



Capacity Building Workshop
on
“State Aid and Affordable Housing Investments”
Brussels, 23 May 2018

Report

On 23 May 2018, the European Urban Agenda Housing Partnership organised a capacity building workshop on “State Aid and Affordable Housing Investments”. The aim of the event was to develop mutual understanding on how the prevailing legal uncertainty in state aid law creates obstacles for public investment in housing. It also sought to contribute to the development of knowledge on the use of state support in the housing sector in general and multi-story apartment buildings in particular. Speakers and participants from the legal field and affordable housing scene discussed how state aid regulations and/or guidance could be improved to increase the supply of affordable housing.

The workshop had a particular focus on how EU regulations can impact on investment in affordable housing focusing on the application of state aid rules and the Decision of Services of General Economic Interest (SGEI) 2012/21/EU. With this event, Housing Partnership has delivered one of its core actions under the work strand “Better Regulation” as part of the EU Urban Agenda.

The seminar, hosted by the Committee of the Regions of the EU, was attended by more than 50 participants, coming from countries across the EU representing national governments, regions and cities, representatives of the European Commission, European Investment Bank, European umbrella organisations in the field of affordable housing and legal experts in state aid.

Opening by CoR Member Hicham Imane

The workshop was opened by Committee of the Regions (CoR) Member Hicham Imane who welcomed the Housing Partnership’s initiative in the area of State Aid. Hicham Imane reiterated the claim contained in the Opinion on an EU Agenda for Housing submitted in 2017 on behalf of the CoR that the definition of groups who are able to access to social housing as set out in the SGEI Decision should be not be limited to the “most deprived persons or less advantaged groups”. According to Mr Imane, a broadening of the narrow target group definition would be in accordance with the discretionary power of the Member States to provide, implement, finance and organise social housing services (subsidiarity) and confirm their autonomy to decide how they use housing policy as an instrument aimed at introducing social diversity and thus avoiding marginalisation and ghettoization.

Introduction by Henrik Morch, Director of DG COMP

Director of DG COMP Henrik Morch welcomed the initiative of the CoR with its opinion “Towards a European Agenda for Housing” and the “Guidance Paper on EU regulation and public support for housing” of the Housing Partnership. He introduced

the regulatory framework that applies to state aid control and social housing. Mr Morch recognised that there is a lack of understanding of what is possible under state aid rules which is a source of uncertainty. An ongoing point for discussion is whether the state aid rules strike the right balance between maintaining a level playing field in the EU internal market and ensuring there is a sufficient attention to social issues. He mentioned that the European Pillar of Social Rights offers a path to social housing generally. Mr Morch also set out some guiding principles on the general rules governing state support for social housing including in particular: entrustment and its duration; absence of overcompensation; and transparency requirements. Mr Morch stated that the Commission recognises a wide appreciation of SGEI and the Commission's assessment takes into account whether there is a "manifest error" in the application of the state aid rules.

Mr Morch also emphasised that there is no cap on funding and, unlike other public subsidies, there is no requirement to notify the Commission. Setting the scene for the discussions that followed, Mr Morch reiterated the definition of social housing under the SGEI rules and the specific need for a social component. Mr Morch also referred to the Dutch social housing Case Decision (2009) where the EC accepted affordable housing for 10% of the target group who did not fulfil the income limits (this case has gone to appeal however and is currently awaiting decision by the General Court).

In his speech, Mr Morch stated that there is currently no plan to revise the SGEI Decision as the period of the current European Commission (2014-2019) is nearing its end. Mr Morch added that the need to revise the definition of social housing under the SGEI remains an open question as a revision to the rules may be possible in the next Commission period. Mr Morch cautioned however that opening a discussion on SGEI may create more confusion for public officials and uncertainty for investors. Mr Morch highlighted that there is a lack of evidence on how the state aid rules cause uncertainty so there is a need for concrete examples of issues particularly as DG COMP has made only two decisions relating to state aid and affordable housing since 2009. Mr Morch clarified that the income threshold for affordable housing should remain a national policy question. Henrik Morch encouraged Member States to report any difficulties in the application of State Aid rules to their country's State Aid Coordinator. He acknowledged, however, that there "probably is a market failure in housing".

Keynote by Dr. Orna Rosenfeld: The Fragmentation of Housing Markets and the State Intervention

Academic expert in housing, Dr Orna Rosenfeld highlighted that a decade after the world economy was hit by the financial crisis, global economies are showing gaps of consistent recovery, one important field being the housing sector. Although the EU does not have an official mandate on housing, housing issues have become increasingly important across the Union. The heightened interest in affordable housing investments and by extension legal certainty around state aid in this sector,

sit in the wider context of the trends and challenges that emerged as the result of the Global Financial Crisis.

