

**To:** The European Commission  
**From:** The Finnish Federation for Social Welfare and Health (STKL)  
**Interest Representative ID No 65967893012-89**  
**Subject:** Consultation on the texts regarding the application of State aid rules to Services of General Economic Interest (SGEI)

*The Finnish Federation for Social Welfare and Health (STKL) is a national non- governmental organization for collaboration in social and health policy. It works for equality and social rights, development of social and health services and basic social security, improvement of people's chances to influence and participate, and reduction of poverty and social exclusion. The members of the Finnish Federation for Social Welfare and Health comprise 137 national organizations and professional unions in the social and health field, 16 social security organizations and, as supporting members, 87 municipalities or other bodies.*

STKL would like to express its appreciation to the Commission for giving this opportunity to comment the proposed texts. State aid rules are particularly important for small national NGOs, whose work is very much depending on the support received from the State. In terms of service production, their position has many similarities to those of social enterprises and SMEs. Their existence and work are of crucial importance in maintaining a functioning society and responding to people's basic needs.

We would like to provide the following comments on the proposed texts.

## **THE COMMUNICATION**

### **RELATION BETWEEN STATE AID AND PUBLIC PROCUREMENT**

STKL appreciates the efforts by the Commission to clarify the relation between State aid and public procurement rules. This area is very problematic. Ideally, the two sets of rules would have been revised jointly in order to ensure full consistency. While the review of the public procurement rules is expected only next year, it is nevertheless hoped that the two be prepared in close coordination in order to ensure a holistic and uniform approach.

In the draft communication the Commission states the primacy of the public procurement rules and emphasizes that, even where the EU procurement Directives are wholly or partially inapplicable (e.g. for social services), the award may nevertheless have to meet Treaty requirements of transparency, equality of treatment proportionality and mutual recognition.

It would be more clear, if in this context it was also mentioned that the Treaty provisions, and principles derived from it, only apply, if the award in question has an effect on trade between Member States. While it is undoubtedly in the interests of the Member States to apply the

principles mentioned also in other cases (which is indeed often required also by national laws), every effort should be made to avoid any misunderstandings about the legal basis of different obligations.

We would request that the Commission clarify the paragraphs 47 vis-à-vis paragraphs 5 and 57. Having just affirmed the primacy of public procurement rules (including the requirement of public tendering procedures), the Commission notes that *in some Member States, it is not uncommon for authorities to finance services which were developed and proposed by the provider himself, and that the entrustment act can then be inserted directly into the decision to accept the provider's proposal*. It is not clear to us, how this relates to the requirements of public procurement. As a matter of fact, it would rather seem to contradict it. This should be explicitly explained to avoid any confusion. We would find this clarification particularly important if in these cases absence of effect on trade was required, because we have understood that such an absence is rare, but the method described not uncommon. Concrete examples of such cases (preferably several, since the method is not uncommon) would be helpful.

We would further request the Commission to elaborate paragraph 59, which states that the Commission regards tendering an appropriate method for certain cases, in order to compare the compensation requested by a pre-determined provider with existing market benchmarks. If the provider is predetermined, why would any other provider participate in a tendering process?

Alas, in spite of the explanations by the Commission, or based on them, determining the compensation where the SGEI is not assigned through the tendering procedure, appears far too complicated for many authorities to apply. We would request that a collection of examples of such cases be compiled and published by the Commission.

## **DE MINIMIS REGULATION**

### **SCOPE**

STKL welcomes the Commission's initiative for the regulation, in which we see the potential for facilitating work of many authorities. However, we do contest that it would only be applied to aid granted by local authorities representing a population of less than 10 000 inhabitants.

Finland is a sparsely populated country where local municipalities are responsible for the provision of basic services. The geographical and demographic circumstances in Finland present the authorities with exceptional challenges. To alleviate a situation, legislation has been adopted and a process ongoing to overhaul the existing structure of municipalities. Already a population base of 20 000 is required of a municipal structure providing social and health services. The direction is towards larger municipalities with bigger populations. However, this "big" population is located in small spots here and there in large territories.

The regulation in its proposed form would exclude Finland from its application. Yet, one could hardly claim that the effect on trade would be any bigger in cases of aid granted to local services in some corner of a municipality in Finland than anywhere else.

We submit that the type and quality of State authority granting aid is irrelevant. It has no significance in determining whether the aid in question has effect on trade or not. The only thing that matters is the aid itself. The proposal discriminates between different authorities.

We also note that the general de minimis regulation has no corresponding requirements related to the body that grants the aid. There is no reason to retain such a provision here, either, and we request that it be dropped.

## MONITORING

We would request that it be clearly stated in the regulation, what happens if the aid granted to an undertaking exceeds the stipulated limit.

We understand that, as a general rule, the amount of aid exceeding the limit is to be recovered by the Member State concerned. In other words, it is the Member State that is responsible for both granting the aid and monitoring the compliance, but it is the recipient that will have to bear the consequences of any mistake, including possible interest that may have to be paid. For a small NGO or SME that are operating with very limited finances, it may have serious consequences.

Taking into account the relatively small amounts of money involved, the possibility of unintentional mistakes and the severity of possible consequences to small undertakings, we propose that the de minimis regulation would include a possibility to waive the right to recovery, if it is constituted that the excessive aid has not had any significant effect on the market position of the recipient.

