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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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**COMMISSION STAFF WORKING DOCUMENT**  
**EVALUATION**

**Evaluation of the**

**State subsidy rules for health and social services of general economic interest (“SGEIs”)  
and of the SGEI de minimis Regulation.**

{SWD(2022) 389 final}

## Table of contents

1. INTRODUCTION .....	4
1.1. The 2012 SGEI Package .....	4
1.2. Purpose of the evaluation.....	5
1.3. Scope of the evaluation.....	5
1.3.1. Sectors covered.....	5
1.3.2. Timeframe and geographical scope.....	6
1.4. Data sources used for the evaluation .....	6
2. WHAT WAS THE EXPECTED OUTCOME OF THE INTERVENTION?.....	7
2.1. Description of the intervention and its objectives .....	7
2.1.1. Notion of State aid.....	7
2.1.2. Procedural aspects .....	9
2.1.3. Notion of Services of General Economic Interest.....	11
2.1.4. The 2011 review .....	14
2.1.5. Objectives of the 2012 SGEI Package.....	14
2.1.6. Main changes between the 2005 SGEI Package and the 2012 SGEI Package	15
The SGEI Communication .....	15
The SGEI Decision.....	16
The SGEI Framework.....	17
The SGEI de minimis Regulation.....	17
2.1.7. Points of comparison .....	18
3. HOW HAS THE SITUATION EVOLVED OVER THE EVALUATION PERIOD?.....	19
3.1. Health sector .....	19
3.1.1. Importance, organisation and development of the health sector .....	19
3.1.2. Key figures and State aid expenditure related to the health sector.....	21
3.1.3. Case practice of the Commission and relevant case law .....	23
3.2. Social services.....	24
3.2.1. Key figures and State aid expenditure.....	24
3.2.2. Case practice of the Commission and relevant case law .....	26
3.3. Recent events: the COVID-19 pandemic and the Russian war of aggression against Ukraine .....	27

3.3.1.	COVID-19 pandemic.....	27
3.3.2.	Russian war of aggression against Ukraine.....	28
4.	EVALUATION FINDINGS .....	28
4.1.	To what extent was the intervention successful and why? .....	28
4.1.1.	Effectiveness.....	29
SGEI Decision .....	30	
SGEI Framework.....	34	
SGEI Communication .....	34	
SGEI de minimis Regulation.....	39	
Conclusion.....	41	
4.1.2.	Efficiency .....	41
Findings of the analysis .....	41	
Conclusion.....	43	
4.1.3.	Coherence .....	43
Findings of the analysis .....	44	
Conclusion.....	46	
4.2.	How did the EU intervention make a difference?.....	46
4.2.1.	Findings of the evaluation .....	47
4.2.2.	Conclusion.....	49
4.3.	Is the EU intervention still relevant? .....	49
4.3.1.	Findings of the analysis .....	49
4.3.2.	Conclusion.....	52
5.	WHAT ARE THE CONCLUSIONS AND LESSONS LEARNED?.....	52
5.1.	Conclusions.....	52
5.2.	Lessons learned.....	53
	ANNEX I. PROCEDURAL INFORMATION .....	54
	ANNEX II. METHODOLOGY AND ANALYTICAL MODELS USED.....	56
	ANNEX III. EVALUATION MATRIX .....	61
	ANNEX IV. OVERVIEW OF BENEFITS AND COSTS.....	63
	ANNEX V. STAKEHOLDERS CONSULTATION .....	67
	ANNEX VI. OVERVIEW OF THE STATE AID RULES SUBJECT TO THE SGEI EVALUATION .....	80

ANNEX VII. RELEVANT LEGAL PROVISIONS IN THE TFEU ..... 81

## Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
COVID-19	The COVID-19 outbreak / pandemic
DG	Directorate-General
EU	European Union
GBER	General Block Exemption Regulation: Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, as amended
GDP	Gross Domestic Product
OECD	Organisation for Economic Co-operation and Development
RSB	Regulatory Scrutiny Board
SGEI	Services of General Economic Interest
SWD	Staff Working Document
TFEU	Treaty on the Functioning of the European Union

## 1. INTRODUCTION

This Staff Working Document (“SWD”) summarizes the results of the evaluation of the State subsidy rules for health and social services of general economic interest (“SGEI”) as well as the SGEI *de minimis* Regulation<sup>1</sup>, launched in June 2019.

### 1.1. The 2012 SGEI Package

The 2012 SGEI Package, which entered into force in 2012, consists of:

- The **SGEI Communication**<sup>2</sup>, which clarifies basic concepts of State aid relevant to SGEIs (e.g. notions of aid, SGEI, economic activity, the relation between public procurement and State aid rules, etc.);
- The **SGEI Decision**<sup>3</sup>, which provides the conditions under which the Member States are exempted from the obligation to notify public service compensation to the Commission;
- The **SGEI Framework**<sup>4</sup>, which sets out the rules for assessing SGEI compensations that constitute State aid and are not exempted from notification by the SGEI Decision; and
- The **SGEI *de minimis* Regulation**, which provides that SGEI compensation not exceeding EUR 500 000 over any period of three fiscal years does not fall under State aid scrutiny.

The overall objective of the 2012 SGEI Package was to support Member States in funding SGEIs that are of key importance to citizens and the society as a whole, while preserving the key aspects of State aid control.

The 2012 SGEI Package, as regards health and social services, aimed at simplifying the compatibility criteria and reducing the administrative burden for Member States which compensate undertakings entrusted to provide SGEI to the (vulnerable part of the) population at affordable conditions. In this context, the 2012 SGEI Decision acknowledged that health and social services have specific characteristics that need to be taken into consideration and it did not necessarily consider that a larger compensation for these services produced a greater risk of distortions of competition. Accordingly, under certain conditions, such compensation was exempted from the notification obligation under Article 108(3) TFEU, irrespective of the amounts.

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<sup>1</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

<sup>2</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

<sup>3</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) (OJ L 7, 11.1.2012, p. 3).

<sup>4</sup> Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

## 1.2. Purpose of the evaluation

The goal of the evaluation is to verify to which extent the rules applicable to health and social services reached these objectives and whether the rules are still appropriate, also in view of the latest jurisprudence of the Union Courts and sectoral developments in the internal and global markets. It seeks to analyse the relevance, effectiveness, efficiency, coherence and EU-added value of SGEI rules applicable to health and social services. The evaluation also seeks to assess how the SGEI *de minimis* Regulation has been applied.

Indeed, the current rules applicable to health and social SGEIs have been in place for more than 10 years but have not been evaluated so far. The objective of the evaluation is to get a detailed understanding of the potential issues that Member States may have had in implementing the SGEI rules applicable to health and social services and whether, why and to what extent the current rules have encouraged and/or deterred Member States from designing new or adapting existing SGEI compensation measures for health and social services in line with the currently applicable SGEI rules.

In addition, the evaluation should provide a better understanding of the application of the SGEI *de minimis* Regulation and possible difficulties encountered by stakeholders, also in the light of possible amendments of the SGEI *de minimis* Regulation after its current expiry date of 31 December 2023.

The evaluation informs the Commission on the need or not to revise the SGEI rules applicable to health and social services and/or whether there is need to prolong or revise the SGEI *de minimis* Regulation.

## 1.3. Scope of the evaluation

### 1.3.1. Sectors covered

The evaluation concentrates on the health and social services sectors. For the purposes of the present evaluation, the health and social services sectors are to be understood as hospitals providing medical care (including, where applicable, emergency services) as well as services 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<sup>5</sup>.

Several reasons underpinned the need to concentrate the evaluation on these health and social services sectors. First, they are of crucial importance for citizens and form an essential part of the welfare system of each Member State.

Second, it results from the SGEI Reports<sup>6</sup> that the SGEI rules applicable to health and social services have been frequently used, but that Member States are facing conceptual and methodological challenges in their implementation (see section 4).

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<sup>5</sup> See Article 2(1) of the SGEI Decision. Other social services, such as for instance social security schemes, would also be considered for the purposes of this evaluation where applicable.

<sup>6</sup> Pursuant to Article 9 of the SGEI Decision and paragraph 62 of the SGEI Framework, Member States shall submit a report on their compliance with the SGEI rules every two years. The reports are available online: [https://ec.europa.eu/competition-policy/state-aid/legislation/sgei\\_en](https://ec.europa.eu/competition-policy/state-aid/legislation/sgei_en).

Third, challenges in relation to health and social SGEI have recently increased in light of several judgments of the Union Courts and the overall legal uncertainty around the existence of State aid in certain cases.<sup>7</sup>

Finally, both sectors have evolved significantly over the years and it appeared necessary to consider the impact of those changes in the use and application of SGEI rules.

Therefore, the evaluation covers the SGEI Communication and the SGEI Decision insofar as they are applicable to health and social services. It also covers the SGEI Framework, although to a lesser extent since it is rarely applied to the sectors concerned. In addition, the evaluation covers the SGEI *de minimis* Regulation, regardless of the sectors covered.

### 1.3.2. Timeframe and geographical scope

The evaluation covers the period from the entry into force of the 2012 SGEI Package (i.e. 31 January 2012) until the present, to the extent that the relevant information and data are available<sup>8</sup>. The consequences of the COVID-19 pandemic and the Russian war of aggression against Ukraine on the 2012 SGEI Package are not analysed in this SWD<sup>9</sup>, but they are taken into account where relevant (see also section 3.3).

Geographically, the evaluation covers all Member States.

### 1.4. Data sources used for the evaluation

The evaluation was launched in June 2019 with a roadmap, informing citizens and stakeholders about the exercise, and involved a public consultation, a targeted consultation, an expert study prepared by an external consultant (“the expert study”) and internal analyses by the Commission services.

The public and targeted consultation were conducted between 31 July 2019 and 4 December 2019. The expert study was carried out between June 2020 and May 2021. The expert study, covering 10 Member States, focused on healthcare (and in particular on hospitals) and social housing in the period 31 January 2012 to 31 December 2019.

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<sup>7</sup> For instance, as regards the criterion of economic activity, the Court of Justice clarified in which circumstances a scheme may be considered to be applying the principle of solidarity. See Judgment of the Court of 11 June 2020, Commission and Slovak Republic v Dôvera zdravotná poisťovňa, a.s., Joined Cases C-262/18 P and C-271/18 P, EU:C:2020:450) where the Court of Justice noted that the existence of a certain amount of competition as regards the quality and scope of services provided in the Slovak compulsory health insurance scheme, such as the ability of insurers to offer insured persons additional services on a free of charge basis and the freedom of the insured to choose their insurer and to switch once a year, is not such as to call into question the social and solidarity-based nature of the activity carried out by the insurance bodies in the context of a scheme applying the principle of solidarity under State supervision. See also Judgment of the General Court of 2 June 2021, Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission, T-223/18, EU:T:2021:315 (currently under appeal in case C-492/21 P - Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission) where the General Court considered that the fact that, following certain reforms, also private healthcare providers operated within the public healthcare system and patients had - to some extent - a free choice between public and private providers, did not alter the principle of solidarity and the principle of universality.

<sup>8</sup> For example, due to the fact that all SGEI reports for 2020 and 2021 were only submitted in Q3 2022 and that translation and analysis of those reports could only be finished in Q4 2022, most data available for this staff working document only relate to SGEI compensation granted until 2019.

<sup>9</sup> As indicated in Annex II, section 2, the public and targeted consultations were conducted between 31 July 2019 and 4 December 2019, i.e. before the COVID-19 crisis and the Russian war of aggression against Ukraine. As for the expert study, it was carried out between June 2020 and May 2021. However, the study was backward looking and focused on the period 31 January 2012 to 31 December 2019. Both the consultations and the external study did not relate to the COVID-19 crisis and the Russian war of aggression against Ukraine.

In addition, one of the important data sources used in the evaluation are the Member States' biennial SGEI reports, monitoring results and interpretation questions by Member States. DG Competition's case practice is also a major source of insight.

Court judgments, desk research, literature review and internal statistics have in addition played a role in data gathering. DG Competition used as well several other publicly available reports and data such as data from EUROSTAT and the OECD. Finally, bilateral meetings were held with stakeholders at their request.

Annex 2 provides a detailed explanation of the process and the method of the evaluation.

## 2. WHAT WAS THE EXPECTED OUTCOME OF THE INTERVENTION?

### 2.1. Description of the intervention and its objectives

#### 2.1.1. Notion of State aid

Competition is a major driver of growth. It incentivises enterprises, including new ones, to enter markets and innovate, improving productivity and competitiveness in a global context.

State aid control is part of competition policy enshrined in the Treaty and its basic rationale is to avoid undue market distortions and subsidy races, as well as to safeguard the internal market and create a competitive landscape with a level playing field.

#### **Box 1**

##### *Article 107(1) TFEU – Definition of State aid*

*“...[a]ny aid granted by a Member state or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible within the internal market”.*

*Consequently, the **cumulative** requirements that have to be met in order for a measure to be considered as State aid and to fall under the State aid **general prohibition** are the following: (i) the aid must be granted by a Member State or through State resources; (ii) there must be a selective advantage to an undertaking; (iii) there must be a (threat of) distortion of competition; and (iv) there must be affectation of trade between Member States.*

State aid is a form of support given by a Member State that provides an undertaking or specific undertakings with an advantage over its/their competitors. State aid can be granted in a variety of ways, such as through the allocation of subsidies, the provision of interest and tax relief, state guarantees, the purchasing of goods and services on preferential terms, etc.

In its Notice on the notion of State aid from 2016<sup>10</sup>, the Commission provided clarifications on the key concepts relating to the notion of State aid as referred to in Article 107(1) TFEU, with a view to contributing to an easier, more transparent and more

<sup>10</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

consistent application of this notion across the Union. It clarifies the Commission's understanding of Article 107(1) TFEU, as interpreted by the Court of Justice and the General Court ('the Union Courts'). In addition, the Commission clarified the key concepts underlying the application of the State aid rules to public service compensation in its SGEI Communication, which clarifies the basic concepts of State aid relevant to SGEIs (e.g. notions of advantage, notion of aid, SGEI, economic activity, the relation between public procurement and State aid rules, etc.).

While Article 107(1) TFEU lays down a general prohibition of State aid granted by Member States to undertakings, other Treaty provisions allow for a number of exceptions:

- Article 107(2) TFEU lists a number of categories of State aids that are automatically compatible with the internal market, without discretion of the Commission.
- Article 107(3) TFEU allows State aids that can be considered compatible with the internal market, under the discretion of the Commission.
- Article 106(2) TFEU allows State aid in the form of compensations for services of general economic interest that can be deemed compatible with the internal market, under the discretion of the Commission.

To ensure predictability and legal certainty for Member States and stakeholders on how the Commission applies its margin of discretion in interpreting the compatibility provisions in Article 107(3) and Article 106(2) TFEU, the Commission has adopted rules in the form of "soft law" such as guidelines and frameworks. The adopted rules aim at laying down the compatibility conditions of aid measures and help Member States to notify their measures accordingly.

As an example, the SGEI Framework lays down the conditions under which certain types of public service compensation are deemed compatible with the internal market pursuant to Article 106(2) TFEU, while being subject to the requirement of prior notification under Article 108(3) TFEU.

The Commission has no legal obligation to adopt guidelines and frameworks – their adoption is an instance of the exercise of the Commission's discretion. They are not and must not necessarily be exhaustive – the Commission cannot be regarded as having deprived itself of the power to recognise State aid as compatible with the internal market directly on the basis of Articles 107(3) or 106(2) TFEU if it has not explicitly adopted a position on the question at issue in the relevant communication, guidelines or framework. Where the relevant rules do not expressly prohibit a certain type of State aid to be granted, the Commission can assess the measure directly on the basis of Article 107(3) TFEU. However, the Commission will make sure that the common compatibility principles are applied to the extent possible when aid is directly assessed under the TFEU.

It results from the above that State aid control thus does not prevent Member States from supporting businesses. State aid control ensures that any detriment arising from distortions of competition is outweighed by the public purpose pursued by the aid.

While the abovementioned rules set out how the Commission will assess aid measures and *allow* Member States to grant support, they do not *oblige* Member States to grant aid; this remains in their discretion. Indeed, Member States are free to choose other policy

instruments to reach a certain goal. Member States, on the basis of their policy considerations, are (to a certain extent) also free to decide which undertakings or sectors they choose to support with State aid.

The purpose of State aid control is not to ensure that Member States grant proportionally equal amount of aid, but rather to ensure that a level playing field is maintained when aid is granted.

The role of State aid control is to define what types of State aid can be accepted, but it is up to the Member States, and taking into account their budget priorities, whether and to what extent they use those possibilities for granting State aid.

Furthermore, Article 107 TFEU confers power on the Commission to control State aid measures. It is outside the remit of State aid control to assess or compare the overall spending levels of individual Member States. There are other tools of economic governance looking into possible investment or reform needs and the broad developments of public finances.

### 2.1.2. Procedural aspects

Member States can grant State aid either in the form of a “scheme” or as “individual aid”. An aid scheme is a measure which defines beneficiaries in a general and abstract manner; the authorities in charge of applying that scheme do not have any margin of discretion in its application.<sup>11</sup> On the contrary, individual aid means (i) aid that is either not awarded on the basis of an aid scheme or (ii) notifiable individual awards on the basis of an aid scheme.

The Commission has exclusive *ex ante* control power: under Article 108(3) TFEU, Member States are obliged to notify their intentions to grant State aid and cannot implement the measure before the Commission's approval. The Commission's approval takes the form of a Commission decision. Such decisions can be challenged and are subject to scrutiny before the Union Courts. Any aid put into effect in contravention of Article 108(3) TFEU constitutes “unlawful aid”.<sup>12</sup>

In State aid procedures, the counterpart of the Commission is the Member State. The beneficiary or beneficiaries are third parties. Once a measure is approved by way of a Commission Decision (or block-exempted, see below), the Member State is authorised to grant the aid to the beneficiary or beneficiaries. This may be done according to its national administrative set-up (at national or regional level for instance, or through specific aid granting bodies) and depending on the type of the aid measure.

For small amounts of aid and/or less distortive aid measures however, the Commission can issue block exemption regulations or decisions of exemption, laying down the conditions<sup>13</sup> that have to be fulfilled in order to deem the State aid measure compatible with the internal market without the necessity of an *ex ante* notification and approval. As an example, the Commission has adopted the the General Block Exemption Regulation<sup>14</sup>

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<sup>11</sup> See Article 1(d) of the Procedural Regulation.

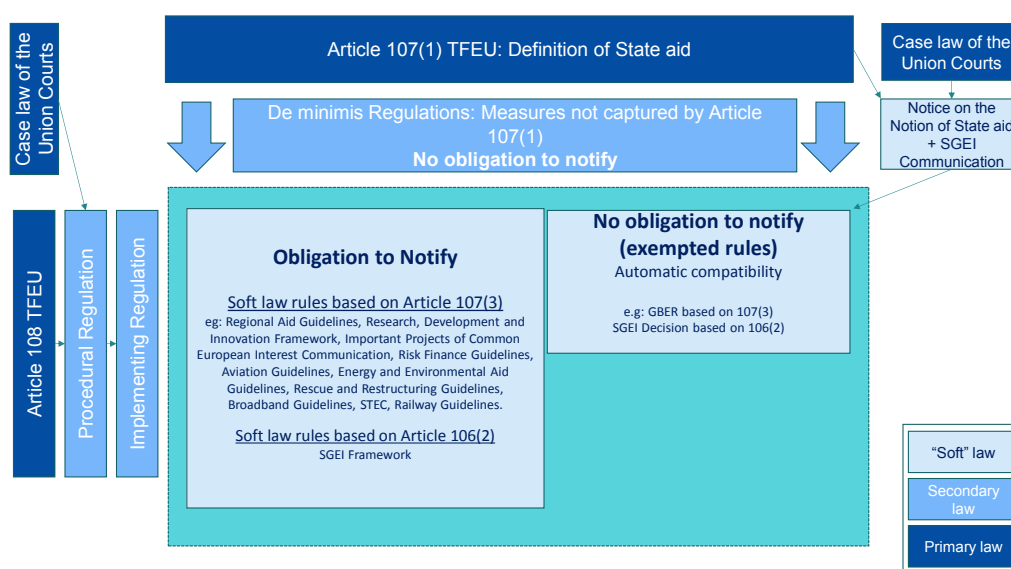
<sup>12</sup> See Article 1(f) of the Procedural Regulation. Lawfulness (or “legality”) of an aid measure is thus a different concept than “compatibility”.

<sup>13</sup> The criteria of the GBER determine, in particular, eligible beneficiaries, maximum aid intensities (i.e. the maximum proportion of the eligible costs of a project that can benefit from State aid) and eligible expenses.

<sup>14</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), as amended.

(“GBER”) and the SGEI Decision. Member States thus may implement under certain conditions measures without prior Commission scrutiny. On the other hand, the fact that a State aid measure is not covered by block exemption regulations/decisions of exemption does not imply that it is incompatible and cannot be granted; it merely means that the measure needs to be notified to the Commission, which will then assess it under the relevant compatibility rules (i.e. guidelines or frameworks or even directly under one of the Treaty provisions) before it is actually granted. Figure 1 depicts how State aid control works.

**Figure 1 – The State aid universe**



In addition, the Commission, in the so-called *de minimis* Regulations, provides ceilings below which measures are deemed not to constitute State aid within the meaning of Article 107(1) TFEU, and are exempted from the notification procedure, because they are considered not to have any effect on trade between Member States and not to distort or threaten to distort competition. As a result, there is no compatibility assessment by the Commission. Among the different *de minimis* Regulations adopted<sup>15</sup> is the SGEI *de minimis* Regulation. This Regulation recognises the importance of the SGEI activities by setting a higher ceiling for providers of SGEIs than for providers of other services<sup>16</sup>.

<sup>15</sup> See Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45), Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

<sup>16</sup> The SGEI *de minimis* Regulation provides that SGEI compensation not exceeding EUR 500 000 over any period of three fiscal years does not fall under State aid scrutiny.

### 2.1.3. Notion of Services of General Economic Interest

#### Services of general interest, Services of general economic interest, and Social services of general interest

Article 14 TFEU, Article 106 TFEU, Protocol n° 26 on services of general interest and Article 36 of the Charter of Fundamental Rights refer to Services of general interest (SGIs) and to Services of general economic interest (SGEIs). However, none of those texts define what SGIs or SGEIs are.

The Commission has clarified these concepts in its Quality Framework for Services of General interest in Europe<sup>17</sup>. SGIs are defined in the Quality framework as “*services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities (see the definition of SGEI below) and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty [...]*”.

The Quality Framework defines SGEIs as “*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 quality, safety, affordability, equal treatment or universal access) by the market without public intervention*”.

The Quality Framework defines social services of general interest (SSGIs) as services which “*include social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role [...]*”. The SSGI definition is developed in the SSGI Communication<sup>18</sup>. According to this Communication, SSGIs include in addition to health services:

- statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability;
- other essential services provided directly to the person. These services that play a prevention and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. In the first place, they offer assistance to persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the people concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include

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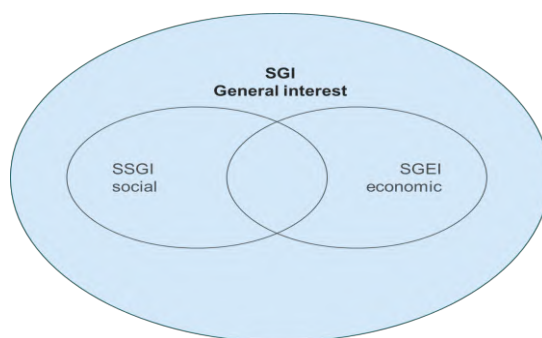
<sup>17</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General interest in Europe, [https://ec.europa.eu/archives/commission\\_2010-2014/president/news/speeches-statements/pdf/20111220\\_1\\_en.pdf](https://ec.europa.eu/archives/commission_2010-2014/president/news/speeches-statements/pdf/20111220_1_en.pdf).

<sup>18</sup> Implementing the Community Lisbon programme: Social services of general interest in the European Union, COM(2006) 177 final, 26 April 2006.

activities to integrate into the society people with long-term health or disability problems. Fourthly, they also include social housing, which provides housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all four of these dimensions.

As the Quality Framework and the SSGI Communication make clear, SSGIs may be of an economic or non-economic nature, depending on the activity involved. Indeed, the jurisprudence makes clear that the social nature of a service is not sufficient in itself to classify it as non-economic<sup>19</sup>. As a result, the fact that an activity is termed ‘social’ is not of itself enough for it to avoid being regarded as an ‘economic activity’ within the meaning of the Court’s case law. SSGIs that are economic in nature are SGEIs. Figure 2 shows the relationships between SGIs, SGEIs and SSGIs.

**Figure 2 – SGI, SGEI and SSGI**



As the State aid rules, and more generally, the internal market and competition rules of the Treaty, only apply to economic activities, the distinction between non-economic SGI and economic SGI (SGEI, including economic SSGI) is of key importance.

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<sup>20</sup>. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned<sup>21</sup> and may thus vary from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given activity can change over time. What is not an economic activity today may become one in the future, and vice versa. Since the distinction between economic and non-economic activities depends to some extent on political choices and economic developments in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. However, the Commission clarified the distinction between

<sup>19</sup> Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 118; Judgment of the Court of Justice of 22 January 2002 INAIL, C-218/00, EU:C:2002:36, paragraph 37; and Judgment of the Court of Justice of 22 May 2003, Freshkot, C-355/00, EU:C:2003:298.

<sup>20</sup> See Judgment of the Court of Justice of 16 June 1987, Commission v Italy, 118/85, EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, Commission v Italy, C-35/96, EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

<sup>21</sup> Judgment of the Court of Justice of 17 February 1993, Poucet and Pistre, Joined Cases C-159/91 and C-160/91, EU:C:1993:63, paragraphs 16 to 20.

SGEI and non-economic SGI with respect to a number of important areas, in particular for (i) social security schemes; (ii) healthcare systems; and (iii) education<sup>22</sup>.

### *Large discretion in defining SGEI*

The Union Courts have established that SGEIs exhibit special characteristics as compared with those of other economic activities<sup>23</sup>. The SGEI concept may apply to different situations and terms, depending on the Member State, and EU law does not create any obligation to designate formally a task or a service as being of general economic interest, except when such obligation is laid down in Union legislation.

Therefore, in the absence of specific EU rules, Member States have a wide margin of discretion in defining a given service as SGEI and in granting compensation to the service provider. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI<sup>24</sup>. The Commission may identify a manifest error, for example, in the following circumstances<sup>25</sup>:

- When a sector is harmonized at Union level and Member States' discretion contradicts the rules governing such harmonization<sup>26</sup> (however, where EU harmonization rules refer only to certain specific services, Member States have considerable discretion in defining additional services as SGEIs);
- If the public service obligation 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 Member State, by undertakings operating under normal market conditions; and
- When the service is not addressed to citizens or in the interest of society as a whole.

If a service is considered as being an SGEI, it can benefit from a specific treatment under State aid rules. The 2012 SGEI Package provides for this specific treatment and lays down the State aid rules applicable to SGEIs (see Chapter 1):<sup>27</sup>

- The SGEI Communication brings clarity by explaining key principles for the application of State aid rules to SGEIs. The main purpose of this Communication is to determine which compensation is subject to State aid rules and which compensation does not fall under State aid rules. In particular, the SGEI Communication explains that a compensation granted according to the so-called

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<sup>22</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4)

<sup>23</sup> See point 45 of the SGEI Communication and Cases C-179/90 *Merci convenzionali porto di Genova*, EU:C:1991:464, paragraph 27; Case C-242/95 *GT-Link A/S*, EU:C:1997:376, paragraph 53; and Case C-266/96, *Corsica Ferries France SA*, EU:C:1998:306, paragraph 45.

