



OPINION

European Economic and Social Committee

State aid / health and social services

State aid rules applicable to health and social services – SGEI in a post-pandemic scenario.
Thoughts and proposals on the Commission evaluation to amend the 2012 legislative package
(own-initiative opinion)

INT/981

Rapporteur: **Giuseppe GUERINI**

Plenary Assembly decision	20/01/2022
Legal basis	Rule 32(2) of the Rules of Procedure Own-initiative opinion
Section responsible	Single Market, Production and Consumption
Adopted in section	05/05/2022
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Plenary session No	569
Outcome of vote (for/against/abstentions)	221/0/5

1. Conclusions and recommendations

- 1.1 The European Economic and Social Committee (EESC) considers that various health and social services such as care (including home care), helping disadvantaged individuals and those with disabilities to break back into the labour market, childcare and social housing are fundamental when it comes to guaranteeing social cohesion in the ongoing period of post-pandemic recovery, humanitarian crisis and international tensions. European rules on state aid for these services are therefore fundamental.
- 1.2 The EESC strongly endorses the Commission's decision, in its evaluation of the current rules¹, to consider health and social services as a subgroup with autonomous features within the broader framework of services of general economic interest (SGEI).
- 1.3 The EESC would emphasise that the 2012 Almunia package laying down rules on state aid applying to SGEI was definitely useful in that it updated and simplified the previous rules which had been approved in 2005. The regulatory approach taken by this package should therefore be retained in future, simply updating certain matters, should the Commission decide to amend the current rules following the ongoing evaluation.
- 1.4 The EESC would point out that within individual Member States, health services and almost all social care services are organised by region, county, town or even by group of towns in the case of larger urban areas. This means that user mobility between regions or counties in a given country is very limited; cross-border mobility of users is therefore a non-factor. There is no cross-border relevance, and so Article 107 TFEU on state aid does not apply to health and social services.
- 1.5 The EESC would point out that national administrations are struggling to develop specific expertise on the entrustment acts which are a prerequisite for applying Exemption Decision No 21/2012 on public service compensation and Regulation No 360/2012 on *de minimis* aid for SGEI. It would therefore be very useful if the Commission could set up a portal giving access to examples of legitimate entrustment acts for the various types of health and social services.
- 1.6 The EESC encourages the exchange of good practices between Member States with similar legal traditions on the application of state aid rules to health and social services, with a view to encouraging more effective use of the discretion that Protocol No 26 to the TFEU accords to national administrations when it comes to establishing and implementing SGEI at local level.
- 1.7 The EESC notes that the rule laid down in Decision No 21/2012, whereby public service compensation cannot exceed what is necessary to cover the costs except for "a reasonable profit", requires further clarification: **i)** on how this reasonable profit should be determined in relation to the capital used to provide the service, considering the operating risk; **ii)** on how to establish the fixed and structural costs which are part of SGEI management costs; and **iii)** on the extent to which the distinctive nature of the services and organisational models typical of social

¹ ARES-2019-3858696.

economy entities could have a greater bearing when they manage and deliver services of general economic interest.

- 1.8 The EESC believes that health and social services should be eligible for a *de minimis* ceiling over three fiscal years which is higher than the ceiling for SGEI generally allowed under Regulation 360/2012 (EUR 500 000), as was clearly pointed out during the Commission's public consultation. The role played by health and social services in terms of social cohesion would justify a higher ceiling than that currently in place.

2. Introduction and background

- 2.1 The topic of state aid for undertakings providing services of general economic interest and, for the purposes of this opinion, for organisations active in the narrower field of health and social services, is governed by the 2012 Almunia legislative package. This package replaced and updated the previous legal framework which dated back to 2005 ("Monti-Kroes package").

- 2.2 The Almunia package contains the following pieces of legislation:

- Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing services of general economic interest;
- Commission Decision of 20 December 2011 on the application of Article 106(2) of the TFEU to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (2012/21/EU);
- 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 interest²;
- Communication from the Commission on the European Union framework for state aid in the form of public service compensation (2011)³.

