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**The Application of EU State Aid rules on Services of General Economic Interest since
2005 and the Outcome of the Public Consultation**

1. INTRODUCTION

Services of general interest are a key element of the European social model. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion, economic growth and environmental quality. The Lisbon Treaty has recently emphasised the importance of services of general interest through the amended Article 14 and the new Protocol No. 26 to the Treaty on the Functioning of the European Union (TFEU).

Services of general interest, whether supplied by public or private operators, can often not be provided under economically acceptable conditions without financial support in the form of public service compensation. This compensation is covered by the State aid rules of the TFEU in so far as these services of general interest constitute economic activities. The Court of Justice clarified in 2003 that such compensation for the performance of services of general economic interest (SGEI) constitutes State aid, unless it is strictly limited to the amount which would be needed to compensate an efficient operator.

The provision of services of general economic interest differs greatly across Member States. It also differs greatly across sectors and is influenced by technological and economic progress and by cultural and social traditions. Therefore, it evolves over time.

With a view to providing public authorities and market operators with legal certainty on the application of State aid rules in this field, the Commission adopted a set of legal instruments in 2005, known as the SGEI Package ("the Package"). The Package clarifies the circumstances in which State aid granted for the financing of a SGEI is compatible with the Treaty. Since then, the Commission has adopted a number of decisions in specific cases. It has also provided further guidance via an Interactive Information Service (IIS)¹ and a set of "Frequently Asked Questions"², recently updated and further developed into a Guide.³

After recalling the main elements of the current legal framework (section 2), the present report sums up the Commission's experience with the application of the Package in different sectors since 2005 (section 3). Finally, the report indicates the main issues arising out of a wide consultation exercise, which included a Member State reporting exercise conducted in 2008 and 2009 and a general stakeholder consultation conducted in 2010 (section 4).

¹ Available under http://ec.europa.eu/services_general_interest/registration/form_en.html.

² Commission Staff Working Document "*Frequently asked questions in relation with Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to undertaking entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation*", SEC(2007) 1516 of 20 November 2007.

³ 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*", SEC (2010) 1545 of 7 December 2010.

2. SERVICES OF GENERAL ECONOMIC INTEREST AND THE TREATY RULES ON STATE AID

2.1. The qualification of SGEI compensation as State aid

State aid is generally prohibited under Article 107(1) of the TFEU, which provides that:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

This prohibition on State aid applies to services of general interest, to the extent that they involve the performance of economic activities by an undertaking⁴. However, until the judgment of the Court of Justice in the *Altmark* case⁵ in 2003, it was not fully clear whether a compensation granted by a public authority for the performance of SGEI came within the scope of Article 107(1) and so constituted State aid.

The Court in *Altmark* found that, in the field of SGEI, compensation is not State aid if it simply offsets the net costs of carrying out such public service obligations. However, it also imposed strict conditions aimed at limiting the compensation granted to the costs which an efficient provider would incur in performing those obligations. The "four *Altmark* criteria", which must all be fulfilled in order to demonstrate that an SGEI compensation does not constitute State aid, are the following:

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

⁴ The concept of "economic activity" is defined by the case law of the Court of Justice of the European Union. In the area of competition law, in summary, according to this case law, an economic activity is any activity which consists in offering goods or services on a market, irrespective of the legal form in which the activity is carried out. See Case C-205/03 P, *FENIN v Commission*, [2006] ECR I-06295, paragraph 25. On the concepts of economic activity and undertaking see also Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

⁵ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

the necessary means, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The Union's Courts have turned again to the question of compensation for the performance of SGEI on a few occasions since the judgment in *Altmark*. For instance, the General Court clarified that the purpose of the four *Altmark* conditions is exclusively that of the classification of the compensation as State aid or not⁶, while Article 106 (2) still constitutes the basis for the compatibility of financial compensation which do not comply with all those 4 conditions⁷. It also made clear that the fourth *Altmark* condition expresses the key feature of the *Altmark*-compensation as apposed to a compensation that classifies as State aid, i.e. that the *Altmark*-compensation must remain limited to the costs of an efficient company (one capable of winning the tender or an average well run company). In other words, the *Altmark*-compensation is the amount required for the provision of the SGEI which represent the least cost to the community⁸. The Package, on the other hand, allows State aid for SGEI to cover the actual costs of the company entrusted with the SGEI, regardless of its level of efficiency⁹. The Court of First Instance also rejected the argument that the *Altmark* jurisprudence only applies to SGEI entrusted after the date of the judgment¹⁰.

The prohibition on State aid under Article 107(1) TFEU is not absolute. In addition to the circumstances specified in Article 107(2) and (3), which are of general application, Article 106(2) TFEU provides for a specific, limited exception for SGEI¹¹. Under Article 106(2):

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Accordingly, what is an SGEI cannot be defined once and for all and Member States have a wide discretion in this respect. However, the Court of Justice has clarified that not any economic activity can be considered as an SGEI for the purposes of Article 106(2) TFEU. Indeed "*the activity must be of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities*"¹². In line with this case law, the Commission already in the past underlined that SGEI are economic activities, which the Member States subject to specific public service obligations by virtue of a general interest criterion. The imposition of these obligations is required when public authorities consider that market forces do not provide such services, or not at conditions

⁶ Case T-354/05, *TFI* [2009] ECR II-00471, point 130.

⁷ *Ibidem*, point 135.

⁸ Case T-289/03, *BUPA v Commission*, [2008] ECR II-81, points 246 and 249.

⁹ Recital 11 and Article 5 (2) of the 86 (2) SGEI Decision and paragraph 16 of the SGEI Framework.

¹⁰ Case T-289/03, *BUPA v Commission*, [2008] ECR II-81, points 158-160.

¹¹ Another specific provision for SGEI in land transport can be found in Article 93 TFEU.

¹² Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, point 27; Case C-242/95, *GT-Link A/S v De Danske Statsbaner (DSB)* [1997] ECR I-4449, point 53 and Case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione* [1998] ECR I-3949, point 45.

considered as satisfactory¹³. Therefore, outside sectors where the definition of SGEI is affected or otherwise constrained by EU law (e.g. sector specific Directives), Member States discretion to define SGEIs is subject to verification by the Commission to check for the absence of manifest error. The Commission exercises this competence under the control of the Union Courts.¹⁴

In contrast, the assessment of whether a particular public service compensation meets the requirements for compatibility under Article 106(2) is a matter for the exclusive competence of the Commission (subject to judicial review by the Court of Justice). The *Altmark* judgment made it clear that many existing public service compensations were to be treated as State aid, and led to a demand from Member States and other stakeholders for guidance on how to design SGEI schemes in compliance with State aids rules and clarification as how the Commission would perform this assessment in practice. As mentioned in the introduction, the Commission responded to this demand in 2005 with a package of measures (the "Package").¹⁵

2.2. The Package

The Package comprises three instruments, commonly known as the SGEI Decision¹⁶, the SGEI Framework¹⁷, and the Transparency Directive¹⁸.

2.2.1. The SGEI Decision

According to Article 108(3) of the Treaty, any Member State which plans to grant State aid must notify this aid to the Commission. The proposed aid must not be put into effect until the Commission has given its decision.

For the sake of avoiding excessive administrative burdens for aids which pose relatively little risk of distortion of competition, the SGEI Decision establishes circumstances in which, by way of exception to the requirement in Article 108(3) of the Treaty, SGEI compensations do not have to be notified to the Commission. The SGEI Decision applies to SGEI compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million¹⁹ during the two financial years preceding that in which the SGEI

¹³ Communication on Services of General Interest in Europe of 2000, OJ C 17, 19.01.2001, pp. 4-23, paragraph 14. See also Annex II of the same Communication. See also Case T-289/03, *BUPA v Commission*, [2008] ECR II-81, points 166,169 and 172.

¹⁴ See Case T-17/02, *Fred Olsen v Commission*, [2005] ECR II-2031; Case T-289/03, *BUPA v Commission*, [2008] ECR II-81, point 13; Case T-309/04, *TV2/Danemark v Commission*, [2008] ECR II-2935, point 95.

¹⁵ Also commonly known as the Altmark Package or the Monti-Kroes Package.

¹⁶ Commission Decision (EC) No 842/2005 of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) of the Treaty on the Functioning of the European Union] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p.67.

¹⁷ Community Framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4.

¹⁸ Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, now codified as 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.

¹⁹ In the case of credit institutions, the threshold is a balance sheet total of EUR 800 million.

was assigned, and which receive annual compensation for the service in question of less than EUR 30 million.

Specific thresholds are in place for air and maritime links to islands and for the operation of ports and airports, based on the number of passengers rather than on financial limits. These thresholds can be applied in alternative to the general threshold based on turnover and amount of compensation. The SGEI Decision does not apply to land transport and public broadcasting. Compensation granted to hospitals and social housing undertakings carrying out SGEI benefits from the exemption irrespective of amount.

However, in order to benefit from these exemptions, public service compensation for the operation of SGEI must also comply with the detailed conditions which are set out in Articles 4, 5 and 6 of the SGEI Decision, and which aim at ensuring that the SGEI provider is not overcompensated.

Article 4 of the SGEI Decision requires that the SGEI be entrusted to the undertaking concerned by way of one or more official acts, setting out, *inter alia*, the nature and duration of the SGEI obligations, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and repaying any overcompensation.

Article 5 requires that the amount of compensation be limited to what is necessary to cover the costs incurred in discharging the SGEI obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations. It also gives details as to how costs, revenues and "reasonable profit" should be calculated.

Finally, Article 6 requires Member States to carry out regular checks to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5 (although with provisions allowing a limited amount of overcompensation to be carried forward to the following year rather than requiring immediate reimbursement).

It is worth noting that these conditions of applicability are based on the first three *Altmark* criteria, with some further detail on their practical application. However, the SGEI Decision does not contain any equivalent to the requirement of the fourth *Altmark* criterion as to the selection of the SGEI provider by public procurement procedure or the benchmarking of its costs against those of a typical well-run undertaking.

2.2.2. *The SGEI Framework*

Those State aids in the form of public service compensation for the operation of SGEI which do not meet the conditions of the SGEI Decision must be notified to the Commission for individual assessment of their compatibility. For such aids, the SGEI Framework establishes the conditions under which they can be considered to be compatible with the internal market.

The conditions of compatibility laid down in the SGEI Framework are in substance the same as the conditions of applicability contained in Articles 4, 5 and 6 of the SGEI Decision.²⁰ The

²⁰ The provisions as to carrying forward overcompensation from one year to the next differ slightly, but the principles of regular checks to prevent overcompensation and limited possibilities of carry-over apply in both the SGEI Decision and the SGEI Framework.

key difference between the two instruments relates to the exemption from the obligation to notify any planned State aid before implementing it. SGEI compensation which complies with these conditions and which also comes within the thresholds of the SGEI Decision, or is granted to hospitals or social housing undertakings for the performance of SGEI, is considered compatible without the need for prior notification to the Commission. By contrast, compensation for the operation of SGEI which complies with the conditions but does not fall within the thresholds contained in the SGEI Decision must be notified to the Commission in order to be declared compatible. The SGEI Framework does not apply to land, air and maritime transport or public broadcasting. Instead, the sector-specific rules apply.