<sup>24</sup> See point 46 of the SGEI Communication and Judgement of the General Court of 12 February 2008, *BUPA and Others v Commission*, T-289/03, EU:T:2008:29, paragraphs 166-169 and 172; Judgement of the General Court of 15 June 2005, *Fred Olsen*, T-17/02 EU:T:2005:208, paragraph 216.

<sup>25</sup> See SGEI Communication.

<sup>26</sup> That limitation applies in sectors which have been harmonised at Union level, such as the postal, telecommunications and energy sectors.

<sup>27</sup> For an overview of the legislative framework, see [http://ec.europa.eu/competition/state\\_aid/legislation/sgei.html](http://ec.europa.eu/competition/state_aid/legislation/sgei.html).

*Altmark*<sup>28</sup> criteria should not be considered as a State aid due to the absence of an advantage.

- The SGEI *de minimis* Regulation provides that compensation which does not exceed EUR 500 000 over any period of three fiscal years does not fall under State aid scrutiny.
- The SGEI Decision exempts Member States from the obligation to notify to the Commission public service compensation if the compatibility conditions laid down in the Decision are fulfilled. In particular, the exemption applies to compensations not exceeding an annual amount of EUR 15 million for the provision of SGEIs in areas other than transport and transport infrastructure, to compensation for hospitals, services meeting social needs and SGEI as regards air or maritime links to islands, if certain conditions are met. Compensations in line with the SGEI Decision are considered to be compatible with the internal market under Article 106(2) TFEU.
- The SGEI Framework sets the conditions for assessing compensation for SGEIs that does not fall under the scope of the SGEI Decision. Those cases must be notified to the Commission and may be declared compatible with Article 106(2) TFEU if they meet the criteria of the SGEI Framework.

#### 2.1.4. The 2011 review

In 2005, a first SGEI Package was adopted. It consisted of a Decision<sup>29</sup> (the “2005 SGEI Decision”) and a Framework<sup>30</sup> (the “2005 SGEI Framework”).

At the end of 2011 and the beginning 2012, following extensive consultation of stakeholders, the Commission adopted the 2012 SGEI Package. There were several reasons that led to the adoption of the 2012 SGEI Package. First, the 2005 SGEI Framework was about to expire and in addition, the consultation of stakeholders had shown that the application of the 2005 SGEI Package more broadly raised certain difficulties. In particular, the following issues were identified:

- An incorrect / insufficient application of the rules;
- An administrative burden too heavy for small SGEIs and for social services;
- Distortions of competition in the market;
- An inefficient delivery of SGEIs.

These issues are detailed in the 2011 impact assessment related to the reform of the EU rules applicable to State aid in the form of public service compensation.<sup>31</sup>

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<sup>28</sup> SGEI Communication, paragraph 43.

<sup>29</sup> Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

<sup>30</sup> Community Framework for State aid in the form of public service compensation (OJ C 397, 29.11.2005).

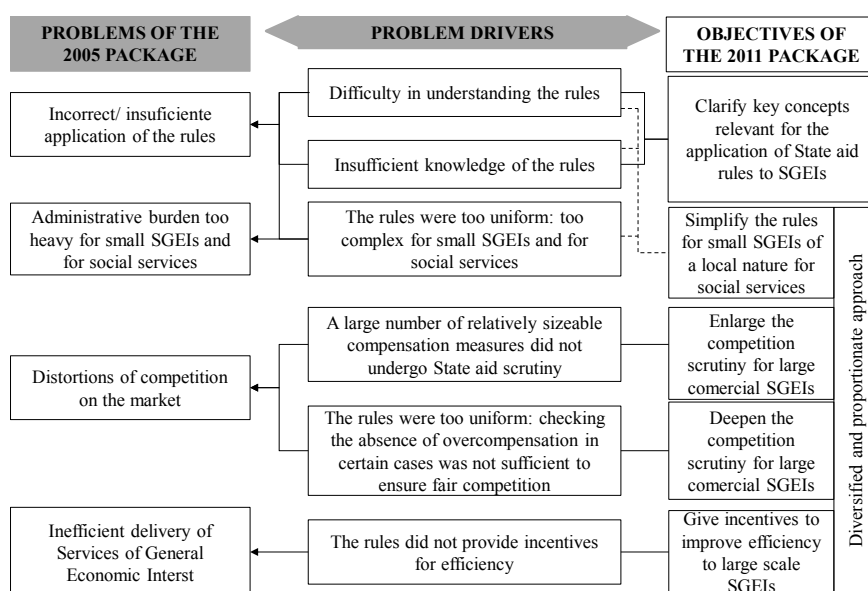
<sup>31</sup> Impact assessment of the Commission related to the Reform of the EU rules applicable to State aid in the form of public service compensation, 20 December 2011, available at [https://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2011/sec\\_2011\\_1581\\_en.pdf](https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_1581_en.pdf).

### 2.1.5. Objectives of the 2012 SGEI Package

The overall objective of the 2012 SGEI Package was to address the issue identified in the evaluation of the 2005 Package and to support Member States in funding SGEIs that are of key importance to citizens and society as a whole while preserving the key aspects of State aid control. To that end, the 2012 SGEI Package aimed at:

- 1) clarifying basic concepts relevant for the application of the State aid rules to SGEIs; and
- 2) a more diversified and proportionate approach for a large variety of SGEIs, taking into account their nature and scope and the extent to which they posed a serious risk of competition distortions in the internal market. In this regard, the 2012 SGEI Package sought to simplify the rules for small SGEIs of a local nature and for social services; enlarge and deepen the competition scrutiny for large commercial SGEI; and give incentives to improve efficiency to large scale SGEIs.

The graph below provides an overview of how the objectives of the 2012 SGEI Package were linked to the problems and the drivers identified in the evaluation of the 2005 Package.



More specifically, as regards health and social services, the 2012 SGEI Package aimed at simplifying the compatibility criteria and reducing the administrative burden for Member States which compensate undertakings entrusted with the provision of SGEIs to the (vulnerable part of the) population under affordable conditions.

In this context, the 2012 SGEI Package acknowledged that health and social services have specific characteristics that need to be taken into consideration. As a result, these services are fully exempted from notification, as they are not considered to produce a greater risk of distortions of competition.

### 2.1.6. Main changes between the 2005 SGEI Package and the 2012 SGEI Package

As a novel feature of the 2012 SGEI Package, the SGEI Communication aimed at clarifying basic concepts of State aid. On the basis of the rulings of the Union Courts and of the Commission's decisional practice, the SGEI Communication explains relevant State aid concepts, such as 'undertaking' and 'economic activity', 'State resources' and 'effect on trade'. Moreover, the Commission also clarifies key concepts of SGEI and provides guidance on the four *Altmark* criteria.

### The SGEI Decision

The SGEI Decision sets out the conditions under which public service compensation for the provision of certain SGEIs constitutes State aid, which is however compatible with the internal market and needs not be notified to the Commission.

This is the component of the 2012 SGEI Package which brought the most significant simplification for the providers of social services. Under the 2005 SGEI Decision, the only services exempted from prior notification regardless of the level of financing were social housing and hospitals. The 2012 SGEI Decision extends the scope of this exemption to all services '*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*' (see Article 2(1)(c)). For the remaining SGEIs, the notification threshold was lowered from EUR 30 million in the 2005 SGEI Decision to EUR 15 million of annual compensation per SGEI in the 2012 SGEI Decision. Moreover, the 2012 SGEI Decision eliminated the requirement of a threshold for the turnover of the service provider.<sup>32</sup>

Another adjustment brought about by the 2012 SGEI Decision applied to the entrustment act. While in the 2005 SGEI Decision the entrustment act was not limited in time, since the revision in 2011, the entrustment act has been limited to a maximum of 10 years, unless the provision of the SGEI requires significant investments which need to be amortised over a longer period.

As regards other compatibility criteria, the 2012 SGEI Decision introduced only a few changes mainly aimed at simplifying the application of the rules and at increasing transparency. Indeed, in order to simplify the application of the rules, the 2012 SGEI Decision allowed for an overcompensation test over a longer time span. The overcompensation tests must be carried out every three years under the 2012 SGEI Decision<sup>33</sup> where they had to be carried out annually under the 2005 SGEI Decision. It also introduced a 'safe harbour' for reasonable profit, which also constitutes a limit to the reasonable profit when the provision of the SGEI is not connected with a substantial risk.

As regards transparency, the 2012 SGEI Decision introduced an obligation to make a reference to it in the entrustment act and to publish the entrustment act and the amount of aid granted for compensation above EUR 15 million.

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<sup>32</sup> The 2005 SGEI Decision set a public service compensation threshold of EUR 30 million per year. This threshold, applicable to social services other than social housing, was complemented by a threshold of EUR 100 million for the service provider's average annual turnover before tax. Public financing which exceeded EUR 30 million per year, or which was granted to a provider having a turnover higher than EUR 100 million, had to be notified to the Commission. Such a large amount was considered likely to affect trade and competition to such an extent that a specific analysis by the Commission services was deemed to be necessary.

<sup>33</sup> It should be noted that Article 6(1) of the 2012 SGEI Decision provides that the overcompensation test must be carried out "*at least every 3 years during the period of entrustment and at the end of that period*".

### The SGEI Framework

The 2012 SGEI Framework introduced a proportionate approach by subjecting to closer scrutiny large aid cases with more significant cross-border effects.

As a result, the 2012 SGEI Framework introduced a number of changes compared to the 2005 SGEI Framework. The 2012 SGEI Framework introduced *inter alia* the need to give proper consideration to the public service needs supported by way of a public consultation or other appropriate instrument; to justify the duration of the entrustment period by reference to objective criteria such as the need to amortise non-transferable fixed assets; to comply with Union public procurement rules and with the Transparency Directive<sup>34</sup>; to check the absence of discrimination, and to introduce an obligation to make public information on the amounts of aid granted to the undertaking on a yearly basis.

In addition, the method of calculating the amount of compensation was modified. The principle remained the same as with the 2005 SGEI Framework but the 2012 SGEI Framework introduced the need to provide incentives for the efficient provision of SGEI of high standard in devising the method of compensation, unless Member States can justify that it is not feasible or appropriate to do so. In addition, the objective of preserving the efficiency incentives of the public service providers led the Commission to switch from an *ex post* approach where, on the basis of the annual accounts, the public authorities checked the absence of overcompensation every year (with only limited possibilities to carry over the possible overcompensation) to an *ex ante* multi-annual approach based on expected profits rather than on realised profits. In the same vein, the 2012 SGEI Framework contains a novel method for calculating the compensation. This method aimed at better calculating the economic costs of the SGEI by requiring the use of the net avoided cost (“NAC”) methodology to calculate the net cost necessary or expected to be necessary to discharge the SGEI and therefore the maximum compensation which can be granted (the 2005 SGEI Framework was based on the cost allocation methodology).

### The SGEI de minimis Regulation

The SGEI *de minimis* Regulation was a novelty introduced by the 2012 SGEI package. It sets out that compensation for a broad range of SGEIs which does not exceed EUR 500 000 over any period of three fiscal years is deemed no aid. Before adopting a special *de minimis* Regulation concerning only SGEIs, the general *de minimis* Regulation of 2006<sup>35</sup> (with a threshold of EUR 200 000 over any period of three fiscal years) also applied to SGEIs. The higher threshold of the SGEI *de minimis* Regulation is justified on the consideration that an SGEI provider incurs costs which are directly associated with its public service obligation under the entrustment act. The aid element in the compensation is therefore presumably lower than the amount actually granted, and the Commission assumes that a EUR 500 000 compensation does not affect trade in the internal market.

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<sup>34</sup> The importance of this provision is limited, considering that the separation of accounts is any event required by the SGEI Framework for undertakings having activities falling both inside and outside the SGEI.

<sup>35</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5)

### 2.1.7. Points of comparison

An evaluation needs an appropriate point of comparison to be able to assess the change that the EU action has brought over time. In general, the main baseline (or counterfactual) is a situation in the absence of EU intervention.<sup>36</sup>

In the current situation, the EU intervention is the adoption of the 2012 SGEI Package. The present evaluation assesses the reform of the SGEI rules introduced by the 2012 SGEI Package as regards health and social services. Therefore, the baseline scenario is one in which the 2005 SGEI Package (2005 SGEI Decision and the 2005 SGEI Framework) would have continued to apply.<sup>37</sup>

The current evaluation does not assess the unlikely scenario that the rules in force prior to 2012 SGEI Package would have expired (in particular the 2005 SGEI Framework). The consequence of the absence of substantive rules would be the direct application of the TFEU, i.e. the notification of each and every measure constituting State aid in the meaning of Article 107(1) TFEU and its compatibility assessment by the Commission directly under Article 106(2) TFEU without any substantive guidance by the relevant soft law.

The current evaluation also does not assess the existence/absence of State aid control as such, as the general prohibition of State aid is enshrined in the Treaty since 1957.

Regarding the evolution of the situation under the baseline scenario, it is likely that the problems that were identified before 2012 would have persisted, or even aggravated. None of the problems identified would be resolved under the baseline scenario and comments of stakeholders would not be considered.

Under the baseline scenario, a number of State aid concepts relevant for SGEIs would continue to be unclear, potentially leading to an incorrect application of the rules and as a result, reduced legal certainty. In addition, distortions of competition, lack of efficiency and certain specificities of different sectors (e.g. social services or large commercial services) would not have been taken into account. For example, small and local SGEIs would not benefit from simplified compatibility conditions. Indeed, under the baseline scenario, only hospitals and social housing would be covered by the notification exemption of the SGEI Decision regardless of the compensation amount. Compensation for other social services would be covered by the notification exemption of the SGEI Decision only if the compensation is lower than EUR 30 million and provided that the beneficiary had an annual turnover of less than EUR 100 million. In addition, only SGEI compensation amounts of up to EUR 200 000 over a three-year period per undertaking would be considered as *de minimis*, which in turns means that more cases would have to be notified to the Commission for prior approval, even if the competition distortions brought about by the SGEI would be limited. Also, under the baseline scenario, the Commission would not have had the possibility to impose conditions or commitments on Member States to remedy serious distortions of competition when assessing large commercial services under the SGEI Framework. Similarly, under the baseline scenario, the rules (namely the SGEI Framework) did not provide incentives to improve efficiency, meaning that aid could be declared compatible for any amount of the net costs,

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<sup>36</sup> It has to be noted that the construction of a baseline scenario for State aid is very complex and may be specific to the facts of the case. See also Section 2.1.7.

<sup>37</sup> For the 2005 SGEI Decision, it would have remained unchanged and continued to apply. For the 2005 SGEI Framework, it would have been prolonged beyond its expiry date, which was in November 2011.

irrespective of whether these costs could be avoided by increasing efficiency in the way the services were provided.

Moreover, since in the baseline scenario it would be necessary to notify to the Commission for approval those cases not covered by the SGEI Decision or the SGEI *de minimis* Regulation, the administrative burden would also be higher and inappropriate, in particular for small, local and social SGEIs. In addition, under the baseline scenario, Member States (including local authorities) would have continued to use detailed monitoring systems which – in particular for small, local SGEIs – would have been cumbersome and costly when compared to the value of the service rendered. Moreover, the lack of clarity of certain SGEI-related concepts would have led Member States to have recourse, at instances, to external accounting and legal advice, thereby increasing costs. Finally, certain administrative requirements would not be correctly and fully applied, leading to an incorrect application of State aid rules and principles, thereby putting at risk the continuation of the relevant SGEI.

### **3. HOW HAS THE SITUATION EVOLVED OVER THE EVALUATION PERIOD?**

Health and social services form an essential part of the welfare system of each Member State and are of crucial importance for citizens. They include medical care provided by healthcare providers, long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups. The adoption in 2017 of the European Pillar of Social Rights<sup>38</sup> is an evidence that these services are necessary for the society.

The importance of the health and social services sectors justified the need to concentrate on them the evaluation started in June 2019.

#### **3.1. Health sector**

##### **3.1.1. Importance, organisation and development of the health sector**

Health is one of the main components of a good life. In addition to having value in itself, good health also translates into a better chance of succeeding in education and in the labour market – ultimately contributing to enhance opportunities for people to improve their standing in life.<sup>39</sup>

The health sector plays a central role in modern societies: it helps people maintain and improve their health, and is therefore essential for social welfare.

Substantial differences exist in the way Member States ensure access and organise their healthcare systems. The organisation of healthcare regimes depends on the specific context of the Member States, their approaches and orientation. In particular, the health sector varies from one Member State to another with regard to the exact role of healthcare providers or the financing schemes.<sup>40</sup> In certain Member States, insurers are

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<sup>38</sup> Interinstitutional Proclamation on the European Pillar of Social Rights (OJ C 428, 13.12.2017, p. 10).

<sup>39</sup> OECD (2019), *Health for Everyone?: Social Inequalities in Health and Health Systems*, OECD Health Policy Studies, OECD Publishing, Paris, <https://doi.org/10.1787/3c8385d0-en>.

<sup>40</sup> One of the major differences relates to the purchaser of healthcare: in certain Member States, the purchasing of healthcare is allocated to insurers, while in other Member states, it is the government or a health fund controlled by the government that purchases care, and in others the government owns the healthcare services.

funding healthcare while in other Member States, it is the government that purchases care. As detailed in the expert study, Member States adopt the following types of models:

- A so-called Beveridge model or “national health service” under which the health system is financed through public taxes, the State directly finances organisations providing healthcare and universal health coverage is provided;
- A Bismarck system or “social insurance system” where healthcare is financed through compulsory contributions (insurance contributions and contributions funding the healthcare activities provided by public or private providers) from employers and employees and the State provides healthcare coverage to people who are not contributing through their income.
- Or a mixed system, where private funding from voluntary insurance schemes also plays an important role.

The margin of discretion of the EU is limited when it comes to health. Article 6 TFEU provides that the competence of the Union is limited to support, coordinate, and supplement the actions of Member States in the protection and improvement of human health. In addition, Article 168(7) TFEU provides a “sector-specific subsidiarity clause”.<sup>41</sup> Moreover, the primary role of Member States in healthcare regulation has been confirmed by the Charter of Fundamental Rights, which provides the right of everyone to access medical treatment “*under the conditions established by national laws and practices.*”

However, despite organisational and financial differences, healthcare systems are built on common values, as recognised by the Council of Health Ministers in 2006<sup>42</sup>: universality, access to good quality care, equity<sup>43</sup> and solidarity.

To respect these principles of universality, access to good quality care, equity and solidarity, the intervention of the State in the health sector plays a central role.

As stressed by the study on the financing models for public services in the EU and their impact on competition<sup>44</sup>, public authorities need to intervene due to a large number of market failures related to (asymmetric) information problems, externalities, public goods and market power. Governments therefore respond to these market failures in different ways, which generally take four main forms: (i) regulation (e.g. determination of the form of the healthcare system and its organisation, enactment of healthcare policies, etc.); (ii) public financing; (iii) public production (public ownership); and (iv) income transfers to users of services.

However, the national funding of the health sector, although critical for social welfare, can also have important competition implications. Certain public/publicly financed providers now compete with private operators. Indeed, if in the past Member States often relied on public operators to provide health services, changing needs, societal challenges,

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<sup>41</sup> According to Article 168(7) TFEU: “*Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.*”

<sup>42</sup> Council Conclusions on Common values and principles in European Union Health Systems (OJ C 146, 22.06.2006, p.1).

<sup>43</sup> Equity relates to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay.

<sup>44</sup> European Commission, Study on the financing models for public services in the EU and their impact on competition, 2016.

and financial constraints have led to structural changes, resulting in gradual opening in some Member States for private operators to compete with the public providers.

In addition, the provision of medical services and the acquisition and subsequent use of complex medical devices and equipment are market activities that can have important spill-over effects on upstream and downstream markets.

State aid control plays a significant role in creating a level playing field between the healthcare providers.

### 3.1.2. Key figures and State aid expenditure related to the health sector

The level of health spending in a country is dependent on a wide range of demographic, social and economic factors, as well as the financing arrangements and organisational structure of the health system itself<sup>45</sup>. In 2019, the government expenditure in the EU amounted to EUR 983 billion or 7 % of GDP<sup>46</sup>, to which should be added direct payments by the patients and private insurance companies.

These figures are more or less stable since 2012.<sup>47</sup> However, with the COVID-19 crisis that severely restricted economic activity, and that increased health spending, the ratio of health expenditure to GDP changed significantly. In 2020, government expenditure in the EU amounted to EUR 1 073 billion or 8.0 % of GDP<sup>48</sup>. This reflects both the extra health spending needed to combat COVID-19 and reductions in GDP caused by restrictions on economic activity.

In addition, it should be noted that according to the Member States' biennial SGEI reports<sup>49</sup>, the total spending on SGEIs under Article 2(1)(b) of the SGEI Decision (i.e. notably hospitals providing medical care and emergency services) is only a fraction of the spending on health presented above, but has likewise increased significantly over the years and even more than inflation (see figure 3 below). Relative to GDP however there is a small decrease in SGEI spending for hospitals providing medical care and emergency services since 2012. In 2012, Member States granted approximately EUR 86 billion in absolute terms, i.e. 0.0075 % of GDP, whereas in 2019, they spent approximately EUR 95.3 billion in absolute terms, i.e. 0.0068 % of GDP. The evolution of SGEI spending for hospital SGEIs as percentage of GDP can be seen in figure 4.

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<sup>45</sup> OECD/European Union (2020), Health at a Glance: Europe 2020: State of Health in the EU Cycle, OECD Publishing, Paris, <https://doi.org/10.1787/82129230-en>.

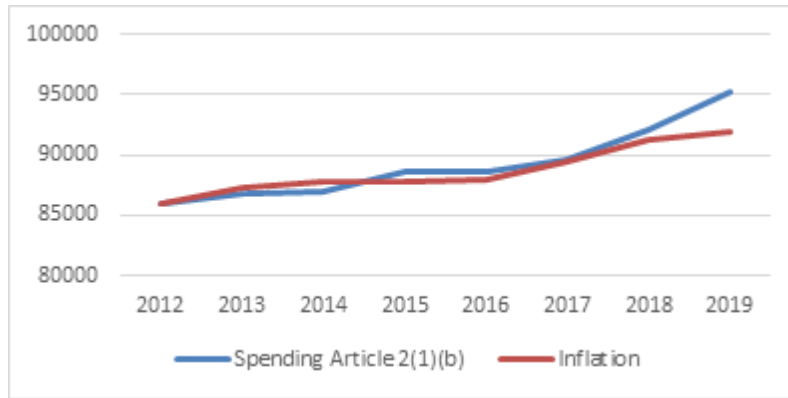
<sup>46</sup> Eurostat, government expenditure on health: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_health](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_health).

<sup>47</sup> 7.1 % of GDP from 2012 to 2015, 7.0% in 2016, and 6.9% in 2017 and 2018 (Eurostat, government expenditure on health: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_health](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_health)).

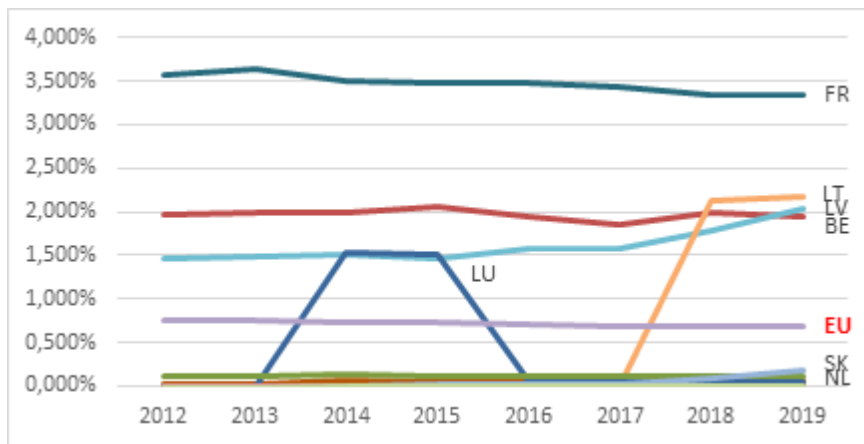
<sup>48</sup> See [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_health](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_health).

<sup>49</sup> Pursuant to Article 9 of the SGEI Decision and paragraph 62 of the SGEI Framework, Member States shall submit a report on their compliance with the SGEI rules every two years. The reports are available online: [https://ec.europa.eu/competition-policy/state-aid/legislation/sgei\\_en](https://ec.europa.eu/competition-policy/state-aid/legislation/sgei_en).

**Figure 3 – Hospital spending in EUR million (Article 2(1)(b) SGEI Decision)**



**Figure 4 – SGEI spending under Article 2(1)(b) SGEI Decision as % of GDP<sup>50</sup>**



It follows from the above that the health sector constitutes a significant part of the expenditure of Member States and therefore makes a significant contribution to the EU's economy. The financing of the EU's healthcare is predominately provided by public funds. Indeed, the vast majority of funding for healthcare comes from general government revenues (such as taxation and levies) together with mandatory social security contributions, which are then channelled to the health sector via the applicable procedures in the relevant Member State. Besides health as such, governments might also contribute with public funds to (social) health insurance, for example, by covering the contributions of particular population groups or providing general budget support to insurance funds.<sup>51</sup> Some Member States also have so-called risk equalisation schemes in place, whereby the different providers of (private) health insurance pay into a fund depending on the number of customers. The proceeds of the fund will then be redistributed to the same providers; however the insurance company or companies with a high risk customer base, or higher than the market average, will receive more from the fund than they had contributed<sup>52</sup>.

<sup>50</sup> Unlabeled lines concern Member States where the percentage was too low to visualise.

<sup>51</sup> OECD (2021), Health at a Glance 2021: OECD Indicators, OECD Publishing, Paris, <https://doi.org/10.1787/ae3016b9-en>.

<sup>52</sup> Such a scheme for example exists in Ireland: Commission Decision SA.64337 (2022/N) of 31 March 2022, Risk Equalisation Scheme 2022 – Ireland (OJ C 196, 20.5.2022, p. 4).

### 3.1.3. Case practice of the Commission and relevant case law

Between 2012 and June 2022, the Commission has adopted at least 23 decisions in the health and related sector. Among these decisions, 5 decisions were adopted under the 2012 SGEI Package (based on the SGEI Decision<sup>53</sup> or on the SGEI Framework<sup>54</sup>), 1 decision<sup>55</sup> was adopted under the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty<sup>56</sup>, 2 decisions were adopted directly under Article 107(3)(c) TFEU<sup>57</sup>, 3 decisions concluded that the measures were existing aids<sup>58</sup> and 12 decisions concluded that the measures do not constitute State aid within the meaning of Article 107(1) TFEU, either because the beneficiaries (for example public hospitals) do not exercise an economic activity and thus do not act as undertakings within the meaning of Article 107(1) TFEU<sup>59</sup>, either because the measure conferred no advantage to the beneficiaries<sup>60</sup>; either because the measure had a purely local impact and consequently had no effect on trade between Member States<sup>61</sup>.

