

European Commission
Directorate General for Competition

HSH ID number: 21670554010-14

Deres ref:

Oslo, 09.09.2010
Vår ref: Gerhard Salicath/ 10-8510

State aid rules on services of general economic interest

Reference is made to the public consultation on the State aid rules on services of general economic interest. HSH is the Federation of service enterprises in Norway. HSH has approximately 14,000 member companies which altogether employ approximately 180,000 people.

As a general comment HSH is concerned that the four Altmark criteria are too rigid and difficult to apply. This again might be detrimental to transparency and general awareness of the rules. HSH urges the Commission to increase efforts to simplify the rules - whilst also ensuring legal certainty. HSH also urges the Commission to revise the current rules package in a way that will increase coherence between the state aid rules for SGEI with the rules on public procurement.

Please see the enclosed questionnaire below for HSH's full comments.

Vennlig hilsen

HSH

Harald Jachwitz Andersen
Director

Gerhard Salicath
Special adviser

ABOUT YOU

For the rules on personal data protection on the EUROPA website, please see:
http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

Specific privacy statement: Received contributions, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case the contribution may be published in anonymous form. Otherwise the contribution will not be published nor will, in principle, its content be taken into account.

1. Please provide your contact details below.

Name	Gerhard Salicath
Organisation Represented	HSH
Location (country)	Norway
E-mail address:	gs@hsh-org.no

2. Do you represent an SGEI provider?

Yes No

If yes, what kind(s) of SGEI(s) do you provide and in which sector?

- HSH is the Federation of service enterprises in Norway. HSH offers services to employers related to employment, commercial and social issues.
- HSH represents the interests of service-providing companies and organisations and offers services that make it easier to be an employer and to run a business. HSH has approximately 14,000 member businesses with a total of approximately 180,000 employees.

3. Do you represent a local authority?

Yes No

If yes, what kind(s) of SGEI(s) have you entrusted, if any?

--

4. Are you working for an organisation representing SGEI users?

Yes No

5. Do you belong to the academic community?

Yes No

6. Are you representing another kind of stakeholder?

Yes No

If yes, please give details:

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its [Code of Conduct](#).

If you are a **registered organisation**, please indicate the name and address of your organisation and your register ID number on the first page of your contribution:

Your contribution will then be considered as representing the views of your organisation.

If your organisation is not registered, you have the opportunity to [register now](#). Then turn to this page to submit your contribution as a registered organisation.

Responses from organisations not registered will be published separately.

SECTION A: QUESTIONS CONCERNING THE NOTION OF SGEI

1. Is it clear to you which activities may be considered as an SGEI?

Yes No Partially

If not, please explain why, possibly by giving concrete examples:

2. Do you know any services which have been qualified as SGEIs by public authorities?

Yes No

If yes, can you please describe them and indicate the public service obligations related to this SGEI?

Examples of SGEI in Norway:

ICT-services and Telecommunications

- Provides essential information and communication networks in society. Usually provided by private service providers, but provide key services for functioning of society, from private homes to business, education sectors, health and care sectors public administration etc.

Transport

- Public transport such as commuter transport. Could be entrusted to private operators by national, regional and municipal authorities. With the exception of railways, transport services are carried out by private service providers.

Cleansing and renovation

- Cleansing and renovation are key services provided by municipalities to their population. These services are often provided by private operators, but remain a public responsibility

Health and social services

- Health and social services are at the core of public service provision, and are provided at both national regional and local levels with varying degrees of specialisation and the different administrative levels. Health and social services are legally a key public responsibility, but a large part of the actual services are produced and delivered by private service providers.

Education (from pre-primary to tertiary education)

- Education is a key public service provided on national, regional and municipal level. Education is legally a public responsibility. There is however an increasing number of private institutions providing education services. App 50 pct of all pre primary institutions is privately owned.

SECTION B: QUESTIONS CONCERNING THE NOTION OF STATE AID

The Treaty rules, as they have been interpreted by EU case law, define the notion of State aid, as well as the conditions under which State aid rules apply to SGEI.

3. Have you encountered difficulties in applying the conditions of Article 107(1) of the [Treaty on the Functioning of the European Union](#) (TFEU)?

Yes No Partially N/A

If yes or partially, on which specific condition(s)?

- Economic activity: Yes No
- Effect on trade: Yes No
- Economic advantage: Yes No
- Selectivity: Yes No
- Transfer of State resources: Yes No

4. Could you give some concrete examples?

SECTION C: APPLICATION OF THE ALTMARK RULING

In its judgment in the case of Altmark Trans GmbH, the European Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107(1) of the TFEU provided that four cumulative conditions are met.

