



# Supporting the Irish housing system to address housing market failure

Cost Rental Housing and Services  
of General Economic Interest (SGEI)



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## Initiative for this Research and Contribution to Cost Rental Discussion

In Ireland, the housing market has changed significantly over the past 20 years, both in terms of the composition of housing demand/need, and what may be deemed as market failure. In response to this, a number of Government interventions were introduced to try to support a properly functioning housing system. Many of these initiatives were addressed towards making housing more affordable for Irish people. Some yielded better outcomes than others, and those which were procyclical created difficulties in the changing housing market.

This research, commissioned by the Irish Council for Social Housing (ICSH) was produced by Professor Padraig Kenna, at the Centre for Housing Law, Rights and Policy NUI Galway. It seeks to provide a better understanding of how the emerging cost rental model will support long-term affordable renting. Cost rental is targeted at those households who cannot meet their housing needs by themselves on the private rental market, especially those who are unable to access housing at an affordable rent.

A number of important instruments at European level, such as Services of General Economic Interest (SGEI) provide a roadmap for Member States to invest in, and support, social housing. In Ireland, Approved Housing Bodies (AHBs) have been particular beneficiaries of this SGEI framework, resulting in the increased new supply of social housing over the last 20 years. This social housing has been targeted towards a range of households, families and specialist groups including persons with disabilities, whose housing need was not, or will not, be met by private housing markets.

This research links the specific application of SGEI rules (which are determined at Member State level) with the new cost rental model, clarifying its position within the Irish housing system, and identifying the housing needs which it meets.

Irish AHB's have already been supported by the Minister for Housing Darragh O' Brien TD, to play a key role in the delivery of the new cost rental model. This builds on their valued expertise and experience in developing and managing new social housing over the decades. Their work is likely to increase, as affordability issues in the private rental sector in key urban areas, in the coming years, require cost rental housing to play a stabilising role in the Irish housing system. Therefore, with the central role of AHBs in the delivery of cost rental housing, and now a forthcoming legislative framework, it was felt to be timely to publish this work, which had been progressed in 2020.

The research seeks to provide a better understanding on how SGEIs operate in the housing sector, drawing from examples across the EU, as well as the experience in Ireland. It points to the use of cost rental as being consistent with SGEI rules, as Ireland addresses its affordability gap in the rental housing market. The public policy objective of meeting citizens housing needs, where this need is not being met by the market, is one shared across Europe.

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# Introduction

Housing meets a primary human need. Across the world it has been enshrined as a human right. These housing rights have been accepted in many European constitutions, laws and policies for more than a century. Housing rights extend beyond shelter, and include respect for human dignity, family and community, equality of access, housing standards, affordability, security of tenure, minimum core obligations on States, and progressive realisation of rights, in national and local housing systems. State provision of adequate, secure, social and affordable housing constitutes a central plank in implementing rights to housing, and will be an integral part of the European Union New Green Deal.<sup>1</sup>

Affordable cost rental housing is set to become part of the housing system in Ireland, with new legislation creating a solid footing for this form of housing tenure. Targeted at those on moderate incomes who are excluded from affordable rented housing in the private sector, rents are intended to be at least 25% below market rents, and these rents will be sustainable in the long term.

The 2016 [most recent] Census showed that there were some two million housing units in the State.<sup>2</sup> Of these, some 611,877 (36%) homes were owned outright, and 535,675 (32%) were owned with a mortgage outstanding. Some 497,111 (29%) were rented, including 143,178 (8.5%) rented from local authorities. Census 2016 showed that the vast majority of people aged between the early-20s to mid-30s were living in rental accommodation, giving rise to the term 'Generation Rent'<sup>3</sup> – a generation for whom the cost of housing has outstripped wage growth, making it 'impossible' for them to be able to buy a home.<sup>4</sup> In 2020, there were over 60,000 households assessed as eligible for social housing support, one third of whom could not afford market rents.

While public debate often revolves around the financialisation and residualisation of housing, (regarding housing as an asset traded globally, and drawing tighter and tighter limits on eligibility for State supports), there is now a growing recognition that housing is central to the economic, social and environmental sustainability of the European Union.<sup>5</sup> An affordable and good-quality home is essential for every person's well-being and social participation. Housing deprivation is at the heart of poverty and social exclusion. It is becoming accepted, too, across Europe, that reliance on 'markets' has largely failed to ensure adequate and affordable rented housing, with increasing numbers of households in secure and well paid employment being unable to afford adequate rented housing in Europe's cities.<sup>6</sup>

This provides the European context for this Report, which examines some key issues around the provision of affordable cost rental housing in Ireland, as part of State measures to support and shape the Irish housing system to address housing market failure.

Section 1 frames the issues in the context of European developments in housing and EU institutional obligations to respect and promote housing rights in the Charter of Fundamental Rights and the European Pillar of Social Rights. Section 2 examines the rules on State Aid and Services of General Economic Interest [SGEIs] set out in Treaty law, case law and European Commission rules and Decisions. The somewhat complex process for establishing which activities constitute SGEIs is illustrated. Section 3 examines the relevant cases and Decisions on social

<sup>1</sup> COM/2019/640 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>

<sup>2</sup> <https://www.cso.ie/en/releasesandpublications/ep/p-cp1hi/cp1hi/>

<sup>3</sup> See Timberley, C. (2020) *Generation Rent* (Canbury Press, Surrey).

<sup>4</sup> Oireachtas Library and Research Office, Houses of the Oireachtas, Number 3 of 2020.

<sup>5</sup> See Kenna, P. (2020) *Briefing Paper: Housing and Housing Rights in the EU Charter of Fundamental Rights*. Centre for Housing Law, Rights and Policy NUI Galway. Available at: <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-1-Housing-and-Housing-Rights-in-the-EU-Charter-of-Fundamental-Rights.pdf>. See UN Doc A/HRC/34/51 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context. Leilani Farha. March 2017. *The financialization of housing*.

<sup>6</sup> OECD (2019), *Under Pressure: The Squeezed Middle Class*, (OECD Publishing, Paris), <https://doi.org/10.1787/689afed1-en>

housing as an SGEI, starting with the examination of the Housing Finance Agency funding for social housing in 2001. This also includes the more recent CJEU Dutch cases where the precise criteria for eligibility for State subsidised social housing was examined in detail. Section 4 examines the wide range of definitions of social housing in Europe. The public interest mission of Irish housing policy measures is considered in Section 5, as well as eligibility for social housing, according to the income deciles. It also sets out the accepted measures of affordability, and outlines the market failure in the Irish private rented sector. Section 6 outlines the Irish cost-rental model, together with the unique and central role of Irish AHBs for the success of this model. The Conclusion assesses the situation of affordable cost rental housing in Ireland in the context of EU State Aid rules.

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# Executive Summary

- There is a clear and demonstrable gap in the market supply of affordable rented housing in Ireland.
- There is a long accepted general/public interest in ensuring the availability of affordable rented housing in Ireland.
- EU rules on Services of General Economic Interest (SGEI) allow Member States to support their housing systems to address market failure.
- Defining the housing services to be provided as an SGEI is a Member State competence, and the European Commission only intervenes where there is a ‘manifest error’ by the Member State, in its interpretation of the SGEI rules.
- Irish State support in this area has been recognised as an SGEI in EU law for twenty years.
- Approved Housing Bodies (AHBs) have benefitted from this recognition, and have expanded their housing provision to now include cost rental housing.
- Cost rental housing should clearly target those households who are excluded from the private rented sector, or who cannot access housing at affordable rents, especially those in Income Deciles 4–8. As such, it is a proportionate response to the demonstrable gap in the Irish private rented market.
- Cost rental housing in Ireland, as well as addressing market failure, has a key role in supporting a functioning stable housing system, especially in the supply of new high quality homes.
- The introduction of cost rental housing is very much about reflecting the evolution of the Irish housing market, addressing key housing market failures towards a defined cohort of household, and is aligned to the SGEI parameters that Irish Governments have defined over two decades.
- Irish AHBs are ideally suited to the provision of cost rental housing as their objectives are entirely compatible, and there is no conflict of interest between shareholders and tenants.
- The long term general/public interest mission of Irish AHBs underpins the long term security of tenants, but also the maturation guarantee, which is essential for the cost rental model to succeed in Ireland.
- To achieve more certainty on the delivery of affordable cost rental (and to move beyond an annual expression of interest) it is recommended to have an ongoing multi annual cost rental delivery programme to enable AHBs and their stakeholders to facilitate greater delivery in a more strategic way.

Affordable ‘cost rental’ housing is set to become a specific category of long-term rented housing in Ireland. It is targeted at households who cannot afford to purchase a home, but who may be ineligible, or who choose not to avail of social housing supports under the Housing Acts. Approved Housing Bodies (AHBs) – commonly known also as non-profit housing associations in Ireland, and internationally, are ideally suited to the provision of this new housing model, for a number of reasons. The publication of the recent European Semester Report (2020) for Ireland by the European Commission explicitly included a recommendation to increase the delivery of social and affordable housing.

Of course, access to adequate and affordable housing is a significant public policy issue, not just in Ireland, but across European cities. The European Union has a role in relation to standards, financial regulation and in supporting Member States housing policies. The European Commission recognises Member State discretion to define, organise and finance their social and affordable housing. Such housing can play a part in the realization of the housing rights recognised across European countries, while the EU internal market/competition law and State Aid rules are also significant.

The EU Treaties prohibit State Aid which could distort competition, but some State Aid is permitted to designated SGEIs. These are economic activities, which deliver outcomes for the overall public good, that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market, without public intervention. The explicit designation of an economic activity, with a public interest mission, as an SGEI, by a Member State, is recognised in EU law.

Since the construction and management of housing is regarded as an economic activity, Member States must define their social, affordable, or cost rental housing in terms of a public interest mission, and an SGEI. The Commission role is to check if the State has made a 'manifest error' in this classification, but 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' is specifically recognised by the Commission as an SGEI.

This eligible SGEI criteria has been applied to preferential loans from the Housing Finance Agency (HFA) to local authorities and AHBs, in 2001 and 2004, respectively. The beneficiaries were socially disadvantaged households whose economic circumstances did not permit them to purchase or rent houses on the open market, and they were unable to get a mortgage. The European Commission Decisions on SGEIs found that Irish AHBs were active in the 'real estate market' but their non-profit nature, public interest mission and application of assets for charitable purposes was significant. State funding was limited to the amounts necessary. More recent Decisions relating to The Netherlands require that the public interest mission be precisely defined in terms of the target group, which must be socially disadvantaged in some way.

Competition Commissioner Vestager, in 2017, has stated that to be an SGEI, "social housing must respond to a public need: 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. Member States may not define a social housing SGEI so broadly that it manifestly goes beyond responding to this public need."

In relation to affordable cost rental as an SGEI in Ireland, it is important to establish the public interest mission, define affordability, identify market failure, clarify the role of AHBs, and establish the relevant State housing policy measures. The public interest mission for social and affordable housing in Ireland is set out in the Housing (Miscellaneous Provisions) Act 2009, and other legislation, including the Affordable Housing Bill 2020, which facilitates the provision of housing support and cost rental housing. Such State support includes some 26,000 units of subsidised home ownership in the first decade of this century.

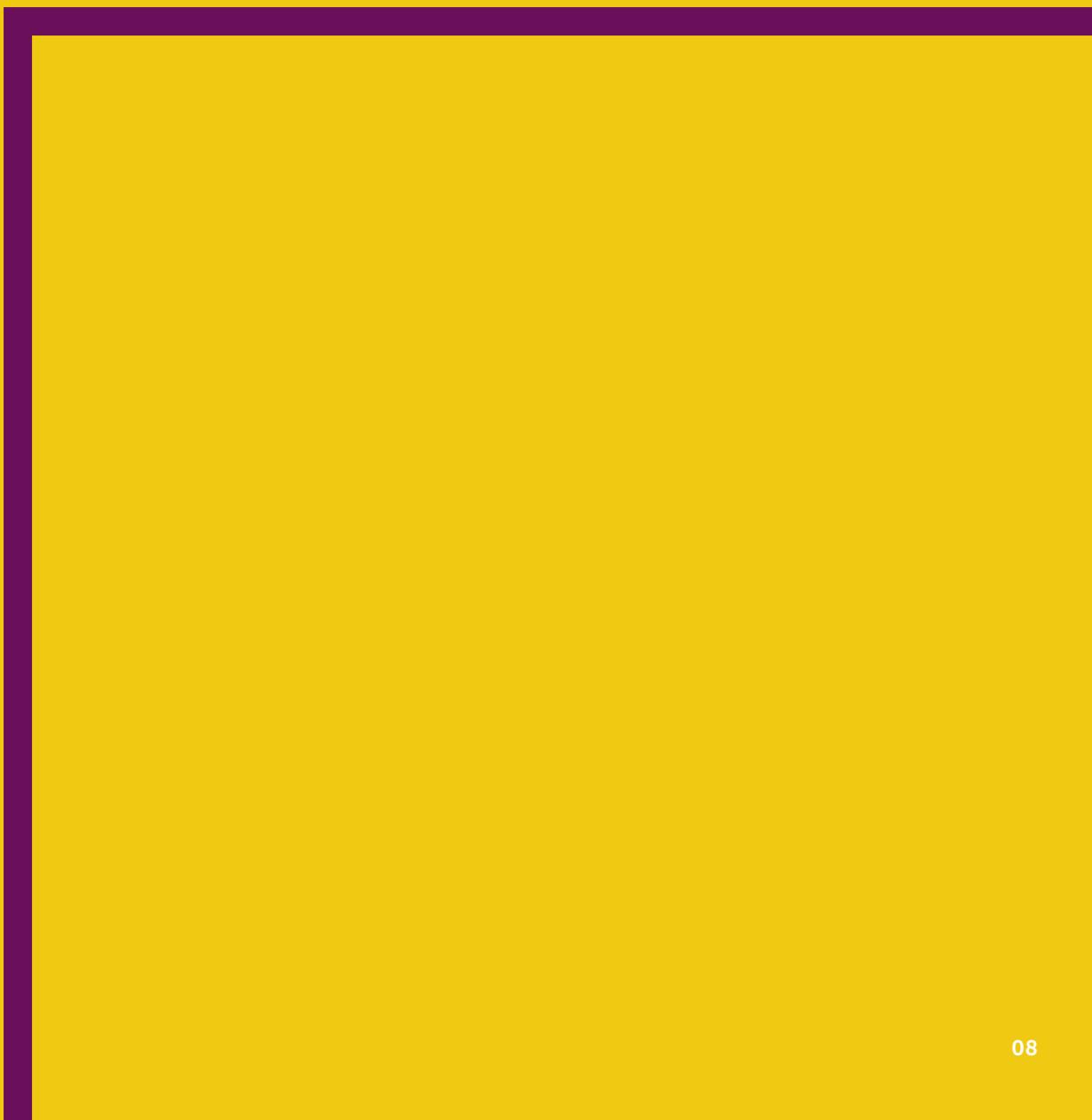
There is a legally defined metric of affordability in the Housing (Miscellaneous Provisions) Act 2009 at 35% of net household income. Data on private sector rents show that those in Income Deciles 1–8 cannot afford average rents in Dublin, although other metrics can also be used (See Appendix 6) and this has been widely acknowledged as market failure. However, the eligibility thresholds for social housing support in Ireland (last set in 2016) comprise three geographic bands, and are confined largely to the lowest four Income Deciles. There were over 60,000 households on waiting lists for social housing support in 2020. This leaves a great many people in an unaffordable 'rental trap', who are not eligible for social housing support, and this is the cohort whose needs could be met through cost rental.

