

## **Position Paper**

### **by the Association of German Non-statutory Social Welfare Organisations regarding the further development of state aid law, in particular the General Block Exemption Regulation (GBER) as well as the SGEI and (general) de minimis Regulation**

#### **I. Introduction and context**

The principle of the welfare state, which is enshrined in Germany's Basic Law (the German constitution), establishes a mandate for the state to attend to and assure social welfare. The principle of subsidiarity associated with this means that public tasks are to be regulated in the greatest proximity possible to citizens, i.e. a higher respective institution in a society only intervenes and takes action if a subordinate unit is not able to perform its tasks on its own. In terms of the state mandate in the area of social welfare, this means that this task is for the most part fulfilled by the *Freie Wohlfahrtspflege* (non-statutory social welfare organisations). The non-statutory social welfare organisations thus constitute an important pillar of the German welfare state and make a significant contribution to social welfare in Germany day in day out with their 120,000 institutions and 1.4 million employees.

Statutory arrangements in the field of social policy in many areas fall within the domains of the Member States, which exhibit widely differing models of social welfare and social security based on long traditions; in many aspects, there is a dearth of European harmonisation.<sup>1</sup>

In contrast to all this, a crucial objective of the European Union is to establish a common internal market, the attainment of which presupposes a system that upholds and protects mutual competition.<sup>2</sup> The EU has exclusive competence and sole jurisdiction over this area (cf. Art. 3 (1) (b) of the TFEU).

These introductory statements are key to understanding the tension between provision of social services by non-statutory social welfare organisations under the German welfare state model and the application of European competition law in general and, in the present context, EU state aid law in particular. In order to ensure both the

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<sup>1</sup> Cf. Diaconia Charter for a Social Europe, II. 3. EU Social Models, p. 9 f., Diaconia Text 03.2017, available at <https://www.diakonie.de/diakonie-texte/032017-diakonie-charta-fuer-ein-soziales-europa>.

<sup>2</sup> Cf. Terhechte in Grabitz/Hilf/Nettesheim - Das Recht der Europäischen Union, 72nd EL February 2021, Art. 3 TEU, para. 41. (in German).

effective, transparent and non-bureaucratic provision of social services on the one hand and the proper observance of EU state aid law on the other, not only must all actors lawfully apply and adhere to the rules - these rules bearing relevance to non-statutory social welfare organisations must also be subject to review and modification.

The demands and suggestions for changes and amendments in the following have been split up into three different areas. First, general demands regarding EU state aid law have been framed (II.), followed by demands more specific to state aid rules governing (SGEI) de minimis aid (III.) and the General Block Exemption Regulation (GBER)<sup>3</sup>(IV.). Parts III. and IV. are the heart of this statement of position. These chapters are based on the wide-ranging experience of non-statutory social welfare organisations in recent years in the application of state aid law in daily practice.

## II. General demands pursuant to state aid law

**Providers of grants must justify their decision on the application of EU state aid law in a transparent and comprehensible manner in each individual case.**

### *Justification:*

Providers of grants<sup>4</sup> often apply state aid law even when the factual requirements laid down in Article 107 (1) of the TFEU are not met and thus state aid is ruled out or deemed unlikely to apply. However, the (non-)application of EU state aid law must be performed in accordance with the principle of administrative lawfulness. This also means that in those cases where the factual requirements set out in Article 107 (1) of the TFEU are not met, state aid law and corresponding measures to obtain exemption (e.g. the submission of a de minimis declaration) must not be applied. The recipient of the funding should always be able to comprehend the decision as to whether state aid is involved. According to a recent study<sup>5</sup>, providers of grants are often largely unaware of the rules applying to SGEI exemptions, which of course presents an obstacle to their proper application.

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<sup>3</sup> Commission Regulation No [651/2014](#) declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU of 17 June 2014.

<sup>4</sup> Whenever grants are mentioned in the following, this term is also intended to include other benefits (such as subsidies) that are sometimes not covered by the notion of grants under budgetary law.

<sup>5</sup> EU Commission Study *on Market Trends in healthcare and social housing and EU State aid implications*, published on 3 September 2021, cf. p. 8 and 108 ff. , available [here](#).