In addition to the above-mentioned decisions, a number of decisions were adopted under the Temporary Framework for State aid measures to support the economy in the current

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<sup>53</sup> See Commission decision of 5 July 2016 on State aid SA.19864 - 2014/C (ex 2009/NN54) implemented by Belgium Public financing of Brussels public IRIS hospitals (OJ L 351, 22.12.2016, p. 68)

<sup>54</sup> See Commission decision of 20 February 2013 on State aid SA.34515 (2013/NN) – Ireland Risk equalisation scheme for 2013 (OJ C 204, 18.7.2013, p. 2); Commission decision of 29 January 2016 on State aid SA.41702 (2016/NN) – Ireland Risk Equalisation Scheme (OJ C 104, 18.3.2016, p. 1), prolonged by Commission Decision of 14 December 2020 on State aid SA.58851 – Ireland Prolongation of the Risk Equalisation Scheme (OJ C 17, 15.1.2021, p. 1); and Commission decision of 31 March 2022 on State aid SA.64337 – Ireland Risk Equalisation Scheme 2022 (OJ C 196, 20.5.2022, p. 4).

<sup>55</sup> See Commission decision 10 December 2014 on State aid SA.39426 (2014/N) Rescue aid to PICFIC in A.S., healthcare services operator in the Region of Lazio (OJ C 44, 6.2.2015, p. 13 )

<sup>56</sup> Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C249, 31.7.2014, p. 1.

<sup>57</sup> See Commission decision of 4 December 2013 on State aid SA.35679 (2012/N) – Germany Telemedicine Infrastructure in Saxony (OJ C10, 14.1.2014, p. 4); Commission decision of 14 April 2021 on State aid SA.59176 (2020/N) – Denmark Aid for the establishment of a notified body in Denmark (OJ C 177, 7.5.2021, p. 12).

<sup>58</sup> See Commission decision of 23 November 2017 on State aid SA.42268 (2017/E) – Germany State aid for the promotion of public welfare services (OJ C 61, 16.2.2018, p. 4); Commission decision of 23 November 2017 on State aid SA.42877 (2017/E) – Germany CarePool Hannover GmbH (OJ C 61, 16.2.2018, p. 4); See Commission decision of on State aid SA.; Commission decision of on State aid SA.18879 – E 6/2006 – Ireland Unlimited guarantee in favour of the Voluntary Health Insurance Board (VHI) (OJ C 363, 23.11.2012, p. 5).

<sup>59</sup> See Commission decision of 12 November 2020 on State aid SA.39324 (2018/NN) – Estonia - Alleged aid to public hospitals listed in the Estonian Hospital Network Development Plan (OJ C 421, 4.12.2020, p. 3), Commission decision of 4 December 2017 on State aid SA.39913 (2017/NN) – Italy Alleged compensation of public hospitals in Lazio (OJ C 102, 16.3.2018, p. 3); Commission decision of 15 October 2014 on State aid SA.23008 - 2013/C (ex 2013/NN) implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP) (OJ L 41, 17.2.2015, p. 25).

<sup>60</sup> See Commission decision of 15 October 2015 on State aid SA. 37624 – Slovakia Alleged illegal State aid to Imuna Pharm (OJ C 44, 6.2.2015, p. 8) ; Commission decision of 18 August 2016 on State aid SA.43092 (2016/FC) – United Kingdom Complaint of Nurse Prescribers Ltd against the UK department of health (OJ C 425, 18.11.2016, p. 9); Commission decision of 23 October 2017 on State aid SA.42028 (2017/NN) – Finland Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP) (OJ C 422, 8.12.2017, p. 1); Commission decision of 24 March 2020 on State aid SA.43546 (2016/FC) – Slovenia Alleged State aid to Lekarna Ljubljana (OJ C 144, 30.4.2020, p. 3); See Commission decision of 21 October 2016 on State aid SA.36798 (2016/NN) – Germany Alleged unlawful State aid scheme "Cash pooling of the undertakings owned by the City of Osnabrück (including Klinikum Osnabrück GmbH)" (OJ C 110, 7.4.2017, p. 4).

<sup>61</sup> See Commission decision of 29 March 2015 on State aid SA.38035 (2015/NN) –Germany –Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery (OJ C 188, 5.6.2015, p. 5); Commission decision of 29 April 2015 on State aid SA.37904 – Germany – Alleged State aid to medical center in Durmersheim (OJ C 188, 5.6.2015, p. 2); Commission decision of 29 April 2015 on State aid SA.37432 – Czech Republic –Funding to public hospitals in the Hradec Králové Region (OJ C 203, 19.6.2015, p. 2); Commission decision of 7 November 2012 on State aid SA.34576 Portugal –Jean Piaget North-east Continuing Care Unit (OJ C 73, 13.3.2013, p. 1).

COVID-19 outbreak (“the Temporary Framework”)<sup>62</sup> in order to support undertakings active *inter alia* in the health sector.<sup>63</sup>

Among the Commission’s decisions adopted in the health sector, 3 were challenged before the Union Courts between 2012 and June 2022: a decision related to the Slovak health insurance<sup>64</sup>, a decision related to public hospitals in Lazio<sup>65</sup>, and a decision related to the public pharmacy “Lekarna Ljubljana”<sup>66</sup>. The issues raised in these cases mainly relate to the distinction between economic and non-economic activities for healthcare providers.

### 3.2. Social services

Social services are of particular importance, as they are central to creating a caring, inclusive, and productive society. This has been recognised by the Council when stating that social services “*contribute directly to reinforcing social protection of every citizen and they contribute to economic, social and territorial cohesion at local, regional, national and European levels while playing a fundamental role in job creation [...]*” and that social services of general interest “*are person-oriented services, designed to respond to human vital needs, generally driven by the principle of solidarity and often rooted in (local) cultural traditions and contribute to the safeguard of fundamental rights and human dignity, to non-discrimination and to ensuring the creation of equal opportunities for all, therefore enabling individuals to play a significant part in the economic and social life of the society*”<sup>67</sup>.

#### 3.2.1. Key figures and State aid expenditure

In 2019, the general government expenditure in the EU-27 only on social protection<sup>68</sup> stood at EUR 2 699 billion, which is 19.3 % of GDP<sup>69</sup>. These figures were more or less stable between 2012 and 2019.<sup>70</sup>

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<sup>62</sup> C(2020) 1863 final (OJ C 091 I, 20.3.2020, p. 1).

<sup>63</sup> See as an example Commission decision of 16 July 2020 on State aid SA.57897 (2020/N) – the Netherlands COVID-19: Direct grant scheme for e-Health services at home under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 260, 7.8.2020, p. 14).

<sup>64</sup> Commission decision of 15 October 2014 on State aid SA.23008 - 2013/C (ex 2013/NN) implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP) (OJ L 41, 17.02.2015, p. 25). Judgment of the General Court of 5 February 2018 *Dôvera zdravotná poisťovňa, a.s. v Commission* EU:T:2018:64. This case has been appealed (See Judgment of the Court of 11 June 2020, *Commission and Slovak Republic v Dôvera zdravotná poisťovňa, a.s.*, Joined Cases C-262/18 P and C-271/18 P, EU:C:2020:450).

<sup>65</sup> Commission decision of 4 December 2017 on State aid SA.39913 (2017/NN) – Italy Alleged compensation of public hospitals in Lazio (OJ C 102, 16.3.2018, p. 3). See Judgment of the General Court of 2 June 2021 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission* EU:T:2021:315. This case is at the moment under appeal under the number C-492/21 P - *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission*.

<sup>66</sup> Commission decision of 24 March 2020 on State aid SA.43546 (2016/FC) – Slovenia Alleged State aid to Lekarna Ljubljana (OJ C 144, 30.4.2020, p. 3); See Judgment of the General Court of 27 April 2022 *Petra Flašker v Commission* Case T-392/20 EU:T:2022:245. This case is at the moment under appeal before the Court of Justice in case C-447/22 P - *Slovenia v Flašker and Commission*.

<sup>67</sup> See Council conclusions of 6 December 2010, “social Services of General Interest: at the heart of the European social model”, available at [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lsa/118297.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/118297.pdf).

<sup>68</sup> Defined as “Sickness and disability; old age; survivors; family and children; unemployment; housing; R&D; social protection and social exclusion n.e.c.” according to the classification of the functions of government (COFOG), developed in 1999 by the OECD (see: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Classification\\_of\\_the\\_functions\\_of\\_government\\_\(COFOG\)](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Classification_of_the_functions_of_government_(COFOG))).

<sup>69</sup> Eurostat, government expenditure on social protection, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_social\\_protection](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_social_protection).

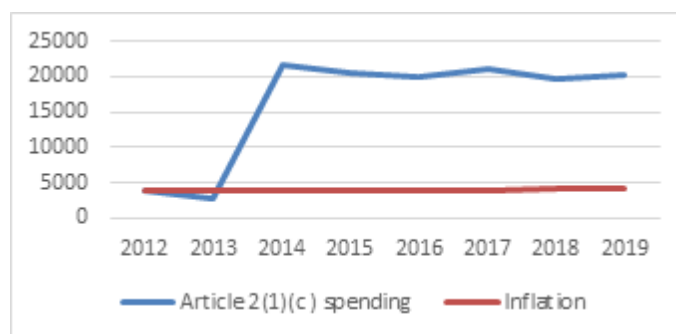
However, in 2020, the government expenditure in the EU on social protection increased by 2.7 percentage points and amounted to EUR 2 942 billion or 22 % of GDP. This is the strongest annual increase of the ratio since 1995. This was a consequence of decreases in the GDP in 2020 as well as increases in total expenditure on 'social protection' to mitigate the effects of the COVID-19 pandemic.<sup>71</sup>

This amount can be split into several groups<sup>72</sup>: “old age” (11.3 % of GDP), “survivors” (1.6% of GDP), “sickness and disability” (3 % of GDP, mostly social insurance schemes), “family and children” (2 % of GDP), “unemployment” (2.2 % of GDP) and “housing” (0.3 % of GDP, mostly social protection payments to households to help with the cost of housing as well as the operation of social housing schemes).

Social protection represented the largest area of general government expenditure in 2020 in all EU Member States. The ratio of government social protection expenditure to GDP varied across EU Member States from 10.2 % of GDP in Ireland to 27.3 % in France.

In addition, it should be noted that according to the Member States’ biennial SGEI reports<sup>73</sup>, the total spending on SGEI under Article 2(1)(c) of the SGEI Decision (i.e. SGEIs meeting social needs) is only a fraction of the spending on social protection presented above. The reported spending on SGEIs meeting social needs made a sizeable jump between 2013 and 2014 (notably Belgium, Czechia, Finland, France, Ireland and the Netherlands reported significantly more spending than in 2012). For this reason, the spending is much more than what would be expected looking at inflation since 2012. Relative to GDP SGEI spending for SGEIs meeting social needs has also increased since 2012. In 2012, Member States granted approximately EUR 3.9 billion in absolute terms, i.e. 0.0003 % of GDP, whereas in 2019, they spent approximately EUR 20.3 billion in absolute terms, i.e. 0.002 % of GDP. The evolution of SGEI spending for SGEIs meeting social needs as percentage of GDP can be seen in figure 6.

**Figure 5 – Social services spending in EUR million (Article 2(1)(c) SGEI Decision)**



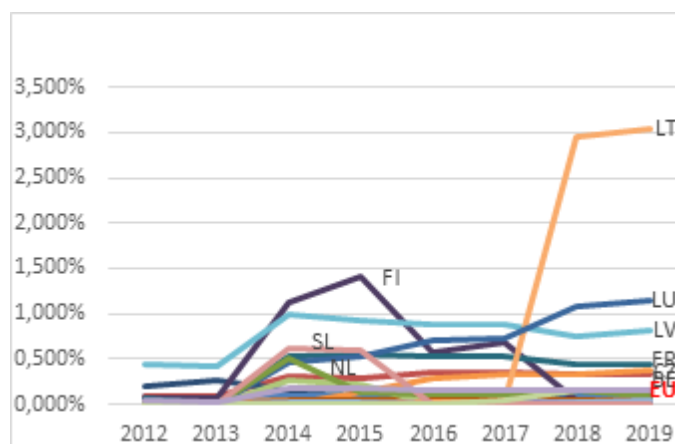
<sup>70</sup> 19.8 % of GDP in 2019, 20% of GDP in 2013, 19.9 of GDP in 2014, 19.7% of GDP in 2015 and 2016, 19.4% of GDP in 2017, 19.2% of GDP in 201, 19.3% of GDP in 2019 (Eurostat, government expenditure on health: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_health](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_health)).

<sup>71</sup> Eurostat, government expenditure on social protection, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government\\_expenditure\\_on\\_social\\_protection](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_social_protection).

<sup>72</sup> For the definition of the different groups, see Eurostat, Manual on sources and methods for the compilation of COFOG statistics, Classification of the Functions of Government (COFOG), 2019 edition, pages 226-228, available at <https://ec.europa.eu/eurostat/documents/3859598/10142242/KS-GO-19-010-EN-N.pdf/ed64a194-81db-112b-074b-b7a9eb946c32?t=1569418084000>.

<sup>73</sup> Pursuant to Article 9 of the SGEI Decision and paragraph 62 of the SGEI Framework, Member States shall submit a report on their compliance with the SGEI rules every two years. The reports are available online: [https://ec.europa.eu/competition-policy/state-aid/legislation/sgei\\_en](https://ec.europa.eu/competition-policy/state-aid/legislation/sgei_en).

**Figure 6 – SGEI spending under Article 2(1)(c) SGEI Decision as % of GDP<sup>74</sup>**



It follows from the above that social services (going beyond what is reported as SGEI) contribute significantly to the EU's economy. The financing of the social services is provided predominately by public funds. Indeed, on average in the EU, social contributions financed over half (55%) of total expenditure on social protection in 2016. The general government contribution, coming from general taxation, accounted for 40% of funding, while other sources (such as interest payments from financial investments) accounted for 5% of the total.<sup>75</sup>

### 3.2.2. Case practice of the Commission and relevant case law

Between 2012 (adoption of the 2012 SGEI Package) and June 2022, the Commission has adopted a number of decisions concerning social services (notably services meeting social needs as regards childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups). Considering the wide scope and diversity of social services it is not possible to be exhaustive. Certain decisions concluded that the measure(s) at issue did not constitute State aid within the meaning of Article 107(1) TFEU<sup>76</sup>. Other measures were declared compatible with the internal market as they fulfilled the conditions of the SGEI Decision<sup>77</sup> or Article 107(3)(c) TFEU<sup>78</sup>.

In addition to the above-mentioned decisions, a number of measures for social services were approved under the Temporary Framework (see Section 3.3.1)<sup>79</sup> in order to support undertakings providing social services.

<sup>74</sup> Unlabeled lines concern Member States where the percentage was too low to visualise.

<sup>75</sup> Social protection expenditure and its financing in Europe: A study of national policies available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8253&furtherPubs=yes>.

<sup>76</sup> See as an example Commission decision of 27 March 2017 on State aid SA.38825 (2016/NN) Alleged State aid to private providers of socio-sanitary services (OJ C 219, 7.7.2017, p. 2). See as well Commission decision of 9 August 2016 on State aid SA.38920 (2016/NN) Alleged grant support to Santa Casa da Misericordia de Tomar (SCMT) (OJ C 406, 4.11.2016, p. 6).

<sup>77</sup> See as examples Commission decision of 4 April 2018 on State aid SA.38469 - Sheltered employment in Sweden (OJ C 198, 7.7.2017, p. 4); Commission decision of 17 March 2022 on State aid SA.49313 Alleged illegal State aid to ENS (Ente Nazionale Sordi) (OJ C 204, 8.6.2018, p. 3).

<sup>78</sup> See as an example Commission decision of 23 July 2018 on State aid SA.44664 (2016/FC) Alleged aid to HelpLink South (OJ C 360, 5.10.2018, p. 3).

<sup>79</sup> See as an example Commission decision of 9 July 2020 on State aid SA.57797 (2020/N) COVID-19: Support to the social tourism sector (OJ 245, 5.10.2018, p. 3); Commission decision of 9 November 2021 SA.100306 COVID-19: Extension of SA.61360 with increased budget (special transport in the Netherlands) (OJ C 469); Commission

### 3.3. Recent events: the COVID-19 pandemic and the Russian war of aggression against Ukraine

#### 3.3.1. COVID-19 pandemic

The COVID-19 pandemic impacted the entire economy and in particular the health sector and social services.

Recognising the COVID-19 pandemic as a major shock to the global and Union's economies and the need to mitigate those negative repercussions on the EU economy, on 19 March 2020, the Commission adopted the Temporary Framework, amended several times afterwards.<sup>80</sup>

The aim of the Temporary Framework was to tackle the severe liquidity needs of undertakings due to the exceptional circumstances created by the COVID-19 pandemic. Unlike the 2012 SGEI Package, the Temporary Framework was mostly based on the second limb of Article 107(3)(b) TFEU, which constitutes an exceptional legal basis for compatibility with the internal market, according to which "*aid to remedy a serious disturbance in the economy of a Member State*" may be declared compatible. Having recognised the COVID-19 pandemic as such a serious disturbance, in line with case law, the Temporary Framework laid down the conditions under which certain COVID-19-related measures would be compatible with the internal market. As such, the Temporary Framework has been developed to cater for an emergency situation and led to extraordinary financial commitments. The Temporary Framework expired on 30 June 2022<sup>81</sup>, with some exceptions<sup>82</sup>.

Healthcare providers and social services providers could benefit from the Temporary Framework. However, if those providers had already benefited from a compensation

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decision of 9 July 2020 on State aid SA.57797 (2020/N) COVID-19: Support to the social tourism sector (OJ C 245, 24.7.2020, p. 12).

<sup>80</sup> Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 1121, 4.4.2020, p. 1), Communication from the Commission C(2020) 3156 final of 8 May 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 164, 13.5.2020, p. 3), Communication from the Commission C(2020) 4509 final of 29 June 2020 on the Third Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 218 of 2 July 2020, p. 3), Communication from the Commission C(2020) 7127 final of 13 October 2020 on the Fourth Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (OJ C 340 I, 13.10.2020, p. 1), Communication from the Commission C(2021) 564 final of 28 January 2021 on the Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (OJ C 34, 1.2.2021, p. 6), and Communication from the Commission C(2021) 8442 final of 18 November 2021 on the Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short term export-credit insurance, (OJ C 473, 24.11.2021, p. 1)

<sup>81</sup> Initially, the Temporary Framework was set to expire on 31 December 2020.

<sup>82</sup> In particular, investment and solvency support measures may still be put in place until 31 December 2023. Investment support was originally possible until 31 December 2022 but has now been extended to coincide with the expiry date of solvency support. In addition, the Temporary Framework already provides for a flexible transition, under clear safeguards, in particular for the conversion and restructuring options of debt instruments, such as loans and guarantees, into other forms of aid, such as direct grants, until 30 June 2023.

under the 2012 SGEI Package, the aid granted under the Temporary Framework could not lead to an overcompensation of the services provided under the SGEI rules.

In addition to the Temporary Framework, the Commission also adopted the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. This Regulation establishes the Recovery and Resilience Facility (RRF)<sup>83</sup>. The aim of the RRF is to mitigate the economic and social impact of the coronavirus pandemic and make European economies and societies more sustainable, resilient and better prepared for the challenges and opportunities of the green and digital transitions. The health sector and social services could benefit from the RRF in many cases.

### 3.3.2. Russian war of aggression against Ukraine

On 24 February 2022, Russia launched an unprovoked and unjustified military aggression against Ukraine. The EU and international partners immediately reacted to the serious violation of the territorial integrity, sovereignty and independence of Ukraine by imposing restrictive measures (for example, sanctions) against Russia and Belarus<sup>84</sup>.

As a result, on 23 March 2022, the Commission adopted a Temporary Crisis Framework to enable Member States to use the flexibility foreseen under State aid rules to support the economy in the context of Russia's invasion of Ukraine<sup>85</sup>. This Temporary Crisis Framework aims to mitigate the immediate social and economic negative repercussions in the EU, to preserve economic activities and jobs, and to facilitate the structural adjustments needed in response to the new economic situation created by the Russian military aggression against Ukraine.

Healthcare providers and social services providers can benefit from the Temporary Crisis Framework. However, if those providers have already benefited from a compensation under the 2012 SGEI Package, the aid granted under the Temporary Crisis Framework cannot lead to an overcompensation of the services provided under the SGEI rules.

## 4. EVALUATION FINDINGS

### 4.1. To what extent was the intervention successful and why?

As noted in section 2.1.5 above, the 2012 SGEI Package aimed at clarifying basic concepts relevant for the application of the State aid rules to SGEIs. At the same time, it sought to simplify the rules for small SGEIs of a local nature and for social services; enlarge and deepen the competition scrutiny for large commercial SGEI; and give incentives to improve efficiency to large scale SGEIs.

The objective of the present evaluation is to assess whether those objectives were successfully achieved and why. However, due to the scope of the evaluation (limited to healthcare and social services), the present evaluation does not assess, or does so only to a limited extent, whether the 2012 SGEI Package actually enlarged and deepened the competition scrutiny for large commercial SGEI, and whether it gave incentives to

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<sup>83</sup> [https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe\\_en#documents](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en#documents) "Europe's moment: Repair and Prepare for the Next Generation" COM(2020) 456 final.

<sup>84</sup> Due to its role in facilitating Russia's military aggression.

<sup>85</sup> Communication from the Commission Temporary Crisis Framework for State aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 1311, 24.3.2022, p. 1).

improve efficiency to large scale SGEIs. This is so because these objectives are inextricably linked to the application of the SGEI Framework, which applies to SGEIs with large compensation amounts. Healthcare and social services are by their very nature covered for the most part by the SGEI Decision, reason why the abovementioned objectives are not assessed in the present evaluation.

This evaluation focuses on assessing whether the 2012 SGEI Package was successful in clarifying basic concepts relevant for the application of the State aid rules to SGEIs, and whether it managed to simplify the rules for small SGEIs of a local nature and for social services. It also analyses to what extent each of these objectives was achieved (effectiveness), how they were achieved (efficiency) and whether this was coherent with other EU policies (coherence).

#### 4.1.1. Effectiveness

This section evaluates the extent to which the objectives of the 2012 SGEI Package have been achieved and also identifies the areas where effectiveness could be improved.

The findings of the analysis on effectiveness are subject to the limitations stemming from the stakeholder consultation<sup>86</sup>.

As described in detail in Section 2.1.5, the overall objective of the 2012 SGEI Package was to support Member States in funding SGEIs that are of key importance to citizens and society as a whole while preserving the key aspects of State aid control.

In particular and as regard health and social services, the 2012 SGEI Package aimed to clarify certain concepts, simplify compatibility criteria and reduce the administrative burden for Member States.

In order to simplify certain requirements, the scope of the sectors subject to the notification exemption was broadened and the threshold below which public compensation is not considered as State aid was increased to EUR 500 000 per undertaking and per three fiscal years (compared to the general *de minimis* ceiling of EUR 200 000 per three fiscal years).

In order to clarify certain State aid concepts, the Commission in particular adopted the SGEI Communication which explains *inter alia*, on the basis of the rulings of the Union Courts and of the Commission's decisional practice, the concepts of 'undertaking', 'economic activity', 'State resources', and 'effect on trade'. Moreover, the SGEI Communication also clarifies key concepts of SGEI and provides guidance on the four *Altmark* criteria.

Overall, stakeholders are of the view that compared to the baseline scenario, the 2012 SGEI Package met its objective. However, they are of the opinion that the rules could be clarified and simplified further.

In the following, the extent to which the 2012 SGEI Package clarified and simplified certain concepts will be analysed.

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<sup>86</sup> That limitation is taken into account when analysing the results of the public consultation and, where possible, its impact has been mitigated by triangulating with other data sources.

## SGEI Decision

With the modification of the SGEI Decision, the scope of the sectors subject to the notification exemption was broadened. Indeed, the scope of the SGEI Decision was extended as regards its application without any compensation threshold to certain social services. That meant that a large set of social services was as of the adoption of the 2012 SGEI Package exempted from prior notification regardless of the amount of the compensation, while aid directed towards other public service providers had to be notified if it exceeded a threshold of EUR 15 million<sup>87</sup>.

As a result, cases where the competition distortions brought about by the SGEI are limited, do not have to be notified to the Commission for prior approval, while the scrutiny for large commercial SGEIs was enlarged and deepened.

Overall, stakeholders are of the view that the enlargement of the notification exemption for certain social services has facilitated the provision of health and social SGEIs as it has simplified the implementation of the rules<sup>88</sup>. Stakeholders agree that it helped to reduce the administrative burden and the workload of public authorities. However, certain stakeholders also highlighted that the lack of clarity of certain concepts could, to a certain extent, undermine the overall efforts of simplification<sup>89</sup>. Those concepts are detailed below.

### *Social housing*

The concept of “social housing” is not new and was already included in the 2005 SGEI Decision:

<b>Recital 16 of the 2005 SGEI Decision</b>	<b>Recital 11 of the 2012 SGEI Decision</b>
<i>“[...] undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions, should benefit from the exemption from notification provided for in this Decision [...]”</i>	<i>“[...] undertakings in charge of social services, including the provision of social housing for disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification provided for in this Decision [...]”</i>

However, in recent years the attention for and focus on the definition of social housing and the closely related term “affordable housing” has increased. This follows for example from the number of written questions on this issue that Members of the European Parliament have asked the Commission. While during the 1999-2004 Commission mandate only one written question concerned this topic, in the following terms the

<sup>87</sup> Under the 2005 SGEI Decision, only hospitals and social housing benefitted from the notification exemption regardless of the amount of compensation. For other services, including social services, a threshold of EUR 30 million applied. The 2012 SGEI Decision extended the notification exemption without threshold to social services.

<sup>88</sup> To the question in the public consultation: “Based on your experience, have the SGEI rules applicable to health and social services achieved the objectives listed below while maintaining a competitive internal market?: To simplify the State aid rules applicable to health and social services/SGEIs compared to the 2005 Package by exempting them from notification to the Commission?”, 30% of the respondents have answered to a large extent and 42.50% to some extent.

<sup>89</sup> This point has been highlighted in particular by several public authorities’ representatives.

number of written questions increased significantly to seven or more. In the current ongoing term 2019-2024, already six questions on this topic have been asked.

Moreover, several stakeholders over the past few years have published written opinions, studies and/or analyses on the topic of social and affordable housing<sup>90</sup>, which will be referenced below to the extent relevant for the present evaluation. The focus of stakeholders was largely on whether the definition of social housing as defined in recital 11 of the SGEI Decision is too wide or too narrow. Those two very diverse views on complete opposite sides of the spectrum were also reflected in the replies to the public consultation carried out end 2019.

To the question whether the definition of social housing (as laid down in recital 11 of the SGEI Decision) facilitated compliance with the SGEI rules applicable to health and social services, 24 respondents fully or partially agreed, while 10 respondents fully or partially disagreed. The other respondents did not know, had no opinion or were neutral.

It appears from the replies received that respondents working for or caring about societal groups that are truly vulnerable (i.e. homeless people) and respondents representing the private rental market agree with the current definition. For example, FEANTSA<sup>91</sup> stated that it *“considers that the scope of social services and the definition of social housing are sufficiently clear and leave significant discretion to [Member States]”* when asked to elaborate on the question above. The International Union of Property Owners<sup>92</sup> took the view that the definition of social housing is among *“the most effective provisions of the former Monti-Kroes package”*.