In her speech, Dr Rosenfeld highlighted the spatially fragmented nature of the housing market and the difficulty of applying universal policy prescriptions to affordable housing solutions. She developed on three fundamental issues. First, the intensified fragmentation of the national housing markets post-GFC have put cities and regional authorities at the centre of the housing strategy discourse. Second, the increased diversity and complexity of housing need that is the result of the general economic trends post-GFC as well as housing market fragmentation regional and city levels. Third, the challenges related to the trade-off between targeting and keeping a social mix in the social housing sector reported by cities, regions and affordable housing providers as they seek to address post-GFC housing circumstances with pre-GFC tools.

She argued that the problem of affordable housing also affects a range of groups from vulnerable groups such as refugees through to those with average incomes. Dr Rosenfeld also asserted that prices continue to rise steeply in many cities. While the changes in global investment patterns appears to be a contributory factor, further research and data is needed to explain the trend of increasing prices. Dr Rosenfeld's speech also highlighted the need to consider the relationship between affordable housing and labour market dynamics and its importance for the economy. Long-term stability for investment levels, as well as regulatory and policy frameworks, are key for medium and long-term results.

Practical examples from the ground

After the opening speeches, delegates were presented with a range of practical examples from the ground to showcase state aid and affordable housing issues as well as possible solutions at the national and city levels.

Helena Henriksson, a lawyer from the Swedish Association of Public Housing Companies showed how public housing companies had been affected by the Organisation of Swedish Property Owners on the ground of EU state aid rules who had stated that public housing companies showed anti-competitive practices as national legislation defined public housing companies on the basis of business-like principles. It was argued that such an approach does not need to conflict with the provision of social housing for those in general need. The Swedish Government believed that it was particularly important to protect the Swedish model of public housing companies, which targets all households in the housing market, not only people with low incomes or who otherwise need help to get a home. Although a compromise has been negotiated, the yearly rent regulations have become more difficult.

Knut Hoeller from the Housing Initiative outlined the main features of housing markets in the new member states, in particular the high proportion of people living in multi-storey buildings in urgent need of renovations, the slow transformation

process and the low proportion of subsidised social housing. Mr Hoeller highlighted that the need for high levels of public investment in multi-storey apartments in new member states may cause issues and uncertainty in the application of state aid rules (for example businesses located in the buildings as well as households would benefit from the investments).

Laurent Ghekiere from Union Sociale pour L’Habitat, France, showed how the legal uncertainty surrounding state aid and affordable housing was still prevailing in France. The “French Case” had been brought before the Commission by Property Owners (UNPI) in 2012 and 2013 on the ground of EU state aid regulations. Until now, no formal decision has been taken. The scope of social housing is now enshrined in national laws and guidance covering aspects such as social mix and diversity of housing and types of compensations (subsidies, LT public loans, VAT, tax exemptions, public lands, ERDF, EIB loans, etc.). According to Mr. Ghekiere, the new laws have allowed a higher income ceiling for affordable housing policies (now covering 61% of the population) and greater scope for supporting social mix.

Ronald Paping, Woonbond, Netherlands, provided an insight based on the Netherlands’ experience of having to exclude wide parts of the population from access to social housing as a result of a Commission decision after the complaint of private institutional investors. Currently, the “Dutch Case” is before the General Court and awaiting a decision by the end of 2018, thus perpetuating the ongoing uncertainty regarding possible investment in social housing. Mr Paping informed that affordable housing investment has slowed down in the Netherlands due to the uncertainty regarding the income limits which are acceptable under the SGEI rules (for example the income limit needs to be higher for multi-person households but it is not clear how high the limit can be). According to Mr Paping, the uncertainty surrounding state aid means that there has been less focus on social mix in recent years and affordable housing investment has slowed down.

Reactions from legal experts on EU level

At the end of the morning session, Barbara Catrysse of the European Investment Bank (EIB) and Viktor Kreuzschitz of the General Court provided legal expert viewpoints in response to the preceding speeches. Ms Catrysse is a Senior Legal Counsel at EIB and an expert on state aid issues while Mr Kreuzschitz has many years of experience as a leading judge on state aid decisions.

