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Services of general economic interest – an (im)possibility in Swedish municipal housing policy

An evaluation of the applicability of the EU provisions on services of general economic interest on housing provision in Sweden

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Summary

In light of the housing shortage in Sweden, municipalities all over the country are struggling to fulfil their responsibility of housing provision. In many municipalities it is an imminent problem to provide affordable and proper housing, not least for the most vulnerable groups in society. This situation has not gone by unnoticed. Several political initiatives have been taken in order to examine and resolve problems in regard to housing provision, and the discussion has put state aid rules in the limelight as a possible solution. The possibility for municipalities to fulfil their responsibility of housing provision by use of EU state aid rules on services of general economic interest has caught particular interest, especially in Swedish preparatory acts, as well as created ambiguity as to the applicability of these state aid rules in municipal housing policy. Following this legal uncertainty, municipalities have been reluctant to use these state aid rules in order to fulfil their responsibility of housing provision.

This thesis examines if housing provision is considered to be a general interest in Sweden, and as such, if it can fall within the concept of services of general economic interest for the purpose of EU state aid rules. It highlights the possibilities that the provisions on services of general economic interest can offer for municipalities, and analyses the application of such rules in municipal housing policy. The thesis argues that municipalities lack legal prerequisites in order to apply the EU provisions on services on general economic interest, and suggests that clarity and guidance is best provided by use of national law.

Sammanfattning

I ljuset av den brist på bostäder som idag råder i Sverige kämpar många kommuner med att uppfylla sitt bostadsförsörjningsansvar. I ett flertal kommuner är det ett angeläget problem att tillhandahålla lämpliga och tillgängliga bostäder, inte minst för de mest utsatta grupperna i samhället. Den problematiska situationen har inte gått obemärkt förbi. Det har tagits flera initiativ på politiskt håll för att utreda och lösa problemen med bostadsförsörjning, med följd att statsstödsreglerna har kommit i fokus som en möjlig lösning. Möjligheten för kommuner att ta sitt ansvar för bostadsförsörjning genom att använda sig av EU:s statsstödsregler om tjänster av allmänt ekonomiskt intresse har uppmärksammats särskilt, inte minst i svenska förarbeten, vilket även givit upphov till stor osäkerhet huruvida regelverket om tjänster av allmänt ekonomiskt intresse går att tillämpa i kommunal bostadspolitik. Osäkerheten har fått till följd att kommuner är tveksamma till att använda sig av statsstödsreglerna för att ta sitt bostadsförsörjningsansvar.

Denna uppsats undersöker huruvida bostadsförsörjning utgör ett allmänt intresse i Sverige och, om så är fallet, huruvida bostadsförsörjning kan utgöra en tjänst av allmänt ekonomiskt intresse inom ramen för EU:s statsstödsregler. Uppsatsen lyfter fram möjligheterna som regelverket gällande tjänster av allmänt ekonomiskt intresse kan utgöra för kommuner, och analyserar tillämpligheten av regelverket i kommunal bostadspolitik. Vidare, argumenteras för att kommuner saknar rättsliga förutsättningar för att tillämpa de EU-rättsliga statsstödsreglerna om tjänster av allmänt ekonomiskt intresse, varvid det föreslås att tydlighet och vägledning främst nås genom nationell lagstiftning på området.

Preface

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*Esmeralda Eberhardson
Malmö, 6 Augusti 2017*

Abbreviations

CJEU	Court of Justice of the European Union
EU	European Union
GBER	General Block Exemption Regulation
SGEI	Service of General Economic Interest
SIGI	Service of General Interest
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Housing construction is booming in Sweden, yet a majority of the country's municipalities are experiencing a severe housing shortage.¹ Notably, it is not all types of housing construction that are on the rise, and certainly not on all markets. Although most municipalities are battling housing shortage, the situation differs from one municipality to another. In weak housing markets it is difficult to attract housing construction.² In such housing markets the costs of production are at risk of exceeding the profits generated from sale.³ Due to the lack of profitability, municipalities find it hard to obtain the necessary housing, either through new production or rebuilding of housing within the municipality.⁴

An imminent problem is the need for housing for newly arrived immigrants, students, low-income households and housing for the elderly. These groups of people are in need of certain types of housing, and especially affordable housing, all of which are in deficit.⁵ For the most vulnerable groups in society the housing shortage is, therefore, even more noticeable.⁶ The situation certainly has an effect on municipal housing policy. Given the legal responsibility of housing provision for municipalities, it is a precarious situation in need of immediate attention.⁷

The housing deficit, especially for groups in a weak position in society, has been, and is still, the subject of criticism, as well as review. In 2013 the government appointed an inquiry chair to look into the European Union (EU) legal basis for municipal housing policy.⁸ The purpose of the inquiry was to submit proposals on how municipalities could promote housing

¹ Boverket, *Bostadsbyggandet fortsätter att öka* (Boverket 2017)

<<http://www.boverket.se/sv/om-boverket/publicerat-av-boverket/nyheter/bostadsbyggandet-fortsatter-att-oka/>> accessed 20 July 2017.

² SOU 2015:58 18.

³ SOU 2015:58 123.

⁴ SOU 2015:58 35.

⁵ Boverket, *Bostadsmarknadsenkäten 2017* (Boverket 2017)

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/>> accessed 11 July 2017. Hereinafter 'Bostadsmarknadsenkäten 2017'.

⁶ Boverket, *Bostadsmarknaden för olika grupper* (Boverket 2016)

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/bostadsmarknaden-for-olika-grupper/>> accessed 11 July 2017.

⁷ Bostadsförsörjningslagen (2000:1383) (Housing Provision Act), § 1.

⁸ Dir. 2013:68 1.

provision, not the least in places with weak housing markets. Furthermore, the inquiry was to examine the possibility for municipalities to promote housing provision by use of EU state aid rules on SGEIs, and assess the adequacy of such measures.⁹ The inquiry resulted in the report “EU and Municipal Housing Policy”¹⁰, published in 2015.¹¹ In a Governmental Bill¹², introduced prior to the abovementioned inquiry, the importance of state aid rules for the formation and review of municipal policy was highlighted and spurred the initiative to examine the matter further.¹³ Parallel to the inquiry instructed by the government, the Swedish national audit office initiated an inquiry¹⁴ with the purpose of reviewing the legal and financial basis, provided by the State, for municipalities on weak housing markets to fulfil their responsibility of housing provision in regard to housing for elderly.¹⁵

Both reports focused on municipalities’ responsibility for housing provision and noted the problems municipalities are facing seeking to fulfil their responsibilities. The inquiry, as well as the review by the national audit office, drew particular attention to the possibility for municipalities on weak markets to maintain the objective of housing provision by use of state aid.¹⁶ In its report, the national audit office found that the ambiguity in regard to SGEIs made it difficult for municipalities to take advantage of the possibilities that state aid offers.¹⁷

Although there has been political interest in the area of SGEIs and the possibility to use state aid in municipal housing policy, it remains a difficult task for municipalities to navigate among the state aid rules. Municipalities seem to lack clear legal prerequisites to fulfil their legal responsibility of housing provision.¹⁸

In light of the uncertainty lingering from previous reports, it is of interest to look into the possibility for municipalities to provide state aid for the purpose of housing provision.

⁹ Dir. 2013:68 18.

¹⁰ SOU 2015:58 *EU och kommunal bostadspolitik*, author’s own translation.

¹¹ SOU 2015:58.

¹² Prop. 2009/10:185.

¹³ Prop. 2009/10:185 14, 63; SOU 2015:58 34.

¹⁴ Riksrevisionen, *Bostäder för Äldre i Avfolkningsorter* (Riksrevisionen 2014). Hereinafter ‘Riksrevisionen’.

¹⁵ Riksrevisionen 9.

¹⁶ Riksrevisionen 9, 11; SOU 2015:58 17, 22.

¹⁷ Riksrevisionen 11.

¹⁸ Riksrevisionen 11.

1.2 Purpose and Research questions

The purpose of the thesis is to resolve whether Swedish municipalities on weak housing markets can use state aid rules in order to fulfil their responsibility of housing provision. Of particular interest is the possibility for municipalities to rely on the rule on services of general economic interest, as stated in Article 106(2) of the Treaty on the Functioning of the European Union (TFEU)¹⁹, according to which state aid is compatible with the internal market. There is however great uncertainty as to whether housing provision in Sweden could fall within the definition of SGEIs in Sweden.

For this purpose my research questions are thus the following:

- *Does housing provision constitute a general interest in Sweden, which can be recognised by the EU provisions on services of general economic interest?*
- *If so, can municipalities on weak housing markets in Sweden provide state aid to municipal housing companies for the purpose of housing provision based on the state aid rules regarding services of general economic interest?*

1.3 Method and Materials

This thesis follows a legal-dogmatic method, meaning that it researches current law by analysing different sources of law such as current legislation, principles, case law and doctrine.²⁰ As the thesis covers both EU law and Swedish national law, it is noted that this involves two different legal methods.²¹ By use of the EU legal method weight is put on the teleological interpretation of a EU provision, thus in order to understand the EU provision it has to be seen in its context and taking into account the objective of the provision.²² On the other hand, in Swedish legal method the preparatory acts are instrumental in the review of the Swedish position on housing provision as a SGEI. According to Swedish legal tradition, the preparatory acts serve as a natural basis for establishing the Swedish

¹⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

²⁰ Jan Vranken, 'Exciting Times for Legal Scholarship' [2012] 42, 43 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf> accessed 5 August 2017.

²¹ Jörgen Hettne and Ida Otken Eriksson (ed), *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (2nd edn, Norstedts juridik 2011) 36. Hereinafter 'Hettne and Otken Eriksson'.

²² Hettne and Otken Eriksson 36, 159.

position on the subject and find out the purpose underlying the provisions in Swedish law.²³

Smits argues that legal-dogmatic method serves the goals of description, prescription and justification.²⁴ Accordingly, the foundation of this thesis are the initial chapters describing existing law, primarily focusing on the EU state aid rules, but also looking at the Swedish laws concerning housing provision. The challenge has been to put the laws into a structure that is comprehensible and to explain how the different sources relate to each other, and why they are relevant for the purpose of this thesis. Smits puts it wisely in describing that this first aim of the method “provides a language for discussion”²⁵. The prescriptive part of the method is found in the application of the described sources of law in order to answer the research questions. In this regard, the analysis reflects on the possibility for housing provision to fall within the concept of SGEI, whilst the conclusion focuses on what needs to be done to improve the current system. The third aim, that of justification, can be seen as the possibility for the method to justify existing law, for instance by trying out a legal solution within a system in order to see if fits.²⁶ In reference to this aim, the thesis is constantly in the meeting point of the national Swedish law and the EU provisions, where the Swedish take on the definition of SGEI is tried against the EU provision on SGEI. The thesis finds that the position of Sweden on housing provision as a SGEI is said not to hinder the applicability of the SGEI provisions, but the analysis shows that this solution is not necessarily effective in the current framework of state aid rules.

The natural basis for this thesis is the TFEU, and EU case law, especially in providing the framework on the state aid rules and, not least, providing guidance on the application of the concept of SGEI. The *Altmark*²⁷-case, being such a prominent case in the context of public service obligation, receives more attention than others. There are also a few cases from the General Court that receive some attention, for instance the *BUPA*²⁸-case. The Almunia package, consisting of a Communication²⁹, a Decision³⁰, a

²³ Hettne and Otken Eriksson 36.

²⁴ Smits JM, ‘What Is Legal Doctrine?’ Rob van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 213. Hereinafter ‘Smits’.

²⁵ Smits 213.

²⁶ Smits 220-221.

²⁷ Case C-280/00 *Altmark* EU:C:2003:415. Hereinafter ‘*Altmark*’.

²⁸ Case T-289/03 *BUPA v Commission* EU:T:2008:29. Hereinafter ‘*BUPA*’.

²⁹ 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 (SGEI Communication) [2012] OJ C8/4. Hereinafter ‘SGEI Communication’.

Framework³¹, and a SGEI de minimis Regulation³², has been an essential resource in the discussion on housing provision as a SGEI. Even though the Communication, as well as other Guidelines from the Commission, are soft law, they are still binding on the Commission and therefore make an important complement to the other legislative instruments.³³

As mentioned above, the preparatory acts of the Swedish national legislation have served an important purpose in analysing the position of Sweden on housing provision as a SGEI. The focus has been on Governmental Bills, where such were to be found, and Swedish Government Official Reports, which have provided fuller reasoning behind the Swedish provisions on housing provision.

Another valuable resource has been “European Union Law of State Aid”³⁴ by Kelyn Bacon, which has been part of the fundament for the chapter on state aid in this thesis. Also the report by SABO, ‘Tillåtet statsstöd på svaga bostadsmarknader: kommunernas bostadsförsörjningsansvar’³⁵, which provides a comprehensive analysis of the SGEI provision in regard to housing provision, has been a useful comment on housing provision in Sweden up to year 2013. As for previous research in regard to the subject-matter of this thesis, the dissertation by Wehlander³⁶ has been a useful comment on the occurrence of SGEIs in Sweden. Lastly, the large amount of online resources deserve a comment. In order to provide a background with up-to-date facts, thus illustrating the current housing market situation in Sweden, the use of online information from Statistics Sweden (SCB), as well as the National board of housing, building and planning (Boverket), has been necessary.

³⁰ 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 (SGEI Decision) [2012] OJ L7/3. Hereinafter ‘SGEI Decision’.

³¹ European Union framework for State aid in the form of public service compensation (SGEI Framework) [2012] OJ C8/15. Hereinafter ‘SGEI Framework’.

³² Regulation (EU) 360/2012 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 (‘SGEI de minimis Regulation’) [2012] OJ L114/8. Hereinafter ‘SGEI de minimis Regulation’.

³³ Hettne and Otken Eriksson 46-47.

³⁴ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, OUP 2017). Hereinafter ‘Bacon’.

³⁵ SABO, *Tillåtet statsstöd på svaga bostadsmarknader: kommunernas bostadsförsörjningsansvar* (Sveriges allmännyttiga bostadsföretag (SABO) 2013). Hereinafter ‘SABO’.

³⁶ Wehlander C, *Who is afraid of SGEI?: services of general economic interest in EU law with a case study on social services in Swedish systems of choice* (Department of Law, Umeå university 2015). Hereinafter ‘Wehlander’.

1.4 Delimitations

The area of state aid law is closely related to procurement rules, however, they are not part of this thesis, as it would render the subject too broad.

As the thesis reflects on the concept of SGEI in EU law, the presence of the concept in Article 36 of the Charter of Fundamental Rights³⁷ is noted. Even though the relationship between Article 36 and the concept of SGEI in Article 106(2) of the TFEU would be interesting to discuss, this falls outside of this thesis.

This thesis limits itself to reflect on aid for housing provision without a closer look at possible ways of providing aid for the purpose of housing provision. In addition, there is no room for further discussion on the types of housing services which would fall into the category of SGEI, even though that would certainly make the arguments presented more tangible. Further research on the reasons for Sweden not to define housing provision as a SGEI, as well as the reasons for the Commission not to provide a more exact definition, would have brought more depth to the discussion. As such discussions would broaden the topic even more, further discussions go beyond the limits of this thesis.

1.5 Outline

Chapter 2 of this thesis provides an insight to Swedish housing politics and puts focus on the concept of housing provision, as it is an instrumental concept for the purpose of answering the research questions posed above. Chapter 3 concerns the state aid rules and lays down the foundation necessary for the following chapter, chapter 4, which focuses on the SGEI provisions. Chapter 4 highlights the importance of the Almunia package, and provides the structure according to which the analysis is performed. Chapter 5 examines the concept of SGEI, as well as SGI, in regard to housing provision, essentially providing the basis for the analysis in regard to the first research question. Chapter 6 provides an analysis of the application of the SGEI provisions in accordance with previous chapters, in order to reply to the research questions of this thesis. The analysis is followed by a conclusion in chapter 7.

³⁷ Charter of Fundamental Rights of the European Union [2016] OJ C 202/396.

2 Housing in Sweden

For the purpose of answering the research questions, this chapter provides a backdrop to the analysis on housing provision as a general interest in Sweden. Accordingly, this chapter sheds light on the housing situation in Sweden, with an added focus on housing in weak markets. It paints a picture that is rather bleak as Sweden has a major housing deficit, which triggers the question of who actually bears the responsibility for housing. This chapter therefore includes an introduction to the concept of housing provision as well as municipal housing companies, which are instrumental in Swedish housing politics.