The housing policy measures promoting affordable cost rental can also be found in *Rebuilding Ireland* (2016) and the *Programme for Government* (2020). These refer to the Vienna model of cost rental, whereby the principle of maturation enables additional rental properties to be developed by non-profit housing providers, based on a pooling of rents, resulting in small overall increases. It can be contrasted with the for-profit approach of setting rents at maximum market levels, which may not reflect costs of production of the housing. The European Commission Semester Report for Ireland (2019) recommends that Ireland take action to invest in affordable and social housing.

Draft legislation and significant funding establishing 'cost rental' tenancies in Ireland has now been commenced, with one scheme nearing completion. The target group are those who cannot access affordable rented (or purchased) housing due to their income level and high market costs. Rents will be set at 25% below market rents and will cover development, management, maintenance and life-cycle costs.

# Section 1

## Housing and the European Union



## The EU Context

While the treatment of housing as property is regarded as a Member State competence, there is a growing recognition that EU measures in a number of areas impact on national housing systems, and today, may actually be constitutive of national housing systems and markets. It is widely accepted that in many of Europe's cities housing 'markets' cannot provide sufficient adequate, secure and affordable housing for rent, even for those earning above average incomes. Some 25% of European tenants are paying market price rents spend over 40% of their income on rent, and rents are constantly increasing.<sup>7</sup> Between 2000 and 2018 Irish rents have become less affordable relative to all other OECD countries.<sup>8</sup> Eurostat figures that Ireland had the third highest levels of rent increases since 2010, with 75% increases in Dublin in the period.

Market failure, as a concept, does not fully describe the situation. The failure of the housing market affects not only those excluded from access to adequate and affordable housing, but also those who are living in unfit, unsuitable or overcrowded homes. In this situation, people are faced with exclusion in many other areas, including employment and healthcare. The most vulnerable groups (migrants, women, LGBTQI people, people with disabilities) are increasingly affected by homelessness.<sup>9</sup> Access to adequate and affordable housing has a major influence on migrant workers, immigrants' employment options, educational opportunities, social interactions, residence situation, family reunification, successful societal integration and citizenship rights.

EU institutional policies on housing are often based on the prevention of 'house price bubbles' to avoid macroeconomic imbalances, leading to financial instability, which regard housing as part of a real estate cycle. At the same time, the European Commission has recognised that access to adequate and affordable housing (whether owned or rented) is integral to combatting social exclusion. Affordable housing is central to the New Green Deal, although EU institutions are beginning to recognise the role of affordable rented housing for choice, stability and balance in housing systems across Europe.

Significantly, the European Parliament in January 2021, adopted the Report on access to decent and affordable housing for all with Kim Sparrentak MEP as Rapporteur.<sup>10</sup> This Report outlines positive proposals to tackle the housing crisis in Europe alongside concrete policy and legislative measures which the European Union should take to ensure that housing is decent, affordable, and accessible for all. The Report addresses all aspects of housing systems (See Appendix 3).

Across European cities, today, the shortage of affordable, secure rented housing has been found to be the main housing-related systemic cause of homelessness.<sup>11</sup> Several inter-related factors contribute to this problem:

- insufficient public (municipal and/or social) housing supply;
- rising housing costs in the rental housing market;
- liberalisation of the housing rental market;
- low or decreasing public investment in the supply of social housing;
- mismatch between demand and supply of affordable housing, either affecting particular territories or particular groups of households and individuals;
- impact of the tourism industry on the supply of affordable rental housing.<sup>12</sup>

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<sup>7</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics)

<sup>8</sup> Kennedy, G. & Myers, S. Economic Stability Note: An overview of the Irish housing market Vol. 2019, No. 16. [https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-16-an-overview-of-the-irish-housing-market-\(kennedy-and-myers\).pdf?sfvrsn=4](https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-16-an-overview-of-the-irish-housing-market-(kennedy-and-myers).pdf?sfvrsn=4).

<sup>9</sup> See FEANTSA: Homelessness on the European agenda: European Parliament and the European Commission discuss homelessness and Housing First during first European Parliament plenary session of the year – <https://www.feantsa.org/en/news/2020/01/17/homelessness-on-the-europeanagenda-european-parliament-and-the-european-commission-discuss-homelessness-and-housingfirst-during-first-european-parliament-plenary-session-of-the-year>

<sup>10</sup> Report on access to decent and affordable housing for all (2019/2187(INI) available at: [https://www.europarl.europa.eu/doceo/document/A-9-2020-0247\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2020-0247_EN.html)

<sup>11</sup> Baptista, I. and Marlier E. (2019) Fighting homelessness and housing exclusion in Europe – study of national policies. European Social Policy Network – DG, Employment, Social Affairs & Inclusion <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8243&furtherPubs=yes>

<sup>12</sup> Ibid., p. 108.

A Report to the European Parliament in 2020 highlighted how financialisation and property speculation has particularly affected housing prices and housing affordability in some large urban areas of Europe, with moderate- and low-income households being pushed from these key urban areas to peri-urban areas, with scant employment and services.<sup>13</sup> Gentrification and short term rentals often associated with online short term rental platforms, have also raised housing costs. The recent European Parliament Report highlights the trend of decreasing public expenditure on supply-side housing measures (such as social and affordable housing), and the increase in public expenditure on demand-side housing measures, such as rent subsidies. Rather than improving housing affordability for households with lower and middle incomes, demand-side subsidies and measures often result in an increase in local house prices and rents.

*Housing Europe* (to which the ICSH is affiliated), points out the dangers of ignoring these housing issues:

The housing question is at the heart of the growing social divide that we observe in most European societies over the last years. While accessing and sustaining decent accommodation is primarily an issue for those living on low incomes, more and more people are affected by the lack of affordable housing, particularly in big cities, and make their voice heard by putting housing de facto on the political agenda.<sup>14</sup>

Eurostat points out that many EU Member States face similar housing challenges, for example: how to renew housing stocks, how to plan, how to combat urban sprawl, how to promote sustainable development, how to help young and disadvantaged groups to get into the housing market, and how to promote energy efficiency among homeowners.<sup>15</sup>

Of course, social and affordable housing does not exist in isolation, and there is a dynamic interaction between market and non-market elements within housing systems across Europe. For instance, some policies may actually contribute to high house and land prices, which directly impede the supply of affordable housing, and contribute to the denial of housing rights for low income households and homelessness.<sup>16</sup> Conversely, where a sufficient supply of low cost social housing is available there is less demand for highly priced owner-occupied or privately rented homes.<sup>17</sup>

Indeed, a great many issues which affect citizens' access to, and enjoyment of, housing are impacted by EU institutions and actions. The levels of State expenditure on housing are subject to the EU institutional macro-economic rules, and those on State Aid for services of general economic interest. The European Central Bank (ECB) regulates the European financial sector, which has a major influence on affordability and access to housing, directly and indirectly, across Member States, including Ireland. ECB monetary policy and financial supervision determines mortgage lending rates and levels of lending, and the costs of government bonds which impacts on public expenditure on housing. Other significant influences arise from the rules on the internal market, competition law and State Aid, freedom of movement of workers, rights of establishment, consumer protection, social inclusion policies, equality and non-discrimination provisions, standardisation of construction products, public procurement arrangements, and the energy and environmental standards being advanced within the EU. It is becoming clear that EU economic governance, financial regulation and supervision, as well as the range of other EU measures which apply to housing, are constitutive of national housing systems and markets, rather than merely acting as minor external influences.

<sup>13</sup> Caturianas, D. et al., *Policies to ensure access to affordable housing*, Publication for the Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020. The Report also suggests that money laundering via investments in real estate, which integrates illegal funds into the legal economy while providing a safe investment, is another phenomenon that is often associated with increasing housing costs, and has received increasing attention in Europe over recent years.

<sup>14</sup> Housing Europe, *The State of Housing in the EU 2019*, p. 6, <http://www.housingeurope.eu/resource-1323/the-state-of-housing-in-the-eu-2019>. Housing Europe is the European Federation of Public, Cooperative and Social Housing. Since 1988, it has become a network of 45 national and regional federations, gathering 43,000 housing providers in 24 countries. Together, they manage over 26 million homes, about 11% of existing dwellings in Europe. This Report points out that the investment gap for social housing in the EU is about €57 billion per year.

<sup>15</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing\\_statistics#Tenure\\_status](https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics#Tenure_status). Eurostat collates statistics on housing quality and housing affordability by tenure status and other related data.

<sup>16</sup> See Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed).

<sup>17</sup> Kemeny, J. (1995) *From Public Housing to the Social Market – Rental Policies in Comparative Perspectives* (London: Routledge); Schmid, C. (ed) (2018) *Tenancy Law and Housing Policy in Europe* (Cheltenham: Elgar).

While Member States retain control over the direction of housing policy, especially those parts which relate to housing as property and asset/wealth, it is becoming accepted that the interaction between land, property, housing and the national and European financial system shapes the macroeconomy.<sup>18</sup> This goes to the root of the EU system of economic governance and financial supervision, and significant EU resources are dedicated to analysing imbalances, risks and ‘bubbles’ in national housing ‘markets’.<sup>19</sup> ECB-driven measures include capital buffers, sustainable lending levels, loan-to-income and debt-service-to-income ratios – measures that essentially restrict mortgage lending to the top income deciles in the population. The fact that the ECB licenses and franchises financial institutions to create vast amounts of credit, based on lending against rising house and associated land prices, has enormous effects on the ability of Member States to implement holistic, tenure-neutral, and inclusive housing policies, and ensure a supply of adequate and affordable housing for all.<sup>20</sup> Recognising these effects enables EU institutions to tailor their policies towards more inclusive national housing policies.

Of course, the European Commission, through the European Semester, provides Member States with policy support, guidance and orientation on how to design efficient national policies aimed at ensuring citizens’ access to affordable and accessible social housing by stressing housing supply shortage, dysfunctional housing markets, macroeconomic imbalances and insufficient stock of social housing.

Indeed, the European Commission Semester Report in 2019 recognised the role of housing, albeit in the context of EU financial stability and ‘markets’, but also highlighting the growing shortage of social and affordable housing in many EU Member States.

Developments in the housing market can affect financial stability and thereby require action in some Member States. Housing is often the main asset held by households, and, at the same time, housing-related lending accounts for a large share of total lending in the economy. Moreover, scarcity of adequate and affordable housing is a growing problem in several Member States. On that account, Ireland, Luxembourg, the Netherlands, Sweden, and the United Kingdom are recommended to reduce bottlenecks to housing supply and remove distortions in their housing markets. As large private debt levels can amplify movements in the housing market, reducing the high indebtedness of households is important for financial stability...<sup>21</sup>

The European Commission promotes affordable housing policies through various initiatives within the European Social Fund (ESF), European Regional Development Fund (ERDF), INVEST EU, the Fund for European Aid to the Most Deprived (FEAD), various research and policy supports, funding for housing and homelessness NGOs. The Commission supports the Housing Partnership Action Plan, established within the framework of the Urban Agenda for the European Union.<sup>22</sup> Between 2011 and 2015, EIB lending for social housing in the EU amounted to a total of €13.8 billion.<sup>23</sup> A new European Social Fund Plus, with a total budget of €101 billion, mostly operated in shared management with Member States, will be the main financial instrument to implement the European Pillar of Social Rights (EPSR), as the EU compass to ensure a socially fair recovery.<sup>24</sup>

However, there is an urgent need for all EU institutions and agencies to recognise the role of affordable rented housing, offering choice, stability and balance in national and local housing systems, both in promoting housing rights, but also as a counter to the negative effects of housing market ‘cycles’.

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<sup>18</sup> See Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed). Since most new mortgage credit is directed to the purchase of existing homes and land, the inevitable result is inflation in prices. The emergence of a model of ‘residential capitalism’ whereby access to mortgage credit and homeownership was widened in the late twentieth century was accompanied by a withdrawal of the State from the direct supply of housing and a shift towards subsidising individuals’ ability to pay rent or buy a home in the market (p. 192).

