



European Committee
of the Regions

Commission for
Economic Policy

ECON

Regions and cities providing SGEIs: identifying difficulties resulting from the State aid framework



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QG-01-20-681-EN-N; ISBN: 978-92-895-1090-5; doi:10.2863/920598

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Table of contents

- Table of contents iv
- List of figures v
- List of tables v
- List of abbreviations vi
- Executive summary 1
- 1 Introduction 5
- 2 State aid rules: Notions and challenges of the SGEI package 7
 - 2.1 The Communication 8
 - 2.2 The Decision 16
 - 2.3 Main challenges identified 17
- 3 Compliance problems and difficulties for SGEI providers 19
 - 3.1 Country Reports, the EC consultation and difficulties 19
 - 3.2 Analysis of challenges 23
 - 3.2.1 Uncertainty about basic concepts 24
 - 3.2.2 Uncertainty about the market 29
 - 3.2.3 Excessive administrative burden 35
 - 3.3 Comparison of findings for 2014-2015 and 2016-2017 Country Reports 45
- 4 Responses to challenges: current approaches, policy gaps and options 47
 - 4.1 Defining SGEI, SSGI and economic nature 47
 - 4.2 Solutions to market uncertainties 50
 - 4.3 Solutions for compensation calculation 52
- 5 Policy conclusions and recommendations 57
 - 5.1 Recommendations for clearer basic concepts 58
 - 5.2 Recommendations to better consider market evolution 60
 - 5.3 Recommendations to reduce administrative burden 61
- Bibliography 63

List of figures

Figure 2-1	The notions of SGI – SSGI – SGEI	9
Figure 3-1	Unexpected or unintended positive (left chart) and negative (right chart) impacts of the 2012 SGEI package for health and social services.....	23
Figure 3-2	Logical steps and key challenges for determining whether the SGEI legislative package applies to public service compensation.....	24
Figure 3-3	2012 SGEI package objectives for health and social services corresponding to today’s (EU internal) market	30
Figure 3-4	Appropriateness of <i>de minimis</i> aid, i.e. up to EUR 500,000 over three fiscal years.....	34
Figure 3-5	Did the 2012 SGEI package reduce administrative burden for health and social services compared to the 2005 package?.....	35
Figure 3-6	Change in administrative resources (e.g. money and personnel) for health and social services compared to 2005-2012	36
Figure 3-7	Difficulties in applying ‘reasonable profit’	42
Figure 3-8	Comparison of challenges mentioned in the 2014-2015 and 2016-2017 Country Reports and EC Consultation	46

List of tables

Table 3-1	Difficulties reported in Country Reports, the EC consultation and interviews	21
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List of abbreviations

Abbreviation	Full term
CoR	European Committee of the Regions
EC	European Commission
ECJ	European Court of Justice
EU	European Union
GBER	General Block Exemption Regulation
LRA	Local and Regional Authority
SGEI	Service of General Economic Interest
SGI	Service of General Interest
SSGI	Social Service of General Interest
TFEU	Treaty on the Functioning of the European Union

Executive summary

Services of General Economic Interest (SGEI) are economic activities that deliver outcomes serving the general public that would not, or not sufficiently, be supplied by the market without public intervention (European Commission, 2011). There is a wide variety of these including social and economic services. The public contribution of SGEI is linked to EU policy objectives of social and territorial cohesion. In line with subsidiarity principles, local and regional authorities (LRAs) are typically responsible for providing SGEI.

To comply with the internal market, the European Commission (EC) has outlined rules within which SGEI may be financially supported by Member States and LRAs to ensure their proper provision. To improve clarity and flexibility on the notion of State aid in relation to SGEI, in 2012 the EC adopted the Almunia package. This includes several legal and guidance documents, such as the SGEI Decision, the SGEI Framework, the SGEI Communication and the SGEI *de minimis* Regulation. These documents have been complemented by the Commission Staff Working Document on the application of EU rules related to SGEI and the most recent Commission Notice on the Notion of State aid.

Any SGEI that is subject to the SGEI Decision or Framework needs to be reported by Member States every two years. This requires assessing whether an SGEI is subject to this legislative package. This assessment must consider whether it is a market activity and who the provider is. Under certain conditions compensation for the provision of such services does not constitute State aid. This report analyses Member State country reports for 2016-2017. In addition, a 2019 consultation by the EC that reviewed health and social services application of the SGEI framework has also been analysed for the present report. Taking this into account widened the perspective of analysis from Member States and LRAs to the stakeholder level.

This report provides a detailed review of State aid rules relating to the SGEI package. The report presents key notions of the SGEI Communication and Decision respectively and identifies challenges arising from these documents under the legal framework for State aid. The analysis shows that most challenges relate to SGEI Communication. In addition, legal uncertainty, lack of clear definitions and determining reasonable profit are crucial challenges with State aid implications.

These challenges can also be confirmed from analysis of country reports and responses to the EC consultation. Challenges noted in the 2014-2015 country reports have been confirmed. Since the legal framework did not change in the

meantime, this is not surprising. The EC consultation provided additional insights into challenges from the perspective of stakeholders. These include the evolution of markets and inappropriateness of the *de minimis*.

Challenges identified from country reports and the EC consultation can be grouped into three categories. These are uncertainties about basic concepts, uncertainties about the market and administrative burden.

Uncertainties about basic concepts concern definitions, including for an economic activity and an undertaking, what services are relevant and the different categories of these. This is aggravated if one entity provides different services that may require different assessments. Market uncertainties are linked to supply and demand. For instance, the types of entities providing social services have undergone major changes with private actors complementing or replacing public providers. On the demand side the target groups change, which is best illustrated by housing market developments in many European cities. Price changes also raise the question of an appropriate *de minimis* threshold, with the current threshold challenging small SGEI provisions. Finally, challenges of administrative burden mainly refer to the methodologies for calculating a reasonable profit and adequate compensation. But the burden with the overall SGEI package and entrustment acts is also perceived as challenging.

Similar to the analysis of the 2014-2015 reports, Member States and LRAs have individual responses rather than general solutions to overcome the continuous challenges. These depend on national and individual contexts and are difficult or impossible to apply elsewhere in the EU. LRAs deal with uncertainties in an ad-hoc manner and solutions differ between types of SGEI. To comply with the rules, they apply their own interpretations of concepts and methods. Thus, solutions vary greatly without a clear pattern of good examples.

For instance, to calculate compensation mechanisms, the analysis suggests a preference for the cost allocation method. However, depending on the type of service and other national circumstances, other methods are also applied. Challenges related to the definition of SGEI lead to different interpretations of what is an economic and a social service, respectively. While this creates legal uncertainty, some authorities appreciate the flexibility to interpret and adjust to different circumstances. One important differentiation refers to recognising types of actors. This means differentiating between cooperatives and other non-profit organisations as opposed to for-profit companies. In this context the *Paint Graphos* judgement may be a good example, since it explicitly recognises constraints of non-profit compared to for-profit companies when determining adequate compensation. Further solutions refer to clarification needs. Some may be better addressed at EU level and others should be dealt with at national level.

Challenges, solutions and proposals from LRAs and stakeholders responding to the EC consultation prompt several recommendations to improve SGEI legislation. Most of these refer to the SGEI package and are thus targeted at the EU level. The proposals cover overcoming the lack of clarity and persisting uncertainties, changing market environments and reducing administrative burden for LRAs. While some of these recommendations target amendments to laws others ask for practical support. In addition to changes at EU level, Member States are also addressed, when difficulties and challenges are rooted in a national or regional legal framework that is too complex or otherwise inadequate to effectively implement the SGEI package.

1 Introduction

SGEI are economic activities that deliver outcomes serving the general public which would not, or not sufficiently, be supplied by the market without public intervention (European Commission, 2011a). Among other outcomes, the public contribution of SGEI lies in pursuing social and territorial cohesion objectives (European Commission, 2012a, paragraph 1). In line with subsidiarity principles, LRAs are typically responsible for providing SGEI. Pursuant to EU Treaties and EU Court case law, Member States have broad discretion to define an SGEI. Protocol No. 26 of the Treaty on the Functioning of the European Union (TFEU) underlines ‘the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users’. It also confirms that the Treaties do not affect the competence of Member States to regulate non-economic Services of General Interest (SGI). However, Member States and LRAs have to define, organise and finance SGEI in line with national and EU rules and regulations.

Against this background this report analyses difficulties resulting from the SGEI legislation. In view of undistorted competition in the internal market SGEI legislation is closely interlinked with State aid rules. The focus of this report is on the implications of State aid rules and SGEI legislation for providers of SGEI. The legislation is grouped under the SGEI package.

To investigate State aid related challenges this report takes a two-fold perspective. Firstly, it provides a theoretical overview of challenges for SGEI providers (Chapter 2). To do so, it reviews the SGEI package and outlines features that imply challenges for providers. Secondly, the report takes a more empirical perspective. It reviews challenges encountered by national authorities, LRAs and other stakeholders when implementing the SGEI package (Chapter 3). For national authorities and LRAs the analysis is largely based on an analysis of the biennial country reports and interviews with selected authorities. Additional stakeholder challenges, e.g. for SGEI providers and their associations, have been collected from the EC public consultation on the health and social sector. LRAs apply different approaches to deal with the challenges (Chapter 4). These are individual rather than general solutions and often depend on the national and/or individual context. This highlights the need for further solutions at EU and Member State level for which the report offers policy conclusions and recommendations (Chapter 5).

2 State aid rules: Notions and challenges of the SGEI package

In 2012, the EC established rules to ensure that SGEI financing with public resources complies with the TFEU, especially Article 107(1). These rules are in:

- the Communication from the EC (European Commission, 2012a, 2012/C 8/02) on the application of State aid rules to compensation for providing SGEI. This is referred to as the SGEI Communication (*the Communication*), setting basic principles and notions for SGEI;
- the EC Decision (European Commission, 2011b, 2012/21/EU) on the application of Article 106(2) of the TFEU to State aid in the form of public service compensation to undertakings entrusted with the operation of SGEI. This is referred to as the SGEI Decision (*the Decision*), providing rules on State aid in the form of public service compensation exempted from the prior notification obligation in Article 108(3);
- the Communication from the EC (European Commission, 2011c, 2012/C 8/03) on the European Union framework for State aid in the form of public service compensation. This is referred to as the SGEI Framework (*the Framework*) which sets out rules for assessing SGEI compensation that constitutes State aid in case of notification under Article 108(3); and the
- EC Regulation (European Commission, 2012b, 360/2012) on the application of Articles 107 and 108 of the TFEU to *de minimis* aid to undertakings providing SGEI, with the threshold for applying aid to SGEI (*de minimis*).

These four acts cover:

- a) the definition of basic concepts and illustration of principles defined by the Altmark judgment;
- b) principles and conditions under which State aid in the form of compensation for SGEI (in certain sectors) are exempted from the notification obligation;
- c) elements and conditions under which the EC can assess aid notified by Member States as compatible with the Treaty;
- d) State aid in the form of small compensation.

Concepts and considerations of topics covered by this analysis take into account clarification in the Commission Notice (European Commission, 2016, 2016/C 262) on the notion of State aid (*the Notice*) as referred to in Article 107(1) of the TFEU. Finally, clarification on the SGEI package, in the Guide to the application of EU rules (*the Guide, or the Guidelines*) (European Commission, 2013, SWD(2013) 53) is important. This is the main instrument for Member States to manage complexity resulting from the rules listed above.

2.1 The Communication

In the Treaty the legal basis for SGEI rules is Article 106(2)¹. The Communication does not provide a definition of SGEI. Instead, the Guidelines provide a definition in point 2: ‘The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation. The Commission has clarified in its Quality Framework that ‘*SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention*’ (European Commission, 2013, SWD(2013) 53, p. 21).

Further definitions in the European regulatory context are useful to consider in parallel with this definition. These help better target the subsequent analysis. The definitions refer to SGI and Social Services of General Interest (SSGI) as explained in the Guidelines (European Commission, 2013, SWD(2013) 53, pp. 21-23) and illustrated in Figure 2-1:

- **SGIs** are services that national, regional or local public authorities in Member States consider to be of general interest and are therefore subject to specific public service obligations (PSOs). SGIs cover both economic activities and non-economic services.

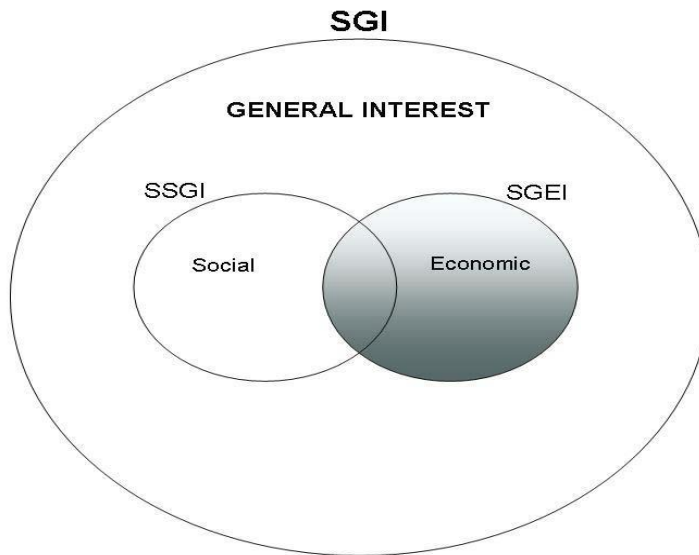
- **SSGIs** include:
 - health services;
 - mandatory and complementary social protection schemes;

¹ ‘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’.

- other essential services provided directly to citizens (assistance to citizens in difficulty due to debt, unemployment, drug addiction or family breakdown, retraining and language training for immigrants, vocational training and reintegration, activities that encourage the integration of people with long term needs because of a disability or a health problem, social housing, etc.).

SSGIs can be economic. An activity that is configured as ‘social’ does not exclude the possibility of being classified as an ‘economic activity’ under the jurisprudence of the European Court of Justice (ECJ).

Figure 2-1 The notions of SGI – SSGI – SGEI



Source: European Commission (2013, SWD(2013) 53, p.23).

Challenge: The SGEI package does not provide a clear definition of the concept. Moreover, the Guidelines, which do not have a legal value, define different concepts and connect their possible application to Article 107(1) and the provisions of the package to verifying the presence or absence of economic activity.

The Communication primarily deals with the applicability of Article 107(1) by illustrating conditions determining the application. Particularly important are the definition of economic activity and the impact on trade and competition².

² The Communication deals with these matters in the same way as the subsequent EC Communication 262/2016.

Identifying the economic or non-economic nature of the activity is crucial. A first indication comes from point 12 of the Notice: *‘To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity’*. In line with this definition, the cases in which it is possible to exclude economic activity are highlighted:

- exercise of public powers (Notice, point 2.2): (a) the army or the police; (b) air navigation safety and control; (c) maritime traffic control and safety; (d) anti-pollution surveillance; (e) organising, financing and enforcing prison sentences; (f) developing and revitalising public land by public authorities; and (g) collecting data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data;
- social security (Notice, point 2.3)³;
- health care, when *‘public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity’* (European Commission, 2016, 2016/C 262, paragraph 24);
- education and research: *‘Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity’* (European Commission, 2016, 2016/C 262, paragraph 28).

For this analysis point 29 of the Notice is important. This highlights that the non-economic nature of a service is not affected if payment for the service is an insignificant part of the costs for providing the service. This can be frequently found for activities such as health and long-term care, childcare, access to and reintegration into the labour market, social housing as well as care and social inclusion for vulnerable groups.