- Firstly, the recipient undertaking must actually have clearly defined public service obligations to discharge.
- Secondly, the parameters for the calculation of the compensation at stake must be established in advance in an objective and transparent manner.
- Thirdly, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
- Fourthly, where the undertaking which is to discharge public service obligations 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 established on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

5. Have you encountered difficulties in the application of the Altmark conditions, especially in respect of the 4th one?

Yes No Partially N/A

If yes, please explain these difficulties. If possible, please give concrete examples:

1. As a general point the application of the Altmark criteria are ridged and difficult. The complexity of the principles and the corresponding complexity of the rules are at times detrimental to transparency and predictability. The rigidity and lack of transparency might also make it difficult to apply the rules and thus contribute unintendedly to lack of compliance.
2. As regards the first point, even if an undertaking actually has a clearly defined PSO, market conditions might change sufficiently, something which in turn might alter the character of the PSO in question. This raises the question whether the current operator should continue with delivery of the PSO, and under which conditions that service might be delivered. For the undertakings in question this amounts to uncertainty. This might also endanger normal depreciations on investments and thus put expected or planned public service delivery at risk of not being carried out.
3. As regards the second point, in theory it is quite clear that any compensation for delivery of public services must be determined prior to the actual service delivery. In practise however, frequently changing framework conditions and changing market conditions changes the cost of production during contract periods. These changes usually lead to increasing costs of production, with limited possibilities of increasing prices to the consumer. The latter is particularly the case as PSO delivery often occurs in regulated markets

This can be exemplified by effects of exogenous changes in framework conditions, that by nature were impossible to include in the agreed compensation, and thus are not covered in the contract for the public service discharge. This might lead to a situation where the private operator might decide to terminate the contract in order to avoid economic difficulty, and thus leave the public authority short of actual service provision. If the public authority should want to compensate for the increasing costs, they on their part risk providing state aid in breach of art 61.1 EEA, as the nature of the increasing cost made it impossible to include in the agreed compensation in advance of the intended service

discharge.

4. As regards the third point, it is important to keep in mind that the cost of production and cost of delivery might vary considerably from year to year. This in turn will affect investment needs, capital costs and to changes in need for skilled labour etc. This might again influence the notion of how to determine “reasonable profit” from one year to another.
5. As regard the fourth point, it is clear that the notion of a typical undertaking that is well run and adequately equipped is difficult to apply as a basis for determining the level of compensation for production and delivery of PSO. Moreover, SGEI covers a wide range of public services or services that are vital to a well functioning society, in very different sectors of the economy. Thus a comparison of compensation between different sectors must not be based on an artificial definition of a “typical undertaking, well run and adequately equipped”. Any application of this principle should be based on the situation in the relevant market.
6. As a general point it appears to be a lack of coherence between the rules for compensation for PSO discharge, and the rules on public procurement. Contracts might be awarded under both set of rules in the same market. This might again lead to a legal vacuum and uneven market conditions. Efforts should be made to provide a clearer link between two sets of rules and thus provide legal more legal certainty.

6. Are you aware of examples where the Altmark ruling has been applied by national courts or national public authorities?

Yes No

If yes, you are welcome to provide information:

SECTION D: CONDITIONS OF THE DECISION AND THE FRAMEWORK

In order to provide legal certainty in the financing of SGEI, while ensuring a level playing field between all undertakings in the single market, the Commission adopted in 2005 the "SGEI Package", to define under which conditions public service compensation that constitute State aid can still be granted for the fulfilment of public service missions. In particular, the Decision defines the conditions under which public service compensation is compatible and is exempted from notification to the Commission, while the Framework

explains how the Commission will assess all remaining public service compensation that has to be notified to the Commission.

These conditions consist in the existence of an act of entrustment containing a precise and correct definition of the service of general economic interest, the definition of the parameters to establish the appropriate amount of the compensation, the absence of overcompensation and the safeguards to avoid any overcompensation.

D.1: ENTRUSTMENT

QUESTIONS REGARDING THE ACT OF ENTRUSTMENT:

7. Are you aware of the legal instruments (contracts, laws, concessions, etc.) that have been used to entrust SGEI to SGEI providers in your sector/region?

Yes No

If yes, you are welcome to provide information on these forms of legal acts:

- Legal acts regulating the provision of health and care services (Lov om kommunehelsetjenester and lov om spesialisthelsetjenester)
- Legal acts regulating day care centres and kindergartens (barnehageloven)
- Legal acts regulating municipal authority (kommuneloven)
- Contracts between public agencies and private service providers

8. Do you know if the act of entrustment, or any other relevant legal basis relevant for your sector/region, gives a precise and correct definition of the service of general economic interest to be provided?