2.2.3. *The Transparency Directive*

The Transparency Directive, in the version in force before 2005, required public service operators to keep separate accounts, on the one hand, for the SGEI services for which they received State aid, and, on the other hand, for other activities. The third element of the SGEI Package consisted in amending the Transparency Directive so as to provide that separate accounting is required for all SGEI services for which a financial compensation is paid by some public authority, whether or not that compensation constitutes State aid.

3. THE APPLICATION OF THE PACKAGE

The *Altmark* judgment applies to determine whether a given public service compensation constitutes State aid, irrespective of the economic sector concerned. The same is not true of the Commission's compatibility assessment, which depends in a number of instances on the specificities of given sectors and their own regulation. In the following, therefore, the application of State aid rules for SGEI is presented with reference to the most relevant sectors.

3.1. Transport

3.1.1. *Size of the Sector and structural Particularities*²¹

With around EUR 500 billion in Gross Value Added (GVA) at basic prices, the provision of transport services (including storage, warehousing and other auxiliary activities) accounted for about 4.6 % of total GVA in the EU-27 in 2007. This figure includes only the GVA of companies whose main activity is the provision of transport (and transport-related) services; own account transport operations are not included. The transport industry as a whole accounts for 7 % of GDP in the EU.

In 2007, the transport services sector in the EU-27 employed more than 9.2 million persons, some 4.4 % of the total workforce. Almost two thirds of them (63 %) worked in land transport (road, rail, inland waterways), 2 % in sea transport, 5 % in air transport and 30 % in supporting and auxiliary transport activities (such as cargo handling, storage and warehousing, travel and transport agencies and tour operators).

²¹ European Commission, *EU Energy and Transport in figures*, Statistical pocketbooks 2010, http://ec.europa.eu/energy/publications/statistics/doc/2010_energy_transport_figures.pdf. The figures on the size of the sector quoted in this section and the following sections on other sectors also include activities which do not constitute SGEI.

3.1.2. Regulatory Framework and sector specific State Aid Rules

Member States spend considerable resources for the provision of SGEI in the transport sector and for the construction, management and maintenance of infrastructure. Union law foresees indeed a number of mechanisms allowing for and encouraging the provision of such services. Member States must, however, ensure that the public financing complies with the applicable rules and in particular that it avoids overcompensation and distortion of competition.

The regulatory framework and the rules applicable vary according to the mode of transport. In public passenger transport, the imposition of public service obligations is subject to detailed sectoral regulation. The SGEI Framework and the SGEI Decision do not apply in this sector. For air and maritime transport only the SGEI Decision applies, but is supplemented by sectoral rules and guidelines.

3.1.2.1. Land Transport

Article 106(2) of the TFEU does not apply to land transport. Instead, Article 93 provides that "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*" It follows that the SGEI Decision and the SGEI Framework are not applicable to land transport.

The new Regulation on public passenger transport services, Regulation 1370/2007²², entered into force on 3 December 2009. The regulation lays down the rules applicable to the compensation of public service obligations in public passenger traffic. Its application to inland waterway passenger traffic is up to the Member States. Until the entering into force of these new rules, the Commission applied the previous State aid rules contained in Regulations (EEC) No 1191/69 and 1107/70 for the compatibility assessment. The Court rulings in *Altmark* have clarified that these Regulations contain rules for the compatibility of State aid.²³

Regulation 1370/2007 imposes the obligation to conclude a public service contract (except for public service obligations which aim at establishing tariffs for all passengers or for certain categories of passengers and which may also be the subject of general rules). It distinguishes between public service contracts, which are subject to the public procurement rules laid down in Directives 2004/17/EC and 2004/18/EC, and public service concessions. For the latter, the award of public service contracts should normally be made using tendering, but this is not mandatory in all cases. All public service contracts and compensations for general rules establishing tariffs must be established in a way "*that prevents overcompensation*", but this general provision does not provide further criteria for the calculation of the compensation.

On the level of compensation Article 4 of the Regulation states that "*no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit*". In addition, the term "reasonable profit" is defined in point 6 of the Annex as "*a rate of return on capital that is normal for the sector in a given Member State and that takes account of the*

²² 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) No 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

²³ Case C-280/00, *Altmark Trans* (cited above footnote 5), paragraph 95.

risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention".

3.1.2.2. Air Transport

In air transport, Regulation 1008/2008²⁴ (the "Air Services Regulation") limits the type of routes for which public service obligations ("PSOs") may be imposed, and introduces strict procedures – especially with regard to tenders – for the imposition of PSOs. An important particularity of PSOs in the air transport sector is the clear distinction between the obligations imposed and exclusive concessions (with or without compensation).

The Air Services Regulation distinguishes two stages in allocating PSOs. First, PSOs may be imposed on an individual air route. Second, only when no air carrier is willing to serve the route may the Member State restrict the access to the air route to a single operator, provided the latter is selected via a European tender procedure. Although its approval is not required, the Commission has the power to examine PSOs and, by decision, to suspend them if they are not in compliance with the Air Services Regulation. Therefore, the Commission must be kept informed of every stage of the PSO procedure and the PSO cannot go ahead before the Commission has published a notice of its imposition and (where relevant) the tender in the Official Journal of the European Union.

PSO compensation can only be paid to air carriers that have been selected via a tender procedure. Article 17 (7) of the Air Services Regulation states that "*The selection among the submissions shall be made as soon as possible taking into consideration the adequacy of the service, including the prices and conditions which can be quoted to users, and the cost of the compensation required from the Member State(s) concerned, if any*". Thus, when the contract is awarded on the basis of the lowest compensation required, compliance with the Air Services Regulation ensures also compliance with the fourth *Altmark* criterion²⁵. Therefore, although the SGEI Decision (but not the SGEI Framework) does apply to air transport, in many cases PSO compensation in the air transport sector may not constitute State aid. It remains however to be verified whether the tender leads to the provision of the services at the least cost to the community. The 1994 Aviation Guidelines provide for rules for the compatibility of SGEI compensation payments in air transport.

In addition, the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports²⁶ provide that certain economic activities carried out by airports can be considered as constituting an SGEI. In "*exceptional cases*", the whole management of an airport can be considered as an SGEI, for example in the case of an airport "*in an isolated region*".

3.1.2.3. Maritime Transport

Article 106(2) TFEU and the SGEI Decision (although not the SGEI Framework) apply to maritime transport. In addition, other rules concerning the provision of SGEIs in this sector are contained in Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the

²⁴ 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 Community, OJ L 293, 31.10.2008, p. 3.

²⁵ However, this may not be the case for the emergency procedure of article 16(12) where the air carrier is selected without open tender.

²⁶ Communication from the Commission of 9 December 2005 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1.

principle of freedom to provide services to maritime transport within Member States (maritime cabotage)²⁷. Article 4 of the said regulation governs the conclusion of public service contracts and imposition of public service obligations for the provision of cabotage services, on shipping companies participating in regular services. The said Community guidelines recognise the possibility for Member State to impose public service obligation or conclude public service contracts in relation to international transport services when that is necessary to meet imperative public transport needs.

With regard to Regulation No 3577/92 the Court of Justice established that the combined provisions of Article 1 and Article 4 of that Regulation permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorization only if: (i) a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated; (ii) it is also demonstrated that that prior administrative authorization scheme is necessary and proportionate to the aim pursued; (iii) such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned²⁸.

In addition, the Commission has issued a number of communications which apply specifically to maritime transport, including the Communication from the Commission providing guidance on State aid to ship management companies²⁹, the Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea³⁰ and the Community guidelines on State aid to maritime transport³¹.

3.1.3. *Commission's Decision-making Practice*

On land transport, a part of the public financing for land public passenger transport services operated under a public service contract is not notified to the Commission either because it does not constitute State aid or because it is exempted from the notification obligation. In this field, the Commission receives and examines a large number of complaints, as well as certain notifications of subsidies to local and regional bus services, mainly focusing on contracts awarded in a way that does not ensure that they are provided at the least cost to the community.

The Commission concluded that the new Danish system of reduced tariffs in favour of certain categories of passengers travelling in long-distance bus services involved State aid, compatible with the common market³². The aim of the scheme is to ensure adequate transport services to low-income groups of the population and overall to boost public transport. The scheme will also help to create harmonised conditions for competition between railway

²⁷ OJ 1992 L 364/7.

²⁸ Case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others*, [ECR] 2001 I-1271, point 40.

²⁹ Communication from the Commission providing guidance on State aid to ship management companies, OJ C 132, 11.6.2009, p. 6.

³⁰ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea, OJ C 317, 12.12.2008, p. 10.

³¹ Communication from the Commission C(2004) 43, Community guidelines on State aid to maritime transport, OJ C 013, 17.01.2004, p.3.

³² Case N 332/2008, *Compensation to long-distance bus operators for discounts given to certain types of passengers using long-distance bus services* (OJ C 46, 25.2.2009, pp. 8-9).

undertakings, which already receive compensation for giving similar or higher discounts, and long-distance bus operators.

In conformity with the *Altmark* ruling, the Commission declared as non-aid the compensations granted by Landkreis Anhalt Bitterfeld in Germany for the public bus transport³³. Similarly, the Commission concluded that the extension of the compensation for public services in the district of Wittenberg linked to supplementing the existing bus lines did not constitute State aid.³⁴ The Commission has also authorized, on the basis of Regulation (EC) Nr. 1370/2007, Regulation (EEC) Nr. 1191/69 and Regulation (EEC) Nr. 1107/70, public service compensation for bus transport, in three cases following the opening of a formal investigation (*Austria – aid for Postbus*, C 16/2007; *Germany - Verkehrsverbund Rhein Ruhr*, C 58/2006; *Czech Republic – South Moravia*, C 3/2008), and in one case without (*Malta – Unscheduled bus services*, NN53/2006). Two further investigations are still pending (*Germany – Emsland*, C 54/2007 and *Czech Republic – C 17/2008, Usti nad Labem*)

In several cases, the most prominent one being the DB Regio case³⁵ related to the public service contract between DB Regio and *Länder* Berlin and Brandenburg, the question has arisen how the "reasonable profit" should be determined. Regulation 1370/2007 refers to a comparison with sector averages, taking into account the risk (or absence thereof) of the specific contract. Unfortunately, in the light of the very diverse profit margins in a sector historically marked by high deficits, such comparison is not always straightforward. In the *Landkreis Sachsen-Anhalt* case, the Commission considered a "profit" (to be understood as turnover margin) of 5 % as reasonable, and State Aid Case C 3/08 (ex NN 102/05)³⁶ - *Czech Republic - Public service compensations for Southern Moravia Bus Companies* a "profit" (to be understood as turnover margin) of 7.85 % as reasonable. The profit also has to be seen in the light of the prevailing macro-economic conditions, notably inflation. Another issue is the appropriate choice of the relevant profit ratio (Regulation 1370/07 refers to 'return on capital') and the level of risk that the operator bears (strongly determined by the contractual terms).