2.1 Swedish housing politics

At the beginning of 2017, Sweden had a population of nearly ten million people.³⁸ Out of those ten million people, almost 87 percent lived in urban areas.³⁹ This is hardly surprising, as urbanisation has led to a higher concentration of the Swedish population living in urban areas.⁴⁰ In fact, Sweden has one of the fastest urbanisation rates in Europe.⁴¹ Although the population is expected to rise to 11.6 million people in year 2053, the population in sparsely populated areas is expected to decrease by 10 percent during the same period of time. Looking closer at the age structure, a higher proportion of people of 65 years or older are living in these areas compared to urban areas, and the situation is not expected to change.⁴² Due to the decrease in population and rural areas being sparsely populated, these municipalities usually have higher operational costs, large pension commitments and a weak tax base. Thus, the economic viability in these

³⁸ SCB, 'Population in the country, counties and municipalities on 31/12/2016 and Population Change in 2016' (SCB 2017)

<<https://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--municipalities-counties-and-the-whole-country/population-in-the-country-counties-and-municipalities-and-population-change/>> accessed 10 July 2017.

³⁹ SCB, 'Localities 2016: Population in localities increased by 120 000' (SCB 2017)

<<https://www.scb.se/en/finding-statistics/statistics-by-subject-area/environment/land-use/localities-areas-population/pong/statistical-news/population-in-localities/>> accessed 10 July 2017.

⁴⁰ Anders Karlsson, 'Sveriges befolkning ökar – men inte i hela landet' (SCB 2015)

<https://www.scb.se/sv/_Hitta-statistik/Artiklar/Sveriges-befolkning-okar--men-inte-i-hela-landet/> accessed 10 July 2017. Hereinafter 'Karlsson'.

⁴¹ Eurostat, *Urban Europe: Statistics on Cities, Towns and Suburbs* (2016 edition, Luxembourg: Publications Office of the European Union, 2016) 65.

⁴² Karlsson.

municipalities, with less than 10 000 inhabitants and a continuous decrease in population, is usually weak.⁴³

In light of the increasing population, Sweden is facing a severe deficit in the housing market. Sweden has 290 municipalities, out of which 255 consider there to be a deficit on the market.⁴⁴ Imbalance on the housing market is hardest on those groups of people that are already in a delicate position on the housing market.⁴⁵ Special housing for elderly, housing for newly arrived persons and apartments to rent with reasonable rates are among the types of housing that are in deficit.⁴⁶

Although the housing deficit is a problem for almost all municipalities in Sweden, both in rural and urban areas of the country, the prerequisites for solving the problems that the housing deficit entails are widely different. Municipalities in rural areas that have weak local housing markets, due to declining population and few job opportunities, are poorly equipped to solve the need for housing, especially when it comes to housing for people in delicate situations.⁴⁷ It should be noted that even in sparsely populated areas, where there might not be a housing deficit in regard to regular housing due to a decrease in the population, there is still a need for housing for people in vulnerable situations, even more so in light of the growing proportion of elderly in the rural areas.⁴⁸

A weak housing market is a market where there is little demand for housing due to a decrease in population, poor household income, low levels of accessibility to workplaces and where the development of employment levels is weak.⁴⁹ When there is little or slow growth of the economy, fewer investments are being made and less people are willing to stay in the

⁴³ SOU 2017:01 157.

⁴⁴ Bostadsmarknadsenkäten 2017.

⁴⁵ Boverket, *Bostadsmarknaden för olika grupper* (Boverket 2016)

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/bostadsmarknaden-for-olika-grupper/>> accessed 11 July 2017.

⁴⁶ Boverket, *Ökat underskott på särskilda boendeformer för äldre* (Boverket 2017)

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/bostadsmarknaden-for-olika-grupper/aldre/sarskilda-boendeformer-for-aldre/>> accessed 11 July 2017; Boverket, *Stort underskott på bostäder för nyanlända* (Boverket 2017).

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/bostadsmarknaden-for-olika-grupper/nyanlanda/>> accessed 11 July 2017.

⁴⁷ Boverket, *Underskott på bostäder i landets övriga kommuner* (Boverket 2017)

<<http://www.boverket.se/sv/samhallsplanering/bostadsplanering/bostadsmarknaden/bostadsmarknadsenkaten-i-korthet/bostadsmarknaden-i-regioner-och-kommuner/laget-pa-bostadsmarknaden-i-ovriga-kommuner/>> accessed 11 July 2017.

⁴⁸ Riksrevisionen 56-60.

⁴⁹ SOU 2015:58 Bilaga 2 609; Riksrevisionen 13.

municipality. As a result, these municipalities are left with deteriorating housing where people in delicate situations cannot get hold of proper accommodation.⁵⁰ In addition, the municipalities in weak housing markets cannot fulfil their responsibility of housing provision as stated in law.⁵¹ Instead these municipalities are struggling to maintain general welfare and provide good housing for their inhabitants.⁵²

2.2 Responsibility for housing provision

In Sweden “the public institutions shall secure the right to work, housing and education, social care and social security”⁵³, as is stated in the Instrument of Government, chapter 1 § 2. These are fundamental objectives of the State and public institutions, and they are the fundament on which other laws and policies are made.⁵⁴ The objective of the national housing policy in Sweden is a long-term, well functioning housing market where the supply of housing meet consumer demands.⁵⁵ In achieving this, the State and the municipalities take on different roles.⁵⁶

Housing provision is essentially the responsibility of the Municipalities.⁵⁷ Each and every municipality has the responsibility to plan for housing provision according to the Swedish Housing Provision Act⁵⁸, the purpose of which is for municipalities to create the conditions necessary to make good housing available for everyone in the municipality.⁵⁹ Moreover, the municipalities have a responsibility to enable housing construction, to implement policies on the use of land and to provide for social and technical infrastructure, all of which are instrumental for achieving good housing within the municipality.⁶⁰

⁵⁰ SABO 6.

⁵¹ Housing Provision Act, § 1.

⁵² SABO 6.

⁵³ Regeringsformen (Instrument of Government) (1974:152) ch 1 § 2, translation from Sveriges Riksdag, *The Constitution of Sweden: the Fundamental Laws and the Riksdag Act* (Sveriges Riksdag 2016) 26-27.

⁵⁴ Sveriges Riksdag, *The Constitution of Sweden: the Fundamental Laws and the Riksdag Act* (Sveriges Riksdag 2016) 26-27.

⁵⁵ Prop. 2016/17:1 23; Regeringen, *Mål för boende och byggande* (Regeringen 2016) <<http://www.regeringen.se/regeringens-politik/boende-och-byggande/mal-for-boende-och-byggande/>> accessed 12 July 2017.

⁵⁶ Thomas Kalbro and Hans Lind, *Bygg mer för fler!: En ESO-rapport om Staten, Kommunerna och Bostadsbyggandet* (Finansdepartementet, Regeringskansliet, 2017) 17. Hereinafter ‘Kalbro and Lind’.

⁵⁷ SOU 2015:58 41.

⁵⁸ Bostadsförsörjningslagen (2000:1383) (Housing Provision Act).

⁵⁹ Housing Provision Act, § 1.

⁶⁰ Kalbro and Lind 9; SOU 2015:58 18.

The State on the other hand, has a responsibility to provide the legal and financial framework necessary for the municipalities to carry out their responsibility of housing provision.⁶¹ The State implements its housing policy, and determines the prerequisites of housing provision, through conditions and restrictions in regard to housing, for instance by implementing rules on how to build houses or provisions on special forms of housing for elderly.⁶² The municipalities in turn have the responsibility to carry out these laws and fulfil the responsibilities therein. As previously mentioned, the Housing Provision Act imposes the responsibility for housing provision primarily on municipalities, a responsibility that is reflected in a number of provisions, not only found in the Housing Provision Act.

The legal framework on the planning of construction is found in the Planning and Building Act⁶³. In its first chapter it is clearly stated that planning the use of land, thus implementing the provisions necessary for housing construction, is a municipal responsibility.⁶⁴ According to the Social Services Act⁶⁵ it is the responsibility of municipalities to ensure that elderly receive the care and support needed, entailing good and proper housing.⁶⁶ Additional provisions in regard to the responsibility of housing provision are found in the Planning and Building Ordinance⁶⁷ and in the Municipal Housing Companies Act⁶⁸.

2.3 Municipal Housing Companies

More than three million people in Sweden live in rental housing, half of which live in public housing. Thus, municipal housing companies account for almost a fifth of the housing provision in Sweden.⁶⁹ As municipally-owned rental housing is home to such a large share of the Swedish population, the municipal companies have significant influence regarding housing provision.

⁶¹ SOU 2015:58 41.

⁶² Kalbro and Lind 9.

⁶³ Plan- och bygglag (2010:900) (The Planning and Building Act).

⁶⁴ The Planning and Building Act, ch 1 § 2.

⁶⁵ Socialtjänstlag (2001:453) (The Social Services Act).

⁶⁶ Social Services Act, ch 5 § 5.

⁶⁷ Förordningen (2011:1160) om regionala bostadsmarknadsanalyser och kommunernas bostadsförsörjningsansvar (Planning and Building Ordinance).

⁶⁸ Lagen (2010:879) om allmännyttiga kommunala bostadsaktiebolag (Municipal Housing Companies Act).

⁶⁹ SABO, *Public Housing in Sweden* (SABO 2016)

<http://www.sabo.se/om_sabo/english/Sidor/Publichousing.aspx> accessed 22 July 2017.

A municipal housing company is a public housing company in which one or more municipalities have the controlling influence. In order to have a controlling influence, the municipality or municipalities need to own half of the shares in a limited liability company and have more than half of all the votes in the company.⁷⁰ The companies are created with a public objective to manage real estate with the primary purpose of managing apartments for rent and offering tenants the possibility to influence the company and its housing.⁷¹ Another, more overall public objective of a municipal company is to promote housing provision within the municipality, or the municipalities, that own the company.⁷² The notion of promoting housing provision means that a municipal housing company has to cater to the need of different forms of housing, effectively providing a variety of housing attracting different types of tenants.⁷³ Municipal housing companies are therefore instrumental in a municipality's efforts to fulfil its responsibility of housing provision.⁷⁴

The Swedish Local Government Act⁷⁵ provides that municipalities may engage in business activity. However, the regulation sets up limitations stating that such activity has to be conducted without a view to profit, in addition to being concerned with the provision of communal amenities or services for the members of the municipality.⁷⁶ Furthermore, a municipality may "take steps for the general promotion of enterprise in the municipality"⁷⁷, and it may give individual support to a specific enterprise given the grounds for doing so are very strong.⁷⁸ In spite of these fundamental provisions, and contrary to the prime cost principle⁷⁹, the municipal housing companies shall conduct their business according to business-like principles.⁸⁰ This means that the companies have to yield market-conforming returns.⁸¹ In addition, the Municipal Housing Companies Act imposes requirements on transfers of value, stating

⁷⁰ Municipal Housing Companies Act, § 1; Prop. 2009/10:185 38.

⁷¹ Municipal Housing Companies Act, § 1.

⁷² Municipal Housing Companies Act, § 1; Prop. 2009/10:185 40.

⁷³ Prop. 2009/10:185 40.

⁷⁴ Prop. 2009/10:185 41.

⁷⁵ Kommunallag (1991:900) (Local Government Act).

⁷⁶ Local Government Act, ch 2 § 7, translation from Government Offices of Sweden, *The Swedish Local Government Act* (Ds 2004:31, Ministry of Finance 2004) 10.

⁷⁷ Local Government Act, ch 2 § 8, translation from Government Offices of Sweden, *The Swedish Local Government Act* (Ds 2004:31, Ministry of Finance 2004) 10.

⁷⁸ Local Government Act, ch 2 § 8.

⁷⁹ Local Government Act, ch 8 § 3c: "Municipalities and county councils may not levy charges exceeding the cost of the services or utilities provided by the municipality or county council", translation from Government Offices of Sweden, *The Swedish Local Government Act* (Ds 2004:31, Ministry of Finance 2004) 76.

⁸⁰ Municipal Housing Companies Act, § 2.

⁸¹ Prop. 2009/10:185 84.

limitations on how much a company is allowed to transfer.⁸² The purpose of such a requirement is for municipal housing companies to have resources in more difficult times, for example due to a change in demand on the housing market. An additional purpose of the limitations is for municipalities to use the buffer in order to fulfil the responsibility of housing provision.⁸³

In the preparatory acts of the Municipal Housing Companies Act emphasis was added on the possibility for a municipality to fulfil its responsibilities in regard to municipal housing policy by the use of its municipal housing companies, even though the municipal housing companies are obliged to conduct their activities on the basis of commercial interests.⁸⁴ However, municipal housing companies have not explicitly been assigned a market-complementary function to the municipalities. Thus there should be no costs in connection to such activities, and accordingly no costs that necessitate state aid.⁸⁵ Instead, any such activity requiring state aid, on part of a municipal housing company due to assignment by the municipality, needs to comply with EU state aid rules.⁸⁶ Accordingly, the Municipal Housing Companies Act explicitly states that the requirement on municipal housing companies to operate according to business-like principles is not a hinder for municipalities to provide aid approved by the Commission, or otherwise in compliance with the EU state aid rules, to their municipal housing companies.⁸⁷

2.4 Housing provision in weak markets

In a municipality where the demand of housing is declining, the housing market weakens.⁸⁸ In this context it is difficult to create the conditions necessary for construction to take place. Lack of demand for housing renders a less attractive market for construction.⁸⁹ The willingness to invest in housing construction is inextricably linked to the business cycle and the demand for housing.⁹⁰

It is however not always the case that the lack of demand of housing equals a saturated housing market. From a political point of view, there may very well be a greater need of housing than the market shows, especially for

⁸² Municipal Housing Companies Act, § 3.

⁸³ Prop. 2009/10:185 52.

⁸⁴ Prop. 2009/10:185 41.

⁸⁵ SOU 2015:58 356.

⁸⁶ SOU 2015:58 321.

⁸⁷ Municipal Housing Companies Act, § 2.

⁸⁸ SOU 2015:58 20-21.

⁸⁹ SOU 2015:58 18.

⁹⁰ SOU 2015:58 353.

certain groups of people, such as elderly and households with low income.⁹¹ As previously stated, several municipalities in Sweden are currently experiencing that there is a need for housing, even in markets where the demand for housing is weak.⁹² Nevertheless, the municipalities have a responsibility for housing provision.⁹³ The responsibility for municipalities to ensure proper housing on weak housing markets, and for groups in society in need of special housing, cannot be dependent on the business cycle or urbanisation trends.⁹⁴ Needless to say, municipalities with weak housing markets, usually in rural areas, find it hard to carry out this responsibility.⁹⁵ The declining housing market and the shortage of proper housing puts a strain on their ability to take responsibility, and the legal and financial prerequisites are not satisfying the needs of municipalities on weak housing markets.⁹⁶

In a survey made in the Swedish Government Official Report on “EU and Municipal Housing Policy”⁹⁷ the municipal politicians confirm the need for measures in order to provide housing in weak markets.⁹⁸ These measures are likely to require an increased public commitment.⁹⁹

State aid could be part of the solution, addressing the issues in regard to housing provision that the municipalities in weak markets are experiencing.¹⁰⁰ Either through direct state measures or on a municipal level, for instance by providing aid to municipal housing companies.¹⁰¹

⁹¹ SOU 2015:58 18.

⁹² SOU 2015:58 340.

⁹³ Housing Provision Act, § 1.

⁹⁴ SOU 2015:58 353.

⁹⁵ Riksrevisionen 9, 14.

⁹⁶ Riksrevisionen 10, 52; Jörgen Hettne, *Rättsutlåtande ang. offentligt stöd på svaga bostadsmarknader* (Riksrevisionen 2013) 32. Hereinafter ‘Hettne’.

⁹⁷ SOU 2015:58 *EU och kommunernas bostadspolitik*, author’s own translation.

⁹⁸ SOU 2015:58 344.

⁹⁹ SOU 2015:58 19.

¹⁰⁰ SABO 4, 47.

¹⁰¹ SOU 2015:58 354.