<sup>19</sup> One example of the relevance of EU economic governance on housing rights can be seen in the 44-page European Commission report on post-programme surveillance of macroeconomic imbalances in Ireland (2019); the document contained some 78 references to housing, demonstrating the central position of housing for banking and financial stability. See <https://www.sipotra.it/wp-content/uploads/2019/04/Post-Programme-Surveillance-Report-Ireland-Autumn-2018.pdf>

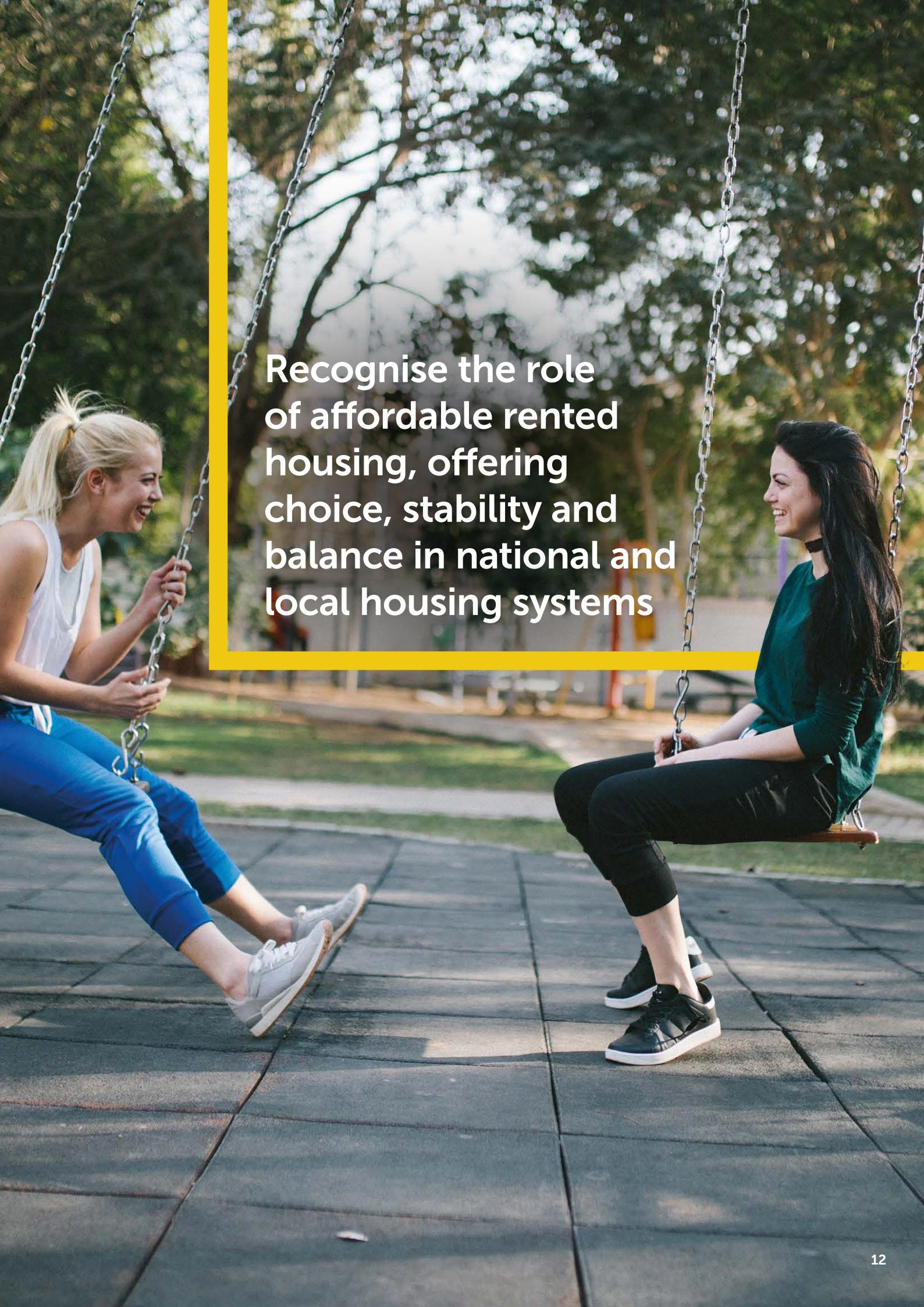
<sup>20</sup> See Kenny, P. (2020) *Briefing Paper: EU Economic Governance and Financial Supervision*, p. 32. Centre for Housing Law, Rights and Policy NUI Galway. Available at: <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Briefing-2-EU-Economic-Governance-and-Financial-Supervision--.pdf>

<sup>21</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, 2019 European Semester: country-specific recommendations, Brussels, 5.6.2019 COM (2019) 500 Final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0500&from=EN> p. 14.

<sup>22</sup> *The Housing Partnership Action Plan*, Urban Agenda for the EU, December 2018, available at: [https://ec.europa.eu/futurium/en/system/files/ged\\_final\\_action\\_plan\\_euua\\_housing\\_partnership\\_december\\_2018\\_1.pdf](https://ec.europa.eu/futurium/en/system/files/ged_final_action_plan_euua_housing_partnership_december_2018_1.pdf)

<sup>23</sup> Colantonio, A. (2018), *EIB Financing for Social and Affordable Housing*. Presentation at the Housing Partnership event ‘Affordable housing for inclusive cities, 16 May 2018, Brussels, available at: [https://ec.europa.eu/futurium/en/system/files/ged/colantonio\\_affordable\\_housing\\_for\\_inclusive\\_cities\\_may\\_2018.pdf](https://ec.europa.eu/futurium/en/system/files/ged/colantonio_affordable_housing_for_inclusive_cities_may_2018.pdf). In Ireland, some €400m has been invested by EIB through the HFA with some €200m expected to follow.

<sup>24</sup> The European Social Fund Plus is the result of a merging of the existing European Social Fund, the Youth Employment Initiative (YEI), the Fund for Aid to the Most Deprived (FEAD), the EU Programme for Employment and Social Innovation (EaSI) and the EU Health programme. <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9705&furtherNews=yes#navItem-relatedLinks>

A photograph of two women swinging on a swing set in a park. One woman, with blonde hair tied back, is on the left swing, wearing a white tank top and blue pants, smiling. The other woman, with dark hair, is on the right swing, wearing a green long-sleeved shirt and black pants, also smiling. They are swinging on a wooden deck with trees in the background.

**Recognise the role  
of affordable rented  
housing, offering  
choice, stability and  
balance in national and  
local housing systems**

## Housing Rights

Housing rights are recognised in the constitutions, laws and policies of many EU Member States for more than a century. The right to housing also is set out in Article 25(1) of the *Universal Declaration on Human Right* (1948)<sup>25</sup> and Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966),<sup>26</sup> both of which are accepted by all European countries, including Ireland.

Affordability of housing is an integral part of housing rights:

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.<sup>27</sup>

Implementing these rights engages the key concepts of human dignity, minimum core obligations on State, and progressive realisation of rights within national and local housing systems.<sup>28</sup>

The *European Social Charter* (ESC) of the Council of Europe sets out a range of housing rights, especially in relation to Article 16 – ‘The family shall enjoy legal, economic and social protection’, which obliges States, including Ireland, to ensure the provision of an adequate supply of affordable housing, of a habitable standard, for families. Indeed, the provision of sufficient social and affordable housing constitutes a central plank in implementing the right to housing.

The EU Charter of Fundamental Rights (Charter) sets out a number of housing rights drawn from national and international instruments in Europe. These include Article 33 (similar to Article 16 of the ESC) on the right of families of social and economic protection (which includes access to adequate and affordable housing), and also Article 36 which states that:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

These Services of General Economic Interest are a founding value of the EU, and are closely connected with the European model of society, the promotion of social cohesion, the notion of EU social citizenship and the exercise of fundamental social rights.

Article 51 on the field of application of the Charter establishes clearly that these and other housing related Articles apply to Member States when they implement EU law, but also to the institutions, agencies, offices and bodies of the Union, in line with the principle of subsidiarity.<sup>29</sup> These institutions and agencies must respect the rights, observe the principles and promote the application of the Charter within their respective competences and mandates, a great many of which relate to housing and housing systems.

At a political level, the European Pillar of Social Rights (EPSR)(see Appendix 5), with its 20 key principles and rights to support fair and well-functioning labour markets and welfare systems, is now integrated into the European Semester.<sup>30</sup> Principle 19 on Housing and Assistance for the Homeless states that “access to social housing or housing assistance of good quality shall be provided for those

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<sup>25</sup> ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’

<sup>26</sup> ‘The States Parties [...] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate [...] housing’.

<sup>27</sup> UN Doc. E/1992/23. Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing.

<https://www.refworld.org/pdfid/47a7079a1.pdf>. Para 11. also states: “States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.”

<sup>28</sup> See UN Doc E/1991/23. UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations.

<sup>29</sup> Article 51(2) states: ‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

<sup>30</sup> European Pillar of Social Rights, available at: [https://eminnetwork.files.wordpress.com/2017/11/social-summit-european-pillar-social-rights-booklet\\_en.pdf](https://eminnetwork.files.wordpress.com/2017/11/social-summit-european-pillar-social-rights-booklet_en.pdf)

in need.<sup>31</sup> Among the Indicators in the Social Scoreboard associated with the EPRS, are two on severe housing deprivation among households in rented housing.<sup>32</sup>

## The EU internal market

Since the Single European Act of 1986, a major driver of change in the EU has been the objective of establishing the EU internal market. This is defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. It is achieved by EU laws which remove technical, legal and bureaucratic barriers to trade, and which harmonise, or unify national rules at EU level, such as the customs union. Some areas of legal competence remain with Member States, and in some areas there is a shared legislative competence with the Union.

The general or public interest requires that every person in Europe have some form of shelter and home to raise families and enjoy lives of dignity and humanity, and fully participate in European society and economy. This concept of the general interest within the internal market is reflected in EU law, which refers to the 'competitive social market economy'.<sup>33</sup> Art 3(3) of the Treaty on the European Union (TEU) states:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.

SGEIs are an integral part and one of the building blocks of the competitive social market economy. Social and affordable housing as an SGEI is one of the ways in which public authorities across EU Member States respond to the shortcomings of the market, with the aim of ensuring universal access to decent affordable housing for all.

**EU institutions and agencies must respect the rights, observe the principles and promote the application of the Charter acting within their competences and mandates**

<sup>31</sup> Commission Staff Working Document – Establishing a European Pillar of Social Rights Brussels, 26.4.2017 SWD(2017) 201 final. The European Pillar of Social Rights is accompanied by a 'social scoreboard' which will monitor the implementation of the Pillar by tracking trends and performances across EU countries in 12 areas and will feed into the European Semester of economic policy coordination. See <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>.

<sup>32</sup> Severe housing deprivation rate is defined as the percentage of population living in the dwelling which is considered as overcrowded, while also exhibiting at least one of the housing deprivation measures. Housing deprivation is a measure of poor amenities and is calculated by referring to those households with a leaking roof, no bath/shower and no indoor toilet, or a dwelling considered too dark. See [https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Severe\\_housing\\_deprivation\\_rate](https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Severe_housing_deprivation_rate)

<sup>33</sup> The social market economy is not hostile to the concept of public services – See Sauter, W. Public Services and the Internal Market: Building Blocks or Persistent Irritant, *European Law Journal*, Vol. 21, No 6, November 2015, pp. 738–757.

## State Aid and Services of General Economic Interest

State Aid to selected industries and undertakings is seen as one of the main barriers to the development of the EU internal market, causing competition distortions.<sup>34</sup> State aid can include direct subsidies, tax exemptions, preferential interest rates, loan guarantees, provision of land and indemnities.<sup>35</sup>

Article 107(1) of the *Treaty on the Functioning of the European Union* (TFEU) (2009) provides the general principle that State aids are incompatible with the internal market:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

However, State aid can be compatible with the internal market in a number grounds, as set out in Article 107 TFEU. These include aid having a social character granted to individual consumers, aid for natural disasters or exceptional occurrences, aid for re-unification of Germany, regional aid, cultural aid, or other aids approved by the EU. The categories of permitted aid are:

- (a) aid to promote the economic development of areas where there is an abnormally low standard of living or serious underemployment and of regions referred to in Article 349 TFEU, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;<sup>36</sup>
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where it does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; and
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.<sup>37</sup>

It is important to point out that Article 107 TFEU<sup>38</sup> does not apply to non-economic activities, where the State acts 'by exercising public power',<sup>39</sup> or where authorities emanating from the State act in their capacity as public authorities. An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State, or is connected with those functions by its nature, its aim and the rules to which it is subject. Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority, and are performed by the State, do not constitute economic activities. Examples are activities related to: (a) the army or the police;(b) air navigation safety and control;(c) maritime traffic control and safety; (d) anti-pollution surveillance; and (e) the organisation, financing and enforcement of prison sentences. These activities have also been held to include the redevelopment and revitalisation of public land by a public authority.<sup>40</sup>

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<sup>34</sup> See European Commission – *Rules applicable to state aid*. <https://eur-lex.europa.eu/summary/chapter/competition/0802.html?root=0802>

<sup>35</sup> See Craig and De Burca (2011) *EU Law, Text, Cases and Materials*, OUP, p. 1088.

<sup>36</sup> See Commission Decision on State Aid (N725/2009) Ireland, where the €32bn. of State aid given to Irish banks through NAMA was held to be compatible with the single market by virtue of Article 107(3)(b)TFEU -C(2010)1155 final (NAMA). The Decision SA.43791 in 2018 related to a claim by a number of developers that by expanding its operations to (the funding of) property development, the State aid measures approved in the NAMA Decision no longer fall under the compatibility ground of the NAMA Decision (i.e. Article 107(3)(b) TFEU). State Aid SA.43791–Ireland – Alleged aid to and through the National Asset Management Agency – [https://ec.europa.eu/competition/state\\_aid/cases/272163/272163\\_1964479\\_141\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/272163/272163_1964479_141_2.pdf)

<sup>37</sup> Article 107(3) TFEU.

<sup>38</sup> See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Charter of Fundamental Rights of the European Union (OJ C 83/13, 30 March 2010).

<sup>39</sup> Case C-118/85 *Commission v Italy*, paragraphs 7 and 8.

