

**Position Paper by the
Association of German Non-Statutory Social Welfare Organisations
(BAGFW)
regarding the Proposal of the Commission for a Revision of the
Regulation on de minimis aid to undertakings providing services of
general economic interest ("SGEI")**

On 1 June 2023, BAGFW contributed to the public consultation regarding the Proposal of the Commission for a Revision of the Regulation on de minimis aid to undertakings providing services of general economic interest ("SGEI"). Before our detailed contribution, including concrete amendments (p. 9 - 10), we provide the following Executive Summary.

EXECUTIVE SUMMARY

1. Inclusion of a description of SGEI in Art. 1 (1) Draft Regulation, highlighting the margin of discretion through a reference to Art. 14 TFEU and Protocol No. 26 to the TFEU

Member States are often unsure whether a service can be classified as an SGEI or not. Therefore, BAGFW demands that a description of an SGEI should be included in the text of the Draft Regulation with a reference to Art. 14 TFEU and Protocol No. 26 to the TFEU. In addition, it should be made clear to the Member States that they have a wide margin of discretion, which they should make use of when classifying SGEIs.

2. Raising the ceiling of SGEI de minimis aid to 1.5 million euros within three years (Art. 3 (2) Draft Regulation)

The maximum ceiling of €650,000 over three tax years proposed in the Draft Regulation is insufficient and does not do justice to the needs and requirements of local social service providers. The current ceiling of €500,000 in three tax years has led to a considerable backlog of important investments in the provision of local social services. Adjusting this ceiling only with regards to inflation would only make a relatively small difference. BAGFW therefore proposes a maximum ceiling of 1.5 million euros in three tax years. Such a ceiling would balance possible distortion of competition on the one hand with the special characteristics of SGEI, which are usually performed on a more local and regional basis, on the other hand. As an alternative, it could also be considered to design different ceilings according to country categories.

3. Inclusion of the requirement for an entrustment act for SGEI in the text of the Draft Regulation

In contrast to a general de minimis aid, a prerequisite for an SGEI de minimis aid is that the enterprise has been entrusted with an SGEI (see Recital 8). This requirement for an entrustment act for SGEIs should be made more apparent to the bodies applying the law. To strengthen its binding nature, BAGFW therefore advocates for the inclusion of the requirement for an entrustment act as a prerequisite for SGEI in the legally binding text of the regulation.

4. Extension of the rules on cumulation according to Art. 5 Draft Regulation

If an enterprise receives both de minimis aid and SGEI de minimis aid, BAGFW demands that the respective ceilings should also be cumulated. An enterprise could thus receive both de minimis aid and SGEI de minimis aid at the respective maximum value (currently, cumulation of general de minimis aid and SGEI de minimis aid is not possible, which means that the maximum amount of aid can only be granted up to the SGEI ceiling).

5. Introduction of a national or European state aid register pursuant to Art. 6 (4) Draft Regulation

In general, BAGFW sees the introduction of an electronic state aid register seen positively. However, in the practical application of the register it must be ensured that incorrect entries can be deleted quickly and unbureaucratically.

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regarding the Proposal of the Commission for a Revision of the Regulation on de minimis aid to undertakings providing services of general economic interest ("SGEI")

The Association of German Non-Statutory Social Welfare Organisations (BAGFW) is an umbrella organisation of providers of non-statutory social welfare in Germany. The principle of the welfare state, which is enshrined in the German constitution, the Basic Law, establishes a mandate for the state to attend to and assure social welfare. According to the principle of subsidiarity, 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 *Freie Wohlfahrtspflege* thus constitutes an important pillar of the German welfare state. Day in day out, with its approximately 120,000 institutions and 1.4 million employees, they make a significant contribution to social welfare in Germany.