**The principle of protection of legitimate expectations on the part of aid recipients is severely constrained by the current legal situation. However, legitimate expectations must always be afforded protection if the aid recipient has ascertained within its latitude of action that the aid was granted in a transparent and justified manner.**

*Justification:*

In contrast to the situation under general German administrative law, the recipient of aid "may only trust and believe in the regularity of aid granted to it if the aid has been granted in compliance with the procedure laid down in Article 108 of the TFEU, i.e. if proper notification has taken place and the measure has been approved by the Commission" or if there is a proper exemption or exception.<sup>6</sup> This restricts the protection of legitimate expectations to an extent that is de facto unattainable and does not sufficiently take into account the principle of administrative lawfulness. A workable "middle ground" must be found between the legitimate interest in promoting and preserving competition in the internal market on the one hand and protection of the legitimate expectations of aid recipients on the other.

### **III. Proposed amendments to the SGEI de minimis Regulation <sup>7</sup>and (general) de minimis Regulation<sup>8</sup>**

De minimis aid is aid that in principle meets the requirements laid down in Article 107 (1) of the TFEU, but is considered to be such a small amount that it is "denied the effect of actually affecting trade and/or distorting or threatening to distort competition".<sup>9</sup> Such aid is then exempt from the notification requirement and can be provided in conformity with law governing state aid if certain rules are observed. The (general) de minimis Regulation from 2013 applies to aid granted to companies in all sectors of the economy with few exceptions.<sup>10</sup> With regard to de minimis aid granted in connection with the provision of services of general economic interest (SGEI), the SGEI de minimis Regulation has applied since 2012. The current SGEI de minimis Regulation is to apply until 31 December 2023.<sup>11</sup>

While both regulations have helped ease the situation in some ways, they have also created new difficulties in part - difficulties which are addressed in the following amendment proposals.

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<sup>6</sup> Cf. Bartosch in Bartosch, EU-Beihilferecht, 3rd edition 2020, Art. 16 Reg 2015/1589, marginal no. 8. (in German).

<sup>7</sup> Commission Regulation (EU) No 360/2012 of 25 April 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 (EU) No [360/2012](#), taking into account the [extension of](#) its period of validity until 31 December 2013.

<sup>8</sup> Regulation (EU) No [1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 on the Treaty of the Functioning of the European Union to de minimis aid.

<sup>9</sup> Von Wallenberg/Schütte in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 71st EL August 2020, Art. 107, para. 80. (in German).

<sup>10</sup> Cf. Art. 1 para. 1 of Regulation No. 1407/2013.

<sup>11</sup> See Commission Regulation (EU) No [2020/1474](#) of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic.

## Proposed amendment 1

<b>Art. 1 (1) of the SGEI de minimis Regulation (currently applicable version)</b>	<b>Art. 1 (1) of the SGEI de minimis regulation (proposed amendment)</b>
This regulation applies to aid granted to undertakings providing a service of general economic interest within the meaning of Article 106 (2) of the Treaty.	This Regulation applies to aid granted to undertakings providing a service of general economic interest within the meaning of Article 106 (2) of the Treaty. <b><i>Member States must in particular respect Article 14 and Protocol No 26 of the Treaty when defining a service of general economic interest.</i></b>

### *Justification:*

In future, directly applicable rules for services of general economic interest (SGEI), such as the SGEI de minimis Regulation, should (more clearly) take into account the wide discretionary power of authorities providing grants in the Member States when determining an SGEI, so that they also make use of this power. The concept of SGEI is enshrined in European law in Article 14 of the TFEU and Protocol No. 26 to the TFEU. According to Art. 14 of the TFEU, services of general economic interest have a special status and "importance in promoting social and territorial cohesion". "The Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions". However, no precise definition of what constitutes an SGEI is to be found either in EU primary or secondary law, and is instead left up to the Member States. Experience has shown that this creates uncertainty for aid providers. However, Protocol No. 26 to the TFEU specifies that national, regional and local authorities have a wide margin of discretion in defining SGEIs and recognises the "diversity of the respective services of general economic interest and the differences in the needs and preferences of users resulting from different geographical, social or cultural situations".<sup>12</sup> The Commission's powers are limited to reviewing whether Member States have not made an obvious error in their ascertainment and to verifying whether the compensation involves state aid.<sup>13</sup> Frequently, agencies granting aid refuse to apply the SGEI de minimis Regulation to obtain exemption under state aid law, claiming that there is no SGEI in the specific case, even if the Regulation is applied by other agencies in comparable cases.

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<sup>12</sup> Protocol (No. 26) to the TFEU. See also Communication on the application of the State aid rules of the European Union to compensation granted for the provision of services of general economic interest of 11 January 2012, [2012/C 8/02](#) (the so-called "SGEI Communication").

<sup>13</sup> See SGEI Communication, para. 46 with reference to ECJ Judt. of 12 February 2008, [T-289/03](#), paras. 166-169, 172 - BUPA v. Commission.