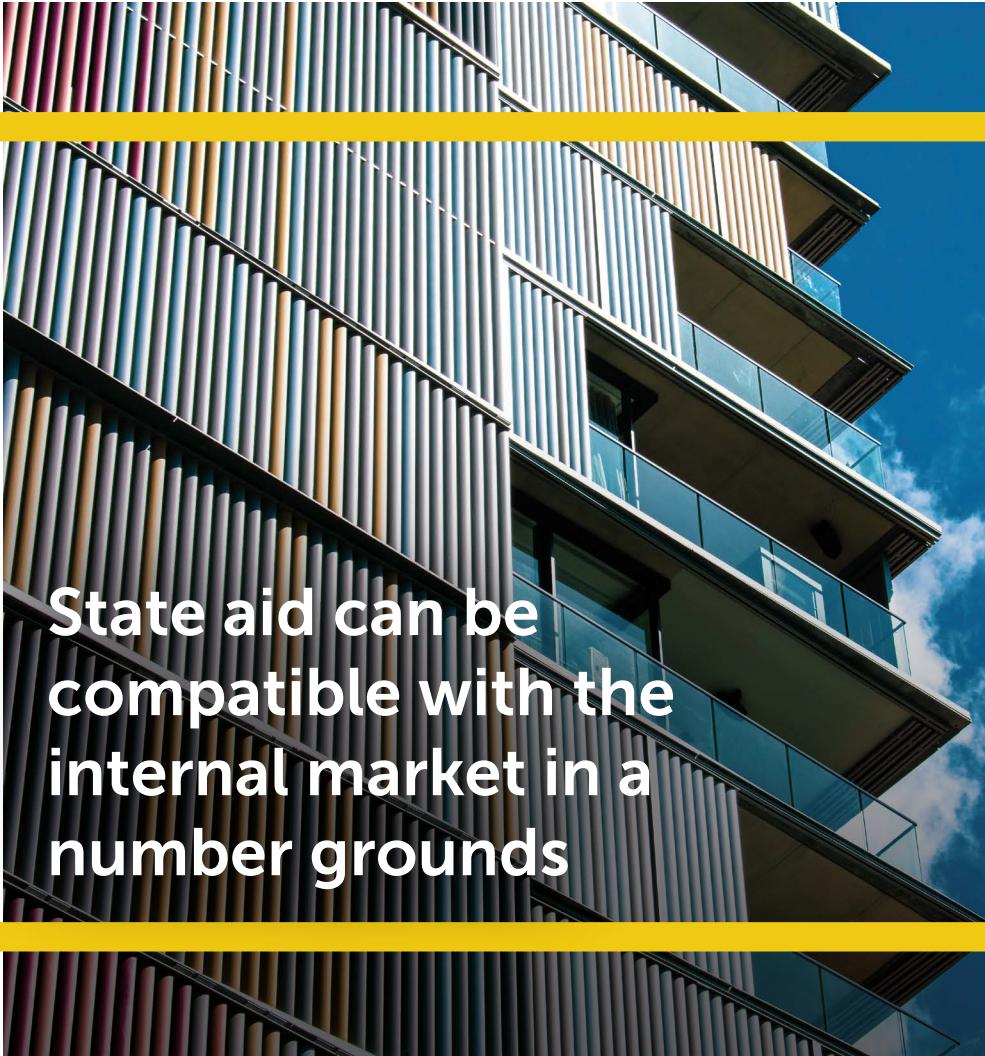
<sup>40</sup> See Commission decision of 27 March 2014 on State aid SA.36346 – Germany – GRW land development scheme for industrial and commercial use. In the context of a measure that supported the revitalisation (including decontamination) of public land by local authorities, the Commission found that making public terrain ready to build upon and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and roads) did not constitute an economic activity, but was part of the public tasks of the State, namely the provision and supervision of land in line with local urban and spatial development plans.

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In 2001, the Commission held that the Housing Finance Agency (HFA) whose borrowings were guaranteed by the Minister for Finance, and which lent to AHBs, was not an 'undertaking' but really part of the activity of the State. However, the local authorities and AHBs which provided housing with HFA finance were regarded as 'undertakings' in competition with other operators in the housing market.<sup>41</sup>

Another exception to the rules on Article 107 are Social Services of General Interest which are statutory and complementary social security schemes, linked to health, ageing, occupational accidents, unemployment, retirement and disability, as well as other services provided directly to the person, such as social assistance services, employment and training services, social housing or long-term care.

However, it is in relation to State support, or State Aid, for Services of General Economic Interest, that the issue of support for cost rental housing in Ireland must be examined.



**State aid can be compatible with the internal market in a number grounds**

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<sup>41</sup> See European Commission, State Aid N 209/2001 – Ireland. Guarantee for borrowings of the HFA. SG (2001) D/289528.

# Section 2

## **Services of General Economic Interest (SGEI)**

# Definitions

Services of General Economic Interest (SGEIs) are a supporting pillar of the European social model and the social market economy.<sup>42</sup> <sup>43</sup> These are services that public authorities of the Member States classify as being of general interest, and which are subject to specific public service obligations.<sup>44</sup> They include areas such as housing, water and energy supply, waste and sewage disposal, public transport, health, social services, youth and family, culture and communication within society, including broadcasting, internet and telephony. The public service obligation is imposed on the provider by way of an entrustment, and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.

As a form of State Aid which is compatible with the internal market, Services of General Economic Interest (SGEI) are treated with special consideration, in terms of competition law and State subsidies. The rules for this form of eligible State Aid are set out in Article 106 TFEU (2009):

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SGEIs must have an economic element, although the service does not necessarily have to be paid by those benefiting from it. The economic nature of a service does not depend on the legal status of the service provider (such as a non-profit making body), or on the nature of service, but rather on the way a given activity is actually provided, organised and financed. Apart from activities in relation to the exercise of public authority, to which internal market rules do not apply, the vast majority of services can be considered as 'economic activities' within the meaning of EC Treaty rules on the internal market.

While the concept of SGEI also appears in Articles 14 and 106(2) TFEU (above) and in Protocol No 26 to the TEU and TFEU, it is not defined in the TFEU or in secondary legislation.

Article 14 of the Treaty of the Functioning of the European Union (TFEU) states:

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role 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, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.<sup>45</sup>

<sup>42</sup> European Commission, (2011), *A Quality Framework for Services of General Interest in Europe*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 900 final. Brussels.

<sup>43</sup> <https://www.eesc.europa.eu/en/policies/policy-areas/services-general-interest>

<sup>44</sup> 'Public interest' is an abstract notion that changes over time or in different cultural contexts. Nowadays, 'public interest' is invoked in order to ensure: (a) access to fundamental goods and services to ensure certain (minimum) living standards, (b) economic development, (c) promotion of economic, social and territorial cohesion and of sustainable development goals. See European Parliament (2016) *Research for REGI Committee – Services of General Interest in the Funding Period 2014–2020*. PE573.411. p. 20. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL\\_STU\(2016\)573411\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL_STU(2016)573411_EN.pdf)

Article 1 of Protocol 26 annexed to the TFEU specifically further defined these SGEI, again referring to the “shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union.” Significantly, it gives Member States the discretion to define SGEIs and how to provide them:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- 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;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.<sup>46</sup>

Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. Ponce-Solé has pointed out that the exceptions to EU rules on competition and other areas which SGEIs offer “can apply only if the services in question enjoy, in advance and by legal act, been attributed a mission of general interest.”<sup>48</sup> Thus, it is necessary to make explicit, at the national level, that a particular activity is categorised as an SGEI in order to apply the benefit of the SGEI rules.<sup>49</sup>

The European Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI, and to assessing any State aid involved in the compensation. The *BUPA* case<sup>50</sup> which involved the imposition of a risk equalisation system for the private medical insurance sector in Ireland, held that there was no clear and precise regulatory definition of the concept of an SGEI mission, and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission.

<sup>45</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

<sup>46</sup> Protocol (No. 26) on Services of General Interest, Article 1.

<sup>47</sup> (COM(2011) 900).

<sup>48</sup> Communication from the Commission – Implementing the Community Lisbon programme – Social services of general interest in the European Union, 26 April 2006, COM(2006) 177 final.

<sup>49</sup> See Ponce-Solé, J. ‘The European Union Role in Ensuring Access to Affordable Housing and in Fighting Against Urban Segregation and Gentrification Moving Forward,’ *European Journal of Human Rights*, 2019 Issue 5., 311-334.

<sup>50</sup> Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraphs 166–169 and 172. In the BUPA case, the CJEU has made clear that SGEIs do not need to correspond to the whole population or be supplied throughout the territory of a Member State. They can have limited territorial reach or cover a relatively limited group of users (paras 186/7).

## Undertakings

State aid rules only apply where the beneficiary is an ‘undertaking’. These are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>51</sup> The legal status of the entity under national law is not decisive, and the only relevant criterion is whether it carries out an economic activity. The application of the State aid rules does not depend on whether the entity is set up to generate profits, and non-profit entities can also offer goods and services on a market. Where there is not a market the non-profit entities remain outside the scope of State Aid rules. To clarify the distinction between economic and non-economic activities, the Court of Justice of the European Union has consistently held that any activity consisting in offering goods and services on a market is an economic activity. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned, and may vary from one Member State to another.<sup>52</sup> Moreover, due to political choice or economic developments, the classification of a given activity can change over time. What is not an economic activity today may become one in the future, and vice versa.

The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity, unless it is a non-economic activity or exercise of a public power.

Since the distinction between economic and non-economic activities depends to some extent on political choices and economic developments in a given Member State, it is not possible to draw up an exhaustive list of activities that *a priori* would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use.<sup>53</sup>

## Entrustment

Responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The term ‘Member State’ covers the central, regional and local authorities. The act or acts must include, in particular:( a) the content and duration of the public service obligations;(b) the undertaking and, where applicable, the territory concerned; (c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority; (d) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and (e) the arrangements for avoiding and recovering any over compensation.<sup>54</sup>

<sup>51</sup> Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, ECLI:EU:C:2000:428, paragraph 75.

<sup>52</sup> See Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, ECLI:EU:C:1993:63, paragraphs 16 to 20. “It does not include, therefore, organizations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non-profit-making.”

<sup>53</sup> 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 C/2016/2946. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016XC0719\(05\)#ntr21-C\\_2016262EN.01000101-E0021](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016XC0719(05)#ntr21-C_2016262EN.01000101-E0021). Paragraphs 17 to 37 of this Notice seek to clarify the distinction with respect to a number of important areas.

<sup>54</sup> COMMUNICATION FROM THE COMMISSION European Union framework for State aid in the form of public service compensation (2011) (Text with EEA relevance) 2012/C 8/03 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0015:0022:EN:PDF>

## Altmark Criteria – What is NOT State Aid

The iconic *Altmark*<sup>55</sup> case on SGEIs (although it did not apply the term, but used the term 'public service') held that public service compensation does **not** constitute State aid within the meaning of Article 107 of the Treaty, provided that four cumulative criteria are met.

Firstly, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Secondly, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. According to the third *Altmark* criterion, the compensation paid to the undertaking must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account receipts and reasonable profits. Reasonable profit is defined as the rate of return on capital required of a typical company involved. Where there is no comparable undertaking comparisons from other Member States may be used. However, efficiency gains cannot be achieved at the expense of quality of the service provided.<sup>56</sup> Fourthly, compensation offered must be as a result of a public procurement procedure based on lowest costs, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means.<sup>57</sup>

Where the undertaking is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

Unless all of these criteria are met, then the compensation constitutes State Aid, and will be examined by the European Commission for compatibility with EU law.



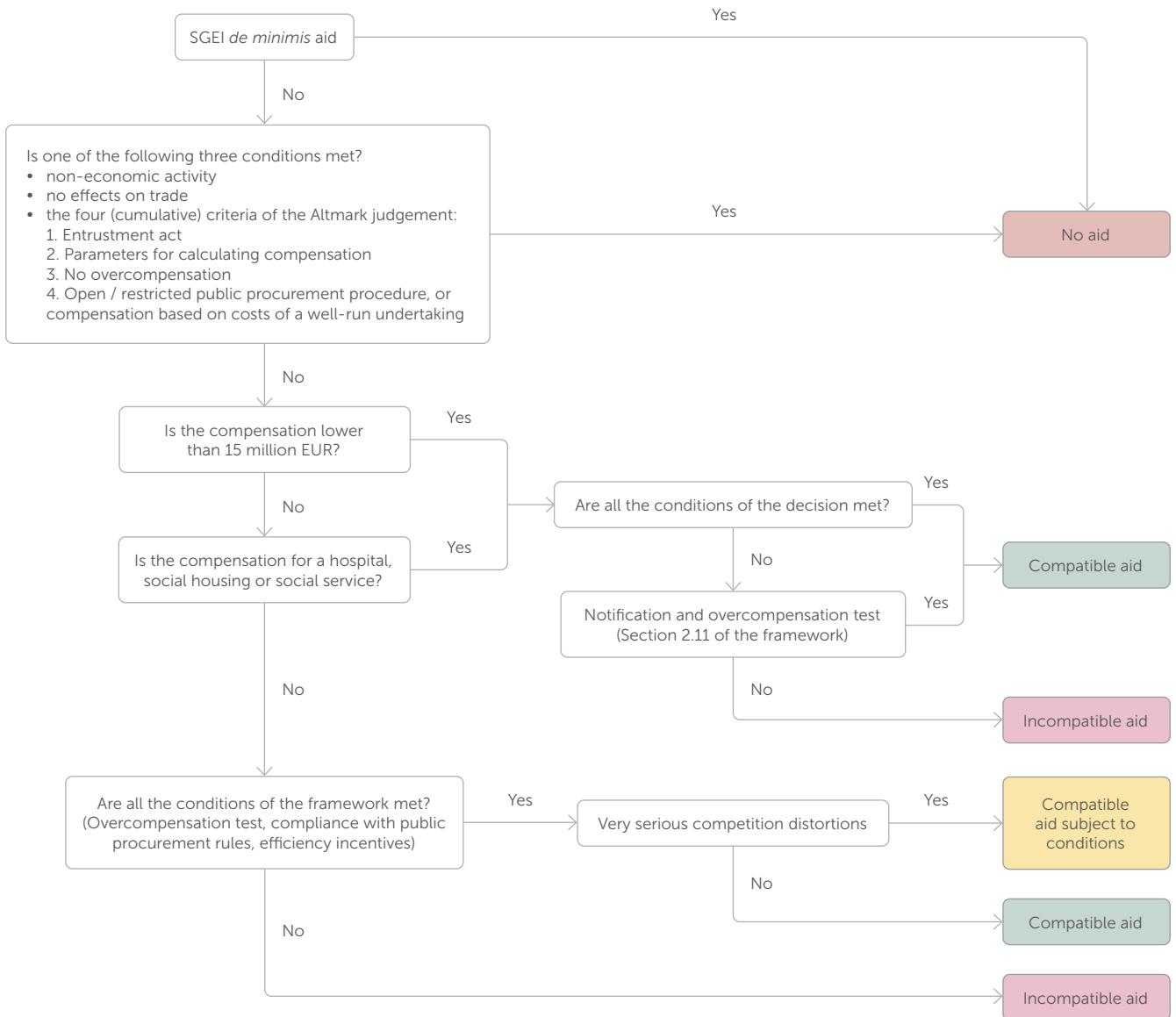
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<sup>55</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

<sup>56</sup> 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 interest(Text with EEA relevance)(2012/C 8/02) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0004:0014:EN:PDF> para 61.