Still, there is also a group that considers the definition of social housing laid down in recital 11 of the SGEI Decision as too strict and narrow. According to this group, there is a growing segment of citizens that do not have the financial means to rent or buy housing on market terms, but are not considered disadvantaged citizens or socially less advantaged groups and are therefore not entitled to social housing funded under the SGEI rules. These stakeholders explained notably that:

- *“the definition for social housing is too tight, “affordable housing” would be more useful”*.<sup>93</sup>
- *“The definition of social housing residents as necessarily being “disadvantaged citizens or socially less advantaged groups” limits public authorities’ ability to ensure social diversity and avoid ghettoization.”*<sup>94</sup>
- *“The SGEI Decision helped clarify the regulatory context in which social housing providers operate. There is, however, room for improvement regarding recital 11.*

*This recital [...] leads to confusion as the group that is ‘unable to obtain housing at market conditions’ moved beyond ‘disadvantaged citizens or socially less advantaged groups’.*

*Today’s market situation with regards to housing, is characterized by steep increases in housing costs, as is assessed by several studies [...]*

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<sup>90</sup> See for example UN [Habitat, Financing Affordable Social Housing in Europe, 2009](#).

<sup>91</sup> Fédération Européenne d’Associations Nationales Travaillant avec les Sans-Abri.

<sup>92</sup> A pan-European non-profit association.

<sup>93</sup> Public authority, national ministry.

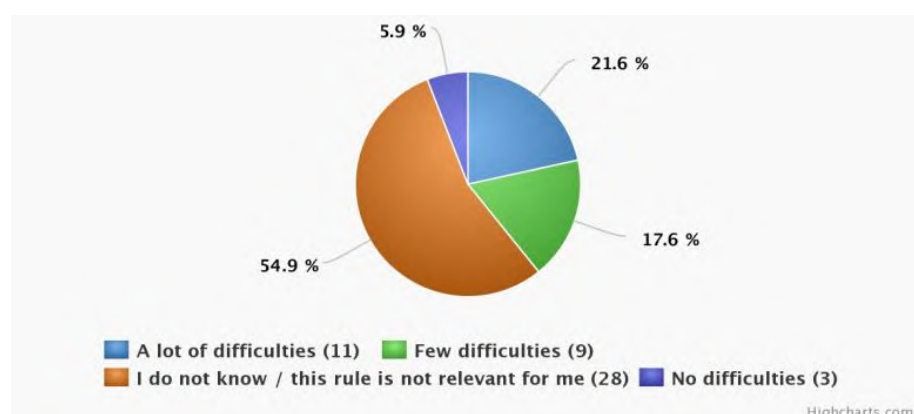
<sup>94</sup> Public authority.

*This changed reality on housing markets should be taken in consideration when revising the SGEI Decision.*<sup>95</sup>

### Reasonable profit

As regards the concept of reasonable profit, which comes back both in the SGEI Decision and the SGEI Framework, 20 stakeholders (39.2 %) that replied to the public consultation and that have experience with the concept indicated that they face difficulties and that the concept is not always clear<sup>96</sup>. Three stakeholders (5.9 %) indicated that they do not face any difficulties with the concept and a majority of 28 respondents (54.9 %) indicated that they do not know or that it is not relevant for them (see figure 7). The expert study confirmed this<sup>97</sup>.

**Figure 7 – Have you experienced difficulties in applying the “reasonable profit” requirement as explained in Article 5 of the 2012 SGEI Decision?**



The European Economic and Social Committee (“EESC”) published a report on the matter. In this report<sup>98</sup>, the EESC highlights the apparent complexity of the reasonable profit calculations, notably for local SGEIs. Currently, the SGEI Decision provides flexibility and allows different ways of calculating a reasonable profit<sup>99</sup>, if the relevant authorities want to add a reasonable profit to the compensation amount. According to the EESC, reasonable profit calculations involve hiring “costly consultancy services” that are out of reach for most SGEIs<sup>100</sup>. A report from the Commission for Economic Policy of

<sup>95</sup> Association representing social housing sector.

<sup>96</sup> As example a general matter, stakeholders consider that the concept is not appropriate to the current market in particular for health and social services and for services provided at local level. Certain Stakeholders indicate that for health and social services it is difficult to calculate the reasonable return on capital as these services are provided in certain Member States by non-profit organisations and these organisations do not have capital in the legal sense. Others indicated that the concept of “commercial risk” is inappropriate/or that the limitation to an upper limit of 100 basis points above the swap rate as reasonable profit for services that do not involve commercial risk is inappropriate. Indeed, stakeholders indicate that SGEIs are as a result not attractive. In addition, acquiring information to determine a reasonable profit can be challenging especially for activities with a social character. Public authorities also faced challenges to calculate the net costs and consequently Member States applied different approaches. Applying the concept is considered, by many stakeholders are being too burdensome.

<sup>97</sup> Footnote **Error! Bookmark not defined.**, page 105-106.

<sup>98</sup> Opinion of the European Economic and Social Committee on the ‘Application of State aid rules for compensating the provision of services of general economic interest (Decision 2012/21/UE and Community Framework)’, Own-initiative opinion (OJ C 345, 13.10.2017, p. 45).

<sup>99</sup> The SGEI Framework is clearer and advocated IRR, while at the same time it leaves the door open also for other methods. The EESC calls upon the Commission to be more flexible and allow the use of different method (point 4.9).

<sup>100</sup> Opinion of the European Economic and Social Committee on the ‘Application of State aid rules for compensating the provision of services of general economic interest (Decision 2012/21/UE and Community Framework)’, Own-initiative opinion (OJ C 345, 13.10.2017, p. 45, point 3.6).

the European Committee of the Regions confirms this as it considers that local and regional authorities are insufficiently equipped to determine the reference points for a reasonable profit<sup>101</sup>. The same report also provides an overview of which authorities and other stakeholders reported difficulties (either in the biennial SGEI report, the public consultation or in interviews) with complying with the reasonable profit requirements. Those that reported difficulties are geographically widespread, i.e. authorities in Czechia, Sweden, Poland, Latvia, Hungary, Germany, Belgium and Italy reported difficulties of some form.

Several public authorities requested more guidance on the concept to facilitate the calculation of the reasonable profit and to adapt it to the market need. Certain Member States indicated that they do not allow SGEI providers to get a reasonable profit as part of the compensation due to the complexity of the concept<sup>102</sup>. For those stakeholders it appears that the existing guidance is not sufficient.

A similar pattern arises from an external study commissioned by the EESC that reviewed the Member States' biennial SGEI reports<sup>103</sup>. This study shows that additional guidance is requested by the Member States<sup>104</sup>. The study recognises the flexibility that the Commission has shown in its case practice, despite the SGEI rules preferring the method to assess a reasonable profit using the internal rate of return<sup>105</sup>. The EESC external study also observes that some Member States do not allow a reasonable profit at all due to the difficulties they have in calculating it.

The EESC came back on the reasonable profit concept in an own initiative opinion from 2022, essentially requesting further guidance and notably how to deal with undertakings that “[keep] ploughing the profits back into [their] own activities and [describe themselves] as a social economy entity or enterprise”.<sup>106</sup>

The European Committee of the Regions has also expressed its views on the concept of reasonable profit in a report from 2016. It calls upon the Commission to revise the definition of reasonable profit, notably because an SGEI provider's profit is often reinvested in SGEIs<sup>107</sup>.

At the same time, there are also stakeholders that take the view that the reasonable profit calculations should not raise any significant difficulty<sup>108</sup>.

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<sup>101</sup> Alessandrini, Michele; Tarantino Salvatore; Zillmer, Sabine; Derszniak-Noirjean, Martyna, Commission for Economic Policy – European Committee of the Regions, Regions and cities providing SGEIs: identifying difficulties resulting from the State aid framework, 2020, page 14-15, 17.

<sup>102</sup> Two national authorities and one regional authority.

<sup>103</sup> ESTAT Ltd, Review of Member States' reports on the implementation of the Commission Decision on the provision of State aid to the provision of services of general economic interest, 2017.

<sup>104</sup> Footnote 103.

<sup>105</sup> The Commission has applied both capital-based (such as ROCE) as well as sales-based (such as ROS) profitability indicators, even though the 2012 SGEI Decision and 2012 SGEI Framework show a preference for assessing the profit on the basis of internal rate of return (IRR) on capital employed in the provision of the SGEI in question.

<sup>106</sup> Opinion European Economic and Social Committee, State aid / health and social services - State aid rules applicable to health and social services – SGEI in a post-pandemic scenario. Thoughts and proposals on the Commission evaluation to amend the 2012 legislative package (own-initiative opinion), INT/981, adopted in the EESC plenary session on 19 May 2022, points 4.6 and 4.7, available at: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/state-aid-rules-applicable-health-and-social-services-sgei-post-pandemic-scenario-thoughts-and-proposals-commission>.

<sup>107</sup> European Committee of the Regions opinion, 119<sup>th</sup> plenary 10-12 October 2016, ECON-VI/013, paragraph 37.

<sup>108</sup> Cruz, Yábar, Pedro, Japsers Knowledge Economy and Energy Division, Staff Working Papers, The Application of State aid rules to the public financing of health care infrastructures, October 2013, page 18. In the targeted consultation four national authority reported no or few difficulties.

Based on the above, the Commission services notice that a number of public authorities experience difficulties with the concept and that some Member States are not using the possibility to grant compensation up to the reasonable profit for fear of being in breach due to the complexity of calculating this profit. The Commission services acknowledge that acquiring information to determine a reasonable profit can be challenging, especially for activities with a social character and that acquiring comparative data to determine the reasonable profit can be burdensome.

### SGEI Framework

With the 2012 SGEI Framework, the Commission enlarged and deepened the competition scrutiny for large SGEIs and gave incentives to improve efficiency to large scale SGEIs, in order to address the difficulties encountered in the application of the 2005 SGEI package.

The present evaluation will not detail to which extent the objectives of the 2012 SGEI Framework have been achieved. Indeed, as mentioned in the introduction to section 4.1, the present evaluation focuses on health and social services, which are generally assessed under the SGEI Decision. However, such measures could also be assessed under the SGEI Framework if they are for example considered to “meet social needs”, but not 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 and exceed EUR 15 million per year (otherwise they could qualify as a general SGEI subject to an annual financing ceiling of EUR 15 million under Article 2(1)(a) of the SGEI Decision).

Such situations in which aid for social services should be assessed under the SGEI Framework are theoretical, as the Commission services have not encountered such a situation yet.

In any event, the considerations as regards reasonable profit in the previous section also apply to the SGEI Framework as it refers to this concept as well<sup>109</sup>.

### SGEI Communication

To address the difficulties encountered in the application of the 2005 SGEI package, the Commission adopted the SGEI Communication, aiming at clarifying the key concepts underlying the application of the State aid rules to public service compensation.

The SGEI Communication gives a comprehensive and practical overview of the EU State aid concepts relevant to SGEIs and provides explanations of key issues in a single document. It summarises the most relevant case law of the EU Courts and the Commission’s decision-making practice. As a result, it aimed at facilitating the application of State aid rules for national, regional and local authorities as well as public service providers.

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<sup>109</sup> See recital 33 and following of the SGEI Framework.

### *Economic and non-economic activities (concept of undertaking)*

In the SGEI Communication, the Commission clarified the distinction between economic and non-economic activities. Indeed, the Commission listed criteria relevant for this distinction in particular as regards social security schemes, healthcare services and education.

The distinction between economic and non-economic activities is a core question for the application of the State aid rules to an activity, as SGEI rules only apply to economic activities because without economic activities there is no undertaking in State aid terms and hence no State aid.

Although guidance on the distinction between economic and non-economic activities is provided through the SGEI Communication, the evaluation demonstrates that the distinction is not always clear-cut.

In the context of the external study, the notion of undertaking was considered “blurry” to a certain extent by certain stakeholders. They notably stressed that:

- *“The definition of an economic activity is not always clear-cut in the field of health and social services. A slightly simplified definition to be used in the context of the SGEI Framework would be very welcome. In the same way, it would be appreciated if the slightly simplified definition of an undertaking, used in article 2, 2 of the regular de minimis regulation (no 1407/2013) could also be used in the successor to the de minimis regulation for aid to SGEI's (no 360/2012).”*<sup>110</sup>
- *“[...] nombre d'actions réalisées par des associations à but non lucratif [sont assimilées] à des [activités] économiques comme le transport volontaire de malades, l'organisation de vacances sociales ou l'hébergement de personnes en perte d'autonomie. [...] Il est important que le dispositif européen reconnaisse la voie médiane entre économique et services publics : le non marchand.”*<sup>111</sup>

It should be stressed that the SGEI Communication does not take into account the recent jurisprudence of the European Courts in the healthcare sector. Indeed, the Court has recently clarified the distinction between economic and non-economic activities for this sector<sup>112</sup>.

As part of the targeted consultation, some Member States<sup>113</sup> indicated that the obligation under the SGEI rules to keep separate accounts is difficult to implement for entities carrying out economic and non-economic activities. Two other respondents to the

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<sup>110</sup> Regional authority.

<sup>111</sup> An association representing the rights of elderly.

<sup>112</sup> Judgment of the General Court (Second Chamber) of 5 February 2018 *Dôvera zdravotná poisťovňa, a.s. v Commission* ECLI:EU:T:2018:64. This case has been appealed (see Judgment of the Court of 11 June 2020, *Commission and Slovak Republic v Dôvera zdravotná poisťovňa, a.s.*, Joined Cases C-262/18 P and C-271/18 P, EU:C:2020:450) and See Judgment of the General Court (Seventh Chamber) of 2 June 2021 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission* ECLI:EU:T:2021:315. This case is at the moment under appeal under the number C-492/21 P - *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission*.

<sup>113</sup> National authorities.

targeted consultation<sup>114</sup> considered that more guidance is needed in this respect, for example for services related to access and reintegration into the labour market.

### *Effect on trade*

With the SGEI Communication, the Commission clarified its understanding of Article 107(1) TFEU as interpreted by the Union Courts and in particular the notion of effect on trade. This notion is particularly relevant as if there is no effect on trade, then there is also no State aid and the SGEI rules would not come into play.

The Commission clarified that where markets have been opened up to competition either by Union or by national legislation or *de facto* by economic development, there is an effect on trade and State aid rules thus apply. It clarified as well that aid measures can also have an effect on trade where the recipient undertaking does not itself participate in cross-border activities.

Finally, the Commission recalled in the SGEI Communication that according to the case law of the Court of Justice, there is no threshold or percentage below which trade between Member States can be regarded as not having been affected<sup>115</sup>. The relatively small amount of aid or the relatively small size of the recipient undertaking does not *a priori* mean that trade between Member States may not be affected<sup>116</sup>.

Regarding this last point, several stakeholders have pointed in the context of the evaluation that in their view, there is a very low risk of distortion of competition and affectation of trade in the health and social services sector<sup>117</sup>:

- *“We take a very positive view of the latest decisions and resolutions of the Commission on investment measures in the health sector, in which it was stated that trade between the Member States was not affected. This includes the following State aid decisions: SA.37432 Czech Republic - Financing of public hospitals in the Hradec Králové region, SA.37904 Germany - Alleged State aid to a medical centre in Durmersheim, SA.38035 Germany - Alleged aid to a rehabilitation clinic specialising in orthopaedics and trauma surgery”*<sup>118</sup>.
- *“Against this background, we would welcome it if the Commission could update its SGEI Communication from 2011 and highlight recent decision-making practice. It should be pointed out here that in the health sector the promotion of investments and educational measures that are invested in the national health*

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<sup>114</sup> National authorities.

<sup>115</sup> Judgment of the Court of 24 July 2003, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, C-280/00, EU:C:2003:415, paragraph 81.

<sup>116</sup> SGEI Communication, paragraph 39.

<sup>117</sup> Depending on the sector, 15 (access and reintegration into the labour market) to 25 (social housing) of the respondents expressed the view that the risk of distortion of competition is still lower than in other sectors.

<sup>118</sup> The Committee of the Regions in its opinion adopted during its 119<sup>th</sup> plenary session on 10, 11 and 12 October 2016 (ECON-VI/013), also refers to the following decisions where the Commission concluded on the absence of an effect on trade: Germany/Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden - Kiel" (SA.33149), Netherlands/Investment aid for Lauwersoog port (SA.39403), United Kingdom/Glenmore Lodge (SA. 37963), and United Kingdom/Member-owned golf clubs (SA.38208).

system are to be assessed as free of aid as they do not meet the criteria of affecting trade between the Member States.”<sup>119</sup>

- “[...] There is limited cross-border competition in [the health] sector and the light touch approach is not unduly burdensome. Greater flexibility in the ability to make direct grants for purely local services would not distort the "market" as these are not commercially driven, for profit activities but are intended to achieve public interest objectives.”<sup>120</sup>
- “As things stand, there remains too much emphasis on avoiding the distortion of competition rather than effective delivery of SGEI. One reason for this is the legal uncertainty over what can constitute a distortion of competition. For example, the "effect on trade between member states" is often given as a restriction without any clear indication that that will be the case, and even if the recipient is not participating in cross-border trade at all.”<sup>121</sup>

One respondent also makes a link with the SGEI *de minimis* Regulation. It indicates that authorities often require a “*de minimis* declaration”, while in reality this might not be needed as the funded activity does not have an effect on trade. Such a *de minimis* declaration also means that funding cannot exceed the EUR 500 000 cap<sup>122</sup>.

The EESC in an opinion from 2022 shows that it is aware of the strict interpretation of the concept of no effect on trade; however, at the same time it explains that even when health and social services are provided in a market context, they “*have an essentially local dimension with no real demand-side cross-border relevance. The local dimension is even more evident when social and health services are managed by social economy entities with the involvement of local communities, with a view to social cohesion and in the public interest.*”<sup>123</sup>

There are also stakeholders who indicated that the SGEI rules acknowledge the local nature of health and social services: “[*The SGEI rules have*] provided a clearer framework for public investment in the field of health and social SGEIs. In fact this has considered the local, cross-border and community dimension of public services and their difference in the management system.”<sup>124</sup>

Among the public authorities it was indicated that it is *a priori* difficult to exclude an effect on trade for aid schemes and that *ex-post* assessing for example the nature of the projects and the aid amounts is administratively burdensome<sup>125</sup>. Another authority<sup>126</sup> explained that difficulties exist as regards healthcare at the regional level, in particular as regards services offered only in municipal districts. As regards social services, this authority considers it difficult to establish no effect on trade in border regions. Moreover, it is of the opinion that the Commission does not consistently apply the criteria laid down in the Commission’s notice on the notion of aid<sup>127</sup>, which leads to insecurity. Six

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<sup>119</sup> European association representing public financial institutions. Almost identical comments were received from a similar association active at national level.

<sup>120</sup> Association active in the health sector.

<sup>121</sup> Network of NGOs.

<sup>122</sup> Association of organisations active in the welfare sector.

<sup>123</sup> Footnote 106, point 3.6 and 3.7.

<sup>124</sup> Network of organization active in the reintegration of disadvantaged workers on the labor market.

<sup>125</sup> National Ministry.

<sup>126</sup> National authority.

<sup>127</sup> Footnote 10.

authorities<sup>128</sup> have indicated that they experience no or only few difficulties with establishing whether an effect on trade is present.

In case of complaints, the European Committee of the Regions takes the view that it is for the complainant and/or the Commission to prove that there is actually an effect on trade in relation to the measure complained about and not for the Member State concerned<sup>129</sup>.

The Commission services note that due to the sectors concerned the services provided often have local dimension. However, the Commission services are of the view that it is *a priori* difficult to exclude an effect on trade for all health and social service. In addition, they note that as regard this condition, the Commission is bound by judgements of the Union Courts<sup>130</sup>. Indeed, the Union Courts have consistently considered that the relatively small amount of aid or the relatively small size of the recipient undertaking does not *a priori* mean that trade between Member States may not be affected. However, the Commission services also note that the Commission has considered, in a number of decisions, in view of the specific circumstances of the cases, that measures could have a purely local impact and consequently no effect on trade between Member States. As an example, the Commission concluded that funding of hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States could not affect trade between Member States<sup>131</sup>. It should be stressed that in certain rare cases, despite its cross-border impact, a measure can be considered not to affect trade if the impact of the measure is limited to local areas<sup>132</sup>. Indeed, certain activities have a purely local impact and consequently no effect on trade if (i) the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States; (ii) it cannot be foreseen, with a sufficient degree of probability, that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

### *Market failure*

In the SGEI Communication, the Commission clarified the Member States' discretion in defining an SGEI and the Commission's check for manifest errors of assessment.

In particular, the SGEI Communication clarified that despite Member States having a wide margin of discretion in defining an SGEI, not every service linked to health or social services can be an SGEI. The SGEI Communication provides indeed that an SGEI entrusted to a provider needs to be a "particular task"<sup>133</sup> that, if the provider would

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<sup>128</sup> Four national authorities and two regional authorities.

<sup>129</sup> Committee of the Regions, Opinion - State aid and Services of General Economic Interest, 119th plenary session on 10, 11 and 12 October 2016 (ECON-VI/013), paragraph 15.

<sup>130</sup> For example, judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 68.

<sup>131</sup> See, for instance, Commission Decisions in State aid cases N 543/2001 Ireland – Capital allowances for hospitals (OJ C 154, 28.6.2002, p. 4); SA.34576 Portugal – Jean Piaget North-east Continuing Care Unit (OJ C 73, 13.3.2013, p. 1); SA.37432 – Czech Republic – Funding to public hospitals in the Hradec Králové Region (OJ C 203, 19.6.2015, p. 2); SA.37904 – Germany – Alleged State aid to medical center in Durmersheim (OJ C 188, 5.6.2015, p. 2); SA.38035 – Germany – Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery (OJ C 188, 5.6.2015, p. 3)

<sup>132</sup> See, for instance, Commission Decisions in State aid cases N 257/2007 Subsidies for theatre productions in the Basque country (OJ C 173, 26.7.2007, p. 1) where the considered that the measure does have an effect on trade, despite the fact that the Basque language is spoken both in France and in Spain. Indeed, the Commission considered that the use of the Basque language is confined to a rather limited linguistic and geographical area.

<sup>133</sup> Article 106(2) TFEU.

consider its own commercial interests it would not assume or would not assume to the same extent or under the same conditions<sup>134</sup>. In other words, the SGEI Communication provides that there is a need to have a market failure. This market failure is also relevant when assessing whether State aid is present in the first place, namely in the context of assessing whether a measure confers an advantage upon the beneficiary<sup>135</sup>.

A large number of stakeholders considered that the clarification of the notion of market failure facilitated the compliance with the SGEI rules applicable to health and social services, at least partially<sup>136</sup>.

However, two Member States considered it difficult identifying a market failure.<sup>137</sup> It should be recalled that markets constantly change and therefore the presence or absence of a market failure can change over time. In addition, there could be a market failure for a service in one Member State and not in another Member State. The expert study has identified two market trends in the health sector that can affect the application of the 2012 SGEI Package. For example, the liberalisation of the health sector (both healthcare provision and insurance) and the introduction of a health insurance risk equalisation scheme<sup>138</sup>. As regards the differences between Member States it should be noted that while in Latvia 72 % of the hospitals were public in 2017, in the Netherlands there were no public hospitals and 75 % were private for profit (the remaining 25 % were private not for profit)<sup>139</sup>. Also for social housing the approaches differ depending on the Member State, leading to different treatment of the (social) housing sector under the SGEI rules in different Member States<sup>140</sup>.

### *Conclusion*

Overall, the Commission services observe that the evaluation demonstrates that the SGEI Communication contributed to the clarification and the simplification of the SGEI rules. However, some stakeholders indicated that they continue to experience difficulties with certain concepts.

### *SGEI de minimis Regulation*

One of the key problems identified with the 2005 SGEI package concerned the excessively high administrative burden for small SGEIs. The rules contained in the 2005 SGEI package were deemed too complex and not adapted for small SGEIs. Small SGEIs could only fall outside the scope of State aid rules if the compensation did not exceed EUR 200 000 over any period of three fiscal years, which was the ceiling corresponding to the general *de minimis* Regulation.

To address this issue, the Commission adopted in 2012 the SGEI *de minimis* Regulation. With this Regulation, undertakings providing a SGEI can receive compensation of maximum EUR 500 000 over any period of three fiscal years, without it be considered

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<sup>134</sup> SGEI Communication, point 47.

<sup>135</sup> Judgment of the General Court of 16 September 2013, *Colt Télécommunications France v Commission*, T-79/10, EU:T:2013:463, paragraph 154.

<sup>136</sup> To the question in the public consultation « *Did the factors below facilitate the compliance with the SGEI rules applicable to health and social services?* » as regard market failure: 28 respondents agree at least partially, 7 disagree at least partially and 16 don't know or have a neutral view.

<sup>137</sup> National authorities.

<sup>138</sup> Footnote 77, page 45.

<sup>139</sup> Footnote 77, page 48.

<sup>140</sup> Footnote 77 **Error! Bookmark not defined.**, page 64-66.

State aid as it is deemed not to affect trade between Member States and/or not to distort or threaten to distort competition.

The evaluation found that the revised ceiling for the *de minimis* ceiling from EUR 200 000 to EUR 500 000 for SGEIs (with the new SGEI *de minimis* Regulation) is welcome as one of the greatest improvements of the 2012 SGEI Package<sup>141</sup>. The most notable simplification compared to the baseline scenario is that, with the introduction of the SGEI *de minimis* Regulation, Member States have the possibility to grant up to EUR 500 000 per three fiscal years, instead of EUR 200 000 before (under the general *de minimis* Regulation of 2006 in force at the time<sup>142</sup>). Indeed, the Commission considered that some of the advantages granted to beneficiaries providing SGEIs are likely to constitute compensation for additional costs linked to the provision of SGEIs. Moreover, it considered that many activities qualifying as the provision of SGEIs have a limited territorial scope.

The adoption of the SGEI *de minimis* Regulation therefore clarified and simplified significantly the granting of SGEIs for providers which receive public service compensations between EUR 200 000 and EUR 500 000. In addition, it reduced the administrative burden for Member States as they no longer need to check compliance with the *Altmark* criteria or fulfil the conditions of the SGEI Decision.

However, certain stakeholders consider that there is a need to clarify the *de minimis* rules further. It appears that certain concepts introduced in the modified general *de minimis* Regulation of 2013 differ from the SGEI *de minimis* Regulation. The comments received both in the context of the present evaluation, but also in the context of the two prolongations of the SGEI *de minimis* Regulation in 2018 and 2020, refer mainly to those differences. These differences relate in particular to the concepts of undertakings in difficulty, mergers and acquisitions and the concept of “any one undertaking” (see section 4.1.3).

In addition, certain stakeholders consider that the ceiling of EUR 500 000 is not adapted to the current financing needs required for the operation of an SGEI. Indeed, the *de minimis* ceiling appears to be easily reached, with the average amount of State support increasing on average since 2012.

33 of 67 respondents to the public and targeted consultations expressed a wish to increase the threshold (e.g. to EUR 500 000 per social services, EUR 750 000, EUR 800 000, or even EUR 1 million). This was confirmed during interviews carried out in light of the external study commissioned by the Commission.

In 2016, the European Committee of the Regions also called for an increase to EUR 1 million due to the often local context of SGEIs and because of this the lack of cross-border distortion of trade or competition that would harm the internal market<sup>143</sup>. The European Committee of the Regions repeated its request for an increase in 2021, without however mentioning a desired ceiling<sup>144</sup>.

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<sup>141</sup> This result from the public consultation, the targeted consultation and the expert study.

<sup>142</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 24.12.2013 L 352).

<sup>143</sup> European Committee of the Regions opinion, 119<sup>th</sup> plenary 10-12 October 2016, ECON-VI/013, para 38.

<sup>144</sup> European Committee of the Regions opinion, 147<sup>th</sup> plenary 1-2 December 2021, ECON-VII/015, para 52.