It is important to note that the Regulation further specifies that the method of compensation must promote the maintenance or development of effective management by the public service operator and the provision of passenger transport services of a sufficiently high standard. This has found an interesting application in the case C 41/2008³⁷ concerning Danish railways where the compensation system has been devised such as to incite the beneficiary to increase its productivity. In this case, the Commission has accepted a return on capital of 6 %, which may increase in case of productivity improvements, with a ceiling of 12 % for each particular year and 10 % over each period of three years. This also implies that contrary to the SGEI decision and the SGEI framework, there is an efficiency requirement for land public passenger transport.

In air transport, as noted above, PSO compensation can only be paid to air carriers that have been selected via a tender procedure (except when the emergency procedure of article 16(12)

³³ Case N 206/2009, *Financing of the public transport services in district of Anhalt-Bitterfeld* (OJ C 255, 24.10.2009, p. 4).

³⁴ Case N 207/2009, *Financing of the transport services in district of Wittenberg* (OJ C 255, 24.10.2009, pp. 4-5).

³⁵ Case C 47/2007, *DB REGIO AG - Contrat de service public* (OJ C 35, 8.2.2008, pp. 13-29).

³⁶ Case C 3/2008, *Public service compensations for Southern Moravia Bus Companies* (OJ L 97, 14.4.2009).

³⁷ Case C 41/2008, *Public service contracts between the Danish Government and Danske Statbaner* (OJ L 7, 11.01.2011, pp. 1-39).

is applied). Therefore (as long as there are sufficient tenderers and the contract is awarded at least cost), PSO compensation in the air transport sector complies with the fourth Altmark criterion and may not constitute State aid³⁸. In this connection, some Member States question the usefulness of the SGEI Decision with regard to the compatibility of PSO compensation in air transport.

In many cases, the response to such tenders is poor and often only one offer is received. Moreover, compliance with the Air Services Regulation does not take away the need for the Member State to assess compliance with each of the four Altmark conditions which are cumulative.

No air transport PSO has ever been notified to the Commission under State aid rules, and only once has the Commission taken a State aid decision with regard to a PSO in the air transport sector (a negative decision in the case C 79/2002³⁹ where Spain granted compensation without tender).

The Commission has so far taken no decision on the basis of the SGEI provisions of the Airport Guidelines, even though they seem to present a relatively clear and favourable framework for granting public financing. Such public funding can be considered as not constituting State aid in case the *Altmark* conditions are fulfilled. Even if it was considered as constituting State aid, this public funding could be considered compatible with the TFEU if the compatibility criteria of Article 106(2) TFEU as developed in the SGEI Decision were met, with the consequence that this funding would not need to be notified to the Commission.

For **maritime transport**, the Commission is aware of the fact that the SGEI Decision has been applied, especially with regard to links with islands. Following an in-depth investigation, the Commission deemed the compensation paid by the French State to *Société Nationale Maritime Corse-Méditerranée* (SNCM) for discharging public service obligations in the period 1991-2001 compatible with the internal market⁴⁰. This decision has been challenged before the General Court and the case is still pending⁴¹.

The Commission has taken a final decision on four SGEI cases (concerning 2 Member States) in maritime transport. One of this decision was however annulled by the General Court and the case is currently being re-assessed:

- C 470/2004⁴² – Italy - Tirrenia shipping company – annulled by judgement T-265/04⁴³
- N 62/2005⁴⁴ – Italy – contrat de service public sur une ligne maritime entre Frioul-Vénétie-Julienne et Slovénie et Croatie

³⁸ A notable exception is the emergency procedure of Article 16(12) which, in case of failure of the operating airline, allows the Member State to designate another airline for a period up to seven months, i.e. the time needed to organize a new tender.

³⁹ Case C 79/2002, *Air Catalunya* (OJ L 110, 30.4.2005, pp.56-77).

⁴⁰ Case C 58/2002, *Aide à la restructuration de la SNCM* (OJ L 225, 27.08.2009, pp. 180-237).

⁴¹ Case T-565/08, *Corsica Ferries France SAS v Commission*, pending.

⁴² Case C 470/2004, *Italy - Tirrenia shipping company* annulled by the judgment of the Court of First Instance of 4 March 2009 in Case T-265/04, *Tirrenia di Navigazione and Others v Commission* (OJ C 90 of 18.04.2009, p. 22).

⁴³ Case T-265/04, *Tirrenia di Navigazione and Others v Commission*.

⁴⁴ Case N 62/2005, *contrat de service public sur une ligne maritime Frioul-Vénétie-Julienne et Slovénie et Croatie* (OJ C 90, 25.4.2007, p. 10).

- N 265/2006⁴⁵ – Italy – compensation de l'augmentation du coût du carburant dans le cadre d'OSP sur une ligne maritime entre Sicile et Iles Mineures
- C 16/2008⁴⁶ – UK – subsidies to CalMac and Northlink for maritime transport services in Scotland

In case C 16/2008, the Commission's decision contains references to the SGEI Framework and makes an assessment by analogy.

3.2. Energy

3.2.1. Size of the Sector and structural Particularities

There were around 27,000 enterprises in the electricity, gas and steam industry across the EU-27 in 2006, which employed 1.2 million persons. Together, these enterprises generated EUR 940 billion of turnover (around 7 % of EU-27 GDP) and EUR 200 billion of value added (3.5 % of the value added of the EU-27 non-financial business economy).⁴⁷

Schematically, the gas and electricity industry chains involve five main levels: 1) exploration and production (for gas) / generation (for electricity); 2) transportation in high pressure pipelines / high voltage grids (transmission); 3) transportation in low pressure pipelines / low voltage grids (distribution); 4) the selling and buying of electricity or gas on wholesale markets (wholesale trading); 5) marketing to final customers (retail supply).

Transport activities (i.e. transmission and distribution) are often considered to be natural monopolies and are therefore subject to specific regulatory measures. By contrast, the gas and electricity market liberalisation directives require production, wholesale trading and retail supply to be opened up to competition.

For the time being, the electricity and gas markets remain mostly national in scope. The Commission has noted on various occasions that in these sectors, market integration was still limited, as demonstrated notably by price differences, regional monopolies and persistent cross-border congestion between Member States. Cross-border trade flows are nevertheless not negligible and expected to increase. For example, in 2008, cross-border flows of electricity accounted for 18 % of gross inland consumption in the EU-27.⁴⁸ There is a political commitment of the European council of February 2011 to complete the internal market for energy by 2014 and the Commission has taken initiatives aimed at abolishing remaining fragmentations of the market.⁴⁹ As regards natural gas, with European reserves declining, initiatives are taken to diversify sources of supply outside the EU and strengthen the connections between Member States.⁵⁰

⁴⁵ Case N 265/2006, *Aide au transport maritime-Società Ustica Lines e Società N.G.I.* (OJ C 196, 24.08.2007, p. 3).

⁴⁶ Case C 16/2008, *State aid to NorthLink & Calmac* (OJ C 126, 23.05.2008, pp. 16-42).

⁴⁷ EUROSTAT Pocketbooks, *Key figures on European business with a special focus on the recession, 2010 edition*, p. 34.

⁴⁸ European Commission, *Market Observatory for Energy*, report 2009, p. 46.

⁴⁹ In order to facilitate integration, the Commission adopted in November 2010 the Communication "*Energy infrastructure priorities for 2020 and beyond – A blueprint for an integrated European energy network*", SEC (2010) 1395 final.

⁵⁰ See Report from the Commission to the Council and the European Parliament of 15.04.2008, *Progress in creating the internal gas and electricity market*, COM(2008) 192 and Commission Decision in Case

Before liberalisation, the predominant model was vertical integration of production / imports, transport and retail supply. Liberalisation has allowed new entries in the production, wholesale trading and retail supply markets. However, these markets have generally remained fairly concentrated, often with a strong position kept by the incumbent companies. In the wake of liberalisation, certain incumbent operators have significantly expanded within the EU outside their home markets, in particular through acquisitions.

3.2.2. Regulatory Framework

The First Electricity⁵¹ and Gas⁵² Directives, adopted in 1996 and 1998 respectively, removed legal monopolies by requiring Member States gradually to allow large business customers to choose their suppliers. The Directives also introduced provisions relating to the access of third parties to transmission and distribution networks. Furthermore, for vertically integrated companies, the Directives mandated a minimum level of separation of the network business from the other activities (“unbundling”). In the gas sector, import monopolies were abolished.

The Second Electricity⁵³ and Gas⁵⁴ Directives reinforced these provisions. In particular, they provided for the complete market opening of the electricity and gas retail markets: they required all business and household customers to be eligible as from 1 July 2004 and 1 July 2007 respectively. As regards electricity generation, the Second Electricity Directive limited the possibility to resort to tendering procedures for new capacity to cases where a shortfall in the supply of electricity is foreseen and the market is not expected to resolve it adequately by itself.

As from 3 March 2011, these Directives will be replaced by the Third Electricity⁵⁵ and Gas⁵⁶ Directives, which have further reinforced their requirements, for example with regard to third party access requirements for networks and the role of the national energy market regulators. They have also reinforced the rules relating to the unbundling of transmission system operators.

Both Directives foresee the possibility for Member States to impose, in the general economic interest, public service obligations which may relate to security (including security of supply), regularity, quality and price of supplies and environmental protection (including energy efficiency, energy from renewable sources and climate protection). The Directives require

N 594/2009, *Aid to Gaz-System S.A. for gas transmission networks in Poland*, OJ C 101, 20.4.2010, p. 9.

⁵¹ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20.

⁵² Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, p.1.

⁵³ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37.

⁵⁴ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p. 57.

⁵⁵ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55.

⁵⁶ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), OJ L 211, 14.8.2009, p. 94.

such obligations to be clearly defined, transparent, non-discriminatory, verifiable and to guarantee equality of access for EU electricity and gas undertakings to national consumers. In 2010, the European Court of Justice adopted a ruling concerning these provisions.⁵⁷ It provided guidance as regards the conditions under which Member States may impose public service obligations relating to gas retail prices.

In addition, the Third Electricity Directive requires Member States to ensure that all household electricity consumers enjoy universal service - that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. The Third Electricity Directive allows Member States to extend universal service to small enterprises. To ensure the provision of universal service, Member States may appoint a "supplier of last resort".

In addition, both the Third Electricity and the Third Gas Directives require Member States to take appropriate measures to protect final customers and, in particular, vulnerable customers. Member States have to define the concept of vulnerable customers, which may refer to energy poverty and, *inter alia*, to the prohibition of disconnection of electricity or gas to such customers in critical times. Moreover, Member States are required to protect final customers in remote areas. The Third Gas Directive foresees that Member States may appoint a "supplier of last resort" for customers connected to the gas system.

The Third Electricity Directive refers to financial compensation provided to electricity companies for the fulfilment of public service obligations: it requires such compensation, as well as any possible exclusive rights, to be granted in a non-discriminatory and transparent way. These requirements come in addition to those foreseen in the SGEI Package, which applies to public service compensations in the electricity sector.

3.2.3. Commission's Decision-making Practice

The Commission has limited experience concerning State aid granted as compensation for the fulfilment of public service obligations in the electricity or gas sector. It has had to deal with many State aid cases in the energy sector in recent years, but very few of these have concerned public service compensation.

