs

- The consideration paid to Poste Italiane for the distribution of postal savings books (*libretti postali*) was lower than the amounts for similar financial products on the market; the compensation paid in this context was therefore deemed to meet the

criterion of a typical, well-run and suitably equipped undertaking, and did not constitute aid, while the other three *Altmark* criteria were also met¹⁰⁴.

However,

- As regards the use of predetermined statistical costs supplied by the Czech authorities in order to calculate the amount of compensation, no proof was provided that these costs were representative of those that would be incurred by a typical, well-run and suitably equipped undertaking¹⁰⁵.

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

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

Where at least one of the *Altmark* criteria is not met, but the other State Aid criteria¹⁰⁶ are fulfilled, the public service compensation constitutes State Aid. However, it may still be compatible with Article 106 TFEU and exempted from notification under the Decision or approved by the Commission upon notification on the basis of the Framework.

3.3 Aid-free compensation under the *de minimis* Regulations

74. *What is the difference between the SGEI de minimis Regulation and the general de minimis Regulation?*

The general *de minimis* Regulation (Regulation 1998/2006) provides that aid measures not exceeding EUR 200 000 over any period of three fiscal years per undertaking are outside the notion of aid (Article 107(1) TFEU) because they are deemed not to affect trade between Member States and/or not to distort or threaten to distort competition. This Regulation applies irrespective of the purpose for which the support is granted, provided the conditions of the Regulation are respected.

The SGEI *de minimis* Regulation provides for a higher threshold (EUR 500 000 over any period of three fiscal years per undertaking) as regards aid measures granted for the provision of an SGEI.

The SGEI *de minimis* Regulation is based on the principle that a higher threshold is justified for measures linked to the provision of an SGEI because at least part of the amount is granted as compensation for additional costs linked to the provision of the SGEI. The potential advantage for an SGEI provider is thus lower than the compensation amount actually granted, while under the general *de minimis* Regulation the advantage from the same amount would be higher. Therefore, the ceiling up to which there is no impact on competition and trade between Member States is higher for compensation for an SGEI.

¹⁰⁴ See Commission Decision on aid C 49/06, cited above, paragraphs 85–93.

¹⁰⁵ Commission Decision on state aid C 3/2008 (ex NN 102/2005) – Czech Republic concerning public service compensations for Southern Moravia Bus Companies, OJ L 97, 16.4.2009, paragraphs 82-83.

¹⁰⁶ That is, (1) transfer of state resources and imputability to the state, (2) an effect on trade between the Member States and distortion of competition, and (3) the selective nature of the measure concerned.

75. *How can it be ensured that the ceiling of EUR 500 000 is respected? Are there any checks for compliance?*

The SGEI *de minimis* Regulation (in the same way as the general *de minimis* Regulation) provides for two alternative methods for ensuring that the total amount received by an undertaking remains within the ceiling. One option is that the Member State establishes a central register of all *de minimis* aid granted by all authorities within the Member State (Article 3(2)). Alternatively, the granting authority has to obtain a declaration from the undertaking about all *de minimis* aid received in order to check that the ceiling is respected (Article 3(1)).

Member States have to compile all the relevant information regarding *de minimis* aid granted in order to be able to demonstrate compliance with the Regulation. The Commission can request submission of the information to check whether all conditions of the SGEI *de minimis* Regulation are complied with (Article 3(3)).

76. *Is an entrustment act in the sense of the Decision/Framework necessary also under the SGEI de minimis Regulation?*

The SGEI *de minimis* Regulation only applies to aid granted for the provision of an SGEI. Therefore, the beneficiary undertaking has to be entrusted with a specific SGEI. This entrustment does not have to contain all the information required under the SGEI Decision or the SGEI Framework but, for reasons of legal certainty, it has to be in writing and has to inform the undertaking of the SGEI in respect of which the compensation is granted (see recital 6 of the SGEI *de minimis* Regulation).

77. *What is the advantage of using the SGEI de minimis Regulation compared to the Decision?*

The SGEI *de minimis* Regulation contains simplifications in two major respects. First, the conditions regarding both the entrustment and the entrustment act are lighter (see question 76). Second, the SGEI *de minimis* Regulation does not require verification of the costs incurred in providing the service and consequently no check for overcompensation is needed.

78. *What are the rules on cumulation of aid granted under the two de minimis Regulations? More specifically, can an undertaking that has received general de minimis aid in the last years now also receive SGEI de minimis aid?*

The SGEI *de minimis* Regulation allows cumulation of SGEI *de minimis* aid and *de minimis* aid granted under another Regulation up to the ceiling of EUR 500 000 (Article 2(7)). This means, for example, that if an undertaking has already received EUR 150 000 during the last three fiscal years, it can still receive up to EUR 350 000 under the SGEI *de minimis* Regulation.

The EUR 500 000 ceiling per undertaking is an absolute maximum for all types of *de minimis* aid added together. It applies irrespective of whether the amount granted under the general *de minimis* Regulation was granted for an SGEI or for a separate non-SGEI activity.

79. *What are the rules on cumulation of compensation granted under the SGEI de minimis Regulation and compensation granted in compliance with the Altmark criteria?*

The SGEI *de minimis* Regulation does not allow for one SGEI compensated in compliance with the Altmark criteria to also receive additional aid under the SGEI *de minimis* Regulation (Article 2(8)). Therefore, in order to avoid being classified as State Aid, the full amount of compensation granted for an SGEI has either to meet the conditions set out in the Altmark judgment or it must not exceed the SGEI *de minimis* threshold.

If one provider, in contrast, is entrusted with several SGEIs, it can be compensated for one of the SGEIs under the SGEI *de minimis* Regulation and may, for other SGEIs, receive compensation that meets all four Altmark conditions.

80. *Can a company receive compensation for one SGEI under the Decision or the Framework, and de minimis aid for another SGEI under the SGEI de minimis Regulation?*

Yes. The SGEI *de minimis* Regulation sets a ceiling of EUR 500 000 for all measures under that Regulation per undertaking, irrespective of whether they are granted for the same or for different SGEIs. It also provides that for the same SGEI, the provider cannot receive compensation both under the Decision or the Framework and under the SGEI *de minimis* Regulation (Article 2(8)), since this would lead to overcompensation. By contrast, receiving compensation under the Decision or Framework for one SGEI and SGEI *de minimis* aid for another SGEI is possible.

81. *Can a service provider who has for a certain period of time received compensation under the Decision or the Framework be financed for another period of time under the SGEI de minimis Regulation for the same service?*

Yes. If different periods of time are concerned, the costs incurred by the SGEI provider have not already been compensated under the Decision or the Framework and therefore the SGEI *de minimis* Regulation can be applied. However, a provider cannot receive for the same service and the same period of time compensation under the Decision or the Framework and under the SGEI *de minimis* Regulation (Article 2(8)). This provision is based on the fact that the SGEI *de minimis* Regulation provides for a higher threshold than the general *de minimis* Regulation because the provider incurs costs that the *de minimis* aid will at least in part compensate for, which is no longer true if the same costs are compensated under the Decision or the Framework (recitals 3 and 15). There is also no need for additional compensation under the *de minimis* Regulation, if compensation is already granted under the Decision or the Framework.

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

Financing of this type may be granted without meeting the criteria laid down in the Decision, if the total amount of state resources provided over a three-year period does not exceed the ceiling laid down in the general *de minimis* Regulation (EUR 200 000) or the SGEI *de minimis* Regulation (EUR 500 000). If the amount does not exceed either of the ceilings, as is the case in this example, both Regulations can be used (recital 14). If the conditions of either of the two *de minimis* Regulations are met, such support does not constitute State Aid within the meaning of Article 107(1) TFEU and would not have to be notified to the Commission.

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

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

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

Yes, public authorities can launch a pilot initiative in order to define the task of the SGEI they want to put in place. In order to finance such pilot initiatives, public authorities can rely on the opportunities offered by the general *de minimis* Regulation, which stipulates that Article 107(1) does not apply to the grant of aid not exceeding EUR 200 000 over a period of three years. They cannot use the SGEI *de minimis* Regulation, in contrast, because the aid is not granted to an SGEI provider for a specific SGEI, as in the pilot initiative the SGEI tasks are still to be defined.

84. *In the event that an SGEI is financed according to the general de minimis Regulation or the SGEI de minimis Regulation, does the amount of EUR 200 000 / EUR 500 000 refer to the SGEI or to the undertaking entrusted with the SGEI, taking into account other activities for which the undertaking receives state resources?*

Both ceilings apply to the undertaking and not to each of the activities for which the undertaking receives state resources. According to Article 2(2)¹⁰⁷ of the general *de minimis* Regulation, the total amount of *de minimis* aid granted to one undertaking cannot exceed EUR 200 000 over any period of three fiscal years. Similarly, under the SGEI *de minimis* Regulation the total amount of *de minimis* aid granted to one undertaking cannot exceed EUR 500 000. What matters is that the same undertaking must not receive more than EUR 200 000 / EUR 500 000 over any period of three fiscal years.

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

No. For both the general *de minimis* Regulation and the SGEI *de minimis* Regulation to apply, the total amount of state resources, irrespective of the objective pursued, granted to any one undertaking cannot exceed EUR 200 000 / EUR 500 000. Consequently, when an undertaking has a number of general economic interest tasks, the total amount that it can receive under the *de minimis* rule is EUR 200 000 (under the general *de minimis* Regulation) or EUR 500 000 (under the SGEI *de minimis* Regulation) over a period of three years. The fact that in accounting terms individual budgets exist for these tasks is of no significance for the application of the *de minimis* rule.

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

No. The financing of services of general interest of a non-economic nature does not come within the scope of the State Aid rules, which apply only to activities of an

¹⁰⁷ *Ibid.*

economic nature. The financing of non-economic general-interest tasks is therefore not regarded as financing within the meaning of the *de minimis* Regulations and does not need to be taken into account when the total amount is calculated for the purposes of applying those Regulations.

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

The investment outlay for an SSGI can be financed by public resources under the *de minimis* Regulations provided, however, that those resources do not exceed EUR 200 000 (under the general *de minimis* Regulation) or EUR 500 000 (under the SGEI *de minimis* Regulation) over any three-year period, whatever the period of three consecutive fiscal years considered, as laid down in the Regulations.

In the event that the public resources exceed EUR 200 000 / EUR 500 000 over any three fiscal years, they may benefit from application of the Decision or the Framework, provided that they fulfil the compatibility conditions (for these conditions, see sections 3.4.2 and 3.5.2).

88. *Do the SGEI de minimis Regulation and the general de minimis Regulation apply to SGEI providers in difficulty?*

No. Neither the general *de minimis* Regulation (Article 1(1)(h)) nor the SGEI *de minimis* Regulation (Article 1(2)(h)) applies to undertakings in difficulty within the meaning of the Community guidelines on State Aid for rescuing and restructuring firms in difficulty¹⁰⁸.

3.4 Compensation under the SGEI Decision

3.4.1 Scope of application

89. *In what cases is the Decision applicable?*

The Decision applies to:

- public service compensation not exceeding EUR 15 million on an annual basis, granted for SGEIs in areas other than transport and transport infrastructure.
- public service compensation granted to hospitals providing medical care, including, where applicable, emergency services, irrespective of the amount.
- public service compensation for the provision of SGEIs meeting social needs as regards health and long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups, irrespective of the amount.
- in the field of transport, only public service compensation for air or maritime links to islands granted in accordance with sectoral rules, on which annual traffic does not exceed 300 000 passengers; the Decision applies also to public service compensation for airports and ports whose average annual traffic during the two financial years

¹⁰⁸ OJ C 244, 1.10.2004, p. 2.

preceding that in which the SGEI was assigned does not exceed 200 000 passengers in the case of airports and 300 000 passengers in the case of ports.

3.4.1.1 The EUR 15 million threshold

90. *Is the threshold of EUR 15 million to be applied as net or gross value?*

The threshold for the amount of compensation set out in Article 2(1)(a) of the Decision is EUR 15 million gross (i.e. without any deduction of taxes).

91. *Does the threshold apply per SGEI entrustment or per undertaking? What if several undertakings jointly provide an SGEI?*

The EUR 15 million threshold applies for each specific SGEI entrusted to a given undertaking.

If an undertaking is entrusted with three different SGEIs, the threshold applies for each of those SGEIs (i.e. the undertaking can receive total compensation up to a maximum of EUR 45 million under the Decision, provided that the compensation per SGEI does not exceed EUR 15 million). If the same SGEI is jointly entrusted to five undertakings, the threshold applies only once for that specific SGEI task (i.e. even if the amount of compensation per undertaking does not exceed EUR 15 million, the Decision does not apply if the aggregate compensation for the SGEI paid to all undertakings is above EUR 15 million).

3.4.1.2 Hospitals and social services

92. *There is a provision on ancillary activity in Article 2(1)(b) for hospitals, but not in Article 2(1)(c) for social services. Does this mean that social services are treated less favourably?*

No. The reference to ancillary activities in Article 2(1)(b) of the Decision is intended to mean that hospitals fall under the decision irrespective of the amount of compensation, also if they pursue other ancillary activities (such as research activity or a cafeteria). However, compensation can only be paid for services of general economic interest.

Article 2(1)(c) for social services does not contain a restriction to purely social service providers that have at the most an ancillary commercial activity. Therefore, social service providers can have other activities that are more than just ancillary, but they can receive compensation only for SGEI activities. The Decision is therefore in fact more lenient for social services than for hospitals.

93. *Who can define the content of the notion of ‘social services’?*

The list of social services in Article 2(1)(c) is an exhaustive list. Since the Decision is directly applicable in all Member States, it does not need to be transposed into national law. Member States do not have competence to adopt legislation that could change or clarify the Decision. Nevertheless, as long as they stay within the scope of Article 2(1)(c), Member States can of course specify in more detail in the entrustment act the specific services they want to be provided, for example which types of childcare, under which conditions and for which beneficiaries. The definition of social services is very broad and covers the most important areas of social services. Moreover, by covering also SGEIs relating to ‘the care and social inclusion of vulnerable groups’, it offers the

necessary flexibility to include, in accordance with the needs of each Member State, different types of services addressed to those groups of society that need them most.

