

The 2011 SGEI Package

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*presentation represents the views of the author

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Overview

- I. Introduction**
- II. The new Communication (20.12.2011)**
- III. The new Commission Decision (20.12.2011)**
- IV. The new Commission Framework (20.12.2011)**
- V. The new SGEI de minimis Regulation (25.4.2012)**

I. Introduction

1) Does compensation for SGEI constitute State Aid ? Altmark

- Article 107(1) TFEU: advantage ?
- Jurisprudence: unclear (FFSA and SIC: aid; Ferring: no aid)
- The Altmark judgment 2003: no aid if four conditions are met
 1. Clearly defined public service obligations
 2. Parameters for calculating the compensation are established in advance in an objective and transparent manner
 3. No overcompensation (costs, taking into account the relevant receipts and a reasonable profit)
 4. Tender or compensation based on costs of a typical, well-run undertaking

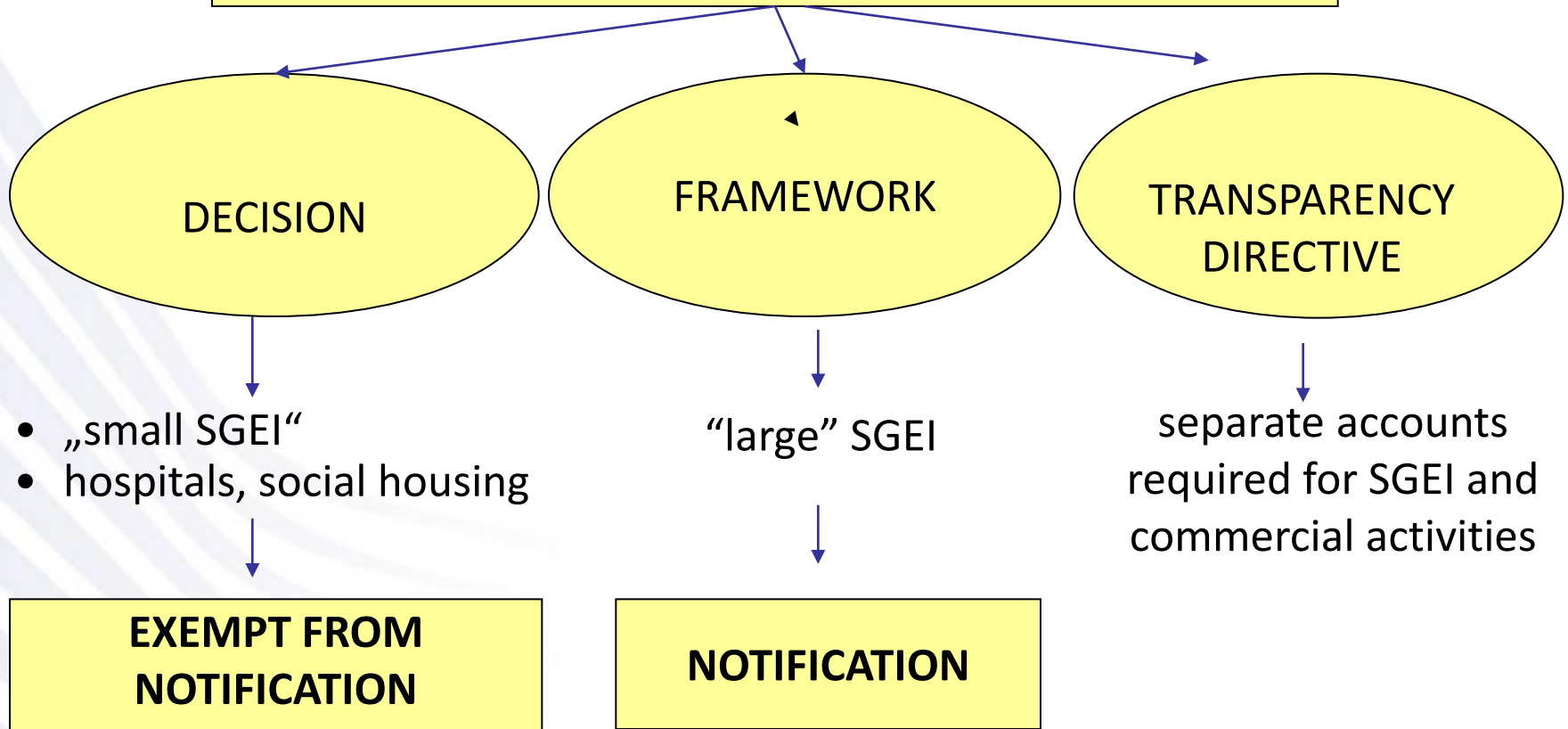
I. Introduction

2) The 2005 SGEI package (Decision and Framework)