The providers of non-statutory social welfare engage in non-profit activities. In the sense of SGEI, they provide services that are "in the general economic interest". They promote or perform tasks in the general interest and contribute to conducive framework conditions for their social services of general interest, so that the provisions of the SGEI de minimis Regulation are applicable to economic activities of the enterprises and associations of the *Freie Wohlfahrtspflege*. Hence, non-statutory welfare work contributes to guaranteeing a well-functioning, generally accessible and high-quality social infrastructure on the ground. The *Freie Wohlfahrtspflege* is a central component of the welfare state structure in Germany's social system. Its ability to function ensures that people's needs are met, among others in the areas of child, youth and elderly care, nursing care, social counselling and support for vulnerable people. In addition, some voluntary welfare associations have agreed on various dates in the next decade by which they want to achieve climate neutrality. The objectives of the European "Green Deal", including the "Fit for 55" package, are not only a legal obligation, but are above all a self-evident part of the actors of non-statutory welfare work in Germany.

The effective, transparent and non-bureaucratic provision of social services also depends on a good competition policy framework in the form of EU state aid law. This means that actors must not only lawfully apply the rules, but the rules itself must be simplified and adjusted in a practical way. This includes the SGEI de minimis Regulation (360/2012). BAGFW appreciates the simplifications that the SGEI de minimis

Regulation brings to the refinancing of tasks and investments in the general interest. Nevertheless, the draft also contains obstacles for the provision of services in the social sector that go beyond the mere level of the ceiling. As a first positive remark, we note that the text of the Draft Regulation has been made more comprehensible.

The Position Paper is structured in the following way:

1. Inclusion of a description of SGEI in Art. 1 (1) Draft Regulation, highlighting the margin of discretion through a reference to Art. 14 TFEU and Protocol No. 26 to the TFEU
2. Raising the ceiling of SGEI de minimis aid to EUR 1.5 million within three years (Art. 3 (2) Draft Regulation)
3. Inclusion of the requirement for an entrustment act for SGEI in the text of the Draft Regulation
4. An extension of the rules on cumulation according to Art. 5 Draft Regulation
5. Introduction of a national or European state aid register pursuant to Art. 6 (4) Draft Regulation

1. Inclusion of a description of SGEI in Art. 1 (1) Draft Regulation, highlighting the margin of discretion through a reference to Art. 14 TFEU and Protocol No. 26 to the TFEU

For a correct implementation of the EU state aid rules and the present Draft Regulation, funding bodies first of all need to decide whether an SGEI exists that should be taken as a basis for the aid. However, in the text of the Regulation, a clear description of an SGEI is lacking. Moreover, concrete indicators regarding which services should be classified as SGEIs are missing. In this context, member states often do not sufficiently use the discretion granted to them to determine an SGEI. A specific reference to Art. 14 TFEU and Protocol No. 26 to the TFEU, highlighting the wide margin of discretion in the definition of an SGEI, could counteract these uncertainties among funding bodies.

Under EU law, the concept of an SGEI is anchored in Art. 14 TFEU and Protocol No. 26 to the TFEU. According to Art. 14 TFEU, services of general economic interest have a special status and serve an important “role in promoting social and territorial cohesion” Art. 14 TFEU also states that “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, a precise definition of an SGEI does not exist in either EU primary or secondary law, but is left entirely up to the discretion of the Member States. Experience has shown that this creates uncertainty among funding bodies. However, Protocol No. 26 to the TFEU specifies that national, regional and local authorities have a wide discretion in defining SGEIs and recognises “the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations”¹

¹ 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 11.1.2012, 2012/C 8/02 (so-called “SGEI Communication”).

In the future, directly applicable regulations for SGEI, such as the SGEI de minimis Regulation, should therefore emphasise the wide discretion of funding bodies in the Member States when defining an SGEI so that they will also make use of this discretion. By emphasising this discretion, aspects of environmental and climate protection as well as human rights or the SDGs could also be included in the concept of an SGEI and would not have to be artificially split off from traditional SGEIs. As an example, in Germany the promotion of e-mobility by social service providers are no longer treated as SGEIs in case of investments in the sense of the Green Deal.