<sup>57</sup> 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 interest(Text with EEA relevance)(2012/C 8/02) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0004:0014:EN:PDF> para 62.

**Figure 1. SGEI Analysis Tree**



**SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention**

**The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned.**



# European Commission SGEI Rules

The European Commission established the first SGEI framework, known as the Monti-Kroes package, in 2005. In 2011, the European Commission updated its framework in the so called *Almunia* package consisting of four legal instruments which apply to State authorities planning to grant aid to SGEIs:

- A Commission Communication which clarifies the basic concepts of State Aid in the area.<sup>58</sup> This provides guidance on the requirements concerning the definition of a service of general economic interest. In particular, Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard.
- A Commission Decision which sets out the exemptions for Member States from the obligation to notify certain State aids to the Commission.<sup>59</sup>
- The European Union framework for State aid in the form of public service compensation, sets out the basis for the Commission's assessment of notified aid.<sup>60</sup> This Framework Communication provides that State aid falling outside the scope of Decision 2012/21/EU may be declared compatible with Article 106(2) of the Treaty if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. The conditions set out in sections 2.2 to 2.10 must be met in order to achieve that balance.<sup>61</sup>

2.2. Genuine service of general economic interest as referred to in Article 106 of the Treaty. Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard.

2.3. Need for an entrustment act specifying the public service obligations and the methods of calculating compensation.

2.4. Duration of the period of entrustment should be justified by reference to objective criteria.

2.5. Compliance with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

2.6. Compliance with Union public procurement rules.

2.7. Absence of discrimination when SGEI assigned between different undertakings.

2.8. The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.

2.9. Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union.

2.10. Transparency. For each SGEI compensation falling within the scope of this Communication, the Member State concerned must publish specific information on the internet or by other appropriate means.

<sup>58</sup> 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 interest (Text with EEA relevance)(2012/C 8/02) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0004:0014:EN:PDF>

<sup>59</sup> COMMISSION DECISION of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest(notified under document C(2011) 9380)(Text with EEA relevance)(2012/21/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>)

<sup>60</sup> COMMUNICATION FROM THE COMMISSION European Union framework for State aid in the form of public service compensation (2011) (Text with EEA relevance) 2012/C 8/03 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0015:0022:EN:PDF>

<sup>61</sup> Ibid.

- A Commission Regulation on *de minimis* aid for the provision of SGEI, setting out the rules for determining that an aid is of minor importance.<sup>62</sup>

These new approaches define the concept of service of general economic interest as an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned. The Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard.

### **(a) De minimis rule**

The Commission SGEI *de minimis* regulation aims to provide simplification for small, local SGEIs, for which compensation below a given threshold is deemed not to constitute State aid.

- up to €500,000 to be granted over three fiscal years
- the aid can only be given for the provision of an SGEI
- any form of *de minimis* aid granted must be cumulated and cannot exceed the €500,000 threshold
- the €500,000 *de minimis* aid under this Regulation cannot be cumulated with any compensation in respect of the same SGEI regardless of whether it constitutes state aid
- the aid can be given as a grant, a loan or a loan guarantee
- there must be a form of entrustment between the beneficiary and the aid grantor
- the aid grantor must inform the recipient that it is being given as *de minimis* aid
- records must be kept for 10 fiscal years from the date on which the aid was granted.

### **(b) Notification waiver rules**

The 2011 SGEI Decision<sup>63</sup> sets out the criteria for Member State block exemptions from the obligation to notify the Commission for certain categories of State Aid:<sup>64</sup>

- The exemption allows unlimited spend in the area of social services. This includes compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.<sup>55</sup>
- For all other SGEI activity the compensation threshold has been set at €15 million per annum. Any funding given above this threshold would have to be notified to the Commission under the SGEI Framework.
- The period of entrustment with an SGEI provider should be limited to 10 years (although recital 12 states that a longer period may be justified such as in the area of social housing).
- Transparency – any organisation receiving more than €15m of funding per annum which has commercial activities outwith the scope of the SGEI must publish details via the internet of the entrustment, and the amounts of aid being granted to the undertaking, on an annual basis.
- Member States are required to submit a report on the implementation of this Decision every two years.<sup>66</sup>

It is in this area that most of the legal development on social housing has taken place in Commission Decisions.<sup>67</sup>

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<sup>62</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. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:114:0008:0013:EN:PDF>, Extended by Regulation (EU) 2018/1923 of 7 December 2018 amending Regulation (EU) No 360/2012 as regards its period of application. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1923&from=EN>

<sup>63</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest(notified under document C(2011) 9380)(2012/21/EU). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=DE>

<sup>64</sup> In the field of Services of General Economic Interest (SGEI), more than 90% of aid measures are also block-exempted under the SGEI Decision according to the annual SGEI reports submitted by Member States. See Code of Best Practices for the conduct of State aid control procedures. Brussels, 16.7.2018 C(2018) 4412 final. [https://ec.europa.eu/competition/state\\_aid/reform/best\\_practise/en.pdf](https://ec.europa.eu/competition/state_aid/reform/best_practise/en.pdf), p. 3.

<sup>65</sup> Article 2(1)(c) of the Decision.

### (c) Which social housing qualifies for the notification waiver?

Recital 11 of Commission Decision of 2011 sets out the general view of how social housing is regarded within SGEI law.<sup>68</sup>

... 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 provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision.

Thus, eligible subsidies for social housing, at any expenditure levels, are not subject to notification. However, 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" has become the key criteria on which the eligibility for non-notification, and consequently, acknowledgement of compatible State Aid, depends. It is the European Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.<sup>69</sup>

Of course, the EU and Member States have an obligation towards citizens to ensure their universal access to decent, affordable housing in accordance with fundamental rights such as articles 16, 30 and 31 of the European Social Charter and Articles 26, 33, 34 and 36 of the EU Charter of Fundamental Rights and Principle 19 of the European Pillar of Social Rights (See Appendix 4).

**It is necessary to make explicit, at the national level, that a particular activity is categorised as an SGEI in order to apply the benefit of the SGEI rules**

<sup>66</sup> For Ireland, in years 2012–13 the estimated total amount was approximately €189.9m. comprising electricity stations (€112m.), housing (€12.2m.), health insurance (equalization) (€65.7m.). For the years 2014–15 the estimated amount was approximately €1,320.m.) comprising electricity stations (€104.7m.), health insurance (€1,108.6m.) and housing (€106.7m.).

<sup>67</sup> The Review of EU Member States' reports on the implementation of the European Commission Decision on the provision of State aid to the provision of SGEI pointed out that the exemption from notification reduces the administrative costs and complexities and suggests raising the threshold for exemptions. The Review found that only some Member States cover all main SGEIs: 12 Member States report hospitals and health care; 16 report social housing and related facilities and 12 social services (child care, elderly care etc). See European Economic and Social Committee (2017) Review of Member States' reports on the implementation of the European Commission Decision on the provision of State aid to the provision of services of general economic interest. P. 73. Available at: <https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-04-17-493-en-n.pdf>

<sup>68</sup> COMMISSION DECISION of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest(notified under document C(2011) 9380)(Text with EEA relevance)(2012/21/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>, Recital 11.

<sup>69</sup> 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 interest (Text with EEA relevance)(2012/C 8/02) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:008:0004:0014:EN:PDF> Para 46.

# Section 3

## SGEI Decisions on Social Housing

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There have been a number of European Commission Decisions on what constitutes 'social housing' for the purposes of the EU State Aid and competition law rules on SGEIs. The CJEU decisions on the Dutch cases has somewhat clarified the position, while the EU Competition Commissioner has also offered clarification.<sup>70</sup>

## Ireland

One of the early housing State Aid Decisions related to Ireland. In Decision N209/01 the Commission examined the State guarantee for borrowing by the Housing Finance Agency (HFA).<sup>71</sup> In that decision the definition of social housing was set out:

Social housing means the provision of housing for the most socially disadvantaged households, and in particular for those households which due to their economic circumstances are unable to fund their own housing requirement at socially acceptable conditions through recourse to commercial lenders. According to your Government, the Irish State has always provided significant support for social housing.<sup>72</sup>

The Commission held that the HFA could be regarded as an extension of the Irish States' in-house activities. The guarantee by the State for its fundraising should be considered as a transfer within the State, thus not coming under the EU competition law rules. However, the municipalities, (Irish local authorities) were found to be performing economic activities and active in the market, thus engaging a Commission review of the compatibility of their actions with the internal market. Since the local authorities received cheap guaranteed funding from the HFA, compared with other providers, they were favoured in the sense of Article 87 (now Art 106), and therefore competition was distorted. However, the guarantee of cheap funding by the State would be exempt from the competition rules if it satisfied the appropriate rules:

- The service in question must be a service of general economic interest and must be accurately defined by the Member State.
- The undertaking in question must be entrusted by the Member State with the provision of such a service.
- The exemption should be limited to what is necessary.
- The exemption must not affect the development of trade within the Union to an extent that would be contrary to the Community's interest.

The European Commission concluded that the above conditions for applying the relevant Treaty rules were fulfilled in this case, because of the following reasons, which have been relied upon in later decisions:

**Operation of a service of general economic interest:**

The objective of the Irish Government's housing policy, as set out in the Housing Acts, is to ensure that every household and specifically the most socially disadvantaged can have a good dwelling in a good housing environment. This objective is entrusted to the local authorities, which operate social housing programmes.

These programmes consist of the provision of general mortgage finance, the operation of a shared ownership scheme, an affordable housing scheme aimed at providing low-cost housing, a rental subsidy scheme and miscellaneous grant schemes for elderly and disabled persons. Beneficiaries

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<sup>70</sup> Joined Cases T-202/10 RENV II and T-203/10 RENV II *Stichting Woonlinie and Others v European Commission* ECLI:EU:T:2018:795.

<sup>71</sup> See European Commission, State Aid N 209/2001 – Ireland. Guarantee for borrowings of the HFA. SG (2001) D/289528. [https://ec.europa.eu/competition/state\\_aid/cases/136265/136265\\_427552\\_14\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/136265/136265_427552_14_2.pdf)

<sup>72</sup> Ibid p. 2.

of these measures are socially disadvantaged households whose economic circumstances do not permit them to purchase or rent houses on the open market. Due to their poor creditworthiness, these households are generally unable to obtain a housing loan in the commercial, competitive sector at affordable rates, which has also to be proved by submitting letters of rejection from two private sector mortgage lenders. They can through this housing-funding-system turn to the municipalities for housing at cheaper rents.

Because of the above considerations the fund raising for the State for social housing can be regarded as an operation under Article 86(2) EC-Treaty. Since in addition the content of the service and the task of the housing-funding-system and the municipalities are accurately defined in the Housing Act 1992 the Commission considers the first condition to be fulfilled.

**Entrustment:**

The HFA was established in 1981 by an Act of the Oireachtas (the Irish Parliament). The tasks of the Agency are clearly set out under Section 5 of the Housing Finance Agency Act 1981, as lastly amended by the Housing Act 1992, which states that the Agency may advance moneys to a housing authority to enable loans to be made by the authority for the acquisition and construction of houses. Under the same law the housing authorities (municipalities) are obliged to grant loans or to hire and construct houses. Ireland has therefore taken specific steps to assign to the municipalities the task of social housing policy. The municipalities implement the public service provided to the private beneficiaries themselves.

**Limitation of the exemption to what is necessary:**

As explained the 'in house' activity on the State's own account of HFA does not come under the competition rules. The benefit of the guarantee has, however, to be transmitted in full to the municipalities. This advantage granted to the municipalities is used exclusively to cover the cost of the above mentioned social public housing service. As this advantage is transferred to the final private beneficiaries it is equal to the 'cost' of the service, which is the lowering of rents for disadvantaged final users. This part of the scheme fulfils the condition that no overcompensation should exist for a public service. But as it is only offered to a part of the market Article 87(2)a does not apply.

**Development of trade within the Union:**

Social housing is fully in line with the basic objectives of the EC-Treaty. It is a legitimate element of public policy and as it is limited to what is necessary it is in the interest of the Community that social housing is supported.

Due to the above considerations the European Commission held that conditions in order for Article 86(2) to apply were satisfied.<sup>73</sup>

The Commission Decision on State Aid (N89/2004) again considered the compatibility with the Treaties of HFA lending to approved housing bodies in Ireland, at preferential rates, under s. 17 of the Housing (Miscellaneous Provisions) Act 2002<sup>74</sup> The European Commission again held the voluntary housing bodies were active in the housing market and received preferential financing from the HFA, resulting in lower costs and lower rents than other competing operators in the housing market. This was regarded as favoured treatment by the State and distorted competition, since other building firms or entrepreneurs operating within the housing sector were not entitled to such cheap funding. The Commission held that this was State Aid within the meaning of Article 87(1)[now Art 107] EC Treaty and must be examined by the European Commission for compatibility with the internal market rules.

However, in the recent 2018 Dutch CJEU case it was held that Decision N209/2001 does not constitute the ultimate European definition of social housing, but only an example (see below).

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<sup>73</sup> Joined Cases T-202/10 RENV II and T-203/10 RENV II *Stichting Woonlinie and Others v European Commission* ECLI:EU:T:2018:795.