3 State aid

The purpose of this chapter is to provide a fundament for the following chapter on the SGEI provisions. It is essential to have a firm grasp of the state aid rules before going in to the applicability of SGEI provisions in municipal housing provision. This chapter begins with highlighting the political element that affects the reasoning behind state aid rules. The following sections aim to structure the different state aid rules in a comprehensive way, and so ends with a diagram illustrating the different steps involved in a state aid assessment.

3.1 What is state aid?

3.1.1 State aid as a cornerstone of EU law

The state aid policy plays an important role in the creation of the EU internal market.¹⁰² Even though the EU in many ways has succeeded in the creation of an internal market, the establishment and development of the single market still remains a primary objective of the EU.¹⁰³ In the creation of the internal market it is imperative that Member States do not succumb to state aid measures that unduly distort competition, thus hindering the achievement of the internal market.¹⁰⁴ If one Member State decides to aid a certain industry, acts of retaliation from other Member States might follow eventually leading to a subsidy race.¹⁰⁵ Consequently, internal market policies and competition concerns are among the strongest reasons for a state aid control regime in the EU.¹⁰⁶

State aid is inextricably linked to politics. As EU state aid rules aim at the conduct of governments, there is a political dimension to the law on state aid that cannot be overlooked.¹⁰⁷ The Commission in itself is political and has political objectives.¹⁰⁸ In the State Aid Action Plan¹⁰⁹ from 2005, the

¹⁰² Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM (2010) 2020 final 20-21.

¹⁰³ TFEU, Art 3(3); Commission, 'Upgrading the Single Market: more opportunities for people and business' (Communication) COM (2015) 550 final 1, 20.

¹⁰⁴ Bacon 4.

¹⁰⁵ Bacon 9.

¹⁰⁶ Bacon 5.

¹⁰⁷ Bacon 5.

¹⁰⁸ Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (Political Guidelines and Opening Statement, Strasbourg, 15 July 2014) and 'Setting Europe in Motion' (Main Messages and Statement, Strasbourg, 22 October 2014) <https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en_0.pdf> accessed 5 July 2017.

Commission emphasised that their approach to state aid would strengthen the objective of the Lisbon Strategy¹¹⁰ and its focus on growth and jobs.¹¹¹ In the State Aid Modernisation Communication¹¹² from 2012 the Commission put focus on the use of state aid control as a means to further the goals of Europe 2020¹¹³ i.e. achieving sustainable growth as well as means to strengthening budgetary discipline and improving the functioning of the internal market.¹¹⁴ State aid is used to incentivise and support certain activities in society by steering state funding or other means of subsidy in directions set by a political agenda. In the context of housing the involvement of a political element is undeniable.

The rules on state aid are set out in Articles 107-109 of the TFEU. The articles form a legal framework on state aid, providing a general definition of aid and clarifying what kind of state aid that is compatible with the internal market and which aid that is not.¹¹⁵

3.1.2 State aid according to Article 107(1) of the TFEU

As a rule, the TFEU dictates that state aid is forbidden. This main principle of EU state aid law is stated in Article 107(1) of the TFEU, which provides a general definition of state aid under EU law.

Article 107

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.¹¹⁶

¹⁰⁹ Commission, ‘State Aid Action Plan: Less and Better Targeted State Aid: a Roadmap for State Aid Reform 2005-2009’ (State Aid Action Plan) COM (2005) 107 final. Hereinafter ‘COM (2005) 107 final’.

¹¹⁰ European Parliament, ‘Presidency Conclusions’ (European Council, Lisbon, 23 and 24 March 2000) <http://www.europarl.europa.eu/summits/lis1_en.htm> accessed 6 July 2017.

¹¹¹ COM (2005) 107 final 5-6.

¹¹² Commission, ‘EU State Aid Modernisation (SAM)’ (Communication) COM (2012) 209 final.

¹¹³ Commission, ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’ (Communication) COM (2010) 2020 final.

¹¹⁴ COM (2012) 209 final 3, 5.

¹¹⁵ Bacon 3.

¹¹⁶ TFEU, Art 107(1).

According to Article 107(1) of the TFEU there are four criteria to be met in order for the aid at hand to constitute state aid within the meaning of EU law.

3.1.2.1 Economic advantage

The first criterion is the required presence of aid, meaning there has to be some sort of economic advantage granted to one or more undertakings.

As is clear from the wording of the article, the beneficiary of the economic advantage needs to be an undertaking in order for Article 107(1) of the TFEU to be applicable. In the context of competition law “an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”¹¹⁷. An economic activity is “any activity consisting in offering goods and services on a given market”¹¹⁸. In addition, the nature of an activity, whether it is economic or not, is not dependant on “the private or public status of the entity engaged in it or the profitability of that activity”¹¹⁹. Consequently, a wide range of activities can constitute aid within the meaning of Article 107(1) of the TFEU.

It is inherent in the word *advantage* that there must be some sort of improvement for the beneficiary, a furthering of its economic position.¹²⁰ An economic advantage, as referred to in Article 107(1) of the TFEU, is such that a recipient undertaking would not have obtained it under normal market conditions.¹²¹

The State can act as a public authority performing public functions or as a market participant engaging in economic activity, and it crucial to examine in what capacity the State is acting.¹²² When the State is exercising an economic activity as a market participant, the acts of the State are measured against that of an operator or private investor on the market.¹²³ The test is to see if the terms of the State activity are compatible with the terms which a

¹¹⁷ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* EU:C:1991:161, para 21.

¹¹⁸ Case C-35/96 *Commission v Italy* EU:C:1998:303, para 36.

¹¹⁹ Case C-288/11 P *Mitteldeutsche Flughafen v Commission* EU:C:2012:821, para 50.

¹²⁰ Joined Cases T-425/04 and T-444/04 *France and Others v Commission* EU:T:2010:216, para 231.

¹²¹ Case C-39/94 *SFEI* EU:C:1996:285, para 60.

¹²² Case T-196/04 *Ryanair v Commission* EU:T:2008:585, para 84.

¹²³ Case T-196/04 *Ryanair v Commission* EU:T:2008:585, para 85; Case T-565/08 *Corsica Ferries France v Commission* EU:T:2012:415, para 79.

commercial investor would find acceptable.¹²⁴ The State activity in question could be as a State owned firm, for instance a municipal housing company, engaged in commercial activity.¹²⁵ If the beneficiary would not have had the same outcome in reference to a private commercial actor, compared to the State as a market participant, then the difference will determine whether the beneficiary has been granted an advantage by the State or not. Consequently, the acts of the State as a market participant are compared to those of a private commercial actor.¹²⁶

This market economy investor principle is useful in determining whether a public company receives benefits constituting an economic advantage for the purpose of Article 107(1) of the TFEU. The question is if a private commercial company, operating under the same terms as a comparable public company and given normal market conditions, would have made an investment the same way as the public company.¹²⁷ If so, then the measure in question would most likely not constitute an economic advantage.¹²⁸

The Court of Justice of the European Union (CJEU) has concluded that the objective pursued, its context, as well as the nature of a measure are all relevant when applying the private investor principle, thus determining in which role a Member State has taken a certain measure.¹²⁹ In addition, the CJEU has concluded that an economic advantage must be assessed in light of the private investor test if it appears that a Member State has conferred an economic advantage in its capacity as a market participant, and not public authority. A global assessment may be required in order for the Commission to reach this conclusion.¹³⁰ Consequently, the private investor test has to be considered when the State is acting as a market participant, for instance as a public municipal housing company.¹³¹

3.1.2.2 State Origin

According to Article 107(1) of the TFEU aid is granted “by a Member State or through State resources”. Contrary to the wording of the provision, said

¹²⁴ Erika Szyszczak (ed.), *Research handbook on European state aid law*, (Edward Elgar 2011) 90. Hereinafter ‘Szyszczak’.

¹²⁵ Szyszczak 91.

¹²⁶ Bacon 29-30.

¹²⁷ Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank v. Commission* EU:T:2003:57, para 245.

¹²⁸ Hettne 6-7; Bacon 39-40

¹²⁹ Case C-124/10 P *Commission v EDF* EU:C:2012:318, para 86. Hereinafter ‘*Commission v EDF*’.

¹³⁰ *Commission v EDF*, para 81 and 92.

¹³¹ *Commission v EDF*, para 81.

requirements are cumulative.¹³² In the *PreussenElektra*¹³³-case the CJEU stated that aid for the purpose of Article 107(1) of the TFEU is an advantage granted through State resources either directly or indirectly. The Court then went on to conclude that the distinction made in the provision, evident by the use of *or*, is intended to bring within the definition of state aid “both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State”¹³⁴, i.e. through State resources.¹³⁵ State aid is therefore defined as an advantage granted directly or indirectly through State resources, in addition to being imputable to the State.¹³⁶

In this context, *State* refers not only to the central authorities of a Member State but regional as well as local bodies are embodied in the notion of *State* in Article 107(1) of the TFEU.¹³⁷ Consequently, aid granted by a municipality, county council or through a public or private undertaking could be considered to be imputable to the state.¹³⁸ This means that a municipality could grant aid to for example a municipal housing company, given all other conditions for aid are satisfied.

3.1.2.3 Selectivity

In addition to the presence of an economic advantage, Article 107(1) of the TFEU requires the advantage granted to the beneficiary to favour “certain undertakings or the production of certain goods”. Such is the case if a certain sector or undertaking is exclusively subject to an advantage.¹³⁹ The aid in question therefore needs to be selective in nature. An economic advantage granted to an individual undertaking usually implies that the selectivity criterion is fulfilled.¹⁴⁰ In cases where selectivity is less apparent, the Court has to assess the measure in reference to others in a comparable situation.¹⁴¹

¹³² Bacon 62.

¹³³ Case C-379/98 *PreussenElektra AG v Schleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* EU:C:2001:160. Hereinafter ‘*PreussenElektra*’.

¹³⁴ *PreussenElektra*, para 58.

¹³⁵ *PreussenElektra*, para 58-62.

¹³⁶ Bacon 62.

¹³⁷ Case C-248/84 *Germany v Commission* EU:C:1987:437, para 17.

¹³⁸ Bacon 62.

¹³⁹ Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group SA and Others* EU:C:2016:981, para. 62.

¹⁴⁰ Case C-15/14 P *Commission v MOL Magyar Olaj- és Gázipari Nyrt.* EU:C:2015:362, para 60.

¹⁴¹ Case C-88/03 *Portugal v Commission* EU:C:2006:511, paras 54 and 56.

3.1.2.4 Effect on trade and competition

According to the fourth criterion in Article 107(1) of the TFEU, the measure has to distort or threaten to distort competition as well as affect trade between Member States. There is an important distinction to be made, as the wording of the provision only requires the measure to be liable to have an effect on trade and competition, not that there be a real effect on trade or that competition is actually distorted.¹⁴² If the advantage conferred on the recipient strengthens that recipient's competitive position, for instance financially, then the aid is said to distort competition.¹⁴³ Likewise, if the position of an undertaking, compared to other undertakings operating in intra-EU trade, is strengthened by the aid then the measure is affecting trade between Member States.¹⁴⁴ However, there is a relatively low threshold for proof of an aid being liable to have an effect on competition and trade.¹⁴⁵

3.1.3 Notification requirement

Article 108(3) of the TFEU provides, as a rule, a notification requirement for all state aid measures prior to the implementation of the measure in question. In addition, the Member States need to await the Commission's response, before the proposed measure is put into effect.¹⁴⁶ However, as is noted throughout the thesis, there are exceptions to this notification requirement.

A municipality in Sweden granting aid in breach of Article 108(3) of the TFEU is at risk of having to recover the aid, which could result in a very difficult situation both for the municipality and the beneficiary undertaking.¹⁴⁷

3.1.4 Aid that falls outside of 107.1 of the TFEU

In order to constitute state aid according to EU state aid rules, the advantage granted needs to reach a certain magnitude. In addition, aid that constitutes compensation for public service is sometimes not considered to be state aid under Article 107(1) of the TFEU.

¹⁴² Case C-494/06 P *Commission v Italy and Wam* EU:C:2009:272, para 50.

¹⁴³ Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission* EU:T:1999:12, para 78; Bacon 85.

¹⁴⁴ Case C-148/04 *Unicredito Italiano* EU:C:2005:774, para 56.

¹⁴⁵ Bacon 84.

¹⁴⁶ Art 108(3) of the TFEU.

¹⁴⁷ Lag (2013:388) om tillämpning av Europeiska unionens statsstödsregler (Law on the applicability of European Union's state aid rules), author's own translation; see also Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH* EU:C:1997:163, paras 23-25.

3.1.4.1 The *Altmark* case

In the *Altmark* case, the CJEU clarified under what circumstances a State measure, i.e. a public service compensation, is not considered to be state aid.¹⁴⁸ The Court listed four conditions to be fulfilled in order for such measure to fall outside of the definition of state aid.

1. The beneficiary must have a clearly defined public service obligation to discharge.¹⁴⁹
2. The parameters for calculating the compensation must be established in advance in an objective and transparent manner.¹⁵⁰
3. The compensation cannot exceed the costs of performing the public service obligations, taking into account receipts and reasonable profit.¹⁵¹
4. The undertaking is chosen pursuant to a public procurement procedure or the compensation to the beneficiary does not exceed that of a typical well-run undertaking, equipped to meet the necessary public service requirements.¹⁵²

The conditions, known as the *Altmark* test, are useful in deciding if payment or other compensation for public services is caught by the state aid provision. The test is essentially used in order to determine if a service of general economic interest constitutes state aid for the purpose of 107(1) of the TFEU.¹⁵³ It has proved difficult for a measure to fulfil all the *Altmark* criteria, in particular the fourth criteria, that of comparison with a well-run undertaking. This is one of the reasons for the clarifications in the Almunia package below.¹⁵⁴

The public service obligation stated in the first *Altmark* criterion corresponds to the definition of a SGEI task in Article 106(2) of the TFEU.¹⁵⁵ Further elaboration on the concept of a public service obligation is therefore found in chapter 4.

¹⁴⁸ *Altmark*, see also Szyszczak 294-295.

¹⁴⁹ *Altmark*, para 89.

¹⁵⁰ *Altmark*, para 90.

¹⁵¹ *Altmark*, para 92.

¹⁵² *Altmark*, para 93.

¹⁵³ Bacon 54-55.

¹⁵⁴ SABO 10-11; Bacon 58.

¹⁵⁵ *BUPA*, paras 162 and 171; SGEI Communication, para 47.

3.1.4.2 De minimis Regulation

Aid that fulfils the conditions of the de minimis Regulation¹⁵⁶ is excluded from the scope of Article 107(1) of the TFEU, and thus falls outside the definition of state aid.¹⁵⁷ As an example, the de minimis Regulation allows for a Member State to grant a total of EUR 200 000 or less to a single undertaking over any period of three years without it constituting state aid.¹⁵⁸ Consequently, if the aid in question satisfies the criteria of the de minimis Regulation the notification requirement under Article 108(3) of the TFEU is no longer applicable.¹⁵⁹

3.1.4.3 SGEI de minimis Regulation

There is also the SGEI de minimis Regulation¹⁶⁰ regarding aid granted to beneficiaries that provide SGEIs. If the SGEI de minimis Regulation is applicable, the measure is not considered to be state aid for the purpose of Article 107(1) of the TFEU.¹⁶¹ Just as in the de minimis Regulation, there is a ceiling on the aid a Member State is permitted to grant in order to meet the criteria in the SGEI de minimis Regulation. Article 2(2) of the Regulation provides that the aid granted to a beneficiary can amount to a total of EUR 500 000 per undertaking over any period of three years. Aid that meets the criteria in the SGEI de minimis Regulation is exempt from the notification requirement in Article 108(3) of the TFEU.¹⁶²

3.2 When is state aid allowed?

3.2.1 Exceptions according to Articles 107(2) and 107(3) of the TFEU

Article 107(2) of the TFEU provides exceptions to the prohibition on state aid in Article 107(1) of the TFEU. It lists the type of aid that is considered to be compatible with the internal market. The listed exceptions concern aid having a social character granted to individual consumers, aid in order to remedy the damage caused by natural disasters or exceptional occurrences, and aid granted to compensate for disadvantages caused by the division of

¹⁵⁶ Regulation (EU) 1407/2013 on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid ('de minimis Regulation') [2013] OJ L352/1.

¹⁵⁷ de minimis Regulation, Art 3(1).

¹⁵⁸ de minimis Regulation, Art 3(2).