Also, the EESC, in its recent own-initiative opinion considered the ceiling too low for health and social services<sup>145</sup>.

As part of the result of the public consultation, only one stakeholder considered the threshold as being too high and three considered the ceiling to be appropriate (4.5 % of the respondents).

The rest of the respondents (44%) don't know whether the current threshold is appropriate, have a neutral view, have not apply the SGEI *de minimis* or have not replied to the question.

### Conclusion

Based on the above, it appears that overall the change to the SGEI rules introduced in 2012 (i.e. the 2012 SGEI Package) facilitated the provision of health and social SGEIs. As an example, a majority of the stakeholders consider that the introduction of the SGEI *de minimis* Regulation did simplify the SGEI rules by allowing Member States to grant up to EUR 500 000 as *de minimis* aid compensation (compared to EUR 200 000 before the introduction of the SGEI Package), even if they consider that the ceiling could be further increased.

However, it also demonstrates a call for further clarification of certain concepts, either related to the notion of State aid (i.e. economic/non-economic activity, effect on trade) or concepts used in the SGEI rules (e.g. reasonable profit, market failure, etc.). The concepts were partly already included in the 2005 SGEI rules. It can therefore be concluded that despite the review of the SGEI Decision and the SGEI Framework in 2011, the introduction of the SGEI Communication and the SGEI *de minimis* Regulation in 2012 and the publication of the SGEI frequently asked questions document in 2013, more clarity is still needed. Certain concepts, such as social housing, do not appear as such unclear but are considered as an obstacle in providing the SGEI adapted to the population's need.

#### 4.1.2. Efficiency

This section evaluates the efficiency of the rules applicable to health and social SGEIs and will focus mainly on the SGEI Decision, which is the act under which State aid for health and social services are usually assessed. The aim is to evaluate what the costs and benefits associated with the application of the requirements set by the rules for health and social SGEIs are. As part of this, the present section assesses whether the 2012 SGEI Package prevented competition distortions on the internal market and whether it clarified and simplified the rules to ensure that the administrative burden for public authorities is not disproportionate.

### Findings of the analysis

The analysis on efficiency is subject to the limitations stemming from the stakeholder consultation.

The lack of quantifiable costs and savings data has hampered analysis of the costs of the measures evaluated. Annual costs incurred by the national administrations are often

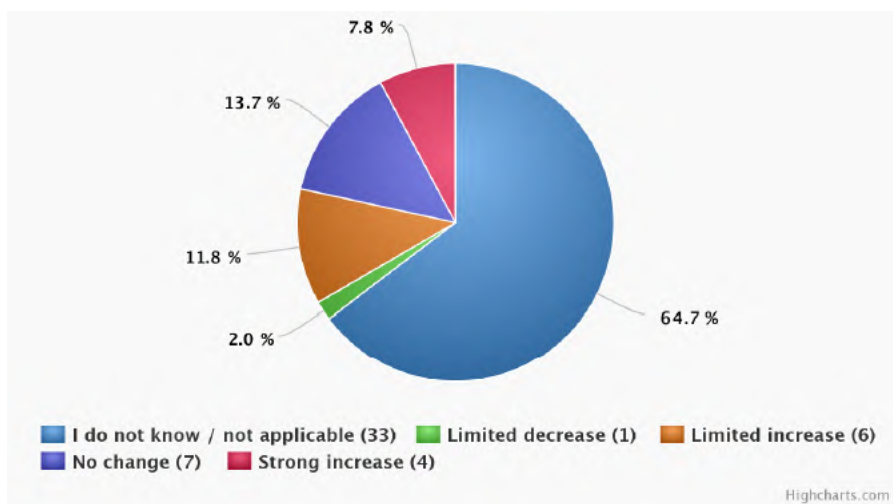
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<sup>145</sup> Footnote 98, point 4.8.

difficult to estimate precisely<sup>146</sup>. No stakeholder or known studies have been able to provide an estimation. Indications of the administrative burden were all qualitative.

Out of the 51 respondents of the public consultation, 33 respondents did not have an opinion on whether the amount of resources (for example money and personnel) spent on administrative activities with regard to health and social services changed, compared to the period 2005-2012 when the 2005 SGEI package was still in force. However, 10 respondents have indicated that the resources spent on administrative activities have slightly increased or strongly increased, 1 that they have decreased and 7 that it remained unchanged compare to the period 2005-2012 (see figure 13 below).

**Figure 13 – To what extent did the amount of resources (for example money and personnel) you spent on administrative activities with regard to health and social services change, compared to the period 2005-2012 when the 2005 SGEI package was still in force?**

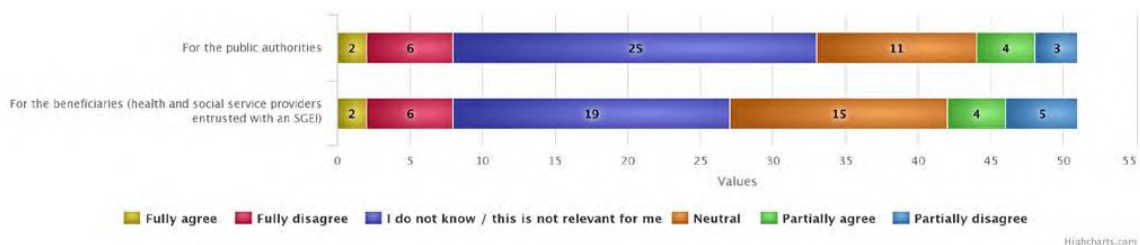


As an example of the additional costs, one Member State indicated that the SGEI rules prompted the relevant department to recruit more specialised staff, participate in specialised seminars and train executives of managing authorities. Other stakeholders indicated that sometimes (expensive) external advice had to be hired.

As regard the administrative burden, out of the 51 respondents of the public consultation, 34 had no opinion on whether it has been reduced for public authorities or beneficiaries compared to the rules in force under the 2005 SGEI package, 12 respondents agreed, at least partially, that the 2012 SGEI package reduced the administrative burden with regard to health and social services and 20 disagreed at least partially (see figure 14 below).

**Figure 14 – Question 29: Did the 2012 SGEI package reduce the administrative burden with regard to health and social services compared to the rules in force under the 2005 package?**

<sup>146</sup> Similar to the conclusions in the Commission Staff Working Document on the fitness check, SWD(2020) 257 final of 30 October 2020, page 101.



As examples of the administrative burden for public authorities, the biennial reporting exercise was considered by one stakeholder as too burdensome (instead of every 2 years, this stakeholder considered a reporting exercise every 5 years to be more appropriate). Several stakeholders based in Germany referred to the apparent request from German authorities to provide a “*de minimis* declaration” in which the beneficiary confirms that the funding need will be limited to EUR 500 000 per three fiscal years so as to avoid the, in their view, more complicated and burdensome requirements associated with an entrustment under the SGEI Decision.

Some stakeholders have however indicated that compared to the 2005 SGEI Package, the administrative burden both for public authorities and beneficiaries has decreased due to the notification exemption for health and social services<sup>147</sup>, irrespective of the compensation amount and due to the adoption of the SGEI *de minimis* Regulation. The enlargement of the scope of the notification exemption and the adoption of the SGEI *de minimis* Regulation have therefore, in their view, significantly simplified the rules.

The expert study confirmed the above. It shows that the 2012 SGEI Package has to a certain extent helped to reduce costs especially due to the notification exemption and the introduction of the SGEI *de minimis* ceiling. However, a meaningful reduction of the administrative costs for public authorities has not been perceived, particularly due to the complexity of certain terms such as the definition of social housing and the distinction between an economic and non-economic activity. Therefore, the expert study concludes that the time saved by the simplification and facilitation brought by the 2012 SGEI Package have not necessary led to a striking reduction in the administrative costs<sup>148</sup>.

### Conclusion

The stakeholders perceive the introduction of the SGEI *de minimis* Regulation and the notification exemption for health and social services under the SGEI Decision (irrespective of the amount) as positive aspects of the 2012 SGEI Package, which simplified the application of the rules.

However, it appears that despite the positive elements, the administrative burden for public authorities and the amount of resources spent on administrative activities with regard to health and social services appear not to have necessarily decreased compared to the period 2005-2012, when the 2005 SGEI package was in force. While none of the respondents to the consultations provided precise costs and benefits associated with the application of the rules for health and social SGEIs, the evaluation suggests that the costs associated with the application of the requirements set by the SGEI rules and the

<sup>147</sup> To the question in the public consultation “*Did the 2012 SGEI package reduce the administrative burden with regard to health and social services compared to the rules in force under the 2005 package?*”, 6 respondents agreed, at least partially, as regards the administrative burden for public authorities and 6 respondents agreed, at least partially, as regards the administrative burden for public authorities.

<sup>148</sup> The expert study stresses that the majority of respondents (8 respondents out of the 15) to the targeted consultation launched by DG Competition indicated that the new level of administrative burden is rather stable in comparison to the situation existing with the previous package.

administrative burden for public authorities could be further reduced, in particular with regard to the monitoring of the SGEI *de minimis* Regulation and transparency requirements.

#### 4.1.3. Coherence

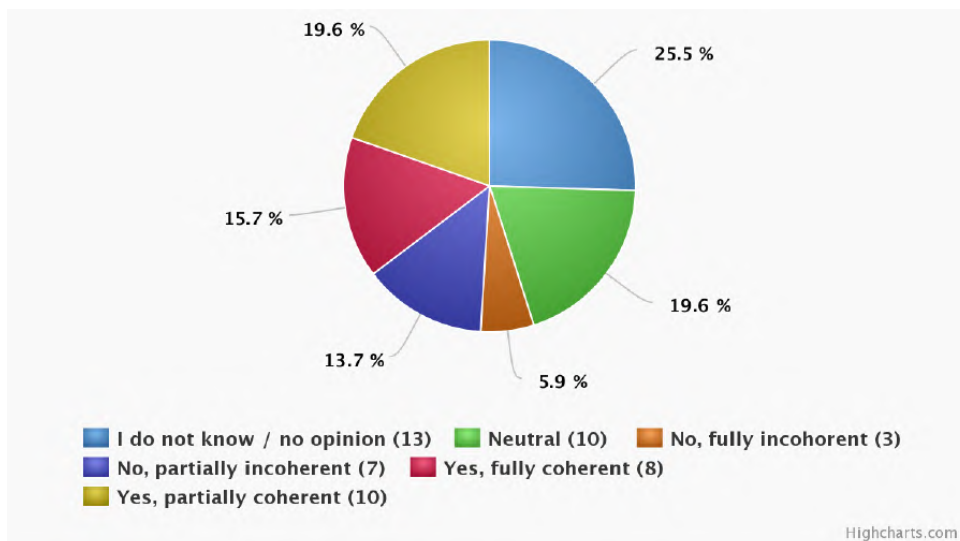
In order to assess the coherence of the 2012 SGEI Package, the questions asked aimed at understanding notably whether the SGEI rules were externally (i.e. with other EU rules) and internally (within the 2012 SGEI Package) coherent.

*Findings of the analysis*

This section aims at answering to the following questions **(i)**: How well do the 2012 State aid rules for health and social SGEIs correspond to the wider EU policy applicable to health and social SGEIs - such as Articles 14 and 168 TFEU and Protocol 26 to the TFEU – and to other State aid instruments? and **(ii)** How do the 2012 State aid rules for health and social SGEIs compare to, complement and interact with other State aid instruments? This section also aims at answering the query of whether **(iii)** the 2012 SGEI Package as applicable to health and social SGEIs is internally consistent and coherent, and whether there are any overlaps, contradictions or missing links between the Decision, the Framework and the Communication, which would run counter to the objective of simplification and clarification of the 2012 SGEI Package.

Respondents were asked whether the SGEI rules, insofar as they are applicable to health and social services, are coherent with each other. Approximately 35% of respondents said they are (fully or partly) coherent, 20% replied that they are (fully or partly) incoherent, 20% were neutral and 25% did not know (see figure 17).

**Figure 17 – Are the SGEI rules (the SGEI Decision, SGEI Framework, SGEI Communication, SGEI *de minimis* Regulation) insofar as they are applicable to health and social services coherent with each other?**



*Coherence with State aid rules*

Although there appears to be a general consensus on the existence of coherence, some submissions pointed out to some potential differences with other State aid rules and provided suggestions for changes to clarify the articulation between the 2012 SGEI Package and other EU rules.

On the coherence of SGEI rules with new EU legislation / initiatives, authorities explained that services to ensure access to and reintegration into the labour market are covered both by the SGEI Decision and GBER, where different conditions are attached to funding such services. Others proposed that, in order to improve the 2012 SGEI Package it would be good to consider how the interaction of the Package with other rules could be optimized, for example how the SGEI rules regarding the health sector are

coherent with several categories in the GBER, in particular the RDI (Research development and innovation) rules.

In addition, it appears that there are certain misalignments between the general and the SGEI-specific *de minimis* Regulations. Misalignments could also be observed with the SGEI Decision.

#### Concept of any one undertaking

In the SGEI *de minimis* Regulation, the EUR 500 000 ceiling per three fiscal years applies to “any one undertaking” as opposed to “single undertaking” in the general *de minimis* Regulation. The Commission services note that the concept of “any one undertaking” under the SGEI *de minimis* Regulation could be interpreted in a more lenient way than the concept of “single undertaking” under the general *de minimis* Regulation, which is strictly defined in its Article 2(2). As part of the Advisory Committees held in the context of the two prolongations of the SGEI *de minimis* Regulation, certain Member States suggested to include the concept of “single undertaking” also in the SGEI *de minimis* Regulation<sup>149</sup>.

#### Concept of undertakings in difficulty

Two public authorities and one stakeholder in the field of healthcare explained that the SGEI *de minimis* Regulation excludes undertakings in difficulty and should be harmonised with general *de minimis* Regulation, which does not exclude undertakings in difficulty, but also the SGEI Decision where no reference to undertakings in difficulty is made.

In the context of the two prolongations in 2018 and 2020, 13 Member States considered that the exclusion of undertakings in difficulty in the SGEI *de minimis* Regulation posed implementation problems<sup>150</sup>. Those considerations should be seen in light of the general *de minimis* Regulation, which does not contain such an exclusion<sup>151</sup>. The Commission had already temporarily removed the exclusion of undertakings in difficulty from the SGEI *de minimis* Regulation in the context of the COVID pandemic<sup>152</sup>. This exclusion expired on 30 June 2021 and was not prolonged; hence, undertakings in difficulty are currently excluded from SGEI *de minimis* compensation.

#### Inclusion of provisions on mergers and acquisitions

Two Member States<sup>153</sup> have noted a different treatment of mergers and acquisitions when granting *de minimis* aid depending on the applicable *de minimis* Regulation. In this respect, Article 3(8) of the general *de minimis* Regulation states that “*In the case of mergers or acquisitions, all prior de minimis aid granted to any of the merging undertakings shall be taken into account in determining whether any new de minimis aid to the new or the acquiring undertaking exceeds the relevant ceiling. De minimis aid lawfully granted before the merger or acquisition shall remain lawful.*” Those Member

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<sup>149</sup> 11 Member States.

<sup>150</sup> 13 Member States.

<sup>151</sup> See also: Sinnave, Adinda, The Complexity of Simplification: The Commission’s review of the *de minimis* Regulation, EStAL 2, 2014, p. 275.

<sup>152</sup> Commission Regulation (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic (OJ L 337, 14.10.2020, p.1).

<sup>153</sup> Two Member States.

States consider that a similar provision should also be included in the SGEI *de minimis* Regulation.

#### Entrustment act

One respondent explained that the entrustment requirement under the SGEI Decision could be confused with the entrustment required by the SGEI *de minimis* Regulation. Apparently, often stakeholders do not realise that also for SGEI *de minimis* Regulation some form of entrustment is needed.

#### *Coherence with other EU rules*

A respondent pointed out that the SGEI rules are internally coherent, but should be aligned with the Services Directive<sup>154</sup> and the Public procurement Directive<sup>155</sup>, and with the case law of the Court of Justice<sup>156</sup>.

Two stakeholders believe that the SGEI rules are not coherent with Protocol 26, Article 14 of the TFEU (see Annex 7), the Charter of Fundamental Rights and the EU Pillar of Social Rights, which, in their view, provide the relevant frameworks for EU policies relating to public services, including EU State aid rules for SGEI.

Finally, respondents also expressed themselves with regard to coherence of SGEI rules with the Treaties and EU sectoral legislation (Article 3 of the SGEI Decision). One national health ministry put forward that in order to ensure that projects comply with the relevant conditions, the public administration spends huge administrative resources on setting up an SGEI compensation scheme and the beneficiaries equally spend a lot of resources on ensuring implementation and follow-up of the SGEI projects.

#### Conclusion

Based on the above, it appears that overall the SGEI rules are coherent within the 2012 SGEI package; however, there is a need to clarify/simplify further the rules to ensure stronger coherence between the general and the SGEI *de minimis* Regulations as regards the notion of “single undertaking”, the provisions on mergers and acquisitions, and the application of the *de minimis* rules to undertakings in difficulty, which should be addressed to simplify further the enforcement of both Regulations. In addition, there is a call for better coherence between the SGEI rules and Protocol 26 annexed to the TEU and TFEU on services of general interest; Article 14 TFEU; the Charter of Fundamental Rights; and the European Pillar of Social Rights, to ensure clarity within EU rules and to simplify their enforcement.

#### **4.2. How did the EU intervention make a difference?**

This question seeks to assess whether the 2012 SGEI Package allowed for a better task allocation between the Commission and Member States and whether the rules helped in ensuring legal certainty.

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<sup>154</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

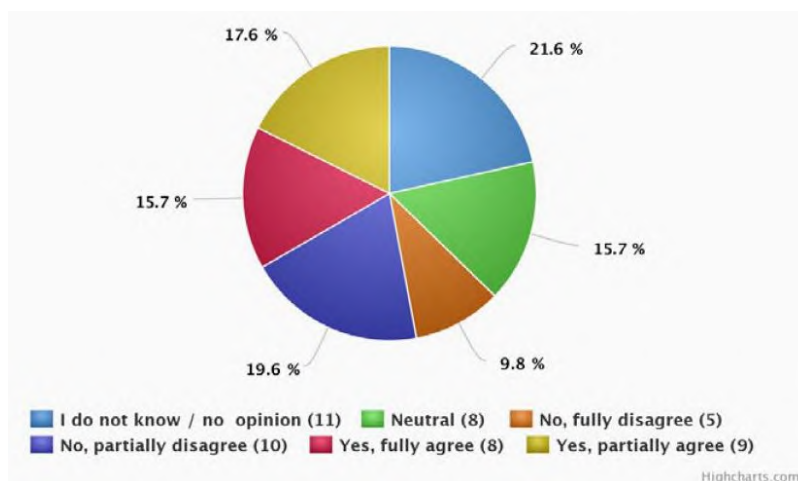
<sup>155</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ L 94, 28.3.2014, p. 65).

<sup>156</sup> This respondent attaches particular importance to the judgement of the Court of Justice of 8 September 2011, *Paint Graphos e.a.*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550.

#### 4.2.1. Findings of the evaluation

Respondents were asked whether the 2012 SGEI Package allowed for a better allocation of tasks between the Commission and the Member States; while 21.6 % did not know and 15.7 % had a neutral view, the remaining replies were equally divided between opposite views with 33.3 % (partially or fully) agreeing and 29.4% (partially or fully) disagreeing (see figure 18).

**Figure 18 – Has the 2012 SGEI Package allowed for a better allocation of tasks between the Commission and Member States?**



Some respondents are under the impression that Member States cannot define themselves what a public need is and that the Commission should take into account the specific characteristics of every Member State. In the same vein, an association expressed the view that the inclusion of additional quality and efficiency considerations is not something for the Commission to decide, but rather something that must be left to local authorities. Another stakeholder in the field of social housing considers that the same applies to housing and that policies in this area should be left to Member States. This stakeholder also considers the current definition of social housing in the 2012 SGEI Decision questionable from a subsidiarity and proportionality perspective in the context of the wide margin in which Member States and local authorities have to organise their SGEIs.

Other voices also expressed the view that the funding and provision of health and social services to the (vulnerable part of the) population at affordable conditions should be left to Member States alone and not be subject to State aid rules.

In the targeted consultation, the public authorities that replied generally consider that the 2012 SGEI Package brought about a better division of tasks, but they would at the same time welcome more methodological guidance. In addition, remarks were made as to the lack of reflection in the SGEI rules of the different kinds of subsidised housing, which at times could lead to different approaches to the management of social housing across the different Member States.

A national health ministry and a ministry in charge of education explained that the distinction between SGEIs and other services is a complex process and that limited guidance on making this distinction is available.

A national authority explained that the reporting obligation laid down in Article 9 of the SGEI Decision is very burdensome and should be relaxed or simplified. The same

authority considers social housing a purely national competence and not at all an EU one. Another national authority explains that different kinds of subsidised housing exist in all Member States, and that this should be reflected in the 2012 SGEI Decision.

The expert study explains that according to the stakeholders, the competencies of those responsible to define social housing should be clarified. Currently, the EU is not competent for social housing as such, though it is competent for controlling State aid provided to social housing. In the framework of State aid control, the SGEI Decision provides a definition of social housing at EU level which Member States must comply with in order to benefit from the notification exemption.

In addition, the expert study explains that certain public authorities and EU associations questioned the perimeter of the social housing target group from a subsidiarity perspective. According to those authorities and associations, the provision of social housing is a Member State competence; hence, the EU, which is not competent for social housing, should not interfere with Member States' social housing policies. The expert study also notes that public authorities are more aware of their national contexts than the Commission is. In this light, it followed from interviews with public authorities that it should therefore be up to national and local authorities to determine which categories of the population should be eligible for social housing and under what circumstances. In addition, the need to safeguard competition in the social housing market is minimal since the risk of distortion of competition in the internal market is low. Hence, there would be no need for the Commission to intervene and define a target group for social housing.

The expert study highlights though that other stakeholders advocate the contrary by being in favour of a more detailed target group and clearer delineation of the competencies between Member States and the Commission<sup>157</sup>. In other words, they question the discretion that Member States have in framing social housing at national level and target groups without a Commission intervention. They thus advocate for a clearer social housing definition at EU level, leaving less discretion to Member States.

In addition, the 2012 SGEI Package also led to the clarification of the rules on the provision of State aid to ensure that the trajectory of State aid expenditure is clearer at national level. The added value of the 2012 SGEI Package lies in ensuring that the rules on State aid are maintained. However, this added value varies according to the national context and the way in which Member States consider healthcare and/or social housing as services of general economic interest.

According to the expert study, the 2012 SGEI Package is a continuation of the 2005 SGEI Package, with certain adaptations. Several stakeholders considered that this continuity has improved legal certainty and has provided a stable legal environment for Member States, SGEI providers and other stakeholders. This legal certainty has been developed with stakeholders maturing their knowledge since the 2005 SGEI Package. Certain stakeholders<sup>158</sup> from Member States that do not consider hospitals and/or social housing as an SGEI underlined that considering these sectors as a SGEI in their Member State would be welcomed since it would (i) pave the way for a clearer set of rules and (ii) facilitate the provisions of State aid. Again, this point echoes the view of certain stakeholders for which the 2012 SGEI Package contributes to the establishment of legal certainty to the environment in which hospital and/or social housing providers operate.

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<sup>157</sup> Several EU and national association active in the social housing sector and few public authorities.

<sup>158</sup> National stakeholders consulted in the course of the external study.

This legal certainty and transparency are essential for providers to gain access to predictable sources of financing.

As explained in the same expert study, when considering the added value of the 2012 SGEI Package, it is necessary to consider the situation should the Package not be in place. Under such circumstances, the legal framework would be general EU competition law and Member States would have to notify all State aid provided which would lead to a greater administrative and financial burden for all parties involved. Moreover, in the absence of the 2012 SGEI Package, a lack of clarity would exist, with a lack of guidance in place on key concepts and methods such as the estimation of net cost and the avoidance of overcompensation. The guidance provided in conjunction with the 2012 SGEI Package was identified by stakeholders consulted through the study as of considerable added value, including the Commission's guide to the application of EU rules on State aid through frequently asked questions.

#### 4.2.2. Conclusion

Respondents broadly agree that the 2012 SGEI Package brought a better division of tasks between Member States and the Commission, but more methodological guidance from the Commission would be welcomed. In addition, certain stakeholders consider that Member States should be able to define themselves what public need means in the national context and that the Commission should take into account the specific characteristics of each Member State.

As regards the legal certainty ensured by the 2012 SGEI Package, many respondents to the expert study consider that the 2012 SGEI Package did manage to provide a stable legal environment for Member States, SGEI providers and other stakeholders and has provided an added value in this sense.

### 4.3. Is the EU intervention still relevant?

This section assesses whether the objectives of the SGEI rules applicable to health and social services still correspond to the needs within the EU. In a first step, it examines whether the SGEI rules are adapted to the developments of society, markets and social policy. In other words, whether the distortion of competition with regard to health and social SGEIs is (still) less compared to other sectors. In a second step, it examines how well the rules are understood by Member States.

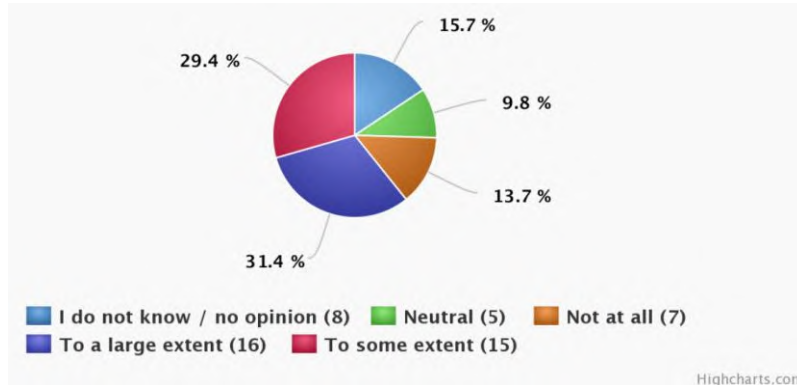
#### 4.3.1. Findings of the analysis

The analysis on relevance is subject to the limitations stemming from the stakeholder consultation.

As indicated in Section 1.4, the public consultation as well as the targeted consultations took place before the COVID-19 crisis and the Russian war of aggression against Ukraine. Hence, possible misalignments with new general policy goals were perhaps not fully visible to stakeholders.

31 out of 51 stakeholders consider that the SGEI objectives for health and social services correspond at least to some extent to today's (EU internal) market situation and are thus relevant.