Challenge: These elements certainly help Member States and LRAs to exclude State aid when providing certain services, but in many cases they do not provide enough legal certainty to ensure compliance with the rules.

³ These schemes are not subject to State aid rules if *‘(a) affiliation with the scheme is compulsory; (b) the scheme pursues an exclusively social purpose; (c) the scheme is non-profit; (d) the benefits are independent of the contributions made; (e) the benefits paid are not necessarily proportionate to the earnings of the person insured; and (f) the scheme is supervised by the State’*. (European Commission, 2016, 2016/C 262, paragraph 20).

A further question concerns the ‘effect on trade’ in the Communication (European Commission, 2012a):

- In paragraph 40 the Communication merely states that ‘*the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Member States. Examples are: (a) swimming pools to be used predominantly by the local population; (b) local hospitals aimed exclusively at the local population; (c) local museums unlikely to attract cross-border visitors; and (d) local cultural events, whose potential audience is restricted locally*’⁴.
- A threshold below which trade between Member States is not affected could not be defined according to ECJ case-law (paragraph 39). Therefore, the relatively small amount of aid or size of the recipient does not a priori mean that trade between Member States may not be affected.

Challenge: The two points create a crucial ambivalence. Excluding State aid because of the local nature of an intervention, while simultaneously not defining a threshold or an unequivocal indication for this, creates a grey zone. Indeed, the EC itself, as stated in points 196 and 197 of the Communication 262/2016, admits the possibility of purely local interventions that would not have significant impacts on trade between Member States (and therefore placed outside the scope of Article 107(1) of the TFEU). At least theoretically, this may push Member States and particularly LRAs to notify pursuant to Article 108(3) for legal certainty so the EC can provide a final decision on the applicability of State aid rules.

The European Commission generally defines SGEI as “*economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services*”.⁵

The assessment of a public service regarding applicability of Article 107(1) and the Decision, the Framework or *de minimis* include:

- an assessment of the economic nature of the activity: if the service is a non-economic activity, it is not subject to Article 107(1) and the public support is not State aid (no need to apply the relevant part of the SGEI package);

⁴ See also point 196 and 197 of the Notice.

⁵ http://ec.europa.eu/competition/state_aid/overview/public_services_en.html

- a local assessment of the activity based on point 40 of the Communication and/or point 197 – even if there is no legal certainty.

Member States can arrange the operation outside the scope of State aid rules under the conditions of the Altmark Judgment (the Communication, point 43). This ECJ Judgement sets out four cumulative criteria defining when public service compensation does not constitute State aid (Court of Justice of the European Union, 2003). These Altmark criteria provide the basis for further assessing the nature of the service and terms for deciding if this compensation should be considered as State aid or not:

1. The recipient must have PSOs to discharge, and the obligations must be clearly defined.
2. The parameters on which the compensation is calculated must be established in advance in an objective and transparent manner.
3. The compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account the receipts and a reasonable profit.
4. Where the undertaking to discharge PSOs is not chosen pursuant to a public procurement procedure that would allow selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the appropriate means, would have incurred. (European Commission, 2013)

For the fourth point, the CoR stressed in past opinions that this criterion created only an incentive rather than an obligation for Member States to use public procurement rules to choose the provider of an SGEI. It has been claimed by stakeholders that Commission practice tends to see this as an obligation. In fact, LRAs may face difficulties when they want to apply the second Altmark criterion (i.e. a typical, well-run and adequately equipped undertaking), as a sector benchmark. This is not feasible where there are no private undertakings in the sector or in cross-border comparisons when one Member State imposes a PSO on a service and the neighbouring Member State does not. The CoR called on the Commission to further develop detailed guidance on what constitutes a typical well-run and adequately equipped undertaking. This would ease fulfilment of the fourth Altmark criterion by public authorities and release an activity from State aid elements.

For the other three conditions, the tables below highlight challenges of the Communication.

1. Undertakings entrusted with operating SGEIs have a particular task.
- 2.

Communication Text	Challenges
<p><i>“Undertakings entrusted with the operation of SGEIs are undertakings entrusted with ‘a particular task’. Generally speaking, the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions.”</i> (Point 47)</p>	<p>This is a general criterion for possible application of the SGEI rules.</p>
<p><i>“It would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions.”</i> (Point 48)</p>	<p>This may create difficulties for a Member State to verify the presence of operators in extremely complex market conditions. The absence of more precise indications makes such a condition difficult to apply except for legal certainty⁶.</p>

2. The parameters on which compensation is calculated must be established in advance in an objective and transparent manner.

Communication Text	Challenges
<p><i>“It should be clear from the outset how the compensation is to be determined.”</i> (Point 55)</p> <p><i>“Where the authority decides to compensate all cost items of the provider, it must determine at the outset how those costs will be determined and calculated. Only the costs directly associated with the provision of the SGEI can be taken into account in that context. All the revenue accruing to the undertaking from the provision of the SGEI must be deducted.”</i> (Point 56)</p>	<p>These two points tend to be easy to approach. However, given the wide scope of the provisions, at least the Guidelines should define more precise elements.</p>

⁶ Together with point 50, ‘The Commission also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole’, it is not configured as exhaustive for assessing the absence of companies operating in the market.

<p><i>“Where the undertaking is offered a reasonable profit as part of its compensation, the entrustment act must also establish the criteria for calculating that profit.” (Point 57)</i></p>	<p>This is a critical point of the Altmark judgment. The indications in other elements of the SGEI package do not make it easy, especially for an LRA insufficiently equipped to determine the reference points.</p>
<p><i>“The entrustment act must specify the arrangements for the review and any impact it may have on the total amount of compensation.” (Point 58)</i></p>	<p>Provisions in point 52 can be very generic and are not exhaustive for the critical issues concerning definition of the act. Examples are:</p> <ul style="list-style-type: none"> i. perimeter and conditions for any extension of the entrustment; ii. management of any exclusive rights; iii. compensation review mechanisms; iv. setting control and recovery mechanisms in case of overcompensation.

3. The compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account receipts and a reasonable profit.

Communication Text	Challenges
<p><i>“Reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts under competitive conditions (for example, contracts awarded under a tender). In</i></p>	<p>Indications provided by the Communication, similar to those in the Decision (Article 5 paragraphs 7 and 8) and in the Framework (points 33 - 38), require information and skills that may be difficult to acquire especially for LRAs. Determining the rate of return, comparison with companies operating in the market (national, in other Member States, or other sectors), creates uncertainty for administrations at all levels. In addition to specific technical</p>

sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, reference can be made to comparable undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains cannot be achieved at the expense of the quality of the service provided.” (Point 61)

skills, this requires information which is at best available at national level. In a nutshell, an important element such as the determination of reasonable profit, without prejudice to principles established by the rules and room for manoeuvre left to Member States, hinders correct application of the rules and is a source of uncertainty.

The principles outlined above and widely articulated by the Communication, the Framework and the Guidelines, lead to the conclusion that Member States and LRAs should notify pursuant to Article 108(3)⁷ for certainty about compliance with the Altmark judgement principles.

Moreover, as stated in Question 63 of the Guide, “*The Communication clarifies that ‘least cost to the community’ is broader than lowest price and that a public procurement procedure does not necessarily have to entail the lowest price as the award criterion in order to fulfil the first alternative of the fourth Altmark criterion*”.

Challenge: The request for further analysis such as quality considerations, social and environmental criteria, creates additional complexity for Member States and LRAs when assessing SGI compliance with the judgment.

In conclusion, the Communication provides the essential elements for qualifying as an SGEI. However, even if it sets out when an SGI may be outside the scope of Article 107(1), these indications – see also the Framework – do not enable Member States and LRAs to verify the compliance of an operation with the principles of the Communication itself in the absence of a notification pursuant to Article 108(3). In consequence, Member States and LRAs are led to treat support measures in compliance with the Decision and define the support measure as State aid. This conclusion has been highlighted in the previous CoR report (Zillmer et

⁷ Even if not explicitly indicated, the answer to question 61 in the Guidelines goes in this direction.

al., 2017): “Complying with Altmark is a very difficult task. Bearing in mind, however, that the first three Altmark criteria and the requirements of the 2012 SGEI package are identical, it is better for public authorities to assume that the compensation they grant is State aid rather than attempt the largely impossible feat of scaling the heights of mount Altmark”.⁸

2.2 The Decision

The Decision defines conditions for granting aid as compensation for PSOs, exempt from the notification obligation pursuant to Article 108(3) of the Treaty.

A first problem is identifying the scope of the Decision. Article 2(1) states that it can be applied for “(b) compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services; the pursuit of ancillary activities directly related to the main activities, notably in the field of research, does not, however, prevent the application of this paragraph; (c) compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.”

Challenge: The decision does not contain an indication or definition of the concepts expressed in these provisions. Different definitions of these concepts in Member States create difficulties in interpretation and application. Particularly critical is the use of similar concepts in ESIF programmes⁹.

For calculating compensation, Article 5 SGEI Decision specifies that the amount shall not exceed what is necessary to cover the net costs of discharging the PSOs, including a reasonable profit (net cost methodology). The costs to be taken into account shall include all costs needed to operate the SGEI. Alternatively, the compensation may be calculated as the difference between the net cost for the undertaking of operating with the PSO and the net cost or profit of the same

⁸ Zillmer et al. (2017, p. 38) based on (Nicolaidis, 2014).

⁹ In this regard, the answer to question No. 94 of the Guide, on the possibility of applying the Decision to social services is: “Since the Decision is directly applicable in the Member States, it needs to contain clear and precise definitions, ensuring legal certainty. Therefore, the exempted aid measures must be comprehensively defined. However, the definition of social services is very broad and covers the most important areas of social services. Moreover, by including also SGEIs relating to ‘the care and social inclusion of vulnerable groups’ it gives the necessary flexibility to include, in accordance with the needs of each Member State, different types of services addressed to those groups of society that need them the most. Should a particular social service not be covered by the definition of social services in Article 2(1)(c), the compensation might still be exempted from notification under Article 2(1)(a) of the Decision, as long as the compensation does not exceed an annual amount of EUR 15 million”.

undertaking without the PSO (net avoided cost methodology). The SGEI Framework (point 22) states that the compensation can be established on the basis of expected costs and revenues, the costs and revenues incurred, or a combination of the two. This depends on the efficiency incentives that the Member State wishes to provide from the outset. In addition, the SGEI Framework (point 27) specifies that the net avoided cost methodology is to be preferred over the net cost or other calculation methodologies.

Other than the difficulties in the Communication already highlighted, further complexity lies in defining a reasonable profit (the Decision, Article 5(7) and 5(8)).

Challenge: These provisions are sometimes an important obstacle for Member States and especially LRAs. For small-scale interventions this produces a significant administrative burden and requires skills with potentially prohibitive costs for some LRAs.

2.3 Main challenges identified

The rules outlined in the SGEI package pose many challenges for Member States and, above all, for LRAs (especially small ones). These challenges are both legal and technical and can strain established public authorities and/or entail (sometimes significant) costs to acquire new competences. Some interventions under the current regulatory framework could reduce the administrative burden and costs for Member States and LRAs in dealing with the SGEI framework. The interventions should address the challenges highlighted in the previous sections of this chapter:

1. **unclear definition of economic activity** to exclude application of State aid rules where public authorities finance interventions attributable to specific social policies;
2. to exclude State aid **for certain services** Member States and LRAs **lack legal certainty** to ensure compliance with the rules;
3. **absence of a clear distinction between SSGIs and SGEIs**;
4. concerning the effects on trade, **there are ambiguous indications about the local level of the intervention**;

5. **inaccurate definition of sectors** social housing, health (assistance for the elderly, the disabled), services for children;
6. **excessive administrative burden** for Member States and LRAs **to comply with the Altmark judgment** due to equivocal indications;
7. lack of simple solutions for **determining a reasonable profit** at least for local interventions or with low financial significance;
8. **no models for entrustment procedures** to reduce administrative burden and ensure compliance with the rules.

3 Compliance problems and difficulties for SGEI providers

This chapter is based on screening the country reports for 2018, the EC consultation documentation and interviews with representatives of LRAs and Member States. It analyses problems and difficulties faced by SGEI providers in complying with the SGEI Decision and Framework. After a short overview of problems it analyses difficulties due to uncertainty about concepts and markets and related to administrative burden. The chapter closes with a short comparison of the findings with the 2017 CoR report.

3.1 Country Reports, the EC consultation and difficulties

The SGEI Decision (Article 9(c)) and the SGEI Framework (point 62(c)) ask Member States to report, among others, on difficulties in applying these documents. The majority of 2018 Member State reports address the difficulties under ‘other issues’ or ‘miscellaneous’. This reporting encourages references to challenges in complying with the SGEI Decision, application of the SGEI Framework, as well as an open question for any other comments on State aid and the SGEI package. More specifically, the issues mentioned in the reporting template where authorities are invited to indicate whether they have experienced difficulties are:

- drawing up an entrustment act (SGEI Decision, Article 4);
- specifying the amount of compensation (SGEI Decision, Article 5);
- determining reasonable profit (SGEI Decision, Article 5 (5)-(8));
- regularly checking overcompensation (SGEI Decision, Article 6);
- public consultation (SGEI Framework, point 14);
- complying with public procurement (SGEI Framework, point 19);
- determining net avoided costs (SGEI Framework, points 25-27);
- determining reasonable profit (SGEI Framework, points 33-38).

The involvement of LRAs in drafting or contributing to the country report varies across Member States. They:

- are authors of the whole report in Austria, Belgium and Germany;
- are authors of chapters or parts of the report in Lithuania, the Netherlands, Poland, Portugal, Spain and the United Kingdom;
- contribute with information in chapters in Hungary, Latvia, France, Romania and Sweden;

- neither appear as authors nor as contributors in Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Italy, Luxembourg, Malta, Slovakia and Slovenia.

In June 2019, the EC launched a public consultation¹⁰ to verify the extent that rules on health and social SGEI reached objectives in the 2012 SGEI package, as well as to identify challenges and recommendations. The EC consultation obtained views of citizens, public authorities and other stakeholders on the effectiveness, efficiency, coherence, relevance and EU added value of the 2012 SGEI package for health and social services, as well as on other services for the *de minimis* regulation. The EC consultation included an online questionnaire. There were 51 replies (European Commission, 2020, p. 2). Thirty-one were from organisations such as business associations, businesses, consumer organisations, NGOs and trade unions; ten from public authorities at different levels; five from individuals; and five from other respondents (including European umbrella organisations and health/welfare organisations).

The online questionnaire included questions about SGEI rules on health and social services as well as the SGEI *de minimis* Regulation. This report covers:

- Questions 23 and 25 about unexpected or unintended positive and negative impacts of the 2012 SGEI package;
- Question 29 about reduced administrative burden compared to the 2005 package;
- Question 31 about changes in resources (for example money and personnel) spent on administrative activities compared to 2005-2012;
- Question 34 about the relevance of 2012 SGEI package objectives in today's (EU internal) market;
- Question 38 about difficulties in applying the 'reasonable profit' requirement; and
- Question 46 about whether the limit of *de minimis* aid, i.e. up to EUR 500,000 over any three fiscal years, is still appropriate.