<sup>74</sup> European Commission Decision on State Aid (N89/2004). [https://ec.europa.eu/competition/state\\_aid/cases/202026/202026\\_1153986\\_14\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/202026/202026_1153986_14_2.pdf)

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This Decision is significant in that it defined AHBs in Ireland in terms of SGEI or public service criteria, emphasising the not-for profit element:

Voluntary housing bodies are not State bodies. To operate as an approved voluntary housing body and qualify for funding for the provision of social housing, the body must first obtain approved status from the Minister for the Environment, Heritage and Local Government. Such bodies must be either limited companies registered under the Companies Acts, societies registered under the Industrial and Provident Societies Act or trusts incorporated under the Charities Acts.

In addition, such a body must be a not-for-profit organisation and have as primary objects the relief of housing needs or poverty or hardship or the welfare of Travellers and the provision and management of housing. The body must have in its memorandum of association or registered rules provisions prohibiting the distribution of any surplus, profit etc. to members and requiring the assets of the body be applied solely towards its objectives.

Approved voluntary housing bodies may not engage in any other commercial activity which may adversely affect the financial solvency of their housing activities.<sup>75</sup>

The Decision held that voluntary housing bodies "supplement the social housing activities of the local authorities in Ireland and operate on a not-for-profit basis. The conditions for eligibility for housing in a scheme administered by a voluntary housing body are the same as those applied for social housing provided by a local authority."<sup>76</sup> AHBs also provide housing for homeless persons and returning emigrants and tenancies are allocated in consultation with the local authority. However, this European Commission Decision also held that local authorities and AHBs are involved in economic activity and are active in the housing market, albeit a 'real estate' market.

Applying the four *Altmark*<sup>77</sup> tests the European Commission held that the fourth test, where the undertaking be chosen in a public procurement procedure, was not met.<sup>78</sup> The Irish authorities had not provided information substantiating that they are being compensated according to the costs of a typical undertaking. Thus, the compensation could constitute State Aid. However, it could constitute compatible State Aid provided it met the four *Altmark* criteria for non-State Aid.

Firstly, the recipient undertaking must actually have a public service obligation to discharge, and the obligation must be clearly defined. Secondly, the undertaking must have been entrusted with the public service task. Thirdly, the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligation. Fourthly, the development of trade must not be affected contrary to the interests of the European Community.<sup>79</sup>

In relation to the third criteria on the proportionality of the compensation this Decision noted that local authorities publish accounts which separate social housing and other activities, and that this is sufficient. Since approved voluntary housing bodies are not engaged in commercial activities, but their housing projects fall within the social housing category, the issue of separate accounting did not arise. The preferential financing granted by HFA to the municipalities and the voluntary housing bodies can only be used to perform the public social housing obligations imposed by legislation, and to cover the costs of the social public housing service insofar, as these costs could not be otherwise recovered. Consequently, the benefit of the cheap guaranteed financing from the HFA to the voluntary bodies may accrue directly and exclusively to the disadvantaged households, for which those bodies provide housing. Also, the approved voluntary housing bodies as not-for-profit organisations must have in their memorandum of association, or registered rules provisions, prohibiting the distribution of any surplus or profit to members, and requiring the assets of the body

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<sup>75</sup> Commission Decision on State Aid N89/2004 paras 32-34.

<sup>76</sup> Commission Decision on State Aid N89/2004, para 10.

<sup>77</sup> Case C-280/00 *Altmark Trans GMBH*.

<sup>78</sup> See para 45. 'Such a procedure does not apply since municipalities and voluntary housing bodies exercise a competence on social housing, apply for subsidies with the HFA within the framework of their competence and are therefore not awarded with public contracts. Furthermore the Irish authorities have not provided information substantiating that they are being compensated according to the costs of a typical undertaking.'

<sup>79</sup> Commission Decision on State Aid N89/2004, para. 48.

be applied solely towards its objectives. Accordingly, this part of the scheme fulfils the condition that no overcompensation should exist for the public service costs.

The European Commission Decision held that in relation to the development of trade contrary to the interests of the Union, the ultimate objective of the notified scheme was social housing, which has been recognized as a legitimate element of public policy by the European Commission in its Decision in 2001,<sup>80</sup> in the case at hand, as well as in other recent European Commission Decisions. The State Aid under assessment was proportionate to the costs incurred by the operators, and this Irish State Aid was compatible with EU law.<sup>81</sup>

The European Commission Decision held that although the AHB housing providers activities had an effect on EU trade, in this case, the subsidies did not give a competitive advantage, and the subsidies were really a compensation for discharging public service obligations as part of the public interest mission of Irish housing policy:

They [AHBs] get preferential financing from the HFA and, in turn, they offer cheaper housing conditions through rents and construction loans, to certain customers and are doing so in competition with other operators in the housing market. They are therefore performing an economic activity. As this activity is supported by the State through the cheap guaranteed funding from the HFA, State resources are involved. Furthermore, since only the municipalities and the voluntary housing bodies receive the advantage of funding at preferential terms with respect to the other operators in the market they are favoured in the sense of Article 87(1) EC Treaty and competition is distorted. Building firms or other entrepreneurs operating with the housing sector are not entitled to the advantage of cheap funding at all. Insofar the Commission cannot exclude that competition with the building sector will be distorted. Since the real estate market is today characterised by significant foreign investment activities the measures may also have an effect on trade between Member States. Thus, the Commission considers the notified measure as State aid within the meaning of Article 87(1) EC Treaty. However, according to the jurisprudence of the Court, a State measure is not caught by Article 87(1) EC Treaty where it must be regarded as compensation for the services provided by the recipient undertaking in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them.<sup>82</sup>

## Germany

Decision N42/2004<sup>83</sup> held that German real estate tax transfer exemptions for housing companies in the *Neue Länder* (East Berlin) were incompatible with the common market.

## Sweden

In European Commission Decision N798/06, a scheme of grant support of approximately 10% of construction cost for construction of special housing for elderly people by Sweden was held to be compatible with the EC Treaty. The Decision follows an earlier Commission Decision on a very similar previous scheme of aid to student housing and other small dwellings (N40/03), which was declared compatible under Article 87(3)(c) of the EC Treaty. The measure was limited in time to five years until the end of 2011, with final payments to be made in 2014 for projects started during 2011.

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<sup>80</sup> See European Commission, State Aid N 209/2001 – Ireland. Guarantee for borrowings of the HFA. SG (2001) D/289528.

<sup>81</sup> Commission Decision on State Aid N89/2004, para. 58.

<sup>82</sup> Ibid., paras 36–37.

<sup>83</sup> [https://ec.europa.eu/competition/state\\_aid/cases/217733/217733\\_636695\\_21\\_1.pdf](https://ec.europa.eu/competition/state_aid/cases/217733/217733_636695_21_1.pdf)

**The objective of the Irish Government's housing policy, as set out in the Housing Acts, is to ensure that every household and specifically the most socially disadvantaged can have a good dwelling in a good housing environment.**



The European Commission concluded that the Aid granted under the scheme was needed to reach an objective of social equity, that was otherwise not being sufficiently met by the market. The Aid would be proportional to the aims pursued and the effects on competition were restricted to the minimum necessary. Consequently, the measure would not adversely affect trading conditions to an extent contrary to the common interest within the meaning of Article 87 (3)(c) EC Treaty.

## Czech Republic

In European Commission Decision N342/2008 the housing and social programme for problematic districts of the Czech Republic was found to be compatible with the Treaties. This involved granting financial support to cover part of the investment costs for the regeneration of existing apartment houses in a selected number of problematic localities of towns with more than 20,000 inhabitants. This qualified under Article 107(3)(a) on "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment."

## Hungary

European Commission Decision N358/2009 approved the Hungarian Mortgage Support Scheme which was aimed at helping homeowners affected by the economic downturn. Under the scheme, the Hungarian State would guarantee 'bridging loans' which cover part of the monthly instalments of the original mortgage loans for a period of up to two years. The Commission concluded that the measure was compatible with Article 87(2)(a) of the EC Treaty that allows State support to individual consumers under certain conditions. In particular, the aid had a social character and was provided on a non-discriminatory basis. The scheme targeted homeowners who were at risk of being unable to service their mortgage payments due to redundancy or other temporary income shocks. Eligible borrowers could conclude so-called 'bridging loans' with banks enabling them to redeem part of their mortgage instalments, for a period of up to two years. Thus, the bridging loan backed by a state guarantee provided a breathing space to restructure their mortgage and keep their family home.

The European Commission concluded that although the measure was mainly aimed at supporting households, it cannot be excluded that an advantage will be granted, not only to the borrowers, but also, to the banks participating in the guarantee scheme, as indirect beneficiaries of the aid. However, the Commission also found that the aid measure was aimed at well-defined objectives of common interest; it was well designed to deliver them and limited the distortions of competition. The scheme was approved under Article 87(2)(a) of the EC Treaty as providing aid of a social character to individuals, affected by a temporary income shock and at risk of losing their home, on a non-discriminatory basis, given that it was open to all banks which granted mortgages in Hungary.

**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**

# The Netherlands

There has been a lengthy engagement between the European Commission and The Netherlands over the SGEI status of Dutch Housing Corporations ('*woningscorporatie*') (hereinafter *wocos*). In Decision N642/2009<sup>84</sup> on the compatibility of State Aid to *wocos* with the rules on the internal market it was held that the fourth *Altmark* criterion was not fulfilled, as *wocos* had not been chosen in a public procurement procedure. Moreover, the Dutch authorities had neither claimed nor proven that the compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with appropriate means, would have incurred in discharging the public service obligations. Nor was there any indication available to the European Commission that would suggest that the fourth criterion of the *Altmark* criteria was met. The Housing Law of 1901 ('*Woningwet 1901*') laid down the task of the Dutch Housing Corporations' to "improve the housing situation of the population." This provides for the financing of the Dutch Social Housing System. In an Article 17 letter of 14 July 2005, the European Commission took the preliminary view that the Netherlands should amend the public service definition of *wocos* so that the social housing would be provided to a clearly defined target group of disadvantaged citizens, or socially less advantaged groups. Dutch authorities in December 2009 made commitments to amend the functioning of *wocos* and the measures favouring them.

The target group of socially disadvantaged households, which was acceptable to the European Commission, in this Decision of 2009, would be defined as individuals with an income not exceeding €33,000 per annum (at the time). This definition would cover approximately 43% of the Dutch population. The ceiling would be indexed every year. The maximum rent in social housing would amount to €647.53 subject to annual indexation. Some 90% of the dwellings in each *woco* would be allocated to individuals belonging to the target group at the moment of allocation. The remaining 10% would be allocated on the basis of objective criteria with an element of social prioritisation. Persons who were above the income threshold, but who nevertheless were considered to be persons in need of social assistance, such as large families and other such categories specified in the relevant rules, would have priority.

In this Decision, the European Commission also considered social mix and social cohesion to be valid public policy objectives, and noted that the proportion of tenants from higher income groups would be strictly limited to a small number.<sup>85</sup>

Construction and renting out of public purpose buildings (*maatschappelijk vastgoed*), such as community centres, health centres, women shelters, care homes for the elderly, cultural centres and sport centres would qualify for State Aid, but *wocos* must rent these at lower than market rents to social organisations. All activities, other than those, could not benefit from State Aid.

The *wocos* appealed the Decision on a number of grounds, but significantly, that the European Commission wrongly defined a social housing SGEI and had overstepped its powers by demanding that The Netherlands come up with a new definition of social housing.

In the meantime, a Parliamentary Answer by Commissioner Vestager (2017) on the issue suggested a wide margin for EU Member States in relation to SGEI social housing activities. Commissioner Vestager has stated that:

Member States have considerable discretion when defining service of general economic interest ('SGEI') social housing. The scope and the organisation of SGEIs vary considerably from one Member State to another, depending on the history, the culture of public intervention, and the economic and social conditions prevailing in each Member State. To be an SGEI, social housing must however respond to a public need: 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. Member States may not define a social housing SGEI so broadly that it

<sup>84</sup> State Aid Decision No E 2/2005 and N 642/2009 – The Netherlands Existing and special project aid to housing corporations. Official Journal L 312, 29.11.2005, p. 67–73. [https://ec.europa.eu/competition/state\\_aid/cases/197757/197757\\_1155868\\_173\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/197757/197757_1155868_173_2.pdf) The Decision followed complaints from Dutch house-building companies, claiming that social housing corporations were, with the help of State Aid, increasingly expanding their commercial activities, instead of using State funding to provide social housing.

<sup>85</sup> State Aid Decision No E 2/2005 and N 642/2009, para 58.

manifestly goes beyond responding to this public need. In this context, the Commission has accepted social mixity and social cohesion as valid public policy objectives for which State aid may be granted under the 2012 SGEI Decision.<sup>86</sup>

The CJEU judgment on the Dutch State Aid (2018) offers the most recent definition of social housing SGEI rules.<sup>87</sup> The judgment pointed out that Decision N209/01 on State subsidies for social housing did not constitute the European definition of social housing, but only an example. The Dutch housing associations were not required to base their scheme on the same criteria, nor were they required to define the SGEI solely by reference to an income ceiling.

However, it is worth noting that the Decision N209/01 on Ireland had accepted a wide range of measures as being included within the term social housing:

... provision of general mortgage finance, the operation of a shared ownership scheme, an affordable housing scheme aimed at providing low-cost housing, a rental subsidy scheme and miscellaneous grant schemes for elderly and disabled persons... Due to their poor creditworthiness, these households are generally unable to obtain a housing loan in the commercial, competitive sector at affordable rates, which has also to be proved by submitting letters of rejection from two private sector mortgage lenders. They can through this housing-funding-system turn to the municipalities for housing at cheaper rents.