**Figure 15 – How well do the objectives of the 2012 SGEI Package as applied to health and social services still correspond to today’s (EU internal) market situation?**

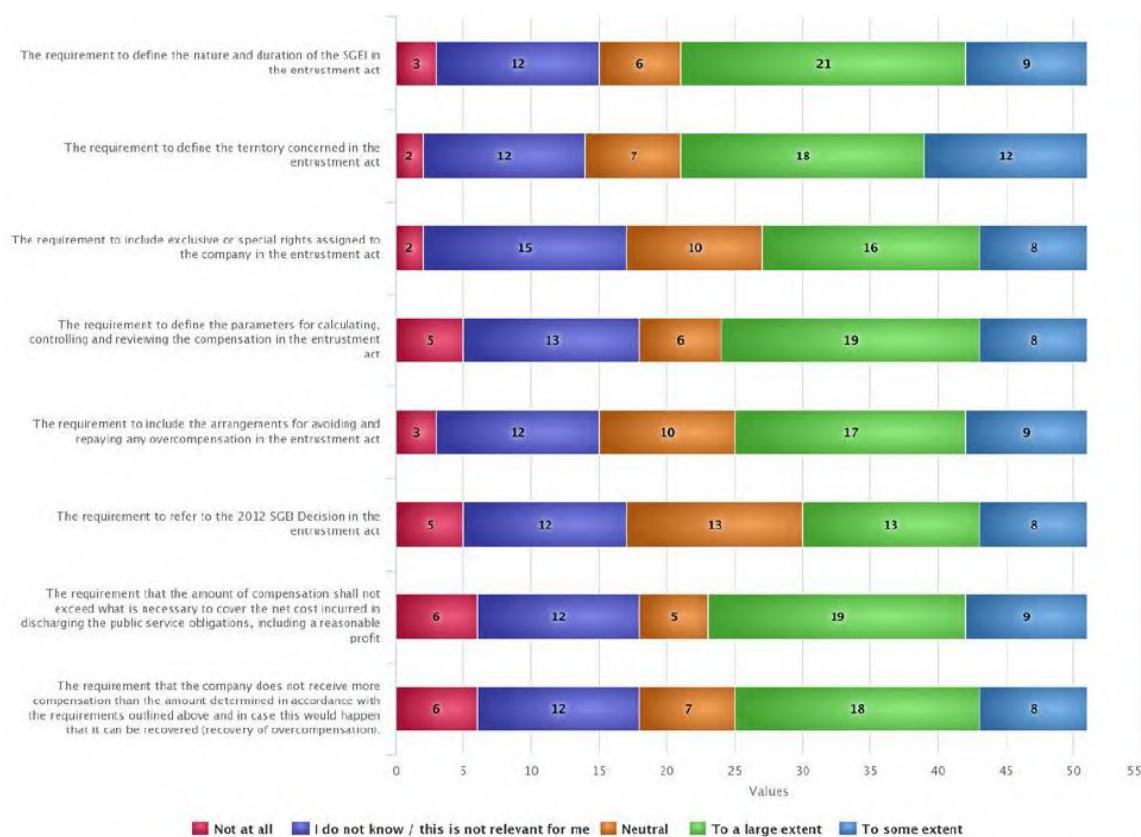


7 respondents to the public consultation stated that the SGEI objectives for health and social services do not at all correspond to the current EU priorities.

While many respondents consider the SGEI rules to be relevant, only a limited number of respondents elaborated on their answer, referring to specific parts of the SGEI rules that they do not consider to be relevant.

It follows from figure 16 that the highest percentage for the parts of the SGEI rules no longer to be considered relevant are the obligation to avoid overcompensation and, in case of overcompensation, to recover it (both 6 out of 51 or 11.8 %). However, 16 out of 51 respondents do consider those two parts relevant to a large or some extent.

**Figure 16 – To what extent does each separate element of the 2012 SGEI Decision correspond to the (EU internal) market developments in the field of health and social services that have occurred since 2012? In other words, do these elements still serve a purpose? (in number of respondents)**



In the (qualitative) comments in response to the questions in the public consultation related to relevance, a respondent advocated for the specific recognition in the SGEI rules of operators active in the so-called “social economy” (i.e. where profits can be made but they will not be distributed to shareholders)<sup>159</sup>. In the respondent’s view, this would make the SGEI rules even more relevant. This is in line with the call from the EESC<sup>160</sup> and other organisations<sup>161</sup> to recognise the special position of social economy enterprises.

Another comment was that the SGEI rules should aim at ensuring quality public services for all citizens and not just for the most vulnerable ones and that ensuring quality services should take precedence over internal market and competition rules<sup>162</sup>.

The external study concludes as well that certain provisions of the SGEI rules could be further adapted to respond to evolving needs at national level, namely the definition of social housing, the SGEI *de minimis* ceiling and certain provisions related to healthcare.

<sup>159</sup> Two organisations active in mutual insurance.

<sup>160</sup> See footnote 98, paragraph 4.7, 4.9 and 4.11.

<sup>161</sup> For example: Social Economy Europe, White Paper – Social Economy... Taking back the initiative, Proposals to make the social economy into a pillar of the European Union (2015), available at: <https://www.socialeconomy.eu.org/wp-content/uploads/2020/02/White-Paper-SEE.pdf>, page 20.

<sup>162</sup> Association of organisations active in the welfare sector.

#### 4.3.2. Conclusion

Based on the above, it appears that the objectives of the 2012 SGEI package are, to a large extent, appropriate for meeting the needs within the EU as regards health and social services. However, the potential impact and the uncertainties brought by the COVID-19 crisis and the Russian war of aggression against Ukraine cannot be fully evaluated yet.

The analysis suggests that further adaptation may be considered to fully meet the needs of stakeholders such as the recognition in the SGEI rules of operators active in the so-called “social economy” or the recognition of quality services.

### 5. WHAT ARE THE CONCLUSIONS AND LESSONS LEARNED?

#### 5.1. Conclusions

The present evaluation aims at assessing the State subsidy rules for health and social services of general economic interest as well as the SGEI *de minimis* Regulation.

The findings of the analysis are subject to the limitations stemming from the stakeholder consultation. The results of the evaluation also need to be interpreted in the light of the COVID-19 crisis and the Russian war against Ukraine because future policy-making cannot disregard the imbalances created in the Member States’ economies due to them. The fact-finding and assessment were done before the COVID-19 pandemic and before the Russian war against Ukraine.

The evaluation suggests that the 2012 SGEI Package is **effective** regarding the objective of clarification and simplification. Indeed, the 2012 SGEI Package did simplify the 2005 SGEI package with, for instance, the introduction of an SGEI-specific *de minimis* Regulation. It also clarified certain basic concepts relevant for the application of the SGEI rules. However, the evaluation indicates that there is still room for improvement, in particular to clarify certain concepts such as economic/non-economic activity, effect on trade, reasonable profit, market failure and social housing. Moreover, from the evaluation it appears that there could be a need to increase the SGEI *de minimis* ceiling and to align the SGEI *de minimis* Regulation with the general *de minimis* Regulation.

With regard to **efficiency**, the evaluation suggests that the SGEI *de minimis* Regulation and the modification of the SGEI Decision have had a positive impact on the reduction of the administrative burden of public authorities. However, there still seems to be room for improvement to decrease this burden, in particular with regard to the monitoring of the SGEI *de minimis* Regulation and transparency requirements. The evaluation also suggests that costs associated with the application of the requirements set by the SGEI rules should be reduced.

With regard to **coherence**, the evaluation suggests that the State aid rules that make up the 2012 SGEI Package are internally coherent. It appears however that there is a need for stronger coherence between the 2012 SGEI Package and Protocol 26 on services of general interest annexed to the TEU and TFEU, Article 14 TFEU, the Charter of Fundamental Rights and the European Pillar of Social Rights. In addition, there appear to be certain misalignments between the general and the SGEI-specific *de minimis* Regulations as regards the notion of “single undertaking”, the provisions on mergers and acquisitions, and the application of the *de minimis* rules to undertakings in difficulty.

Overall, the existence of the SGEI rules subject to the evaluation has an **EU added value** that is acknowledged by stakeholders. Indeed, there appears to be a broad agreement that the 2012 SGEI Package brought a better division of tasks between Member States and the Commission, although more methodological guidance from the Commission would be welcomed. Also, there is consensus that the 2012 SGEI Package did manage to provide a stable legal environment for Member States.

As to the **relevance** of the rules, the evaluation indicated that the objectives of the 2012 SGEI Package are, to a large extent, appropriate to meet the needs within the EU. However, the potential impact and the uncertainties brought by the COVID-19 crisis and the Russian war of aggression against Ukraine cannot be fully evaluated yet. The evaluation also suggests that further adaptations may be considered to fully meet the needs of stakeholders such as the recognition in the SGEI rules of operators active in the so-called “social economy” or the recognition of quality services.

## **5.2. Lessons learned**

The evaluation indicates that the 2012 SGEI Package as regards health and social services is broadly fit for purpose. It therefore appears to the Commission services that the 2012 SGEI Package (as regards health and social services) was largely successful in achieving two of its main objectives, as it significantly clarified and simplified the rules applicable to SGEI providers which had a positive impact on citizens, undertakings, and public administrations.

However, it also results from the evaluation a call for further clarification of certain concepts, either related to the notion of State aid (i.e. economic/non-economic activity, effect on trade) or concepts linked the SGEI rules (e.g. reasonable profit, market failure, etc.). The review of certain rules and/or the update of certain concepts therefore appears to be necessary to further clarify and simplify the 2012 SGEI Package in order for the rules to be exploited to their full potential and to make sure *inter alia* that undertakings and public administrations get the legal certainty they look for.

The EUR 500 000 ceiling of the SGEI *de minimis* Regulation in particular seems to have significantly clarified and simplified the granting of SGEIs for providers which receive public service compensations below that amount. In addition, it reduced the administrative burden for Member States as they no longer need to check compliance with the *Altmark* criteria or fulfil the conditions of the SGEI Decision for compensations below EUR 500 000.

Nevertheless, it seems that there would be a need to assess whether the current EUR 500 000 ceiling is still appropriate in the current situation. Similarly, coherence between certain concepts of the SGEI *de minimis* Regulation (single undertaking, undertakings in difficulty and inclusion of the requirement to take into account mergers and acquisitions) with the general *de minimis* Regulation appears to need further thinking, in order to further facilitate the application of the SGEI *de minimis* Regulation.

## ANNEX I. PROCEDURAL INFORMATION

### 1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

Commission Directorate-General for Competition (DG Competition).

### 2. ORGANISATION AND TIMING

In the second half of 2019, the Commission services launched an evaluation exercise the purpose of which was to check if the rules on health and social services of general economic interest ('the services') meet their objectives under the 2012 services package.

The Roadmap was published on 17 June 2019 and set out the context, purpose and scope of the evaluation exercise. Stakeholders had until 15 July 2019 to comment on the Roadmap.

The first Inter-Service Steering Group (ISSG) was set up on 24 June 2019 and gathered representatives from the Commission's Secretariat General, and Directorates-General: REGIO, GROW, SANTE, EMPL, and the LEGAL SERVICE. The ISSG was consulted on the scope SGEI rules and the evaluation to be carried out.

The ISSG was consulted by e-mail on the factual summary report of the public consultation on 25 March 2020 and on the draft expert study on 13 April 2021.

A public consultation was open from 31 July 2019 to 4 December 2019 on the Better Regulation Portal. DG Competition launched targeted consultations in the form of online questionnaires (EU Survey tool) addressed to the main stakeholders and interested parties on specific issues related to the evaluated rules.

The Evaluation was also supported by a study carried out on specific aspects of the evaluated rules across ten Member States, i.e. France, Ireland, Germany, the Czech Republic, Latvia, Portugal, Romania, Croatia, Sweden and the Netherlands. The selection of the Member States was inspired by case practice. The objective of that study was to receive an independent evidence-based assessment on how the rules worked. The Study provides: an overview of sector and market trends since 2012 (Task 1); an analysis of how competition on the market has evolved since 2012 (Task 2); an analysis of the extent to which Member States are aware of possible State aid implications of policy and market trends (Task 3); and an assessment of the effectiveness, efficiency, relevance and EU added value of the 2012 SGEI Package in so far as healthcare and social housing are concerned. The Study is 'backward-looking', focusing on the period following the entry into force of the 2012 SGEI Package until 2020, although the period prior to 2012 was also considered to undertake a counterfactual analysis.

The expert who carried out the above-mentioned study completed the data provided by the consultation with an online survey. The survey was launched in two stages:

- i. First stage: from 13 October 2020 to 7 December 2020 for nine Member States.
- ii. Second stage: from 16 February 2021 to 26 February 2021. The survey was re-opened to include additional respondents from Romania.

A targeted consultation was also carried out inviting the national authorities to express themselves.

The ISG met for a third time on 10 November 2022 to discuss the draft version of the present SWD.

### **Agenda planning – Timing**

<b>Date</b>	<b>Description</b>
17 June 2019 - 15 July 2019	Roadmap
24 June 2019	1 <sup>st</sup> ISSG meeting
31 July 2019 - 4 December 2019	Public consultations
25 March 2020 and 13 April 2021	2 <sup>nd</sup> ISSG consultation by e-mail
10 November 2022	3 <sup>rd</sup> ISSG meeting

### **3. EXCEPTIONS TO THE BETTER REGULATION GUIDELINES**

No exceptions were made to the Better Regulation Guidelines<sup>163</sup> during this Evaluation.

### **4. CONSULTATION OF THE RSB (IF APPLICABLE)**

N/A

### **5. EVIDENCE, SOURCES AND QUALITY**

The Evaluation was supported by an external study. The study was procured in the framework of a tender under the reference number No COP/2019/006<sup>164</sup> of 24 December 2019.

Data sources included the State aid Scoreboard<sup>165</sup>, which comprises aid expenditure made by Member States falling under the scope of Article 107(1) TFEU. Internal Commission/DG Competition data used for the internal assessment include for instance interpretation questions by Member States. DG Competition's case practice was a major source of insight. Court judgements, desk research, literature review and internal statistics have also played a role in data gathering. The Commission services also used several other external reports and several bilateral meetings were organised with stakeholders at their request. The Commission services also used several other reports.

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<sup>163</sup> [https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en).

<sup>164</sup> <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=5308>.

<sup>165</sup> [https://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html#what](https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html#what).

The current Evaluation was based on a wide range of data sources/inputs.

Indeed, as mentioned in this SWD, the evaluation involved both internal analyses by the Commission services and an expert study prepared by an external consultant.

As regards its own analysis, the Commission services used, in addition to the results of the public consultation and the targeted stakeholder consultation, existing studies, experience from its case practice, internal statistics and data from the SGEI reports submitted by the Member States every two years.

## **1. DATA SOURCES**

### **1.1. Consultation activities**

#### **1.1.1. Roadmap consultation**

Stakeholders had the opportunity to provide their feedback on the Roadmap on the website<sup>166</sup> from 17 June 2019 to 15 July 2019.

#### **1.1.2. A public consultation**

The open public consultation on the evaluation of SGEI rules applicable to health and social services and the SGEI *de minimis* Regulation ran between 31 July 2019 and 4 December 2019.

The objective of this public consultation was to obtain the views of citizens, public authorities and other relevant stakeholders on the effectiveness, efficiency, coherence, relevance and EU added value of the 2012 Service of general Interest (SGEI) package with regard to health and social services, as well as to other services in the specific case of the SGEI *de minimis* Regulation.

The public consultation took the form of an online survey, with a mix of closed and open questions. Participants were able to reply in any of the EU's official languages.

This public consultation was also promoted through Twitter, DG Competition's State aid Newsletter and DG Competition's website. The statistics computed in this summary are based only on contributions to the public consultation submitted through the online questionnaire. The input has been analysed using a data analysis tool, complemented by manual analysis.

The factual summary of the answers is available in Annex 5.

#### **1.1.3. A targeted consultation**

At the same time of the public consultation, (also between the 31 July 2019 and 4 December 2019), the Commission launched a targeted consultation, addressed to

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<sup>166</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation-\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation-_en).

Member States directly impacted by State aid rules applicable to health and social services. The targeted online survey was similar to the survey of the public consultation. However, it included additional questions specifically targeted to the experience of Member States with the 2012 SGEI Package. Given that it is the Member States and other public authorities (for instance regional and local authorities) who design public policies and apply the State aid rules, their responses are of particular relevance to the analysis.

## 1.2. Expert study

The Commission commissioned an external study with the objective to develop a better understanding of sector developments and the functioning of competition in the sectors concerned.

It was conducted by Ernst and Young Advisory SAS and published on 2 September 2021<sup>167</sup>. It was carried out in the course of 2020, also making use of the results of the public and targeted consultation mentioned above. The expert study is ‘backward-looking’, focusing on the period following the entry into force of the 2012 SGEI Package until 2020, although the period prior to 2012 was also considered to undertake a counterfactual analysis.

The expert study focused on healthcare (and in particular on hospitals) and social housing. It focuses on the following Member States: France, Ireland, Germany, Czech Republic, Latvia, Portugal, Romania, Croatia, Sweden and the Netherlands.

The expert study provides an overview of sector and market trends since 2012; an analysis of how competition on the market has evolved since 2012; an analysis of the extent to which Member States are aware of possible State aid implications of policy and market trends; and an assessment of the effectiveness, efficiency, relevance and EU added value of the 2012 SGEI Package in so far as healthcare and social housing are concerned.

The Study focused on a **number of data collection tools**.

A core tool of the methodology was **documentary review** to gather both quantitative and qualitative data on market trends in relation to the application of the 2012 SGEI Package. It aimed at providing a strong understanding of the main changes brought by the 2012 SGEI Package, the issues at stake but also the developments in terms of market, policies or national reforms. For the Study legislative documents, documents from international institutions, reports from NGOs and think tanks, national reports and sources and written contributions sent by interviewees that answered questionnaires deployed for the Study were consulted.

**In-depth statistical research** was also needed to collect the necessary quantitative data for the Study. The Member States’ biennial SGEI reports, which they need to submit under Article 9 of the SGEI Decision, provided an overview of the expenditure related to SGEIs in the Member States covered by the Study, with the OECD and Eurostat databases providing an overview of the Member State expenditure related to healthcare and housing as well as the European trends. The national statistical databases complement this data and provide details on certain sectoral trends.

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<sup>167</sup> Commission, Directorate General for Competition, final report prepared by EY France (Jessica Chamba, Emilie Balbirnie, Timothé Peroz, Soumia Benaich), Study on market trends in healthcare and social housing and EU state aid implications, 2021 (published on 3 September 2021 and available here: <https://op.europa.eu/s/wlXK>).

**Interviews** were undertaken with stakeholders from: national/local authorities in charge of the healthcare or/and social housing sectors; national/local authorities in charge of implementing and monitoring SGEIs; providers (healthcare and social housing); national industry and consumer associations; and EU NGOs and associations (89 in total). The interviews aimed to provide qualitative data relating to the overall effectiveness, efficiency, relevance and EU added value of the 2012 SGEI Package. An **Online Survey** was sent to the above-mentioned stakeholder groups at national level. 53 stakeholders replied, covering all Member States falling under the scope of the Study. The analysis of the Online Survey was supplemented by analysis of responses to the Commission's Open Public Consultation and targeted consultation disseminated prior to the launch of the Study.

Finally, **10 Member State fiches** were prepared for the Member States covered by the Study in order to provide an overview of: the market situation in the healthcare and social housing sectors; the reforms that have impacted the legislative landscape and the regulatory framework in the Member States; and the government expenditure for healthcare and social housing as well as the evolution in the number and type of providers and competition.

### **1.3. Other data sources**

One of the important data sources used by the Commission in its evaluation are the Member States' biennial SGEI reports. These reports are submitted by Member States under Article 9 of the SGEI Decision and under paragraph 62 of the SGEI Framework, and provide an overview of the SGEI expenditure and entrustments in each Member State.<sup>168</sup>

DG Competition has also conducted its own internal assessment of the application of the 2012 SGEI Package, the sectors governed by those rules and its market developments. Internal Commission data used for the internal assessment include for instance monitoring results and interpretation questions by Member States. DG Competition's case practice is also a major source of insight.

Court judgments, desk research, literature review and internal statistics have in addition played a role in data gathering. DG Competition used as well several other publicly available reports and data such as data from EUROSTAT and the OECD.

Finally, bilateral meetings were held with stakeholders at their request. Over the years, the Commission services met with organisations in the field of (social) housing, welfare services and other social services.<sup>169</sup> Commission staff also participated to a number of forums and conferences on the matter.<sup>170</sup>

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<sup>168</sup> The reports are available online: [https://ec.europa.eu/competition-policy/state-aid/legislation/sgei\\_en](https://ec.europa.eu/competition-policy/state-aid/legislation/sgei_en).

<sup>169</sup> As examples, the Commission services met with Build Europe, the Union Nationale des Fédérations d'Organismes HLM, the Fédération Française des Entreprises de Crèches and the Fédération Française des services à la personne et de proximité, Aedes, Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege e.V. (BAGFW), Housing Europe, etc.

<sup>170</sup> As examples webinar on SGEI organised by the Cercle Europe et Economie Sociale (CEES), Conference « Europe et Services Publics Locaux » organised by the Association Française du Conseil des Communes et Régions d'Europe.

## 2. LIMITATIONS AND CHALLENGES OF THE EVALUATION

One limitation of the evaluation stems from the fact that for certain services the impact of the rules is not fully tangible yet. The effects of State aid measures often only materialise with a certain delay and not sufficient time has elapsed in order to fully capture the impact since the 2012 SGEI Package entered into force.

This limitation is increased by: (i) the time gap due to the set-up of the Member States' reporting obligations; and (ii) the fact that the obligation of reporting is every two years, which makes the evaluation of the 2012 SGEI Package particularly difficult.

In some areas, the data are not available due to the lack of an obligation for the Member States to gather and report such data (for example SGEIs falling under the SGEI Communication or the SGEI *de minimis* Regulation). In other areas, the available data are not sufficiently granular in order to enable a full analysis of all types of aid. It also has to be recalled that with regard to exempted measures – which are not notified to the Commission – limited *ex ante* information is available. *Ex post* there is basic information available for all measures as reported by the Member States in their biennial SGEI reports. More detailed information is available but only for a sample of SGEI exempted measures (monitoring, transparency for measure above the threshold and, if applicable, complaints).

To this one needs to add the difficulty of gathering data in State aid control as opposed to other competition instruments, such as mergers and antitrust, which partially stems from the fact that the counterpart of the Commission in the proceedings is the Member States and information gathering tools are limited (and many of them relatively recent) under the State aid Procedural Regulation.

Further, and considering the scope of the evaluation (limited to health and social services), there have been only a limited number of decisions adopted/schemes put in place in these sectors, limiting thus the practical experience of the Commission.

Furthermore, despite DG Competition's efforts to make stakeholders aware of the public consultation, the total number of replies was limited. The public consultation generated 51 replies, which is a very small number compared to the reference population of citizens, companies and public authorities potentially affected by the SGEI rules.

Finally, this SWD does not take into account the impact of the COVID-19 crisis and Russian war of aggression against Ukraine (which are unprecedented situations) and possible future policy measures which might be adopted by the Commission. Indeed, the public and targeted consultation were closed before the COVID-19 crisis and the Russian war of aggression against Ukraine<sup>171</sup>. As for the expert study, it was carried out during the COVID-19 crisis<sup>172</sup>. However, the study was backward-looking and focused on the period 31 January 2012 to 31 December 2019. As a result, it did not take into account the COVID-19 crisis and the Russian war of aggression against Ukraine. It should be stressed that COVID-specific issues were addressed under that temporary Framework (see section 3.3.1) and issues related to the Russian war of aggression against Ukraine were addressed under the Temporary Crisis Framework (see section 3.3.2).

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<sup>171</sup> The consultations were conducted between 31 July 2019 and 4 December 2019.

<sup>172</sup> The expert study was conducted between June 2020 and May 2021.

## 2.1. Method of the evaluation

An evaluation needs an appropriate point of comparison to be able to assess the change that the EU action has brought over time. In general, the main baseline (or counterfactual) is a situation in the absence of EU intervention.<sup>173</sup>

In the current situation, the EU intervention is the adoption of the 2012 SGEI Package. The present evaluation assesses the reform of the SGEI rules introduced by the 2012 SGEI Package as regards health and social services. Therefore, the baseline scenario is one in which the 2005 SGEI Package (2005 SGEI Decision and the 2005 SGEI Framework) would have continued to apply.<sup>174</sup>

The current evaluation does not assess the unlikely scenario that the rules in force prior to 2012 SGEI Package would have expired (in particular the 2005 SGEI Framework). The consequence of the absence of substantive rules would be the direct application of the TFEU, i.e. the notification of each and every measure constituting State aid in the meaning of Article 107(1) TFEU and its compatibility assessment by the Commission directly under Article 106(2) TFEU without any substantive guidance by the relevant soft law.

The current evaluation also does not assess the existence/absence of State aid control as such, as the general prohibition of State aid is enshrined in the Treaty since 1957.

The evaluation questions and criteria are presented in Annex 3 below.

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<sup>173</sup> It has to be noted that the construction of a baseline scenario for State aid is very complex and may be specific to the facts of the case. See also Section 2.1.7

<sup>174</sup> For the 2005 SGEI Decision, it would have remained unchanged and continued to apply. For the 2005 SGEI Framework, it would have been prolonged beyond its expiry date, which was in November 2011.

## ANNEX III. EVALUATION MATRIX

### Effectiveness

1. To what extent have the updated state aid rules for SGEIs facilitated the provision of health and social SGEIs adapted to the population's needs?
  - a. To what extent has the simplification of the rules enabled Member States to pursue aid measures for health and social SGEIs?
  - b. If there are significant differences between Member States/sub-sectors what caused them? How do these differences link to the clarification of health and social SGEIs concepts?
  - c. Which specific requirements have contributed to or stood in the way of achieving the provision of health and social SGEIs?

### Efficiency

2. What are the costs and benefits (both monetary and non-monetary) associated with the application of the requirements set by the rules for health and social SGEIs for the different stakeholders?
  - a. To what extent have the specific rules for health and social SGEIs enabled the provision of social services without distorting competition disproportionately?
  - b. To what extent have the specific rules for health and social SGEIs enabled the provision of social services without causing disproportionate administrative burden for Member States?

### Relevance

3. How well adapted are the SGEI rules for health and social services to the development of the society, markets and social policy?
  - a. Is there evidence for the statements made in recital 11 of the SGEI Decision that the risk of distortion of competition in health and social SGEIs is still lower than in other sectors?
  - b. To what extent is the approach for health and social SGEIs introduced in the 2012 SGEI Decision still justified (allowing unlimited compensation and no notification as long as the conditions of the 2012 SGEI Decision are met)?
4. To what extent are the Member States aware of the (relevance of the) rules applicable to health and social SGEIs?
  - a. To what extent do Member States understand the applicability of (some of) the rules to each of their health and social SGEIs?

### Coherence

5. How well do the 2012 State aid rules for health and social SGEIs correspond to the wider EU policy applicable to health and social SGEIs - such as article 14 and 168 TFEU and Protocol 26 to the TFEU – and to other State aid instruments?
  - a. How do the 2012 State aid rules for health and social SGEIs compare to, complement and interact with other State aid instruments (such as the SGEI *de minimis* Regulation, R&R guidelines or the GBER)?

6. Is the 2012 SGEI Package applicable to health and social SGEIs internally consistent and coherent? Are there any overlaps, contradictions or missing links between the Decision, Framework and Communication?

**EU added value**

7. Has the 2012 SGEI Package allowed for a better task allocation between the Commission and Member States?
8. Have the rules helped in ensuring legal certainty?