Ms Catrysse highlighted the important role of the EIB in providing loans for social and affordable housing projects. The value of the Bank’s loans to the sector was 9.5 billion Euros in the period 2011-15. The EIB also provides an advisory service to Member States that are dealing with affordable housing projects. Ms Catrysse emphasised the need for legal certainty in making lending decisions. She highlighted that affordable housing does not tend to be an area where EC enforces rules or takes negative decisions. However Ms Catrysse stressed that while it was clear that there are certain “red lines” that cannot be crossed (e.g. overcompensation and account separation), other rules including SGEI are applied in a more flexible way.

She stressed that certainty could be improved by Member States developing clearer eligibility criteria for affordable housing as this would meet the state aid test market failure test.

Mr Kreuzschitz reiterated that the EC recognises a wide appreciation of SGEI and that there must be a “manifest error” in the application of the state aid rules for the Commission to overturn a decision. Moreover, Mr Kreuzschitz stressed that there are many situations where direct transfers can be made that do not constitute state aid, for example where an investment is limited to a local and regional economy and has no bearing on trade between countries. Mr Kreuzschitz highlighted a contextual point however that levels of public investment in affordable housing, which amount to approximately 3bn Euros in the last 10 years, is negligible compared to all public investments.#

Interactive group discussions

During the afternoon session, participants had the opportunity to take part in two interactive group discussions. The first workshop examined state aid and affordable housing from the perspective of the European Commission – “in the shoes of Commissioner Vestager” and the second workshop from the perspective of cities – “in the shoes of a Mayor”. Breakout sessions for each of these themes enabled a rich and varied discussion.

A number of key considerations emerged:

1) on better knowledge:

- The problem of capacity in local municipalities and the fear of not interpreting state aid rules correctly.
- Developing more robust data collection on housing need at the local and regional level in order to make the market failure case for state subsidies.
- The need for more evidence on the difficulties and challenges facing cities in the application of state aid rules in order to bring this to the attention of the EC.
- The problem of establishing a more detailed set of criteria.
- A national/regional exchange organisation or development bank that would deal with enquiries and provide guidance on state aid.
- Clearer transfer of knowledge from national level to regional/local levels on the calculation of compensation which is very challenging for local municipalities. There is a particular problem of demonstrating non-overcompensation in the long run e.g. because of changing interest rates.
- A possible recommendation is for the EC to develop a Staff Working document on state aid and affordable housing with more interpretation and examples e.g. how to deal with overcompensation and de minimus.
- The eState aid WIKI is open to a limited number of users only. The reason for that is to avoid the repetition of similar questions. Members of the working groups suggested to open a reading function for all public authorities who are interested in the WIKI System to be able to read all questions and answers in the Systems, this would be very helpful.

2) on better legislation:

- The need to delete the target group for social housing in the SGEI framework.
- The need for a broader definition of the target group linked to market failure arguments.
- Providing clarity on the types of schemes that would automatically fall outside of the scope of state aid as they would not affect trade between states e.g. schemes in rural areas or more peripheral areas.
- The use of an ancillary principle – e.g. where a certain proportion of the development can be non-housing use (supporting individuals outside of state aid rules).
- The circumstances under which general housing can be supported within the scope of the SGEI framework.

Closing remarks by Co-coordinator Michaela Kauer

At the end of the day, conclusions on the workshop were provided by Michaela Kauer, Co-coordinator of the Urban Agenda Housing Partnership. The exchange has been fruitful and meaningful, positions and problems became clearer and were mutually understood. She showed satisfaction with the fact that the discussion had shown that Housing Partnership has pointed out an important obstacle for public investment in affordable housing with its work on state aid. The opinion of the partnership that a deletion of the narrow target group in the SGEI Decision would help de-block investments had been reinforced through the workshop. The new evidence that had been depicted by the workshop on aspects of capacity building and knowledge will be taken into account in the action plan of the partnership.

Ms Kauer thanked all those who had helped to contribute to a successful meeting, the Members and officials of the CoR, the speakers, the participants and all members of the Housing Partnership who had taken an active role to facilitate the interactive group discussions.

Documents are available for download [here](#):

- Speech of Mr. Icham Imane, Member of the CoR
- Presentation by Director Henrik Morch, SG COMP
- Presentation by Dr. Orna Rosenfeld, housing expert
- Presentation by Helena Henriksson, SABO, Sweden
- Presentation by Knut Hoeller, Housing Initiative for Eastern Europe
- Presentation by Laurent Ghekiere, USH, France
- Presentation by Ronald Paping, Woonbond, Netherlands
- Guidance Paper on EU regulation and public support for housing
- CoR Opinion “Towards a European Agenda for Housing”