As is well known, the Commission's powers are limited to checking that the Member States have not made a manifest error in the definition of an SGEI and to checking whether the compensation includes state aid.² Member states must therefore be constantly informed about the wide discretionary powers of the funding bodies.

BAGFW therefore proposes to include a description of SGEI in Art. 1(1) of the Draft Regulation:

This Regulation applies to aid granted to undertakings entrusted with the operation of a service of general economic interest within the meaning of Article 106 (2) TFEU. When defining an SGEI, Member States shall consider Article 14 TFEU and Protocol No. 26 to the TFEU. In particular, when defining an SGEI, national, regional and local authorities must take their wide margin of discretion into account.

In a new Recital (8a), a reference to Protocol No. 26 should be added and thus made more transparent for those applying the law:

(8a) In determining whether an undertaking provides a service of general economic interest within the meaning of Article 106(2) of the TFEU, national, regional and local authorities have a wide margin of discretion within the meaning of Protocol No 26 to the TFEU. In particular, the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations must be recognised.

2. Raising the ceiling of SGEI de minimis aid to EUR 1.5 million within three years (Art. 3 (2) Draft Regulation)

BAGFW criticises that the ceiling of SGEI de minimis aid as foreseen in the Draft Regulation is insufficient. Such a low increase does not do justice to the needs and requirements of the providers of social services on the ground. BAGFW has already stated in previous position papers³ that the ceilings of de minimis aid proposed by the Commission no longer correspond to the real situation in terms of inflation and price developments for the providers of social services. In the provision of non-statutory

² See SGEI Communication, para. 46 with reference to Case T-289/03 BUPA v. Commission, 12 February 2008, paras. 166-169, 172.

³ https://www.bagfw.de/fileadmin/user_upload/Veroeffentlichungen/Stellungnahmen/2022/2022-12-21_BAGFW_Konsultationsbeitrag_Vorschlag_f%C3%BCr_die_%C3%9Cberarbeitung_der_Verordnung_%C3%BCber_De-minimis-Beihilfen_DG_COMP_FINAL.pdf;
<https://www.bagfw.de/veroeffentlichungen/stellungnahmen/positionen/detail/stellungnahme-der-bagfw-zur-zur-weiterentwicklung-des-beihilfenrechts-insbesondere-der-allgemeinen-gruppenfreistellungsverordnung-agvo-sowie-der-dawi-und-der-allgemeinen-de-minimis-verordnung>.

social welfare, numerous investments - above all in the area of climate protection, but also innovation and digitalization in the long-term care sector or pedagogy, cannot be refinanced on a fee-basis. Many important goals, such as high quality, sustainability and good framework conditions for effectively attracting skilled workers, cannot be achieved if the scope for investments becomes scarce due to the unavailability of public funds.⁴

With a ceiling of EUR 650,000 within three years, as proposed by the Commission, important socio-ecological investments and innovative, digital tasks cannot be carried out. Already today there is a considerable backlog of important investments in the provision of social services on the ground. A sole correction of to the applicable ceiling would only make a relatively small difference

Raising the threshold to EUR 1.5 million within three fiscal years would create a greater scope for application and better practicability of the SGEI de minimis Regulation. Such an increase of the ceiling takes into account the trade-off between a possible distortion of competition on the one hand and the services of general economic interest on the other hand, which are usually carried out on a local or regional basis.