- 2.3 The relevant legal framework has therefore been in place for almost a decade and, as the Commission points out, the Member States have made considerable use of it ever since it came into force, despite various operational problems which could justify further action by the EU legislator, not least given the considerable amount of time that has passed since the framework was approved.

- 2.4 On this point, the Commission launched a broad stakeholder consultation to verify whether the current rules are effective and efficient, provide added value and are fit for purpose, with particular emphasis on health and social services.

- 2.5 The consultation ran from 31 July 2019 to 14 December 2019, in the form of a questionnaire prepared by the Commission. Fifty-one responses were sent in, from undertakings, confederations, trade unions, NGOs, private individuals and public administrations.

² [OJ C 8, 11.1.2012, p. 4.](#)

³ [OJ C 8, 11.1.2012, p. 15.](#)

- 2.6 Through this own-initiative opinion and in its capacity as a representative body of Europe's economy and civil society, the EESC seeks to bring to the Commission's attention a number of issues relating to applying the rules on state aid in the field of health and social services, with a view to the possible future revision of state aid rules targeting these sectors.

3. **General comments**

- 3.1 The EESC acknowledges that devising rules governing state aid in the field of social and health services is a very complex process for the EU legislator, given the competing needs to strike a tricky balance between public support for activities contributing to objectives which are in the general interest and to safeguard free, unimpeded competition in the internal market. European regulation of state aid should also enable the public investment necessary for the development of social and health services infrastructure which will contribute to the objectives of the European Pillar of Social Rights.
- 3.2 The EESC strongly endorses the Commission's decision to consider health and social services as a subgroup with autonomous features within the broader framework of SGEI, due to the specific characteristics of these services and the unique objectives that those services aim to achieve. In the document on the evaluation of the current rules, the Commission in fact notes that "From a State aid perspective, health and social services form a subgroup of services of general (economic) interest"⁴.
- 3.3 The EESC would emphasise that the 2012 Almunia package laying down rules on state aid applying to SGEI was definitely useful in that it updated the previous rules which had been approved in 2005, reducing the administrative and regulatory burden on national authorities intending to finance SGEI. The regulatory approach taken by this package should therefore be retained in future, simply updating and clarifying certain matters.
- 3.4 The EESC considers that various health and social services such as care (including home care), helping disadvantaged individuals and those with disabilities to break back into the labour market, childcare and social housing are fundamental when it comes to guaranteeing social cohesion in the internal market, and are shared values of the Member States, as laid down in Protocol No 26 to the TFEU. These services are still more strategic and important in the ongoing period of post-pandemic recovery, international tensions and rising populism in the Member States.
- 3.5 The EESC would point out that health and social services are, in some cases, provided at national level by means of non-economic activities which do not come under EU rules on state aid. At the same time, where these services are provided by means of economic activities, those activities have only minor cross-border relevance: they are largely rooted in local communities and are instrumental in ensuring social cohesion within a given country.

⁴ ARES-2019-3858696.

- 3.6 The EESC would point out that health and social services are often provided by means of non-economic activities, in which case they do not come under EU rules on state aid (Article 107 TFEU). Moreover, even when they are provided in a market context, health and social services have an essentially local dimension with no real demand-side cross-border relevance. The local dimension is even more evident when social and health services are managed by social economy entities with the involvement of local communities, with a view to social cohesion and in the public interest.
- 3.7 However, Commission practice and European case-law consider that the cross-border relevance of health and social services cannot in principle be excluded, due to the potential distortion of cross-border investment. While understanding the reasons underpinning this approach which seeks to fully safeguard the freedom of movement enshrined in the Treaties, the EESC would urge the Commission to provide appropriate guidelines on the cross-border relevance of health and social services. Specific, flexible provisions need to be devised for these services within the broader debate on the concept of cross-border relevance, which is itself an element of the concept of state aid as laid down in Article 107 TFEU.
- 3.8 The EESC notes that even when social and health services do have a cross-border dimension, as in the case of the EU's 37 cross-border urban areas coming under the Cross-Border Healthcare Directive, this is on the basis of physical proximity between border areas and in accordance with territorial subsidiarity principles. Therefore, more state aid would not substantially undermine cross-border competition between businesses.