The Court of Justice and national courts can be called upon to decide whether an aid is illegal or whether it falls under the exemption provision of Article 2(1)(c) of the Decision. However, they cannot change the content of the Decision.

94. *Why is the list of exempted social services in the Decision exhaustive? What if a Member State wants to entrust a service provider with a social service of general interest that is not covered by this list?*

Since the Decision is directly applicable in the Member States, it needs to contain clear and precise definitions, ensuring legal certainty. Therefore, the exempted aid measures must be comprehensively defined. However, the definition of social services is very broad and covers the most important areas of social services. Moreover, by including also SGEIs relating to ‘the care and social inclusion of vulnerable groups’ it gives the necessary flexibility to include, in accordance with the needs of each Member State, different types of services addressed to those groups of society that need them the most. Should a particular social service not be covered by the definition of social services in Article 2(1)(c), the compensation might still be exempted from notification under Article 2(1)(a) of the Decision, as long as the compensation does not exceed an annual amount of EUR 15 million.

95. *How does the list of social services in the Decision relate to the lists of services in Annex II B of the public procurement Directive (Directive 2004/18/EC)?*

The list of social services in Article 2(1)(c) of the Decision is different from the list of services in Annex II B of the public procurement Directive (Directive 2004/18/EC).

The list contained in the Decision enumerates the social services which are covered by the Decision, irrespective of the amount of compensation the service provider receives. This list is based on broad categories (for example ‘care and social inclusion of vulnerable groups’).

The list of services in Annex II B of the public procurement Directive is based on the Common Procurement Vocabulary (CPV) and has a different purpose. This list covers all categories of social services, but also other categories of services that are considered as less likely to be of certain cross-border interest for tenderers in other Member States and that, for this reason, are not subject to the full set of provisions of Directive 2004/18/EC, but only to a limited number of rules of this Directive and to the general principles of the TFEU. Directive 2004/18/EC thus offers a very flexible approach (as regards procurement rules) to social services and other services covered by Annex II B of this Directive (for more details on this point, see answer to question 200).

96. *What does the term ‘childcare’ in Article 2(1)(c) cover?*

The term ‘childcare’ is a broad concept that covers different forms of care for and supervision of children in different organisational settings. However, for the Decision to apply in the first place, the Member State must entrust the provider with a specific public service obligation.

97. Does the wording ‘meeting social needs’ restrict the type of social services that can be an SGEI, for example in the case of childcare, to childcare for families with financial difficulties?

The wording ‘meeting social needs’ in Article 2(1)(c) does not restrict the services mentioned in the list. As long as the services defined qualify as genuine SGEIs, the Decision can apply to all respective services. In the example, the Decision can be applied to all childcare services, not only if they are provided for families with financial difficulties.

98. What does the term ‘social inclusion of vulnerable groups’ in Article 2(1)(c) cover?

The term ‘social inclusion of vulnerable groups’ gives Member States the necessary flexibility to include, in accordance with the needs of each Member State, different types of services addressed to those groups of society that need them the most. It is a broad concept and could cover, for example, social integration services for people with disabilities, social assistance services for migrants, services for the homeless, parenting support services¹⁰⁹, services supporting over-indebted persons or social services for the lesbian, gay, bisexual and transgender (LGBT) community.

99. What does the term ‘access to and reintegration into the labour market’ in Article 2(1)(c) cover? Is professional training part of it?

The term ‘access to and reintegration into the labour market’ refers to different types of services that aim at facilitating the employability. Professional training only falls under Article 2(1)(c) of the Decision if it allows access to or reintegration into the labour market or if it fosters the social inclusion of a vulnerable group. Therefore, for example, professional training for the long-term unemployed falls under Article 2(1)(c) of the Decision. If the professional training, in contrast, is for persons already in employment, it would normally not fall under Article 2(1)(c) of the Decision, unless it were to provide for the inclusion of a vulnerable group. It should be noted, however, that State aid for professional training can be granted under the conditions set out in Article 38 and 39 of Regulation 800/2008/EC (General block exemption Regulation).

100. Can aid to social and work integration enterprises be covered by the Decision?

Social integration enterprises can have different characteristics and take different forms, but in general they offer employment opportunities to different groups of disadvantaged workers facilitating their access to and their reintegration into the labour market and promoting their social inclusion. They often benefit from support measures such as exemption or reduction of social contributions pursuant to national laws or regulations.

Such aid can under certain conditions be covered by the GBER¹¹⁰ or the general *de minimis* Regulation¹¹¹.

¹⁰⁹ Parenting support services encompass different types of interventions (e.g. information, training, counselling, etc.) directly linked to rearing children from disadvantaged families. The ultimate goals of parenting support is helping parents raise their children and having a positive impact on the physical, emotional and cognitive development of children from disadvantaged families.

¹¹⁰ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation).

¹¹¹ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379 of 28.12.2006.

Public authorities in the Member States might also define social and work integration as a SSGI and entrust social and work integration enterprises with a SGEI. In these cases, the SGEI Decision applies to those services.

3.4.1.3 Duration of the entrustment period

101. Can the duration of the entrustment period exceed 10 years only if a significant investment has to be amortised over a longer period or also for other justified reasons? What does ‘significant investment’ mean?

The only case where the duration of the entrustment period may exceed 10 years is the depreciation of a significant investment. Whether an investment can be considered significant depends both on the absolute value and on the relative value of the investment that needs to be amortised over a period longer than 10 years compared to the value(s) of other assets needed for the provision of the service. The difference between the rules on the duration of the entrustment period in the Decision and the Framework is further explained in question 166.

102. Given the limitation of the entrustment period to 10 years in principle, is it no longer possible to authorise a provider for an unlimited period?

An authorisation to perform a certain activity without an obligation of the provider to provide a specific public service has to be distinguished from an entrustment act, which necessarily confers an obligation on the provider to provide a specific public service. The authorisation without the obligation is not relevant from a State Aid point of view. The State Aid rules therefore do not prevent Member States from authorising a provider for an unlimited period to perform an activity, but in order to be able to receive compensation for the provision of a service of general economic interest, the undertaking has to be entrusted with a specific public service obligation. As regards the duration of this entrustment, it is under the Decision in principle limited to 10 years (Article 2(2)). The Decision allows for a longer period of entrustment in cases where a significant investment is required that needs to be amortised over a period longer than ten years. Since the duration is closely linked to the period of time needed for amortisation of the asset, unlimited duration is not possible under the Decision. After the end of the period of entrustment, the same provider can be entrusted again with the provision of the service.

3.4.1.4 Application to the transport sector

103. What is the difference between Article 2(1)(d) and Article 2(1)(e) of the Decision?

Article 2(1)(d) of the Decision sets out the scope of application of the Decision to SGEIs providing air or maritime links, i.e. air or maritime transport services. Article 2(1)(e) of the Decision, in contrast, deals with the scope of application as regards the imposition of SGEI obligations on ports and airports, i.e. transport infrastructure.

104. What exactly does the 300 000 passenger threshold for air and maritime links to islands as set out in Article 2(1)(d) of the Decision refer to? Can the Decision also be applied to air/maritime routes that do not provide links to an island?

The threshold of 300 000 passengers for air and maritime links to islands refers to a one-way count, i.e. a passenger flying to the island and back counts twice. The threshold applies to the individual route between one airport/port on the island and one airport/port

on the mainland, not to all air traffic from any airport/port on the island to any airport/port on the mainland.

As regards air/maritime routes, the Decision only applies in the case of air or maritime links to islands. It does not apply to air/maritime routes between two airports/ports on the **mainland**.

105. Do airports with more than 200 000 passengers or ports with more than 300 000 passengers fall within the scope of the Decision in cases where the public service compensation does not exceed EUR 15 million?

No. The general threshold of EUR 15 million does not apply to transport and transport infrastructure (Article 2(1)(a) of the Decision). If airports have more than 200 000 passengers and ports have more than 300 000 passengers, aid for SGEI does not fall under the Decision and will be examined by the Commission after notification on the basis of the Framework. The passenger thresholds are to be interpreted as meaning arriving and departing passengers (one-way count).

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

Example:

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

106. What is the relation between the Decision and Regulation (EC) No 1008/2008, in particular Article 16 of the Regulation? Could you give some examples of what kind of services could be defined as SGEIs for airports under Article 2(1)(e) of the Decision?

Article 2(4) of the Decision stipulates that the Decision can only be applied to air transport if the requirements set out in Regulation 1008/2008 as well as the requirements set out in the Decision are met.

Paragraphs 45 *et seq.* of the Communication give further guidance on the scope of the Member States to define SGEIs and the Commission’s tasks. Regarding airports in particular, paragraphs 34 and 53 of the 2005 Guidelines on financing of airports provide guidance on what activities can be considered as SGEIs. In substance, the overall management of an airport can only be considered an SGEI in exceptional cases, such as isolated regions. In any case, the pursuit of commercial activities not directly linked to

the airport's core activities cannot be included in the scope of an SGEI (see paragraph 53 (iv) of the 2005 Guidelines).

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

The Decision does not apply to public service compensation in the land transport sector (Article 2(5) of the Decision). Compensation for public service obligations in the rail and road passenger transport sector is governed by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007. Compensation granted in compliance with the provisions of this Regulation is exempted from the obligation of prior notification.

3.4.1.5 Undertakings in difficulty

108. Does the Decision also apply to firms in difficulty?

Yes. There is no provision that would prevent the Decision from being applied to firms in difficulty.

3.4.2 *Compatibility conditions*

3.4.2.1 General presentation

109. What are the main compatibility conditions established by the Decision?

The main compatibility conditions established by the Decision are the following:

- An act of entrustment specifying, in particular, the nature and duration of the public service obligations, the undertaking and the territory concerned, the nature of any exclusive or special rights assigned to the undertaking, the parameters for calculating, controlling and reviewing the compensation, the arrangements for avoiding and repaying any overcompensation and including a reference to the Decision.
- The compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations including a reasonable profit; a calculation of all costs as well as any kind of revenue received is necessary to this end.
- Control of overcompensation by the Member States' public authorities.

110. What is the difference between the conditions of the *Altmark* judgment and the conditions laid down in the Decision?

The *Altmark* judgment establishes when a measure comes within the scope of the concept of State Aid, while the Decision and the Framework establish the conditions under which compensation constituting State Aid is compatible with the internal market. The main substantive difference between the judgment and the SGEI package concerns the amount/calculation of the compensation.

According to the fourth criterion of the *Altmark* judgment, in order not to constitute State Aid¹¹² the amount of the compensation must be defined:

- through an open, transparent and non-discriminatory public procurement procedure, allowing for selection of the tenderer capable of providing the services at the least cost to the community; or
- through a procedure whereby the public authorities have to determine the amount of compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped.

In other words, the fourth *Altmark* criterion is fulfilled if the compensation is not set above the level that would be required by an efficient undertaking (capable of winning a tender or identified through a benchmarking exercise).

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

As long as the public authority proves that the compensation granted corresponds to the net costs estimated on the basis of the precisely defined parameters contained in the act of entrustment and that there is no overcompensation, the compensation in question is regarded as State Aid compatible with the TFEU rules¹¹³.

Example:

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

- The SGEI in question is provided by an operator selected through a tendering procedure complying with the fourth *Altmark* condition at a price of 90. If all other conditions of the *Altmark* judgment are met, the compensation of 90 will not constitute State Aid.
- The SGEI is provided by an operator at a net cost of 90. If this cost of 90 corresponds to that of a typical undertaking, well run and adequately equipped, in accordance with the fourth *Altmark* criterion, and if all other conditions of the *Altmark* judgment are met, the compensation of 90 will not constitute State Aid.
- The SGEI is provided by an operator that is not selected through a tendering procedure complying with the fourth *Altmark* criterion and net costs exceed 90 (e.g. 100). A compensation of 100 will be regarded by the Decision as compatible State Aid provided that the compensation does not go beyond what is necessary to cover the net cost actually incurred by the operator in providing the SGEI, including a reasonable profit. This obviously is possible if the SGEI in question falls under the categories defined in the Decision.

111. What are the main differences between the 2005 and 2011 Decisions as regards the compatibility conditions?

¹¹² As long as the other three criteria of the *Altmark* judgment are met (see question 61).

¹¹³ As long as the other conditions laid down in the Decision are met.

The differences between the 2005 and the 2011 Decisions mainly concern the scope of application (reduction of the compensation threshold from 30 to 15 million, removal of the service provider's turnover threshold, extension of the list of eligible social services regardless of amounts beyond hospital and social housing, limitation of the duration of the entrustment period).

As regards the compatibility conditions, there are only a few changes which are mainly aimed at simplifying the application of the rules and at increasing transparency.

In order to simplify the application of the rules, the new Decision allows for an overcompensation test over a longer time span¹¹⁴. It also introduces a safe harbour for reasonable profit¹¹⁵, which also constitutes a limit to the reasonable profit when the provision of the SGEI is not connected with a substantial risk.

As regards transparency, the new Decision introduces an obligation to make a reference to the Decision in the entrustment act¹¹⁶ and to publish the entrustment act and the amount of aid granted for compensation above EUR 15 million¹¹⁷.

112. In the event that all market operators are entrusted with the same SGEI, should they all receive the same amount of compensation for provision of the SGEI within the meaning of the rules on State Aid?

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

As explained in section 3.5.2 of the present guide, when the compatibility of the aid is assessed on the basis of the Framework, the method of calculating the compensation must be the same for all undertakings entrusted with the same SGEI.

113. Does the Decision require selection of the least expensive undertaking for the provision of SGEIs?

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

114. Is it correct that if a public authority classifies a service as SGEI and complies with the Decision, it does not need to comply with EU public procurement rules?

¹¹⁴ See Article 6(1) of the Decision.

¹¹⁵ See Article 5(7) of the Decision.

¹¹⁶ See Article 4(f) of the Decision.

¹¹⁷ See Article 7 of the Decision.