**ANNEX IV. OVERVIEW OF BENEFITS AND COSTS**

*Table 1. Overview of costs and benefits identified in the evaluation*

	Citizens/Consumers		Businesses		Administrations		Others		
	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	
<b>[Cost or Benefit description]:</b>									
<p align="center"><b>Costs:.</b></p> <p><b>Direct compliance costs</b> (adjustment costs, administrative costs, regulatory charges)</p> <p><b>Enforcement costs:</b> (costs associated with activities linked to the implementation of an initiative such as monitoring, inspections and adjudication/litigation)</p> <p><b>Indirect costs</b> (indirect compliance costs or other indirect costs such as transaction costs)</p>	<b>Recurrent</b>	0  The evaluation has not identified any quantifiable costs	The evaluation has not identified direct compliance costs, enforcement costs or indirect costs	0  The evaluation has not identified any quantifiable costs	The evaluation has not identified direct compliance costs, enforcement costs or indirect costs for businesses.	0  The evaluation has not identified any quantifiable costs	The evaluation has not identified any direct compliance costs. However, it had identified enforcement and indirect costs. Indeed, the complexity of certain concepts may require technical expertise, which at times might lead to an increase in terms of time spent for interpretation and implementation of those concepts as well as a need for additional staff members or external experts (legal advisers, consultants). e.g. SGEI rules with, for instance, the introduction of an SGEI-specific de minimis Regulation or the enlargement of the notification exemptions.	N/A	N/A

<p style="text-align: center;"><b>Benefits:</b></p> <p><b>Direct benefits</b> (such as improved well being: changes in pollution levels, safety, health, employment; market efficiency)</p> <p><b>Indirect benefits</b> (such as wider economic benefits, macroeconomic benefits, social impacts, environmental impacts)</p>	<b>Recurrent</b>	<p>0</p> <p>The evaluation has not identified any quantifiable benefits</p>	<p>For citizens and consumers, the adoption of the SGEI rules implied an easier access to certain SGEIs</p>	<p>0</p> <p>The evaluation has not identified any quantifiable benefits</p>	<p>The 2012 SGEI Package simplified the SGEI rules with, for instance, the introduction of an SGEI-specific <i>de minimis</i> Regulation or the enlargement of the notification exemptions. It also clarified certain basic concepts relevant for the application of the SGEI rules. As a result, there is a simpler legal framework for SGEI provision.</p>	<p>0</p> <p>The evaluation has not identified any quantifiable benefits</p>	<p>The 2012 SGEI Package simplified the SGEI rules with, for instance, the introduction of an SGEI-specific <i>de minimis</i> Regulation or the enlargement of the notification exemptions. It also clarified certain basic concepts relevant for the application of the SGEI rules. As a result, there is a simpler legal framework for SGEI provision.</p> <p>Overall, the evaluation concludes that the benefits of the 2012 SGEI Package are higher than the costs and that the novelties introduced by the 2012 SGEI Package facilitated to a certain extent the provision of SGEIs.</p>	N/A	N/A
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**TABLE 2: Simplification and burden reduction (savings already achieved)**

	Citizens/Consumers/Workers		Businesses		Administrations		Others	
	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment
<b>Includes direct compliance cost savings; enforcement cost savings; and indirect cost savings.</b>								
<b>Recurrent</b>	0	Citizens/consumers are not directly concerned by the administrative burden	0	Overall, the evaluation suggests that businesses consider that the level of administrative burden after adoption of the 2012 SGEI Package is rather stable in comparison to the situation existing with the previous 2005 SGEI package.	0	The enlargement of the notification exemption for certain social services and the adoption of the SGEI <i>de minimis</i> Regulation simplified the implementation of the rules. Due to the absence of prior notification for these SGEIs, it helped to reduce the administrative burden and the workload of public authorities. However, the complexity of the method for cost calculation and the interpretations of legal terms, the monitoring of the absence of compensation itself can be burdensome for the authorities.  The evaluation suggests that the administrative burden after the 2012 SGEI package is stable or has slightly decreased.	N/A	N/A

**PART II: Potential simplification and burden reduction (savings)**

	Citizens/Consumers/Workers		Businesses		Administrations		Others	
	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment
<b>Includes direct compliance cost savings; enforcement cost savings; and indirect cost savings.</b>								
<b>Recurrent</b>	0	Citizens/consumers are not directly concerned by the administrative burden	0	Additional simplification and clarification of the applicable SGEI rules could be necessary to reduce further the administrative burden. As an example, the SGEI <i>de minimis</i> ceiling could be increased and certain concepts could be clarified (e.g. concepts of economic/non-economic activities, reasonable profit, etc.)	0	Additional simplification and clarification of the applicable SGEI rules could be necessary to reduce further the administrative burden. As an example, the SGEI <i>de minimis</i> ceiling could be increased and certain concepts could be clarified (e.g. concepts of economic/non-economic activities, reasonable profit, etc.)	N/A	N/A

## 1. INTRODUCTION

This report covers feedback and input from public authorities, associations, companies and other organisations (“stakeholders”) as well as citizens as regards the Evaluation on the SGEI rules.

The objective of the consultations was to gather evidence from stakeholders on the five evaluation criteria including for the purpose of verifying to which extent the SGEI rules reached the envisaged objectives under the 2012 SGEI Package. A separate question was asked as regards the SGEI *de minimis* Regulation inquiring whether the amount of aid that can be granted under the SGEI *de minimis* Regulation, i.e. up to EUR 500 000 over any period of three fiscal years, is still appropriate.

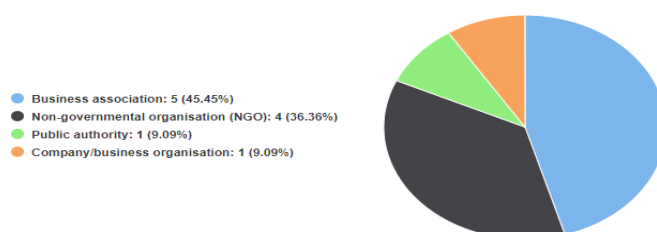
The Commission carried out an **open public consultation** in order to gather inputs from a broad range of stakeholders. The public consultation aimed at reaching out to all relevant stakeholders and gave unlimited access to everybody who wanted to contribute. It took the form of an extensive questionnaire covering certain provisions of the SGEI rules.

In addition, DG Competition made use of **targeted consultations** in the form of online questionnaires addressed to the main stakeholders beyond the general public on specific issues related to the SGEI rules. The stakeholders for the targeted questionnaires included those who are directly impacted by those rules, such as Member States, regional and local authorities, and other granting authorities.

## 2. FEEDBACK ON THE COMMISSION ROADMAP

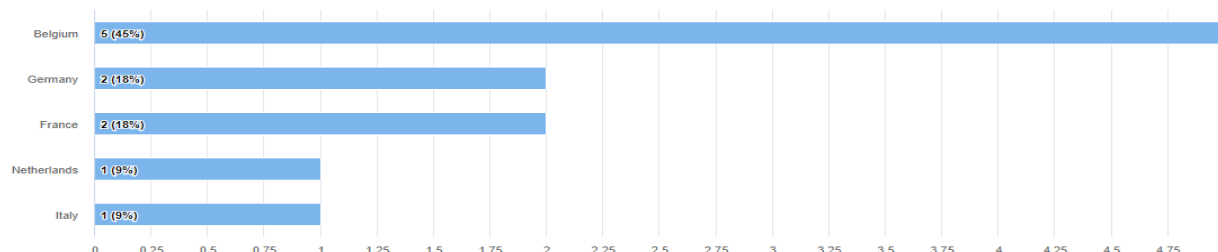
Stakeholders had the opportunity to provide their feedback on a Commission roadmap on the the SGEI Rules<sup>175</sup> from 17 June 2019 to 15 July 2019.

By category of respondent



<sup>175</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation/feedback\\_en?p\\_id=5544255](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation/feedback_en?p_id=5544255).

#### By country



A total of 11 stakeholders submitted their feedback on the Commission roadmap. These were from Business associations (5), Non-gouvernemental organisations (4), Public authorities (1) and companies / business organisations (1). As regards the geographical repartition, most answers stemmed from Belgium (5) followed by Germany and France (2 replies each) and Netherlands and Italy (1 each).

The submissions largely supported the Commission's intention to evaluate the SGEI State aid rules under the Evaluation.

Many submissions received by the Commission concerned the housing sector and tackled the increasing price levels of locative spaces in EU cities which are often no longer affordable for average-income families and drew the attention on the necessity of the public hand to intervene on the housing market.

### 3. OPEN PUBLIC CONSULTATION

#### 3.1. Introduction

An open public consultation, meeting the Commission's minimum standards, was open from 31 July 2019 to 4 December 2019.<sup>176</sup>

The objective of this public consultation was to obtain the views of citizens, public authorities and other relevant stakeholders on the effectiveness, efficiency, coherence, relevance and EU added value of the 2012 Service of general Interest (SGEI) package with regard to health and social services, as well as to other services in the specific case of the SGEI *de minimis* Regulation.

The public consultation, targeting citizens and stakeholders, took the form of an online survey<sup>177</sup> published on the Commission's Better Regulation Portal, which included open and closed questions. The questionnaire was published in 23 EU official languages<sup>178</sup>. Participants to the questionnaires could reply in any of those languages.

This public consultation was also promoted through Twitter, DG Competition's State aid Newsletter, and DG Competition's website. In addition, the European Parliament's ECON committee was informed about the public consultation.

The input has been analysed using a data analysis tool, complemented by manual analysis. The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analysing and visualising replies to public consultations.

<sup>176</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation-public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-State-subsidy-rules-for-health-and-social-services-of-general-economic-interest-evaluation-public-consultation_en).

<sup>177</sup> EUSurvey tool.

<sup>178</sup> With the exception of Irish.

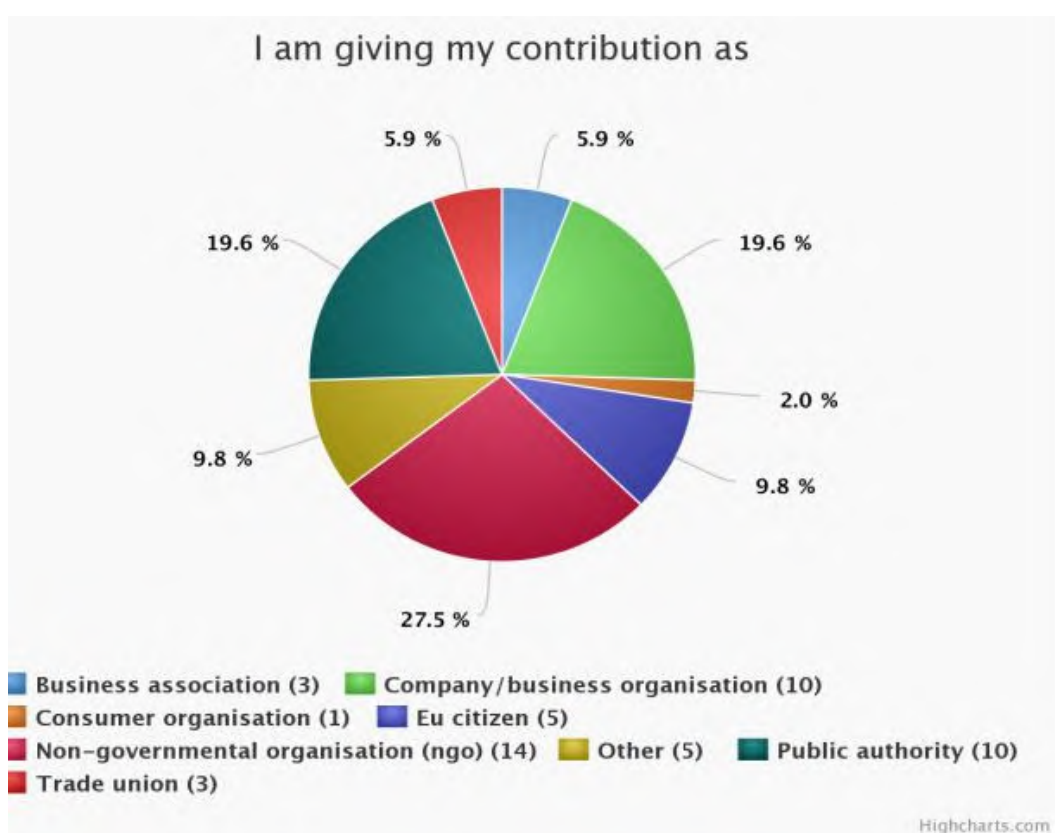
### 3.2. Factual summary of the contributions received in the context of the public consultation on the SGEI Rules<sup>179</sup>

The factual summary below only takes into account the replies to the closed questions. Questions not presented in this document constitute open questions.

#### 3.2.1. Overview of the respondents

In total, the public consultation received 51 replies: 31 from organisations such as business associations, company/business organisations, consumer organisations, NGOs and trade unions), 10 from public authorities at different levels, 5 from individuals and 5 from other respondents (see figure 1 for details). “Other respondents” include for example European umbrella organisations and health/welfare organisations.

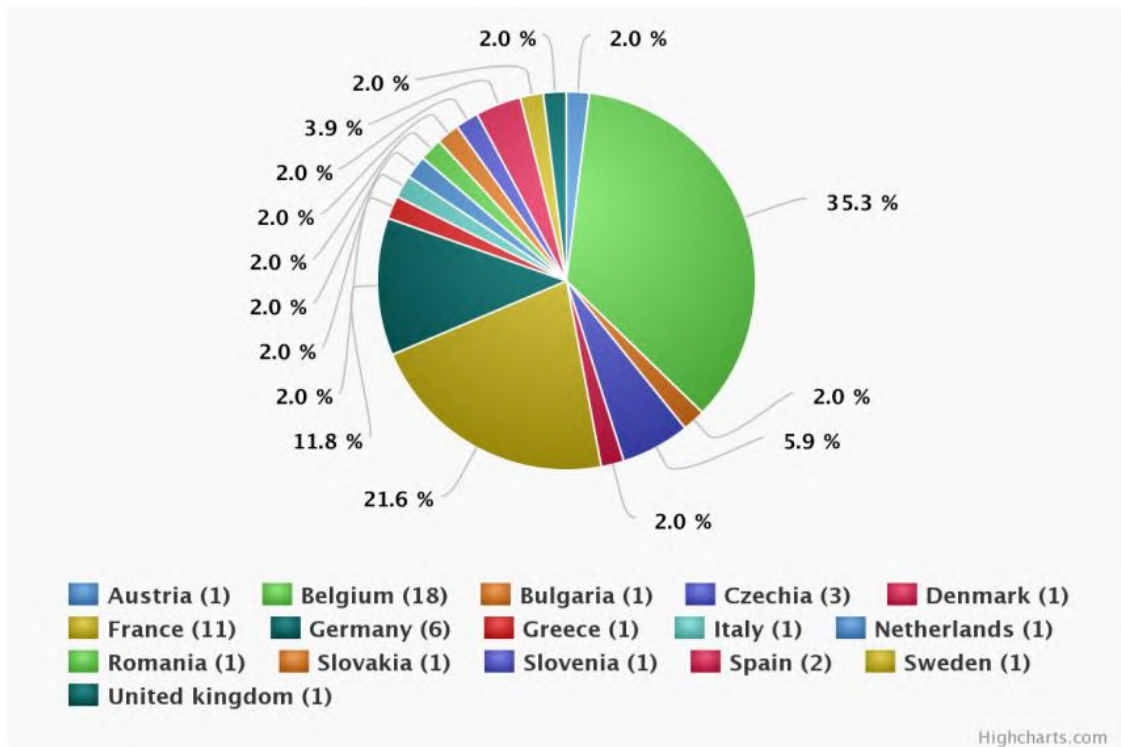
Figure 1: Profile of the respondents



The most common languages of contribution were English and French (17 each) and German (7). All the replies came from EU countries, mainly from Belgium (18), France (11) and Germany (6). The origin of the respondents is represented in Figure 2.

<sup>179</sup> This section should be regarded solely as a summary of the contributions made by stakeholder during the public consultation on the State aid rules. It cannot in any circumstances be regarded as the official position of the European Commission or its services. This section only provides a factual summary. This factual summary was published on the Commission’s Better Regulation Portal on 3 April 2020.

Figure 2: Country of origin



The questionnaire contained a total of 46 questions (including sub questions), with a mix of closed and open questions, which were devised around the five evaluation criteria effectiveness, efficiency, coherence, relevance and EU added value. In addition, it contains a specific section on the SGEI *de minimis* Regulation. All closed questions were obligatory, but the respondents had the choice of “I Do not know” and “Not relevant for me” options.

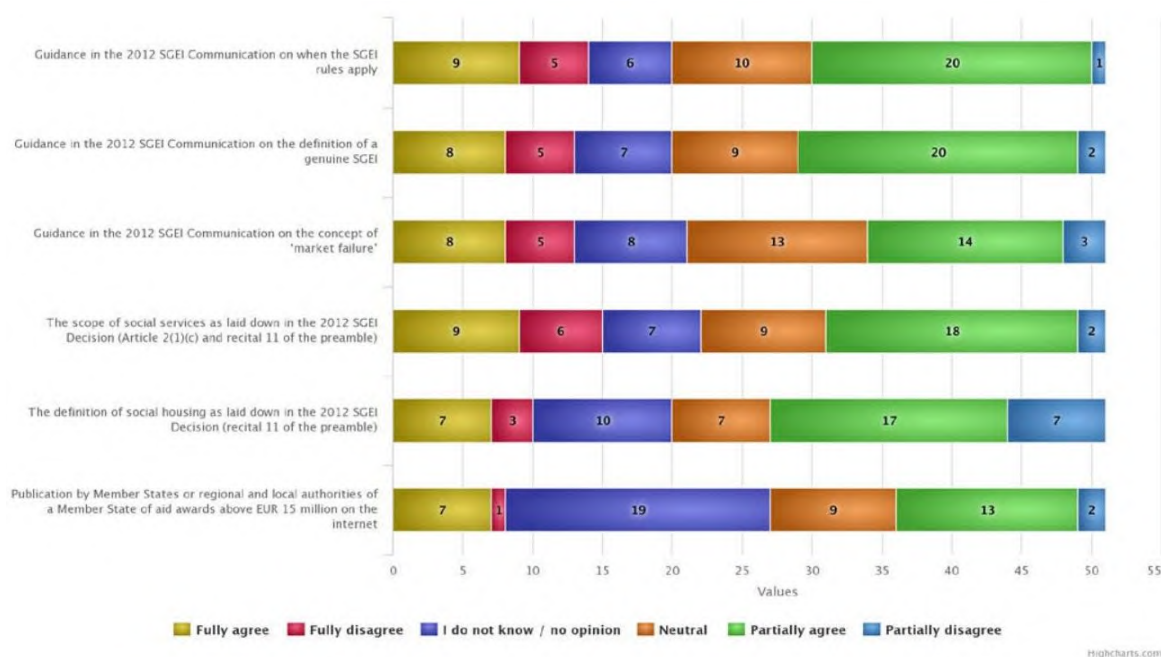
The public consultation covered all four documents part of the 2012 SGEI Package and subject of the Evaluation. However, for some respondents only part of the 2012 SGEI Package might have been relevant. This could be one of the reasons why the percentage of “I Do not know” and “not relevant for me” responses was fairly high.

### 3.2.2. Effectiveness (Have the objectives been met?)

In order to evaluate whether the SGEI rules for health and social services met their objectives, stakeholders were asked to answer a set of twelve questions.

**Question 18** inquired whether some specific factors facilitated compliance with the SGEI rules applicable to health and social services.

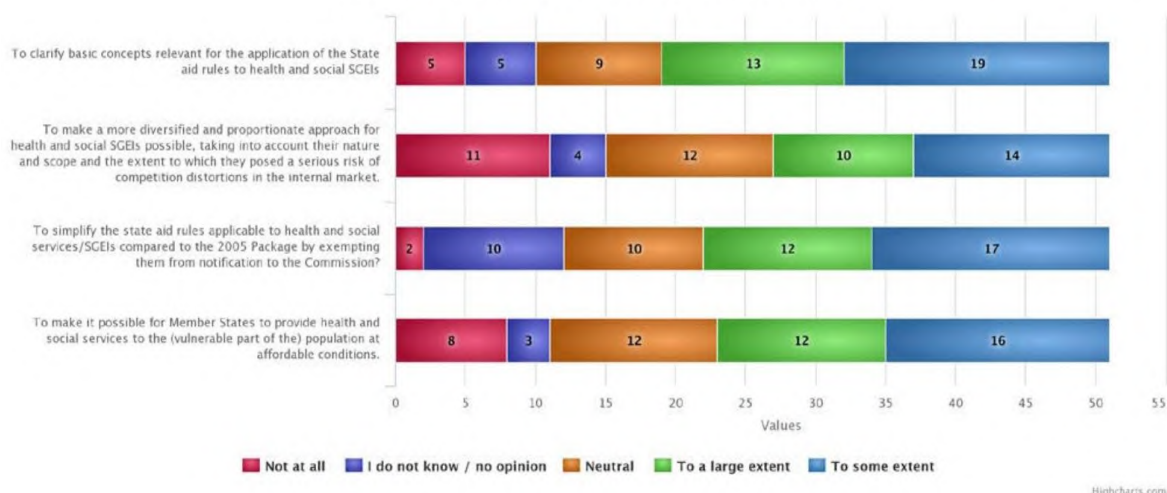
*Figure 3: Question 18 - Did the factors below facilitate the compliance with the SGEI rules applicable to health and social services?*



**Question 21** inquired whether the four main objectives of the SGEI rules applicable to health and social services were achieved while maintaining a competitive internal market.

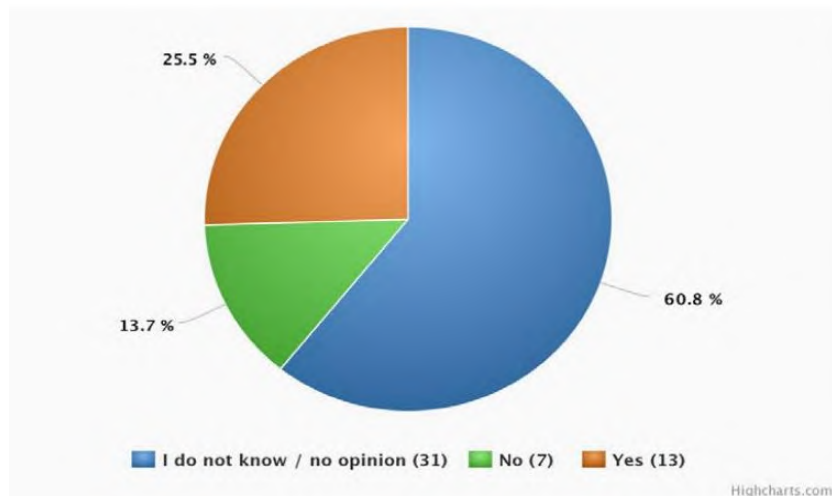
*Figure 4: Question 21 - Were the objectives of the SGEI rules applicable to health and social services achieved while maintaining a competitive internal market?*

Based on your experience, have the SGEI rules applicable to health and social services achieved the objectives listed below while maintaining a competitive internal market?



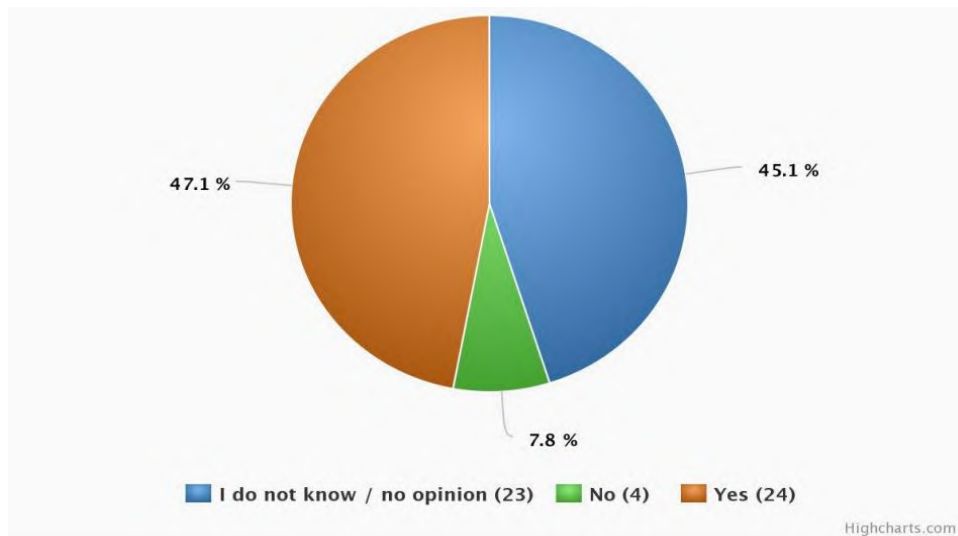
**Question 23** inquired whether the 2012 SGEI Package with regard to health and social services had any positive impacts that were not expected or not intended. 31 out of 51 respondents did not express a view. 13 respondents who expressed a view were of the opinion that the 2012 SGEI rules had positive impacts that were not expected or not intended. 6 of them identified themselves as a “company/business organisations”. Other type of respondents include public authorities (2), NGOs (3), trade unions (1) and other (1).

Figure 5: Unexpected or unintended positive impacts of the 2012 SGEI Package.



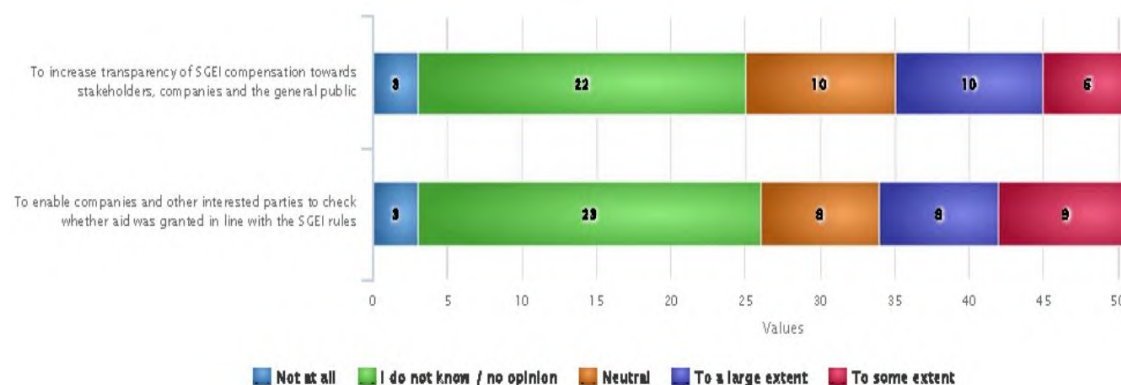
**Question 25** inquired whether the 2012 SGEI Package with regard to health and social services had any negative impacts that were not expected or not intended. 24 respondents who expressed a view were of the opinion that the 2012 SGEI rules had negative impacts that were not expected or not intended.

Figure 5: Unexpected or unintended negative impacts of the 2012 SGEI Package.



**Question 27** inquired whether the publication on the internet or by other means of SGEI compensation for health and social services above EUR 15 million made it easier to check the entrustment acts, possibly to challenge them and whether it made aid transparent for stakeholders, companies and the general public. 22 (increasing transparency towards stakeholders), respectively 23 (enable companies and other interested parties to check whether aid was granted in line with the rules) respondents did not have an opinion on this. 16 respondents who expressed a view were of the opinion that the publication obligation increased, at least partially, the transparency of SGEI compensation. 17 respondents were of the opinion that it enabled, at least partially, interested parties to check whether aid is granted in line with SGEI rules.

Figure 4: Question 27 - Did the publication on the internet or by other means of SGEI compensation for health and social services above EUR 15 million make it easier to check the entrustment acts, possibly to challenge them and did it make aid transparent for you, (other) stakeholders and companies and the general public?