Table 3-1 displays difficulties reported in country reports (national or LRA level) for 2018, in the EC public consultation (stakeholder level) and in interviews (national or LRA level). They are listed following the findings from the previous chapter and are grouped in three categories:

- difficulties from uncertainty and lack of clarity about basic concepts;
- challenges from inappropriate SGEI legislation for the current market;
- problems linked to excessive administrative burden.

¹⁰ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-Evaluation-of-State-aid-rules-for-health-and-social-services-of-general-economic-interest-and-SGEI-De-Minimis/public-consultation>

Table 3-1 Difficulties reported in Country Reports, the EC consultation and interviews

Difficulties		Country Report (national level)	Country Report (LRA level)	EC Public Consultation (stakeholder level)	Interviews (national/LRA level)
Uncertainty about basic concepts	Dealing with the concept of ‘undertaking’		<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) • Flanders (Belgium) 		<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium)
	Distinguishing across different services	<ul style="list-style-type: none"> • Poland • Latvia 	<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) 	<ul style="list-style-type: none"> • Housing Europe 	<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) • Latvia • Spain (Asturias) • Germany (Saxony) • Italy (Sardinia)
Uncertainty about the market	Dealing with market evolution: operators			<ul style="list-style-type: none"> • FFEC (France) • Groupe VYV (France) • Build Europe (Belgium) 	<ul style="list-style-type: none"> • Latvia
	Dealing with market evolution: disadvantaged groups			<ul style="list-style-type: none"> • Amsterdam Federation of Housing Associations (the Netherlands) • AEDES (the Netherlands) • International Union of Tenants (Belgium) • Housing Europe • Union Sociale pour l’Habitat (France) 	<ul style="list-style-type: none"> • Latvia • Italy (Sardinia)
	Appropriateness of the de minimis		<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) 	<ul style="list-style-type: none"> • EC consultation questionnaire 	<ul style="list-style-type: none"> • Germany (Saxony) • French Community Commission (Brussels Capital Region, Belgium) • Spain (Asturias)
Excessive administrative burden	Dealing with the SGEI package	<ul style="list-style-type: none"> • The Netherlands • Czech Rep. • France 	<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) • Flanders (Belgium) 	<ul style="list-style-type: none"> • EC consultation questionnaire • CEEP (Belgium) • Amsterdam Federation of Housing Associations (the Netherlands) 	<ul style="list-style-type: none"> • French Community Commission (Brussels Capital Region, Belgium) • Spain (Asturias) • Latvia • Germany (Saxony) • Italy (Sardinia)
	Complying with public procurement rules	<ul style="list-style-type: none"> • Czech Rep. 	<ul style="list-style-type: none"> • Saxony (Germany) • French Community Commission (Brussels Capital Region, Belgium) 		<ul style="list-style-type: none"> • Spain (Asturias) • Germany (Saxony)

	Determining the net avoided cost	<ul style="list-style-type: none"> • Denmark • France 	<ul style="list-style-type: none"> • Asturias (Spain) • Saxony (Germany) 		<ul style="list-style-type: none"> • Germany (Saxony)
	Complying with reasonable profit requirement and overcompensation	<ul style="list-style-type: none"> • Czech Rep. • Sweden • Poland • Latvia • Hungary 	<ul style="list-style-type: none"> • Saxony (Germany) • Flanders (Belgium) 	<ul style="list-style-type: none"> • EC consultation questionnaire • Housing Europe • Union Sociale pour l'Habitat (France) 	<ul style="list-style-type: none"> • Poland (Warsaw) • Germany (Saxony) • French Community Commission (Brussels Capital Region, Belgium) • Latvia • Italy (Sardinia)

In the country reports, authorities in eight Member States indicated problems or difficulties. In three country reports these were explicitly indicated by LRAs: French Community Commission in the Brussels Capital Region¹¹ (Belgium), Flanders (Belgium), Saxony (Germany) and Asturias (Spain).

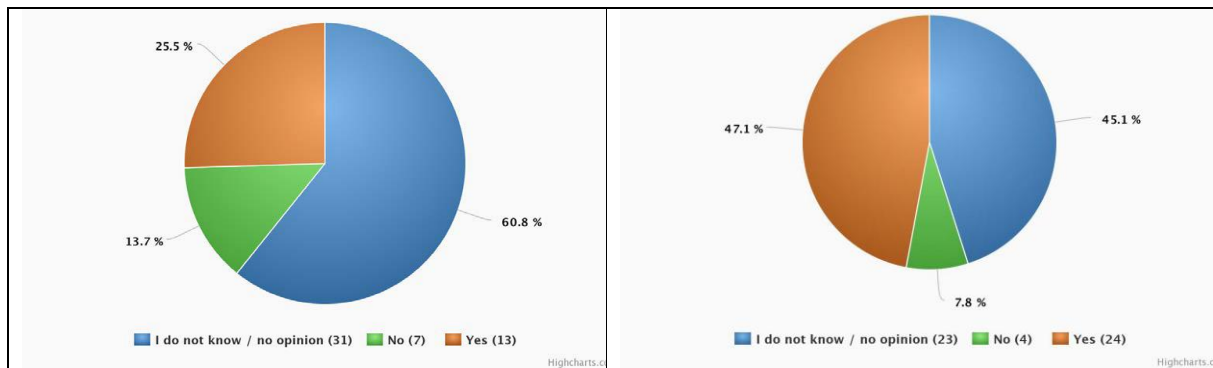
In some cases, problems are general, as with a general administrative burden in dealing with the SGEI package. This may be due to the procedures when drafting the Member State report or to problems not specific to a sector or to a type of SGEI. In other cases, for national authorities and LRAs most problems are about the administrative burden of complying with the methodology for calculating costs, overcompensation and reasonable profit. Lack of clarity for some issues seems to hinder estimations of key variables to assess State aid.

According to the EC consultation, stakeholders face difficulties due to a lack of coherence in SGEI legislation with current and evolving characteristics of the market in different sectors. Some SGEI rules are seen as too strict or out-of-date.

Finally, it seems the SGEI package on health and social services has produced more unexpected or unintended negative impacts than positive. In addition to questions on difficulties with the SGEI package (see the next sections), the EC consultation questionnaire investigates unexpected impacts of the package. Of 51 respondents, 31 did not express a view on such impacts (see **Error! Not a valid bookmark self-reference.**). Thirteen noted positive impacts, including six business organisations and two public authorities. However, unexpected or unintended negative impacts were expressed by 24 respondents. Only four indicated no negative impact.

¹¹ Belgium is a federal state made up of communities and regions, and each level of power is responsible for analysing the services it financed or approved. The federal state is responsible for coordinating reports drafted by each level of power, organising and coordinating information collection and writing its own report. The French Community Commission (COCOF) ensures, within the Brussels Region, representation of the French Community in the south of the country. This includes culture, education, health care and personal assistance. COCOF takes initiatives within the Brussels Region in terms of culture, education and customisable subjects. It can create and finance institutions, but also take initiatives within the framework of Community competences. The French Community of Belgium has also transferred powers to COCOF since January 1994.

Figure 3-1 Unexpected or unintended positive (left chart) and negative (right chart) impacts of the 2012 SGEI package for health and social services



Source: reproduced from European Commission (2020, pp. 4–5, Questions 23 and 25).

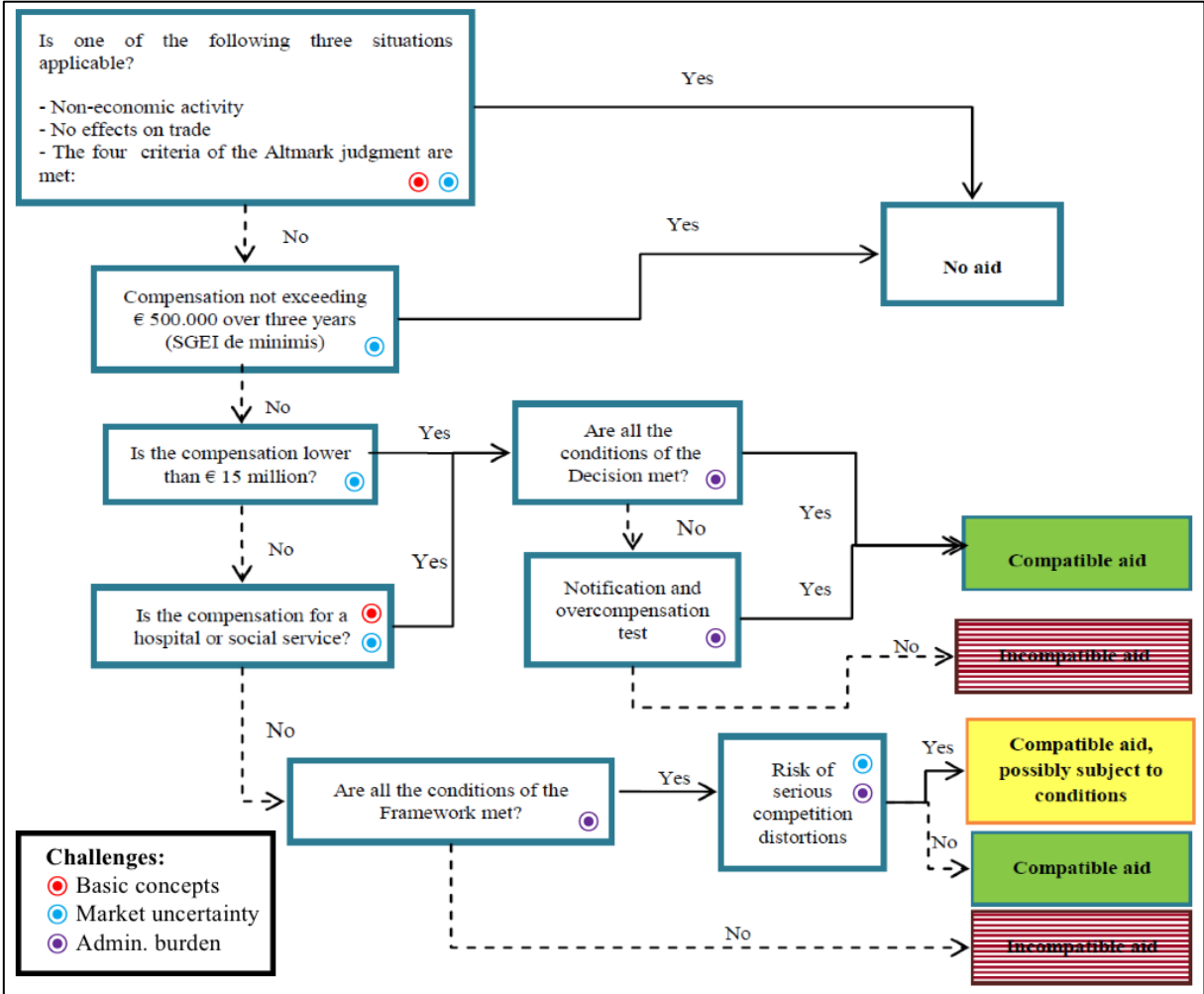
3.2 Analysis of challenges

Challenges can be grouped into three categories:

- **uncertainty and lack of clarity about some basic concepts**, such as the definition of economic activity and SGEI as well as the distinction between categories of services;
- **inappropriateness SGEI legislation for the current market**, raising questions on which service operators (supply side) and/or target groups (demand side) can be covered by the SGEI rules;
- **excessive administrative burden**, mainly related to calculating reasonable profit and determining compensation.

As displayed in the following figure, these challenges occur at different stages of processes that national, regional and local authorities have to apply to State aid, providing SGEI and determining compensation.

Figure 3-2 Logical steps and key challenges for determining whether the SGEI legislative package applies to public service compensation



Source: Elaboration based on European Commission (2013, p. 29).

3.2.1 Uncertainty about basic concepts

The first problem related to key concepts of the SGEI rules is the **lack of evidence for defining an undertaking**. The determining factor is whether the undertaking performs an economic activity. This is more complicated when different activities are performed by the same undertaking. For the French Community Commission in the Brussels Capital Region this problem can occur also at territorial level since *‘an undertaking pursuing the same object can receive public aid from different levels of government. It is sometimes complicated to identify whether these activities come under the same general interest task. [...] For some undertakings, one level of government grants approval, but not public aid. This distribution of responsibility by level of government complicates the application of the SGEI Decision’* (Member State report Belgium, 2018, French Community Commission, p.11).

Correct identification of **an undertaking affects compensation, calculation of costs and a reasonable profit** (more detail in section 3.2.3.4). As underlined in the Country Report of Belgium by the Flemish Government, social services are described as an economic activity in the current SGEI regulations, which is mainly applicable to network industries or comparable sectors. Applying this logic to services and subsidies for work and the social economy is more challenging and is certainly not applicable in all respects. Concepts such as reasonable profit, return on capital or other profit indicators cannot be easily applied to training courses, reintegration for job seekers or predominately social services, where profit-making is not always an objective.

Quote from interview:

• **Belgium (French Community Commission, Brussels Capital Region):** *"A key issue arose at the level of the very concept of 'enterprise'. For the EC, this also applies to non-profit organisations with a social vocation while the profit made by the activities developed by this type of association cannot be distributed to founders, members, directors or any other natural or legal person. This sets them apart from private companies whose purpose is instead the profit which is distributed to the directors. This issue is linked to the very nature of economic activity. Indeed, the subsidies that receive these associations rarely cover all the costs inherent to the service itself. In addition, some regulations impose co-financing of associations on the basis of own resources. They must therefore set up activities, that is to say, other services but always in line with their corporate purpose, to be able to earn income. So this is where there is difficulty: the economic activity is intrinsically linked to other integrated activities, which do not have an economic vocation".*

Moreover, for the French Community Commission (Member State report, Belgium), SGEI concepts as defined by the European Commission suffer from a lack of terminological clarity and together with the lack of clarity about the definition of an undertaking, it is difficult to differentiate between SGEI or SSGI activities within an undertaking. Therefore, in the current SGEI package, there is also **uncertainty about the definition of a service and distinguishing services**. The Polish authorities also point out that service providers have reported problems linked to defining a service and distinguishing between public service and SGEI (Country Report, Poland).

The Latvian Ministry of Health stressed that **the necessity to separate aid for SGEI when the aid beneficiary also provides other services, demands substantial administrative resources for both the granter and the beneficiary**. This is problematic as the proportion of non-SGEI activity is five per cent or less of the service provider's activity. To simplify aid management, it is necessary to

evaluate and establish the acceptable proportion of non-SGEI activity and to specify when it can be applied without affecting competition. (Member State report Latvia, 2018).

From the EC consultation, an internal survey in 2016 among Housing Europe members reveals that all respondents found application of the Decision in social housing problematic for several reasons. In particular, 55% of respondents identified the definition of SGEI for social housing as the main problem. According to the same survey, there is also confusion over State aid in general (Housing Europe, EU).

Quotes from interviews:

• **Belgium (French Community Commission, Brussels Capital Region):**

"There is difficulty in identifying an SGEI and to decide for what amount the service provided is an economic activity or not. In some cases, such as cost sharing, identification is easy, but in others the border is more blurred. In addition, some SGEIs are approved by our institution, but receive financial aid from another level of power (for example, nursing homes). There is also an issue in the concept of profit. In general, the precautionary principle prevailed in the analysis. When there was doubt, the service has been listed as SGEI and analysed as such."