This is not correct. As provided by recital (29), the Decision applies without prejudice to the Union provisions in the field of public procurement. Applicable public procurement rules should thus be complied with. However, compliance with those rules is not a condition for the application of the Decision.

3.4.2.2 Entrustment act

115. Why is there a new requirement to add a reference to the Decision in the entrustment act (Article 4(f))?

By requiring public authorities to include a reference to the Decision in the entrustment act, the Commission intends to increase transparency and improve compliance with the rules. In particular, stakeholders will know what rules are applicable and which conditions the aid should meet to be compatible with the internal market. Thereby legal certainty is also increased.

116. The Decision requires parameters to calculate the amount of compensation to be defined in the act of entrustment. How is it possible to do so before offering the service?

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

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

The compensation may cover the net cost incurred in providing the SGEI (compensation ex post in full), but in this case, pursuant to Article 5(7) of the Decision, the profit should be limited to the relevant swap rate + 100 basis points.

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

Examples:

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

– the equipment used and trainers' salaries over a one-year period.

117. Even for bodies experienced in providing SGEIs, there may be a high level of cost unpredictability and a risk of ex post losses: unpredictable changes in the level of care required, in users' profiles, in user numbers and in the level of revenues (non-payment of user fees, fluctuation in number of users, refusal of other public authorities to contribute). How can public bodies cope with this situation?

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

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

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

Two options are possible for as long as the total amount of annual compensation does not exceed the threshold established by the Decision:

- the public authority may define in the act of entrustment an ex post correction mechanism which will allow for periodic revision of the cost parameters;
- the public authority may update the act of entrustment if it sees that a cost parameter has to be modified.

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

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

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

119. How should the parameters for cost compensation be determined in the event that a given SGEI is financed by two or more public authorities?

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

The public authorities may determine their individual contributions to the compensation as they wish, as long as the total amount corresponding to all the different kinds of compensation received does not exceed the net cost incurred by the SGEI provider, including a reasonable profit.

120. In the event that a public authority wishes to finance only a part of the annual costs of a provider assigned an SGEI, how should the parameters for compensation be determined?

What counts is that the amount of compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit¹¹⁸.

For instance, a public authority can provide in the entrustment act that it will compensate the provider for 60% of the net cost (costs minus revenues) incurred in providing the SGEI.

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

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

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

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

Nevertheless, Member States have some leeway in defining the parameters of their choice in order to facilitate their financial planning, in so far as the method chosen allows for transparent and verifiable calculation of compensation. What matters in terms of compatibility with the State Aid rules is that they do not end up overcompensating SGEI operators. Member States are free to decide the manner and the level of financing of their SGEIs as long as they abide by the EU rules. In principle they can, therefore, define the compensation parameters in reference to covering operating losses provided that the calculation parameters make it possible to determine that there is no overcompensation. In this case, pursuant to Article 5(7) of the Decision, the profit should be limited to the relevant swap rate + 100 basis points.

¹¹⁸ See Article 5 of the Decision.

3.4.2.3 Amount of compensation

123. What methodology should be used to calculate the net cost of the public service obligations pursuant to the Decision?

Article 5(2) of the Decision provides for two methodologies, either of which can be used to calculate the net costs of a public service obligation:

- as under the 2005 Decision, the net cost can be calculated as the difference between costs and revenues ('methodology based on cost allocation'); where the undertaking concerned also carries out activities falling outside the scope of the SGEI, only the costs related to the SGEI will be taken into consideration;
- alternatively, the net cost may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation ('net avoided cost methodology'). This methodology can be appropriate for instance in the social housing sector: the net cost can be calculated as the sum of foregone rent (due to limitation of rent compared to market price) and the additional costs arising from the public service obligation (e.g. costs incurred in checking that tenants are eligible); revenues which would not have been received if the housing had been commercial should be subtracted.

In contrast to the Framework, the Decision does not impose a specific methodology: Member States can decide which methodology is the most appropriate for each specific case.

124. Could you provide some examples of the type of investment which could be supported as part of an SGEI? For example, can the costs linked to a ship engine be considered SGEI cost, knowing that the authority has entrusted the owner of the ship with a public service obligation to carry passengers?

Pursuant to Article 5(3)(d) of the Decision, the costs linked with investments necessary for the provision of the SGEI may be taken into account to determine the amount of the compensation. There is no limitative list of the type of investment concerned. The depreciation costs of an engine for a ship that is used exclusively for the provision of SGEIs are a valid example. If the ship is used also for non-SGEI activities, the costs can only partially be taken into account (see Article 5(3)(c)).

125. Is it necessary to attribute a specific amount of compensation to specific costs?

No. The rules on State Aid do not refer to the nature of SGEI costs (e.g. salaries, maintenance of premises, specific external expenses or purchases) but to their scope, that is whether the costs are associated with the operation of an SGEI or not. It is not necessary for the public authority to set aside a specific amount of compensation for specific services within the overall public service task.

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

Yes. According to Article 5(4) of the Decision, the amount of compensation includes all the advantages granted by the State or through state resources in any form whatsoever. In this respect, the exact financial or material nature of the advantages provided by the public authorities (compensation, services, etc.) is of no significance.

Therefore the public authority should take into account both grants and services (or buildings or assets) provided below market prices, when calculating the compensation and checking for overcompensation. This means that a grant equivalent should be calculated for the provision of services (or buildings or assets) below market price.

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

Article 5(4) of the Decision stipulates that profits in excess of a reasonable profit deriving from special or exclusive rights and any other advantage granted by the State to the undertaking operating the SGEI must be included in the revenue to be taken into account and therefore reduce the compensation. The same can be done for other profits deriving from other activities if the State so decides.

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

Assuming that the members which are not public authorities provide the operator with financial contributions or some other form of support, what needs to be determined is whether such contributions must be characterised as State Aid within the meaning of Article 107(1) TFEU. The contribution made by a body governed by private law can indeed be characterised as State Aid if it is made by way of ‘state resources’. That is the case, in particular, if the private law-governed body in question is a public undertaking within the meaning of the Transparency Directive¹¹⁹ and, moreover, if the decision to grant the aid is imputable to a public authority¹²⁰. If the contribution concerned is characterised as State Aid, it must be added to the other instances of State Aid and then it must be ascertained whether or not the total sum of State Aid exceeds what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and, where necessary, a reasonable profit for discharging those obligations.

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

If the contribution made towards the public service obligations is not characterised as State Aid within the meaning of Article 107(1) TFEU, it does not need to be added to the

¹¹⁹ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

¹²⁰ Judgment of the Court of Justice in Case C-379/98 *Preussen Elektra AG* [2001] ECR I-2009, paragraph 58.

calculation of the overall amount of State Aid; it is, however, to be added to the revenue relating to the public service obligations and thus reduces both the net costs resulting from the SGEI and therefore the basis for potential compensation. It does not, however, have to satisfy the conditions laid down in the Decision and the Framework.

129. *Should tax benefits arising from the corporate status of a body be counted among revenues within the meaning of Article 5(4) of the Decision?*

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

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

130. *Should payments made under a profit-and-loss transfer agreement within a public holding be counted as revenues within the meaning of Article 5(4) of the Decision?*

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

Such payments received to cover SGEI losses are to be counted among revenues within the meaning of Article 5(4) of the Decision and will accordingly reduce the net costs eligible for compensation.

131. *What is the meaning of the term ‘reasonable profit’ for the calculation of compatible compensation?*

According to Article 5(5) of the Decision, ‘reasonable profit’ means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. The ‘rate of return on capital’ means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.

Article 5(8) of the Decision provides that ‘*Where, by reasons of specific circumstances, it is not appropriate to use the rate of return on capital, Member States may rely on profit level indicators other than the rate of return on capital to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales*’.

Article 5(7) of the Decision provides for a safe harbour provision, stating that a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event. This rate is also the upper limit for reasonable profit if the provision of the service is not connected with a substantial risk.

132. How should 'risk' be defined? Can you give examples of what would constitute a risk for the provider?

Risk is to be understood as a factor which could reduce the expected profit (by reducing expected revenue and/or increasing expected costs).

Certain factors can be included in the parameters for the calculation of compensation (for instance oil price or number of passengers for a bus service); if those factors have been included in the parameters, they no longer constitute risk factors.

Article 5(5) of the Decision provides that the level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.

The characteristics of the compensation mechanism are an important example of a factor which affects the risk. Where the net cost incurred in providing an SGEI is essentially compensated ex post in full, the level of risk will be negligible and the reasonable profit will therefore be limited. A contrario, a lump sum for the provision of the SGEI, determined ex ante, involves a higher risk for the provider.

The sector of the activity is another example of a risk factor. Competitive sectors, where demand and costs are volatile (unless already factored into the compensation parameters) or where assets are expensive and difficult to resell, are considered to be more risky. Therefore, a provider would require a higher return on capital to invest and provide the service in such cases.

133. For the purpose of calculating reasonable profit, the Decision refers to a rate of return on capital. Is it possible to use different methods to calculate reasonable profit?

Yes, under specific circumstances, as set out in Article 5(8) of the Decision.

The return on capital (meaning the 'internal rate of return' that the undertaking makes on its invested capital) may not be available or appropriate for a concrete case, whereas other profit level indicators, such as the return on sales, are available and more appropriate. In such circumstances, it is possible to use other profit indicators, like those mentioned in Article 5(8) of the Decision, in order to provide solid and reliable references for the calculation of reasonable profit.

134. The profit safe harbour only applies to return on capital. Is there no safe harbour if, upon justification, other profit level indicators are used?

It was found not to be feasible to provide a single safe harbour for profit level indicators other than the rate of return on capital. This is because profit levels determined by other indicators, such as 'rate of return on assets' or 'rate of return on sales', have to be assessed in the light of the sector where the provider is active. For a similar risk, a certain level of return on assets would be considered reasonable in a given sector, whereas it would not be considered reasonable in another sector.

Even if a safe harbour is provided only for the rate of return on capital, this does not prevent Member States from assessing what the reasonable profit should be on the basis of profit level indicators other than the rate of return on capital, if duly justified.

135. Is there any practical means of knowing the level of the relevant swap rate?

Swap rates will soon be published on the Commission's DG Competition website. They will be provided for different EU currencies and maturities.

136. *Would it be acceptable to add to the costs 20 % overheads, and take that as reasonable profit?*

No, it would not be acceptable to add 20% overheads to the costs and take that as reasonable profit. This is because the calculation of the profit would not be linked to the risk incurred in providing the service and could therefore exceed what should be considered as a reasonable profit.

An appropriate contribution to the overhead costs can be taken into account to determine the net cost incurred in providing an SGEI.

A reasonable profit can then be added to this net cost to determine the appropriate compensation. But this reasonable profit should be linked with the risk incurred by the provider.

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

Yes, pursuant to Article 5(9) of the Decision, undertakings carrying out activities falling both inside and outside the scope of an SGEI must keep accounts that show separately the SGEI's costs and receipts, and those linked to other services.

It is the best way for such undertakings to prove that the compensation allocated does not exceed the net cost of the SGEI and thus involves no overcompensation. At the same time separate accounting for activities falling inside and outside the scope of the SGEI enables the Commission and the Member State to assess whether the criteria laid down by the Decision are indeed fulfilled¹²¹.

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

The internal accounts should enable the costs linked to provision of the SGEI to be identified; otherwise, the amount of compensation cannot be established. Moreover, in case of a complaint, the undertaking to which the SGEI is attributed should be able to demonstrate the absence of overcompensation. Therefore, it is in practice necessary to keep separate accounts in such situations.

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

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

3.4.2.4 Overcompensation and recovery

140. *The Decision allows for the payment of public service compensation but prohibits overcompensation; what does the term 'overcompensation' mean?*

¹²¹ See Article 5(9) of the Decision.

Overcompensation should be understood as compensation that the undertaking receives in excess of what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.

Article 5 of the Decision provides guidance on how to determine the net cost incurred in discharging the public service obligations, including a reasonable profit.

141. There should be a control every three years. Is it possible to carry over overcompensation to the following period beyond the 10 % if there will be no overcompensation over the whole period of entrustment? Or should there be recovery?

With a view to increasing flexibility, the 2011 Decision takes a multi-annual approach, rather than an annual approach as under the 2005 Decision. This means that a provider can receive compensation in excess of the net cost incurred in discharging the public service obligations for a certain year, as long as there is no overcompensation for the whole duration of the contract.

However, with a view to avoiding cases where the beneficiary would receive overcompensation over the whole duration of the contract, Article (6) of the Decision provides that Member States must carry out regular intermediate checks (at least every three years) during the period of entrustment and at the end of it. Where an undertaking has received overcompensation in excess of 10% of the amount of the average annual compensation, the Member State must intervene to ensure that the compensation mechanism is in line with what had been provided in the entrustment act. The Member State must ensure that the undertaking concerned repays the overcompensation and the parameters for calculating the compensation have to be updated for the future. Where the amount of overcompensation does not exceed 10% of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

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

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

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

The entrustment acts should be designed in such a way as to ensure that the total compensation received by the SGEI provider from the different public authorities does not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.

In particular, when a public authority determines the amount of compensation to grant to an undertaking for discharging public service obligations, the said authority should

include in the revenues of the undertaking the compensation that the undertaking will receive from other public authorities. If the amount of compensation received from other authorities is not known in advance, the public authority can include this amount as a parameter for calculating the compensation.

Checks for any overcompensation are based on the same principles as if the SGEI were financed by just one public authority. Public authorities should carry out regular checks, or ensure that such checks are carried out, at least every three years during the period of entrustment and at the end of such period, to ensure that the compensation actually granted is in line with the entrustment act and does not lead to overcompensation. It is for the Member State concerned to decide which public authority should carry out those checks.

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

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

3.4.2.5 Undercompensation

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

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

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

It is only overcompensation which is prohibited under the State Aid rules. In the event of undercompensation, it is for the Member States to decide on the methods to be used for any revision of the amount of compensation, provided that such revision does not give rise to overcompensation. As regards the possibilities for revising the act of entrustment and the parameters for calculating compensation, see the answers to questions 58 and 117.