Since the adoption of the First Electricity Directive, the Commission has approved five schemes⁵⁸ involving financial compensation granted for the fulfilment of public service obligations relating to electricity generation from indigenous fuel sources. In these cases, the Commission took the view that the public service obligations in question corresponded to genuine SGEI justified for reasons of security of energy supply, in particular in light of a specific provision of the Electricity Directives.⁵⁹ This provision allows Member States, for reasons of security of supply, to direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding 15 % of

⁵⁷ Case C-265/08, *Federutility and Others* [2010] ECR I-0000.

⁵⁸ Case NN 49/99, *Costs of transition to competition* (OJ C 268, 22.9.2001, p. 7), Case N 6/A/2001, *Public Service Obligations imposed on the Electricity Supply Board with respect to the generation of electricity out of peat* (OJ C 77, 28.3.2002, p. 27), Case N 34/99, *Stranded costs compensation* (OJ C 5, 8.1.2002, p. 2), Case C 7/2005, *Electricity tariffs* (OJ L 219, 24.8.2007, p. 9), Case N 178/2010, *Public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants* (OJ C 312, 17.11.2010, p. 5).

⁵⁹ Article 8 (4) of the First Electricity Directive, Article 11 (4) of the Second Electricity Directive and Article 15 (4) in the Third Electricity Directive. These three provisions are identical.

the overall primary energy necessary to produce the electricity consumed in the Member State concerned. In the most recent case, the Member State provided detailed explanations which were considered as justifying the intervention.

The Commission has also assessed financial compensation planned in relation to a public service obligation consisting in bringing on line new electricity reserve generation capacity.⁶⁰ In that case, the Member State had provided detailed evidence that it would face a risk of disruption of electricity supply at certain moments in peak periods and that it needed reserve capacities that the market was unlikely to provide by itself.

The Commission has received no State aid notifications in recent years concerning public service compensations related to the electricity universal service, public service obligations for vulnerable customers or customers in remote areas, or suppliers of last resort. A possible explanation is that, where SGEI obligations are imposed on incumbent operators who have in any event maintained a strong position on their home market, the Member States concerned can decide that no separate financial compensation is needed. In such cases, incumbents may be able to maintain the financial equilibrium of their operations overall, even though the costs of certain public service obligations imposed on them may exceed the revenues that these generate.

The resort to tendering procedures to attribute public service obligations in the electricity and gas sectors seems relatively rare. For example, according to the European Regulators' Group for Electricity and Gas (ERGEG), the Commission's formal advisory group of national energy market regulators, suppliers of last resort are most commonly designated by the public authorities and in half of the cases, the incumbent supplier acts as the "supplier of last resort".⁶¹

3.3. Waste and Water Services

3.3.1. Size of the Sector and structural Particularities

The total turnover of industries active in the provision of environmental services (eco-industries) in the EU-27 was EUR 319 billion in 2008, equivalent to 2.5 % of the EU's GDP. The EU's environment industries represent around 3.4 million direct jobs. The most important sectors in terms of revenue are by far waste management, water supply, wastewater management and recycled materials.⁶²

The provision of water supply and water and waste management services is often a responsibility of local public authorities which have an obligation to ensure that such services are satisfactorily provided within their geographic area of competence.

This responsibility is often discharged directly by public administrative entities and enterprises or by the entrustment of a public service concession to a private enterprise, which performs the services under conditions and for a duration specified in the concession contract. In both cases, exclusive rights granted by the public authorities often accompany the

⁶⁰ Case N 475/2003, *Public Service Obligation in respect of new electricity generation capacity for security of supply* (OJ C 34, 7.2.2004, p. 8).

⁶¹ ERGEG *Status review of the definitions of vulnerable customer, default supplier and supplier of last resort*, Ref: E09-CEM-26-04, 16 July 2009, p. 31.

⁶² ECORYS, *Study on the Competitiveness of the EU Eco Industry*, October 2009, available on http://ec.europa.eu/environment/enveco/jobs/index.htm#_Toc240786985.

performance of the service in the geographic area, so that competition at the local level, takes place more often "for" the market (in connection with the choice of beneficiary of the concession) than "on" the market.

At the level of direct service provision to households and businesses, the scope of the market concerned is thus often narrow and confined to the geographic area of competence of the local public authority or, at most, the areas of several authorities which have pooled together the provision of the services in question. However, large parts of the waste and water treatment sectors are operated by multi-national companies, both at the local level of service provision under concession and further upstream, and services such as sorting of waste, exemption system provision or recovery services for waste can be national in scope or even wider.

3.3.2. *Regulatory Framework and Sector specific State Aid Rules*

Sectoral EU directives or regulations leave a certain discretion to Member States as to the conditions under which waste management and water supply and treatment services are entrusted within the internal market. The provision of those services must, however, meet the standards laid down in EU environmental law as to waste and water, and a number of Directives also provide for relatively detailed rules which extend to the operation of the services concerned (e.g. Packaging Waste⁶³, Waste from Electrical and Electronic Equipment⁶⁴, End-of-Life Vehicles⁶⁵ and Battery Directives⁶⁶). These sectoral provisions are without prejudice to the application of the general competition rules.

In relation to the application of Article 106(2) TFEU, there are no specific State aid rules relating to these sectors other than the Package. However, as with all sectors, the general exceptions to the State aid prohibition under Articles 107(2) and (3) apply. In this context, specific provision is made as to the application of Article 107(3)(c) in the Community Guidelines on State Aid for Environmental Protection⁶⁷. In addition to the general principles and criteria followed by the Commission, these guidelines contain more detailed rules for waste management activities (chapter 3.1.9). The guidelines also provide rules for aid intended to increase the level of environmental protection beyond or in the absence of EU standards (chapter 3.1.1), which may, in appropriate circumstances, apply to water supply and waste water treatment. It is also worth noting that user charges for water services need, in application of the "polluter pays" principle, cover the economic costs of the services in application of the Water Framework Directive.

3.3.3. *Commission's Decision-making Practice*

Since the adoption of the Package in 2005, Member States have not notified to the Commission any plans to grant compensation for the provision of waste or water SGEI pursuant to Article 106(2) of the Treaty. This may owe something to the fact that the services

⁶³ Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste, OJ L 365, 31.12.1994, p. 10.

⁶⁴ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ L 37, 13.02.2003, p. 24.

⁶⁵ Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, OJ L269, 21.10.2000, p. 34.

⁶⁶ Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, OJ L 266, 26.09.2006, p. 1-14.

⁶⁷ Community Guidelines on State Aid for Environmental Protection, OJ C 81, 1.4.2008, p.1.

provided are often local in nature, and so may fall within the thresholds in the SGEI Decision. However, where the local area concerned is a major city or broader agglomeration, the contracts concerned might typically be worth dozens of millions of Euros per year.

Waste and water supply services to households and undertakings are normally remunerated by end-user charges and/or levies, which are regularly adjusted – sometimes automatically in the concession contract if the services are provided by third parties under concession - to cover the costs of service provision together with a regulated, or even pre-determined, profit. As a result, there may be no further SGEI compensation to the service supplier in addition to the revenues from user charges, at least if the contracts are performed as planned.

Where services are provided by public undertakings, public financial support may take the form of increases in share capital or other financial contributions by the public authorities/shareholders. Such financial support would, unless it met the conditions of the market investor principle, constitute a *de facto* SGEI compensation⁶⁸. However, Member States have not notified any such case in the past five years.

3.4. Postal Services

3.4.1. Size of the Sector and structural Particularities

The overall EU postal sector, comprising letter post, parcel and express services, earned total revenues of about EUR 94 billion in 2007 (0.7 % of EU-27 GDP). Total sector employment in the EU was around 1.6 million in 2006, representing 0.7 % of total EU employment.⁶⁹

The letter post activity represents the largest segment, with 56 % of the revenues of the sector. This activity was traditionally covered by monopolies. In spite of recent steps towards market liberalisation, incumbent national postal services, which carry out the universal service obligation, retain a market share of over 95 %⁷⁰. At the same time, this activity is the most vulnerable to substitution by other, electronic forms of communication⁷¹ and is in clear decline in the majority of Member States.

The parcel and express markets, which together represent 44 % of the revenues of the sector, have been liberalised in most Member States for decades. These markets contain both international players - of which some are owned by EU postal incumbents⁷² and others are independent or non - EU⁷³ and also local operators. This activity benefits from electronic commerce through delivery of goods ordered over the internet ('internet fulfilment').

⁶⁸ The Commission rules describing the Member States' obligations in the field of application of the market economy investor principle are laid down in the Commission's position on the Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, 1984, Bulletin EC 91984, pp. 28-29 and further spelled out in Communication as to the application of Articles 107 and 108 TFEU to public holdings and Communication, 1993, OJ C 307, 13.11.1993, p. 3–14.

⁶⁹ EUROPEAN COMMISSION, *The Evolution of the European Postal Market since 1997*, Report by ITA Consulting and Wiki Consult, August 2009, p. 18.

⁷⁰ *Ibid.*, p. 19.

⁷¹ However, the service of hybrid mail, under which digital data is transformed into physical letter items at distributed print centres located as close as possible to the final delivery addresses, represents one way in which electronic communication and letter delivery are complements rather than substitutes.

⁷² For example: DHL (Deutsche Post), TNT (NL), GLS (Royal Mail – UK), DPD (La Poste France).

⁷³ For example: UPS and Fedex.

3.4.2. Regulatory Framework and sector-specific State Aid Rules

Historically, postal incumbents have provided a universal service of delivering letters and parcels throughout the territory of the Member State concerned. Many incumbents enjoyed a monopoly over certain activities – generally, letters up to a certain weight or price –. The services covered by the monopoly were referred to as the 'reserved area', an area which has been gradually reduced over time. The scope of the universal service obligation (USO) has always been broader than the scope of the reserved area. In particular, the USO includes parcel services. The first postal green paper in 1992 illustrated this as follows:

	Weight / price criteria	
Universal requirement (personalised/individual communication)	Letters/postcards (under monopoly, gradually reducing in scope then eliminated)	Letters outside the monopoly (higher priced/weight)
Universal requirement (goods / printed papers)	Parcels and printed papers (up to certain weight)	
No universal requirement	Express items Heavier parcels and printed items Document exchange items	

Reserved	Non-reserved
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Both national postal incumbents and other operators have always offered services which are covered neither by universal service requirements nor by monopoly. These services, sometimes called commercial services, are offered in competition with other operators and include many express and parcel services.

The first postal Directive⁷⁴ and the second postal Directive⁷⁵ limited the reserved area gradually to the standard (as from 1 January 2006) of items weighing less than 50g and costing less than two-and-a-half times the basic tariff.

The third postal Directive⁷⁶ abolishes the letter monopoly, with effect from between 2011 and 2013 depending on the Member State, and creates a regulatory framework which guarantees

⁷⁴ 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.

⁷⁵ 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.

⁷⁶ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ L 52, 27.2.2008, p. 3.

citizens a universal service, while also limiting the extent to which Member States may choose to restrict access for economic operators.

Annex I of the third postal Directive is particularly important in the context of State aid, as it sets out a new calculation method for the costs which may be compensated. Unlike the SGEI Framework, which is based on full cost allocation, the Annex I methodology only allows compensation for the net costs that would have been avoided in the absence of the universal service obligations insofar as these net costs constitute an unfair burden for the Postal operator. The Directive requires an assessment of what service would be provided, and what costs a provider would incur, in the absence of an SGEI entrustment. It also foresees a range of different ways for these net costs to be compensated when they constitute an unfair burden, not all of which would constitute state aid.⁷⁷

In this connection it has to be noted, that the Postal Directive is not based on article 107-109 TFEU and therefore cannot derogate to State aid rules but just create additional requirements. However, for the purpose of State aid assessment the application of Annex I of the Postal Directive (regarding the methodology to calculate the net cost of the universal postal service) can be relevant.