Yes No Partially N/A

If no or partially, please explain and provide example(s):

HSH is unaware any act, entrustment or contract that gives a clear and precise definition of the SGEI in relation to PSO

9. Do the legal instruments, of which you may be aware, contain all the elements required by Article 4 of the Decision, such as:

- the nature and duration of the public service obligations: Yes No

- the undertaking(s) and territory concerned: Yes No
- the nature of any exclusive or special rights assigned to the undertakings:
Yes No
- the parameters for calculating, controlling and reviewing the compensation:
Yes No
- the arrangements for avoiding and repaying any overcompensation:
Yes No

10. Have some of these elements raised difficulties in your opinion?

Yes No

If yes, please explain why and provide concrete examples:

11. Have you encountered difficulties concerning the notion of act of entrustment in the sense of State aid and internal market rules?

Yes No N/A

If yes, please explain why, possibly by giving concrete examples:

12. Do you consider that the entrustment of local SGEI, in particular those of a social character, has raised specific difficulties?

Yes No Partially N/A

If yes, please explain why, possibly by giving concrete examples:

Ref section C above. The application of the Altmark criteria has been difficult and has contributed to uncertain market conditions and uncertain framework conditions.

D.2: COMPENSATION

I) QUESTIONS REGARDING THE CALCULATION OF COSTS AND REVENUES RELATED TO AN SGEI

13. Have you faced difficulties with the calculation of costs and revenues related to an SGEI?

Yes No Partially N/A

If yes, could you describe these difficulties?

HSH has encountered considerable difficulties in calculating and determining adequate compensation for discharge of public services in private health and social care providers that operate within the framework of the public health and welfare systems.

The problems arise when external factors increases cost of production, with little or no possibility to increase the compensation for the discharge of the public service. Relevant examples from Norway are increases in wages following collective wage bargaining, which again increase costs of future retirement obligations.

These are factors which the service providers have limited possibilities to influence – but which increase costs of production. If the public agency responsible for the delivery of the service should increase compensation, it also runs the risk of providing illegal state aid in conjunction with discharging PSO.

14. In particular, in case you represent an undertaking which carries out activities falling both inside and outside the scope of SGEI, do you have separate accounts?

Yes No Partially N/A

15. Have you faced difficulties in separating the accounts?

Yes No Partially N/A

If yes, you are welcome to give details:

16. Has guidance been provided to public service providers in order to allow for a proper allocation of costs and revenues and to avoid cross-subsidisation between SGEI and non-SGEI activities/funds?

Yes No Partially N/A

If yes, you are welcome to give details about the guidance provided:

17. Do you think that the variable and fixed costs referred to by the Decision and the Framework, are the appropriate categories to allocate costs between the different services?

Yes No Partially N/A

If no, could you explain why?

18. Are any quality aspects taken into account for the calculation of the amount of compensation granted?

Yes No N/A

II) QUESTIONS REGARDING REASONABLE PROFIT

If you are aware of an example where an SGEI provider has received public service compensation,

19. Could you:

- please indicate whether this compensation included a reasonable profit?

Yes No

- indicate whether the reasonable profit was calculated on the basis of the rate of return on own capital as provided for by the Decision and the Framework?

Yes No

- If the reasonable profit was not calculated on the basis of the rate of return on own capital, please explain why a different type of rate was applied and give information about the chosen rate:

20. Have you faced difficulties with identifying what a "reasonable" profit is?

Yes No Partially N/A

If yes, please specify:

Difficult to determine reasonable profit. Varies from market to market, and is

subject to wide discretion and interpretation.

21. Do you know what the average rate of return on own capital in the relevant sector is?

Yes No N/A

If no, how have you identified the reasonable profit?

22. Has the calculation of the reasonable profit in your specific case taken account of the productivity gains achieved by the provider?

Yes No N/A

If yes, please explain and, where appropriate, provide examples where the calculation of the compensation has taken into account the efficiency of the provider

D.3: CONTROL OF THE OVER-COMPENSATION

23. Are you aware of the mechanisms controlling overcompensation implemented in your country?

Yes No N/A

If yes, has the absence of overcompensation been controlled by external auditors?

Yes No

24. Have you encountered cases of overcompensation?

Yes No N/A

If yes, you are welcome to provide us with information about the reimbursement:

25. Have you faced difficulties with the rules on reimbursement of overcompensation?

Yes No Partially N/A

If yes, in which cases and why?

26. Article 6 of the Decision provides that an overcompensation not exceeding 10% of the amount of the annual compensation (20% for social housing), may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period. Have you faced difficulties with the application of this provision?

Yes No Partially N/A

If yes or partially, please explain why:

D.4. MONITORING AND ANNUAL REPORTS

Article 7 of the Decision provides that underlying elements must be kept for at least 10 years to allow the Commission to check their conformity with the Decision.

27. Is such a reporting system in place in your Member State regarding the services with which you may be concerned, and if so, does it ensure that these obligations are fulfilled?