3.4.3 Transparency and reporting

147. Does the additional transparency requirement set out in Article 7 of the Decision apply if the compensation for one SGEI exceeds EUR 15 million or also if all SGEIs entrusted to one undertaking exceed EUR 15 million?

Article 7 applies if the compensation for one SGEI exceeds EUR 15 million. This article needs to be seen in conjunction with Article 2(1)(b) and (c) in particular, and is intended for large social services that benefit from the application of the Decision regardless of any thresholds. For these cases, the Decision sets out additional transparency requirements in Article 7. It is not intended to apply to undertakings that provide several SGEIs, each of which is individually compensated with an aid amount not exceeding EUR 15 million, as can also be understood from the reference in Article 7(a) to ‘the entrustment act’, in the singular.

148. *Is the publication required by Article 7 of the Decision for amounts exceeding EUR 15 million needed every year or is it permissible to publish the yearly amounts at the end of the entrustment period?*

Although the timing of the publication is not mentioned in Article 7 of the Decision, the objective of this article is to ensure transparency, by informing public service providers that an SGEI has been entrusted, to whom, what it covers, and what the annual compensation is. This also allows a possible competitor or a citizen to bring to the attention of a judge or of the Commission a case of illegal or incompatible aid. It would therefore appear to result from the objective of this provision that this information should be published at the time of the entrustment or in the course of that year. If one were to wait until the end of the entrustment period, the transparency objective could no longer be fully achieved.

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

No. When applying the Decision, national authorities are not under any obligation to send the Commission an information sheet. The only procedural obligations that the Decision imposes on Member States are that the Member States must keep available for the Commission, for a period of at least ten years, all the elements necessary to establish whether the compensation granted is compatible with the Decision¹²², and that they must submit periodic reports, every two years, on the implementation of the Decision¹²³.

150. *Who should provide the reports on the implementation of the Decision — the Member States or the regional / local authorities?*

The reports on the implementation of the Decision must be submitted by the Member States to the Commission every two years¹²⁴. For this purpose, the Member States should organise the reporting exercise in advance, allocating sufficient time for collecting the necessary information from the relevant regional and local authorities.

3.4.4 *Entry into force and transitional provisions*

151. *Since when has the Decision been applied? Is it retroactive?*

The Decision applies since 31 January 2012, the date of its entry into force.

¹²² See Article 8 of the Decision.

¹²³ See Article 9 of the Decision.

¹²⁴ See Article 9 of the Decision.

It applies also to any aid put into effect before the entry into force of the Decision which was not compatible or exempted from notification under the 2005 Decision (i.e. unlawful aid), but which fulfils the conditions laid down in the (2011) Decision (Article 10(b)). This provision applies also to aid schemes that were put into effect before the entry into force of the new Decision; for those schemes it is irrelevant whether the individual provider was already entrusted with an SGEI before the entry into force of this decision or only after that. ‘Aid put into effect’ means that the undertaking has been granted the legal right to receive the aid; it is not relevant whether the aid has actually been paid or not.

152. Do the Member States have to bring existing individual aid, legally implemented under the 2005 Decision, into line with the new Decision?

No. Under the transitional provisions set out in Article 10 of the Decision, aid schemes that were compatible with the 2005 Decision will continue to be compatible with the internal market and exempt from notification for two years. The Decision does not mention individual aid granted in compliance with the 2005 Decision. Therefore the legal situation of those instances of individual aid is unaltered by the new Decision. The concepts of ‘aid scheme’ and ‘individual aid’ are defined in Article 1(d) and (e) of Council Regulation 659/1999 (the Procedural Regulation).

153. Can Member States that have in place SGEI schemes which were legally implemented under the 2005 Decision, still grant new entrustments under the 2005 Decision during the transitional period of two years?

As aid schemes compatible with the 2005 Decision continue to be compatible and exempt from notification for two years, the Member States can grant new entrustments under such existing schemes. However, at the end of the transitional period, aid schemes have to be brought into line with the revised Decision or terminated.

3.5 Compensation under the SGEI Framework

3.5.1 Scope of application

154. Does the Framework apply to public service compensation for the transport sector?

The Framework does not apply to the land transport sector¹²⁵, but it applies to air and maritime transport. The Framework applies without prejudice to additional requirements laid down in:

- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community¹²⁶,
- Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)¹²⁷.

155. Does the Framework apply to compensation for the public service broadcasting?

¹²⁵ See paragraph 8 of the Framework.

¹²⁶ OJ L 293, 31.10.2008, p. 3.

¹²⁷ OJ L 364, 12.12.1992, p. 7.

The Framework does not apply to the public service broadcasting¹²⁸. This sector is covered by the Communication from the Commission on the application of State Aid rules to public service broadcasting¹²⁹.

156. What are the rules for applying the Framework to firms in difficulty?

Aid to SGEI providers in difficulty¹³⁰ will be assessed under the Community guidelines on State Aid for rescuing and restructuring firms in difficulty¹³¹.

157. Is it necessary for aid exceeding the threshold laid down in Article 2(a) of the Decision to be notified to the Commission?

The Decision applies to public service compensation not exceeding EUR 15 million per year. As regards hospitals and certain social services, there is no limitation on the amounts which are exempted from notification.

If the compensation for services other than hospitals and social services exceeds the threshold of EUR 15 million per year, prior notification to the Commission is required. Such compensation will then be assessed in accordance with the provisions of the Framework. Notification does not mean that the compensation is automatically incompatible with the Treaty, but because of the high amount of aid concerned and the higher risk of distortion of competition, the aid must be assessed by the Commission in order to ensure that all the compatibility conditions are met¹³².

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

The notification procedure is initiated by the Member State concerned¹³³. The procedure primarily involves the Commission and the national authorities of the Member State concerned. Consequently, from the point of view of the EU rules on State Aid, the decision to notify an aid scheme or an individual aid award is up to the Member State and not the local or regional communities¹³⁴.

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

¹²⁸ See paragraph 8 of the Framework.

¹²⁹ OJ C 257, 27.10.2009, p. 1.

¹³⁰ See paragraph 9 of the Framework.

¹³¹ OJ C 244, 1.10.2004, p. 2.

¹³² For more details on the compatibility conditions of the Framework, see section 3.5.2.

¹³³ See Article 108 TFEU and Article 2 of Regulation (EC) No 659/1999 of 22 March 1999 laying down implementing rules for Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

¹³⁴ See Article 108 TFEU.

3.5.2 *Compatibility conditions (Please note that the replies to the following questions relating to the Decision are also applicable mutatis mutandis to the Framework: 117, 119, 124 to 138, 140 to 147)*

159. What are the main changes compared to the 2005 Framework as regards the compatibility conditions?

The revised Framework introduces a proportionate approach by subjecting large aid cases, with more significant cross-border effects, to closer scrutiny.

The following table summarises the main changes in the 2011 Framework as compared to the 2005 Framework:

Framework 2005	Framework 2011
Compatibility conditions: - Genuine SGEI - Entrustment act - Overcompensation test (annual check)	Compatibility conditions: - Genuine SGEI - Entrustment act - Duration of the entrustment period - Compliance with Transparency Directive - Compliance with EU public procurement rules - Absence of discrimination - Overcompensation test based on ex ante multi-annual approach, efficiency incentives and the net avoided cost methodology - Strengthened transparency - Possible additional requirements for particularly distortive aid

160. What is the purpose of the requirement, mentioned in paragraph 14, for prior public consultation before an SGEI is entrusted?

Under the revised Framework, Member States have to carry out a public consultation or use any other appropriate instrument to take the interests of users and providers into account, before entrusting a public service obligation to a certain provider. This can help the public authorities to determine whether the service concerned is or could be provided by the market and increases transparency of the process. It also helps to identify the precise needs of users, and thus to draw up the entrustment act more accurately. This requirement does not apply where it is clear that a new consultation will not bring any significant added value to a recently held consultation on the same issue.

161. What should be the content of the public consultation mentioned in paragraph 14? Can such a consultation also take the form of a public hearing?

The public consultation should enable the public authority to improve its knowledge of the users' needs and interests and of the market offers with a view to defining the public service obligations in an appropriate and proportionate manner. The content could cover for instance questions relating to the users' needs in terms of accessibility, quality of service, affordability and whether/ to what extent those needs are not met by services already provided on the market in the absence of a public service provider. If there is already a public service provider entrusted with an SGEI, and the public authorities are

considering a new entrustment of this or another provider, the consultation could examine whether the public service obligations of this provider are still in line with the current or future users' needs.

A consultation can also take the form of a public hearing, if users are sufficiently well informed about the hearing and able to express their views on the public needs during this hearing.

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

As provided in paragraph 38 of the Framework, compensation mechanisms whereby the net cost incurred in providing the SGEI is essentially compensated ex post in full provides no efficiency incentives for the public service provider. Hence the use of such a compensation mechanism is strictly limited to cases where the Member State is able to justify that it is not feasible or appropriate to take into account productive efficiency and to have a contract which gives incentives to achieve efficiency gains. In this case, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36 of the Framework.

163. What are non-transferable fixed assets, as referred to in paragraph 17? Can you give examples?

Non-transferable fixed assets designate assets which cannot easily be sold and/or converted into cash. For instance, capital equipment of a manufacturing company which is specific to the production methods of that company may constitute a non-transferable fixed asset.

164. What is meant by 'the most significant assets', as mentioned in paragraph 17?

In the context of paragraph 17, the most significant assets required to provide an SGEI are the assets which are necessary to provide the SGEI and whose value is sufficiently high - compared to the total value of the assets necessary for provision of the SGEI- to justify a certain period of duration for the entrustment. For instance, sorting equipment/centres could be considered to be significant assets for postal operators.

165. Would a duration of 10 years always be acceptable under the Framework? Or would even a shorter period of e.g. 8 years need a justification based on the depreciation of significant assets?

Any duration should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. It follows from this that a duration of 10 years or even shorter would not always be acceptable under the Framework.

166. What is the difference between the requirements in terms of duration of the entrustment period under the Decision and the Framework. Is the requirement under the Decision stricter than the one under the Framework, and if so, to what extent?

According to Article 2(2) of the Decision, the Decision only applies where the entrustment period does not exceed 10 years or where a significant investment is required which needs to be amortised over a longer period.

According to paragraph 17 of the Framework, the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.

The Framework (paragraph 55) also provides that where the entrustment has a duration which cannot be justified by reference to objective criteria (such as the need to amortise non-transferable fixed assets), serious competition problems may arise. In such a case, the Commission would examine whether the same public service could equally well be provided in a less distortive manner, for instance by way of a more limited duration of entrustment.

The Framework is thus stricter than the Decision as any period of entrustment – including a duration not exceeding 10 years – must be justified by reference to objective criteria.

If the duration of the entrustment period exceeds 10 years without justification based on the need to amortise significant assets, the Decision does not apply and, in principle, the aid will not be found compatible under the Framework.

167. Why did the Commission introduce a new provision in paragraph 18 on compliance with the Transparency Directive?

The objective is to increase transparency and more effectively ensure proportionality of the compensation – in particular by requiring a separation of accounts between activities receiving public service compensation and other activities – so as to make it easier to quantify the net costs of the SGEI. It should be underlined that paragraph 18 does not widen the scope of application of the Transparency Directive beyond what is already set out in the Directive itself. Therefore it does not create any new obligations for undertakings entrusted with SGEIs.

168. Does paragraph 19 of the Framework require selection of the service provider by means of public procurement procedures?

The new SGEI package does not create any additional public procurement obligations. Nevertheless, whenever EU public procurement rules, including both public procurement Directives and Treaty principles, apply, in the event of non-compliance with such rules, the aid would not be considered compatible with the internal market. Paragraph 19 of the Framework therefore explicitly refers to existing public procurement requirements. Although State Aid law does not create any tendering obligations, tendering out the service can facilitate compliance with the Altmark criteria so that the compensation is considered not to constitute State Aid under Article 107 (1) TFEU (see the SGEI Communication).

169. What is the link between the fourth condition of the Altmark judgment and paragraph 19 of the Framework?

Altmark concerns the existence of State Aid, whereas the Framework deals with the compatibility of the aid.

Pursuant to the Altmark judgment, public service compensation does not constitute State Aid if four conditions are fulfilled (see question 61).

The fourth condition of the Altmark judgment provides that the compensation offered must either be the result of a public procurement procedure which allows for the selection of the tenderer capable of providing the service at the least cost to the community, or the result of a bench-marking exercise with a typical undertaking, well run and adequately provided with the necessary means.

If a public procurement procedure in line with the fourth Altmark criterion has been carried out and the other Altmark criteria are fulfilled, there is no State Aid and therefore there is no scope for applying the Framework.

If no public procurement in line with the fourth condition of Altmark has been carried out and if the measure can be classified as State Aid under Article 107(1), then the Decision or the Framework is applicable. Even if no public procurement in compliance with Altmark has been carried out, it might well be the case that the aid is in line with paragraph 19 of the Framework. This is true for instance if a selection procedure (e.g. a negotiated procedure) which complies with the requirements of the applicable EU public procurement rules, but which is not considered to be sufficient to fulfil the fourth Altmark criterion, has been carried out (see, for instance, question 67).

170. Why did the Commission introduce a provision in paragraph 20 about the absence of discrimination? Why was it not introduced in the Decision as well?

This is an important provision aiming to deal more effectively with competition distortions which may occur when public authorities entrust the same SGEI to several undertakings and compensate them on the basis of different methods. The Commission has received a number of complaints about such occurrences. It is no longer appropriate to accept such discrimination, considering that the Framework now takes better account of competition aspects.

The Decision does not include a non-discrimination clause. This is because it was felt that under the diversified and proportionate approach, competition considerations should target the large cases, with potentially more significant competition distortions, i.e. the cases covered by the Framework, while small-scale and social services should benefit from simplified treatment.

171. Why was a new methodology introduced in paragraph 24 (the net avoided cost methodology) to determine the amount of compensation?

The revised Framework encourages Member States to use the net avoided cost methodology (NACM) for calculating the net cost of a public service obligation. The choice of this methodology was an important element of the reform. The primary reason for introducing it is to better estimate the economic cost of the public service obligation and to fix the amount of compensation at a level which ensures the best allocation of resources.