3.4.3. Commission's Decision-making Practice

Within the last five years, the Commission has taken 15 decisions concerning postal operators.

As regards SGEI in the postal sector, the Commission's decision-making practice has been guided by the following theme:

- USO providers (incumbents) should not be put at an advantage in competitive markets by overcompensating them for the costs of the USO or through other measures. Commercially viable postal services should not benefit from cross-subsidies⁷⁸. Targeted public financing can, however, be accepted to cover the (net) costs of universal service provision. The calculation of these costs has so far followed the methodology of the SGEI Framework, but this has changed with the entry into force of the third postal Directive on 1 January 2011 (see above).

The Commission has approved substantial aid to postal incumbents for the provision of universal services in, for example, France, Italy, UK, Sweden and Poland.⁷⁹ In addition, a

⁷⁷ For example, the directive provides the option of "a mechanism for the sharing of the net cost of the universal service obligations between providers of services and/or users" as an alternative to compensation from public funds. Such a mechanism may or not be caught by the definition of State aid, depending on how it is constructed.

⁷⁸ The Commission has taken action to bring to an end *unlimited guarantees* in favour of postal incumbents since such measures improve financing conditions for all their activities, including competitive/commercial ones. It has also considered the rather specific issue of the conditions under which *logistical support* by a postal operator to its subsidiary operating in commercial markets may constitute aid if not adequately remunerated – see Reference for Judgment of the ECJ on 3 July 2003 in Case C-83/01 P, C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost v. Ufex and Others*, [2003], ECR I-06993; see also Commission Decision 606/2010 of 26 January 2010 on case C 56/07, *Garantie d'Etat illimitée - La Poste* (OJ L 274, 19.10.2010, pp. 1-53).

⁷⁹ Case C 43/2006, *Pension reform with La Poste* (OJ L 63, 07.03.2008, pp. 16-43); Case NN 24/2008 and C 47/1998, *Poste Italiane* (OJ C 145, 11.06.2008, p. 3); C 21/2005 and C 22/2005, *Poczta Polska* (OJ C 33, 15.02.2007, pp. 9-10); Case N 642/05, *Posten AB* (OJ C 291, 05.12.2007, p. 1).

significant number of cases involve services provided by the postal incumbent falling outside the postal sector or the network of post offices (as distinct from the collection and delivery operation covered by the monopoly). This is the case of UK, Ireland, Sweden and some Italian cases.⁸⁰

It is notable that the cases which have been assessed so far involve only nine Member States. Many Member States have relied on the traditional postal (letters) monopoly to finance their postal operators. Indeed, many postal operators have been historically profitable and, rather than requiring subsidy, some have even been sources of financing for their host governments, or have been able to use profits generated from high stamp prices to expand in other areas.

It can be noted that only three negative State aid decisions have been taken so far⁸¹. However, in several other cases, the Commission required amendment of the proposed measures, during the notification phase, before authorising them. Examples of this include UK measures in favour of Post Office Limited and the French pension measure in favour of La Poste.⁸²

3.5. Financial Services

3.5.1. Size of the Sector and structural Particularities

Financial intermediation accounted for 5.7 % of EU-27 GDP in 2009. The banking sector has been open to competition for many years⁸³. Financial markets are already quite liberalised. Most banks perform cross-border operations. As to the extent of cross-border operation in the retail current account market, cross-border payment card transactions account for about 10 % of total payment card transactions. It is expected that the adoption of the Single Euro Payment Area (SEPA)⁸⁴ will give rise to an increase in the number of cross-border transactions as

⁸⁰ Case N 388/2007, *Post Office Limited: Transformation programme* (OJ C 14, 19.01.2008, p. 2), Case N 642/05, *Posten AB* (OJ C 291, 05.12.2007, p. 1), Case N 650/2001, *Equity Injection notification - An Post* (OJ C 43, 27.02.2007, p. 1); Case NN 24/2008 and C 47/1998, *Poste Italiane* (OJ C 145, 11.06.2008, p. 3).

⁸¹ Commission Decision (EC) No 753/2002 of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post AG, OJ L 247, 14.09.2002, pp. 27-55 which has been annulled by the General Court on 1 July 2008 (Case T-266/02), *Deutsche Post v Commission*, [2010] ECR II-1233, confirmed by the Court of justice in case C-399/08, *Deutsche Post v Commission*; Commission Decision (EC) No 948/2008 of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport, OJ L 346, 23.12.2008, pp. 1-36 confirmed by Judgement of General Court of 7 October 2010 (Case T-452/08, *DHL v Commission*); Commission Decision (EC) No 178/2009 of 16 July 2009 on a State aid scheme implemented by Italy to remunerate current accounts held by Poste Italiane with the State Treasury Case C 42/06, *Poste Italiane SpA – BancoPosta*, (OJ L 64, 10.03.2009, pp. 4-44).

⁸² Case C 43/2006, *Réforme du mode de financement des retraites des fonctionnaires de l'Etat rattachés à La Poste* (OJ L 63, 07.03.2008, pp. 16-42; Case N 822/2006, *Debt payment funding to Post Office Limited* (OJ C 80, 13.04.2007, p. 5).

⁸³ See for instance Case 267/86, *Van Eyke*, [1988] ECR 4769 and paragraph 23 of the Advocate-General's opinion; Case C172/80, *Zuchner*, [1982] ECR 2021. See also Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, p. 5) and the Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 386, 30.12.1989, p. 1-13).

⁸⁴ SEPA is an initiative set up by the European banking industry aimed at ensuring that cross border payments become as easy, efficient and secure as domestic payments within a Member State. It will allow any customer (consumer, merchant, company) to make non cash payments in Euro to any beneficiary located anywhere in the Euro area, using the same bank account and the same payment instrument under the same conditions as in his home country. SEPA will cover credit transfers, direct debits as well as payments by cards. In December 2010 the European Commission issued a proposal for

citizens will be able to use the same account for cross-border transactions rather than using several accounts in different Euro area Member States.

Of particular importance from an SGEI perspective is the fact that a substantial minority of EU citizens do not have access to a basic bank account.⁸⁵ This lack of access can raise serious issues of social exclusion, since access to a bank account is of increasing necessity for everyday financial transactions such as receiving salary or benefit payments, paying bills and accessing other financial services.

3.5.2. Regulatory Framework and sector specific State aid Rules

The provision of basic banking accounts is not currently subject to any regulations at EU level.⁸⁶

There are no specific State aid guidelines in financial services that have an effect on the treatment of SGEI. The SGEI Framework is the basis for applying SGEI rules in the financial services sector.

3.5.3. The Commission's Decision-making Practice

The Commission has dealt with 12 cases⁸⁷ that involve a SGEI in the financial services sector⁸⁸. Of these cases, two are ongoing⁸⁹ and one was closed by a negative decision⁹⁰. Of the 10 closed cases, there was only one in which the 2005 SGEI Framework was applied⁹¹.

the Regulation establishing technical requirements for credit transfers and direct debits in euros which should allow for a full immigration of existing national credit transfer and direct debit schemes to Sepa instruments.

⁸⁵ According to recent data, on average, 30 million adults in the EU do not have a bank account. This figure includes both voluntary and involuntary unbanked people. See Commission services working document of 6.10.2010, *Consultation on Access to a Basic Payment Account*, http://ec.europa.eu/internal_market/consultations/docs/2010/payment_account/access_basic_payment_account_en.pdf

⁸⁶ See Commission services working document of 6.10.2010, *Consultation on Access to a Basic Payment Account* (cited above footnote 82).

⁸⁷ Case N 642/2005, *State compensation to Posten AB for providing basic payment and cash facilities services - Sweden* (OJ C 291/2007, 05.12.2007, p. 5); Case N 749/2001, *Posten AB giro payment service - Sweden* (OJ C 187, 07.08.2003, p.9); Case N 514/2001, *Universal Banking Services "Modernisation of the UK benefit payment system and provision of access to universal banking services through post offices" - UK* (OJ C 186, 06.08.2003, p. 17); Case N 252/2002, *Reinvention of the urban Post Office network - UK* (OJ C 269, 08.11.2003, p. 22); Case N 784/2002, *Government rural network support funding, debt payment funding and rolling working capital loan to Post Office Limited - UK* (OJ C 269, 08.11.2003, p. 23); Case N 244/03, *Credit Union - Provision of Access to Basic Financial Services - Scotland*; Case C 42/2006, *Poste Italiane - Banco Posta - Remuneration of current account deposited with the State - Italy* (OJ C 290, 29.11.2006, p. 8; and L 64, 10.03.2009, p. 4); C 49/2006, *Poste Italiane - Banco Posta - Italy* (on postal saving books "libretti postali" and postal savings certificates "buoni fruttiferi postali" (OJ C 31, 13.02.2007, p. 11 and OJ L 189, 21.07.2009, p. 3); Case C 88/1997, *Possible aid to Crédit Mutuel through livret bleu - France* (OJ C 210, 01.09.2006, p. 12-32); Case CP 280/2009, Case N 531/2005, *SGEI entrusted to Banque Postale - France* (JO C 21, 28.1.2006, p. 2).

⁸⁸ Exclusively or as a banking item of a larger postal service SGEI.

⁸⁹ Case C 88/1997, *Possible aid to Crédit Mutuel through livret bleu* (OJ C 210, 01.09.2006, p. 12-32); Case N 531/2005, *SGEI entrusted to Banque Postale - France* (JO C 21, 28.1.2006, p. 2).

⁹⁰ Case C 42/2006, *Poste Italiane - Banco Posta - Remuneration of current account deposited with the State - Italy* (OJ L 64, 10.03.2009, p. 4).

The complexity of financial services lies in the fact that identifying the correct costs, revenues and reasonable profit associated with SGEI is very difficult.

An important task that has arisen in these cases has been the proper allocation of costs to the SGEI. In most cases the SGEI requires the bank to provide a service that it might not otherwise provide. These services are usually provided through the banks' normal distribution networks. In addition, the normal back office functions are also used by the SGEI. Therefore the proper allocation of costs to the SGEI requires identifying both the specific costs related to the SGEI and the proportion of overheads that it consumes. While this issue is common to all SGEI, the complex operations of banks allied to the fact that the SGEI are usually provided nationwide means that the cost structure of the whole bank generally needs to be analysed.

With regards to revenues, an important part of the business model of banks is cross selling, meaning that if a customer already has one product with a bank, the bank normally attempts to sell this customer another product in order to generate additional revenue. When banks are entrusted with an SGEI, they are sometimes given a special or exclusive right to provide this product (for example, Banque Postale, Caisses d'Epargne and Cr dit mutuel were the only three banks in France that had been granted special rights to distribute a tax-exempted savings account "Livret A"). Given their normal business strategy, they might in practice sell extra products to some people who use the SGEI, thus generating additional revenue.