• **Latvia (representatives of Member States):** *"It is challenging to qualify an activity as SGEI. For example, in the case of health services that also provide paid/private services, it is sometimes very difficult to differentiate between them and calculate them differently, by separating the paid services as economic from others which are SGI."*

• **Germany (Saxony):** *"There are differences of opinion with the EC on the question whether economic development and tourism promotion measures constitute SGEIs (Germany confirms this, the EC denies this). The question typically arises whether a measure is qualified as State aid or not and less whether it should be classified as an SGEI if it is subject to State aid. A practical example for illustration: a project manager that is a social association receives support and employs drug addicts with the aim of bringing them back to the labour market through structured daily routines in business areas such as catering, gardening, etc."*

• **Spain (Asturias):** *"Assessing the economic nature of social service is a very challenging activity. Indeed, the interpretation and application of the regulation is too complicated. Every service has his specificities, and it is not possible to apply a homogeneous approach for different services. Especially because these*

services are provided in contexts that may differ one from the other. The interpretation of State Aid and SGEI regulation is very unclear. In many cases the assessment is based on the breakdown between public and private interests.”

• **Italy (Sardinia):** *“The main difficulty relies in understanding where it is possible to create the conditions for fair competition or keep the services exclusively under the public sector. The challenge is to understand if some specific services can be provided only by private operators (completely free market) or whether the welfare mission should be subsidised by the public. In the first case, the concept of general interest could not be guaranteed; in the second one, the stimulation of private providers to enter in some sectors previously served only by the public and the efforts to improve competition could not be ensured. Sometimes, in some sectors, private projects cannot be sustainable in the long run.”*

The concept of ‘general interest task’ is often confused with specific activities to be carried out. It is difficult to identify and value aid in kind and indirect financing received by undertakings (provision of premises, staff, equipment). It is also difficult to identify in balance sheets the amounts for an SGI (where funding does not fall under *de minimis* aid) and those covered by the *de minimis* regulation. Finally, an additional difficulty is in identifying in balance sheets whether public aid has been granted to one or several SGEI, which results in the public aid being combined (Member State report Belgium, 2018, French Community Commission).

Quotes from interviews:

• **Belgium (French Community Commission, Brussels Capital Region):** *“A key difficulty is to determine if our institution financed services of ‘general interest’ within the meaning of the EC. Often the services provided by non-profit organizations intervene where new needs are felt, and where the absence of this type of service has been identified. These can be seen as an initial response to the deficiency observed and services are then provided on a voluntary basis. The public authorities intervene in second line by financially supporting initiatives. If the association develops an economic activity that generates a profit, this should be weighted in relation to the benefits it generates for the community in which it fits. In a way, it is possible to consider that the economic and social (even environmental) repercussions are of general interest (decrease in unemployment, improvement in sanitary conditions, increase in the well-being of population, but also economic repercussions for local and regional contexts through the creation of new small businesses). These associations thus participate in a certain way the redistribution of local or regional wealth. This is a mechanism that should also*

be taken into account in the analysis of SGEIs. It therefore seems imperative in the SGEI approach to develop a more flexible approach, as was the case in certain European programs where positive discrimination was applied for disadvantaged areas or populations. Note that in poor or disadvantaged regions, there is little competition with private companies (i.e. only non-profit associations can provide social services). However, of course, this does not exempt non-profit associations to comply with the rules imposed by the SGEI decision”.

• **Spain (Asturias):** *“The problem when assessing the economic nature of a social service is mainly related to the specificities of each sector that are often not considered by the regulations. Sometimes these problems are also exacerbated by the significant discrepancies between EU and Member State rules in interpreting and qualifying a case as economic activity or a selective economic advantage.*

A key example we had here in Spain to illustrate these problems is the case of the Congregación de Esrnelas Pias Provincia Betania¹². This religious institution had paid a local tax for the renovation and expansion works of the assembly hall of one of its schools (transformed and extended with a view to hosting meetings, courses and conferences). It then asked for the exemption according to the national rule¹³. But the municipal tax authority refused that application, relying on the argument that the exemption only applied to properties used for purely religious purposes and that, if not, the granting of the exemption would amount to a conferral of State aid. The case was then litigated up to the Administrative Tribunal of Madrid, which made a reference to the Court of Justice (CJ) for a preliminary ruling on this point. The CJ first addressed the question whether the Congregación qualifies as an ‘undertaking’ based on whether at least some of the activities of the Congregación were to be considered as an ‘economic activity’ and whether the conference hall was used, at least partly, for such economic activities. With respect to the first query, two types of educational activities carried on by the Congregación have been examined, i.e. the public educational activities funded by the Spanish State and the private educational activities financed by private contributions (of students and parents). In this respect, the CJ concluded that it is up to the national (referring) court to determine whether the Congregación’s educational activities are economic, non-economic or mixed, and it provided some guidelines in this respect¹⁴. With respect to the second question,

¹² See D. Ordunes Solis (2019)

¹³ As acknowledged by the Spanish Ministry of Finance in an order of 16 June 2001, the indirect municipal property tax on constructions, installations and works falls within the scope of Article IV(1)(B) of the Agreement of 3 January 1979 between the Spanish State and the Holy See on financial matters, which provides for a ‘complete and permanent exemption from property and capital gains taxes and from income tax and wealth tax’. Hence, the Catholic Church (or its establishments) do not have to pay constructions, installations and works tax on their properties, irrespective of the nature of the activities for which the properties are used (although this point was litigated before the Spanish courts).

¹⁴ These are: 1) Educational activities are non-economic where they are ‘integrated into a system of public education and financed, entirely or mainly, by public funds’, as that would amount to the State aiming to fulfil its

the CJ mandated the national (referring) court to determine whether the conference hall was used exclusively for non-economic activities, exclusively for economic activities, or for both types of activities (mixed use). Moreover, the CJ concluded that the exemption (i.e. refund) of the tax enjoyed by the Congregación likely conferred a selective economic advantage onto it.”

• **Italy (Sardinia):** *“In the case of education for example, there are private operators that receive public support, but then they also operate as pure private entities asking fees for the canteen or extra-school activities. And due to the public contribution, they can apply different prices for the services provided with respect to a purely private market. This problem concerns how to distinguish different services provided by the same undertakings. So, all this ambiguity and a different treatment of some operators, creates distortion in the market. And this can prevent the increase and improvement of fair competition in a specific sector, when this is the aim of public support”.*

3.2.2 Uncertainty about the market

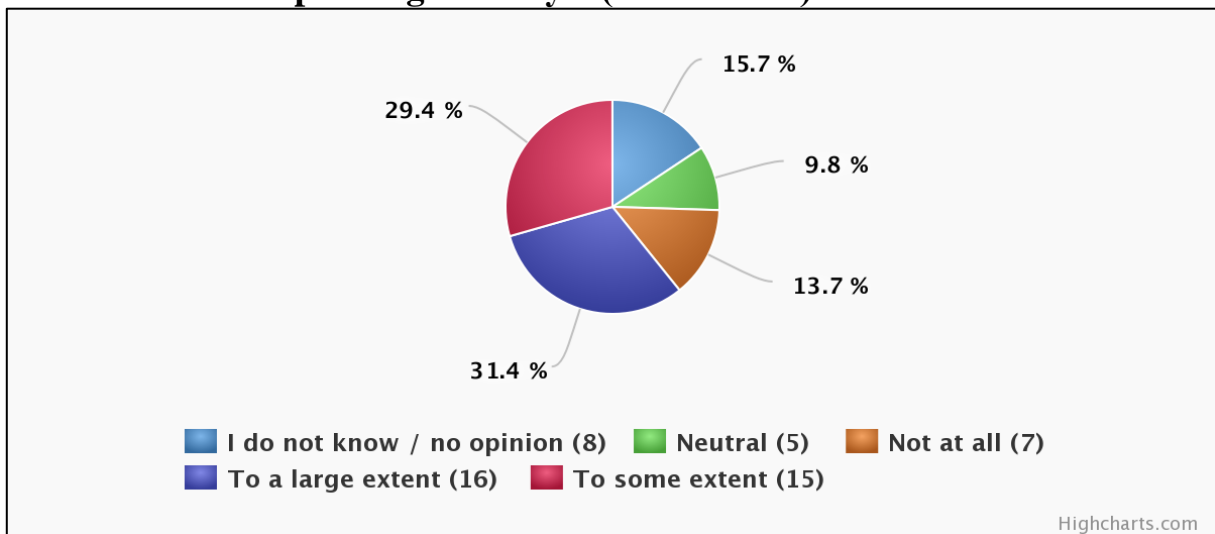
The problems identified in the previous section can be also amplified by the evolution of the market.¹⁵ Authorities, and in particular, **LRAs, may lack the analytical instruments to understand the market and its evolution especially when the 2012 SGEI package objectives do not seem to be fully coherent with the current market.**

The EC public consultation questionnaire reveals that 16 of 51 respondents expressed the view that the 2012 SGEI package objectives for health and social services still correspond to the current market. But 15 respondents agree that the objectives are partially relevant and seven respondents indicated a complete lack of correspondence.

educational obligations vis-à-vis the general public. In that respect, the CJ cautiously hints at the public educational activities of the Congregación being non-economic ones. 2) Educational activities can, on the other hand, be considered as economic ones where they are ‘financed essentially by private funds’ (that do not come from the provider itself). In this respect, the CJ indicates that the private educational activities of the Congregación are economic ones, as they are essentially financed by private contributions (of students and their parents), although the CJ stipulates that it is not so much the funding by the beneficiaries of the service that is relevant, but private funding in general. 3) An entity can be deemed to carry on mixed activities, on the condition that it keeps separate accounts for the various funding sources to exclude the risk of cross-subsidisation of private activities by means of public funds.

¹⁵ The analysis of market related uncertainties draws, above all, on the EC public consultation. Complementing insights from interviews are added in text boxes.

Figure 3-3 2012 SGEI package objectives for health and social services corresponding to today's (EU internal) market



Source: reproduced from European Commission (2020, p. 8, Question 34).

Market evolution may be due to changes in the supply side (market operators) or demand side (disadvantaged groups).

3.2.2.1 Evolving market operators

The market evolution can affect whether and how market operators are considered by the SGEI legislation. This was highlighted by some stakeholders responding to the EC consultation. For example, for FFEC (Fédération Française des Entreprises de Crèches) the French market for childcare services is undergoing profound changes, involving the public sector (mainly local authorities such as municipalities, communities and departmental councils). Also involved, especially in the last 15 years, are private non-profits, cooperatives and others. The market is now open to the commercial sector, including private operators and nurseries. However, local authorities are slowly evolving towards non-distortive practices, and the 2012 SGEI package does not yet allow full equality between public, non-profits and commercial actors. In the private sector, French private nurseries do not benefit sufficiently from strict equality between actors provided for by Community law. Provisions transposing the SGEI package and implementing the *de minimis* regulations for SGEI together with distortive practices of many local authorities tend to discriminate against private nurseries.

Groupe VYV (France), although providing activities in the same field as for-profit companies, faces distortion of competition directly linked to their legal model. They do not have transferable or negotiable ‘capital’. Their only finance is from accumulating surpluses or loans which they must repay including interest. This creates a disadvantage compared to for-profit companies which can issue shares.

According to Build Europe (Belgium), there are similar issues in the housing sector. Europe has two types of social housing systems. In the closed system only a limited number of public or semi-public social companies may provide social housing directly to disadvantaged groups or citizens (e.g. in France and Belgium). In the open system private developers may rent out and sell social housing directly on the market (e.g. in Germany and Spain). Build Europe believes that the Commission plays a crucial role in the closed systems, as it enables a level-playing field, without unfair or distorted competition. Unfortunately, first time buyers and renters in the free market often bear the cost of this policy. Social housing research shows that there is little convincing evidence that physical intervention in cities, such as mixing socio-economic groups with private and ‘social’ housing in the same area, contributes to solving inequality problems.

Quotes from interviews:

• **Latvia (representatives of Member State):** *"To see whether a service can be qualified as SGEI, we need to see what is happening on the market and whether the market can provide it. And the burden of deciding what is an SGEI (of economic and non-economic nature) is on the side of Member States, not the EC. It is not a problem that Communication does not clarify it entirely. But there should be a flexibility because the situation on the market changes so SGIs/SGEIs should be able to be defined in a more flexible way by the Member States."*

• **Italy (Sardinia):** *"For example, in some social services (i.e. support for people with disabilities) we prefer to use public financial resources to directly support the families with income subsidies. We have a specific regional law for this. But in case we decide to support these people for their employability (for instance by using some resources for the support of the families), for the creation of enterprises, or to directly support enterprises that offer these social services, the difficulties rise, since the public resources should be used to start the business activities (otherwise these are not sustainable) but also to maintain them in the long period. So, in this case, a distortion in the market is created. For instance, we can support business creation for people with disabilities, but then these entrepreneurs should be able to maintain the activities in the long run on their own. It is the free market that has to ensure which entrepreneurs can survive and evaluate the quality of the services provided. Should the compensation be treated as something that improves the quality of the services provided or something that distorts fair competition, decreasing therefore the quality of the services provided? It is not clear, with the current SGEI package, which is the extent of manoeuvre for LRAs."*

3.2.2.2 Evolving disadvantaged groups

Moreover, **market evolution can affect how socially disadvantaged citizens are considered by the SGEI legislation.** In this sense, and as highlighted by respondents to the EC public consultation, the SGEI framework does not seem to be fully appropriate, especially for the housing market.

As pointed out by the Amsterdam Federation of Housing Associations (the Netherlands), the Dutch housing market has seen steep cost increases. This is especially for rents in cities, making it difficult to find affordable housing at market prices. The current market pressure further widens the gap between social housing and commercial housing. As further explained by AEDDES, a Dutch trade association of housing corporations, the private rental sector and the owner-occupied sector is not affordable for many middle-income households but at the same time these households are not eligible for social housing. A recent report concluded that due to this around 400,000 middle-income households struggle to find affordable housing. Since the introduction of the SGEI decision, the housing market has changed. Those unable to obtain housing at market conditions has moved beyond disadvantaged citizens or socially less advantaged groups to include middle income households.

This issue is also supported by the International Union of Tenants (Belgium). It points out that current EU State aid rules, in particular recital 11 of the Decision, by enforcing single market rules on the housing sector, force Member States to limit access to social and affordable housing solely to socially disadvantaged groups while the needs of other groups have been largely neglected. Such legislation denies the fact that housing alternatives are not readily available for low and middle-income groups due to possible market failures.

For l'Union Sociale pour l'Habitat (France), France is not affected by a lack of affordable and social housing, nor by the need to increase the energy performance of housing in general. Rather, accommodation in metropolitan areas is increasingly more difficult for middle-income populations. Young people increasingly face problems in accessing the housing market and integrating migrants also requires specific solutions. The challenges are multiple and complex, and they are evolving rapidly. L'Union Sociale pour l'Habitat recommends that these needs must be recognised in European competition policy in the definition of SGEI for social housing, in compliance with European Treaties and in particular Protocol 26 TFEU. The European framework and the SGEI decision must allow allocation of State aid to the internal market to meet such needs not satisfied by market forces alone. **The definition of social housing linked to beneficiaries and 'disadvantaged people' should be better clarified.**

Therefore, **the reference to a narrow target group in the Decision (‘socially disadvantaged citizens’)** seems to contradict the reference to market failures as legitimate criteria to define the SGEI target group. For Housing Europe, there remains uncertainty regarding the criteria to define the target group for SGEI. State aid rules for health and social SGEIs are generally coherent and necessary in EU policy for health and social SGEI. However, consistence with Protocol 26 of the TFEU requires improvement, since social housing is the only sector in the SGEI Decision that refers to a specific target group.