¹⁵⁹ de minimis Regulation, Art 3(1).

¹⁶⁰ SGEI de minimis Regulation.

¹⁶¹ SGEI de minimis Regulation, Art 2(1).

¹⁶² SGEI de minimis Regulation, Art 2(1).

Germany.¹⁶³ They are all the type of aid that the Commission shall deem compatible with the internal market, thus if the conditions of article 107(2) of the TFEU are fulfilled the aid is said to be automatically lawful.¹⁶⁴

Article 107(3) of the TFEU on the other hand, provides for exceptions where it is at the Commission's discretion to decide on the compatibility of the aid.¹⁶⁵ The list of exceptions include regional aid and "aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment"¹⁶⁶, aid to promote important projects of "common European interest"¹⁶⁷, aid to "facilitate development of certain economic activities"¹⁶⁸, aid to "promote culture and heritage conservation"¹⁶⁹ and other categories of aid "specified by decision of the Council"¹⁷⁰.

In order for the Commission to avoid political pressure, and otherwise subject themselves to criticism of a too extensive power of discretion, the Commission has adopted guidelines for the purpose of specifying which aid can be deemed compatible.¹⁷¹ If there is no guideline for the aid in question, or the aid does not fall within the scope of the existing guidelines, the compatibility of the aid with the internal market is decided based on the conditions in Article 107(3) of the TFEU.¹⁷²

Notably, both exceptions require prior notification to the Commission.¹⁷³

3.2.2 The General Block Exemption Regulation

The General Block Exemption Regulation¹⁷⁴ (GBER) declares certain aid, within the meaning of Articles 107(2) and 107(3) of the TFEU, to be compatible with the internal market.¹⁷⁵ It allows for regional and horizontal aid, as well as aid to specific sectors to be granted without notification to the

¹⁶³ TFEU, Art 107(2).

¹⁶⁴ TFEU, Art 107(2); Bacon 93.

¹⁶⁵ Bacon 93.

¹⁶⁶ TFEU, Art 107.3 (a).

¹⁶⁷ TFEU, Art 107.3 (b).

¹⁶⁸ TFEU, Art 107.3 (c).

¹⁶⁹ TFEU, Art 107.3 (d).

¹⁷⁰ TFEU, Art 107.3 (e).

¹⁷¹ Bacon 6.

¹⁷² Bacon 99.

¹⁷³ Bacon 94.

¹⁷⁴ Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ('GBER') [2014] OJ L187/1.

¹⁷⁵ GBER, Art 3.

Commission.¹⁷⁶ When the GBER criteria are met, the notification requirement in Article 108(3) of the TFEU is no longer applicable.¹⁷⁷

The purpose of the GBER is to clarify when state aid is permitted, prioritise state aid enforcement so as to allow “good aid”¹⁷⁸ and to increase legal certainty for those beneficiaries that are granted aid by enhancing transparency.¹⁷⁹ Most of the state aid granted to undertakings is approved by virtue of the GBER. In fact, the Commission recently estimated as much as 95 percent of new implemented aid measures to fall within the GBER.¹⁸⁰

3.2.3 SGEI

Even if all of the conditions of the *Altmark* test are not satisfied, rendering the measure in question to be defined as state aid in accordance with Article 107(1) of the TFEU, the aid granted to the beneficiary could be approved under Article 106(2) of the TFEU. Compensation for services of general economic interest may well be the type of aid that satisfies all conditions necessary for Article 106(2) of the TFEU to be applicable.¹⁸¹

A closer look at Article 106(2) of the TFEU is found in the next chapter, which revolves around SGEIs.

3.3 Assessing state aid – step-by-step

In order to bring clarity to the steps involved in assessing a measure under the state aid rules, the following section provides a step-by-step guide, also illustrated by Diagram 1 below. The first step is to consider if a measure constitutes state aid according to Article 107(1) of the TFEU. This means that all four criteria regarding economic advantage, state origin, selectivity and effect on trade and competition, need to be fulfilled. The measure in question is not characterised as state aid unless all four conditions are satisfied.¹⁸² In this regard it should be noted that if the *de minimis* Regulation is applicable then the measure is not state aid for the purpose of

¹⁷⁶ Bacon 154; GBER, recital 32.

¹⁷⁷ GBER, Art 3.

¹⁷⁸ Commission, *State aid: Commission exempts more aid measures from prior notification* (Press Release IP/14/587, Commission 2014).

¹⁷⁹ GBER, recital 3; Commission, *State aid: Commission exempts more aid measures from prior notification* (Press Release IP/14/587, Commission 2014).

¹⁸⁰ Commission, *State aid: 2016 Scoreboard shows benefits of modernisation for quick implementation of aid measures in Member States* (Press Release IP/17/624, Commission 2017).

¹⁸¹ Bacon 55.

¹⁸² Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C:2017:178, paras 22-23.

Article 107(1) of the TFEU.¹⁸³ As shown in chapter 3, there are exceptions to Article 107(1), one of which is found in Article 107(2) of the TFEU. Another exception is Article 107(3) of the TFEU, according to which categories of aid are made exceptions by discretion of the Commission. Accordingly, aid could fall under the GBER, which provides an exception to Article 107(1) of the TFEU.

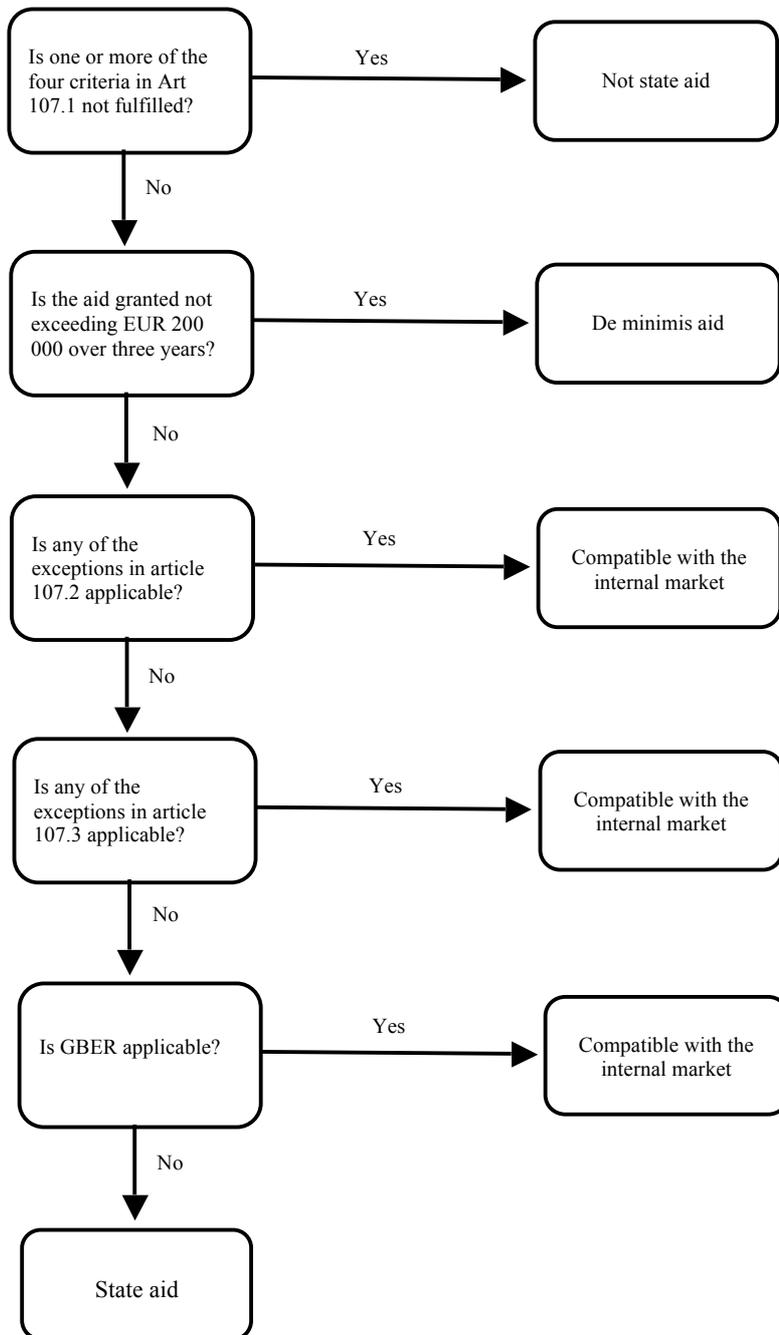


Diagram 1

¹⁸³ de minimis Regulation, Art 3(1).

4 Services of general economic interest

The first part of this chapter elaborates on the notion of service of general economic interest, frequently referred to as SGEI. It is important to provide an introduction to the concept, as it lays the foundation for the application of EU provisions on SGEI. The chapter therefore provides an insight to the difficulties in defining an SGEI, and highlights the role of SGEI in EU law.

After initial comments on the concept of SGEI, there is a section on the new legislative package adopted by the Commission in the wake of the *Altmark* case. The Almunia package, as it is called, was adopted with the purpose to bring clarity to the SGEI provisions. All four instruments are therefore examined, with a special focus on the SGEI de minimis Regulation and the Decision as they could provide a possible outlet for municipalities in providing aid to municipal housing companies. Further elaborations on the latter are found in chapter 6.

The second part of this chapter is focused on Article 106(2) of the TFEU, initially having a look at the purpose of the provision. The following section is centred on the application of the article and its relationship to the *Altmark* conditions. In its final part, the chapter clarifies the different steps involved when assessing an advantage provided to a beneficiary undertaking, determining whether it constitutes state aid or not. The last step being that of a compatibility assessment, in case the granted advantage is deemed to be state aid under Article 107(1) of the TFEU. The purpose of the step-by-step section is to provide clarity among the different state aid rules, and provide the basic structure on which the analysis is founded.

4.1 Services of general economic interest

4.1.1 The definition of SGEI

According to the Commission "[t]he concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned"¹⁸⁴. In other words, there is no established definition of SGEI to be found in EU legislation. Instead, Union law leaves it to each and every Member State to define SGEI. In this aspect

¹⁸⁴ SGEI Communication, para 45.

Member States have a wide margin of discretion to choose which services will fall within the notion of SGEI, and to formulate the guiding principles under which such services are performed. Only in the event of manifest error is it within the competence of the Commission to question the definition by the Member States.¹⁸⁵

In its SGEI Guide, the Commission is clear that the application of SGEI may vary depending on the particular situation and the Member State setting the agenda for the concept of SGEI. According to the Commission there is no obligation in EU law for Member States to specify and state which measures constitute SGEI. Thus, a public service obligation does not require formal designation as a SGEI by a Member State; that the public service obligation in question be clearly identified will suffice for the purpose of falling within the concept of SGEI.¹⁸⁶

4.1.2 SGEI in EU law

The concept of SGEI is found in various realms of EU law. Primarily in Article 106(2) of the TFEU, which is the focus of section 4.2 below. However, this provision is not the only place where the concept of SGEI is found.

For instance, Article 14 of the TFEU stresses the important role of SGEI in promoting “social and territorial cohesion”, and highlights the place of SGEI in the shared values of the Union. The provision further establishes that Member States 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”¹⁸⁷. Consequently, emphasis is put on the role of Member States to legislate and decide on matters in order to ensure that SGEIs are provided for on a national level.¹⁸⁸

The concept of SGEI is also part of Protocol (No 26) to the TFEU, which makes reference to Article 14 of the TFEU and expand on the notion of SGEI therein. Protocol (No 26) elaborates on the shared values of the Union, within the meaning of Article 14 of the TFEU, and states that they include for instance “the essential role and the wide discretion of national,

¹⁸⁵ *BUPA*, para 166; Case T-17/02 *Olsen v Commission* EU:T:2005:218, para 216; SGEI Communication, para 46.

¹⁸⁶ Commission, ‘Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest’ (Commission Staff Working Document) SWD(2013) 53 final/2 22. Hereinafter ‘SGEI Guide’.

¹⁸⁷ TFEU, Art 14.

¹⁸⁸ Commission, ‘A Quality Framework for Services of General Interest in Europe’ (Communication) COM(2011) 900 final 5. Hereinafter ‘COM(2011) 900 final’.

regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”¹⁸⁹. The Protocol thereby emphasises the enhanced freedom for local authorities in the provision, commissioning and organisation of SGEIs.¹⁹⁰ Protocol (No 26) was annexed to the Lisbon Treaty with the purpose of putting emphasis on the importance of SGEI, as stated by the high contracting parties in the very beginning of the Protocol.¹⁹¹

Another source highlighting the concept of SGEI is the Charter of Fundamental Rights¹⁹², Article 36, according to which access to SGEI is expressed as a fundamental right.

4.1.3 The difference between SGI and SGEI

SGEI is easily confused with service of general interest (SGI), as the two concepts somewhat overlap. In Protocol (No 26) there is a reference to SGI, but no explanation as to the nature of such services.¹⁹³ In an attempt to bring clarity to the concepts of aid, the Commission stated that SGIs are services that are subject to certain public service obligations, given their classification by the Member States as being of general interest. Although SGIs cover economic, as well as non-economic activities, it is only the activities that are economic in nature that are subject to EU competition rules.¹⁹⁴

SGEIs on the other hand are, as the phrasing implies, 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”¹⁹⁵. They are services entrusted to an undertaking, or undertakings, for the purpose of a general interest.¹⁹⁶ SGEI therefore seems to fall under the concept of SGI. The key element is the “general interest” which is important in determining which measures constitute SGEI. In the discussion on housing provision, and whether it is a SGEI, the concept of “general interest” plays an important role.

¹⁸⁹ Protocol (No 26) to the TFEU, Art 1. Hereinafter ‘Protocol (No 26)’.

¹⁹⁰ Protocol (No 26); Tom Madell, *Tjänster av allmänt intresse: ett svenskt perspektiv* (Svenska institutet för europapolitiska studier (SIEPS) 2011) 27. Hereinafter ‘Madell’.

¹⁹¹ Protocol (No 26).

¹⁹² Charter of Fundamental Rights of the European Union [2016] OJ C 202/396.

¹⁹³ See title of Protocol (26) as well as the introductory sentence in the Protocol.

¹⁹⁴ COM(2011) 900 final 3.

¹⁹⁵ COM(2011) 900 final 3.

¹⁹⁶ COM(2011) 900 final 3.

4.1.4 The Almunia Package

In light of the CJEU ruling on public service compensation in the *Altmark* case the Commission adopted a legislative package, which specified the rules on SGEI. Due to expire in 2011, the Commission reviewed the package and adopted a new set of state aid rules on SGEI in December of 2011.¹⁹⁷ In April the following year the Commission adopted the final legislative measure out of the four instruments known as the Almunia package. It included a new Communication¹⁹⁸ from the Commission, a revised Decision¹⁹⁹, a revised Framework²⁰⁰, and finally a new SGEI de minimis Regulation^{201 202}.

The package was adopted with the purpose of clarifying state aid principles and to simplify the application of state aid rules by national or local governments, paving way for a greater focus on the competition concerns in regard to larger cases.²⁰³ As stated by the former Commission Vice-President Joaquín Almunia, at the time responsible of competition policy, "[t]he new SGEI package provides Member States with a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens which have become even more necessary in these crisis times"²⁰⁴.

In addition to the Almunia package, the Commission published a guide on the application of state aid rules on SGEIs, i.e. the SGEI Guide²⁰⁵. It is important to note that the SGEI Guide is a working paper and not binding on the Commission.²⁰⁶ It aims to clarify certain issues concerning the application of state aid rules in regard to SGEIs, and does so by answering a wide range of questions.²⁰⁷ As for the Almunia package it can be seen as binding on the Commission given that the different instruments limit the

¹⁹⁷ Commission, 'State aid: Commission adopts new rules on services of general economic interest (SGEI)' (Press Release IP/11/1571, Commission 2011). Hereinafter 'Press Release IP/11/1571'.

¹⁹⁸ SGEI Communication.

¹⁹⁹ SGEI Decision.

²⁰⁰ SGEI Framework.

²⁰¹ SGEI de minimis Regulation.

²⁰² Commission, 'State aid: Commission adopts de minimis Regulation for services of general economic interest (SGEI)' (Press Release IP/12/402, Commission 2012); Commission, 'State aid: Commission publishes updated Guide on services of general economic interest (SGEI)' (Press Release IP/13/123, Commission 2013).