Finally, the appropriate level of reasonable profit allowed is difficult to establish in financial SGEI. Firstly, this is because the profit margins generated by banks are in general not public information. Secondly, the question of risk (or absence of risk) is vital in determining the correct reasonable profit. Where the bank is simply paid a fee for providing a service, this may be relatively straightforward to determine. However, in hybrid systems, where the bank collects deposits as part of the operation of the SGEI but then invests it at its own risk, the calculations of the appropriate reasonable profit become more complicated. This is an important issue and little guidance can be found in cases in other sectors.

3.6. Public Service Broadcasting

3.6.1. Size of the Sector and structural Particularities

Each Member State has one or more public service broadcasters, usually with a strong market position. Public service broadcasting, independently of its economic relevance, differs from public services in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

The particular role of public service broadcasting is underlined by the Protocol No. 29 on the system of public broadcasting in the Member States annexed to the TEU and to the TFEU. The Protocol after considering *'that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'*, states that *'the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and*

⁹¹ Case N 642/2005, *State compensation to Posten AB for providing basic payment and cash facilities services - Sweden* (OJ C 291/2007, 05.12.2007, p. 5).

organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

3.6.2. Regulatory Framework and sector specific State aid rules

The Commission Communication on the application of State aid rules to public service broadcasting of 2009 and its predecessor text of 2001⁹² take into account that public service broadcasting, although having a clear economic relevance, is not comparable with a public service in any other economic sector. The main provisions of the Communication include a great focus on accountability and effective control at the national level, including a transparent evaluation of the overall impact of publicly-funded new media services (prior evaluation of significant new services launched by public service broadcasters), control of overcompensation and the supervision of the public service mission. The Communication leaves no room to also apply the SGEI Framework to public service broadcasters.

3.6.3. The Commission's Decision-making Practice

Since the adoption of the Package in 2005, the Commission has assessed State aid measures in favour of public service broadcasting in 16 State aid cases. The cases were not assessed under the Package but on the basis of the Broadcasting Communications. The main issues in these cases were the entrustment of the broadcaster with a public service mission, the right of broadcasters to offer new audiovisual services, and appropriate mechanisms to avoid overcompensation. Efficiency is as a rule not a consideration in these cases.

The future evolution of technical platforms may lead to an increasing focus on the prior evaluation of significant new services, as mentioned in section 3.6.2 above. However, it should be noted that the responsibility for the application of this test lies primarily with the Member States.

3.7. Broadband

3.7.1. Size of the Sector and structural Particularities

The ICT sector is directly responsible for 5 % of European GDP, with a market value of EUR 660 billion annually⁹³. The telecoms sector accounts for 52% of this amount. Many players of different size compete among each other and in particular against the incumbent former state monopoly operators.

⁹² Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257, 27.10.2009, p. 1–14; Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320 of 15.11.2001, pp. 5-11.

⁹³ Commission Communication of 26 August 2010, A Digital Agenda for Europe, COM(2010) 245 final, p. 4.

3.7.2. Regulatory Framework and Sector specific State Aid Rules

Directive 2002/21/EC ("Framework Directive")⁹⁴ provides for the separation of accounts for public communications networks/services providers which have special or exclusive rights for the provision of services in sectors other than electronic communications in the same or another Member State. Furthermore, Directive 2002/22/EC ("Universal Service Directive")⁹⁵ provides Member States with the possibility in certain circumstances to designate a universal service provider with the obligation to deliver connections to a public communications network, and with a mechanism to compensate the determined net costs resulting from such obligation under transparent conditions from public funds or a sector-specific fund. In addition, the Universal Service Directive provides for the possibility to mandate additional services outside the scope of universal service defined at EU level for telecoms, but in such circumstances, no compensation mechanism involving specific undertakings may be imposed⁹⁶.

The Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks⁹⁷ contain specific provisions concerning the deployment of basic broadband and Next Generation Access networks with public support in areas where private operators do not invest. In this case, the aid is often not granted as public service compensation but as sectoral investment aid under Article 107(3)(c) of the Treaty. However, public service compensation can also be found compatible under Article 106(2) where the general conditions are met.

3.7.3. The Commission's Decision-making Practice

Only very few cases have identified the support system for broadband rollout as SGEI. In three cases⁹⁸ this led to a no aid decision (*Altmark* criteria fulfilled) of which only the third of these was adopted after the Package. In one case⁹⁹ the aid was found compatible under the SGEI Framework.

The cases dealt with so far have focused primarily on establishing the conformity of the tender procedures in question with the fourth *Altmark* criterion, and on the definition of broadband rollout as SGEI. It can be expected, however, that the assessment of State aid for broadband deployment under Article 106(2) TFEU will continue to be the exception rather than the rule in future.

⁹⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.04.2002, pp. 33-50.

⁹⁵ 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, OJ L 108, 24.04.2002, pp. 51-77.

⁹⁶ Article 32 of Universal Service Directive.

⁹⁷ 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.

⁹⁸ Case N 382/2004, *Haut débit en Limousin – DORSAL* (OJ C 230, 20.09.2005, pp. 6-7); Case N 381/2004, *Haut débit en Pyrénées-Atlantiques* (OJ C 162, 02.07.2005, pp. 5-6); Case N 331/2008, *Réseau à très haut débit en Hauts-de-Seine* (OJ C 256, 23.09.2010, p. 1).

⁹⁹ Case N 196/2010, *Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection (EstWin project)*.

3.8. Health Care

3.8.1. Size of the Sector and Structural Particularities

Health care is a very important area both in terms of subjective importance for the population but also as regards public expenditure, which represents from 6 to 10 % of EU countries' GDP.¹⁰⁰

Two major types of health care systems exist in the EU:

- National Health Services (NHS): These services are financed by taxes and operate according to a benefit-in-kind system. Several Member States have introduced a NHS including in particular the United Kingdom, Italy, Spain and Portugal.
- Social Insurance Systems: These systems are based on compulsory insurance, which implies that either all citizens, or particular groups of person, are obliged to be affiliated with a health insurer.

Three markets can be distinguished in the health care sector:

- Health services: hospital and non-hospital services.
- Health goods: the pharmaceutical industry, pharmacies and other health goods.
- Health insurance: the financing of the provision of health services/goods and professional insurance for medical professionals.

In the health services market, there is a progressive development of a real internal market in health services: a relatively small, but growing, number of companies deliver health care in more than one country in Europe.

In the private insurance market, with one or two exceptions, there seems to be a clear divide between the EU-15 and EU-12 Member States with regard to market development and public debate about private health insurance. Markets in the EU-15 tend to be larger, show more diversity in terms of role and are or have been dominated by mutual associations. In contrast, markets in much of the EU-12 have struggled to take off, play a mainly supplementary role and are sometimes exclusively commercial.

In terms of spending, private health insurance does not make a significant contribution to total health spending in the European Union. It accounts for less than 5 % of total health expenditure in two-thirds of the Member States, although it has a considerably larger role in Slovenia (13.1 %), France (12.8 %), and Germany (9.3 %).¹⁰¹

3.8.2. Regulatory Framework

There are no specific State aid rules applying to the health care sector. Under the SGEI Decision, however, aid to hospitals is exempted from notification regardless of the amount of

¹⁰⁰ EUROSTAT, *Statistics explained: Healthcare expenditure*, April 2008.

¹⁰¹ EUROPEAN COMMISSION, *Private health insurance in the European Union: Final report prepared for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities*, 24.06.2009, p. 6.

compensation involved, provided that the conditions of the SGEI Decision are met (see section 2.2.1 above).

Other relevant EU legislation include

- In 2006 the Council adopted a Communication on common values and principles in the health care systems of the Member States and noted that universality was such a shared value: no-one should be barred access to health care and access for all must be ensured. In its Health Strategy adopted in 2007 the Commission stressed the importance of universal coverage.¹⁰²
- Under the Third non-life insurance Directive of 2008, governments can no longer influence the market structure.¹⁰³

3.8.3. Commission's Decision-making Practice

Health Services: The Commission mostly deals with complaints from private clinics about aid to public hospitals.¹⁰⁴ The complaints seem to be primarily concerned with preferential treatment in favour of public hospitals, even though, in complainants' view, both private and public hospitals are entrusted with the same SGEI obligations. More specifically, the complaints target:

- the lack of transparency of the public hospitals' entrustments and accounts,
- the potential presence of overcompensation with no real verification from the State, and
- the potential cross-subsidies for commercial activities with public money.

The transparency of the entrustments and accounts is an important issue in the hospital sector because it is often the case that public hospitals receive more aid than private hospitals. It has to be clearly documented which additional services are provided by the public hospitals that justify a higher compensation.

It is worth noting that some of these complaints appear to rest on a misunderstanding of the requirements of the SGEI Decision. Private complainants often consider that all health service providers should be treated equally and that it would not be possible to entrust one provider with more public services obligations than another. Furthermore, they often contend that it would not be possible to compensate inefficient providers.

Private Health Insurance: the cases assessed by the Commission mainly concern risk equalisation schemes applied to private health insurers, as for example in the Netherlands

¹⁰² Council Conclusions on Common values and principles in EU Health Systems, 2733rd Employment, Social Policy, Health and Consumer Affairs Council meeting, Luxembourg, 1-2 June 2006; Commission White Paper COM(2007) 630 of 23 October 2007, *Together for Health: A Strategic Approach to the EU 2008-2013*.

¹⁰³ Directive 2008/36/EC of the European Parliament and of the Council of 11 March 2008 amending Council Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, as regards the implementing powers conferred on the Commission, OJ L 81, 20.03.2008, pp. 69-70.

¹⁰⁴ Case NN 54/2009, *Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique* (OJ C 74, 24.03.2010, p. 1).

(2006) and Ireland (2006).¹⁰⁵ Risk equalisation schemes are a direct form of intervention typically involving financial transfers from insurers with low risks to insurers with high risks. They are an essential component of health insurance markets with open enrolment and community rating, where they are introduced to ensure access to health insurance and fair competition among insurers. Risk equalisation measures aim to lower insurers' incentives to compete through risk selection, and to encourage insurers to compete on cost and quality. The *BUPA* judgement established that these financial transfers can constitute SGEI compensations.¹⁰⁶

3.9. Social Services and Services Organised by Local Authorities

3.9.1. Size of the Sector and structural Particularities

As described in the Commission Communication *Implementing the Community Lisbon programme: Social services of general interest in the European Union*¹⁰⁷, "social services include statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), and other essential services provided directly to the person and playing a preventive and socially cohesive role, such as social assistance services, employment and training services, social housing, childcare and long-term care services".

Statistical data on social services is often aggregated with health services and specific information on different sub-sectors is scarce.¹⁰⁸ Health and social services together generate around 5 % of the total economic output in the EU-27 and provide 21.4 million jobs, the employment rate of the sector being equal to 10 %. Moreover, as explained below in more detail, two important services – long-term care and social housing – may account for more than 2 % of GDP in some Member States.¹⁰⁹

Depending on Member State, social services are either completely provided by public administrations or by a mix of private and public providers. In some countries, there is already a developed market for long-term care in which public and private operators are in competition with each other.

Social services are mainly provided at local level by small operators entrusted by the public authorities. However in some fields, large service providers are present with subsidiaries in several Member States.