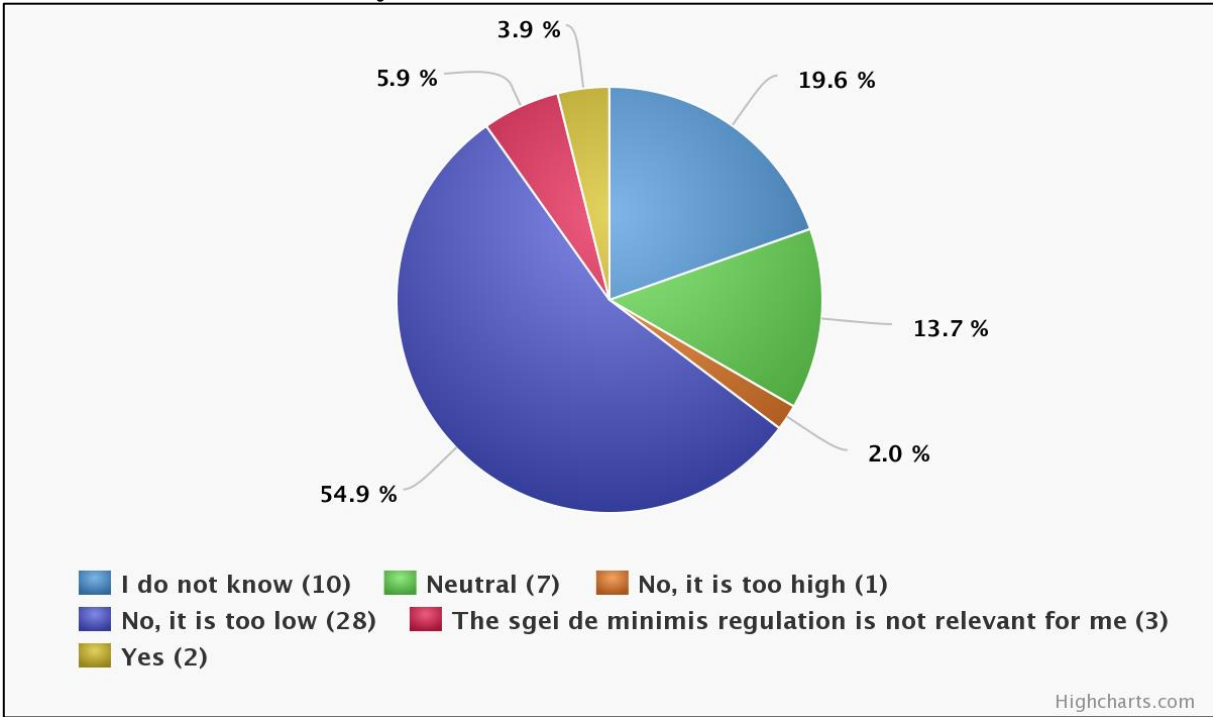
Quote from interview:

• **Latvia (representatives of Member State):** *“There is problem in defining target groups for social housing. Flat rentals are usually for young people, who do not want to own flats and ministries are considering to build flats for rental, but they need to obtain information on what are the target groups and they find it difficult to define target group in order to qualify it as SGEI. Moreover, purely social services (SSGI) such as prisons or elderly homes are not considered economic as long as there is no interest from the market to provide this service. In contrast to the Communication that states SSGI can be of economic nature (the Communication differentiates between the types of services based on the sector), Latvia bases this on whether there is economic interest in the market. If there is no interest in the market it is purely social. Once we see that there is an economic interest we reevaluate and decide whether it is SGI and we apply SGI rules. The situation differs depending on the situation on the market and the definition of a service as economic can shift according to it.”*

3.2.2.3 Appropriateness of de minimis to the current market

SGEI legislation is not fully coherent with the market and this is also seen with an **appropriate de minimis aid threshold**. The EC public consultation inquired whether the amount of aid that can be granted under the *de minimis* rule, i.e. up to EUR 500,000 over three fiscal years, is still appropriate. Most respondents assessed this as being too low (see figure below).

Figure 3-4 Appropriateness of *de minimis* aid, i.e. up to EUR 500,000 over three fiscal years.



Source: reproduced from European Commission (2020, p. 12, Question 46).

Moreover, as indicated by the French Community Commission, where one level of government assigns a general interest task through an entrustment and grants public aid, another level of government may fund activities through a call for proposals. In this case **it is not easy to distinguish between *de minimis* aid (less than EUR 500,000 over three years) and State aid compatible with the market (up to EUR 15 million per year).** (Member State report Belgium, 2018, French Community Commission).

Quotes from interviews:

- **Germany (Saxony):** *“There is lack of applicability of the SGEI de minimis regulation to firms in difficulty.”*
- **Spain (Asturias):** *“Other than the most common problems concerning SGEI (understanding the key concepts, too much complicate rules), also to comply with de minimis rules is very problematic.”*
- **Belgium (French Community Commission, Brussels Capital Region):** *“The SGEI approach (given the admissible thresholds of three years) takes little account of the social and economic environment in which the service integrates and / or has been created.”*

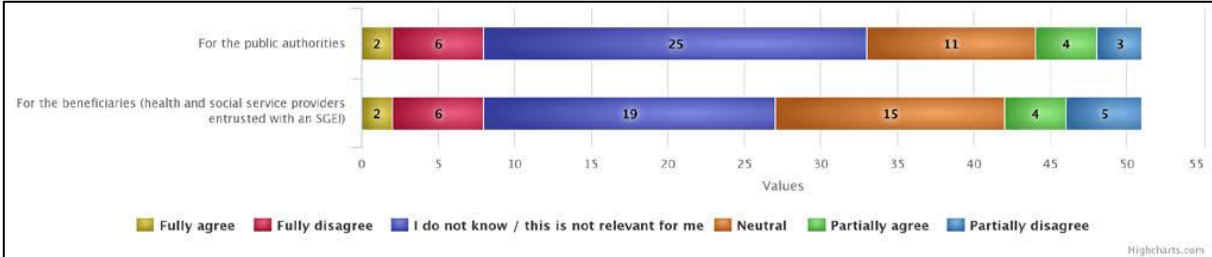
3.2.3 Excessive administrative burden

A key common problem faced by Member States and LRAs is the excessive administrative burden of complying with SGEI legislation. In addition to the general burden of the SGEI package and public procurement, stakeholders have to determine net avoided costs and apply the reasonable profit and overcompensation requirements.

3.2.3.1 General administrative burden

The EC consultation questionnaire inquired whether the 2012 SGEI package reduced administrative burden for health and social services compared to the 2005 package (Figure 3-5). There was no opinion on the burden for public authorities and beneficiaries from 25 and 19 respondents respectively. Nine and 11 respondents respectively disagreed that the burden has been reduced at least partially. Only a few respondents agreed on a reduced burden.

Figure 3-5 Did the 2012 SGEI package reduce administrative burden for health and social services compared to the 2005 package?

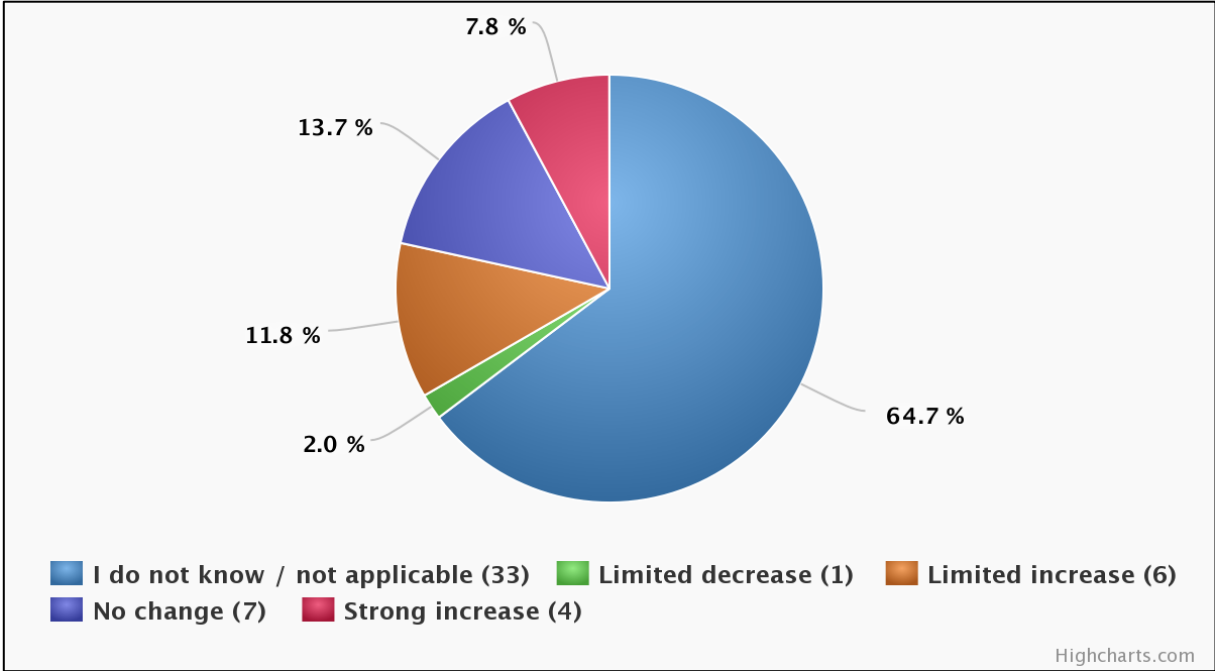


Source: reproduced from European Commission (2020, p. 7, Question 29).

Ten respondents assessed that the resources spent on administrative activities increased due to the 2012 SGEI package compared to the 2005 SGEI package (Figure 3-6).

The Centre Européen de l'Entreprise Publique, Belgium (CEEP) links two key conditions to the administrative burden. The **large number and complexity of daily operations, and adaptability to new needs and challenges in a quickly evolving landscape**. Ongoing investment flows are vital for SGEI providers to cope with these constraints. Further legal certainty, simplification and clarification are necessary for SGEI providers. The Amsterdam Federation of Housing Associations (the Netherlands) also experienced considerable administrative burden from State aid rules.

Figure 3-6 Change in administrative resources (e.g. money and personnel) for health and social services compared to 2005-2012



Source: reproduced from European Commission (2020, p. 7, Question 31).

Quotes from interviews:

• **Belgium (French Community Commission, Brussels Capital Region):** *"The reporting procedure is very heavy to ensure at the level of our administration. We can consider that this work mobilizes on average per sector analysed (social, health, disabled people, vocational training, integration of foreign populations) from 7 to 10 working days per sector (i.e. 15 hours per agent involved), every two years. As an indication, in 2014 it mobilized 37 officials to a total of 567 hours including 522 hours of file analysis and 45 hours of preparation, information and coordination. Moreover, problems did not change since the last progress report. We can only notice that some competences changed, for instance we are now in charge of health promotion, but we lost other competences such as support for people suffering violence. Each time that a new competence is added, we have to study granted subventions, and this can generate administrative complexity".*

• **Spain (Asturias):** *"The main problem LRAs encounter when dealing with SGEI regulation is related to the complexity of the topic. Indeed, there is a lot of information, different regulations and approaches that risk to create confusion and uncertainties. This huge number of rules, instead of helping LRAs dealing with SGEIs, in several cases create more complexities. Problems increase when SGEIs are provided by local authorities. Indeed, local authorities are not very used to work with these topics and people working on*

these, in many cases, are not prepared to deal with these activities. There is lack of expertise and time in LRAs to comply with State aid rules, and these aspects are especially challenging for small LRAs. The smaller an LRA, the higher are the problems. For instance, Asturias is a very small region, with only 1,000,000 inhabitants. But however, according to the experience in Spain, most of the problems in dealing with the SGEI package and State aid in general involve all the Spanish regions. There is a continuous work for regions (and Asturias in particular) to accomplish national and EU requirements”.

• Italy (Sardinia): *“The administrative burden is often related to the relevant normative framework (EU, national or regional) for the provision of a service. There are too many different regulations across the EU, among Member States and within a Member State (such as in Italy) at regional level. Often these national and regional normative frameworks reflect the profound differences in the national and regional services systems across the EU. The territorial differences should be also considered within a region. For instance, public transport is different when it serves remote areas (where a private market cannot be established since unsustainable) compared to the most populated ones. Moreover, our national legislation is trying on one side to keep some services under the public sphere by supporting private undertakings, but on the other to follow the EU rules on fair competition. Such ambiguity does not help LRAs to decide without costs what to do and how to use the SGEI rules. There is also the fear, due to these uncertainties, to incur mistakes. So, some potential solutions foreseen under the SGEI legislative framework have not been explored yet by our region, since in some cases it is better - and costless - to follow national or regional rules. So improved and clearer rules in the EU normative architecture taking into account the differences across sectors but also within sectors at territorial level are needed.”*

The Dutch authorities sought **advice from an expert** lawyer specialising in State aid and SGEI, since they do not deal with this matter on a daily basis and they find it difficult to apply the requirements of the SGEI Decision of 2012, e.g. preparing the entrustment act and determining the amount of compensation (Member State report the Netherlands, 2018).

Quotes from interviews:

• Belgium (French Community Commission, Brussels Capital Region): *“The EC does not seem to measure that control or reporting activities following directives or regulations to be adopted generate significant additional work year after year for public services. This workload requires a qualified staff. In fact, sometimes the complexity of the documents is such that it requires the use of specialized law firms, which generates additional costs for the institutions.*

But we did not hire an external expert to prepare the report. We did it internally. The activity is part of the tasks of the project managers. In some cases, considering that the reporting could be very time-consuming, this can also cause some delays."

• **Latvia (representatives of Member State):** *"Administrative burden is a problem because great number of people from LRAs are involved in process. Frequently, local authorities do not understand why the regulations apply at all and the central authority has to explain the general framework on State aid and how to be apply SGEI, how the provisions have to be put in the contracts, followed and observed. Therefore central authority representatives need to explain the general framework on State aid, how to be apply SGEI criteria and other administrative processes because LRAs find it difficult to understand the State aid regulations."*

• **Spain (Asturias):** *"There is lack of expertise and time in LRAs to comply with State Aid rules, and these aspects are especially challenging for small LRAs"*.

The Czech report underlines the **greater administrative burden in applying the SGEI decision compared with other subsidies** (in particular keeping accounts for compensation payments) due to increased time required for administrative activities and calculations (Member State report Czech Republic, 2018).

With regard to carrying out a public consultation in line with paragraph 14 of the SGEI Framework¹⁶, French authorities consider that the requirement for compatibility must remain reasonable, but this *'must not undermine the freedom of Member States to define the content and terms of SGEI (case of La Banque Postale¹⁷)*. This condition of compatibility may result in an additional administrative burden and additional major costs for the authorities' (Member State report France, 2018, p. 46).

¹⁶ 'For the scope of application of the principles set out in this Communication, Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments that take the interests of users and providers into account. This does not apply where a new consultation will clearly not bring any significant added value to a recent consultation.'