BAGFW is aware that an SGEI de minimis threshold may have different economic and competition policy effects in each EU Member State. Nevertheless, when assessing the maximum limit, substantial state support should be possible in achieving the socio-ecologically necessary tasks and challenges. In the case **of state aid to promote SGEIs of this magnitude, it can be assumed that they do not affect competition and trade between Member States within the meaning of Article 107 (1) TFEU.**⁵ This is also the case for social services as SGEIs in Germany, which generally relate to a geographically narrow area. Moreover, the threshold value of €500,000 goes back more than 16 years (Regulation 1998/2006), so that even the rate of inflation and price increases is not reflected by an increase to €650,000. BAGFW is aware that the ceiling is directly applicable to all EU Member States, which are positioned very differently in terms of their GDP and actual purchasing power. If, for these reasons, the EU Commission does not want to follow our proposal of 1.5 million euros, it could consider defining the ceiling of both the general and the SGEI de minimis Regulation on a country-specific basis. As a practical example, different country categories with a specific maximum value adapted to their specific economic situation could be defined and attached in an Annex to the Regulation.

Since the next adjustment of the SGEI de minimis ceiling is scheduled for 2030, future price and inflation developments must be considered in the current adjustment of the ceiling. Only then can the adjusted threshold do justice to the actual financing needs of SGEI providers.

⁴ Due to the social mandate in various socio-political fields of work, the activities of the associations of BAGFW extend into various funding programmes. In addition, the various fields of assistance are subject to different legal requirements that have to be fulfilled. Due to the low SGEI ceiling, only a few forward-looking projects can be applied for or implemented. In addition, many service providers of social SGEI were founded in the 19th century and therefore have a partly old building stock with the corresponding need for action in climate protection etc.

⁵ In a 2012 opinion, the Committee of the Regions already called for the threshold to be raised to EUR 800,000 per fiscal year (i.e. EUR 2.4 million in three fiscal years). 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 these do not affect competition and trade between the Member States within the meaning of Article 107 (1) TFEU. A comparatively moderate increase to EUR 1.5 million in three tax years ensures this even more.

Therefore, BAGFW proposes to amend Art. 3 (2) Draft Regulation as follows:
The total amount of de minimis aid granted per Member State to an undertaking providing services of general economic interest shall not exceed EUR 1500000 over any period of 3 fiscal years.

4. Inclusion of the requirement for an act of entrustment for SGEI in the text of the Draft Regulation

Recital (8) of the Draft Regulation describes the requirement that a beneficiary undertaking should be “entrusted in writing” with the service of general economic interest in respect of which the aid is granted. This requirement stems directly from Article 106 (2) TFEU, but it should also follow directly from the legal text of the SGEI de minimis Regulation. This would contribute to transparency and coherence of the regulations and is also more in line with the requirements of practical application of the law. Hence, BAGFW demands that the binding **requirement of an entrustment in writing should be made** more apparent to the funding bodies. This would link the act of entrustment more clearly to the concept of an undertaking. With a codification of the act of entrustment in the legal text of the Regulation, the independence of the respective enterprise would be clearly linked to the entrustment. Only when the act of entrustment is embedded in the legal text of the regulation does it become clear that it is the respective entrusted entity that needs to be taken into account when considering the selective favouring of an independent enterprise.

Thus, BAGFW advocates for the inclusion of the requirement of an SGEI in the legally binding text of the Regulation.

5. An extension of the regulation on cumulation according to Art. 5 Draft Regulation

Funding programmes for investments in the area of the ecological and digital transformation often fall under the ceiling of Art. 3 (2) Draft Regulation, even though they should not. Due to the special financing structures of non-profit providers of social services means, they are hardly able to save up sufficient reserves for necessary investments in staff and buildings. Non-statutory welfare work in Germany operates under private law and is organised on a non-profit basis. According to German non-profit law, available funds are to be used promptly for the charitable purposes pursued by the non-profit undertaking in accordance with its statutes. This leads to a comparatively low level of equity capital that is available in non-profit entities. Moreover, these entities do not operate on a for-profit-basis. Providing basic social infrastructure is not designed to cover costs. As a result, compared to commercial undertakings, profitability in the non-profit sector is low. The financing of social institutions and services is heterogeneous and consists of different financing components. Public subsidies are an important component of the overall financing. These can be grants as well as low-interest loans, guarantees, etc. All these public subsidies are subjected to state aid. According to Art. 5 (2) Draft Regulation SGEI de minimis aid may only be cumulated with general de minimis aid up to the ceiling of SGEI de minimis aid.