Main principles:

- Applied to compensations that constitute State Aid (not fulfilling all the Altmark criteria)
- Decision (exemption: 30 mio/year if turnover below 100 mio) + Framework (notified cases)
- The substantive compatibility conditions were practically the same in Decision and Framework
- They basically took over the first 3 Altmark criteria: define SGEI, define calculation parameters, no overcompensation

The 2005 Altmark Package



I. Introduction

3) Evaluation of the existing rules

- Consultation of Member States and stakeholders 2008-2010
- **The Report** (March 2011): sectoral analysis and results of the consultation
 - Need for **clarification** (notion of aid, definition of SGEI/manifest error, Altmark criteria, act of entrustment, relation with public procurement, application of the package, ...)
 - Need to take better account of the specificities of **social services**
 - Need for more proportionate rules for **local services**
 - Need for more emphasis on **efficiency** considerations for large-scale commercial services

I. Introduction

4) The March 2011 Communication

Main contents:

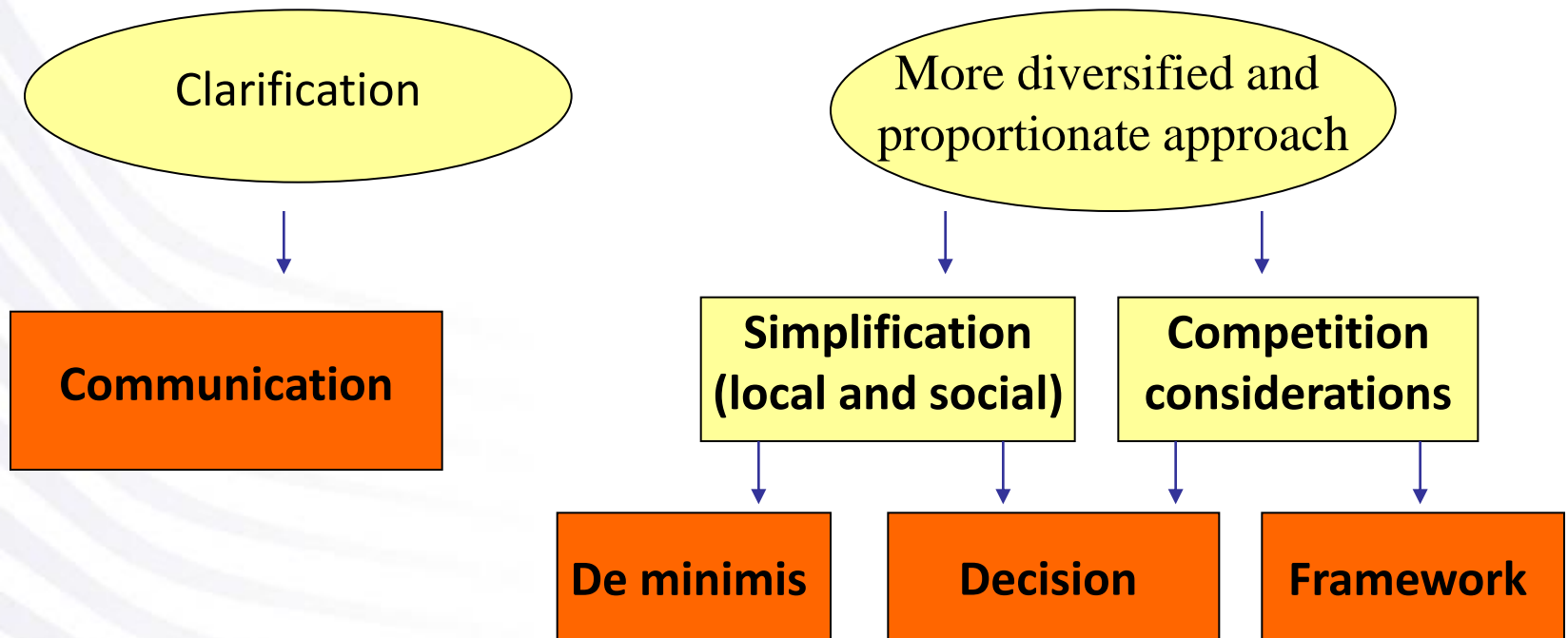
- Drew conclusions from the consultation and aimed at launching the debate for the reform
- Two key conclusions (principles for the revision)

Need for clarification

More diversified and
proportionate approach

The new SGEI rules

- Proposals made public in September 2011; wide consultation process
- Adopted 20.12.2012. How do they implement the reform principles ?