²⁰³ Press Release IP/11/1571.

²⁰⁴ Press Release IP/11/1571.

²⁰⁵ SGEI Guide.

²⁰⁶ SGEI Guide 18.

²⁰⁷ SGEI Guide 19.

Commission's discretion in making an assessment under Article 106(2) of the TFEU.²⁰⁸

4.1.4.1 The Communication

The Communication aims to clarify key concepts of state aid rules such as economic activity, undertaking, state resources and SGEI.²⁰⁹ The use of the Communication in the application of Article 106(2) of the TFEU is discussed further in section 4.2 below.

4.1.4.2 The Decision

Under the Decision, economic advantage granted to undertakings providing SGEIs can avoid the notification obligation.²¹⁰ Although, the possibility to notify aid to the Commission and let them assess whether the conditions of the Decision are fulfilled or not remains to be a possibility for the Member States.²¹¹ This could be useful in case there is uncertainty in assessing whether the conditions of the Decision are met.

The Decision makes clear certain conditions that need to be satisfied when providing compensation for public service obligations in order to escape the requirement of prior notification under Article 108(3) of the TFEU.²¹² Some of the conditions are more relevant for the purpose of this thesis, and are therefore examined more closely.

Entrustment

It is a condition for the Decision to be applicable, that the beneficiary undertaking has been specifically entrusted, by way of one or more acts, with the provision of a particular SGEI.²¹³ The Member State may determine which form the entrustment act should take but it needs to fulfil the requirements stated in Article 4 of the Decision. Among other things, the entrustment act should include the content of the public service obligation and the duration of such an obligation, a description of the way in which the undertaking receives compensation, and a reference to the Decision.²¹⁴

²⁰⁸ Erika Szyszczak & Johan Willem Gronden (red.), *Financing services of general economic interest : reform and modernization* (T. M. C. Asser Press 2013) 112-113; see also Joined Cases C-75/05 P and C-80/05 P *Germany and Others v Kronofrance* EU:C:2008:482, para 61.

²⁰⁹ SGEI Communication, para 3; Press Release IP/11/1571.

²¹⁰ SGEI Decision, recital 7.

²¹¹ SGEI Decision, recital 26.

²¹² SGEI Decision, recital 7 and Articles 1 and 3.

²¹³ SGEI Decision, recital 13 and art 4.

²¹⁴ SGEI Decision, Art 4 (a), (d), and (f).

Social services

Within the scope of the Decision fall certain categories of SGEIs meeting social needs.²¹⁵ In its press release for the Almunia package the Commission stated that the legislative package would mean that all social services, no matter the size of the compensation, would become exempt from the notification requirement in Article 108(3) of the TFEU.²¹⁶ That is a significant expansion compared to the previous standard, exempting hospitals and social housing.²¹⁷ Article 2(1)(c) of the Decision asserts that state aid to undertakings providing social services “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”, is such compensation that falls under the Decision. In other words, the Decision does not exempt *all* social services, as stated by the Commission, but rather includes the just mentioned list of social services, which is held to be exhaustive. According to the Commission the list covers the most important areas of social services, thus providing a broad definition as to the notion of social services. More importantly, the Commission puts emphasis on the possibility for Member States to include various types of services within the concept of “inclusion of vulnerable groups”, as stated in Article 2(1)(c) of the Decision. The Commission points out that it is a broad term, thus allowing Member States the possibility to address the needs of the most vulnerable groups in society.²¹⁸

Threshold of EUR 15 million and effect on trade and competition

The scope of the Decision extends beyond SGEIs constituting social services. Compensation for SGEIs that do not constitute social services can instead fall under Article 2(1)(a) of the Decision, according to which compensation that does not exceed EUR 15 million a year is exempt from the notification requirement. Such amounts of aid are exempt because they are not considered to affect development of EU trade and competition. This is vital because aid under the Decision is only deemed compatible with the internal market given its effect on trade and competition, as just mentioned, is not contrary to the interests of the Union.²¹⁹ Notably, the stated amount is half of the previous amount of EUR 30 million, below which aid granted for a SGEI used to fall under the Decision.²²⁰ The added impetus on the cases

²¹⁵ SGEI Decision, Art 2(c).

²¹⁶ Press Release IP/11/1571.

²¹⁷ 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 [2005] L 312/67, Art 2(1)(b) and recital 16.

²¹⁸ SGEI Guide 56-57.

²¹⁹ SGEI Decision, recital 9.

²²⁰ 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

with the most impact on competition, i.e. the larger cases, is therefore accentuated by this change in the new Decision.

Other conditions of the Decision

The Decision sets up a few more important conditions for its applicability. One being the time limit of ten years in regard to the period of time a SGEI is entrusted to an undertaking.²²¹ Another condition is the requirement in Article 5 of the Decision, stating that no overcompensation of the public service obligation is allowed. Furthermore, the Decision provides a number of provisions with the purpose of monitoring the fulfilment of the conditions, laid down in Article 106(2) of the TFEU, necessary for the exception to be applicable.²²² This includes, for example, regular control on part of the Member States, control of overcompensation for public service obligations, and an obligation for Member States to submit reports on the application of the Decision.²²³ Even though aid granted to an undertaking under the Decision means that the aid is exempt from the notification obligation in Article 108(3) of the TFEU, Member States still have the possibility to notify aid to the Commission and let it assess whether the conditions of the Decision are fulfilled or not.²²⁴

4.1.4.3 The Framework

The Framework is applicable on such aid that falls outside of the Decision, i.e. public service compensation that requires prior notification according to Article 108(3) of the TFEU.²²⁵ Prior notification entails an assessment by the Commission on the fulfilment of criteria set out in Article 106(2) of the TFEU. The Framework is the basis on which such an assessment will take place, therefore providing guidance on how to evaluate if all conditions are satisfied.²²⁶ These conditions, and the way to make an assessment under Article 106(2) of the TFEU, are discussed in section 4.2 below.

4.1.4.4 The SGEI de minimis Regulation

The final instrument of the Almunia package is the SGEI de minimis Regulation. As previously discussed in chapter 3, the Regulation states that public service compensation that does not exceed EUR 500 000 over a

undertakings entrusted with the operation of services of general economic interest [2005] L 312/67, Art 2(1)(a).

²²¹ SGEI Decision, Art 2(2).

²²² SGEI Decision, recital 7.

²²³ SGEI Decision, Articles 6 and 9.

²²⁴ SGEI Decision, recital 26.

²²⁵ SGEI Framework, para 7.

²²⁶ Bacon 113.

period of three years should be deemed not to affect inter-EU trade or distort competition. Such aid is exempt from the notification requirement in Article 108(3) of the TFEU.²²⁷ It is clearly a tool for the Commission to achieve the overall objective of the Almunia package to simplify the application of SGEI rules, not least for the provision of small and local SGEIs.²²⁸ The SGEI de minimis Regulation does, however, set up a few requirements in order for an economic advantage to avoid scrutiny by the Commission. Member States are required to inform the beneficiary undertaking which service obligation the advantage is granted for, and the undertaking has to be entrusted with the SGEI in writing. Notably, the requirement to inform does not correspond to all the information required by the Decision. In addition, there has to be a reference to the SGEI de minimis Regulation in the entrustment act and, needless to say, the advantage in question has to be granted for the purpose of a SGEI.²²⁹

Another condition, or rather limitation, of the SGEI de minimis Regulation is the requirement of the beneficiary undertaking not to be in difficulty, i.e. insolvent or for other reasons almost certainly going out of business.²³⁰ The rationale for the exception, as stated by the Commission in the Regulation, was that it is not considered appropriate for beneficiary undertakings in difficulty to receive aid unless such aid is part of a restructuring concept.²³¹

According to the Commission, it was appropriate to have a separate de minimis Regulation for SGEI since, in its experience, the ceiling below which public service compensation could be said to have an effect on trade or competition could differ from the general de minimis Regulation²³². One reason for this was that undertakings with a public service obligation providing these services incurred costs, which the economic advantage granted to them was likely to, at least to some extent, compensate for.²³³ The ceiling for SGEI was therefore raised from EUR 200 000 in the general de minimis Regulation, to EUR 500 000 in the SGEI de minimis Regulation.²³⁴

²²⁷ SGEI de minimis Regulation, recital 4 and Art 2(1)-(2).

²²⁸ Press Release IP/11/157.

²²⁹ SGEI de minimis Regulation, recital 6 and Art 3(1).

²³⁰ SGEI de minimis Regulation, Art 1(2)(h) and recital 11; Commission, 'Community guidelines on state aid for rescuing and restructuring firms in difficulty' (Communication) [2004] OJ C 244/02, section 2.1.

²³¹ SGEI de minimis Regulation, recital 11.

²³² Regulation (EU) 1407/2013 on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid ('de minimis Regulation') [2013] OJ L352/1.

²³³ SGEI de minimis Regulation, recital 3.

²³⁴ de minimis Regulation, Art 3(2); SGEI de minimis Regulation, Art 2(1)-(2).

4.2 Article 106(2) of the TFEU

4.2.1 Article 106(2) of the TFEU - a balancing act

Article 106(2) of the TFEU is an exception to the main rule in article 107(1) of the TFEU. In case law and literature, it is often referred to as a derogation rule.²³⁵ But there seem to be some ambiguity as to the character of the provision, and the CJEU has opened the door for the element of balancing interests rather than stick to a clear derogation rule.²³⁶ In *France v Commission*²³⁷ the Court stated that “[i]n allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market”²³⁸, a phrase that has come to be referenced over and over again.²³⁹ What is put to light by this phrase is the objective of Article 106(2) of the TFEU to reconcile the interest of Member States to designate certain services as SGEIs to pursue achievement of national policy, and the interests of the Union.²⁴⁰ Article 106(2) of the TFEU therefore seems to stick to the notion of a derogation rule, but with the purpose of reconciling different interests.²⁴¹

4.2.2 Aid to undertakings for SGEIs

If a measure is considered to be state aid as per Article 107(1) of the TFEU, it can still fall under Article 106(2) of the TFEU and be declared compatible with the internal market.²⁴² Such aid usually needs to be approved by the Commission following a notification by virtue of Article 108(3) of the TFEU. However, the notification requirement is not applicable if the measure falls under the GBER, the de minimis Regulation, the SGEI de minimis Regulation or the Decision.²⁴³

²³⁵ Case C-159/94 *Commission v France* EU:C:1997:501, para 53; Case C-157/94 *Commission v Netherlands* EU:C:1997:499, para 37; Madell 28, 33.

²³⁶ Wehlander 248.

²³⁷ Case C-202/88 *France v Commission* EU:C:1991:120

²³⁸ Case C-202/88 *France v Commission* EU:C:1991:120, para 12.

²³⁹ Case C-157/94 *Commission v Netherlands* EU:C:1997:499, para 39; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430, para 103; Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C:2017:178, para 31.

²⁴⁰ Wehlander 249.

²⁴¹ Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C:2017:178, para 31.

²⁴² SGEI Guide, 18-19.

²⁴³ See, above, section 3.3.2; section 3.2.1.2, section 3.2.1.3; section 4.1.4.2.

As been previously noted, aid that meets the four conditions stated in the *Altmark* case does not constitute state aid.²⁴⁴ Thus, if the compensation to an undertaking entrusted with a public service obligation matches or falls below the costs incurred by the obligation, resulting in no less favourable position on part of the undertaking, the compensation falls outside the scope of Article 107(1) of the TFEU.²⁴⁵ Since the *Altmark* criteria targets public service obligations, fewer cases are considered under Article 106(2) of the TFEU.²⁴⁶ In a situation where the *Altmark* criteria are not met, rendering the measure to be classified as state aid, Article 106(2) of the TFEU could still be applicable.²⁴⁷

4.2.3 Applying Article 106(2) of the TFEU

Aid that does not fulfil the conditions laid out in the Decision is assessed under the Framework, in combination with clarifications stated in the Communication. As previously noted, the most significant difference between the Decision and the Framework is the notification requirement for aid that does not fall under the Decision. Any aid falling under the Framework needs to be notified to the Commission.²⁴⁸

The Commission has to look at a number of conditions that need to be met in order for Article 106(2) of the TFEU to be applicable. Notably, the Member State that invokes Article 106(2) of the TFEU holds the burden of proof to show that the criteria in that provision are met.²⁴⁹

There are three conditions to satisfy in the application of Article 106(2) of the TFEU, as identified in settled case-law.²⁵⁰ According to the General Court in *Viasat Broadcasting UK v Commission*²⁵¹ the first condition requires the existence of a SGEI. The second condition is in regard to entrustment, requiring that the beneficiary undertaking has been explicitly entrusted with the provision of the SGEI.²⁵² The Court stated that “the third condition is based on the concept of proportionality”²⁵³, which involves the

²⁴⁴ See section 3.2.1.1.

²⁴⁵ *Altmark*, para 87.

²⁴⁶ Bacon 93.

²⁴⁷ Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C:2017:178, para 34-35.

²⁴⁸ SGEI Framework, para 7.

²⁴⁹ Case C-159/94 *Commission v France* EU:C:1997:501, para 94.

²⁵⁰ Case T-125/12 *Viasat Broadcasting UK v Commission* EU:T:2015:687, para 61.

Hereinafter ‘*Viasat*’; Case T-442/03 *SIC v Commission* EU:T:2008:228, para 144; Joined Cases T-204/97 and T-270/97 *EPAC v Commission* EU:T:2000:148, para 125-126; Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* EU:C:1991:464, para 26. Hereinafter ‘*Merci*’.

²⁵¹ *Viasat*.

²⁵² *Viasat*, para 61.

²⁵³ *Viasat*, para 61.

assessment of the necessity of the measure in question as well as considering if the measure affects the development of trade to the point of acting contrary to Union interest.²⁵⁴ These three criteria are also found in the Framework.²⁵⁵ In addition, the Framework provides a set of conditions that sometimes act as sub-criteria under these three more overall criteria, or can be seen as additional criteria that need to be fulfilled for the application of Article 106(2) of the TFEU.

4.2.3.1 SGEI

The first criterion requires aid falling under Article 106(2) of the TFEU to be granted to an undertaking for a “genuine and correctly defined”²⁵⁶ SGEI.²⁵⁷ There are certain requirements to adhere to when defining a SGEI, in order for a definition to be correct in this sense. Guidance on these requirements is found in the Communication, which among other things makes it clear that “services that are already provided or can be provided satisfactorily and under conditions [...] consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions”²⁵⁸ are such that cannot constitute public service obligations.²⁵⁹

It is ascertained in the Communication, as well as in case-law, that in comparison to the general economic interest of other economic activities, services constituting SGEIs exhibit special characteristics.²⁶⁰ As previously stated, it is for the Member States to define what constitutes a SGEI, and they have a wide margin of discretion in doing so.²⁶¹ Defining a SGEI falls outside the competence of the Commission, as it can only question a definition of a SGEI by a Member State in the event of manifest error.²⁶²

Although Member States have a wide margin of discretion, the General Court made it clear in the *BUPA-case* that Member States are required to ensure that the service they designate as a SGEI satisfies certain minimum criteria, found in all SGEIs.²⁶³ To mention a few of these criteria, also known as special characteristics, the Court went on to state that an SGEI is

²⁵⁴ *Viasat*, para 61.

²⁵⁵ SGEI Framework, para 5.

²⁵⁶ SGEI Framework, para 12.

²⁵⁷ SGEI Framework, para 12.

²⁵⁸ SGEI Communication, para 48.

²⁵⁹ SGEI Framework, para 13; SGEI Communication, para 48.

²⁶⁰ *Merci*, para 27; Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and Others* EU:C:1998:306, para 45; SGEI Communication, para 45.

²⁶¹ SGEI Communication, para 46.

²⁶² Case T-17/02 *Olsen v Commission* EU:T:2005:218, para 216; SGEI Communication, para 46.