¹⁷ La Banque Postale is required to offer a product – the Livret A (Savings Account A), with specific characteristics laid down by law – allowing people who are excluded from accessing current accounts to access certain basic banking services. Under the Addendum to the Livret A Agreement, every year La Banque Postale sends the French authorities the overall Livret A separate account, which complies with the criteria in the methodological note on Livret A of 10 July 2009. This separate account sets out the revenue and the costs associated with managing Livret A. The difference between the revenue and costs represents the net costs. If the compensation exceeds the net costs of Livret A in the same year, the French State decides whether this excess can be treated as a reasonable profit under EU case-law, taking into account the risks and regulatory constraints associated with this activity. Otherwise, the French State determines the excess compensation that La Banque Postale must repay. If this excess does not exceed 10 % of the compensation due to La Banque Postale for the net costs arising from the Livret A, it may be carried forward and deducted from the payment due the next month. Otherwise, La Banque Postale must repay this excess to the State no later than the 5th day of the following month.

The administrative burden is not proportionate to the service provided. For example, the Flemish government (Member State report Belgium, Belgium) underlines that it is important to assess the implementation of a public contract and the financial resources. However, current SGEI regulations are not practicable when many service providers receive entrustments for a measure. The administrative burden of SGEI regulations is high, especially for smaller measures (< EUR 15 million) and requires an additional, disproportionate government investment.

Quote from interview:

• **Germany (Saxony):** *“In the GBER, no control intervals are provided for when the recovery mechanism is used, while control intervals for the SGEI exemption decision of 3 years are too short, especially in case of volatile markets and longer contract periods (e.g. tender for emergency services). As in the GBER, the control intervals should be decided by the Member State. At least for tenders over 7 years (e.g. emergency services), which must be included under the exemption decision because no more than one bidder applies or could apply (this requirement should also be urgently reconsidered!). For these tenders the contract duration should be decisive rather than a predetermined fixed period that does not fit the contract.”*

3.2.3.2 Difficulties in complying with public procurement rules

The Country Report of Belgium stresses that in the absence of complaints, it is difficult to determine whether calls for proposals that are selective by nature may also lead to distortions of competition (Member State report Belgium, 2018, French Community Commission). These problems seem to be related to how different levels of government assign a task of general interest.

This distribution of responsibility by level of government complicates application of the SGEI Decision. Moreover, the flexibility allowed by the Commission for Member States to define general interest tasks, which is at the discretion of the subsidising authorities, creates legal uncertainty.

For example, where one level of government assigns a general interest task through an entrustment and grants public aid, another level of government may fund activities through a call for proposals. In this case it is not easy to distinguish between *de minimis* aid (less than EUR 500,000 over three years) and State aid compatible with the market (up to EUR 15 million per year). Moreover, information on public aid granted to undertakings in one region is not being regularly exchanged between the different levels of government (need to carry out

analysis based on balance sheets). (Member State report Belgium, 2018, French Community Commission).

Quote from interview:

• **Spain (Asturias):** *“In, general, complying with public procurement procedures is a problem for all LRAs, in particular those small as Asturias. However, also other bigger regions had problems, as in the case of the region of Valencia that experienced numerous difficulties for the exemption of taxes for social services and struggled with the complicated public procurement rules.”*

Czech authorities also have problems with selecting SGEI grantors given legislation on public procurement, especially whether the grantor must be selected based on a public tender, in accordance with the Decision (Member State report Czech Republic, 2018). The State of Saxony in Germany refers to the Commission believing that a call for tenders is not enough to ensure that no State aid is provided when only one bid is made. This can be problematic in practice, especially for emergency services. This anticipation should be relaxed, at least according to the Notice (Member State report Germany, 2018, Saxony).

Quote from interview:

• **Germany (Saxony):** *“According to the EC’s current view, tendering does not lead to an exemption from State aid if only one offer is received. This is a problematic rule in practice (especially in the rescue service) and should be relaxed at least in accordance with the Notification of Aid”.*

3.2.3.3 Difficulties in determining net avoided costs

Difficulties arise in different sectors and for different reasons when determining net avoided costs as pointed out in several country reports.

Denmark mentions the need to determine net avoided cost as required by paragraphs 25-27 of the SGEI Framework for the airport sector. **The ‘net avoided cost’ methodology requires the undertaking’s revenue and expenditure to be established in a hypothetical scenario.** In this case, the SGEI is the primary activity at the airport. The services not covered by the entrustment (other commercial activities) depend on there being an SGEI. Therefore no relevant hypothetical scenario can be used when the airport conducts only the other activities. The ‘net avoided cost’ methodology cannot be used (Member State report Denmark, 2018).

French authorities stress that **this method can prove to be highly complex depending on the characteristics of the SGEI and defined by the Member State**. Furthermore, it involves generating counterfactual and sometimes costly scenarios that make determining the compensation very difficult. In addition, assumptions for developing these scenarios sometimes seem to be artificial (Member State report France, 2018).

These difficulties also affect LRAs. For instance, authorities in Asturias (Spain) underline these challenges for hospitals, including determining compensation as the unit prices paid to each hospital are specified in the Annexes to the agreements. The rates include the costs of in-house and joint work, healthcare- and non-healthcare-related costs, and of care for medical and surgical processes. These rates are invoiced by hospitals as compensation for expenditure to provide the services and carry out the processes in the hospitals. However, differences in the size and capacity of hospitals, as well as the complexity associated with similar tests for different purposes, result in different rates for processes and sub-processes, even within the same hospital (Member State report Spain, 2018).

In Germany, the State of Saxony underlines that, for welfare-oriented measures, the obligation to use actual cost accounting without the alternative allowed under the General Block Exemption Regulation (GBER) of validating a reliable forecast and the control obligation after three years implies a higher burden for welfare-oriented services compared to other sectors. For other sectors the GBER does not regulate the control time (Member State report Germany, 2018, Saxony).

Quote from interviews:

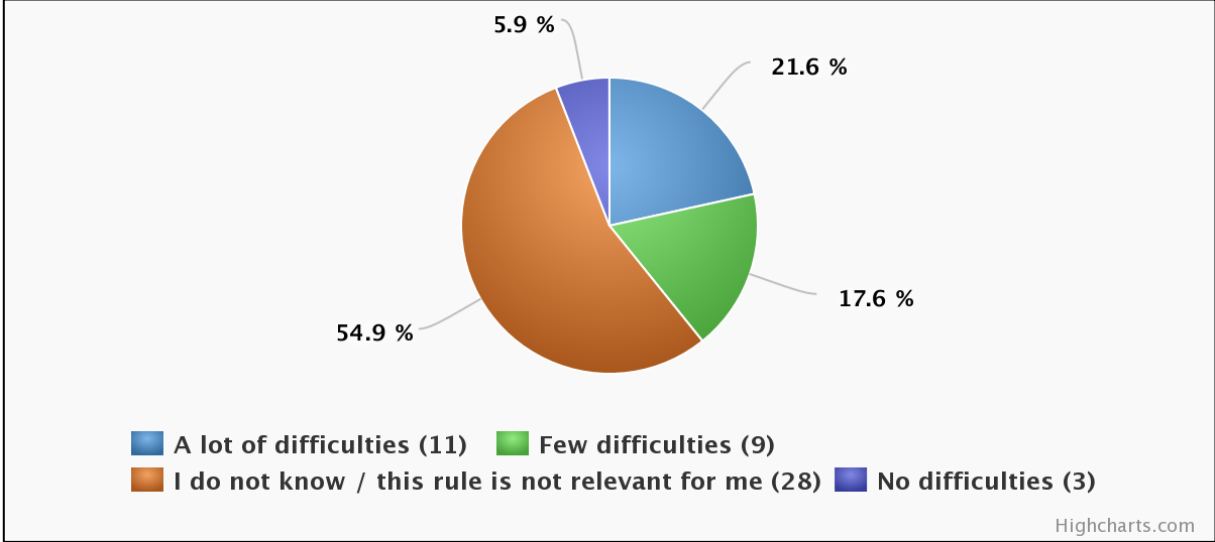
• **Germany (Saxony):** *“So far, the SGEI decision has only controlled actual costs, while the GBER leaves the Member State the choice between a recovery mechanism (actual costs) and a binding declaration of ‘realistic projections’ (planned costs). The obligation to use actual costs without the alternative of a binding reliable forecast as permitted in the GBER and the control obligation after three years, while the timing of the control is not regulated in the GBER, leads to a higher burden for social measures compared to sector measures. Equal assessments are urgently required, i.e. allowing the approval of the planned cost approach also for the SGEI rules”.*

3.2.3.4 Difficulties in complying with the reasonable profit requirement and avoiding overcompensation

According to the Altmark criteria, compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account receipts and a reasonable profit. According to the EC public

consultation, 20 respondents experienced some or even many difficulties in applying the reasonable profit requirement (Figure 3-7). Only three respondents declared that they had not encountered any difficulty.

Figure 3-7 Difficulties in applying ‘reasonable profit’



Source: reproduced from European Commission (2020, p. 10, Question 38).

In the internal survey among Housing Europe members carried out in 2016, 44% of respondents quote issues with the separation of accounts and calculating overcompensation. For l’Union Sociale pour l’Habitat (France) practical experience shows that monitoring overcompensation must be simplified. They must also consider feasibility given the continued investment required to meet housing needs and the needs of territories with particularly dense social housing. Czech authorities also mention a recurring problem with establishing a reasonable profit level in accordance with Article 5(5) to (8) of the SGEI Decision (Member State report Czech Republic, 2018).

The Swedish Trollhättan/Vänernsberg Airport experience stresses that **the rules for establishing reasonable profit and overcompensation (Articles 5.5–5.8 and 6) are difficult to understand and should be made clearer with examples and calculation models.** Otherwise, there is a risk that the airport will wrongly interpret the rules, leading to a repayment obligation. The system would gain by having clearer definitions and a more consistent terminology in the reporting directives templates. This would enable a more structured and clearer reporting package with simple examples and references to the rules to ensure uniform application of the rules. One example is that the reporting template does not refer to ‘other State aid from the municipality’ (Member State report Sweden, 2018).

The Flemish Government (Member State report Belgium, 2018) notes that working with concepts such as reasonable profit, is suited to a business context, but cannot be easily applied to social activities. Here, fees are determined for

providing a service, which is often based on anticipated costs not taking into account reasonable profit. **The concept of economic activity and, therefore, of reasonable profit, creates many questions and uncertainties for policy-makers and service providers.**

A lack of clarity or detailed explanation of whether and when remuneration for a service should be regarded as part of the compensation is stressed by Polish authorities. Some entities commissioning a service had doubts as to whether the payment they made to the SGEI provider should be treated as remuneration (revenue reducing the value of the compensation) or a component of the compensation. Moreover, the Polish authorities had difficulties determining a reasonable level of profit for the social housing scheme implemented by the BGK Bank. **This problem is due to the gap between a longer SGEI entrustment period and a shorter period set up by the EC to calculate prices.** Owing to the SGEI 30-year entrustment period, it was difficult to obtain the appropriate interest rate to determine reasonable profit¹⁸. (Member State report Poland, 2018).

Quotes from interviews:

• **Poland (Warsaw):** *“In the case of calculation of compensation in social housing, it is difficult to separate private services offered with the framework of public investment. In fact, the problem occurs when social housing buildings are built in areas where, according to the spatial plan, the needs to provide some services is foreseen. In such cases, there must be a private service premise (e.g. in a residential building, one or more flats for offering services or shops). In such cases where the services have a private nature, it is challenging how to calculate the compensation or how to separate the revenues from such premises from compensation calculation.*

Calculation of compensation in case of waste management is sometimes difficult due to complicated national law. Waste management is in fact heavily regulated in Poland and some of its elements create problems for LRAs. These complications and difficulties do not allow LRAs to have their own companies to manage perform the entire chain of waste management service because there are restrictions on what can and cannot be done and how funds are allocated. For example, they cannot collect the ‘revenue’ and so finance their service provision. The revenue is a tax that can only be collected by the authority. So

¹⁸ The regulations for the scheme did not initially use the Commission IRS rates for SGEI compensation because the Commission calculates swap prices for up to 10 years on the basis of Bloomberg data. When drawing up the legislation, this was not seen as suitable since entrustment of the public service for social housing is normally for 30 years. The IRS quotation for the longest period available on the financial market, i.e. 20 years, was used to calculate a reasonable profit. This was based on data published by the Financial Markets Association ACI Polska.

the authority collects the tax and then needs to transfer it back to the company it owns and contracts with the service. The problem from the perspective of SGEI/State aid is that the sum transferred (the sum of tax collected that should be the revenue of the service provider) is much higher than 15 million euro. In this case, the LRA lacks legal certainty and is considering whether they need notification. Nobody is able to find a solution to this problem”.

• **Italy (Sardinia):** *“All these rules are quite complex and they also strictly depend on the type of the sector and on the quality of data available. For instance, when a public support is foreseen for three years, but for some reasons, the first payment is delayed to the second year, how this should be treated and how does it affect the calculation?”*

In Hungary, most questions submitted to the State aid monitoring office by aid-grantors **concerned the start date of eligibility for costs and the determination of reasonable profit**. As the Decision does not allow claims for costs incurred prior to the entrustment, project preparation costs are not eligible. Hungarian authorities require new rules to ensure a legal basis for compatibility of these preparation costs with EU law. Using several aid categories, however, makes compensation calculation more difficult for both beneficiaries and aid-grantors. (Member State report Hungary, 2018)

In the Germany Country Report, the State of Saxony stressed continuing uncertainties about reasonable profit. At least for minor cases, **sales would be a helpful basis rather than return on investment or discounting**. (Member State report Germany, 2018, Saxony)

Quotes from interviews:

• **Germany (Saxony):** *“There are persistent uncertainties about a reasonable profit. For small cases, a safe harbour based on turnover would be helpful (instead of return on capital or discounting). ... In general, it can be said that the rules on the act of entrustment in the SGEI decision - in particular the requirement of a description of the compensation mechanism and the parameters for calculation, monitoring and change - are hardly tangible and therefore remain a reason for less experienced funding authorities to avoid as far as possible an entrustment in the sense of the SGEI exemption decision. The need for advice on issues related to entrustments is still far too high. The really necessary specifications for SGEI grants should therefore - with the necessary flexibility - be formulated in the future set of rules. Models for this can be the more easily manageable infrastructure exemptions (such as Art. 55) in the GBER”.*

- **Belgium (French Community Commission, Brussels Capital Region):** *"There is complexity in compensation calculations because deadlines imposed for the return of balance sheets and supporting documents by our administration do not coincide with the deadline for submitting the SGEI report to the EC."*
- **Latvia (representatives of Member State):** *"There is not enough guidance for applying the compensation calculation. More specific guidance from the EC would be beneficial."*