## Proposed amendment 2

Art. 2 (2) of the SGEI de minimis Regulation (currently applicable version)	Art. 2 (2) of the SGEI de minimis Regulation (proposed amendment)
The total amount of SGEI <i>de minimis</i> aid granted to any one undertaking providing services of general economic interest shall not exceed EUR 500,000 over any period of three fiscal years.	The total amount of SGEI <i>de minimis</i> aid granted to any one undertaking providing services of general economic interest shall not exceed <b>EUR 1,500,000</b> over any period of three fiscal years.

### *Justification:*

Raising the total amount (“ceiling”) from EUR 500,000 at present to EUR 1.5 million in three fiscal years creates greater scope for application and renders the SGEI de minimis Regulation more practicable.<sup>14</sup> The EU Commission is of the opinion that *inter alia* in the case of aid recipients which offer goods or services only in a geographically limited area in one Member State and are unlikely to attract customers from other Member States, this may be an indication that there is no effect on trade between Member States.<sup>15</sup> The provision of SGEIs involves (local) services of general interest more often than in the case of “general” services. Many SGEI providers grant this aid primarily with the aim of having a task fulfilled, not with the intention of making a profit. Moreover, these SGEI providers are usually active throughout the country, i.e. including in areas that are economically uninteresting for profit-oriented providers. While this does not rule out the possibility that these services will not also be offered by (potential) competitors from other EU Member States, it makes this less likely. However, it also means that non-profit SGEI providers in particular are often dependent on external funding. If one weighs this special societal role as well as the specific financing needs of many SGEI providers on the one hand against the low risk of a significant impact on competition and trade between the Member States on the other, the former is to be assigned considerably more weight in the final equation. The increase in the ceiling being proposed here takes account of this trade-off and does justice to the actual financing needs of SGEI providers almost ten years since the current ceiling was set. Finally, in an opinion as far back as 2012, the Committee of the Regions called for the level to be raised to EUR 800,000 per fiscal year (i.e. EUR 2.4 million in three tax years).<sup>16</sup> This was justified, among other things, by the fact that even in the case of aid to promote SGEIs of this magnitude, it could be assumed that such aid does not affect competition and trade between the Member States within the meaning of Article 107 (1) of the TFEU. A comparatively moderate increase to EUR 1.5 million in three fiscal years ensures this all the more.

<sup>14</sup> Cf. also the statement of position by the BAGFW on the further development of state aid law, in particular the SGEI de minimis Regulation of 2 March 2018, available [here](#). (in German.)

<sup>15</sup> Cf. Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union of 19 July 2016, (2016/C 262/01), para. 196.

<sup>16</sup> Cf. Opinion of the Committee of the Regions on ‘EU State aid rules on services of general economic interest’ (revised opinion) of 11 January 2012, [2012/C 9/09](#).

## Proposed amendments 3 and 4

Art. 2 (7) of the SGEI de minimis Regulation (currently applicable version)	Art. 2 (7) of the SGEI de minimis Regulation (proposed amendment)
<p><i>De minimis aid</i> under this Regulation may be cumulated with de minimis aid granted under other de minimis regulations up to the ceiling laid down in paragraph 2.</p>	<p><i>De minimis aid</i> under this Regulation <b>may be cumulated up to ceiling resulting from the cumulation of the ceiling stipulated in paragraph 2 with the ceilings laid down in the other de minimis regulations.</b></p>
Art. 5 (1) of the (general) de minimis Regulation (currently applicable version)	Art. 5(1) of the (general) de minimis Regulation (proposed amendment)
<p>De minimis aid granted in accordance with this Regulation may be cumulated with <i>de minimis</i> aid granted in accordance with Commission Regulation (EU) No 360/2012 (15) up to ceiling laid down in that Regulation. It may be cumulated with <i>de minimis</i> aid granted in accordance with other <i>de minimis</i> regulations up to the relevant ceiling laid down in Article 3 (2) of this Regulation.</p>	<p>De minimis aid granted in accordance with this Regulation may be <b>cumulated up to the ceiling resulting from the cumulation of the ceiling laid down in Article 3 (2) with the ceiling laid down in [new Regulation (EU) No 360/2012]</b>. It may be cumulated with de minimis aid granted in accordance with other de minimis regulations up to the relevant ceiling laid down in Article 3 (2) of this Regulation.</p>

### *Justification:*

Until now, according to Art. 2 (7) of the SGEI de minimis Regulation and Art. 5 (1) of the (general) de minimis Regulation, SGEI and general de minimis aid may only be cumulated for one undertaking up to the ceiling applicable under the SGEI de minimis Regulation (currently EUR 500,000 in three fiscal years). This does not do justice to the special and important function that services of general economic interest perform in the Member States and the special financing needs of these undertakings compared to others. Instead, in the case of actual cumulation of general de minimis aid and SGEI de minimis aid, it should also be possible to cumulate respective ceilings. A new arrangement for cumulation rules applying to the cumulation of de minimis aid not covered by the SGEI de minimis Regulation does not appear to be necessary.

