



UK Representation to the EU Brussels

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Dear Sir/Madam,

UK Response to the Commission's Consultation on the functioning of the 2005 SGEI State Aid Package

My authorities have prepared the following response to the Commission's consultation on the 2005 SGEI State Aid package. I understand that the consultation closed on 10 September, and therefore pass on my authorities' apologies for the delay in responding.

Should you have any queries on the UK authorities' response then please do not hesitate to contact me.

Yours sincerely,

Gemma Cook

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General comments

The UK welcomes the opportunity to respond to the Commission's consultation into the functioning of the 2005 SGEI State aid package.

We consider the SGEI Decision and Framework to be a helpful clarification of the legal framework for public service compensation, providing sufficient flexibility for the state to support valuable public services which would otherwise not be provided, or not provided at the required level of quality.

We believe that the SGEI Decision may be under utilised in the UK, due to a lack of understanding of the concept of SGEI. The Commission will be aware that the UK has undertaken a range of awareness raising activities to address this.

Ultimately however it is difficult to establish with any certainty to what extent to which the SGEI Decision is being used because there is no requirement to register its use with the Commission, as one would with the General Block Exemption Regulation. We would encourage the Commission to consider introducing a system whereby use of the SGEI Decision would be registered on SANI, as with the General Block Exemption Regulation.

Specific comments

Section A

In recognition of the diversity of public service provision across the EU, we consider it appropriate that the definition of SGEI remains a Member State competence, subject, of course, to manifest error.

Case law can be helpful e.g. Commission decisions send out a clear message that there must be a clear "social objective". Dutch Housing Associations (NN 93/02, E 2/2005 and N/642/2009)). Paragraph 39 (NN 93/02), states "the Commission feels that letting homes to households that are not socially deprived cannot be regarded as a public service."

The UK agrees with this view as it balances the needs of Member States to support public services with the need to prevent abuse and maintain a level playing field for competition.

Services that operate as SGEIs in different parts of the UK include: CALMAC – lifeline ferry services, the provision of social housing, the provision of life line air travel to certain remote Scottish islands, support of credit unions and Post Office Limited.

Section B

While the application of the State aid tests are clear to those who are familiar with State aid, organisations are not always aware of how to apply the tests, particularly as they relate to economic activity and the potential effects on trade between Member States. We continue to work with organisations to increase their knowledge and awareness of State aid.

Section C

As we have indicated in previous representations, the Altmark criteria are both opaque, and difficult to meet under any interpretation. In particular, the fourth criterion of Altmark is very difficult to meet. In many cases, there is no “typical undertaking” with which to compare. This is affirmed in paragraph 36 of the Chronopost judgement (C-83/01 P):

“Because of the characteristics of the service which the La Poste network must be able to ensure, the creation and maintenance of that network are not in line with a purely commercial approach. As was recalled in paragraph 22 above, Ufex and Others have indeed accepted that a network such as that available to SFMI-Chronopost is clearly not a market network. Therefore that network would never have been created by a private undertaking”.

Section D

Entrustment can take a number of different forms, for Post Office Limited it is done via a Ministerial letter.

Taking the operation of credit unions in Wales as an example; the legal instrument used to entrust SGEI to credit unions in Wales is the funding agreement between Welsh Ministers and each individual credit union. The act of entrustment includes a detailed description of the SGEI to be provided and includes all the elements required by Article 4 of the Decision which are listed in the questionnaire. There were no difficulties in drafting the entrustment to include each required element.

The entrustment document sets out how compensation is to be calculated, which includes reasonable profit based on a rate of return on credit unions’ own capital, and the requirement for the maintenance of separate accounts

Credit unions have not had difficulties calculating costs and revenues associated with SGEI and guidance has been provided. It is considered that the fixed and variable costs are appropriate categories for the allocation of these costs to SGEI and non SGEI activities. There have been no difficulties identifying what is meant by reasonable profit.

The credit unions are monitored on at least an annual basis and comprehensive records are maintained by funders to demonstrate compliance with the SGEI Decision. There are however no central reporting systems within the UK as there is no requirement to register schemes operating in accordance with the SGEI Decision.

However, more broadly, we have also received comments that it can be very difficult to ascertain if there is no comparable company running a similar service. Further to this, there can be difficulties in measuring a “reasonable profit” when a subsidised company providing an SGEI has no other business or revenue but is there purely to run an SGEI.

Section E

By and large, UK authorities have not reported difficulties applying the thresholds set out in the SGEI Decision and consider the ceilings to be appropriate.

However, the Scottish authorities have asked us to point out that there are discrepancies between the SGEI decision, the maritime cabotage rules and Regulation 1008/2008, the latter providing

common rules for the provision of air services. For example, the maritime cabotage rules state that when a Member State imposes public service obligations, it shall do so on a non-discriminatory basis". This indicates that regardless of passenger numbers ferry services should be procured. This leads to the question: What is the purpose of the 300,000 passenger cap in the SGEI decision?

Regulation 1008/2008, also seems to contradict the SGEI package to an extent. It states that an appropriate aviation provider must be tendered for unless passenger numbers are less than 10,000. This is inconsistent with the cap of 300,000 for air and maritime passengers in the SGEI decision.

In relation to the provision of road and rail transport, Regulation 1370/2007 advises that: Public service contracts can be granted directly where their "average annual value is €100,000 or where they concern the annual provision of less than 300,000 km." "In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than €200,000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services."

There is an apparent inconsistency in the factors used to measure whether a service should be tendered.

Section F

We consider the principles of the Decision and Framework are appropriate to maintain an equal footing between SGEI and commercial providers; however it is difficult to ascertain whether there is distortion across Member States in respect of the Decision as measures are not registered.

Section G

The UK authorities have provided comprehensive guidance and training to public authorities who may wish to provide public service compensation. UK Guidance may be found here: <http://www.bis.gov.uk/files/file53292.pdf>

There is some awareness of the Interactive Information Service but it is unclear whether it has been used.

Section H

We consider the Decision and Framework enables Member States to deliver quality public services while maintaining a level playing field for competition.