BAGFW demands that the respective de minimis ceilings must be added on top of each other, so that the corresponding ceiling applies to each category of de minimis aid. The proposal to limit cumulated de minimis aid to the maximum amount of EUR 650 000 does not do justice to the special and important function that services of

general economic interest fulfil in the Member States, neither does it do justice to the special financing needs of these entities.

Therefore, BAGFW proposes the following amendment to Art. 5 (2) Draft Regulation:

De minimis aid under this Regulation may be cumulated up to the maximum amount resulting from the cumulation of the ceiling laid down in Article 3(2) and the ceilings laid down in other de minimis regulations.

6. Introduction of a national or European state aid register pursuant to Art. 6 (4) Draft Regulation

In principle, BAGFW is in favour of a central state aid register. Such a register could help to improve the transparency of de minimis aid distribution in the respective Member State. Above all, it can serve to facilitate to keep proof of the maximum aid amounts ("de minimis declaration"). BAGFW would prefer such a register at the national level. This would facilitate the application of national law in the event of data entry errors or data protection issues. Even though the advantages of such a register must be stressed, for competitive reasons between social undertakings it is important that data entry errors can easily be corrected. Such a danger exists particularly in the case of legal decisions that may have been issued incorrectly in connection with de minimis declarations due to the lack of all the constituent elements of Art. 107 (1) TFEU. Such a case demands sufficient instruments of effective legal protection, for example in the form of an appeal possibility against the register entry. If errors are identified, the entry in the register must be corrected or, if necessary, deleted in an unbureaucratic manner by means of a complaint or a revocation.

In the text of the Regulation, or at the latest in the accompanying documents for the implementation of the register, it must be ensured that possible legal errors do not become entrenched in an electronic system.

BAGFW Amendments on the Commission Proposal on the Revision of the SGEI de minimis Regulation

Draft Regulation	Proposed BAGFW Amendments
	<p>Recital 8a (NEW) <i>(9) In determining whether an undertaking provides a service of general economic interest within the meaning of Article 106 (2) of the TFEU, national, regional and local authorities have a wide margin of discretion within the meaning of Protocol No. 26 to the TFEU. In particular, the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural circumstances must be recognised.</i></p>
<p>Art. 1 (1) <i>This Regulation applies to aid granted to undertakings entrusted with the operation of a service of general economic interest within the meaning of Article 106 (2) TFEU.</i></p>	<p>Art. 1(1) <i>This Regulation applies to aid granted to undertakings entrusted with the operation of a service of general economic interest within the meaning of Article 106 (2) TFEU. When defining an SGEI, Member States shall consider Article 14 TFEU and Protocol No. 26 to the TFEU. In particular, when defining a service of general economic interest, national, regional and local authorities must take their wide margin of discretion into account.</i></p>
<p>Art. 3 (2) <i>The total amount of de minimis aid granted per Member State to a single undertaking providing services of general economic interest shall not exceed EUR 650 000 over any period of 3 fiscal years. The period of 3 fiscal years shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.</i></p>	<p>Art. 3 (2) <i>The total amount of de minimis aid granted per Member State to an undertaking providing services of general economic interest shall not exceed EUR 1 500 000 over any period of 3 fiscal years. The period of 3 fiscal shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.</i></p>
<p>Art. 5 (2) <i>De minimis aid under this Regulation may be cumulated with de minimis aid</i></p>	<p>Art. 5 (2) <i>De minimis aid under this Regulation may be cumulated up to the maximum</i></p>

Draft Regulation	Proposed BAGFW Amendments
<i>under other de minimis regulations up to the ceiling laid down in Article 3(2).</i>	<i>amount resulting from the cumulation of the ceiling laid down in Article 3(2) and the ceilings laid down in other de minimis regulations.</i>

Berlin/Brussels, 06.06.2023

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