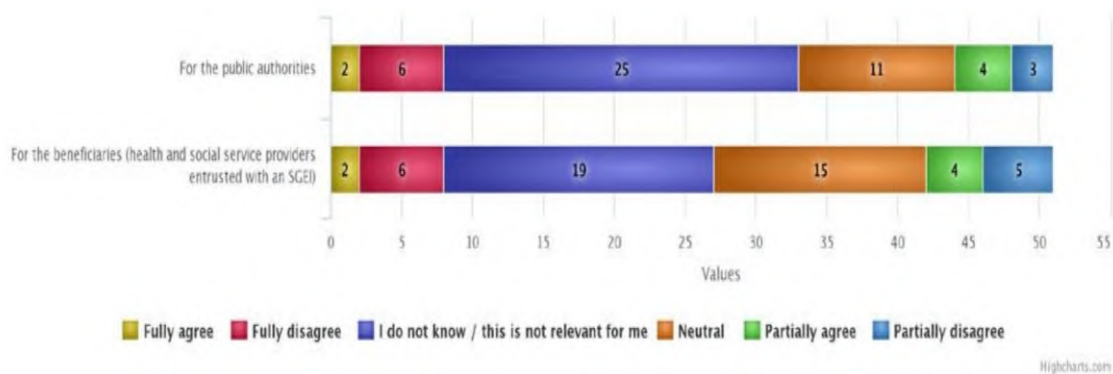


### 3.2.3. Efficiency (Were the costs involved proportionate to the benefits?)

In order to evaluate whether the costs involved in complying with the SGEI rules for health and social services were proportionate to the benefits of having such rules, stakeholders were asked to answer a set of five questions.

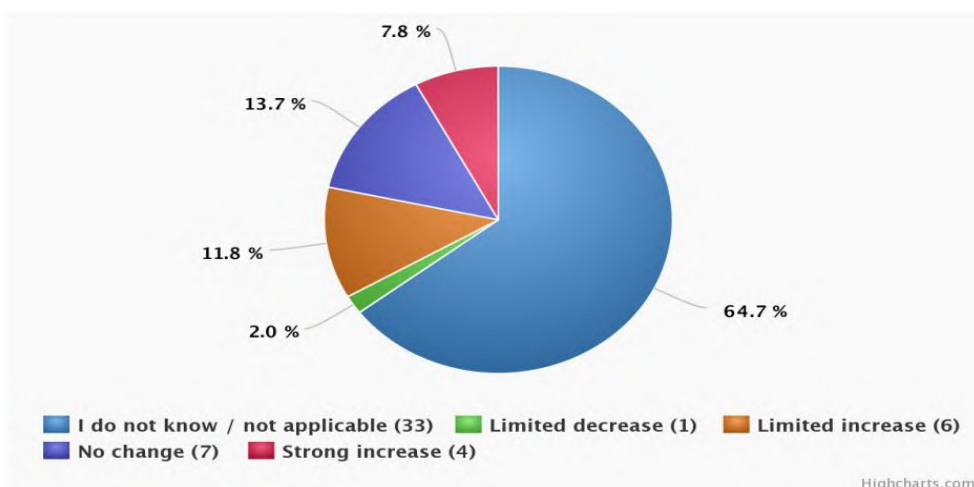
**Question 29** inquired whether the 2012 SGEI Package reduced the administrative burden with regard to health and social services compared to the rules in force under the 2005 SGEI Package. 25 (as regards the administrative burden for public authorities) and 19 (as regards the administrative burden for the beneficiaries) respondents did not have an opinion on this. 9 respondents disagreed, at least partially as regards the administrative burden for public authorities and 11 respondents disagreed, at least partially as regards the administrative burden for public authorities.

Figure 5 - Question 29: Did the 2012 SGEI Package reduce the administrative burden with regard to health and social services compared to the rules in force under the 2005 package?



**Question 31** inquired to what extent the amount of resources (for example money and personnel) spent on administrative activities with regard to health and social services changed, compared to the period 2005-2012 when the 2005 SGEI Package was still in force. 33 respondents did not have an opinion on this. 11 respondents who expressed a view was of the opinion that the amount of resources spent did not change or increased.

Figure 6 - Question 31: To what extent did the amount of resources (for example money and personnel) you spent on administrative activities with regard to health and social services change, compared to the period 2005-2012 when the 2005 SGEI Package was still in force?

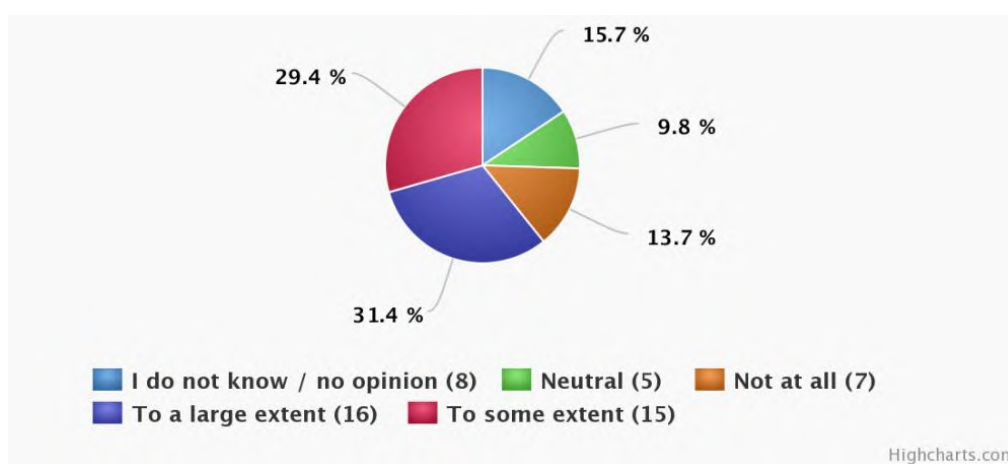


### 3.2.4. Relevance (Is EU action still necessary?)

In order to understand if the SGEI rules for health and social services are still relevant considering the market developments, stakeholders were asked to answer a set of eight questions.

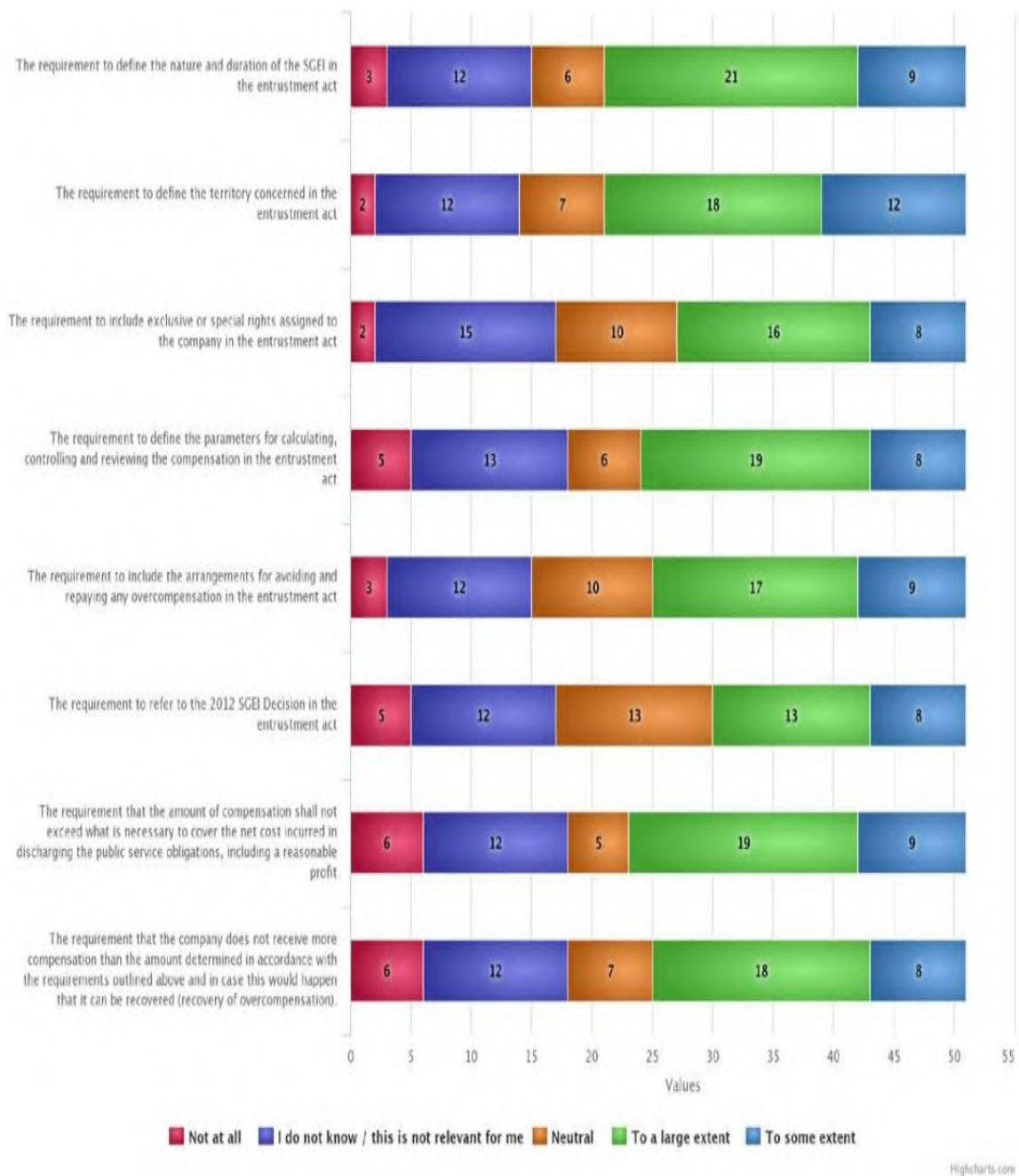
**Question 34** inquired how well the objectives of the 2012 SGEI Package as applied to health and social services still correspond to today's (EU internal) market situation. In particular, the question referred to the objective of simplifying the compatibility criteria and reducing the administrative burden for Member States that compensate undertakings entrusted to provide such services to the (vulnerable part of the) population at affordable conditions. 31 respondents expressed the view that the mentioned objectives still correspond, at least partially, to the current market situation.

Figure 7 - Question 34: how well do the objectives of the 2012 SGEI Package as applied to health and social services still correspond to today's (EU internal) market situation?



**Question 36** inquired to what extent some specific elements of the 2012 SGEI Decision correspond to the (EU internal) market developments in the field of health and social services that have occurred since 2012. With regard to each of the elements presented, 21 (the requirement to refer to the 2012 SGEI Decision in the entrustment act) to 30 (the requirement to define the nature, duration and territory concerned) respondents expressed the view that the SGEI rules are still relevant, at least to some extent.

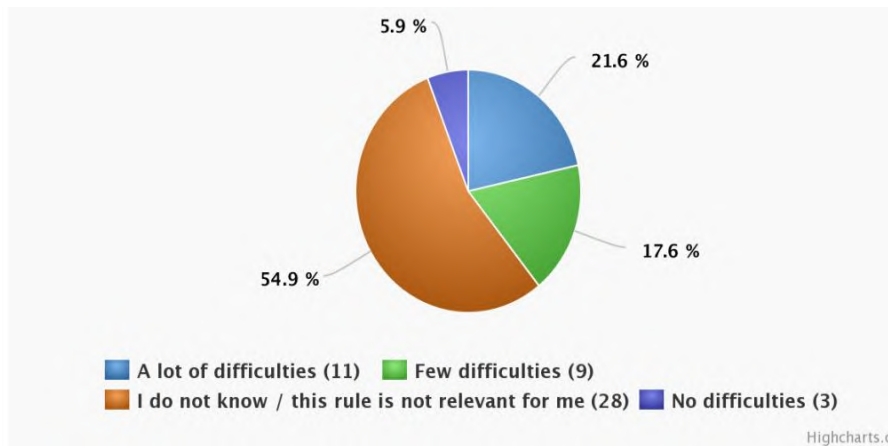
Figure 8 - Question 36: To what extent does each separate element of the 2012 SGEI Decision correspond to the (EU internal) market developments in the field of health and social services that have occurred since 2012? In other words, do these elements still serve a purpose?



**Question 38** inquired whether the respondents experienced difficulties in applying the “reasonable profit” requirement as explained in Article 5 of the 2012 SGEI Decision.<sup>180</sup> 20 respondents who expressed a view declared that they experienced difficulties (either a lot or few difficulties).

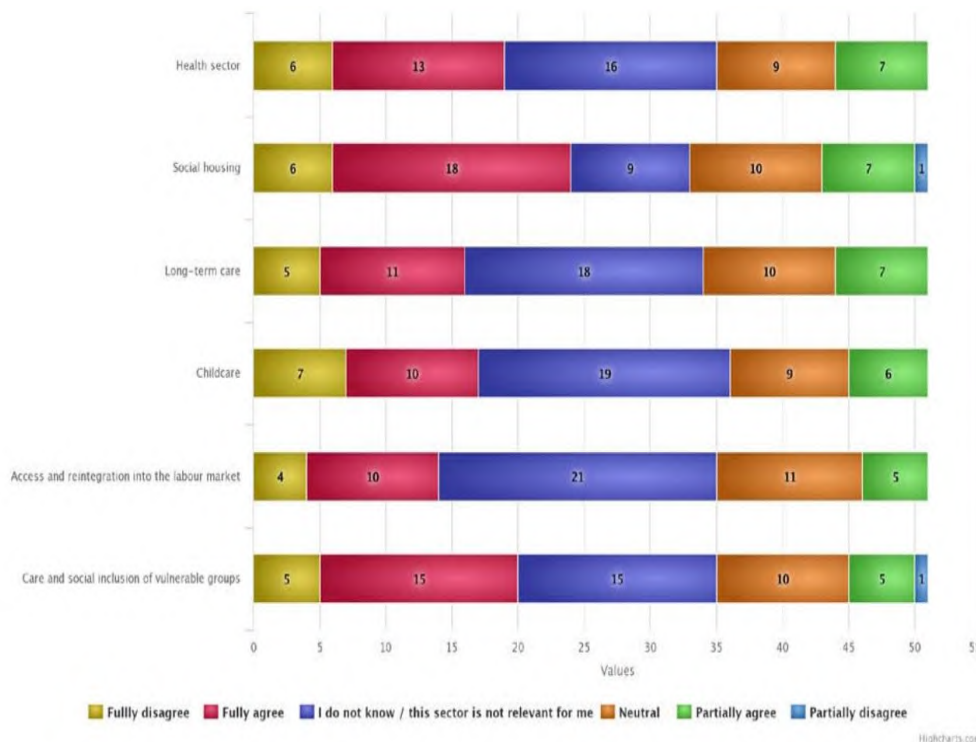
*Figure 9 - Question 38: Have you experienced difficulties in applying the “reasonable profit” requirement as explained in Article 5 of the 2012 SGEI Decision?*

<sup>180</sup> The question clarified that ‘reasonable profit’ means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk.



**Question 40** inquired, for each of the sectors covered by the 2012 SGEI rules, if the assumption on which the 2012 SGEI rules were adopted, i.e. that the risk of distortion of competition for health and social services is lower than in other sectors, is still valid. Depending on the sector, 15 (access and reintegration into the labour market) to 25 (social housing) of the respondents expressed the view that the risk of distortion of competition is still lower than in other sectors.

Figure 10 - Question 40: compared to 2012, when the SGEI Package entered into force, do you consider that the risk of distortion of competition in the health and social services sector is still lower than in other sectors?



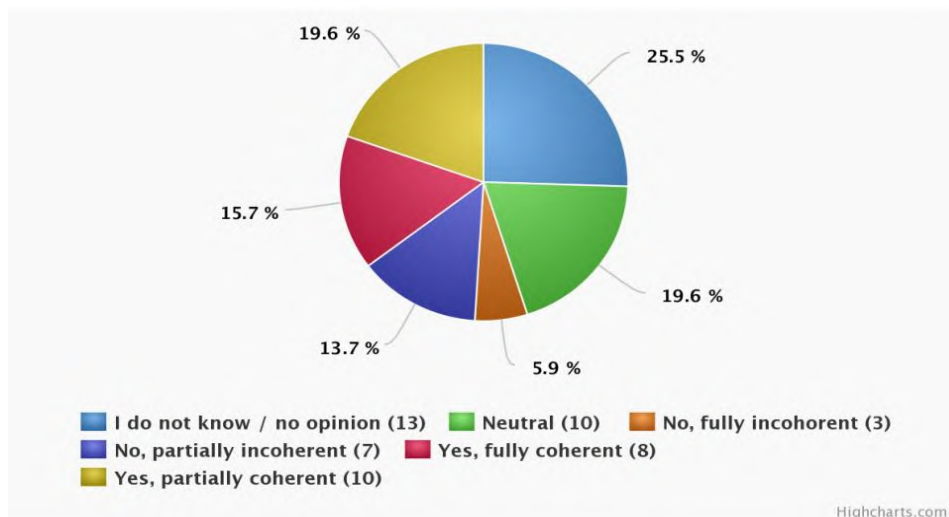
### 3.2.5. Coherence (Does the policy complement other actions or are there contradictions?)

In order to understand the extent to which the SGEI rules are coherent with each other and with other EU rules, stakeholders were asked to answer the following question.

**Question 42** inquired whether the SGEI rules as applicable to health and social services

are coherent with each other. 18 respondents who expressed a view stated that the SGEI rules are coherent with each other, fully or partially.

Figure 11: Question 42 - Are the SGEI rules (the SGEI Decision, SGEI Framework, the SGEI Communication and the SGEI de minimis Regulation) insofar as they are applicable to health and social services coherent with each other?

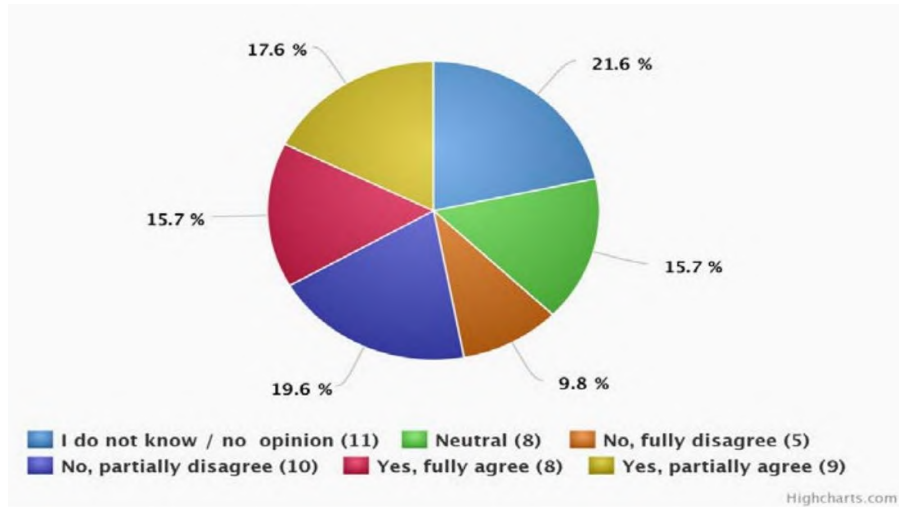


### 3.2.6. EU added value (Did EU action provide clear added value?)

In order to evaluate the EU added value of the SGEI rules for health and social services, stakeholders were asked to answer two questions.

**Question 44** inquired whether the SGEI Package, with regard to health and social services, allowed for a better task allocation between the Commission and the member States. The respondents expressed very different views. Around half of the respondents who expressed a view were of the opinion that the SGEI rules allowed, at least partially, a better allocation of tasks between the Commission and the Member States, while the other half took the opposite view.

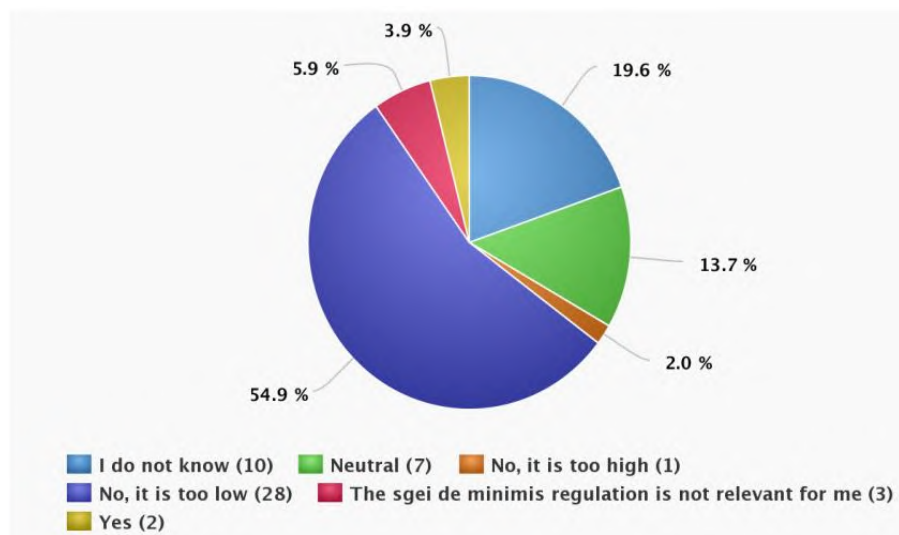
Figure 12: Question 44 - Has the 2012 SGEI Package allowed for a better allocation of tasks between the Commission and the Member States?



### 3.2.7. SGEI *de minimis* Regulation

**Question 46** inquired whether the amount of aid that can be granted under the SGEI *de minimis* Regulation, i.e. up to EUR 500 000 over any period of three fiscal years, is still appropriate. 28 respondents took the view that the amount of aid that can be granted under the SGEI *de minimis* Regulation is too low.

Figure 13: Question 46 – Is the amount of *de minimis* aid that can be granted under the SGEI *de minimis* Regulation, i.e. up to EUR 500 000 over any period of three fiscal years, still appropriate?



## 4. TARGETED CONSULTATION

As described above in section 1 of the present annex, in addition to the public consultation, DG Competition carried out a targeted consultation in the form of an online

questionnaire addressed to public authorities. The targeted consultation allowed public authorities to elaborate more on their answers and/or to flag issues not addressed in the open questionnaire. The results of the targeted consultations were not published.

In total, 21 replies were received. Out of these, 13 were received from the national level (e.g. ministries), two were submitted by regional entities, and one reply was submitted by a municipality.

The questionnaire was almost identical with the one sent for public consultations, with a mix of closed and open questions, which were devised around the five evaluation criteria effectiveness, efficiency, coherence, relevance and EU added value. All closed questions were obligatory, but the respondents had the choice of “I Do not know” and “Not relevant for me” options.

The targeted consultation covered all four documents part of the 2012 SGEI Package and subject of the Evaluation. However, for some respondents only part of the 2012 SGEI Package might have been relevant. This could be one of the reasons why the percentage of “I Do not know” and “not relevant for me” responses was fairly high.



**ANNEX VI. OVERVIEW OF THE STATE AID RULES SUBJECT TO THE SGEI EVALUATION**

State aid rules under the SGEI Evaluation	Entry into force	Expiry/Review clause	Part of SAM	OJ reference	Preceded by	Objective
<a href="#">SGEI Decision 2012/21/EU</a>	31 January 2012	N/A	No	OJ L 7, 11.1.2012, p. 3–10, Special edition in Croatian: Chapter 08 Volume 003 P. 289 - 296	Decision 2005/842/EC OJ L 312, 29.11.2005, p. 67–73; OJ L 327M , 5.12.2008, p. 488–498 (MT) Special edition in Bulgarian: Chapter 08 Volume 002 P. 186 - 192 Special edition in Romanian: Chapter 08 Volume 002 P. 186 – 192	To declare certain compensation granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty (see Art. 2 thereof) compatible with the internal market and exempt them from the requirement of prior notification and Commission approval.
<a href="#">Communication from the Commission — European Union framework for State aid in the form of public service compensation</a>	31 January 2012	EC intended to review by 31 January 2017	No	OJ C 8, 11.1.2012, p. 15–22	Community framework for State aid in the form of public service compensation OJ C 297, 29.11.2005, p. 4–7 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) Special edition in Bulgarian: Chapter 08 Volume 004 P. 216 - 219 Special edition in Romanian: Chapter 08 Volume 004 P. 216 - 219 Special edition in Croatian: Chapter 08 Volume 005 P. 146 – 149	The principles set out in this Communication apply to public service compensation only in so far as it constitutes State aid not covered by Decision 2012/21/EU. Such compensation is subject to the prior notification requirement under Article 108(3) of the Treaty. This Communication spells out the conditions under which such State aid can be found compatible with the internal market pursuant to Article 106(2) of the Treaty.
<a href="#">SGEI de minimis Regulation No 360/2012</a>	26 April 2012	31 December 2023	No	OJ L 114, 26.4.2012, p. 8–13 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) Special edition in Croatian: Chapter 08 Volume 003 P. 297 - 302	Commission Regulation (EC) No 1998/2006; OJ L 379, 28.12.2006, p. 5–10 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV) OJ L 314M , 1.12.2007, p. 654–659 (MT) Special edition in Bulgarian: Chapter 08 Volume 005 P. 96 - 101 Special edition in Romanian: Chapter 08 Volume 005 P. 96 - 101 Special edition in Croatian: Chapter 08 Volume 003 P. 197 - 202.	To provide a ceiling below which aid measures to undertakings for the provision of a service of general economic interest are deemed not to constitute State aid within the meaning of Article 107 TFEU, and are exempted from the notification procedure, because they are considered not to any effect on cross-border competition among Member States.
<a href="#">Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest</a>	31 January 2012		No	OJ C 8, 11.1.2012, p. 4–14 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)	N/A	To clarify basic concepts of State aid, which are relevant for SGEIs, in particular the notion of aid, SGEI, economic activity etc



## 1. ARTICLE 14 TFEU

*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.*

## 2. ARTICLE 106 TFEU

*1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*

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

*3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*

Article 106 TFEU chiefly concerns undertakings for which MS must take special responsibility by reason of the particular influence that they may exert over their actions. The Treaty provision is part of the system of undistorted competition that the TFEU provides by securing equality of opportunity between the various economic operators.

## 3. ARTICLE 107(1) TFEU: NOTION OF AID AND GENERAL PROHIBITION

Article 107(1) TFEU states that: “*any aid granted by a Member state or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible within the internal market*”.

Consequently, the **cumulative** requirements that have to be met in order for a measure to be considered as State aid and to fall under the State aid **general prohibition** are the following:

- a. the aid must be granted by a Member State or through State resources;

- b. there must be a selective advantage;
- c. there must be a -threat of- distortion of competition; and
- d. there must be affectation of trade between Member States.

#### **I. *Ex lege* derogations provided by Article 107(2) TFEU**

Once defined if the measure constitute State aid, Article 107(2) TFEU provides a list of State measures that are *ex lege* deemed to be **compatible** with the internal market, provided that the conditions therein are met:

- a. Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- b. Aid to make good the damage caused by natural disasters or exceptional occurrences;
- c. Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

#### **II. Discretionary derogations provided by Article 107(3) TFEU**

Once defined if the measure constitute State aid, Article 107(3) TFEU provides a list of State measures that **maybe** considered **compatible** with the internal market. The measures are the following:

- a. aid to the economic development of most disadvantaged regions within the European Union;
- b. aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- c. aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- d. other categories as may be specified by a decision of the Council.

#### **4. ARTICLE 108 TFEU**

*1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.*

*2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.*

*If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.*

*On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.*

*If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.*

*3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

*4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.*

## **5. ARTICLE 109 TFEU**

*The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.*

## **6. PROTOCOL 26 ON SERVICES OF GENERAL INTEREST ANNEXED TO THE TFEU**

### **Article 1**

*The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:*

*— 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;*

*— the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*

*— a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*

## ***Article 2***

*The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.*