Defining social housing was the most contentious part of the Dutch (2018) CJEU judgment. The test is related to the precision of the public interest mission, and the possibility of clearly identifying the target group, who must be clearly defined and be socially disadvantaged.<sup>88</sup> The definition of social housing in Dutch law which was examined, did not meet the requirements. Therefore, the Dutch SGEI did not meet the requisite level of clarity, inasmuch as the delimitation of the target group to whom the social housing was destined was not sufficiently precise. It was therefore up to the Dutch authorities to demonstrate that the definition of the mission granted to the housing associations was sufficiently precise in order to meet the aim of social housing as a SGEI, which is, according to Decision 2005/842, to procure housing to economically disadvantaged persons, or to vulnerable social groups, who cannot afford and therefore cannot find housing under market conditions. Failure to clearly identify the target group will constitute a manifest error. The Dutch definition was held to be imprecise, because it provides for rental as a "priority to persons who have problems finding suitable housing", without any clearer definition of this target group of 'economically disadvantaged persons'.

Where the housing associations engaged in commercial activities in parallel with their social housing SGEI, something that they were entitled to do, it was important to avoid the risk that subsidies aimed at funding the social housing SGEI activities be used instead to finance ancillary activities that would then no longer be performed under market conditions. In such a case, these commercial activities would have to be operated using separate books.

The burden of proving that a form of State aid for social housing qualifies as an SGEI rests with the Member State, and not the European Commission. The CJEU pointed out that the case law consistently holds that the Member States have extensive leeway when it comes to defining what they consider as a SGEI, and as a result, the definition of these services by a Member State can only be challenged by the European Commission in case of a blatant error of judgement. But the prerogative of the Member States in this respect is not unlimited, and cannot be exercised arbitrarily for the sole purposes of enabling a particular sector to sidestep the application of the European competition rules. Member States are not dispensed from having to demonstrate, backed by suitable legal justification, that the scope and ambit of the SGEI is necessary and proportionate in relation to a genuine need for a public service. The precedents hold that the burden of proof to demonstrate that a SGEI is delimited sufficiently clearly rests upon the national authorities. Although the CJEU dismissed the Dutch petitioners' challenge in the present case, the ruling did not inasmuch approve a

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<sup>86</sup> Parliamentary questions, 6 June 2017, Answer given by Ms Vestager on behalf of the Commission, Question reference: E-001712/2017.

<sup>87</sup> Joined Cases T-202/10 RENV II and T-203/10 RENV II *Stichting Woonlinie and Others v European Commission* ECLI:EU:T:2018:795. I am indebted to Virginie Toussaint, legal adviser, Union sociale pour l'habitat – EU office – Brussels for providing the English translation of the judgment.

<sup>88</sup> I am grateful to Robin van Leijen, AEDES, The Netherlands for clarifying this issue.

restrictive definition of 'social housing', but rather came out against the inaccuracy of the Member State's definition of the public/general interest mission that was entrusted to the housing associations.

The CJEU ruled that the exemption from notification of the State subsidies mentioned by Decision EC 2005/842 as applicable to housing associations, for instance, required an accurate and clear definition of the public/general interest mission granted, and a link to the beneficiaries of this service, namely economically disadvantaged persons. Housing associations that procure housing to socially deprived persons or to vulnerable social groups who cannot afford, and therefore, cannot find housing under market conditions, must benefit from the exemption from notification, provided that the services that they provide can be construed as services of general economic interest by the Member State. Nevertheless, the CJEU confirmed the freedom of Member States to define social housing in keeping with the principles of necessity, proportionality and respect of the internal market. Indeed, although they do not have 'unlimited' powers in this respect, the criteria of the scope of the mission remain open, with the particular one chosen in the present case, namely an income ceiling, not being the only one that could be used by the national authorities.



**The scope and the organisation of SGEIs vary considerably from one Member State to another, depending on the history, the culture of public intervention, and the economic and social conditions prevailing in each Member State**

# Section 4

## SGEIs and Social and Affordable Housing

# SGEIs and Social and Affordable Housing

There is no universally accepted definition of social housing, which makes international comparisons difficult.<sup>89</sup> For instance, there are differences in the treatment of housing co-operatives, time-limited subsidies, and subsidies to private or semi-State suppliers. Across countries, there are also differences in terms of the groups served, ranging from, only the very poor, to the low-waged working class, to middle classes. There are also differences in the providers (private or public sector) and in the funding regimes. Using the national definitions of social housing as a component of total housing, social housing accounts for only 4 per cent of tenures in Hungary, but some 25 per cent in the Netherlands, with Ireland towards the lower end at 10 per cent.

A report to the European Parliament (2016) pointed out that there were a variety of national social housing policies across EU Member States and it was important to examine which qualify as SGEIs.<sup>90</sup> Due to the variety of policies, and while no common definition exists, three common elements could be identified:

- (1) a mission of general/public interest;
- (2) the objective of increasing the supply of affordable housing, by constructing, managing or purchasing social housing;
- (3) the definition of target groups in terms of socio-economic status or the presence of vulnerabilities.

Beyond these similarities, the term 'social housing' is not officially defined across Europe, but two models have been identified, mainly based on the allocation criteria. Universal approaches assume public responsibility for providing everyone with decent, affordable housing, while targeted approaches assume that social housing is only directed to those whose demand is not satisfied by the market. Among the targeted approaches, two sub-models exist: in the generalist model social housing is allocated to people with an income below a defined ceiling, whereas in the residual model social housing is focussed towards the most vulnerable groups.

Four general features of social housing can be identified that vary between different national systems<sup>91</sup>

- Tenure: Social housing is mainly provided for rent, but in some countries also for sale, intermediate tenure or shared ownership (i.e. to buy a share and pay a rent for the remainder).
- Provision: Different providers of social housing exist, ranging from authorities, non-profit associations and companies to cooperatives, for-profit developers and investors.
- Beneficiaries: In some countries social housing is directed to all citizens and high income ceilings should guarantee a mix among beneficiaries. In others, it is a targeted service and low income ceilings ensure that only the most vulnerable groups are eligible. Besides income ceilings, other criteria such as housing conditions, homelessness, unhealthy accommodation, over-occupation and forced cohabitation can play a role and prioritise certain target groups such as youths, elderly, disabled persons, families with many children, ethnic minorities or refugees.<sup>92</sup>
- Funding arrangements: The social housing sector mainly relies on public funds in some countries, while in others on credits raised on the finance market. Different sources are used for social housing projects, ranging from private loans, mortgages and private funds to public grants and loans. In addition, municipalities often contribute by offering land at reduced prices or even for free.<sup>93</sup>

The original definition for eligible State Aid for housing (the Monti-Kroes package 2005) restricted it to "housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions." This restrictive definition led to several

<sup>89</sup> Hansson, A.G., Lundgren, B. (2019), 'Defining Social Housing: A Discussion on the Suitable Criteria,' *Housing, Theory and Society*, 36:2, pp. 149-166.

<sup>90</sup> European Parliament (2016) *Research for REGI Committee – Services of General Interest in the Funding Period 2014–2020*. PE573.411. p. 29. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL\\_STU\(2016\)573411\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL_STU(2016)573411_EN.pdf)

<sup>91</sup> European Parliament, 2013, p. 10.

<sup>92</sup> Scanlon, K., Fernández Arrigoitia, M., Whitehead, C.M.E. (2015), *Social housing in Europe. European Policy Analysis*. available at: [http://eprints.lse.ac.uk/62938/1/Fernandez\\_Social%20housing%20in%20Europe\\_2015.pdf](http://eprints.lse.ac.uk/62938/1/Fernandez_Social%20housing%20in%20Europe_2015.pdf).

<sup>93</sup> European Parliament (2016) *Research for REGI Committee – Services of General Interest in the Funding Period 2014–2020*. PE573.411. p. 29/30. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL\\_STU\(2016\)573411\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL_STU(2016)573411_EN.pdf)

disputes between the European Commission, Member States and various interest groups. Some countries that had pursued a universalistic and inclusive model like Sweden or the Netherlands, consequently had to adjust their social housing policies. The conflict can thus be characterised as a conflict between two models: on the one hand a universalistic and inclusive model that promotes a social mix of tenants and aims at preventing segregation and stigmatisation; and on the other hand, a residualised and selective model following a liberal tradition, which assumes that housing is an economic sector open to the market and its players.<sup>94</sup>

Yet, according to the European Commissioner for Competition Policy, "social mixity and social cohesion are also acceptable public policy objectives for which State aid may be granted." She acknowledges that "the scope and organization of SGEI's differ significantly from one Member State to another, depending on the history, the culture of public intervention and the economic and social conditions prevailing in each Member State."<sup>95</sup>

This offers a wider scope for social housing as an SGEI than housing only for "disadvantaged citizens or socially less advantaged groups who due to solvency constraints are unable to obtain housing at market conditions." Indeed, the definition of eligibility for social housing in Decision No 642/2009 on Dutch housing corporations would have covered 43% of the population.

The Urban Agenda pointed out that in some areas up to 50% of the population experience housing disadvantage and the value of social housing interventions to prevent the formation of ghettos and uplift disadvantaged urban areas is currently not recognised in the SGEI Decision. Yet, social housing is the only sector in the SGEI Decision for which the European Commission mentions a target group. This uncertainty may limit the adoption of SGEI policies to deliver social and affordable housing to some groups and may hinder the promotion of social mix, diversity of habitat, housing tenure neutrality and sustainable urban development, according to the Urban Agenda Guidance Paper. Are young working households disadvantaged? Or senior people? Are school teacher, nurse and police officers, socially less advantaged? How does this relate to the tasks of social mixity, community services and urban renewal some housing organization have?<sup>96</sup>

*Housing Europe Observatory* Chair, Laurent Ghekire has pointed out that the public, cooperative and social housing sector needs clarity and legal certainty due to the specific nature of social housing services, and availability of financial means. He suggests that the so called 'Almunia package' was used to attack the sector in certain countries. The Netherlands have been requested to review the whole target group for social housing. Ghekire proposed, on behalf of *Housing Europe*, that a wider group is taken into account to reflect the diversity of housing needs, and the fact that effective social mix of income groups in social housing prevents ghettos.

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<sup>94</sup> Ibid., p. 30.

<sup>95</sup> Parliamentary questions, 6 June 2017, Answer given by Ms Vestager on behalf of the European Commission, Question reference: E-001712/2017.

<sup>96</sup> See EU Urban Agenda – Housing Partnership, *Guidance paper on EU regulation and public support for housing* (2017) available at: [https://ec.europa.eu/futurium/sites/futurium/files/housing\\_partnership\\_-\\_guidance\\_paper\\_on\\_eu\\_regulation\\_and\\_public\\_support\\_for\\_housing\\_03-2017.pdf](https://ec.europa.eu/futurium/sites/futurium/files/housing_partnership_-_guidance_paper_on_eu_regulation_and_public_support_for_housing_03-2017.pdf)



The test is related to the precision of the public interest mission, and the possibility of clearly identifying the target group

# Section 5

Cost Rental Housing as an SGEI

# Cost Rental Housing as an SGEI

In Ireland, there are major problems of access to affordable rented housing for many income groups. Eligibility for 'social housing support' is limited to certain income levels (see Table 1 – below). Households with incomes higher than those eligible for social housing, but too low to secure a mortgage, are forced into high cost long term private renting. Many of these are key workers. To address this group, over the years, some 'intermediate' tenures involving new forms of subsidised housing have emerged. These 'affordable' housing solutions took a variety of forms, such as 'shared ownership', 'affordable housing schemes' subsidised mortgages and other measures.<sup>97</sup> In all the discussions about State aid for affordable housing it is important to identify the general/public interest mission.

In the private rented sector in Ireland at least one-third of tenancies receive State subsidy, as a result of unaffordable rents.

## Public Interest Mission

Services of general economic interest (SGEI) form a major building block of the EU social market economy, and social and affordable housing is regarded as an SGEI.<sup>98</sup> However, the exceptions to EU rules on competition and other areas which SGEIs enjoy "can apply only if the services in question enjoy, in advance and by legal act, been attributed a mission of general interest."<sup>99</sup> Thus, it is necessary to make explicit at the national level, that a particular activity is categorised as an SGEI, in order to apply the rules on eligible State Aid.

The public interest mission in relation to social/affordable housing has been set out in successive policy statements and in legislation.<sup>100</sup> The *Programme for Government 2020* states:

### **Mission: Housing for All:**

We believe that everybody should have access to good quality housing to purchase or rent at an affordable price, built to a high standard and located close to essential services offering a high quality of life. We understand that provision of more affordable housing has a profound benefit socially and economically and believe the State has a fundamental role in enabling the delivery of new homes and ensuring that best use is made of existing stock....

### **Over the next five years we will:**

Put affordability at the heart of the housing system.

- Prioritise the increased supply of public, social and affordable homes....
- Improve the supply and affordability of rental accommodation and the security of tenure for renters...<sup>101</sup>

An overriding objective of our housing policy is to make homes more affordable.

<sup>97</sup> In the first decade of the twenty-first century over 26,000 housing units were provided through State action under the different 'affordable' housing schemes. See Lewis, E. (2019) *Social Housing Policy in Ireland – New Directions* (Dublin: IPA). P. 156.

<sup>98</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) (Text with EEA relevance) 2012/21/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>; Joined Cases C-197/11 and C-203/11, *Libert and Others* [2013].

<sup>99</sup> Communication from the Commission – Implementing the Community Lisbon programme – Social services of general interest in the European Union, 26 April 2006, COM(2006) 177 final.