Under the NACM, the cost of the public service obligation is calculated as the difference between the net cost to a company of operating an SGEI and the net cost to the same company operating without a public service obligation.

The NACM is already used in the telecommunication and postal sectors to calculate the net cost of providing the universal service. Annex IV to Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 (as amended by Directive

2009/136/EC¹³⁵) on universal service and users' rights relating to electronic communications networks and services, and Annex I to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, contain more detailed guidance on how to apply the net avoided cost methodology.

The new Framework also allows for alternative methodologies when the NACM is not feasible or appropriate.

172. Why do the new rules require Member States to include efficiency incentives in their compensation mechanisms?

In devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEIs, unless the use of such incentives is not feasible or appropriate. Efficiency gains have to be achieved without prejudice to the quality of the service provided. The Commission has introduced this new requirement to foster the provision of services of better quality at a lower cost for taxpayers and users and to limit distortions of competition that could arise from the ongoing subsidisation of seriously inefficient service providers.

The inclusion of efficiency incentives in the compensation mechanism has to be distinguished from the efficiency test under *Altmark*. Contrary to the *Altmark* test, there is no requirement for the provider to be as efficient as a typical well-run undertaking; there is only a requirement to introduce efficiency incentives into the compensation mechanism, so as to make providers more efficient for the benefit of both users and public authorities.

Member States have a wide margin of discretion in devising their method for compensation and determining the efficiency targets. However the mechanism should be based on objective and measurable criteria set out in the entrustment act and subject to transparent ex post assessment carried out by an entity independent of the SGEI provider.

173. Can you give examples of compensation mechanisms which would provide efficiency incentives?

The Framework gives two examples of such compensation mechanisms:

- Upfront definition of compensation level: the Member State defines a fixed compensation level which incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act;
- payment dependent upon the extent to which efficiency targets have been met: Member States define productive efficiency targets in the entrustment act whereby the level of compensation is made dependent upon the extent to which the targets have been met. If the undertaking does not meet the objectives, the profit should be reduced. In contrast, if the undertaking exceeds the objectives, the profit should be increased.

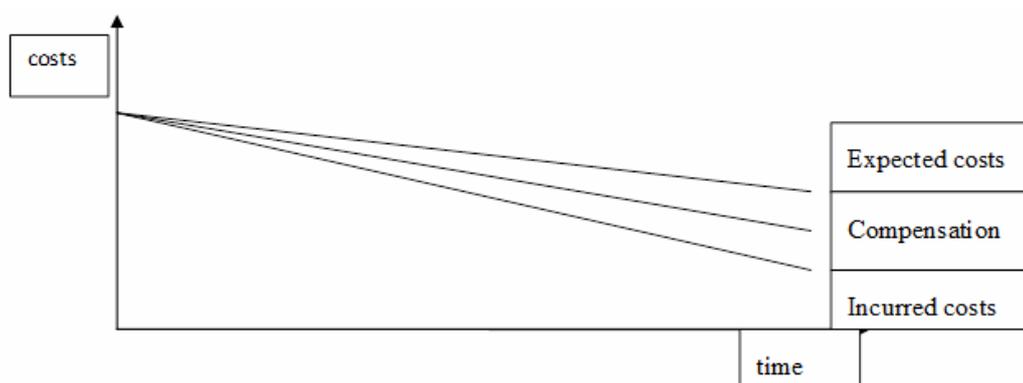
¹³⁵

OJ L 337, 18.12.2009.

In any event, the compensation should in principle no longer be based on incurred costs only. To preserve the incentive for the provider to become efficient, the compensation should be based on the expected costs (upfront definition of compensation level) or on a combination of expected and incurred costs (payment depending upon whether the efficiency targets have been met). The compensation mechanism has to be specified in advance in the entrustment act.

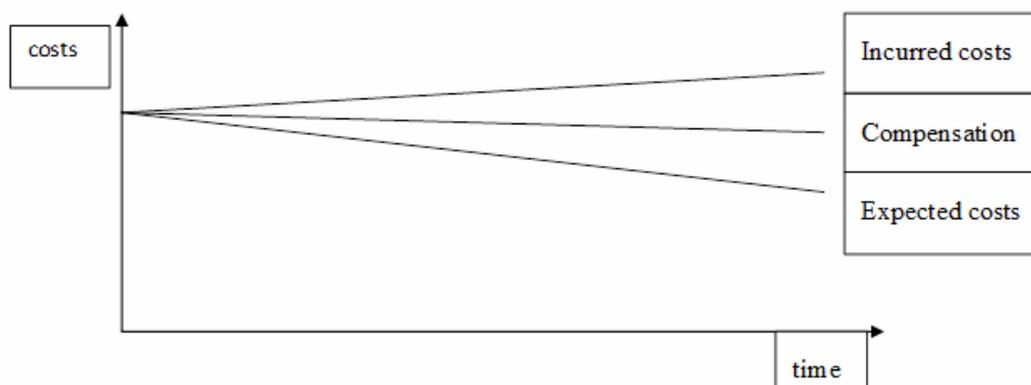
The following two graphics illustrate cases where the compensation is based on a combination of expected and incurred costs:

Case 1: efficiency gains are higher than expected, so incurred costs are below expected costs.



In the event that incurred costs are below expected costs, the compensation can exceed the incurred costs, thus increasing the profit of the undertaking. The compensation should however in no case exceed the expected costs (plus reasonable profit).

Case 2: efficiency gains are lower than expected, so incurred costs are above expected costs.



In the event that incurred costs are above expected costs, the compensation cannot cover the total incurred costs. So the undertaking has to bear part of the loss due to the fact that it was less efficient than expected.

174. If the amount of compensation is fixed following a negotiated procedure, does the Commission consider that the condition regarding efficiency incentives is fulfilled?

The negotiated procedure confers wide discretion upon the contracting authority and may restrict the participation of interested operators (see paragraph 66 of the

Communication). This is the reason why the Commission considers that the negotiated procedure is not always sufficient to ensure that the amount of compensation corresponds to the least cost for the community. For the same reason, the Commission does not consider that the fixing of the compensation following a negotiated procedure is automatically sufficient to ensure that the compensation level incorporates any efficiency gains. This can only be assessed by carefully analysing all details of the individual case.

Therefore, the Member State should ensure that, if a fixed amount of compensation is determined following a negotiated procedure, this amount takes account of expected efficiency gains.

In any event, the Member State should notify the aid so as to get the Commission's clearance before entering into a contractual agreement with the public service provider.

175. In the case of an upfront payment, how can the risk of the provider overstating the expenses or underestimating the revenue be avoided?

As indicated in paragraph 23 of the Framework, where the compensation is based on expected costs and revenues, those costs and revenues must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided. They must rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking.

In the absence of plausible and observable parameters and where the Member State has little means of verifying whether the expected costs and revenues are plausible, it might be appropriate to define a compensation mechanism other than an upfront payment.

For instance, Member States can design a compensation mechanism that takes into account of certain parameters, such as the number of users of the service. Those parameters should be defined in the entrustment act.

176. The Framework permits the payment of public service compensation but prohibits overcompensation; what does the term 'overcompensation' mean?

Paragraph 47 of the Framework defines overcompensation as compensation that the undertaking receives in excess of the amount necessary to cover the net cost of discharging the public service obligations including a reasonable profit for the whole duration of the contract.

This amount of compensation – or the mechanism for calculating this amount – should be specified in the entrustment act.

A surplus that results from higher than expected efficiency gains may be retained by an undertaking as specified in the entrustment act. This is not considered as overcompensation but as an additional reasonable profit.

177. Why should a 2-year or 3-year control be provided in case the compensation has been defined ex ante as a lump sum (and is therefore independent of the costs and revenues which are actually incurred)?

As provided by paragraph 50 of the Framework, where the Member State has defined upfront a fixed compensation level which adequately anticipates and incorporates the efficiency gains that the public service provider can be expected to make over the period

of entrustment, on the basis of a correct allocation of costs and revenues and of reasonable expectations, the overcompensation check is in principle confined to verifying that the level of profit to which the provider is entitled in accordance with the entrustment act is indeed reasonable from an ex ante perspective.

However, if the upfront payment has not been determined on the basis of a correct allocation of costs and revenues and of reasonable expectations, the compensation mechanism should be reviewed to the extent that is legally possible. In such a case, the Member State should ensure that the efficiency incentives are maintained in the compensation mechanism.

178. Should the regular checks be limited to the issue of overcompensation or should they also look at the question of whether an SGEI is still justified or whether in the meantime the service could be provided by the market?

The check whether the service could be provided by the market should be made before the entrustment (see questions 11 and 12 above). The Framework does not require national authorities to examine during the entrustment period whether the SGEI is still justified. However, Member States are free to do so if they wish, in order to ensure that the SGEI continues to reflect actual users' needs or could be provided by other means that cause less distortion of competition or are less expensive for the public purse.

179. Is it possible to carry overcompensation over to the following period if there will be no overcompensation over the whole period of entrustment? Or should recovery take place?

Yes, carry-over is possible if it is in line with the entrustment act and there is no overcompensation over the whole period of entrustment.

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

As provided by paragraph 46 of the Framework, the Member State concerned may decide that profits accruing from other activities outside the scope of an SGEI (coming from another SGEI or from non-SGEI activities) will be allocated in whole or in part to the financing of the SGEI.

However this should be decided when the SGEI is entrusted to the provider and reflected in the entrustment act.

Where incentives for the efficient provision of SGEIs have been introduced in the compensation mechanism, deficits resulting from lower than expected efficiency gains should not be covered by the public authorities.

The transfer of profits accruing from other non-SGEI activities must be shown in the accounts of the undertaking in question, be carried out in accordance with the rules and principles set out in the Framework, notably as regards prior notification, and be subject to proper control. In addition, overcompensation cannot remain available to an undertaking on the grounds that it would constitute aid compatible with the TFEU; such aid should be notified to and authorised by the Commission or be exempted from notification under the relevant rules.

181. Why has the Commission introduced additional requirements for particularly serious competition distortions in section 2.9 and what are they?

The Commission has to ensure that trade and competition in the internal market are not affected to an extent contrary to the interests of the EU (Article 106(2) of the TFEU). In some exceptional circumstances, an SGEI measure has the potential to create serious distortions of competition that could affect trade to such an extent as would be contrary to the interests of the EU. In such cases, the Commission will therefore carry out an in-depth assessment of its impact on competition and assess whether the distortions can be remedied through conditions applicable to or commitments obtained from Member States.

182. An example of serious distortions given in paragraph 55 of the Framework is that of unnecessary bundling. Could there also be cases of unnecessary unbundling, i.e. where bundling would be better from a competition perspective (e.g. because more profitable services would be bundled with loss-making services)?

Bundling a series of tasks can result in operators being prevented from competing for the provision of an SGEI, if those operators are not able to provide all the services included in the SGEI. Unbundling would normally not have the same effect of preventing operators from competing for the provision of the SGEI.

It is, however, correct to say that the bundling of profitable services with loss-making services would lead to lower compensation under the methodology based on cost allocation. When bundling is considered, it would also have to be examined whether the profitable services can qualify as genuine SGEIs which are not or could not be provided by the market.

183. Pursuant to paragraph 61, certain compatibility conditions do not apply to services that would have fallen within the scope of the Decision but do not comply with the Decision's compatibility conditions. Could you explain why and give an example?

The Framework contains compatibility conditions which might be considered too burdensome or not appropriate for small-scale services and social services. Cases where aid falling under Article 2(1) of the Decision – i.e. in particular compensation not exceeding € 15 million and compensation to hospitals and social services – is not covered by the Decision because it fails to meet all its compatibility conditions will be assessed on the basis of the Framework (and therefore have to be notified). Such aid will escape the application of certain compatibility conditions provided for in the Framework, such as the obligation to carry out a public consultation on public needs to define the SGEI, the absence of discrimination between providers, the use of the net avoided cost methodology, the obligation to introduce efficiency incentives, etc.

For instance, if aid falls under Article 2(1) of the Decision but does not meet one of the compatibility criteria under the Decision (e.g. the entrustment act does not specify all the elements required under Article 4 of the Decision), its compatibility would be assessed on the basis of the Framework. Pursuant to paragraph 61, certain conditions of compatibility will not be applicable.

3.5.3 Entry into force and transitional provisions

184. Since when has the Framework been applied? Is it retroactive?

The Framework applies to all notified aid measures, even if these were notified before 31 January 2012, the date of its entry into force¹³⁶.

It also applies to unlawful aid on which a decision is taken by the Commission after 31 January 2012, even if the aid was granted before this date. However, where the aid was granted before 31 January 2012, certain requirements¹³⁷ which did not exist in the previous Framework, and would therefore have been difficult to anticipate, do not apply¹³⁸.

185. If individual aid has been legally granted on the basis of the 2005 SGEI Framework, is it necessary to ensure that such aid now complies with the new Framework? Is a new notification necessary?

No. Individual aid granted before the entry into force of the revised Framework and declared compatible by the Commission under the 2005 Framework is not affected by the revision, and does not have to comply with the revised Framework. When a new entrustment is granted, this has to be compatible with the new SGEI package and (unless the new SGEI compensation complies with the Decision) a new notification is required.

186. What are the rules for the existing schemes?

According to the appropriate measures set out in the Framework¹³⁹, Member States have to publish a list of all existing aid schemes concerning public service compensation that are not in line with the revised Framework by 31 January 2013. This can be done on the internet, in an official journal or by other appropriate means. These aid schemes have to be brought into line with the revised Framework by 31 January 2014. All Member States have accepted those appropriate measures. As a consequence, the existing aid schemes in question can no longer be lawfully applied after 31 January 2014.

3.6 The SGEI package and other rules

187. Do SGEIs concerning the social and work integration of unemployed people and the vocational training come within the scope of the Decision or the General block exemption Regulation (EC) No 800/2008¹⁴⁰?