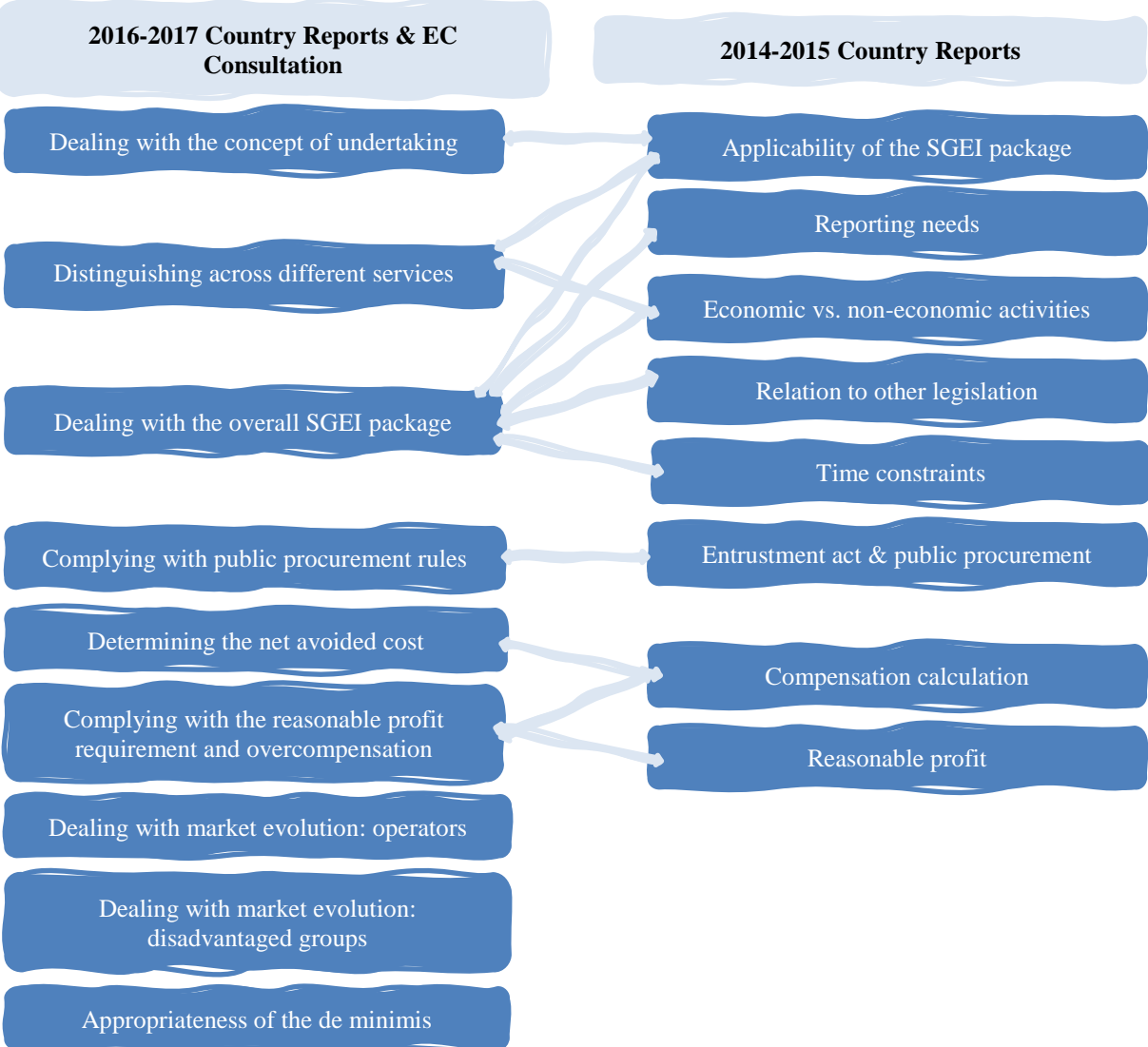
3.3 Comparison of findings for 2014-2015 and 2016-2017 Country Reports

The EC public consultation highlights more challenges than the country reports. However, **the challenges in the 2014-2015 reports are similar to those for 2016-2017**. The analysis above structured the challenges along State aid issues whereas the previous analysis focused on SSGI, namely social housing and health care. The following gives a short comparison of the respective challenges.

Uncertainties about basic concepts and excessive administrative burden were mentioned in the previous reporting period (see Figure 3-8). These challenges have been discussed in different detail in the two reporting periods. In addition, challenges from market uncertainties were added in the latest reporting period. These were mentioned, however, only by stakeholders in the EC public consultation. This highlights **the need to consider not only national and LRA perspectives but also service providers or their associations when assessing the adequacy and applicability of the SGEI package**.

Some countries continue to report the challenges they mentioned previously. Examples are compensation calculation in the reports of the Czech Republic and Poland or applying SGEI concepts to non-economic services as outlined in the Belgium report. Only a few Member States that previously reported challenges did not mention any in their 2018 report. Examples are Italy, Romania and Ireland. Simultaneously, Member States that previously did not report challenges mentioned them in the 2018 reports. These include Denmark, Hungary, Spain and Sweden. Since the challenges cannot be linked to changed framework conditions or legislation, they existed previously and not all country reports contain corresponding information.

Figure 3-8 Comparison of challenges mentioned in the 2014-2015 and 2016-2017 Country Reports and EC Consultation



Source: own elaboration based on Zillmer et al. (2017).

4 Responses to challenges: current approaches, policy gaps and options

The most evident challenges are uncertainties about basic SGEI concepts. Linked to this lack of clarity, there is a lack of understanding regarding terms such as **compensation, calculating costs and reasonable profit and methods for calculating compensation mechanisms.**

The lack of clarity is also **related to market uncertainties.** Problems with defining target groups or the nature of SGEI and the status of responsible bodies create obstacles for authorities to understand markets and how these relate to their activities.

All these problems can increase administrative burden, especially for LRAs, and may differ between countries also in relation to different responsibilities at national and LRA levels. The country reports show that LRAs are involved in reporting to different extents. Thus, information may be specific to territories and may not reflect all the problems for LRAs. Interviews with LRAs showed that some problems have not been reported. The level of detail also varies in the descriptions.

Responses to the challenges SGEI providers choose to deal with has been collected from analysis of the country reports, the EC consultation and interviews. **Rather than general solutions to challenges, these responses depend, inter alia, on the national and/or individual context and cannot be translated into generally applicable solutions for all SGEI provisions in the EU.**

LRAs deal with uncertainties in an ad-hoc manner based on preferred solutions that differ for each SGEI. They apply own interpretations of concepts and methods for complying with the rules, such as compensation mechanisms. It is difficult to recognise a pattern or good example in these practices as they vary strongly. While cost allocation and net avoided costs are the predominant calculation methods, there are many other methods to calculate compensation. Often more than one method is applied even within one sector.

4.1 Defining SGEI, SSGI and economic nature

There are ambiguities concerning the definition an activity as economic or non-economic and as SGEI or SSGI. For example, in Latvia ‘purely’ social services (SSGI) such as concerning running of prisons or elderly houses are not considered

economic because and/or as long as there is no interest from the market to provide such services. So, any service without interest in the market is considered purely social. Once the authorities note there is an economic interest they reevaluate and decide, by consulting the respective ministry, if it is an SGEI and apply SGEI rules. This is in line with the Communication that states SSGI can be economic. While the Communication suggests certain services and sectors are truly social (SSGI), it does not exclude these services being economic. The distinction for these sectors is whether they are offered in a market or not.

Quotes from interviews:

• **Latvia (representatives of Member States):** *“There is a national law on State aid control that states that if an authority provides financing for an economic service, it has to contact the respective ministry (Ministry of Finance) to consult whether it is compliant.”*

• **Belgium (French Community Commission, Brussels Capital Region):** *“Our institution subsidises and approves associations that offer different services to the population of Brussels in sectors as diverse as personal assistance, health, social integration of people of foreign origin and vocational training. Only if they meet the requirements laid down in the framework of the government decree that they are then mandated via a legal act to fulfil the mission of general interest and in return they receive aid financial whose method of calculation is also specified in the decree implementing the decree. However, in general, the precautionary principle prevailed in the analysis. When there was doubt, the service has been listed as SGEI and analysed as such.”*

The diversity in interpreting of these concepts, often caused by specific aspects of national rules, is confirmed by the Polish interviewee. In contrast to the Latvian and EC approach, every SGI is considered as economic and social. Every SGI is economic because of its economic impacts. SGIs are also social because every SGI can offer a benefit for society. For some sectors, national law is complicated to the extent that tasking municipal companies to perform all necessary services is not straightforward. For example, waste management companies cannot collect the service fee, given that the fee is a tax and must be collected by the LRA. In consequence the service fee collected by the LRA must be transferred to the municipal company to finance its SGEI activities. If the tax/service fee is very high, the entire process raises questions about the SGEI package. According to the interviewee, it even creates legal uncertainty for the LRA if it is admissible given the SGEI regulation, or whether a notification is needed. In addition, for other sectors, the national law regulates in-house orders and constitutes an obstacle to these. In such situations, it is the national, rather than the EU level, that is requested to provide simplification and clarification on how to proceed.

Quote from interview:

• **Poland (Warsaw):** *“The main problems come from national laws, especially those in the waste management and in social housing. These are sectors heavily regulated in Poland and some elements of national regulations create problems especially for LRAs”.*

The lack of clarity in defining SGEIs and related concepts has been repeatedly mentioned in country reports. In the EC consultation, stakeholders also argued that more clarity and clarification of these concepts is necessary. Given that SGEI provision differs between Member States and sectors, some freedom in choosing individual paths is necessary. Nevertheless, stronger guidance is needed. The question that arises in this context, is **whether clarifications should come from the EU level or from the national level.**

Differences between SGEI provision modes are at the national level because they depend on the governance and the distribution of responsibilities between authorities at the different levels. Thus, there is a difference between the specifications needed from the EU and from the national level. Some problems relate to national specificities, others to EU issues. Sometimes EU regulations remain ambiguous in order to respect differences between Member States. Clarification of each problematic concept and issue should be addressed at the appropriate level. In general, clarification requests at a respective level are necessary for all related issues mentioned above including:

- differences between types of services (e.g. SGEI or SSGI) and sectors;
- the concept of an undertaking;
- public and private actors, services and undertakings;
- the functioning of markets.

The EC consultation shows that housing policies particularly suffer from a lack of clear and tailored policies, especially social housing. The stakeholders call for clarification of roles between local, regional and national authorities to facilitate adjustment to an evolving housing market. Stronger and clearer references to public needs and beneficiaries of the SGEI are needed.

Respondents also advocated the primacy of the national level in defining the framework and criteria for allocating social and affordable housing. Subsidiarity should be strictly enforced in the housing sector.

In many cases, SGEI providers need to refer to national legislation for specification. This includes understanding if a service is an economic activity.

The country reports provide varying levels of detail on how national legislation is relevant and helpful in specifying open questions.

Even when legislation at different levels is available and clarifies ambiguities, some SGEI providers need guidance in applying or complying with SGEI rules. Member State level interviewees from Latvia suggested that local authorities require significant support from central authorities in understanding, applying and complying with SGEI rules. These are complicated and LRAs do not always understand why they exist in the first place. For this also LRA size, human capacity and resources are decisive. For central authorities at the Member State level this need for guidance is a substantial resource requirement. At the same time, interviewees admitted that this should not suggest that SGEI and State aid rules are unimportant. The example shows how important it is to have a central authority, whether at national or regional level, with the resources to guide and support local actors (beneficiaries) and local authorities that cannot afford to employ State aid specialists.

4.2 Solutions to market uncertainties

Certain issues require focus at the EU level. These are predominantly universal for Member States due to the common market and competition rules. Such issues concern competition, compensation or defining a reasonable profit. Moreover, a prominent issue for stakeholders was the need to recognise changing contexts of market failure as part of the SGEI provision.

Interviewees from Latvia suggested that market dynamics can change the SGI definition to economic or non-economic, depending on interest in the market to offer such a service. Based on this, **Member States should have liberty and flexibility to define SGIs as economic or non-economic, so they can react flexibly to market changes.** Member States and/or LRAs should be able to intervene without restrictions with market failure or when SGI is necessary.

Quote from interview:

• **Poland (Warsaw):** *“LRAs define that there is a need for SGI intervention depending on the sector. In case of sewage management and transport they have monopoly so only they can provide the service. In case of social housing, it is based on market failure”.*

According to Protocol 26 of the TFEU, SGEI tasks, such as providing social and affordable housing, should be based on specific national, regional or local entrusted missions that reflect the needs and proportional support for housing and communities. National, regional and local governments should have broad discretion in defining the scope, organisation and financing of SGEI based on their cultural, economic and democratic choices and ability to adapt to community needs. The Commission should intervene in the definition and organisation of SGEI only where there is a manifest error.

In this sense, according to Housing Europe, there still seemed to be uncertainty about the flexibility for Member State authorities concerning State aid to social housing to define disadvantaged groups. However, the *Woonpunt and Woonlinie* case of 15 November 2018¹⁹ confirms that a clear definition of an SGEI is necessary to ensure compliance and reduce the risk of overcompensation. It also says, that while there is an obligation for authorities to define a public need, they can choose from a wide range of criteria (not only income levels). This clarification is important, since the wording of recital 11 referring to ‘disadvantaged citizens or socially less advantaged groups’ was often interpreted as an obligation to focus on low-income households.

Similarly, the Social Union for Housing (France) recognises that the SGEI decision gave the clarity necessary to supply social housing in France, by implementing article 14 TFEU and Protocol 26 TFEU while respecting European competition policy. **Maintenance and simplification are necessary so different – and evolving – housing needs are recognised and taken into account at Union level together with the conditions for calculating and controlling any overcompensation.**

Another frequent response in the EC consultation suggested **modifying State aid rules so they clearly recognise the difference between SGEI providers who are mutual societies and cooperatives as opposed to for-profit companies.** Even if they make surpluses, non-profit companies do not aim to distribute it for the personal enrichment of its members. Respondents argue that such changes will allow countries to better respond to social problems. Increased State aid flexibility (for example, removing requirements on notifications of State aid in cases such as ‘open systems’ as opposed to ‘closed systems’) would also allow more decision making by LRAs. These are the most aware of specific problems and ways of addressing them via SGEI. In this context, respondents referred to the *Paint Graphos* judgement²⁰. This judgement is perceived favourably as it provides a tax system that may not be considered under State aid for cooperatives which have additional constraints compared to for-profit companies in funding their activities.

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010TA0202>

²⁰ <http://curia.europa.eu/juris/document/document.jsf?docid=109241&doclang=EN>

The Paint Graphos judgement concerned a tax concession for cooperatives in Italy. The judgement established the difference between cooperatives and commercial companies in the mode of providing services. As long as certain conditions apply and there are differences between such cooperatives and commercial companies, they can be exempted from tax, without this exemption constituting State aid.

An interesting solution to granting State aid to agencies providing social care programmes is in Cyprus. The country provides State aid in two instalments over two three-year periods. Each year the national body analyses whether the beneficiary has a debt or outstanding amount vis-à-vis state bodies. If so the grant is offset by this amount and the beneficiary receives the difference. Further instalments depend on appropriations in the annual budget of the government authority. (Member State report Cyprus, 2018)

4.3 Solutions for compensation calculation

As underlined in the previous chapter, dealing with SGEI legislation can imply an excessive administrative burden, especially to calculate compensation and reasonable profit and to fulfil the overcompensation requirement.

Using consultancy services or digitalising procedures can reduce administrative burden for authorities dealing with SGEI rules. For instance, as underlined in the Netherlands country report, authorities facing difficulties in applying the requirements concerning preparation of the entrustment act and compensation, sought advice from an expert (lawyer) specialising in State aid and SGEI. As reported by the French Community Commission (Belgium), the general administrative burden can be also reduced by modernising (i.e. digitalising) internal procedures.

Quote from interview:

• **Belgium (French Community Commission, Brussels Capital Region):** “*Our administration, as part of its modernisation, is currently working on the gradual introduction of the generalisation of the digitisation of administrative documents. When the operators can submit their financial aid request as well as their annual financial report in a computerised manner, the control of aid granted, whether State aid or not, will be faster and more easily identifiable. For the future, we expect to become more ‘digitalised’. Indeed, with the digitalisation and informatisation of the procedures, reporting could be more efficient. However, we do not expect to be able to digitalise these procedures before 2024*”.