²⁶³ *BUPA*, para 172.

universal and compulsory in nature.²⁶⁴ However, this does not mean that such a service has to be a universal service, even though that is a SGEI in the classical sense. Accordingly, a SGEI does not need to be a service that meets the need of the whole population, it can suffice that it is enjoyed by a limited group of people.²⁶⁵ It should, however, be noted that an important characteristic of SGEIs is the need for such services to be undertaken in the public interest or to be addressed to citizens.²⁶⁶ As for the compulsory nature of a public service obligation, an undertaking may have an exclusive or special right to provide the service in question. However, in absence of such rights, the existence of a SGEI is established by concluding that the service needs to be offered to every citizen requesting the service.²⁶⁷

In addition to these minimum criteria, the Member States have further limitations to take into consideration when defining a service as a SGEI. Furthermore, the Member States are not permitted to have a service designated SGEI for the purpose of avoiding EU competition rules.²⁶⁸

4.2.3.2 Entrustment

According to the second criterion, the responsibility to provide a SGEI must have been entrusted to an undertaking.²⁶⁹ The undertaking can be either private or public in order to fall under Article 106(2) of the TFEU.²⁷⁰

Imbedded in the notion of ‘entrusted undertaking’ is the requirement of a public service obligation having been assigned to it by a public authority.²⁷¹ Meaning that “certain obligations are imposed on it by the State in the general economic interest”,²⁷² as stated by Advocate General in the *Dusseldorp case*²⁷³.

The entrustment criterion requires the provision of SGEIs to be entrusted by means of one or more entrustment acts specifying, among other things, the

²⁶⁴ *BUPA*, para 186-188.

²⁶⁵ *BUPA*, para 186-187.

²⁶⁶ SGEI Communication, para 50.

²⁶⁷ *BUPA*, para 188-190.

²⁶⁸ *BUPA*, para 168.

²⁶⁹ SGEI Framework, para 15; SGEI Communication, para 51.

²⁷⁰ SGEI Communication, recital 2; Case C-288/11 P *Mitteldeutsche Flughafen v Commission* EU:C:2012:821, para 50.

²⁷¹ Case C-127/73 *BRT v SABAM* EU:C:1974:25, para 20.

²⁷² Opinion of Jacobs AG in Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*. EU:C:1997:508, para 103.

²⁷³ Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*. EU:C:1997:508.

public service obligation and applicable compensation method.²⁷⁴ The entrustment criterion does not, however, require a legislative measure.²⁷⁵

4.2.3.3 Proportionality

Having concluded that the measure has been entrusted to an undertaking, the next step is determining whether or not the Treaty rules obstruct the performance of the service obligation assigned to the undertaking.²⁷⁶ This assessment is done by reviewing whether the advantage given to the beneficiary undertaking is necessary in order for the SGEI to be carried out by the undertaking under economically acceptable conditions.²⁷⁷ In other words, assessment under Article 106(2) of the TFEU involves a necessity test.

It is stated in Article 106(2) of the TFEU that the Treaty rules apply insofar as they do not obstruct the performance of the public service obligation entrusted to an undertaking. This is weighed against the last phrase of the provision, which states that such performance cannot affect the development of trade to such an extent that would be contrary to the interests of the Union. This is thus the balancing that needs to be performed in assessing a measure under Article 106(2) of the TFEU. Essentially it is a proportionality test, under which the assessment of Article 106(2) of the TFEU needs to be made, where the CJEU has to "strike a balance between, on the one hand, guaranteeing the effectiveness of EU (competition) law and, on the other hand, safeguarding the general interest pursued by national authorities."²⁷⁸²⁷⁹ However, the proportionality test used under Article 106(2) of the TFEU seems to be a soft version, rather than a strict proportionality test. According to Baquero Cruz, the case law demonstrate the use of a necessity test where step one is the presence of a legitimate aim, and step two is the "measure objectively tailored to achieve that end"²⁸⁰, with the result that the usual final step, assessing whether the objective in question has been achieved by least restrictive means, falls away. Accordingly, the test is more flexible and lenient than a strict test of

²⁷⁴ SGEI Framework, para 16; SGEI Communication, para 52.

²⁷⁵ Bacon 116.

²⁷⁶ C-157/94 *Commission v Netherlands* EU:C:1997:499, para 43.

²⁷⁷ *BUPA*, para 222; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430, para 107.

²⁷⁸ Koen Lenaerts, 'Defining the Concept of 'Services of General Interest' in Light of the 'Checks and Balances' Set out in the EU Treaties.' [2012] 19(4) *Jurisprudencija* 1247, 1256. Hereinafter 'Lenaerts'.

²⁷⁹ Lenaerts 1256; Wehlander 252.

²⁸⁰ Julio Baquero Cruz, 'Beyond competition: Services of General Economic Interest and European Community Law' Gráinne De Búrca (ed), *EU law and the welfare state: in search of solidarity* (OUP 2005) 196. Hereinafter 'Baquero Cruz'.

proportionality. Baquero Cruz however points out that the application of the proportionality test may vary depending on which provisions Article 106(2) of the TFEU is applied in relation to.²⁸¹ Notably though, he argues that the interpretation of Article 106(2) of the TFEU “should not vary depending on the institution applying it”²⁸², i.e. it should not matter if it is the CJEU or the Commission interpreting the provision.²⁸³

On a final note, it is stated in the last sentence of Article 106(2) of the TFEU, and reinforced by the Framework, that the performance of the SGEI task must not affect the development of trade in a way that would be contrary to the interests of the Union.²⁸⁴ This final condition can be viewed as an additional proportionality assessment.²⁸⁵

4.2.3.4 Additional criteria in the Framework

As has been shown above, Article 106(2) of the TFEU provides criteria, ensuring that Member States do not act contrary to Union interests. The Framework provides even more clarity as to the different requirements that need to be fulfilled in order for the measure in question to be deemed compatible with the internal market. It sets up requirements concerning for instance compliance with the EU public procurement rules.²⁸⁶ Furthermore, requirements on absence of discrimination, requirements in relation to the compensation mechanism and additional requirements for aid that remains to be serious competition concerns are all found in the Framework.²⁸⁷

4.2.4 Article 106(2) of the TFEU and *Altmark*

An important distinction needs to be made between measures that fulfil the *Altmark* criteria, and measures falling under Article 106(2) of the TFEU.

In *TFI v Commission*²⁸⁸ the General Court made it clear that the *Altmark* criteria have the sole purpose of determining whether the measure in question can be classified as state aid. The Court continued to state that this more specifically entailed the determination of “the existence of an

²⁸¹ Baquero Cruz 196-197; see also Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart 2007) 218.

²⁸² Baquero Cruz 198.

²⁸³ Baquero Cruz 198.

²⁸⁴ SGEI Framework, para 11.

²⁸⁵ Alison Jones and Brenda Sufrin, *EU competition law: text, cases, and materials* (5th edn, OUP 2014) 652.

²⁸⁶ SGEI Framework, para 19.

²⁸⁷ SGEI Framework, para 50, section 2.8 and section 2.9.

²⁸⁸ Case T-354/05 *TFI v Commission* EU:T:2009:66. Hereinafter ‘*TFI v Commission*’.

advantage”²⁸⁹.²⁹⁰ In comparison, the purpose of an assessment under Article 106(2) of the TFEU is to determine if a measure that constitutes state aid is compatible with the internal market or not.²⁹¹ The question of whether the measure constitutes state aid therefore needs to be resolved prior to the application of Article 106(2) of the TFEU. Accordingly, where the latter assessment is at hand, it does not involve application of the *Altmark* criteria.²⁹² This does not, however, rule out the possibility that the *Altmark* criteria sometimes coincide with that of the requirements under Article 106(2) of the TFEU.²⁹³

4.3 Assessing aid for a SGEI – step-by-step

There are many steps to be taken before an assessment under Article 106(2) of the TFEU takes place. These steps are illustrated in Diagram 2 below.

If the measure in question is considered to be a SGEI, the first step is still to determine if Article 107(1) of the TFEU is applicable.²⁹⁴ Following the *Altmark* case, public service obligations may fall outside of the state aid rules. Thus, the next step involves the *Altmark* criteria, as they all need to be satisfied in order for a measure to fall outside of Article 107(1) of the TFEU. Conversely, a measure that does not meet all the *Altmark* criteria is considered to constitute state aid.²⁹⁵

The final step is to apply Article 106(2) of the TFEU and the corresponding Almunia package, the key being the existence of SGEI. Accordingly, aid granted to a beneficiary undertaking providing a SGEI could be considered de minimis aid as per the SGEI de minimis Regulation. If the aid granted exceeds EUR 500 000 per undertaking over any period of three years then the measure must instead be reviewed under the Decision.

If the measure fulfils the conditions laid down in the Decision, then the measure is considered to be compatible with the internal market and exempt from the notification requirement in Article 108(3) of the TFEU. Where the Decision is not applicable, the measure can still fulfil the criteria in the Framework. Such state aid needs the approval of the Commission after notification by means of Article 108(3) of the TFEU. If the measure does

²⁸⁹ *TFI v Commission*.

²⁹⁰ *TFI v Commission*, para 130; see also *Viasat*, para 77.

²⁹¹ *TFI v Commission*, para 140; *Viasat*, para 77.

²⁹² Case C-660/15 P *Viasat broadcasting UK v Commission* EU:C:2017:178, para 34-35.

Hereinafter ‘*Viasat broadcasting UK v Commission*’.

²⁹³ See for instance SGEI Communication, para 47.

²⁹⁴ *Viasat broadcasting UK v Commission*, paras 22-23.

²⁹⁵ *Viasat broadcasting UK v Commission*, paras 25-27.

not meet the requirements of the Framework, and essentially the requirements of Article 106(2) of the TFEU, then the measure is considered to constitute state aid.

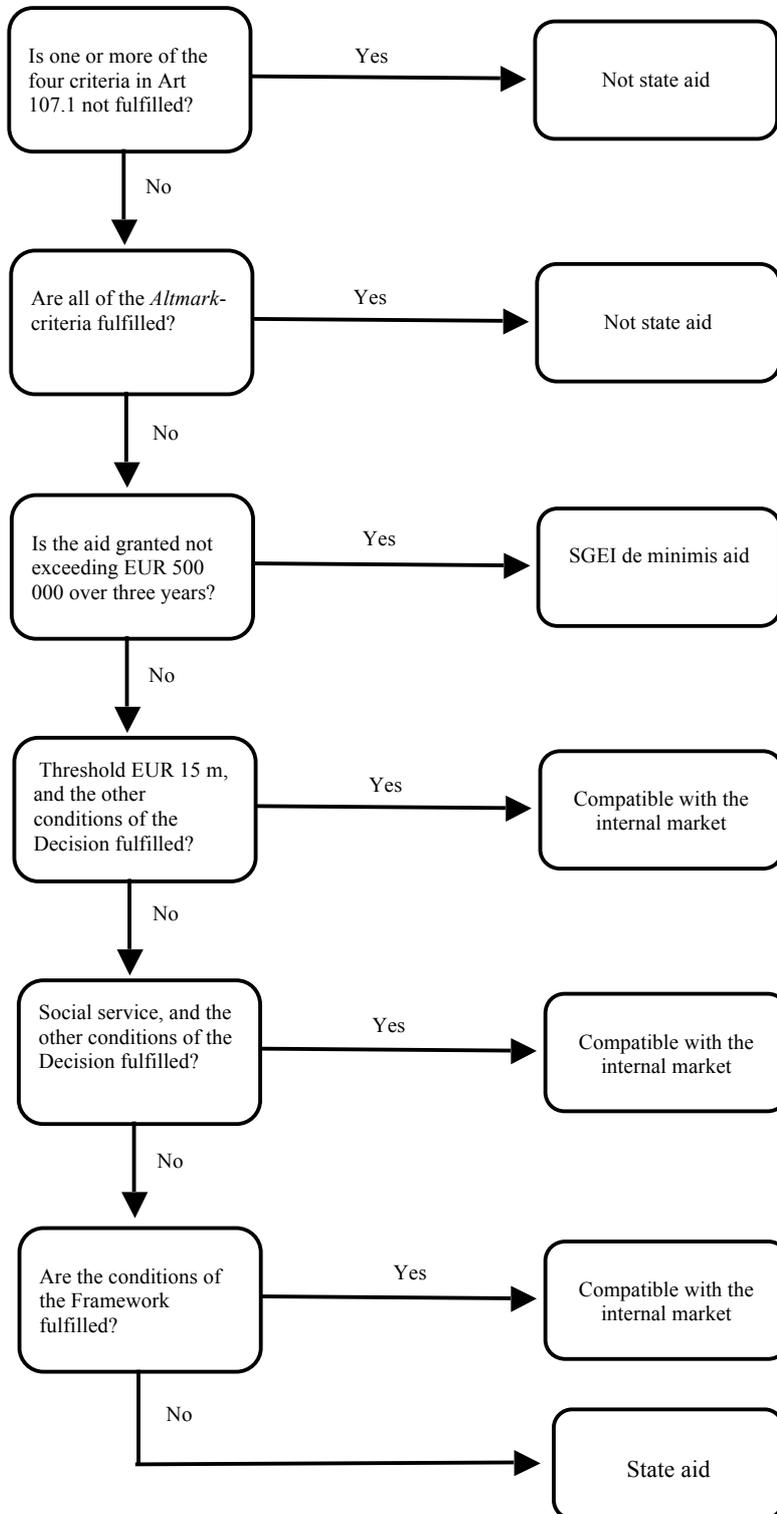


Diagram 2

5 SGEI and Housing Provision

The content of this chapter pertains to the first research question, which is why the structure of this chapter is initially focused on housing provision as a SGI and then as a SGEI. The question was the following:

Does housing provision constitute a general interest in Sweden, which can be recognised by the EU provisions on services of general economic interest?

The subject of housing provision has already been discussed in chapter 2, and more specifically in section 2.2. The risk for repetition is therefore impending, however, for the sake of clarity a few things are mentioned again.

It is important to determine if housing provision is considered to be a general interest in Sweden. Establishing that housing provision indeed constitutes a general interest provides the foundation for further discussion on why housing provision is, or is not, defined as a SGEI. This chapter therefore begins with a review of several Swedish laws. In the following section the discussion turns to housing provision as a SGEI, and whether it can be defined as such in Sweden. The view of the government on this matter is expressed in different Swedish Government Official Reports and Governmental Bills, the outcome of which presents the Swedish standing on housing provision and whether it falls within the concept of SGEI. The section therefore provides a review of the outcome of those reports.

Lastly, this chapter contains a brief look at social housing since it relates to the definition of SGEI. On part of the Commission, the most prominent focus when it comes to housing and SGEI is on social housing, given the explicit reference in the Decision. The section is concluded with the Swedish stand on social housing, where the opinion remains to be against the establishment of such housing in Sweden.

5.1 Housing provision – a general interest in Sweden

The Swedish Instrument of Government, abovementioned in section 2.2, states in chapter 1 § 2 that the public institutions have a responsibility to

secure the right to housing in Sweden.²⁹⁶ This provision provides that in certain areas in society the public institutions have a particular responsibility to exercise their powers.²⁹⁷ It follows from this that the areas stated in the provision constitute areas where there is a general interest prompting the State to act.

In the Local Government Act it is further stated that “[m]unicipalities and county councils may themselves attend to matters of general concern which are connected with the area of the municipality or county council or with their members”²⁹⁸, where “general concern” corresponds to the more familiar notion of “general interest”.²⁹⁹ In other words, municipalities may attend to matters of general interest.

The review on the responsibility for housing provision in chapter 2, above, showed that housing provision is a shared responsibility between the municipalities and the state, where the main operational responsibility lies with the municipalities.³⁰⁰ In the Governmental Bill, prior to the adoption of the Municipal Housing Companies Act, the government listed a number of laws which illustrated the importance of housing and the role the public authorities have to play in regard to housing provision.³⁰¹ Notably, the government never explicitly stated in the Governmental Bill that housing provision is a general interest. The context did however give reason to assume that housing provision indeed is of general interest, given that it was first stated that municipalities can attend to matters of general interest, followed by the statement that housing provision is the responsibility of the public authorities.³⁰² The presented laws thereafter further substantiated such a conclusion.

The Social Services Act

In the preparatory acts of the Social Services Act, the government emphasised the importance of housing for the well-being and safety of people. The government concluded that it is vital for the individual, as well as for society, to know that there is housing for elderly.³⁰³ In light of this general interest, the Social Services Act states that providing good housing for elderly is the responsibility of municipalities.³⁰⁴

²⁹⁶ Instrument of Government, ch 1 § 2.

²⁹⁷ Instrument of Government, ch 1 § 2.

²⁹⁸ Local Government Act, ch 2 § 1, translation from Government Offices of Sweden, *The Swedish Local Government Act* (Ds 2004:31, Ministry of Finance 2004) 9.

