



Revision of the SGEI-package

Introduction

Although social housing is a social service, the European Court of Justice, the European Commission as well as the European Parliament clearly indicate that the provision of housing to disadvantaged citizens constitutes an economic activity. In many Member States, social housing is therefore qualified as a service of general economic interest (SGEI).

As an economic activity, the organisation and the financing of social housing in the Member States must in principle respect the internal market and competition rules. However, the application of these rules to SGEIs can sometimes prove to be disproportionate or unsuitable. In line with Article 106 TFEU, service providers entrusted with the operation of an SGEI are therefore only subjected to the internal market and competition rules in so far as the application of these rules does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by the national, regional or local authorities.

The competence of Member States to define social housing as an SGEI however remains subject to the principles of necessity, proportionality and the absence of manifest error.

The current SGEI-package

In its SGEI Decision of 20 December 2011 (2012/21/EU), the Commission states that “undertakings in charge of social services, including the provision of social housing for disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification”. This means that state aid to a provider of social housing can, subject to the conditions laid down in the SGEI Decision, be exempted from prior notification. The compensations provided by Member States that have defined their social housing scheme in line with the SGEI-package will therefore be subject to less rigorous state aid control.

According to the 2009 Commission Decision on Dutch social housing (E2/2005 and N642/2009), the European Commission’s role is limited to verifying that Member States do not make manifest errors in the definition of social housing as an SGEI and that they comply with the basic conditions of the SGEI state aid rules, notably the necessity to avoid overcompensation and accounting separation. In exercising that role, the European Commission does not impose on Member States a specific notion of social housing that can represent an SGEI, but rather verifies the definition proposed by the national authorities.



This was also recognised by former Commissioner for Competition Joaquín Almunia in 2014 stating that “the Commission has no power at all to impose a definition of social housing. It is for each Member State individually to define its policy in this area. The Commission has the sole responsibility to ensure that the aid intended for social purposes is not misused to finance commercial activities, which would be contrary to the provisions of the Treaty”.

More recently, Commissioner for Competition Margrethe Vestager again confirmed in her 6 April 2016 letter to the President of Housing Europe that the European Commission recognises that Member States have a wide discretion to define, organise, and finance social housing. Moreover, she stated that the Commission’s role is limited to verifying that Member States do not make manifest errors in the definition of social housing as an SGEI, and that they comply with the basic conditions of the SGEI state aid rules.

The initiatives to change the SGEI-package in relation to social housing

According to the SGEI Decision, the European Commission was expected to carry out a review of this Decision 5 years after its entry into force. Although this deadline has already expired, the Commission has not taken any decision as to the timing of a possible review.

A request for a modification of the SGEI-package has been made by the Partnership on Housing which operates within the framework of the European Urban Agenda, a joint effort of the European Commission, Member States and European Cities Networks. This Partnership also includes various public stakeholders, such as for instance Eurocities or Housing Europe. However, the European Union of House Builders and Developers (UEPC) or any other private stakeholders are excluded from being official members.

On 23 March 2017, the Partnership published a Guidance Paper on EU regulation and public support for housing pushing for a change of the SGEI-package, notably on social housing.

In our view, however, the central argument of the Guidance Paper stating that the definition of social housing should be set at the local level is futile because this is already provided in the SGEI Decision. Indeed, as underlined above, Member States are free to define what they understand as “disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions”. The European Commission only acts in the event of manifest error. Accordingly, it seems that the real aim of the Partnership on Housing is to open social housing for middle income citizens.

In addition, the Guidance Paper gives an unacceptable interpretation of “disadvantaged citizens” (e.g. reference to young working households and senior people, school teachers, nurses and police officers). The application of such categories would evidently lead to situations where persons that are not in need would nonetheless qualify for social housing.



The request from the Partnership was welcomed by the Committee of Regions (CoR). On 11 October 2016, the CoR published its Opinion on 'State Aid and Services of General Economic Interest' in which it advocated for the widening of the definition of social housing (point 41) to give Member States more discretion in "planning, delivering, financing and organising the construction of social housing". In that vein, it was calling for the removal of the restriction of social housing to disadvantaged citizens or socially less advantaged groups. The CoR also published an Opinion on 'The European Pillar of Social Rights' calling for modifications of the Principle 19(a) on housing and assistance for the homeless. The European Commission did not respond to these initial attempts and decided not to follow-up on these questions with the Proclamation of the European Pillar of Social Rights on 17 November 2017.

In its Opinion of 30 November 2017 "Toward a European Agenda for Housing" the CoR nonetheless continues to call for a revision of the SGEI Decision, with the aim of broadening access to social housing beyond disadvantaged citizens or socially less advantaged groups.

The position of the European Commission

On 6 June 2017, in response to a written parliamentary question on the possible revision of the SGEI-rules in relation to social housing submitted by MEP Agnes Jongerius (The Netherlands, S&D), Commissioner Margrethe Vestager stated that Member States may not define a social housing SGEI so broadly that it manifestly goes beyond responding to the provision of accommodation to disadvantaged citizens or socially less advantaged groups who due to solvency constraints are unable to obtain housing at market conditions.

In addition, Commissioner Margrethe Vestager added that the European Commission has accepted 'social mixity' and 'social cohesion' as valid public policy objectives for which state aid may be granted under the SGEI Decision. There are, however, no legal precedents that confirm this position. On the contrary, in the Libert case (case C-197/11) the European Court of Justice confirmed that "the obligation imposed on those economic operators to discharge the social obligation provided for by [the Decree of the Flemish Region of 27 March 2009 on land and real estate policy], in so far as its purpose is to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population, may be justified by requirements relating to social housing policy in a Member State as an overriding reason in the public interest". It is obvious that this definition should also apply in state aid matters.

In this context, UEPC also learned that, in its written observations in another case for a preliminary ruling referred by a Belgian court (case C-343/17), the European Commission reiterated its position and argued in favour of a well-targeted definition of social housing.

The need for a genuine level playing field



As a general rule, and also in view of the fact that the Union is striving for a more competitive economy, UEPC considers that there should be a genuine level playing field between public and private developers in the housing market. Accordingly, state aid must be equally available to all actors, irrespective of their public, semi-public or private status.

In Europe, however, there are currently two types of social housing systems. On the one hand, there are so-called 'closed' systems where social housing can only be provided by a limited number of public or semi-public social companies. Such systems exist for instance in France and Belgium. On the other hand, there are the so-called 'open' systems where private for-profit developers can also contribute to the construction and organisation of social housing. Typical Member States with an 'open' system are Germany and Spain.

In view of the two different approaches that exist in the different Member States, UEPC believes that the European Commission should refrain from modifying the current state aid rules in relation to social housing. In the event the state aid rules would nonetheless be changed so that prior notification of state aid would no longer be required, for example to help a wider group of persons, this flexible approach should only apply to the 'open' systems. Prior notification should in any event be maintained in the 'closed' systems, so that the European Commission can continue to guard against unfair competition in European housing markets at the expense of private for-profit developers. UEPC believes that the European Commission plays a crucial role in these 'closed' systems, as it allows for the creation of a level-playing field without unfair competition or distortion of competition.