II. The new Communication

- Objective: clarification. Scope for clarification is limited by the Treaty and the jurisprudence
- notion of aid: economic/non-economic activity; effect on trade
- Altmark criteria
 - Notion of SGEI / manifest error
 - Entrustment act
 - Wel-run, typical undertaking
 - Relation with public procurement rules: what type of procedures ?
What type of award criteria ?

III. The new Commission Decision

- Objective: diversified and proportionate approach
- How ? simplification
strengthened control
- But main contents of the 2005 Decision are kept:
 - Entrustment act (Art. 4: content and duration of the SGEI, provider and territory, special and exclusive rights, compensation mechanism, arrangements to avoid and repay over-compensation, reference to Decision)
 - Compensation: cost - revenues + a reasonable profit (no efficiency check)
 - Separation of accounts needed if also non-SGEI activities

III. The new Commission Decision

1) Simplification

- social services: **no thresholds for the exemption of social services** (extension of the exemption for social housing and hospitals in the 2005 Decision)

Definition ? Exhaustive but wide in scope

SGEI meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups

III. The new Commission Decision

1) Simplification (continued)

- No turnover criterion
- Safe harbour for reasonable profit: return on capital = swap rate plus 100 basis points (for risk-free cases this is also the maximum)
- Flexibility to use other profit indicators for determining the reasonable profit if return on capital is not feasible (e.g. return on equity, return on assets, return on sales)
- No annual check of overcompensation (every 3 years)

III. The new Commission Decision

2) Strengthened control

- reduction of the ceiling to **EUR 15 mln** per year for other than social services (most SGEI remain below the ceiling)
- reduction of exemption for regional airports from 1 mln to **200 000 passengers** (and no choice to apply the ceiling of EUR 15 mln)
- period of **entrustment limited to 10 years**, unless significant investment is required

III. The new Commission Decision

3) Transitional rules (Art. 10)

- Existing schemes need to be adapted within 2 years
- The new Decision has no effect on existing individual entrustments (if lawfully implemented under the 2005 Decision, they remain exempted for the full duration of the entrustment)
- Unlawful aid: exempted if complying with the new Decision (could occur where new Decision is more generous, eg social services)

IV. The new Commission Framework

- Objective: diversified and proportionate approach; take better account of competition and efficiency considerations for non-exempted SGEI
- How ? Strengthened compatibility conditions; substantial changes compared to the 2005 Framework

IV. The new Commission Framework

Stricter compatibility conditions, e.g.:

- **Prior public consultation:** to take interests of users/providers into account, unless no significant added value to recent consultation (para 14)
- **Duration of the period of entrustment:** flexibility but needs to be justified by objective criteria, e.g. depreciation time for assets (para 17)
- **Compliance with public procurement rules:** where public procurement rules apply, compliance will be checked. (para 19)
- **Absence of discrimination:** if the same SGEI is assigned to several providers, same calculation method for the compensation (para 20)

IV. The new Commission Framework

- Amount of compensation: net cost + reasonable profit
 - Expected costs/revenues or incurred costs/revenues or both (para 21-24)
 - Net avoided cost methodology, unless not feasible or appropriate (para 24-27)
 - Efficiency incentives, unless not feasible or appropriate (para 39-43)
 - Member States are free to design how
 - rewards resulting from efficiency gains are to be shared between provider and authority
 - efficiency gains should not affect quality
- Additional requirements for serious distortions (para 50-59)
- Transparency: MS must publish basic info for each SGEI (para 60-61)

V. The new SGEI de minimis Regulation

- Objective: simplification for local services
- How ? Special SGEI de minimis Regulation, allows higher amount than general de minimis
- Scope: exclusion of agriculture, fisheries and aquaculture, road freight transport, coal, enterprises in difficulty

But: mixed companies (e.g. agri and non-agri) can receive SGEI de minimis for the non-excluded activities, provided that the activities are separated and the MS ensures that it does not go to excluded activities.

V. The new SGEI de minimis Regulation

- Conditions:
 - SGEI (“light” entrustment act)
 - Parameters to ensure that the service is “local” : amount of compensation per undertaking is below **EUR 500 000** over three years
 - Other parameters used in the first draft (size of the local authority, size of the provider) were not maintained
- Cumulation rules
 - Cumulation with general de minimis up to the ceiling of this Regulation
 - No cumulation with State aid for the same eligible costs
 - No cumulation with other compensation (aid or not) for the same SGEI

Conclusion

What are the main novelties ?

- Communication: clarification and more convergence with public procurement
- SGEI de minimis
- new thresholds in the Decision (full exemption for all social services, others up to 15 million, no turnover threshold)
- Framework: enforcement of public procurement, efficiency incentives, net avoided cost methodology