## Proposed amendment 5

Art. 2 (8) of the SGEI de minimis Regulation (currently applicable version)	Art. 2 (8) of the SGEI de minimis Regulation (proposed amendment)
<i>De minimis</i> aid under this Regulation shall not be cumulated with any compensation in respect of the same service of general economic interest, regardless of whether or not it constitutes state aid.	<i>De minimis</i> aid under this Regulation cannot be cumulated with <b>state aid</b> for the same SGEI.

### *Justification:*

According to the previous version of Art. 2 (8), de minimis aid under the SGEI de minimis Regulation cannot be cumulated with compensation for the same SGEI, irrespective of whether the compensation constitutes state aid or not. This prohibition against cumulating de minimis aid with other compensation for the same service should only apply, however, if these compensations are in fact deemed to constitute state aid. This not only clarifies what kind of compensation is involved, but also does justice to the aim and objective of free and fair competition: if a compensation payment is not deemed to constitute aid within the meaning of Article 107 (1) of the TFEU, its payment is already compatible with the internal market "in and of itself". Cumulation with SGEI de minimis aid therefore does not create "more" aid that is prohibited in principle.

## **IV. Proposed amendments to the General Block Exemption Regulation (GBER)<sup>1718</sup>**

The General Block Exemption Regulation (GBER) allows EU Member States to grant greater amounts of public funds to a broader range of undertakings (in the meaning of state aid) without prior review by the EU Commission within the meaning of Article 108 of the TFEU.

The GBER exempts EU countries from this notification requirement, provided that the specified requirements of the respective groups are met.

Exemption under the conditions laid down in the GBER serves to reduce the administrative burden for national and local authorities. It also encourages Member State governments to target aid at activities that promote economic growth without creating an unfair competitive advantage for the beneficiaries.

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<sup>17</sup> Commission Regulation No [651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

<sup>18</sup> In addition, BAGFW has made its own contribution to the [consultation](#) on the targeted review of the GBER concerning environmental and energy aid, aid for risk financing, aid for research, development and innovation and regional aid (deadline 8 December 2021).

For non-statutory social welfare organisations in Germany, the following groups of aid measures inter alia are relevant: Regional aid, training aid and aid for small and medium-sized enterprises (SMEs). The following proposed amendments are intended to help simplify application of the GBER.

**Proposed amendment 6**

Art. 8 (3) (b) of the GBER (currently applicable version)	Art. 8 (3) (b) of the GBER (proposed amendment)
<p>Aid with identifiable eligible costs exempted by this Regulation may be cumulated with: (...) any other State aid, in relation to the same eligible costs, partly or fully overlapping, only if such cumulation does not result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation.</p>	<p>Aid with identifiable eligible costs exempted by this Regulation may be cumulated with: (...) any other State aid, in relation to the same eligible costs, partly or fully overlapping, only if such cumulation does not result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation.</p> <p><b><i>This shall not apply in the case of cumulation with aid within the meaning of Article 107 (2) (b) and (3) (b), second alternative of the TFEU.</i></b></p>

*Justification:*

Due to the coronavirus pandemic, many aid recipients have special, unforeseeable funding needs. However, many non-profit institutions and organisations that receive funding bearing a relevance to state aid, for example through EU funding programmes, which are exempted under the GBER, cannot receive any further funding due to the requirements set out in Art. 8 of the GBER and the necessary compliance with aid intensities. In the EU Commission's "Temporary framework for state aid in connection with the current outbreak of COVID-19", which has been adapted several times, it was stipulated that in principle aid can be cumulated, but the cumulation rules of the relevant regulations (thus also Art. 8 of the GBER) must be observed.<sup>19</sup> According to Art. 8 (3) (b) of the GBER, cumulation with other state aid is permitted, but only if the aid intensity applicable under the GBER is complied with. In order to comply with this aid intensity, additional funds of the undertaking itself must then be used parallel to the aid, even though additional aid will be necessary to surmount the crisis. This is impossible for recipients, especially in view of their problematic financial situation. In actual practice, it has therefore not been possible to call up (additional) aid. In order to avoid such a situation in extraordinary situations in future as well, Art. 8 (3) (b) of the GBER must be amended to the effect that in those cases mentioned in Art 107 (2) (b) and (3) (b), aid intensities or the greatest aid amounts applicable under the GBER may be exceeded. Since all competitors in the internal market are affected by these extraordinary situations, there is no preferential treatment of the aid

<sup>19</sup> Cf. Temporary Framework for State Aid Measures to Support the Economy in the current Covid-19 Outbreak ([consolidated version](#)) of 18 November 2021, para 20 and fn. 19, p. 8.



recipients affected. Instead, the *status quo* that would exist without this extraordinary situation is preserved.