Yes No Partially N/A

SECTION E: SPECIFIC CATEGORIES OF SGEI

The Decision exempts from notification public service compensations below certain thresholds.

28. Please explain if you have faced difficulties with the classification of the compensations in the following categories :

- Compensation of less than EUR 30 million per year granted to undertakings with less than EUR 100 million turnover:

Yes No Partially N/A

- Compensation granted to hospitals:

Yes No Partially N/A

– Compensation to social housing undertakings:

Yes No Partially N/A

– Compensation for air links to islands with less than 300 000 passengers per year:

Yes No Partially N/A

– Compensation for maritime links to islands with less than 300 000 passengers per year:

Yes No Partially N/A

– Compensation for airports with less than 1 000 000 passengers per year:

Yes No Partially N/A

– Compensation for ports with less than 300 000 passengers per year:

Yes No Partially N/A

29. What kinds of services have been financed through public service compensations in the hospital sector?

Full scale hospital services.

30. What kinds of services have been financed through public service compensations in the social housing sector?

31. Do you consider that the ceilings provided for by the Decision allow simplification while ensuring correct application?

Yes No Partially N/A

If no, please explain why possibly by giving concrete examples:

- Lack of clear definitions of SGEI
- Lack of definitions of what e.g. is a hospital, and what is a smaller health or social service institution

32. On the basis of your experience, have the ceilings met the needs of the specific categories?

Yes No Partially

Yes No Partially

Yes No Partially

If no or partially, please explain which ceilings have not met the needs of the respective category and why:

See answer above

33. Do you consider that the combined ceilings of EUR 30 million of compensation amount and the EUR 100 million turnover have raised difficulties?

Yes No Partially

If yes, please explain if the difficulties relate to the combination of these ceilings, to one, or to both of them, by providing concrete examples:

34. Are you aware of other instruments than public service compensations (for instance direct aid to users, direct provision of SGEI by the State, etc.), used by public authorities to foster public service activities?

Yes No N/A

If yes, please feel free to provide any information on these instruments and the areas in which they are used:

Public procurement procedures

SECTION F: COMPETITION AND INTRA-COMMUNITY TRADE

35. According to your experience, the principles on which the Decision and Framework are based (in particular the act of entrustment and the absence of overcompensation) have been appropriate to preserve an equal footing between SGEI providers and commercial providers and to avoid distortions of competition and intra-Community trade?

Yes No Partially N/A

If no, please explain why:

- Lack of clear definitions of what is a PSO, and what is a particular institution that might be entrusted to carry out PSO
- Lack of transparency
- Altmark criteria are ridged in practise – makes the application of the rules difficult.

36. In your sector/region, are public services provided by various public service providers?

Yes No N/A

If no, could you explain why?

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

Yes No Partially N/A

If yes, please explain why. You are welcome to provide concrete examples to substantiate your views:

- Discharge of PSO is clearly economic activity
- Certain SGEI are of a scale that by nature will affect intra community trade, e.g. telecommunications, transport, health and social services.

38. Do you consider that the State aid rules on public service compensations may in certain cases have the effect of foreclosing the market or led to other distortions of competition?

Yes No Partially

If yes, please explain why and in which cases:

SECTION G: ACTIONS FOR THE CORRECT IMPLEMENTATION OF THE DECISION AND FRAMEWORK

39. Are you aware of any guidance paper on the implementation of the Decision and Framework prepared by the authorities in your country?

Yes No N/A

40. Do you find useful the Commission staff working document on the [frequently asked questions on the application of State aid rules to SGEI](#)?

Yes No Partially N/A

41. Are you aware of the existence of the [Interactive Information Service](#) through which questions regarding the application of Community rules to SGEI/SSGI can be answered?

Yes No N/A

42. In instances where you submitted a question to the [Interactive Information Service](#), were you satisfied with the service provided?

Yes No Partially N/A

If no, could you explain why?

43. Do you consider that the Decision and Framework are sufficiently known and correctly implemented?

Yes No Partially N/A

If no, please indicate which stakeholders are not sufficiently informed. In your opinion, why is that?

- Lack of knowledge/awareness of rules

SECTION H: MISCELLANEOUS

44. According to your experience, have the Decision and the Framework succeeded in striking the appropriate balance between the accomplishment of the public service mission and a level playing field between businesses and across Member States in the single market?

Yes No Partially N/A

If no, please explain why, by providing concrete examples:

- Not possible to know, given the lack of transparency and lack of awareness.

45. Do you consider that there are cases where the application of Community rules to SGEI has raised difficulties which were not covered by the previous questions?

Yes No Partially N/A

If yes or partially, could you explain which rules have raised these difficulties and why, by providing concrete examples?

46. Do you have any other comments?

The Commission should develop a strategy to promote more awareness of the rules and new tools to promote transparency.

Thank you for answering all/part of this questionnaire.