An SGEI concerning social and work integration or vocational training, defined as such by the State and entrusted to an undertaking by it, may come within the scope of the Decision, provided that the conditions laid down therein are fulfilled. Therefore, compensation paid to an undertaking which has a public service remit in the field of social and work integration or training may be exempted from notification in so far as the undertaking concerned has genuinely been entrusted with this public service task (see more specifically the conditions for entrustment in Articles 2, 4 and 6 of the Decision and section 3.4.2 of this guide).

¹³⁶ See Paragraph 68 of the Framework.

¹³⁷ The consultation on the public service needs, compliance with EU public procurement rules, the absence of discrimination, use of the net avoided cost methodology, introduction of efficiency incentives in the compensation mechanism and publication of information including the amounts of aid granted.

¹³⁸ See Paragraph 69 of the Framework.

¹³⁹ See Paragraph 70 of the Framework.

¹⁴⁰ OJ L 214, 9.8.2008, p. 3.

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

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

188. Does compliance with the SGEI package mean that public procurement rules do not have to be applied?

No. The SGEI package only deals with EU State Aid law. It does not limit by any means the application of EU public procurement rules (see recital 29 of the Decision; para. 10 (b) of the Framework; recital 21 of the SGEI *de minimis* Regulation). It also does not limit the application of national public procurement rules.

189. Is financing of SGEIs by the ESF and the ERDF State Aid? Is this the responsibility of the Member States or the Commission?

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

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

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

191. Is financing of SGEIs by the EAFRD state aid?

State aid rules apply to the financing within the framework of the Rural Development Regulation whenever MS exercise discretion as regards the allocation of the funds (cf. Article 88 of Regulation (EC) No 1698/2005). However, the Rural Development Regulation stipulates that for Annex I products the State aid rules apply neither to the Union support nor to the national contributions of the Member States.

For the support of rural development for non Annex I products, under the conditions just mentioned, the State aid rules fully apply to all parts of payments: the Union part, the

financial contribution provided for by the Member State (co-financing) and the additional national part (top-ups). The specific rules on SGEI can therefore be applied if the general State aid rules do apply.

192. Does an SGEI funding via EAFRD resources for non Annex I products have to be granted in accordance with the SGEI package?

Rural development measures concerning non-agricultural products have to be covered either by *de minimis* (Regulation (EC) No 1998/2006) or by a state aid block exemption regulation or an already approved state aid decision. In the latter case, whenever an SGEI is concerned, the conditions of the SGEI package would have to be fulfilled.

Support granted from EAFRD resources is included, like any other public funding intended to enable a company to provide services of general economic interest, in the calculation of compensation for the provision of such services. The total amount of support (i.e. Union part, co-financing and top ups) must be granted in accordance with the SGEI Package.

Responsibility for defining the parameters for calculating, controlling and reviewing the compensation in the act of entrustment rests with the national, regional or local authority setting up the service of general economic interest, regardless of the origin of the public funding allocated by that authority to the service.

193. What is the interplay between the State Aid rules on regional aid that set out specific aid intensities and the SGEI rules?

If the contribution from the ERDF fulfils all the requirements of the Decision or the Framework, it is compatible with the internal market based on Article 106(2) TFEU. The aid intensities laid down in the regional aid guidelines (based on Article 107(3)(a) and (c)) do not apply in this case.

If the undertaking performs other activities in addition to its public service tasks, it can receive regional aid for those other activities. In this case, separate accounting is necessary to ensure that the respective compatibility conditions for the two sets of activities are fulfilled.

194. Are State Aid controls compatible with controls on ESF funding?

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

The funding for a single project may have to be examined from both of these angles. The ESF controls will, where applicable, also include the respect of State Aid rules. This is due to the fact that operations co-financed by the ESF have to comply with the provisions of the Treaty and with the acts adopted under it¹⁴¹.

195. According to the rules on managing ESF funds, only items of expenditure and receipts strictly devoted to the project being co-financed are eligible, i.e. excluding reasonable

¹⁴¹ Cf. Article 9(5) Regulation (EC) No 1083/2006.

profit. In the case of an SSGI funded from ESF resources, can reasonable profit be included, as provided for in the Decision?

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

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

Projects funded by the ESF are subject to systematic control by the authorities responsible for managing ESF operational programmes. Regulation (EC) No 1083/2006 contains detailed provisions on the control systems to be put in place by the authorities in charge of the ESF operational programmes. ESF managing authorities have to verify whether the co-financed products and services are delivered and whether the expenditure declared by beneficiaries for operations has actually been incurred and complies with Union and national rules. Before expenditure can be declared to the Commission, the certifying authority has, inter alia, to certify that the statement of expenditure is accurate and that the expenditure declared complies with applicable Union and national rules.

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

197. If a Member State confers an advantage on an undertaking entrusted with public service obligations in the area of electronic communications which go beyond the scope of Directive 2002/22/EC¹⁴² as amended by Directive 2009/136/EC, is it still possible to assess the compensation in question in the light of the State Aid rules?

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

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

¹⁴² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51.

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

4.1 The SSGI is provided by the public authority itself

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

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

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

The ‘in-house’ exception is meant to cover a situation where a public authority decides to provide a service itself, albeit acting through a legally distinct entity. In this case the public authority and the entity providing the service are effectively regarded as one. Such a relationship is covered neither by the principles of transparency, equal treatment and non-discrimination derived from the Treaty, nor by the Public Procurement Directive 2004/18/EC (hereinafter ‘the Directive’)¹⁴³.

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

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

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

The Court of Justice has made it clear that if a private undertaking holds even a minority share in the capital of that third entity this will exclude the possibility of a public authority exercising over that entity a control similar to that which it exercises over its own departments¹⁴⁴.

and

¹⁴³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

¹⁴⁴ Case C-26/03 *Stadt Halle* [2005] ECR I-0001, paragraphs 49-50.

B) The essential part of the activities of the legally distinct entity is carried out with the controlling public authority or authorities¹⁴⁵.

In house-exception and similar joint control: As regards the first criterion (similar control), the Court has recognised that it is not essential for the similar control to be individual and that it can therefore be exercised jointly by several public authorities¹⁴⁶. It has also confirmed that, if several public authorities control a legally distinct entity, the second criterion (essential activity) may also be met by taking into account the activity which the legally distinct entity carries out with all of the public authorities together¹⁴⁷. Consequently, public procurement procedures do not have to be applied if several public authorities cooperate within a separate public entity which is subject to joint control by the public entities which own it and which carries out its essential activity with those same public entities. For further information on cooperation between public authorities see the answer to question 211.

For information about compliance with the rules on State Aid in cases where the SSGI provider is linked to the public authority ('in-house provider'), see the answer to question 220.

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

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

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

Two cases must be distinguished:

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

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

If the relevant thresholds are reached¹⁴⁸ the public service contracts will fall within the scope of the Directive. However, under Article 21 of the Directive, health and social services contracts are not subject to all of the detailed rules of the Directive¹⁴⁹; only a very small number of its articles apply. These require, in particular, that the technical specifications¹⁵⁰ must be laid down in accordance with the Directive at the start of the procurement process (see the answer to question 203) and the results of

¹⁴⁵ Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50.

¹⁴⁶ Case C-324/07 *Coditel Brabant* [2008] ECR I-8457 and Case C-573/07 *Sea* [2009] ECR I-8127.

¹⁴⁷ Case C-340/04 *Carbotermo* [2006] ECR-I-4137, paragraph 70, and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 62.

¹⁴⁸ Article 7 of Directive 2004/18/EC.

¹⁴⁹ Social services and health services are among the services listed in Annex II B to Directive 2004/18/EC. Contracts for such services are subject only to a limited number of provisions of the Directive (on the distinction between the services listed in Annexes II A and II B, see Articles 20 and 21 of Directive 2004/18/EC). The codes referred to may be consulted on the DG Internal Market website at www.simap.europa.eu.

¹⁵⁰ Article 21 read in conjunction with Article 23 of Directive 2004/18/EC.

the award procedure¹⁵¹ must be published. Moreover, when awarding health and social services contracts, the public authorities must also comply with the basic principles of the TFEU, such as the transparency requirement and the obligation to treat economic operators equally, without discrimination, if and in so far as the services in question are of cross-border interest¹⁵². For further information about the concept of cross-border interest see the answer to question 201.

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

It should be noted, however, that in the case of mixed service contracts that comprise social services and other services that are fully covered by the Public Procurement Directive¹⁵³, such as transport, scientific research, consulting or maintenance, the Directive will apply to a limited extent only – as explained above – if the value of the social service¹⁵⁴ is greater than the value of the other service.

For example, ambulance services have both a health service component and a transport service component. If the transport service exceeds the health service in value, all the provisions of the Directive will apply. If the value of the health service is higher, the Directive will apply only partially, as explained above¹⁵⁵.

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

If the value of the contract to be awarded is less than the threshold for applying the Directive, the public authority must nevertheless comply with the basic rules and principles of EU law, such as the principles of equal treatment, non-discrimination and transparency, if the contract in question is of cross-border interest. For further information about the exact nature of these principles, see the answer to question 201.

B) The public authority grants a service concession. In this case the remuneration consists mainly of the right to exploit the service economically¹⁵⁶. The concessionaire assumes the substantial operating risk resulting from the exploitation of the service in question¹⁵⁷. Public authorities granting service concessions must, where they have a cross-border interest comply with the basic rules and principles of EU law, particularly the principles of transparency, equal treatment and non-

¹⁵¹ Article 21 read in conjunction with Article 35(4) of Directive 2004/18/EC.

¹⁵² In other words, they are of interest to economic operators situated in other Member States of the European Economic Area. See Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraphs 29 *et seq.*

¹⁵³ The services listed in Annex II A to Directive 2004/18/EC.

¹⁵⁴ Article 22 of Directive 2004/18/EC.

¹⁵⁵ See Case C-76/97 *Tögel* [1998] ECR I-5357, paragraphs 29-40.

¹⁵⁶ See Article 1(4) of Directive 2004/18/EC.

¹⁵⁷ See Article 17 of Directive 2004/18/EC and Court of Justice case law, particularly the judgment of 25 March 2010 in Case C-451/08 *Helmut Mueller* [2010] ECR I-2673.

discrimination¹⁵⁸. For further information about the exact nature of these principles see the answer to question 202.

201. What is meant by the concept of cross-border interest?

A public contract or concession has a cross-border interest if it is of interest to economic operators situated in other Member States of the European Economic Area¹⁵⁹.

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

If a public contract or concession is of cross-border interest, the public authority must comply with the principles of the TFEU (non-discrimination, transparency, etc.)¹⁶⁰ during the procedure for awarding it. Public contracts and concessions that have no cross-border interest are not bound by the principles of the TFEU.

Thus, under certain conditions, small, local service contracts may be awarded without complying with the above principles, if the services in question have no cross-border interest for operators from other Member States and therefore have no impact on the functioning of the internal market. This might be the case if, in view of the very modest value of the contract¹⁶¹ (well below the threshold for application of the Directive 2004/18/EC which currently stands at EUR 200 000¹⁶²) and the nature of the social service and market segment involved, it is unlikely that economic operators from other Member States will be potentially interested in providing the services in question¹⁶³.

For instance, in cases involving contracts for legal services worth an average of around EUR 5 000 EUR¹⁶⁴ or town planning services worth between EUR 6 000 and EUR 26 500¹⁶⁵ the Commission considered that, in view of their low value (around 10% or less of the threshold for application of the Directive) and the individual circumstances of the cases, the contracts in question were not relevant to the internal market.

Nor is the existence of a complaint relating to the contract in question sufficient evidence that it is of cross-border interest¹⁶⁶.

¹⁵⁸ See the following judgments: Case C-324/98 *Telaustria* [2000] REC I-10745, paragraph 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16-19 and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 49.

¹⁵⁹ See Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraphs 29 *et seq.*

¹⁶⁰ Case C-59/00 *Bent Moustén Vestergaard* [2001] ECR I-9505, paragraph 20, Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraphs 32-33, Case C-6/05 *Commission v Greece* [2007] ECR I-4557, paragraph 3.

¹⁶¹ The criterion of value alone is not sufficient to indicate that a market has no cross-border interest. As the Court of Justice ruled in Joined Cases C-147/2006 and C-148/2006 *Secap* [2008] ECR I-3565, paragraph 31 'in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.'

¹⁶² After indexation under Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract.

¹⁶³ See Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20, which related to service concessions.

¹⁶⁴ See press release IP/07/357, 21 March 2007.

¹⁶⁵ See press release IP/06/1786, 13 December 2006.

¹⁶⁶ See Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraph 34.

When evaluating the relevance of the contract to the internal market, public authorities can refer to the Commission interpretative communication¹⁶⁷ on EU law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives¹⁶⁸. This communication encompasses contracts only partially covered by the Public Procurement Directives, such as contracts for health and social services¹⁶⁹. Since the communication contains a general interpretation of the concept of internal market relevance under the Treaty, it can also be used as a guide for concessions.

202. What are the obligations deriving from the principles of transparency and non-discrimination?

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

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

Court of Justice case law on effective judicial protection¹⁷⁰ requires, at a minimum, that decisions adversely affecting a person who has or had an interest in obtaining the contract, such as a decision to eliminate a bidder, should be subject to review for possible violations of the basic standards derived from EU primary law.

When applying these principles, the public authorities can draw on the Commission interpretative communication on the EU law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. As mentioned above, this communication also deals with contracts that are only partially covered by the Public Procurement Directives ('the Directives')¹⁷¹, such as contracts for the services listed in Annex II B to Directive 2004/18/EC, which include health and social services¹⁷². As stated at question 200 and pursuant to Article 21 of Directive 2004/18/EC, public contracts for these services are subject to certain rules of Directive 2004/18/EC only (namely the obligation to define the technical specifications in the contract documents and to publish the result at the end of the procedure) and are

¹⁶⁷ This Communication has been analysed by the Court case T-258/06, *Germany v Commission* who concluded, in general, that the Communication does not contain new rules for the award of public contracts which go beyond the obligations under Union law as it currently stands.

¹⁶⁸ OJ C 179, 1.8.2006, p. 2.

¹⁶⁹ As referred to in Annex II B to Directive 2004/18/EC.

