

## ABOUT YOU

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1. Please provide your contact details below.

Name	
Organisation Represented	Scottish Government
Location (country)	Atlantic Quay, Scotland
E-mail address:	Catriona.syme@scotland.gsi.gov.uk

2. Do you represent an SGEI provider?

Yes  No

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

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: Devolved Government

**THIS RESPONSE IS BASED UPON THE SCOTTISH GOVERNMENTS STATE AID UNITS ADVISORY CAPACITY ON THE IMPLEMENTATION OF SGEI OPERATING IN SCOTLAND.**

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:

This is often difficult to assess, apart from the areas which are specified in the SGEI decision and the guidance note on public sector broadcasting. Case law can be helpful e.g. Commission decisions send out a clear message that there must be a clear “social objective”. This is apparent in the case relating to the 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 Scottish Government agrees with this interpretation.

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?

CALMAC – lifeline ferry services

The provision of social housing,

The provision of life line air travel to certain remote Scottish islands.

## 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?

**Economic activity** – if there is no market for a product/service, then it cannot still be argued to be “economic”. E.g. air links and maritime links to remote islands. Most of these routes are either small scale and/or not economically viable, Some of the boats/aircraft have to be custom made and therefore it is not feasible for many different operators to put a bid in for the operation of the routes. The market has “failed”, so why are such services still deemed to be economic? Protocol 26 of TFEU may provide the basis upon which to determine this.

**Local trade** – This can be difficult to measure and the Scottish Government always errs on the side of caution when we are asked for advice. The Commission interpretation of what constitutes local trade has recently seemed quite restrictive e.g. N 293/2008 states that public libraries in Hungary are in competition with bookshops because they are operating as undertakings. We believe that this should be considered a duty of the

Member State to provide such a general service to the population. A significant degree of confusion has been created by apparently differing case law. To highlight this we have looked at Commission case law, the Hungarian decision, referred to above and the decision below:

***Bataviawerf* – Reconstruction of a vessel from the 17<sup>th</sup> century. (N377/2007)**

“Bataviawerf addresses a very local demand and it is not aimed at attracting international visitors. Bataviawerf is visited by the inhabitants of the town and the surrounding area. The scientific and cultural activities of Bataviawerf are dedicated to the local and national Dutch maritime history.

Unlike certain big national museums, Bataviawerf does not enjoy an international reputation. It is very unlikely that tourists would choose to travel abroad to The Netherlands only in order to visit Bataviawerf. This is confirmed by the fact that [between 75 and 85%] of the tourists coming to Bataviawerf live in the radius of 75 kilometres around Lelystad. Moreover, the targeted group of sponsors for the museum is composed of individuals and local undertakings. This shows that sponsoring is only expected to generate commercial benefits on a local rather than international scale. It can therefore be concluded that given the specificities of the case, the measure in question will not have an effect on intra-community trade.

**IV CONCLUSION**

In view of the above and taking into account the current situation of Bataviawerf, the Commission considers that the measure at stake does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.”

The argument in this case could be applied to the Hungarian libraries and museums, the scope and appeal of the libraries and museums seems to be very limited and unlikely to attract customers from afar, however the Commission deemed some of the activities to be aid under Article 107 3 (d) and some not to constitute aid within the meaning of Article 107.

Clarity over what constitutes “local trade” would be very helpful.

## **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 4<sup>th</sup> one?

Yes  No  Partially  N/A

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

The fourth criteria of Altmark is very difficult to meet. Often there is no “typical undertaking” with which to compare. Perhaps further guidance could be issued on the application of Altmark or it may be clearer to no longer incorporate Altmark in the SGEI package. The recent BUPA case has added to confusion over Altmark as it appears to have undermined all of the 4 criteria in Altmark.

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:

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):

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:

In Scotland the same principles of entrustment are applied. Many of our air and maritime routes are very localised in nature. Our Air Discount Scheme operates as an “Aid of a Social Character” because it is limited to certain individuals. The Air Discount Scheme (ADS) aims to tackle the problem of high air fares for the remotest communities in the Highlands and Islands by providing a discount of 40% on the core air fare on eligible routes. The scheme is only open to individuals resident on one of the designated areas :Western Isles, Orkney Isles, Shetland Isles, Islay, Jura, Caithness and North-West Sutherland.

## **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?

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:

CALMAC is wholly owned by the Scottish Government and only delivers SGEI, and the majority of it's funding comes from the SG.

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

Yes  No  Partially  N/A

If yes, please specify:

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.

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?

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

Mid-market rental housing, affordable housing for the socially disadvantaged, elderly and disabled.

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:

It is not clear exactly what the purpose of the ceilings is and how these figures have been calculated. As a result they are somewhat artificial. Further to this point, a high number of passenger numbers does not necessarily indicate that a route is commercially viable.

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 €1 000 000 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 EUR 2 000 000 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.

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:

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:

The figures can be too low dependent on the nature of the service which requires funding.

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:

**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:

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:

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?

The Scottish Government has done extensive scoping work and awareness raising throughout Scotland, and continues to do so, to increase the profile and understanding of the concept of SGEI and how it can be utilised to best advantage in the provision of many of our core services e.g. maritime transport, air transport and the provision of social housing. The State Aid Unit continues to provide training events across the public sector in Scotland

## 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:

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?

Because there is no reporting requirement to register SGEI schemes under the SGEI package it is difficult to ascertain to what extent it is being utilised. This became apparent when Member States had to submit a report on SGEI in 2008/09. The Scottish Government has and continues to carry out extensive awareness raising and training events to educate stakeholders as to how to utilise the scope of the SGEI package.

46. Do you have any other comments?

*Thank you for answering all/part of this questionnaire.*