4. **Specific comments**

- 4.1 The EESC would point out that despite the useful clarity and simplification provided by the 2012 Almunia package, the legal concepts to be applied to SGEI are still objectively complex, not least given the greatly intertwined nature of the legal and economic assessments typical of the SGEI sector.
- 4.2 The EESC would therefore ask the Commission to publish a guide updating the *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* (SWD (2013) 53 final/2), which has been very useful for stakeholders in previous years.
- 4.3 The EESC feels that national authorities are less familiar with the specific rules on SGEI, as regards both public procurement and state aid, than with the corresponding ordinary rules on public procurement and state aid. Investing appropriately in training public administration staff, drawing partly on European resources, could therefore be beneficial for boosting the standard of these services and for ensuring increased compliance with EU law.
- 4.4 The EESC would point out that in both the technical and operational domains, national administrations are struggling to develop specific, high-level expertise on the entrustment acts which are a prerequisite for applying Exemption Decision No 21/2012 on public service compensation and, albeit in simplified terms, Regulation No 360/2012 on state aid (the higher de minimis ceiling of EUR 500 000 over three fiscal years).

- 4.5 On this point, it would therefore be very useful if the Commission could set up a portal giving access to examples of entrustment acts for the various types of health and social services considered to be legitimate and sufficiently well developed by the Commission's Directorate-General for Competition. The exchange of good practices between Member States with similar legal traditions could also be very useful in this respect, encouraging more effective use of the discretion that Protocol No 26 to the TFEU accords to national administrations when it comes to establishing and implementing SGEI at local level.
- 4.6 As is well-known, the rule laid down in Decision No 21/2012 stipulates that the compensation granted to operators entrusted with public service obligations cannot exceed what is necessary to cover the costs except for "a reasonable profit". It would be useful to further flesh out this concept with a view to achieving greater clarity on the following three issues: **i)** how should this reasonable profit be determined in relation to the capital used to provide the service in the light of the operating risk?; **ii)** establishing the fixed and structural costs which are part of the costs incurred when managing the SGEI; and **iii)** the extent to which the distinctive nature of the services and organisational models typical of social economy entities could have a greater bearing when they manage and deliver services of general economic interest.
- 4.7 When defining the concept of "a reasonable profit", the EESC points out that account should be taken of the characteristics of the undertaking in question, particularly when that undertaking keeps ploughing the profits back into its own activities and describes itself as a social economy entity or enterprise.
- 4.8 The EESC believes that health and social services should be eligible for a *de minimis* threshold over three fiscal years which is higher than and different from the threshold for SGEI under Regulation 360/2012 (EUR 500 000), as was clearly pointed out during the Commission's public consultation. Such an increase is justified by the public and general interest role of social and health services and the limited impact of these activities on competition and trade between Member States. Increasing the *de minimis* threshold for social and health services would widen the scope of application of Regulation 360/2012, making the use of that regulation and its simplified forms more accessible.
- 4.9 The role played by health and social services in terms of social cohesion would justify a higher ceiling, which would have the triple advantage of: **i)** allowing more aid to be granted under the simplified and quicker framework on *de minimis* aid; **ii)** taking into account the return of inflation at macroeconomic level, which would suggest that more frequent revisions of the ceiling over three fiscal years are needed; and **iii)** recognising the supporting role played by many social economy entities.
- 4.10 The EESC recognises the importance and role of SMEs and private companies involved in the management of social and health SGEIs on the basis of public procurement procedures run by local authorities. Here too, data and information on selection procedures for service providers, compensation and performance collected and circulated by national administrations could provide useful pointers.

4.11 Lastly the EESC, as recognised by the Commission in its social economy action plan⁵, considers that health and social services could also be supported indirectly by granting social economy organisations, which are very active in these sectors, better access to support measures for accessing financing and credit, along with specific incentives to employ workers deemed to be disadvantaged or to have a disability by the general regulation on state aid exemption. On this point, clear and flexible European rules authorising the reasonable cumulation and combination of different incentives for the same activities would be very useful.

Brussels, 19 May 2022

Christa Schweng

The President of the European Economic and Social Committee

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