²⁹⁹ Local Government Act, ch 2 § 1.

³⁰⁰ Housing Provision Act, § 1.

³⁰¹ Prop. 2009/10:185 13.

³⁰² Prop. 2009/10:185 13-14.

³⁰³ Prop. 2005/06:115 25.

³⁰⁴ Social Services Act, ch 5 § 5.

The Planning and Building Act

Another law, illustrating the importance of housing, is the Planning and Building Act, which contains provisions on the planning of land and construction.³⁰⁵ In its opening chapter it states that “[t]he purpose of the provisions is, with regard to the freedom of the individual, to promote societal progress with equal and proper living conditions and a clean and sustainable habitat, for people in today’s society and for future generations”³⁰⁶. This is the general interest, in view of which municipalities bear the responsibility to plan the use of land, and consequently provide the foundation for housing construction to take place.³⁰⁷

The Housing Provision Act

The Housing Provision Act is naturally instrumental in establishing that housing provision is such a matter of general interest that municipalities have a responsibility to attend to. The planning of housing provision within a municipality falls on the municipality itself and, as highlighted in section 2.2 above, the purpose for this provision is to create the conditions necessary to make good housing available for everyone in the municipality.³⁰⁸ In view of this, there is a general interest involved in the responsibility for municipalities to plan for housing provision.

The Municipal Housing Companies Act

The Swedish Association of Public Housing Companies (SABO) made a similar examination of laws, relevant for the purpose of housing provision as a general interest, in its report “Permitted Aid on Weak Housing Markets: municipalities’ responsibility for housing provision”³⁰⁹.³¹⁰ In addition to the aforementioned laws, the report puts focus on the Municipal Housing Companies Act and the public purpose of municipal housing companies to promote housing provision, as stated in § 1.³¹¹ By use of the words “public purpose”³¹², the provision stresses the general interest of housing provision.

SABO also points out that the Municipal Housing Companies Act’s limitation on transfers of surplus, as stated in § 3, is exempt in case the transfer is used for measures falling within the municipalities’ responsibility

³⁰⁵ Planning and Building Act, ch1 § 1.

³⁰⁶ Planning and Building Act, ch1 § 1, translation from Boverket, *Legislation Planning and Building Act (2010:900) Planning and Building Ordinance (2011:338)* (Boverket 2016) 15.

³⁰⁷ The Planning and Building Act, ch 1 § 2.

³⁰⁸ Housing Provision Act, § 1.

³⁰⁹ SABO, *Tillåtet statsstöd på svaga bostadsmarknader: kommunernas bostadsförsörjningsansvar*, author’s own translation.

³¹⁰ SABO 19-21.

³¹¹ Municipal Housing Companies Act, § 1; SABO 21.

³¹² *allmännyttigt syfte*, author’s own translation, see Municipal Housing Companies Act, § 1.

of housing provision, given the surplus is used for measures that promote integration and social cohesiveness.³¹³ The exemption also applies if the surplus is used for measures that cater to the needs of people, which the municipalities bear a particular responsibility for.³¹⁴ As was stated in section 2.3, above, the purpose of the limitation on transfers of surplus is for municipal housing companies to have means in times of difficulty, as well as the additional purpose of municipalities having a buffer to fulfil their responsibility of housing provision.³¹⁵ Thus, both the main rule in § 3 of the Municipal Housing Companies Act, as well as the exception in § 5, have the nature of promoting housing provision in order to see to it that people have access to good housing. In addition, the underlying objective for municipalities to set up municipal housing companies in the first place, is to fulfil a general interest. For municipal housing companies, this general interest is satisfied by means of promoting housing provision.³¹⁶

Altogether, the laws presented above all point in the direction of housing provision being of general interest, a conclusion shared by SABO in its report “Permitted Aid on Weak Housing Markets: municipalities’ responsibility for housing provision”.³¹⁷ In the Swedish Government Official Report, it was also stated that housing provision indeed is a general interest in Sweden.³¹⁸

5.2 Housing provision as a SGEI

5.2.1 Housing provision as a SGEI in Sweden

As previously mentioned, a SGEI is an economic activity of general interest which would not be provided under normal market conditions, i.e. a public service obligation entrusted by the Member State on a national, regional or local level.³¹⁹ However, as stated in section 4.1.1, above, SGEIs are not defined in EU law. Instead, it is up to Member States to define SGEIs.³²⁰ In doing so, they need to satisfy a range of conditions in order for a service to be designated a SGEI.³²¹

³¹³ Municipal Housing Companies Act, § 3 and § 5; SABO 21.

³¹⁴ Municipal Housing Companies Act, § 5.

³¹⁵ Prop. 2009/10:185 52.

³¹⁶ Prop. 2009/10:185 40.

³¹⁷ SABO 19.

³¹⁸ SOU 2015:58 372.

³¹⁹ COM(2011) 900 final 3; Madell 26.

³²⁰ *BUPA*, para 166; Case T-17/02 *Olsen v Commission* EU:T:2005:218, para 216; SGEI Communication, para 46.

³²¹ See section 4.2.3.1.

It follows from case-law that Member States have a wide margin of discretion in defining a SGEI.³²² The reference to “Member States” includes municipalities, and other regional public authorities, not only federal authorities.³²³ Accordingly, the Swedish official authorities, be it nationally or locally, can make use of their given discretion in defining SGEIs in Sweden.³²⁴ In addition, when defining a SGEI, the Member States cannot be precluded from considering national policy objectives or “from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings”³²⁵, meaning that Sweden, in defining SGEIs, can take into account its objectives in national policy.³²⁶ Thus, the legal framework on SGEIs provides a margin of discretion for municipalities to decide on such service that could constitute SGEIs, given all other conditions are met.

The concept of housing provision as a SGEI has been in focus in several inquiries and reports in Sweden. In the Governmental Bill on Municipal Housing Companies, the government stated that “*housing provision should not be defined in law as a SGEI, neither in general terms nor in part*”³²⁷. The statement was made in spite of the conclusion that the applicability of SGEI rules in the area of housing provision could not be ruled out, although the possibility for such application, in the government’s opinion, was limited.³²⁸ In light of this discussion, the government went on to acknowledge the need for reform and a support scheme in order for municipalities with housing companies in weak markets to be able to fulfil their responsibility of housing provision. In this regard, the government announced its intention to further examine such a support scheme.³²⁹

In the Governmental Bill on the municipalities’ responsibility for housing provision³³⁰, published in 2013, the government responded to a proposal by the National Board of Housing, Building and Planning (Boverket), suggesting that municipalities would be able to use the rules on SGEI for the

³²² *BUPA*, para 166; T-17/02 *Olsen v Commission* EU:T:2005:218, para 216.

³²³ Case C-248/84 *Germany v Commission* EU:C:1987:437, para 17; Prop. 2016/17:171 153.

³²⁴ Madell 28.

³²⁵ Case C-157/94 *Commission v Netherlands* EU:C:1997:499, para 40.

³²⁶ Case C-157/94 *Commission v Netherlands* EU:C:1997:499, para 40.

³²⁷ Prop. 2009/10:185 29, paraphrasing from the Swedish statement ”bostadsförsörjningen varken generellt eller i delar bör definieras i lag som en tjänst av allmänt ekonomiskt intresse”.

³²⁸ Prop. 2009/10:185 28-29.

³²⁹ Prop. 2009/10:185 63.

³³⁰ Prop. 2012/13:178 *En tydligare lag om kommunernas bostadsförsörjningsansvar*.

purpose of promoting housing provision.³³¹ The government stated that it was appropriate to await the result of the inquiry initiated in regard to a new Local Government Act, as well as the inquiry which was about to be initiated in regard to EU and municipal housing policy, before taking a stand.³³² Thus, in 2013 the government initiated an inquiry with the purpose of examining possible ways for municipalities to encourage housing provision, and to examine if the rules on SGEI could be a suitable way to achieve the that purpose.³³³

The inquiry resulted in the Swedish Government Official Report “EU and Municipal Housing Policy”³³⁴, which was published in 2015.³³⁵ In the report, it was noted that in the aftermath of the Governmental Bill on Municipal Housing Companies, uncertainty lingered as to the possibility for municipalities to grant aid to an undertaking for a SGEI. This is particularly true, in light of the government’s statement that housing provision should not be defined as a SGEI in law.³³⁶ The report did not depart from this statement by the government, but assured that the question of aid to undertakings for SGEIs was within the competence of the local public authorities. It stated that as long as the EU state aid rules are applied there is nothing hindering a municipality from acting within its competence, thus providing aid in accordance with SGEI provisions.³³⁷ The report went even further and concluded that there is nothing, in either EU law or national law, preventing a municipality from defining and financing a SGEI for the purpose of fulfilling municipal housing policy.³³⁸

As mentioned above, the government initiated yet another inquiry with the purpose of modernising the Local Government Act. The inquiry was set to examine the provisions in the Local Government Act in light of EU rules, and in particular examine the possibility to apply the rules on SGEI in Sweden.³³⁹ The inquiry resulted in the Swedish Government Official Report, “A Local Government Act for the Future”³⁴⁰, which was the basis for the Governmental Bill, “A new Local Government Act”³⁴¹, published in

³³¹ Prop. 2012/13:178 14, 25; Regeringen, *Uppdrag att göra en översyn av lagen (2000:1383) om kommunernas bostadsförsörjningsansvar (S2012/2989/PBB)* (Socialdepartementet 2012).

³³² Prop. 2012/13:178 25.

³³³ Dir. 2013:68 1, 18.

³³⁴ SOU 2015:58 *EU och kommunal bostadspolitik*, author’s own translation.

³³⁵ SOU 2015:58.

³³⁶ SOU 2015:58 373-374; Prop. 2009/10:185 28-29.

³³⁷ SOU 2015:58 373-374.

³³⁸ SOU 2015:58 381.

³³⁹ Dir. 2012:105 1, 17-19.

³⁴⁰ SOU 2015:24 *En Kommunallag för Framtiden*, author’s own translation.

³⁴¹ Prop. 2016/17:171 *En ny kommunallag*, author’s own translation.

2015 and 2017 respectively.³⁴² The report observed that Sweden, for the most part, has not taken the opportunity to define services as SGEIs, and referred to its previous standing in the Governmental Bill on Municipal Housing Companies.³⁴³ In the report it was argued that to attribute SGEIs on a national level was preferred to having each and every municipality designate services as SGEIs on their own.³⁴⁴ The report further concluded that the state should take responsibility and see to it that the question of SGEIs gets properly assessed, preferably by way of examining SGEIs in certain sectors. In regard to the suggestion of sectoral inquiries, the report acknowledged the ongoing inquiry in regard to EU and Municipal Housing Policy that, at the time, had yet to be published.³⁴⁵ The report did not, in itself, provide a definition on SGEIs in regard to housing provision.

In the Governmental Bill, “A new Local Government Act”³⁴⁶, the government did not provide any definition of SGEI in relation to housing provision. In fact, it was quite short on the subject. It stated that, given the lack of a definition of SGEIs in EU law as well as in national law, municipalities have the possibility to designate a service as a SGEI, and to entrust an undertaking with such a service.³⁴⁷ Consequently, Sweden has remained reluctant to define housing provision as a SGEI in Swedish law. Wehlander suggests that the reason for this is that an “explicit formulation can tie Member States to welfare commitments and modes which restrict a differentiated demand of social services, may restrict profit opportunities in this field of activity, and render liberalisation more difficult”³⁴⁸. Thus, the political presence may influence the reasoning behind the lack of definition in Swedish law.

In summary, there have been a lot of reports and inquiries, many of which have awaited the results of the others. In the latest Governmental Bill it seems as if the government remains unwilling to provide a definition of SGEI in national law. Instead, references are made to the legal framework that is already in place and which, according to the government, suffices for municipalities to designate certain services as SGEIs.³⁴⁹ In spite of this, in the reports it has come to attention that municipalities have not taken advantage of the opportunities that the rules on SGEI provide in regard to

³⁴² SOU 2015:24; Prop. 2016/17:171.

³⁴³ SOU 2015:24 393.

³⁴⁴ SOU 2015:24 426.

³⁴⁵ SOU 2015:24 426-427.

³⁴⁶ Prop. 2016/17:171 *En ny kommunallag*, author’s own translation.

³⁴⁷ Prop. 2016/17:171 153.

³⁴⁸ Wehlander 460.

³⁴⁹ Prop. 2016/17:171 153.

housing provision, prompting the conclusion that municipalities lack clear prerequisites for using the framework on SGEIs.³⁵⁰

5.2.2 Social housing

Housing provision is not explicitly mentioned in the Almunia package, or in the SGEI provisions, the focus is rather on the concept of social housing. According to the Decision, compensation for providing social services is exempted from the notification obligation in Article 108(3) of the TFEU.³⁵¹ This includes 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”³⁵². Thus, the Commission recognises that aid granted to meet the needs of social housing is permitted, regardless of the amount of compensation the beneficiary receives, given all other conditions of the Decision are met.³⁵³

This can be compared with the objective of municipal housing companies i.e. to promote housing provision within the municipality.³⁵⁴ As stated in section 2.3, above, this means that municipal housing companies have to meet the needs of various forms of housing, for instance housing for people with special needs or people that for some other reasons are vulnerable on the housing market.³⁵⁵ This purpose could correspond to the concept of social housing. However, as previously stated, the legislator has refrained from the possibility to define the operational activities of municipal housing companies as SGEIs, and especially as matters of social housing. In the Governmental Bill on Municipal Housing Companies the government stated that it is not a desirable development to have the housing companies reduced to social housing-companies. The reason being, that the municipal housing companies should address everyone on the housing market, not just a certain group of people.³⁵⁶ Thus, housing provision has not been considered to fall within the concept of social housing in Sweden.

³⁵⁰ SOU 2015:24 427-428; SOU 2015:58 472; see also Regeringskansliet, *Report on services of general economic interest (2014-2015)* (Commission 2017) <http://ec.europa.eu/competition/state_aid/public_services/2015_2016/sweden_sv.pdf> accessed 2 August 2017.

³⁵¹ SGEI Decision, Art 2(c) and Art 2(1).

³⁵² SGEI Decision, para 11.

³⁵³ SGEI Decision, para 11; SGEI Decision, Art 2(c) and Art 2(1).

³⁵⁴ Municipal Housing Companies Act, § 1; Prop. 2009/10:185 40.

³⁵⁵ Prop. 2009/10:185 40.

³⁵⁶ Prop. 2009/10:185 s. 28.

6 Analysis

With the purpose of examining the possibility for Swedish municipalities on weak housing markets to use the rules on SGEI in order to fulfil their responsibility of housing provision, two questions were raised in the opening chapter.

- Does housing provision constitute a general interest in Sweden, which can be recognised by the EU provisions on services of general economic interest?

- If so, can municipalities on weak housing markets in Sweden provide state aid to municipal housing companies for the purpose of housing provision based on the state aid rules regarding services of general economic interest?

In the following, these two questions will be considered in turn. The structure follows Diagram 2 as presented above, section 4.2.5. The analysis offers a few comments on aid granted to undertakings that does not qualify as compensation for SGEIs. The main focus is, however, on the applicability of the SGEI rules on compensation granted to municipal housing companies for the purpose of housing provision.

Does housing provision constitute a general interest in Sweden, which can be recognised by the EU provisions on services of general economic interest?

As shown in chapter 5, the first research question is essentially made up of two parts. The first part regards the question of *whether housing provision constitutes a general interest in Sweden?*

It has been established above, more than once, that it is stipulated in Swedish fundamental law that the public institutions bear responsibility for securing the right to housing in Sweden.³⁵⁷ This fundament, according to which the public authorities act, provides guidance on the areas in which municipalities carry a particular responsibility. Accordingly, securing the right to housing is clearly an area tied to a general interest. As was stated in section 5.1, above, matters of general interest are such areas which municipalities may attend to. Consequently, municipalities take part in the responsibility of securing the right to housing in Sweden. In fact, as has

³⁵⁷ Instrument of Government, ch 1 § 2.

been consistently held, municipalities bear a responsibility for housing provision.