¹⁷⁰ See Case C-50/00 P *Union de Pequeños Agricultores* [2002] ECR I-6677, paragraph 39, and Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

¹⁷¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

¹⁷² As referred to in Annex II B to Directive 2004/18/EC.

otherwise governed by the general principles of the TFEU (non-discrimination, transparency, etc.) if they are of a certain cross-border interest.

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

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

The Directive offers a wide range of possibilities for drawing up specifications¹⁷³. It is up to the public authorities to make full use of these possibilities by requiring bidders to develop tailor-made service concepts in order to provide the best possible services of the requisite quality standard. They may, for instance, specify that bidders have to address the particular needs of certain groups of users or insist that the proposed service concept must be compatible with existing structures that are already in place. It is also conceivable that a public authority might insist that the service be operated and evaluated in a way that involves the users.

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

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

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

When **setting out the technical specifications**¹⁷⁴, for example, the public authority may specify all the characteristics of the service which it considers useful to ensure high-quality provision (e.g. requirements to ensure continuity of service, the satisfaction of the specific needs of different categories of user, accessibility of infrastructure for people with reduced mobility, and more generally requirements relating to the quality of this infrastructure). The technical specifications of the service may be defined in the form of very detailed characteristics (which may in some cases contribute to over-standardisation of the services offered), or in terms of requirements for functional performance. The second approach usually leaves candidates a greater margin of discretion, allowing them the opportunity to suggest to the public authority more innovative solutions/working methods for achieving the quality targets that have been set.

¹⁷³ Article 23 of Directive 2004/18/EC, which also applies to the services listed in Annex II B to the Directive, including social services.

¹⁷⁴ See Article 23 of Directive 2004/18/EC.

The experience and standard of the service provider's staff are also decisive factors contributing to the quality of the service provided. When setting out the **selection criteria**¹⁷⁵, the public authority may specify particular requirements for professional ability (e.g. professional experience, staff qualifications, technical infrastructure available) to ensure that the selected contractor has sufficient capacity to perform the service to the quality standards laid down by the contract.

Quality requirements may also be included in the **award criteria**¹⁷⁶. The public authority is not compelled to award the contract on the basis of the lowest price, but may award it to the most economically advantageous tender. This allows it to include in the award criteria all the qualitative factors it considers important and which are linked to the subject matter of the contract. The public authority may also use the weighting of the different award criteria to reflect the importance it attaches to the various qualitative aspects of the service.

The **conditions for performance of the contract**¹⁷⁷ are another way of focusing on the quality of the service. The public authority may, for example, include in the performance criteria¹⁷⁸ clauses requiring the contractor to ensure a proper level of training and remuneration for the staff involved in implementing the contract, provided that these are compatible with the relevant provisions of EU law. Such clauses ensure that the contractor is not tempted to cut staff costs, which might demoralise the employees in question, increase staff turnover and ultimately undermine the quality of the service delivered.

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

205. Is it possible to amend the contract during implementation?

Amendments during the lifetime of the contract are possible provided they do not substantially change the terms of the original tender¹⁷⁹.

According to the Court of Justice, an amendment to a public contract during its currency may be regarded as being substantial in the following cases:

- when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;

¹⁷⁵ See Articles 44 and 48 of Directive 2004/18/EC.

¹⁷⁶ See Article 53 of Directive 2004/18/EC.

¹⁷⁷ See Article 26 of Directive 2004/18/EC.

¹⁷⁸ For reasons of transparency, the performance criteria must be published in advance in the contract documentation. Compliance with the performance criteria cannot be verified before the contract is awarded; verification will only be possible during implementation. To ensure compliance the public authority may make provision for deterrent contractual penalties.

¹⁷⁹ Case C-496/99 *Commission v CAS Succhi di Frutta SpA* [2004] ECR I-3801, paragraph 116 and Case C-454/06 *Pressetext*, 2008 I-04401, paragraphs 35 to 37.

- when it extends the scope of the contract considerably to encompass services not initially covered;
- when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.¹⁸⁰

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

It is up to the public authority to structure the tender in a way that gives small economic operators a chance to participate and succeed. The wider the scope of the service required and consequently the more exacting the economic and financial requirements, the more difficult it will be for small service providers to participate. In the case of bigger contracts (for instance for a range of services or for services to be performed in several places), the awarding authority might consider dividing the contract into different lots that are more accessible to SMEs. However, an artificial splitting of contracts into separate contracts of a value under the thresholds with the effect of circumventing the application of the relevant provisions of the Public Procurement Directives is not permitted by the Directives. In general, it is advisable for public authorities to draw up tender specifications with SMEs in mind, keeping formalities to a strict minimum.

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

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

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

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

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

Examples:

¹⁸⁰ Case C-454/06 *Pressetext*, 2008 I-04401, paragraphs 35 to 37.

- A public authority may, for instance, require as part of the performance criteria that the successful tenderer establish a local infrastructure such as an office or a workshop or deploy specific equipment at the place of performance, if this is necessary for the provision of the service.
- A municipal authority intending to set up a women's shelter, intended particularly for women from a specific cultural minority, may specify in the call for tenders that the service provider must have prior experience of this kind of service in an environment with similar social and economic characteristics, and that the employees who will be in contact with and/or address the needs of the women facing problems must be sufficiently familiar with the relevant cultural and linguistic context.
- A public authority that intends to put in place a job placement service targeting young unemployed adults from disadvantaged areas and addressing in an integrated way the specific difficulties encountered by the users (e.g. mental health problems, drug addiction or alcohol abuse, social housing and debt) might specify that the service provider must have prior experience with this kind of service for similar target groups. It may also indicate that the service provider must ensure that from the outset the employees dealing with the users of the service have a knowledge of the networks of social actors that already exist, with whom they will need to liaise in order to address the needs of the young unemployed adults in an integrated way.

In any event, a restriction of this kind must not go beyond what is strictly necessary to ensure adequate service provision. The Court of Justice decided, for example, that when awarding a public contract for health services providing home respiratory treatments a public authority cannot require the potential tenderer to have, at the time when the tender is submitted, an office open to the public in the capital of the province where the service is to be provided¹⁸¹.

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

The issue of the direct award of low-value contracts to small local service providers has already been addressed in the answer to question 206.

209. Is it possible to limit the tender to non-profit service providers only?

Two situations have to be distinguished:

- Individual contracting authorities cannot decide themselves to limit a tender procedure to non-profit service providers. The Public Procurement Directive is based on the principles of equal treatment and non-discrimination of economic operators¹⁸². The Directive does not, therefore, allow contracts to be reserved for specific categories of undertaking¹⁸³, such as non-profit organisations,

¹⁸¹ Case C-234/03 *Contse* [2005] ECR I-9315, paragraph 79.

¹⁸² Article 2 of Directive 2004/18/EC.

¹⁸³ This is why a specific exception had to be included in the Directive to allow Member States to reserve the right to participate in certain contracts to a particular category of organisations, i.e. sheltered

regardless of the type of services involved – whether listed in Annex II A or Annex II B to the Directive (e.g. social services)¹⁸⁴.

- However, national law¹⁸⁵ regulating a particular activity might, in exceptional cases, provide for restricted access to certain services for the benefit of non-profit organisations. In this case public authorities would be authorised to limit participation in a tender procedure to such non-profit organisations, if the national law is compatible with European law. Nevertheless, such a national law would restrict the working of Articles 49 and 56 of the TFEU, on the freedom of establishment and the free movement of services, and would have to be justified on a case-by-case basis. On the basis of the case law of the Court of Justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social welfare system¹⁸⁶.

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

As mentioned in the answer to question 202, the public authorities may use negotiated procedures in order to purchase health or social services through public contracts or concessions. The public authorities in question will not be subject to the specific rules on negotiated procedures laid down in Directive 2004/18/EC, since this Directive does not apply to service concessions and contains only a few rules applicable to the services listed in Annex II B to the Directive (such as SSGIs)¹⁸⁷. For this reason, when awarding a public contract or an SSGI concession, public authorities are free to organise an *ad hoc* negotiated procedure provided national law does not lay down specific rules. In any case, the general principles of transparency and non-discrimination laid down by the TFEU, in accordance with which equal treatment must be given to all the economic operators invited to participate in the negotiated procedure, are applicable to services with a cross-border interest.

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

workshops where most of the employees concerned are disabled (see Article 19 of Directive 2004/18/EC).

¹⁸⁴ The distinction between the services in Annex II A and those in Annex II B is relevant only from Article 20 of the Directive onwards.

¹⁸⁵ The term ‘national law’ refers to general, abstract national rules, as opposed to a decision by an awarding authority in the context of a specific contract. On the other hand, the level of legislation (national or regional) is not crucial here, provided that the rules are abstract and generally applicable.

¹⁸⁶ See Case C-70/95 *Sodemare SA v Regione Lombardia* [1997] ECR I-3395.

¹⁸⁷ As stated in answer 199 and pursuant to Article 21 of Directive 2004/18/EC, public contracts for these services are subject only to certain rules of Directive 2004/18/EC (namely the obligation to define the technical specifications in the contract documents and to publish ex-post the result of the procedure) and are otherwise governed by the general principles of the TFEU (non-discrimination, transparency, etc.).

The public procurement rules apply when a public authority intends to award a public service contract to a third party¹⁸⁸ in return for payment. It makes no difference whether the third party is a private operator or public authority.

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

- Thus, the Court of Justice recently found that public authorities could carry out the public service activities for which they were responsible by using their own resources, in cooperation with other public authorities, without the need for any particular form of organisation or the need to provide for application of European public procurement legislation to the implementation of these organisational practices.
 - (a) Cooperation between public authorities can be organised within the framework of a separate public body that meets the in-house criteria¹⁸⁹. Concerning this point, see question 199.
 - (b) The Court of Justice has also stated¹⁹⁰ that public/public cooperation does not necessarily require the creation of new jointly-controlled entities. According to the Court, such cooperation can be based simply on cooperation between public bodies with the sole purpose of jointly ensure the execution of a public task which the bodies concerned have to perform, for the pursuit of public interest objectives. This does not necessarily mean that each public authority cooperates in an equal measure in carrying out the public interest tasks, since the cooperation can be based on sharing tasks and on specialisation. However, there must be genuine cooperation, with mutual rights and obligations between the participants, as opposed to a public contract where one party carries out a task in return for payment. There must not be any financial transfers between the public authorities other than reimbursements of costs. The cooperation must be based solely on considerations and requirements linked to the pursuit of public interest objectives, which excludes the pursuit of profit and the participation of any private or mixed capital entities. Finally, the cooperation agreement cannot be artificially used as a means to circumvent the application of the relevant rules of the Public Procurement Directives.
- Public authorities such as municipalities can of course jointly organise public procurement procedures. Thus, a public authority can launch a procedure for itself and for another public authority¹⁹¹ provided it announces this at the start of the procedure. The public procurement rules will thus apply to a procedure launched by the public authority for itself and for the other public authority/ies, but will not apply to cooperation between public authorities.

¹⁸⁸ See the judgments in Cases C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51, C-94/99 *ARGE* [2000] ECR I-11037, paragraph 40, and C-220/05 *Auroux* [2007] ECR I-385, paragraph 62.

¹⁸⁹ See the judgment in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457.

¹⁹⁰ See the judgment in Case C-480/06 *Commission v Germany* [2009] ECR I-4747.

¹⁹¹ See Article 11 of Directive 2004/18/EC on central purchasing bodies.

- Several public authorities can create a new entity and fully transfer to it a specific task. In this case, the public authorities do not retain any control over the service performed, which is provided by the new entity acting in full independence and under its own responsibility. In this case, no service is provided and consequently neither the Treaty nor the directives apply¹⁹².
- When public authorities put in place structures involving mutual assistance and cooperation for no remuneration, there is no provision of services within the meaning of the Treaty and EU law is not applicable.

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

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

With regard to institutionalised PPPs (implying the existence of a mixed capital entity), it should be pointed out that, as indicated in the answer to question 199, there cannot be an ‘in-house’ relationship between a public authority and a public-private entity in which a public authority participates jointly with a private entity. Consequently, it follows that services entrusted to a public-private entity must be awarded in accordance with the public procurement rules laid down in the Treaty or in the Public Procurement Directives. It also follows that the acquisition by a private operator of a share in the capital of an entity that performs public tasks awarded under an arrangement involving an in-house relationship puts an end to this relationship and makes it necessary to re-tender the contract or concession in question, unless the private operator has been selected in accordance with the public procurement rules.

If a public authority follows an award procedure in accordance with European public procurement law in order to select a private partner who is to perform the service contract or benefit from the service concession jointly with a public authority within the framework of a mixed public-private entity, it is no longer necessary to organise a second award procedure for provision of the service. However, if there is any substantial change in the parameters concerning the provision of the service not envisaged in the original public procurement procedure, a new procedure must be launched. For further information, refer to the Commission communication on institutionalised PPPs¹⁹³, which explains in detail how to organise such a procedure.

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

¹⁹² See Commission press release IP/07/357 of 21.3.2007, which states that the complete transfer of a public task from one public entity to another does not imply the provision of services for remuneration within the meaning of Article 49 of the EC Treaty, if the public entity to which the task has been transferred performs this task in full independence and under its own responsibility. Such a transfer of public tasks constitutes an act of internal organisation of the public administration of the Member State in question. As such, it is not subject to the Treaty and its fundamental freedoms.

¹⁹³ Commission interpretative communication C(2007) 6661 on the application of Community law on public procurement and concessions to institutionalised public-private partnerships (IPPPs), OJ 2008 C 91, p. 4.

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

If the contract in question is not covered by the above-mentioned Directives, as is the case, for example, with service concessions or public contracts whose value is lower than the thresholds for application of those Directives, the rules and principles of the TFEU, as interpreted by the Court of Justice, still apply if the contracts are of certain cross-border interest¹⁹⁴. In this respect, the obligation to observe the principles laid down by the TFEU, in particular the principle of non-discrimination, also prevents the authority awarding the contract from imposing conditions not linked to the subject of the contract or to its performance, when awarding contracts not covered by the Public Procurement Directives.