In complying with compensation rules, Member States and LRAs frequently apply different mechanisms for different SGEI providers. **This flexibility is appreciated since it enables different cost structures and complexities related to sectors and/or services.** For example, in Croatia the net avoided cost method is applied for airports and post offices while ferry, shipping and high-speed routes use the cost allocation method based on direct aid and subsidies. Latvia uses the cost allocation methodology for health care services. Net avoided cost cannot be applied as the costs of complex and expensive health care services are difficult to compare. In its country report, Greece applied the net avoided cost methodology for providing electricity to the ‘Interconnected System’ and ‘Non-Interconnected Islands (NII)’. In particular, compensation covers the difference between the cost of electricity on the interconnected network and the NII network, which exceeds the basic regulated charges. Compensation is computed monthly and for each NII system so the specific NII system supplier recovers the SGI compensation for that network. The costs avoided by not using the national electricity transmission system to supply electricity to the NII are taken into account and reduce the cost of providing the public service. This reduces the amount to be recovered via public service charges for all consumers. In establishing the SGI compensation, the Greek authorities take into account all revenue earned from selling electricity to the NIIs.

However, while the compensation mechanisms vary for different SGEI, the reports suggest that the **cost allocation method is preferred for grants, subsidies and bonds.**

The Flemish government (Member State report Belgium, 2018), concerning work and social economy policy services, underlines **that the compensation mechanism underlying the subsidies varies between different measures.** The price may be determined from a public procurement procedure combined with predetermined target prices or may be set in advance on the basis of objective parameters. Control points have been incorporated for all measures to verify the price and parameters are in line and whether any adjustments must be made for the subsequent period. In addition, there is a check on implementation and when abuses are discovered, the compensation must be recovered.

In Latvia there is also a further specification in the agreement on water supply and waste collection services. The agreement on these public services includes a paragraph specifying that a provider may only receive compensation for investments in infrastructure that ensure public services at the quality level specified by regulations. According to the agreement, the service provider must repay compensation in excess of the costs of providing the public service. Overcompensation is therefore avoided by determining the amount of investment in infrastructure at the initial stage. EU and Latvian regulations cover the

qualitative and quantitative indicators of services to be provided, as well as the financial and economic indicators to attract EU and public funding for investment in infrastructure for water supply and household waste landfill services. (Member State report Latvia, 2018)

In an interview, representatives from Saxony also evaluated the possibility of applying different calculation methods as very positive. The possibility of choice should be maintained because, as the representatives claim, different methods can be appropriate in different contexts. Even if the cost allocation method is dominant, the net avoided cost method can be used for social housing (if data is available). However, describing the compensation mechanism and parameters for calculation, monitoring and change are still complicated and need further clarification or guidance from the EU. It was also stated by the LRA in Saxony that flexibility in understanding reasonable profit is beneficial, particularly with smaller providers.

Quote from interview:

• **Germany (Saxony):** *“In general, it can be said that the regulations on the act of entrustment in the SGEI decision - in particular the requirement of a description of the compensation mechanism and the parameters for calculation, monitoring and change - are hardly tangible and therefore remain a reason for less experienced authorities to avoid as far as possible an entrustment in the sense of the SGEI exemption decision. The need for advice on issues related to entrustment files is still far too high. The really necessary specifications for SGEI grants should therefore - with the necessary flexibility - be formulated in the future set of rules. Models for this can be the more easily manageable infrastructure exemptions (such as Art. 55) in the GBER.”*

However, from the review of the reports, it is clear, that **the cost allocation method is more widely used as it is much easier to calculate**. In most cases there is not enough data to correctly estimate net avoided costs. For instance, the Italy country report states that it is difficult to use net avoided cost for air transport. This method of calculation would involve a precise analysis and correct estimate of the difference between the cost to operate air transport links involving PSOs and the proceeds from ticket sales. But both these factors, in particular the air carrier costs, vary considerably limiting the accuracy of estimates.

Quotes from interviews:

• **Germany (Saxony):** *“We see positively that the SGEI regulations allow the net avoided cost method in addition to the cost allocation method. The latter method can be a sensible alternative to the cost allocation method in individual cases, so the option should be retained. In most cases the cost allocation method was used. In social housing, the net avoided cost method was also used.”*

• **Belgium (French Community Commission, Brussels Capital Region):** *“The calculation of the amount of compensation is specified in the decree of application of the (national) law relating to the recognition (or approval) of the service concerned. As a general rule, the calculation is made on the basis of fixed or capped amounts (salary costs and operating costs).”*

• **Poland (Warsaw):** *“Cost allocation method has been used, since there are not enough data for net avoided cost.”*

5 Policy conclusions and recommendations

This report provides an analysis of State aid rules relating to SGEI legislation by illustrating key notions of the SGEI Communication and Decision and identifying challenges, especially for LRAs, from the State aid legal framework. The report also offers an overview of solutions adopted or proposed to overcome the challenges. The analysis is based on screening Member State country reports for 2016-2017, documentation from the EC consultation with stakeholders in 2019 on health and social services, as well as interviews with selected Member States and LRA representatives.

In the country reports, authorities in eight Member States indicated problems or difficulties. In three country reports these are explicitly highlighted by LRAs.

The analysis shows that:

- most challenges relating to the SGEI Communication derive from **persistent legal uncertainty, lack of clarity for definitions, and difficulties in applying methodologies to estimate compensation;**
- the country reports highlight that complying with the SGEI legal framework often implies a **high administrative burden** for national authorities and LRAs;
- from the EC consultation, additional problems relate to **inappropriate SGEI legislation for evolving markets;**
- the interviews conducted for this report confirmed key findings from the document analysis. Moreover, they also stressed that **challenges can be greater for small LRAs and national legislation can create additional obstacles** for compliance with the SGEI legislative framework;
- **these challenges are often strictly inter-connected.** For instance, correct identification of an undertaking may affect compensation, calculation of costs and reasonable profit. At the same time, evolution of the market can raise questions on how to distinguish among services and criteria to select the most disadvantaged targets. The administrative costs associated with choosing the best methodology to estimate compensation is a function of basic concepts and market uncertainty.

5.1 Recommendations for clearer basic concepts

There are several unclear elements in the legislation concerning undertakings, general economic interest and the distinction between SGEIs and SSGIs. These can create difficulties to identify and weight aid in kind and indirect financing received by undertakings, as well as the amounts for an SGI and those covered by the *de minimis* regulation. Another difficulty is whether the public aid has been granted to one or several SGEIs, which results in the aid being combined. The absence of precise definitions can give more flexibility to national authorities and LRAs in interpreting the legislative framework. However, **there is a trade-off between flexibility due to a lack of clarity and legal uncertainties which can cause potential mistakes in compliance with the rules.**

According to the document review, such problems can be amplified when an undertaking:

- performs different services;
- receives public support from different government levels;
- operates in a sector heavily regulated by national laws.

Especially the third aspect, as underlined by Polish authorities, can pose additional uncertainty for LRAs and service providers. In this case, **improving simplification or clarity should target national authorities rather than the EU level.**

In Latvia, when there is no interest from the market to provide social services, these are considered purely social (i.e. SSGI). Once Latvian authorities note there is an economic interest they reevaluate and consult the respective ministry to see if it is an SGEI. The French Community Commission in Brussels Capital Region (Belgium) adopts a more precautionary principle. When there was doubt, the service was listed as SGEI and analysed as such. In Sardinia (Italy), the complexity of the SGEI framework coupled with persistent discrepancies between regional or national rules with EU rules along with the difficulty of finding a balance between the quality of services and ensuring fair competition for private undertakings, has prevented the region from exploiting the options offered by the SGEI rules.

Differences between SGEI provision modes are at the national level, since they depend on governance and the distribution of responsibilities between authorities at different levels. Thus, **different specifications are needed from the EU and from the national level.** For instance, the interview with the French Community Commission (Brussels Capital Region, Belgium) suggests that, as long as exemption criteria are clearly specified by the EC (safety, legal) and following the example of actions under the Services Directive, Member States – or states in federal countries – under consultation with LRAs, could list social services distinguishing SSGIs falling within or outside the regulation (positive and negative lists). This would take country and region specific SGEI needs into account. SSGIs in the negative list should no longer be subject to a report every two years. Such lists could be updated every five years.

Recommendations to improve the SGEI legislation:

- i. For the distinction between SSGI/SGEI and the definition of key concepts, it is of the utmost importance to **provide more details to enable Member States and LRAs to distinguish between services.**
- ii. Indications provided in relation to the Altmark Judgment do not enable Member States to be certain about applying those principles to individual cases, unless they make use of a notification for legal certainty. **Solutions that clearly link current cases to those principles should be considered.** Conversely, the best solution for a Member State and LRAs will be to apply the Decision or Regulation 360/2012.
- iii. On the basis of the reports by Member States, for social housing, healthcare (care for the elderly, the disabled) and childcare services, **the Commission should integrate elements defining the sector and create the conditions for clear demarcation between mere intervention in support of the community and economic activities.**
- iv. Economic activity and enterprise are crucial elements connected to the previous one. As stated by the Commission in its own acts, it is very complex to define an exhaustive list of non-economic activities applicable to all Member States. Furthermore, this would not take into account national and regional specifics and would thus lack sufficient consideration of subsidiarity. **However, thresholds to clearly and unequivocally define whether an intervention is eminently important locally should be possible and, above all, desirable.** Especially for SGI, this would be an ideal solution for LRA interventions with marginal importance for competition that affect limited catchment areas in limited territories (internal areas, marginal areas, small municipalities).

5.2 Recommendations to better consider market evolution

The lack of appropriateness and coherence of SGEI legislation for evolving markets can lead to additional problems. These have been underlined by stakeholders in the EC consultation and confirmed by interviews, especially the need to revise *de minimis* thresholds.

Most of these problems relate to the evolution of specific markets, such as housing, and to a wider group of people in need of social services but not included in the SGEI definition of ‘disadvantaged groups’. The recent COVID-19 emergency raises additional questions on defining needs and how to consider a target group as disadvantaged. Several stakeholders call for a revision of this definition taking into account current – and future – changes in services, which affect beneficiaries and operators. **Community law should result in a legal framework conducive to non-profit enterprises** that exists in some national laws. This should consider the Paint Graphos judgment on cooperatives and extend its scope to other non-profit companies (mutual societies, associations, foundations).

Despite recognising that it is crucial to maintain a specific framework for health and social SGEI, **the evolution of the market also calls for better recognition of the role of national, regional and local levels in defining housing policy needs.** For instance with social housing, some stakeholders request a clear definition of public need in relation to the SGEI. This is the sole responsibility of Member State authorities using the most adequate and transparent criteria (not necessarily income). In this way social housing could be qualified as an eligible SGEI activity when households cannot obtain housing at market conditions or there is market failure.

Given evolving markets and different national social systems in the EU, **it is crucial that Member States and LRAs have the flexibility to define SGIs as economic or non-economic, so they can react quickly to market changes.** Member States and/or LRAs should be able to intervene without restrictions in case of market failure or when they consider an SGI intervention necessary. State aid legislation should not leave them with limited alternatives when struggling with segregation and promoting social cohesion in urban policies. A wide diversity of social and affordable services ought to be dictated by local and regional needs. This may also call for a **paradigm shift from the prevalence of economic aspects over common interests and for an extended use of SGEI beyond the sole remit of Competition Policy.**

Recommendations to improve SGEI legislation:

- i. In the *de minimis* regulation, **increase the maximum aid allowed to SGEI providers.**
- ii. **A revision of State aid to cover non-profit companies** such as mutual societies, associations or foundations which do not aim to distribute any surplus for the personal enrichment of their members. The European Union must recognise the specificities of these companies, in line with the principle of diversity in forms of business recognised by the Treaties of the Union.
- iii. For the definition of public need or target group in relation to SGEI, **more qualitative definition criteria are needed, beyond income.**

5.3 Recommendations to reduce administrative burden

A key problem faced by Member States, LRAs and stakeholders is the excessive administrative burden to comply with SGEI provisions. These include the general burden of the SGEI package, issues with public procurement and technicalities such as determining net avoided costs, reasonable profit and overcompensation.

Some authorities, as in the Czech Republic, also underlined the **greater administrative burden in applying SGEI compared to other subsidies**. For the Flemish government the administrative burden does not seem to be proportionate to the size of the service and current SGEI regulations are not practicable when a very large number of service providers receive entrustments for a measure. **For smaller measures, such as those under EUR 15 million, an additional, disproportionate government investment is required.**

However, there is a general opinion that a lot of information, different regulations, including at national or regional level, and the wide variety of approaches risk creating confusion and uncertainties. To comply with SGEI legislation, **LRAs, and especially the smallest, must comply with many complex operations, and have to frequently adapt to new needs and challenges in a quickly evolving landscape.** The support of consultancy services, as experienced by Dutch authorities, or digitalising procedures, as planned by the French Community Commission (Belgium), can reduce the administrative burden. Both solutions, however, imply costs and can be time consuming.

For calculating compensation, SGEI legislation foresees some flexibility in adopting the most appropriate methodology, which is appreciated by Member States and LRAs. However, **the net avoided cost methodology is mostly seen as too complex**. This is primarily due to the need to establish the undertaking's revenue and expenditure in a hypothetical scenario often coupled with a lack of data and reliable information. Some LRAs have also argued that **working with reasonable profit, return on capital or other profit level indicators cannot easily be applied for social activities**. It is difficult when fees are determined based on anticipated costs, without taking into account a reasonable profit. These concepts in such a context create additional questions and uncertainties for policy makers and service providers.

Recommendations to improve SGEI legislation:

- i. For the definition of reasonable profit, a solution could be **short-cut solutions for cases of low financial importance and/or possibly the area of service, increasing the maximum aid for SGEI providers**. Also for small cases, using sales as a reference rather than return on investment or discount rates would be helpful.
- ii. For the definition of assignment procedures and related administrative burden, **SGEI provisions could be accompanied by specific guidelines and contract formats**. Commission collaboration with the technical authorities of Member States could be useful. For instance, the Commission could offer guidance by issuing templates for entrustment acts without making these compulsory. These could refer to different conditions depending on sectors.
- iii. In accordance with the notification of aid, **enable some tendering to be exempt from State aid if only one offer is received**.
- iv. **Remove the obligation to settle actual costs without the alternative of binding a reliable forecast, as permitted in the GBER and remove the obligation to check after three years**, while the control timing is not regulated in the GBER. This leads to a higher burden for SGEI measures compared to sectoral measures. This would **improve consistency between the SGEI package and the GBER**.
- v. A final recommendation to reduce administrative burden, concerns revising the SGEI package to ensure the elements referred to in the Communication comply with the Framework **to have a single point of reference for Commission positions**.

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Alphabetical order of written responses from stakeholders on EC Public Consultation (other than responses to questionnaire):

- Amsterdam federation of housing associations, business association (NL)
- Build Europe, business association (BE)
- Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege (Federal association for independent welfare services), NGO (DE)
- European Hospital and Healthcare Federation (HOPE), NGO (BE)
- European Property Federation, business association (BE)
- Groupe VYV, business organisation/company (FR)
- Housing Europe, business association (BE)
- International Union of Tenants (IUT), NGO (BE)
- Union sociale pour l'habitat (Social Union for Housing), Business organisation (FR)

EN

ISBN 978-92-895-1090-5
doi:10.2863/920598

QG-01-20-681-EN-N



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