3.9.2. Long-term Care

Long-term care services for older people take different forms across Europe: they include services delivered in long-stay institutional facilities, ("residential long-term care services"), services delivered within day centres and other community based facilities ("community-

¹⁰⁵ Case N 214/2010, *Risicovereveningssysteem voor Nederlandse zorgverzekeraars* (OJ C 333, 10.12.2010, p. 3); Case N 46/2003, *Risk equalisation scheme in the Irish Health insurance market* (OJ C 186, 06.08.2003, p. 16).

¹⁰⁶ Judgment of the Court of First Instance of 12 February 2008 in Case T-289/03, *BUPA v Commission* (cited above footnote 8).

¹⁰⁷ Communication from the Commission, *Implementing the Community Lisbon programme: Social services of general interest in the European Union* COM (2006) 177 final, 26 April 2006.

¹⁰⁸ See chapter 1 of Commission Staff Working Document SEC(2010) 1284 of 22 October 2010, *Second Biennial Report on social services of general interest*.

¹⁰⁹ See chapter 3.9.2 for Long term care and 3.9.5 for Social housing.

based long-term care services") and services delivered within individuals' homes ("home-care services"). There is also a significant variation in the availability of services across Europe, ranging from countries in Scandinavia where there is a high reliance on formal care services to other parts of Europe, such as Portugal, Spain and Greece, where there has traditionally been a reliance on family members to provide care and where formal long-term care service provision remains scarce.

Long-term care accounts for between 1 and 20 % of total health expenditures by Member States. This means that several Member States (including Germany, France, Denmark and Belgium) spend between 1 and 2 % of their GDP on long-term care. Due to the ageing of the population, this percentage is expected to increase significantly in all Member States.¹¹⁰

3.9.3. *Early Childhood Education and Care Services*

Most countries in Europe have introduced separate rules and administration for early education services and childcare, although in practice there is a considerable overlap between both types of services.

3.9.4. *Employment Services*

Employment services across Europe have changed considerably during the past decade. There has been a shift towards merging the provision of passive and active services based on a rights and duties philosophy, where more is expected from the users of these services as well as from the services themselves¹¹¹. Possibly the biggest change has been the increasing involvement of private service providers for at least some employment services, as well as a growing degree of outsourcing and subcontracting from public to private operators in relation to certain functions.

3.9.5. *Social Housing*

Social housing provision in Europe encompasses development, renting/selling and maintenance of dwellings at affordable prices as well as their allocation and management, which may also include the management of housing estates and neighbourhoods. Increasingly, management of social housing can encompass social aspects: for example, care services are involved in housing or rehousing programmes for specific groups or in debt-management for low-income households. In most cases, however, specific care institutions cover the care component and collaborate with social housing providers.¹¹²

According to EUROSTAT, the public expenditure on social housing amounts on average to 0.6 % of EU-27 GDP.¹¹³ Those Member States which have public expenditure above the EU average are mostly in the EU-15 (including Germany, France, Sweden, Denmark and the United Kingdom).

¹¹⁰ EUROSTAT, *Health expenditure*, Data in focus, 26/2008, p. 1.

¹¹¹ See section 2.1.3 of the *Second Biennial Report on social services of general interest*.

¹¹² See section 2.1.4 of the *Second Biennial Report on social services of general interest*.

¹¹³ EUROSTAT, Statistical books ISSN 1681-9365, *European Social Statistics – Social Protection – Expenditure and receipts*, Data 1997-2005.

3.9.6. *Other Social Services and Services organised by local Authorities*

Many local authorities provide a number of services to enhance social cohesion at a local level. These services are provided with the objective of enabling access for all groups (including, for example, low-income families, persons with disabilities or persons in social difficulties). Services which have been the subject of a complaint, (pre)notification, or questions from Member States include:

- Recreational activities (e.g. swimming pools, zoos, sport centres, youth clubs)
- Educational and cultural activities for children and adults (e.g. child care, libraries, learning centres, museums)
- Counselling for persons in difficult social situations
- Shelter for homeless persons
- Community centres
- Local town/concert halls

The provision of these types of services is important for social cohesion at local level but also at regional level within a Member State. Local authorities finance museums, town halls, concerts, exhibitions to provide cultural events that would not be provided otherwise.

3.9.7. *Regulatory Framework*

For social SGEI the compatibility assessment is based on the Package. No sector-specific EU rules exist. Under the SGEI Decision, however, aid to social housing undertakings is exempted from notification regardless of the amount of compensation involved, provided that the conditions of the SGEI Decision are met (see section 2.2.1 above).

Cultural services are a special case in this respect, as under Article 107(3)(d) of the Treaty, they benefit from a specific exception to the State aid prohibition. This does not, however, prevent them from being treated as SGEI to the extent that they fulfil the necessary requirements.

3.9.8. *Commission's Decision-making Practice*

Long-term care: The Commission has received complaints from private competitors in Germany and the Netherlands about the financing of public long-term care providers. The public financing in question was assessed to be in line with the requirements of the Package.

Social housing: The Commission took an important decision on social housing in the Netherlands on 15 December 2009, declaring the Dutch Social Housing system compatible with EU State aid rules under Article 106(2) TFEU.¹¹⁴ The positive decision is based on the Dutch commitments to bring the existing system into line with EU State aid rules. In particular, state funding is not to be used for commercial activities and housing is to be

¹¹⁴ Case N 642/2009, *Projet d'appui spécifique aux associations de logement pour les approches de district* (OJ C 31, 09.02.2010, pp. 6-7).

attributed in a transparent manner according to objective criteria. The Commission has also received a large number of complaints from other Member States.

Other social Services and Services organised by local Authorities: The Commission has received a large number of complaints, as well as (pre)notifications and questions from Member States, concerning other types of SGEI and services organised locally. Many of the services in question have turned out, on further consideration, to come within the scope of the SGEI Decision and so not to require notification.

For services with a primarily cultural dimension, a large number of notifications has been dealt with pursuant to Article 107(3)(d). However, as cultural services – especially if provided on local level – would often fulfil the criteria to be defined as SGEI, they might instead have been entitled to exemption from notification under the SGEI Decision.

3.10. Guide on Social Services of General Interest

In connection with the 2007 Communication, the Commission services originally issued two FAQ documents covering the application of the State aid and public procurement rules.¹¹⁵ These documents were aimed at addressing questions raised by different types of stakeholders when applying the rules.

The Commission services have recently updated these two documents based on additional questions submitted through the IIS, new case-law and further issues raised by stakeholders. The update has been integrated into a single document, entitled "*Guide on the application to services of general economic interest, and in particular to social services of general interest, of the EU rules on State aid, public procurement and internal market*".¹¹⁶ To ensure user friendliness and readability, the Guide covers all relevant areas of EU law in one text.

Similar to the questions raised via the IIS, the Guide is not limited to explaining the conditions of the Package on issues such as entrustment and compensation. It also covers general questions such as the definition of SGEI and the distinction between economic and non-economic activity.

Given that the new Guide was only issued by the Commission services very recently, stakeholders have not had the opportunity to comment on the text in the framework of the consultation. Comments on the 2007 FAQ documents confirm that these documents were often perceived as having made a useful contribution to the aim of legal certainty. However, as with the IIS, many stakeholders do not regard them as a substitute for more formal guidance to be issued by the Commission.

4. PUBLIC CONSULTATION PROCESS

Paragraph 25 of the SGEI Framework and Article 9 of the SGEI Decision provided for the Commission to conduct an extensive consultation process about the application of the Package. This consultation process, which concluded in 2010, comprised a reporting exercise by Member States and a wide stakeholder consultation.

¹¹⁵ See cited above footnote 2.

¹¹⁶ Commission staff working document SEC(2010) 1545 of 7 December 2010, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*.

An aim of the consultation process was to identify the impact of the Package on the delivery and efficiency of SGEI in Europe and to identify potential areas for an improvement of these rules.

4.1. Member State Reporting

The first step in the consultation process was a reporting exercise by Member States¹¹⁷. This reporting exercise was conducted between 2008 and 2009. A number of Member States had difficulties in gathering detailed statistical information on the provision of SGEI from different parts of their national administration. Some Member States pointed to the fact that the rules contained in the Package are often applied on a regional or even local level with little national coordination, which makes data collection a difficult task. In fact, some Member States have not provided statistical information on the application of the SGEI Decision at all, whilst others have concentrated their reports on SGEI compensation organised at central government level.

Instead of providing detailed statistical information on the application of the Package, most Member States have thus focussed their contributions on practical experience with the application of the Package.

The comments received from Member State are not limited to the instruments and requirements of the Package itself. Instead, Member States have also dealt with issues of aid definition under Article 107 TFEU and with the implications of the *Altmark* jurisprudence of the Court of Justice¹¹⁸ in their reports.¹¹⁹

4.2. Consultation of other stakeholders

The Commission services also conducted an extensive public consultation in 2010¹²⁰. This consultation aimed at assessing the experiences of stakeholders with the application of the Package, and included questions on the qualification of certain measures as State aid (Article 107 TFEU) and on the *Altmark* jurisprudence.

The consultation generated interest from a range of organizations. In total, the Commission received 107 substantive submissions.¹²¹ Of these 107 submissions, 4 came directly from Member States, 23 from other public bodies, 64 from SGEI providers active in different EU Member States (and their organisations) and 16 from other organisations e.g. academia and members of the general public.¹²²

¹¹⁷ The reporting obligation was set out in Article 8 of the SGEI Decision, which obliges Member States to provide: "... reports on the implementation of this Decision, comprising a detailed description of the conditions of application in all sectors, including the social housing and the hospital sectors...".

¹¹⁸ See section 2.1 above.

¹¹⁹ The Commission has published all reports on the website of DG Competition at the following address: http://ec.europa.eu/competition/consultations/2010_sgei/reports.html

¹²⁰ This stakeholder consultation was launched on 10 June 2010 and concluded on 10 September 2010, although several contributions were received after the expiry of the 10 September deadline.

¹²¹ Annex 1 contains a list of the substantive contributions received.

¹²² The Commission has published the submissions it has received on the website of DG Competition: http://ec.europa.eu/competition/consultations/2010_sgei/index_en.html#replies

4.3. Key Issues arising out of the Consultations

The Commission services' consultation exercise has generated input from a very diverse group of stakeholders, active in different economic sectors. National authorities, municipalities, large private operators, social service providers, taxpayers often express different points of view and wishes. Consequently, the content of the submissions received and the positions expressed in them vary significantly. This overview is therefore limited to the most important and recurring issues, addressed in different submissions from Member States and other stakeholders.

4.3.1. Overall Perception of the SGEI Package

A wide range of Member States and other stakeholders consider that the Package has made a valuable contribution. It is often considered that, compared to the situation before 2005, the Package has offered an overall increase in legal certainty. Also the SGEI Decision was welcomed as a means of reducing the administrative burden connected with the need for individual State aid notifications for SGEI compensation schemes.

Many Member States and stakeholders see the instruments used by the Commission in the Package (most importantly the SGEI Framework and SGEI Decision) as being appropriate for their respective purposes and do not suggest that these legal texts should be replaced or complemented by other legal instruments.¹²³

The general stakeholder consultation also asked for comments on whether the rules contained in the Package are generally applied correctly. Unfortunately, a very large number of respondents across a range of sectors and Member States do not consider this to be the case. The reason most frequently cited for this lack of application is that decision-makers in regional and local authorities are often not aware of the Package and the obligations it imposes.