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

However, as mentioned in the answer to question 203, the public authority may require the specific service to be performed and assessed in a way involving the participation of the users, provided that this does not lead to discrimination of any kind or prejudice the award of the contract.

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

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

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

¹⁹⁴ See the judgment in Case C-324/98 *Telaustria* [2000] ECR I-10745.

For example, public authorities are free to define the technical specifications¹⁹⁵, either by drawing up detailed technical characteristics or by performance or functional requirements¹⁹⁶. In the latter case, the public authorities may indicate the results sought without specifying in detail the means. This encourages the creativity of the candidates, who can identify and propose more innovative solutions in order to meet users' complex needs.

The use of variants¹⁹⁷ is another means of encouraging innovation. Public authorities which authorise variants can thus compare the advantages and disadvantages of a more innovative alternative to the standard solution.

Given that SSGIs are subject only to a few of the rules in Directive 2004/18/EC, the public authorities may choose the procedure they consider the most appropriate for the specific service in question, provided that the procedure chosen is in line with the TFEU principles (transparency, non-discrimination). For example, in the case of complex SSGIs for which the public authority is not in a position to identify the best way of meeting users' specific needs, it can use a procedure similar to that of the competitive dialogue¹⁹⁸.

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

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

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

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

¹⁹⁵ Article 23 of Directive 2004/18/EC.

¹⁹⁶ As stated in Article 23(3) of Directive 2004/18/EC, when technical specifications are defined in terms of performance or functional requirements, 'However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract'.

¹⁹⁷ See Article 24 of Directive 2004/18/EC. Even if the social services of general interest are subject only to a limited number of the rules laid down in Directive 2004/18/EC, the public authorities may of course use the optional provisions of the Directive if they consider them useful.

¹⁹⁸ Provided for in Article 29 of Directive 2004/18/EC for contracts subject to all the Directive's rules.

Yes. The competent public authority may, for example, establish in advance the conditions for provision of a social service and, after sufficient advertising and in accordance with the principles of transparency and non-discrimination (see the answer to question 202), grant licences or authorisations to all providers meeting these conditions. Such a system does not specify any limits or quotas concerning the number of service providers; all those meeting the conditions can participate.

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

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

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

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

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

When the establishment of an SGEI gives rise to the award of a public contract or a concession (i.e. when a service is provided in return for remuneration in the form of payment of a price or by granting the right to exploit the service notably remunerated by a fee payable by users), the public authorities must comply not only with the State Aid rules but also with the rules on public contracts and concessions. For more information see the answer to question 200.

If management of an SGEI is awarded as part of a public procurement procedure allowing selection of the candidate able to provide the service at the least cost to the community, and if the other conditions of the *Altmark* judgment are complied with (for these conditions, see question 61), the compensation awarded does not constitute State Aid within the meaning of the *Altmark* judgment.

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

The State Aid rules and the rules on public contracts and concessions have different aims and scope. The State Aid rules relate to the conditions for financing SGEIs and consequently economic SSGIs and are aimed at preventing distortions of competition caused by financing or similar benefits granted by the State and its emanations. The rules on public contracts and concessions, on the other hand, concern the conditions for awarding these services to operators. One of their main aims is to ensure equal treatment and transparency and prevent distortions of competition that may arise from the management of public funds by the contracting authorities when awarding these services.

Other aims are to maximise competition in Europe and value for money, particularly for service users.

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

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

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

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

- a) the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences;
- b) the nature of the service and the way in which it is to be provided are specified in detail by the public authority;
- c) the contract provides for remuneration of the service (payment of a price or granting of the right to operate the service in return for a fee payable by users);
- d) the public authority takes the initiative of finding a provider to whom to entrust the service
- e) the contract lays down penalties for failure to meet contractual obligations, in order to guarantee that the service entrusted to the third party is provided properly in such a way as to meet the public authority's requirements (penalties, compensation for damages, etc.).

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

219. Is it possible for the concessionaire of an SGEI to receive State Aid in the form of public service compensation in order to cover the effective costs of the public service task it is entrusted with?

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

With regard to the rules on public contracts and concessions, the concept of service concession does not preclude granting of State Aid if the concessionaire continues to assume the substantial operating risk involved in providing the service. However, if the

aid removes the risk involved in providing the service or renders it negligible, the contract in question might qualify as a public service contract. In this case, the detailed provisions of the Directive are applicable in principle.

However, with regard to the services indicated in Annex II B to the Directive, such as social services, only certain provisions of the Directive are applicable (see the answer to questions 200 and 202).

220. Does the exception whereby the public procurement rules do not apply to in-house operations mean that the State Aid rules do not apply either?

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

For information on the State Aid rules, see the answer to question 44.

For information on the EU rules on public procurement, see the answer to question 199.

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

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

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

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

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

6 GENERAL QUESTIONS RELATING TO THE APPLICATION TO SGEIS, AND SSGIS IN PARTICULAR, OF THE TREATY RULES ON THE INTERNAL MARKET (FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES)

The 'Treaty rules on the internal market' here refer to the provisions of the Treaty on the Functioning of the European Union (TFEU) on the freedom of establishment

(Article 49 of the Treaty) and the freedom to provide services (Article 56 of the Treaty). With regard to the rules on public procurement, see the part of the document dealing with public procurement (section 4).

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

SSGIs are covered by the internal market rules in the TFEU (Articles 49 and 56) where they constitute an ‘economic activity’ within the meaning of the Court’s case law on the interpretation of those Articles. Certain SSGIs may also be covered by the Services Directive. However, ‘non-economic’ activities are not covered by any of these rules.

The concept of ‘economic activity’ is a concept in EU law which has been progressively developed by the Court on the basis of Articles 49 and 56 of the TFEU. Since this concept defines the field of application of two of the fundamental freedoms guaranteed by the Treaty, it may not, as such, be interpreted restrictively¹⁹⁹. For more information on the concept of ‘economic activity’ within the meaning of the Treaty rules on the internal market, see question 223.

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

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

In accordance with the Treaty rules on the internal market, all services provided for remuneration must be classified as economic activities. According to Court of Justice case law, the service does not necessarily have to be paid for by those for whom it is performed²⁰⁰, but there must be a consideration for the service in question.

The Court has also stated that the ‘economic’ nature of an activity does not depend on the legal status of the operator or of the organisation (which may be a public body or not-for-profit)²⁰¹, nor on the nature of the service (e.g. the fact that the service provided is a social security or health service does not in itself exclude it from application of the Treaty rules)²⁰². The activities performed by members of a religious community or amateur sports association could thus be deemed to constitute an economic activity²⁰³. Furthermore, the ‘economic’ nature of an activity does not depend on how it is classified in national law. A service deemed in domestic law to be of the ‘non-market sector’ can be deemed to be an ‘economic activity’ under the Treaty rules referred to above. The fact that a service is provided in the general interest does not necessarily affect the economic nature of the activity.

¹⁹⁹ Joined Cases 51/96 and C-191/97 *Delière* [2000] ECR I-2549, paragraph 52.

²⁰⁰ For example, the Court has considered that hospital services provided free of charge under the applicable health insurance scheme could constitute an economic activity within the meaning of the Treaty.

²⁰¹ Case C-172/98 *Commission v Belgium*. In Case C-157/99 *Smits and Peerbooms* (paragraph 50), the Court threw out the argument that an additional condition for considering the provision of a service to constitute an economic activity within the meaning of Article 60 of the Treaty is that the service provider must seek to make a profit.

²⁰² Judgment in *Smits and Peerbooms*, cited above.

²⁰³ Case C-196/87 *Steymann* and Joined Cases C-51/96 and C-191/97 *Delière*.

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

The Services Directive applies to all the services that are not explicitly excluded from its scope (certain social services are excluded: for more information on the application of the Services Directive to social services, see the answer to question 229). Only activities of an economic nature as defined above are covered by the concept of ‘service’ as defined in the Directive.

For more information on the implications, for the social services concerned, of being qualified as an ‘economic activity’ within the meaning of the Treaty rules on the internal market, see also the answers to questions 226 and 227.

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

According to Court of Justice case law, activities that are performed without any consideration, by the State or on behalf of the State, as part of its duties in the social field, for example, do not constitute an economic activity under the Treaty rules on the internal market and the Services Directive²⁰⁴.

Examples:

- services provided by an organisation as part of an obligatory insurance scheme (e.g. the payment of compensation in the event of damage from natural risks)²⁰⁵.
- courses provided under the national education system²⁰⁶ or at an institute of higher education financed essentially out of state funds²⁰⁷.

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

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

²⁰⁴ Case C-109/92 *Wirth*.

²⁰⁵ In its judgment in Case C-355/00 *Freskot*, the Court considered that contributions paid to this body did not constitute economic consideration if, in particular, they were essentially imposed by the legislator and the level of the benefits provided by the insurer and the system for payment of these benefits were fixed by the legislator.

²⁰⁶ In its judgment in Case C-263/86 *Humbel*, the Court stresses that, in establishing and maintaining a national education system, the State is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

²⁰⁷ In the *Wirth* judgment referred to earlier, the Court in fact ruled that the considerations set forth in the aforementioned *Humbel* judgment applied equally to courses provided at an establishment of higher education which is financed essentially out of public funds.

level), by providers mandated by the State or by charities recognised as such by the State.

Services excluded from the scope of the Services Directive which constitute economic activities continue to be covered by the Treaty rules, in particular those on freedom of establishment and freedom to provide services (Articles 49 and 56 of the TFEU). National measures regulating the services excluded from the Services Directive are therefore still liable to be assessed for their compatibility with EU law by a national court or by the Court of Justice, in particular in the light of the above-mentioned Articles 49 and 56. Measures aimed at regulating the social services sector may be justified on the grounds of social policy objectives provided these measures are proportionate to the objectives pursued. See also the answers to questions 226 and 227.

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

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

Case law has identified a number of ‘overriding reasons of general interest’ which constitute objectives allowing the Member States to justify restrictions on the freedoms of the internal market (e.g. objectives relating to social policy, protection of the recipients of the services, consumer protection, etc.). Generally speaking, current Court case law shows that social considerations may justify restrictions on the fundamental freedoms, for example in so far as it may be considered unacceptable to allow private profit to be drawn from the weakness of recipients of services²⁰⁸. Any measure must, however, be suitable for guaranteeing the achievement of one or more legitimate objectives invoked by that Member State and must not go beyond what is necessary to achieve those objectives.

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

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

The Court of Justice has held that, according to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of certain activities by entrusting them to public or charitable

²⁰⁸ See the judgment in Joined Cases C-447/08 and C-448/08 on gambling via the internet.

bodies²⁰⁹. Any measure of this kind must, however, be suitable for guaranteeing the achievement of one or more legitimate objectives invoked by that Member State and must not go beyond what is necessary to achieve those objectives. National legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, such restrictions must be applied without discrimination.

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

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

Services of general economic interest (SGEIs) are covered by the Services Directive if they are not specifically excluded from its scope (as are, for instance, transport services, healthcare services, certain social services, electronic communications networks and services and audio-visual services). Social services have been partially excluded: they are covered by the Directive when they are provided by private operators not mandated by the State, but they are excluded when they are provided by the State, by providers mandated by the State or by charities recognised as such by the State.

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

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

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

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

Information on the laws adopted by the Member States to implement the Services Directive and links to the various legislative texts once available can be found at:

²⁰⁹ See judgment in Joined Cases C-447/08 and 448/08, paragraph 43, cited above. See also the previously cited Case C-70/95 *Sodemare SA v Regione Lombardia* [1997] ECR I-3395.

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

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

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

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

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

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

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

Moreover, it should be noted that the authorisation schemes excluded from the Services Directive still come under the Treaty rules, in particular those concerning freedom of establishment and freedom to provide services (Articles 49 and 56 of the TFEU). They are thus still liable to be assessed for compatibility with EU law by a national court or by the Court of Justice, in particular in the light of the above-mentioned Articles 49 and 56 TFEU. See also the answers to questions 225 and 230.

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

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

However, the Directive does not require the Member State to set up separate authorisation schemes depending on whether or not a service comes within the scope of the Directive, nor does it prohibit a Member State from establishing separate schemes. The main thing, from the point of view of the Directive, is that the Member State must ensure that the authorisation schemes relating to services under the scope of the Directive are brought into line with the Directive (for further details, see the answer to question 230).

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

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

Social services relating to nurseries and day care centres provided by operators not mandated by the State are not excluded from the scope of the Directive. See also the answer to question 229.

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

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

Pursuant to Article 2(2)(j) some social services (both those furnished by the ‘State’ and those provided by ‘providers mandated by the State’) have been excluded from the scope of the Directive. In accordance with recital 27 of the Directive, the concept of State

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

234. *What does the concept of ‘providers mandated by the State’ (Article 2(2)(j)) cover?*

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

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

See the answer to question 51.

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

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

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

Lastly, it must be pointed out that the services excluded from the scope of the Services Directive still come under the TFEU rules, in particular those on freedom of establishment and freedom to provide services (Articles 49 and 56 TFEU). See also the answer to question 226. As regards the application of the rules on State Aid to this type of measure, see the answer to question 52.

237. What does the concept of ‘charities recognised as such by the State’ (Article 2(2)(j)) cover?

The concept is specific to the Services Directive, hence its interpretation does not depend directly on concepts existing in the national laws of Member States or in other EU instruments. It is intended only to identify certain operators whose services can be excluded from the scope of the Directive by virtue of Article 2(2)(j), namely social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by charities recognised as such by the State.

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

Referring to this concept in its implementation handbook²¹⁰, the Commission quoted the following as examples of charities within the meaning of the Directive: ‘churches and church organisations which serve charitable and benevolent purposes’. Whether or not such an organisation is religious or lay is not decisive, however, for the purposes of defining the scope of the exclusion of social services from the Services Directive. It follows that the services provided by an organisation whose charitable nature has been recognised by the State are excluded from the Services Directive pursuant to Article 2(2)(j) irrespective of whether the organisation concerned is lay or religious.

²¹⁰ Handbook on implementation of the Services Directive, available at the following website: http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.