In any case, it is clearly in the interests of the recipient to ensure that the aid it received is in accordance with the rules. Therefore, it should also have a possibility to do so. In Article 3 paragraph 1 of the draft regulation, Member States granting de minimis aid are required inform the recipient in writing of the amount of aid and its de minimis character, making express reference to the relevant legal documents. Paragraph 3 states that where a Member State has set up a central register of de minimis aid, paragraph 1 shall cease to apply to that Member State. That means that the recipient might not be informed about the nature of the aid it has received.

We strongly support the idea of the central register, which would be the best way to keep track on the aid granted. However, the Member State should still be required to provide the relevant information on the aid to the recipient. Otherwise the recipients would be in a very awkward position with regard to their legal protection.

In paragraph 1 of the same article it is stated that, in case of de minimis aid granted under a scheme, it is sufficient that a Member State may inform the recipients of a fixed sum corresponding to the maximum aid amount granted under that scheme. It is further stated that the fixed sum shall be used for determining whether the ceiling of aid laid down in the regulation is met. We read it to mean that if, for example, a Member State grants aid under scheme in which a maximum amount is EUR 50 000, it is this fixed sum that it may provide to the recipient, even if the recipient is actually granted EUR 10 000. The fixed maximum amount of EUR 50 000 will then be used in calculation of the total amount of de minimis aid granted to that undertaking. Thus the ceiling may be reached without the undertaking actually having received that much aid. The recipient would forfeit the possibility of receiving the difference between the fixed sum and the actual amount (in this

example EUR 40 000) from other potential sources granting de minimis aid. We cannot see any justification for such a loss, which can be crucial for the operation of small NGOs or SMEs. Therefore, we propose that the information provided and the basis of determining if the ceiling is met should be the actual amount of aid granted to each undertaking.

## **COMMISSION DECISION**

STKL is pleased to note that the Commission has taken into account special characteristics of certain social and health services by not imposing an upper limit to the aid granted to them. We are, however, concerned about the interpretation of article 1 (c). It is not clear what social services are expected to be in and what out of its scope. As it is stated in paragraph 10 of the recital, the intensity of the distortion of competition in the social sector as a whole is relatively minor. We are therefore of the opinion that the said provision should cover all social services. If the Commission is aware of any particular services within the sector, where the risk is considerably higher, that could be explicitly excluded from the scope of this provision.

The Commission has reduced the notification ceiling from EUR 30 million to EUR 15 million without giving any other reason than “evolution of the markets”, in footnote 6. We find this insufficient. In the absence of any grounded reasons for the reduction and seeing that the proposed level may be too low for certain activities, we are of the view that the current level of the ceiling should be maintained.

## **THE FRAMEWORK**

Considering that some social and health services may not be exempted from the ceiling of the decision and consequently fall under the framework, STKL is expressing its concern over compulsory efficiency incentives. We believe that it falls under the competence of Member States to assess the efficiency of the services provided. Furthermore, the whole concept, as well as that of “productive efficiency targets” is alien to the social sector and there are no objective and measurable criteria that it could be based on. Care of children and elderly cannot be compared to e.g. waste management. Efficiency incentives should be voluntary or social and health sectors excluded from the scope of their application.

With regard to the relation between State Aid and public procurement, we refer to what is said above. A categorical requirement for application of public procurement rules, in particular public tendering procedure, might in some cases be counterproductive. Therefore, exceptions should be allowed, as long as the relevant treaty principles are respected.

The Member States do have a wide discretion in the definition of SGEI. Methods that they may use in assessing the public service needs fall under this discretion. The fact that a Member State has decided to define a service as SGEI proves that it has given the matter its consideration. It is our view that questioning the depth of that consideration or requiring the use of certain methods to prove it goes beyond the competence of the Commission. We also see no need to complicate the procedures by introducing such compulsory methods. Thus, it is our view that paragraph 14 should be deleted.

## GENERAL REMARKS

STKL appreciates the intention of the Commission to clarify concepts and rules, to adopt a diversified and more proportioned approach and to simplify the application of the rules for certain services. This type of a reform is long called-for. We hope that the result will ultimately meet the expectations and manage to alleviate the situation of many local authorities, NGOs and SMEs, who feel excessively burdened by – if not completely lost in - the multitude of rules and instructions concerning state aid, public procurement and competition. The burden placed on them is felt directly by the people they serve, as it affects their access to the basic social and health services they are entitled to.

Therefore, we must note with regret that, in spite of the stronger emphasis on the basic rights and public services in the Lisbon agreement, the highest value in the EU is (still) put on competition and the freedom of market. Article 14 TFEU on public services is to be applied without prejudice to the application of competition rules. SGEI are an exception that be applied restrictively and only where the development of trade is not affected in a way that would be contrary to the interests of the Union. What is in the interests of the Union tends to be assessed first and last from the point of view of the competition.

The problem is that the Treaty was originally drafted primarily with trade of industrial products in mind. It had nothing to do with e.g. services to mothers suffering from substance abuse. The idea of SGEI was also related to large network industries. Therefore, the concepts and provisions developed can only be applied with great difficulty to many individual, personalized services of a social nature.

Having said that, however, it must be born in mind that the concept of SGEI is indeed, as the Commission has mentioned, an evolving one. The Commission is in a position to influence the direction to which the concept and the interpretation of the relevant rules are evolving. It has to base its positions on the existing case-law, but also take into account current circumstances and look into the future. The new provisions of the TFEU should help in viewing the rules related to general interest from a new angle, an angle that would put more emphasis on the interests of the society as a whole, wider than just from the point of view of the market. When it comes to SGEI, it should be possible to apply a balancing test, in which the interests of the society are given their due weight vis-à-vis the interests of the market. We rely on the Commission to do that, either by way of interpretation of the existing rules or, if need be, by using its legislative initiative.

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