4.3.2. Request for Clarification

The consultation has clearly highlighted that many Member States and other stakeholders would welcome additional clarifications in relation to a number of key concepts which underlie the State aid rules for SGEI and the case-law of the Court of Justice. The perception that further guidance would be helpful is irrespective of the clarification measures already put in place by the Commission.¹²⁴

This includes the scope of the Treaty provision on State aid (for example the distinction between economic and non-economic activity), the definition of SGEI, the definition of State aid under Article 107 TFEU (e.g. concept of effect on trade between Member States) and the *Altmark* jurisprudence of the Court of Justice (e.g. benchmarking requirement under the fourth *Altmark* criterion).

The above concepts were not introduced by the Package itself but have their origin in primary EU law and the related case-law of the Court of Justice. Some stakeholders therefore

¹²³ This is without prejudice to requests for the introduction of additional legal instruments, namely to increase legal certainty about some key concepts, see below.

¹²⁴ See under section 3.10. above. Stakeholders were not able to take the most recent Guide on the SGEI rules into account as part of the consultation exercised because this Guide was only issued subsequently.

recognise that the definitions are not within the control of the Commission when revising the Package. The Commission's role in this context would thus in any event have to be limited to clarifying and interpreting the notions and criteria used by primary law and by the Court of Justice.

Concept of Economic Activity and Undertaking: As already explained above, the European State aid rules only apply to undertakings carrying out an economic activity. Non-economic services of general interest are therefore excluded from the scope of these rules. The general distinction between economic and non-economic services has repeatedly been relied upon in the case-law of the Court of Justice to define the scope of the State aid rules. The most relevant criterion used in this context is whether there is a market for the services concerned. Many Member States and other stakeholders nevertheless take the view that the concept of economic activity remains difficult to apply in practice. Some of these difficulties arise out of the fact that certain SGEIs are organised in a very different manner across the EU. Consequently, that fact that a given service provided in the general interest is to be treated as non-economic in one Member State does not necessarily mean that the same categorisation applies across the EU as a whole. A number of Member States and many other stakeholders thus ask the Commission for further guidance on the general criteria for distinguishing between economic and non-economic activities for the purposes of applying the state aid rules and for concrete examples illustrating the application of these criteria.

Definition of SGEI: In addition to the requests for greater clarity on the notion of economic activity, some stakeholders ask for clarification as to what qualifies as an SGEI and the minimum requirements in this respect. However, it is sometimes also felt that as the definition of SGEI (outside sectors regulated at the EU level) falls within the competence of the Member States, further Commission guidance on this point is not necessary.

Concept of Effect on Trade: Many stakeholders have identified difficulties in deciding whether or not a certain activity has an effect on trade between Member States. Under Article 107 TFEU, such an effect on trade is necessary in order for the SGEI compensation to be regarded as State aid. The lack of clarity in this respect mostly concerns the treatment of services organised by local authorities for a relatively limited amount of compensation. Commentators therefore ask the Commission to state a set of criteria for determining the existence of effect on intra-EU trade. Some stakeholders have made concrete suggestions in this respect, including amongst others the amount of compensation granted for the service, the geographical scope of the service in terms of potential users and the size of the municipality concerned.

Benchmarking under the Fourth Altmark Criterion: Many respondents have commented on the fourth *Altmark* requirement as established by the Court of Justice.¹²⁵ Most of these comments focus on the benchmark of a "well-run" undertaking, on which the Court of Justice has relied in the *Altmark* judgment as an alternative means to ensure that the public compensation does not exceed what would be necessary for an efficient service provider. Many of the submissions received on this point highlight that the standard of a well-run undertaking is difficult to apply for public authorities and service providers. It is generally considered that choosing the right undertaking for the benchmarking can, depending on the market concerned, be a very difficult exercise.

¹²⁵ See under section 2.1 above.

Entrustment: Some respondents ask the Commission to clarify the requirements in relation to the entrustment of the SGEI to a given undertaking.

In-house Provision and Cooperation between Public Authorities: Some respondents ask the Commission to clarify how the provision of SGEI by in-house providers or in the framework of cooperation between public authorities would be treated under the State aid rules.

Compensation Level: Many stakeholders have asked the Commission to clarify some of the requirements of the Package concerning the level of permissible SGEI compensation and the avoidance of overcompensation. They refer to difficulties in defining what revenues need to be taken into account when calculating the SGEI compensation and which benchmark to use.

Relationship between Package and Sector-Specific State Aid Rules: Some of the comments received address the relationship between the application of the Package and the sector specific rules mentioned in this report.

Relationship between State Aid and Public Procurement Rules: Many of the comments received from stakeholders and Member States touch on the relationship between the State aid rules for SGEI and the application of the EU Public Procurement rules¹²⁶. These contributions often focus on the argument that a tendering procedure conducted in line with the relevant EU law tendering requirements should be regarded as a sufficient means for excluding the existence of State aid. Some service providers develop further on this point, highlighting that procedures for the award of services concessions should also be viewed as sufficient in this respect. Based on the law as it stands at the moment, the award of services concessions is not subject to the detailed provisions of the EU procurement directives but must nevertheless comply with general TFEU requirements of transparency and equal treatment. As regards the choice of award criteria, some Member States and SGEI providers consider that the standard applied by the Court of Justice under the State aid rules ("*provision of the service at the least cost to the community*") should be interpreted as being fully in line with the requirements under EU procurement law ("*most economically advantageous tender*"). In particular, as regards social services, many respondents already active in this sector point out that qualitative criteria should be given an important role as opposed to a decision allegedly based exclusively on price.

4.3.3. *Social Services – Requests for Taking their Particularities better into Account*

Many of the submissions received in the stakeholder consultation focus on the treatment of certain kinds of social services.

The concern expressed in this respect is that the current rules may not be sufficiently targeted to take the specificities of social services into account. This position is frequently taken by providers of social services and by public entities involved in the commissioning of such services. Some stakeholders argue that, even where social services are provided in an economic environment (and are therefore in principle covered by the State aid rules), they are necessarily also influenced and driven by purely social objectives, which should be taken into account in their treatment under the State aid rules.

¹²⁶ In particular: 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 (OJ L 134, 30.04.2004, pp. 114-240).

A range of different proposals is being made by Member States and stakeholders to better take account of these specificities of social services under the State aid rules. One of the most frequent proposals is to expand the list of activities which benefit from the SGEI Decision, currently only available for hospitals and social housing. It means that compensation for the relevant activities can be granted without prior State aid notification irrespective of the relevant compensation amounts, provided that the conditions in the SGEI Decision are met. Other proposals in this context include the introduction of specific and simpler rules for the way social services are entrusted, the way compensation is determined and overcompensation is avoided.

4.3.4. *Services organised by local Authorities – Requests for a Proportionate Response*

Many stakeholders have argued that the requirements of the Package are not fully proportionate for compensation measures by local Communities which only have a very limited effect on trade between Member States. This concern is also raised by a series of municipalities, which argue that compliance with the Package represents an excessive administrative burden for them. They ask for the requirements, in particular the ones provided for in the SGEI Decision, to be more proportionate as regards the treatment of their services.

Some stakeholders and Member States suggest that SGEI compensation below a certain amount should be exempted from State aid scrutiny entirely. A suggested way of achieving this aim could be the introduction of an SGEI specific *de minimis* threshold, to be set above the general EUR 200 000 threshold under the Commission's general *de minimis* Regulation¹²⁷. Such a *de minimis* threshold would be different from the thresholds already contained in the SGEI Decision in that financing below the threshold would not be regarded as State aid, and the substantive requirements of the SGEI Decision concerning entrustment and compensation would not have to be met.

4.3.5. *Input concerning Large-scale Commercial Services*

The stakeholder input concerning large scale SGEI differs in some respects from the submissions focussed primarily on social and/or small scale SGEI. In fact, a number of operators active in large commercial services highlight that the current SGEI Decision, in particular due to its thresholds, removes a large number of relatively sizeable compensation measures from the Commission's State aid scrutiny.

In this context, some stakeholders also comment on the fact that the current SGEI Framework does not require any efficiency checks or an analysis of the competitive effects of the compensation. The SGEI Framework instead allows for the compensation of all costs incurred by the provider in question. It has been suggested that, instead of focusing exclusively on the compensation of cost and reasonable profit, the Commission could put a stronger emphasis on efficiency and compensation issues in its analysis. As already indicated under section 3 above, there are sectoral rules which, contrary to the SGEI Framework, impose compliance with efficiency obligations. Regulation 1370/2007 not only imposes tendering obligations for certain types of contracts in the land transport sector but also specifies that the compensation method must promote the maintenance or development of effective management by the public service operator.

¹²⁷ Commission Regulation 2006/1998/EC of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, pp. 5–10.

Some members of the business community also point out that the role which "reasonable profit" plays for SGEI should not be overestimated. They argue that, instead of focusing on the development of reasonable profit standards, the Commission should foster the use of tendering procedures as the best method for determining the correct amount of compensation.

5. CONCLUSIONS

Since its introduction in 2005, the Package has been applied across a wide range of economic sectors and Member States.

Some sectors, such as transport and health, have given rise to a significant number of State aid cases. Other sectors, such as the energy sector and environmental services have, in spite of their significant economic weight, to date only been subject to limited State aid scrutiny by the Commission.

The competition issues which the Commission has encountered differ significantly depending on sectoral specificities:

- Some SGEI activities are characterised by the existence of large market players operating on a national or even international scale. Often, the activity of such operators is not limited to SGEI or at least divided between different types of SGEI entrustments.
- Other activities are mainly organised and provided at the level of local authorities and therefore, although being in principle covered by the State aid rules, have only a relatively limited impact on trade between Member States and less potential for serious competition distortions.

Some sectors are characterised by detailed sector-specific State aid rules or general EU regulation governing the degree of market opening and competition. This is, for example, the case in the transport, telecoms, postal and energy sectors. These sector-specific rules often either replace the general SGEI rules entirely or at least have an impact on their interpretation and application.

The consultation exercise conducted by the Commission has highlighted that Member States and stakeholders generally consider that the Package has made a useful contribution to the overall objective of legal certainty in this area. However, it is also felt that some aspects of the Package could be reviewed to facilitate its practical application.

As with the Commission's decision making practice, the comments and concerns expressed by stakeholders to some extent depend on the sectors concerned. For certain types of activities (in particular for social services and small scale services), many stakeholders consider the existing framework insufficiently flexible. However, it is also felt that the existing rules withdraw a relatively large number of sizeable compensation measures from State aid scrutiny and more consideration could be given to the efficient delivery of the services concerned.

In addition to the comments on the provisions of the Package itself, many stakeholders take the view that some of the key concepts underlying these rules would benefit from further clarification by the Commission. This concerns, for example, the notions of economic activity under State aid rules, the question which services can genuinely be regarded as SGEI, the need for an effect on trade between Member States and the conditions imposed by the Court of Justice in the *Altmark* judgement.

Finally, stakeholders often consider that a possible synergy between the State aid and the Public Procurement rules should be enhanced.