### **Amendment 7**

<b>Art. 14 (4) of the GBER ("Regional investment aid", currently applicable version)</b>	<b>Art. 14 (4) of the GBER ("Regional investment aid", proposed amendment)</b>
<p>The eligible costs shall be as follows:</p> <ul style="list-style-type: none"> <li>a) investment costs in tangible and intangible assets;</li> <li>b) the estimated wage costs arising from job-creation as a result of an initial investment, calculated over a period of two years; or</li> <li>c) a combination of points (a) and (b) not exceeding the amount of (a) or (b), whichever is higher.</li> </ul>	<p><i>Art. 14 (4) of the GBER is to be <u>maintained</u> / no changes.</i></p>

#### *Justification:*

Article 14 (4) of the GBER must be maintained in its current version. As far as we are informed, there have been discussions in the past about not deeming certain costs (especially wage costs within the meaning of Article 14 (4) (b) of the GBER) to be eligible for state aid. It must be possible to consider wage costs for the employment of parties implementing projects as costs eligible for state aid, however. This is absolutely necessary so that inter alia projects funded by the European Structural and Investment Funds can be implemented.

### **Proposed amendment 8**

<b>Art. 31 (3) of the GBER ("Training aid", currently applicable version)</b>	<b>Art. 31 (3) of the GBER ("Training aid", proposed amendment)</b>
<p>The eligible costs shall be the following:</p> <ul style="list-style-type: none"> <li>a) trainers' personnel costs, for the hours during which the trainers participate in the training;</li> <li>b) trainers' and trainees' operating costs directly relating to the training project such as travel expenses, materials and supplies directly related to the project, depreciation of tools and equipment, to the extent</li> </ul>	<p><i>Art. 31 (AGVO3) is to be <u>retained</u> / no changes.</i></p>

<p>that they are used exclusively for the training project. Accommodation costs are excluded except for the minimum necessary accommodation costs for trainees' who are workers with disabilities;</p> <p>c) costs of advisory services linked to the training project;</p> <p>d) trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) for the hours during which the trainees participate in the training.</p>	
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*Justification:*

Article 31 (3) of the GBER must be maintained in its current version. As far as we are informed, there have been discussions in the past about not deeming certain costs (especially personnel costs within the meaning of Art. 31(3) (c) of the GBER) to be eligible for state aid. Personnel costs of training participants (e.g. release costs/participants' earnings) and direct and indirect material costs must be able to be taken into account as costs eligible for state aid. This is imperative so that, among other things, employee projects funded through the European Structural and Investment Funds can be implemented, especially in partnership programmes in the European Social Fund plus (ESF+).

**Amendment 9**

<b>Art. 31 (4) of the GBER ("Training aid", currently applicable version)</b>	<b>Art. 31 (4) of the GBER ("Training aid", proposed amendment)</b>
<p>The aid intensity shall not exceed 50% of the eligible costs. It may be increased, up to a maximum aid intensity of 70% of the eligible costs as follows:</p> <p>a) by 10 percentage points if the training is given to workers with disabilities or disadvantaged workers;</p> <p>b) by 10 percentage points if the aid is granted to medium-sized enterprises and by 20 percentage points if the aid is granted to small enterprises.</p>	<p>The aid intensity shall not exceed <b>60% of the eligible costs</b>. It may be increased to a maximum of <b>80% of the eligible costs</b> as follows:</p> <p>a) by 10 percentage points if the training is given to workers with disabilities or disadvantaged workers;</p> <p>b) by 10 percentage points if the aid is granted to medium-sized enterprises and by 20 percentage points if the aid is granted to small enterprises.</p>

*Justification:*

At present, according to Art. 31 (4) of the GBER, aid intensity is between 50% and 70% of the eligible costs. Accordingly, 50% to 30% of an undertakings' own funds must be provided. This is difficult for certain eligible costs within the meaning of Art. 31 (1) of the GBER, however, especially for small and medium-sized enterprises (SMEs), such as the establishment of digital structures for online training offers, which have become important especially during the coronavirus pandemic and will also be used in the future.

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