The review of the different laws in section 5.1, their preparatory acts and not least their purpose, altogether demonstrate the coherent view that housing provision is considered to be a general interest in Sweden. The Municipal Housing Companies Act is one of many laws which illustrates that housing provision is indeed a general interest. As was stated in section 2.3, above, municipal housing companies have the overall purpose of promoting housing provision, meaning that they have to meet the needs of different forms of housing within the municipality. This purpose corresponds to the responsibility of securing the right to housing in Sweden, as stated in the Instrument of Government chapter 1 § 2. The conclusion must therefore be drawn that the underlying reason for the municipalities' responsibility to provide housing for elderly, to plan for the provision of housing and the use of land, to carry out provisions in order for construction to take place, and to enable access to good housing for everyone within the municipality is that housing provision essentially is a general interest which the municipalities bear responsibility for.

To answer this first part of the question, it can be concluded that housing provision constitutes a general interest in Sweden.

The following question is *whether housing provision, being a general interest in Sweden, can be recognised by the EU provisions on services of general economic interest?*

First of all, it is clear from the review in section 4.1.1, above, that there is no established definition of SGEI in EU legislation. The presence of SGEI, in for instance Article 14 of the TFEU and the Protocol (No 26), emphasises the important role of SGEI in the shared values of the EU, without extending the provisions with any definition. Other than the concept of social housing in the Decision, EU law does not give guidance on the applicability of the SGEI concept on housing provision. The reference to social housing could however be indicative of the Commission's approach on housing provision as a SGEI, at least in regard to housing provision that is social in nature.

The task of designating which services fall within the SGEI provisions is instead left to the Member States. As been previously pointed out, the reference to "Member States" includes the regional public authorities, such

as municipalities.³⁵⁸ In designating a service as a SGEI, Member States not only have a wide margin of discretion, but are also free to consider objectives in national policy.³⁵⁹ In this regard it is worth remembering that national housing policy in Sweden has the objective of housing supply meeting consumer demand i.e. a well-functioning housing market.³⁶⁰ Thus, the question of whether housing provision falls within the EU provisions on SGEI is therefore subject to the Swedish position on the matter. From this vantage point, the possibility of housing provision falling within the concept of SGEI is, on the outset, promising. Sweden has, however, not fully embraced the possibility offered by this margin of discretion.

The previous chapter on housing provision and SGEI, section 5.2 above, highlighted a statement made by the government in the Governmental Bill on Municipal Housing Companies.³⁶¹ A statement that portrayed the clear, unequivocal position of the Swedish government that housing provision is not to be defined as a SGEI in Swedish law, not even in general terms. Since the publishing of the Governmental Bill in 2010, there has been no indication of change in the government's willingness to define housing provision as a SGEI. Consequently, housing provision is not designated as a SGEI in Swedish law. However, the answer to the question stated above is not found in the statement by the Swedish government.

As was discussed in section 4.1.1, above, there is no obligation, and no need, of formal designation of a service to constitute a SGEI. Thus, the Commission can still assess a measure under Article 106(2) of the TFEU without a definition of a SGEI in national law. In the Swedish context, in regard to housing provision, where no such formal designation has been made by use of legislation, this provides an opportunity for municipalities to designate services as SGEIs themselves. This is in line with the view expressed in the Swedish Government Official Report "EU and Municipal Housing Policy"³⁶² where the inquiry held that it was within the competence of the municipalities to define services as SGEIs, as well as finance such services, for the purpose of municipal housing policy.³⁶³ The conclusion to be drawn from that statement is that municipalities have the possibility to designate a service as a SGEI for the purpose of fulfilling their

³⁵⁸ Case C-248/84 *Germany v Commission* EU:C:1987:437, para 17; Prop. 2016/17:171 153.

³⁵⁹ See section 5.2.1.

³⁶⁰ Prop. 2016/17:1 23; Regeringen, *Mål för boende och byggande* (Regeringen 2016) <<http://www.regeringen.se/regeringens-politik/boende-och-byggande/mal-for-boende-och-byggande/>> accessed 12 July 2017.

³⁶¹ Prop. 2009/10:185 29.

³⁶² SOU 2015:58 *EU och kommunal bostadspolitik*, author's own translation.

³⁶³ SOU 2015:58 381.

responsibility of housing provision. This is also confirmed by the statement in the Governmental Bill “A new Local Government Act”, in which the government underlined the possibility for municipalities to designate a service as a SGEI as well as entrusting an undertaking with the provision of that service.³⁶⁴

Before reaching a conclusion in regard to the posed question, the concept of SGEI requires a comment. It is not enough for a Member State, or a municipality for that matter, to decide that a certain service constitutes a SGEI, even though the discussion might give that impression. The designated service has to meet certain criteria, as was held in the *BUPA*-case.³⁶⁵ For housing provision to be designated as a SGEI, it needs to meet the criteria stated by the General Court i.e. that SGEIs are universal, as well as compulsory in nature.³⁶⁶ In addition, it is inherent in the wording of the concept that there is need for a SGEI to be provided with a public interest in mind, alternatively to be addressed to citizens.³⁶⁷

In regard to the requirement that a SGEI needs to be universal it can be stated that housing provision is universal in nature, as it has the possibility to address all citizens in one way or another, given that everyone is in need of proper housing. However, housing provision designated as a SGEI is likely to be enjoyed by a limited group of people, for instance elderly, rather than an entire population within the municipality. That does not, however, necessarily call into question the nature of the service as a SGEI.³⁶⁸ In addition, housing provision addressed to a certain group of people goes hand in hand with the idea that a SGEI is an economic activity that would not be provided without public interference.³⁶⁹ In weak markets, housing provision as a SGEI is likely to be centred on provision to those in society that lack the means necessary to acquire proper and suitable housing.³⁷⁰ Aid granted for the purpose of housing provision would therefore only be necessitated, as well as granted, given that an undertaking would not provide the service under normal market conditions.³⁷¹

Consequently, there are several requirements that municipalities need to adhere to when designating a service as a SGEI. In which form housing provision is most likely to take place is not for this thesis to decide. The

³⁶⁴ Prop. 2016/17:171 153.

³⁶⁵ *BUPA*, para 172.

³⁶⁶ *BUPA*, para 186-188.

³⁶⁷ *BUPA*, para 188-190.

³⁶⁸ *BUPA*, para 87.

³⁶⁹ COM(2011) 900 final 3.

³⁷⁰ See section 2.1.

³⁷¹ see SGEI Communication, para 48.

following analysis in under the premise that those other minimum criteria in regard to SGEIs are considered to be fulfilled. The focus is instead on the initial requirement in Article 106(2) of the TFEU, that of a SGEI being genuine and correctly defined.³⁷²

To sum up, while the Swedish government has been reluctant to address housing provision as a SGEI in law, neither EU case-law nor Swedish authorities have been hesitant to argue that it falls within the ambit of municipalities to designate a service as a SGEI. Given that municipalities enjoy a margin of discretion in deciding on such services, they have the possibility to decide that housing provision is a public service obligation i.e. a service that constitutes a SGEI. Housing provision could therefore be recognised by the EU provisions on SGEIs if municipalities were to clearly define a public service obligation as a SGEI. Municipalities have, however, not made reality of that possibility which is why housing provision is not, yet, a clearly defined SGEI for the purpose of the SGEI rules.

If so, can municipalities on weak housing markets in Sweden provide state aid to municipal housing companies for the purpose of housing provision based on the state aid rules regarding services of general economic interest?

Aid according to Article 107(1) of the TFEU

The first step in assessing whether aid can be granted to municipal housing companies for the purpose of housing provision is to examine if such a granted advantage constitutes state aid in the first place. A measure that does not fall within Article 107(1) of the TFEU is not considered to constitute state aid under the state aid rules. As was initially pointed out, it needs to be determined if the undertaking, in this case a municipal housing company, has received an economic advantage that it would not have enjoyed under normal market conditions. This is where the private investor test becomes relevant.

In the context of a municipality granting a municipal housing company compensation for housing provision, this measure constitutes aid if a private investor, given the same circumstances, would not have performed the same measure, for instance investing in construction to adapt housing for elderly. For instance, in weak markets where there is little or no incentive to invest in housing for groups in society with little purchasing power there is a need for measures that would not be performed under normal market conditions. Municipal housing companies are required to conduct their business

³⁷² SGEI Framework, para 12; see section 4.2.3.1.

according to business-like principles pursuant to Swedish national law. In other words, they should not perform activities that do not yield market-conforming returns. If they are beneficiaries of an economic advantage that makes it possible for them to carry out activities that would not be performed under normal market conditions, such measures are likely to constitute state aid according to Article 107(1) of the TFEU.

Before going in to the question of possible ways for housing provision to fall under the provisions on SGEI, it should be noted that the *de minimis* Regulation could provide an outlet, in case housing provision is deemed not to fall under the SGEI provisions whatsoever.

De minimis Regulation

If a municipal housing company is granted aid below the amount of EUR 200 000, such aid would fall outside the state aid rules. Such aid is deemed not to affect the development of trade in the Union and requires no notification to the Commission. Naturally, all other conditions of the *de minimis* Regulation need to be satisfied. Aid to municipal housing companies for the purpose of housing provision could therefore fall within this category of aid.

The focus of this thesis is, however, aid granted under the provisions on SGEI.

Altmark criteria

Firstly, there is the possibility of aid to municipal housing companies fulfilling the *Altmark* criteria. When a measure has the character of a public service obligation, *Altmark* criteria has provided a way for such measures to fall outside of Article 107(1) of the TFEU. Given that housing provision is not a clearly, defined public service obligation in Sweden, the *Altmark* criteria are not applicable. However, if a municipality would designate housing provision to constitute a public service obligation there is the possibility of such a measure to fall outside of Article 107(1) of the TFEU. Even in such a case, given it has proven difficult to satisfy all the *Altmark* criteria, there is a real risk that housing provision would not fall outside the state aid rules.

The Almunia package

If aid to municipal housing companies does not satisfy the *Altmark* criteria, and consequently is considered to be state aid, there is still the possibility of the aid being considered compatible with the internal market. As was stated in section 4.1.4, above, the Almunia package provides guidance on the applicability of the SGEI rules on housing provision. Given the somewhat

uncertain position on the definition of SGEI in Sweden, the following section provides an analysis on the applicability of the SGEI provisions given that housing provision is designated as a SGEI by the municipalities, thereby fulfilling the requirement of a clearly defined SGEI.

The SGEI de minimis Regulation

If housing provision was designated a SGEI by a municipality, the municipality would have the possibility to grant compensation for a SGEI up to an amount of EUR 500 000 over a period of three years according to the SGEI de minimis Regulation.³⁷³ In the context of municipalities in weak housing markets that are in need of measures to enable them to fulfil their responsibility of housing provision, this is not an insignificant amount of compensation to grant an undertaking. There are many activities that a municipal housing company could carry out with that amount of support, for instance in the shape of subsidy or guarantee.

The Decision

Aid exceeding EUR 500 000 over a period of three years could instead fall under the Decision. As highlighted in chapter 4, above, there are primarily two ways in which housing provision could fall under the Decision, one being more plausible than the other.

Threshold of EUR 15 million

If municipalities designated housing provision as a SGEI, aid granted to municipal housing companies could fall under Article 2(1)(a) of the Decision. This provision provides that compensation for a SGEI that does not exceed EUR 15 million a year is exempt from the notification requirement in Article 108(3) of the TFEU. The Decision does however set up a number of requirements that need to be satisfied in order for the Decision to be applicable. This makes the assessment of whether the Decision is applicable a bit more difficult, compared to the assessment under the SGEI de minimis Regulation. There is, however, no doubt that the threshold in itself is a comprehensible requirement and that compensation from municipalities to municipal housing companies up to EUR 15 million would have the possibility of making a difference on the housing situation for municipalities in weak housing markets.

Social Services

The second category of interest in the Decision is found in Article 2(1)(c) regarding social services such as social housing. This remains to be a very hypothetical scenario as the Swedish government has been clear that social

³⁷³ see sections 4.1.4.4; SGEI de minimis Regulation, recital 4 and Art 2(1)-(2).

housing is not a desirable way to go in municipal housing policy. Although, it can be questioned if there is not already social housing in Sweden to some extent, for instance by provision of special housing for students. In section 4.1.4.2, above, the possibility for Member States to include various types of services within the concept of “inclusion of vulnerable groups”, as stated in Article 2(1)(c), was also highlighted. Given that there is already uncertainty in regard the more straightforward application of, for instance, SGEI de minimis Regulation, it is not likely for municipalities to argue that compensation for housing provision falls under this concept of “inclusion of vulnerable groups”. Such application requires, even more than any other application of the SGEI provisions, guidance on a national level.

The Framework

Aid that does not meet the requirements under the Decision can still fall under the Framework which, as previously stated in section 4.1.4.3, requires previous notification under Article 108(3) of the TFEU. The Commission could find that aid to municipal housing companies is compatible with the internal market under Article 106(2) of the TFEU, if all conditions of the Framework are met i.e. that there is existence of a SGEI, that the municipal housing company in question has been entrusted with the SGEI task and that the measure meets the requirement of proportionality. In other words, the assessment under Article 106(2) of the TFEU is a case by case assessment where housing provision very well could be deemed compatible with the internal market.

To sum up, it is vital for the application of the Almunia package that the service in question is designated as a SGEI. This possibility is, as previously argued, not ruled out when it comes to designating housing provision as a SGEI. However, as the position stands today, Sweden has not designated housing provision as a SGEI, and neither has the municipalities. This means that in theory, the application of the abovementioned instruments is possible. Foremost, the SGEI de minimis Regulation, that could have a real impact on the possibility for municipalities in weak housing markets to fulfil their responsibility of housing provision by granting aid to municipal housing companies. In addition, the Decision provides a possibility to grant larger amount of aid according to Article 2(1)(a), given all other criteria is fulfilled. As none of these instruments have ever been used by the municipalities in Sweden in order to grant aid for the purpose of housing provision, there is reason to question if the provisions on SGEI really can be used for housing provision, under the current circumstances, or if their applicability remains to be a fiction.

7 Conclusion

Currently, a large number of municipalities in Sweden are experiencing difficulties in fulfilling their responsibility of housing provision. In light of the role borne by the state to provide the framework necessary for the municipalities to carry out this responsibility, this thesis argues that the state has, to some extent, failed to take action. The analysis shows that the concept of SGEI could be a key instrument for municipalities in fulfilling their responsibility of housing provision. Where other possibilities are exhausted, the use of the SGEI provisions, such as the SGEI de minimis Regulation and the Decision, could provide a possibility for municipalities to grant aid to meet the housing needs in weak housing markets.

Despite the consensus that housing provision is considered to be a general interest in Sweden, the government remains firm that housing provision should not be defined as a SGEI in law. The uncertainty that follows from lack of clarity on a national level has stifled the potential to use SGEI provisions in municipal housing policy. Without guidance from the government, and the Parliament, the usefulness of the state aid rules is hollowed, as they cannot effectively be applied. The government has made it clear that it is within the competence of municipalities to designate a service as a SGEI, and entrust an undertaking with the service in question.³⁷⁴ The municipalities have, however, never made reality of this possibility. According to this thesis, the reason can be found in the lack of proper prerequisites for municipalities to apply the provisions on SGEI.

The Almunia package was adopted with the purpose of being applicable across the EU, and consequently in all of the different legal environments found within the Member States. For the package to be accessible for the municipalities, there is need for national regulation, preferably in the form of legislation, to guide municipalities in the applicability of the SGEI provisions. It is an unrealistic burden to place on all municipalities, to assess which service that can constitute a SGEI and when such a service satisfies the criteria set out in the different SGEI instruments.

Thus, the possibility for municipalities to use the SGEI provisions is clouded by the reluctance by the government in Sweden to bring clarity on the possibility of housing provision falling within the concept of SGEI, as well as clarity on the application of the SGEI rules. It is hard to disregard the political element involved in state aid rules, and as has been previously

³⁷⁴ See section 5.2.1; Prop. 2016/17:171 153.

mentioned, there might be reasons as to why the state does not want to get tied to a certain formulation as it may affect other areas of politics. There is, however, no doubt that this lack of clarity suppresses, or at least hinders, the willingness of municipalities to fulfil their responsibility of housing provision by use of SGEI rules. The result of this situation is that municipalities are struggling to fulfil their responsibility to provide housing and risk granting aid that cannot be deemed compatible with the internal market. For the sake of improving the situation for the municipalities, and taking its own part of the responsibility of housing provision, Sweden should provide guidance on the applicability of SGEI provisions in regard to housing provision in national law.

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