<sup>100</sup> <https://www.gov.ie/en/policy/aa076a-housing/>

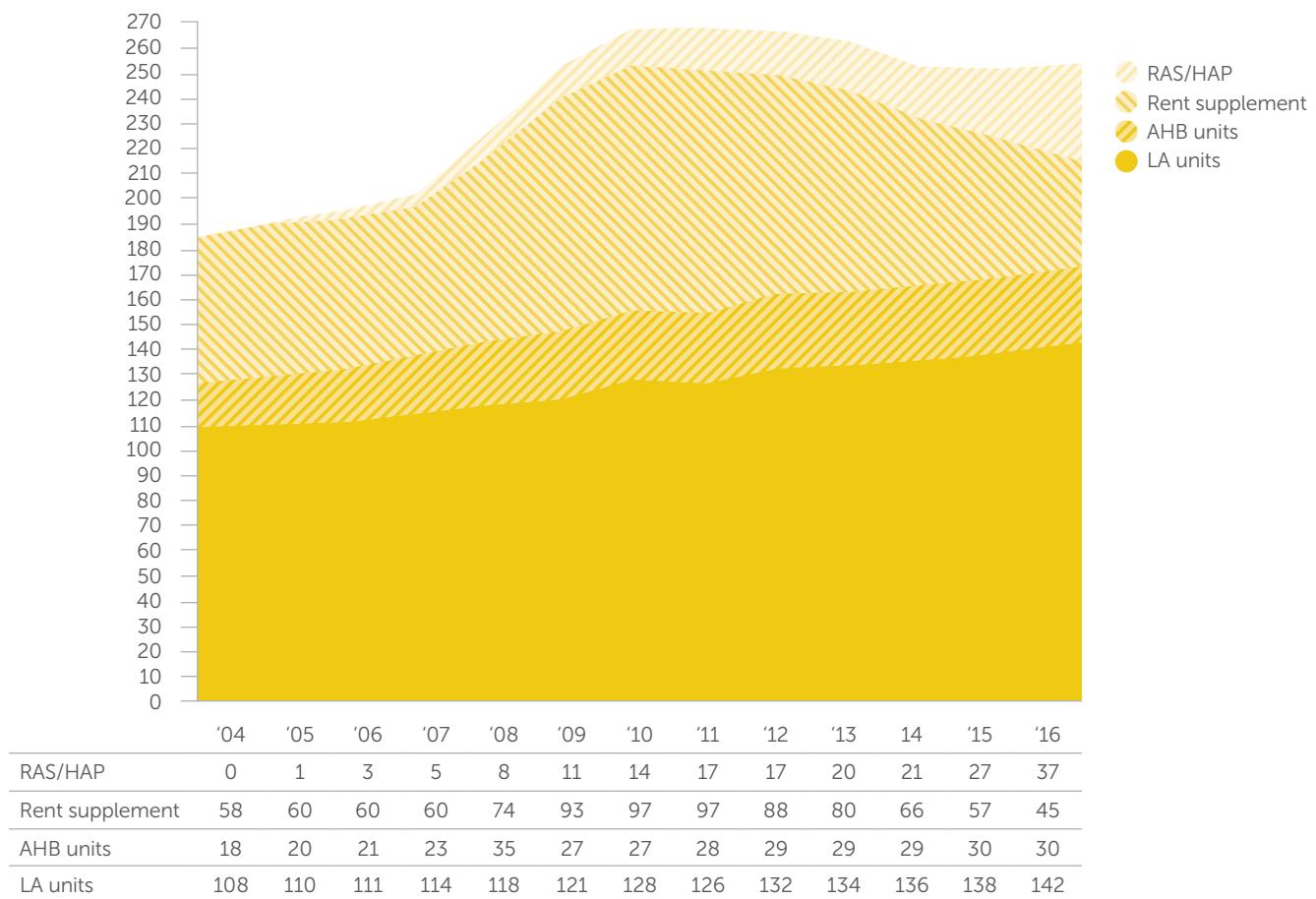
<sup>101</sup> Programme for Government 2020 p. 60. *Housing for All*, Available at: <https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf>

The Housing (Miscellaneous Provisions) Act 2009 (HMP) and other legislation provides the legal basis for a range of housing supports to be provided, including:<sup>102</sup>

- (i) social housing support;
- (ii) affordable housing;
- (iii) the granting of shared ownership leases;
- (iv) the sale, or consent to the sale, of its dwellings;
- (v) subsidies for affordable housing;
- (vi) loans for Traveller accommodation;
- (vii) grants for works of improvement or adaptation to houses;
- (viii) grants and other assistance for the provision of new houses or improvement works to houses;
- (ix) homelessness services;
- (x) the provision of sites for persons to build their own homes;
- (xi) assistance for resettlement of homeless persons;
- (xii) regeneration and refurbishment of local authority dwellings.

The main forms of social housing support for low income households involve the allocation of local authority tenancies, local authority or AHB long term leased dwellings, medium or long term financial support for tenants in the private rented sector (RAS and HAP) and short term financial support for tenants in the private rented sector (Rent Supplement) – see Appendix 1.

### **Chart 1. Estimated Social Housing Units, (broadly defined) provided between 2004–2016 (in 000 units)**



<sup>102</sup> See also Housing (Miscellaneous Provisions) Act 1992 and Housing Act 1966.

<sup>103</sup> Corrigan, E., & Watson, D. (2018). *Social Housing in the Irish Housing Market*. ESRI Working Paper, p. 9. <https://www.esri.ie/publications/social-housing-in-the-irish-housing-market>

# Income Eligibility for Social Housing Support

Eligibility for 'social housing support' is based on the Regulations issued under the Housing (Miscellaneous Provisions) Act 2009. The Social Housing Assessment Regulations, 2011, as amended 2 June 2016<sup>104</sup> and 2021 set out the maximum income levels, based on net income for each household type, based on three local authority Area Bands – largely related to the most expensive and least expensive areas (see Appendix 2).

To be eligible for social housing support, households must have an average net income from the 12 months preceding the application for social housing support, of less than €35,000 in Band 1; €30,000 in Band 2; or €25,000 in Band 3. Net income means that income tax, Universal Social Charge, PRSI and Additional Voluntary Contributions are deducted from the relevant assessable gross income. Income that is assessable includes income from employment, including overtime, bonuses and commissions (up to a limit), income from self-employment, maintenance payments received, (subject to the criteria set out), other similar sources of income, pensions and social insurance and social assistance payments, allowances and benefits. Some payments by the Department of Social Protection such as Child Benefit, Carers Benefit, Mobility Allowance and Fuel Allowance are disregarded.<sup>105</sup>

**Table 1. Social Housing Assessment Regulations – Eligible Income Levels**

	Single person household	2 adults, no children	1 adult, 1 child	1 adult, 2 children	2 adults, 1 child	2 adults, 2 children	2 adults, 3 children	2 adults, 4 or more children	3 adults, 4 or more children
Band 1 €35,000	€35,000	€36,750	€35,875	€36,750	€37,625	€38,500	€39,375	€40,250	€42,000
Band 1 €30,000	€30,000	€31,500	€30,750	€31,500	€32,250	€33,000	€33,750	€34,500	€36,000
Band 1 €25,000	€25,000	€26,250	€25,625	€26,250	€26,875	€27,500	€28,125	€28,750	€30,000

These income bands are expressed in terms of a maximum income threshold for a single-person household, with an allowance of 5% for each additional adult household member, subject to a maximum allowance under this category of 10% and separately a 2.5% allowance for each child subject to no maximum.

These limits are the current maximum thresholds set by the Minister in Regulations, although a local authority may set a lower limit if appropriate. The income of all persons in the household over 18 years is included in the calculation.<sup>106</sup>

<sup>104</sup> S.I. No. 288/2016. [https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/table\\_with\\_2016\\_income\\_limits.pdf](https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/table_with_2016_income_limits.pdf)

<sup>105</sup> See Guidance Notes on the Household Means Policy (March 2021. Circular 11 of 2021 relating to the Social Housing Assessment (Amendment) Regulations 2021 (S.I. 116 of 2021).

<sup>106</sup> S.I. No. 116/2021 – Social Housing Assessment (Amendment) Regulations 2021.



**Housing is affordable if the occupant's remaining budget is at least sufficient to cover other essential expenditure for a life in dignity**

# Measuring Affordability<sup>107</sup>

While housing affordability can be measured by different metrics, the affordability index for tenants, measured by the rental price to income ratio was 22% above pre-crisis levels by mid-2019, and has since worsened.<sup>108</sup> Between 2000 and 2018 Irish rents have become less affordable relative to all other OECD countries.<sup>109</sup> Rents in Dublin have increased by 75% since 2010.

While there is no official, legal or statutory definition of the term 'affordable housing' or 'housing affordability' which is universally accepted across EU Member States, housing affordability is usually operationalised by policy makers on the assumption that households should not be required to spend more than 30–40% of their net income on housing.<sup>110</sup> But even this may be high, and a European Parliament report in 2021 suggests that housing is affordable if the occupant's remaining budget is at least sufficient to cover other essential expenditure for a life in dignity. There are proposals to refine the EU House Price Index Indicator and to set the threshold for housing costs overburden at around a quarter of the disposable income of a household.<sup>111</sup>

The European Investment Bank (EIB) defines housing affordability as "the 'gap' between social housing (the sector for low-income persons, typically eligible for housing allowances) and 'market rate housing'. This gap is identified through comprehensive local housing market analysis.<sup>112</sup> In line with the standards set out in UNCESCR General Comment No. 4 on the right to housing, other definitions of affordability define housing as affordable if it leaves sufficient income (according to a specific, national definition) for other expenses (such as food, health and education).<sup>113</sup> *Housing Europe* takes into account a range of affordable housing factors, including the impact of environmental policy and legislation (standards) on the cost of delivery of affordable housing, the effects of housing policy and practice on social exclusion and financial mechanisms that enable the delivery of affordable housing.

Of course, this 30% of net income metric is less relevant in the case of those with higher incomes, and a refinement of the metric is to limit it to those in the lower 40% of incomes.<sup>114</sup>

In Ireland, affordable housing is legally defined in the Housing (Miscellaneous Provisions) Act 2009, as housing where costs do not exceed 35% of net household income.<sup>115</sup> While this is lower than Eurostat standard of 'housing costs overburden' at 40% of net income,<sup>116</sup> it is higher than the internationally standard of housing affordability, based on housing costs within 30% of the

<sup>107</sup> Common metrics to measure housing affordability include price-to-income ratios, housing-expenditure-to-income ratios, residual income measures, housing quality measures, and subjective indicators of housing affordability. See OECD (2021), 'Building for a better tomorrow: Policies to make housing more affordable', Employment, Labour and Social Affairs Policy Briefs, OECD, Paris, <http://oe.cd/affordable-housing-2021>. See Appendix 6 of this Report for the advantages and limitations of these metrics.

<sup>108</sup> See Doval Tedin, N. J. & Faubert, V. (2020) *Housing Affordability in Ireland*, European Economy – Economic Brief 061, December 2020. Luxembourg European Commission. [https://ec.europa.eu/info/sites/info/files/economy-finance/eb061\\_en.pdf](https://ec.europa.eu/info/sites/info/files/economy-finance/eb061_en.pdf),

<sup>109</sup> Kennedy, G. & Myers, S. Economic Stability Note: An overview of the Irish housing market Vol. 2019, No. 16. [https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-16-an-overview-of-the-irish-housing-market-\(kennedy-and-myers\).pdf?sfvrsn=4](https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-16-an-overview-of-the-irish-housing-market-(kennedy-and-myers).pdf?sfvrsn=4).

<sup>110</sup> Colini, L. (2016), *EU Urban Agenda: The challenge of 'affordable housing' in Europe*, available at: <https://ec.europa.eu/futurium/en/housing/eu-urban-agenda-challenge-affordable-housing-europe-laura-colini-urbact-expert>; Quigley, J. M. and Raphael, S. (2004) 'Is Housing Unaffordable? Why isn't it More Affordable?', *The Journal of Economic Perspectives*, Vol. 18, No. 1, pp. 191–214; Bramley, G., (2012). 'Affordability, Poverty and Housing Need: Triangulating Measures and Standards', *Journal of Housing and the Built Environment*, Vol. 27, No. 2, pp. 133–151.

<sup>111</sup> See Report to European Parliament January 2021 in Appendix 3 – extract – "35. Stresses the need to refine the House Price Index indicator; considers that housing is affordable if the occupant's remaining budget is at least sufficient to cover other essential expenditure for a life in dignity; stresses the need to develop a comprehensive definition of housing affordability at EU level taking into account a broad range of indicators such as eviction and poverty rates; points out that the current reference threshold for the housing cost overburden rate of 40% of the disposable income of a household insufficiently represents the number of households that is overburdened by housing costs; calls for a reassessment of the reference threshold, and invites Eurostat to produce a broader set of data on housing costs expenditure of households from 25% to 40% of disposable income at 5% intervals."

<sup>112</sup> EIB, *Social and Affordable Housing with the EIB: Advanced Finance for a Basic Need*, 17 September 2019, available at: [https://www.eib.org/attachments/thematic/social\\_and\\_affordable\\_housing\\_en.pdf](https://www.eib.org/attachments/thematic/social_and_affordable_housing_en.pdf).

<sup>113</sup> Rosenfeld, O. (2017), *Analysis of interpretations of the term affordable housing in the EU Urban Agenda Partnership for Housing*, a briefing note prepared for DG REGIO and the EU Urban Agenda Partnership for Housing, European Commission, DG REGIO, Brussels: [https://ec.europa.eu/futurium/en/system/files/gd/briefing\\_note\\_2017\\_interpreting\\_the\\_term\\_affordable\\_housing\\_-\\_march\\_2017.pdf](https://ec.europa.eu/futurium/en/system/files/gd/briefing_note_2017_interpreting_the_term_affordable_housing_-_march_2017.pdf).

<sup>114</sup> Baker, E., K. Mason and R. Bentley, 2015. 'Measuring Housing Affordability: A Longitudinal Approach', *Urban Policy and Research*, Vol. 33, No. 3, pp. 275–290.

<sup>115</sup> Section 84(2)(b). 'Any other assets of the household which could be used to defray all or any part of the cost of providing accommodation to meet the accommodation needs of the household shall be taken into account' – Section 84(3).

<sup>116</sup> According to Eurostat the housing cost overburden rate is the percentage of the population living in households where the total housing costs ('net' of housing allowances) represent more than 40 % of disposable income ('net' of housing allowances). See <https://ec.europa.eu/eurostat/en/web/products-datasets/-/TESSI162>

occupant household net income. One detailed and authoritative approach, based on analysis of SILC data between 2006 and 2016, shows that in Ireland the 30% of net income rule could effectively be applied to the lowest 50% of net incomes, to get a realistic picture of affordability in the private rented sector.<sup>117</sup>

At the other end of the spectrum, the Central Bank of Ireland report on new mortgage lending shows that the average incomes of those first time buyers granted mortgages in 2019 was €75,132 p.a. with an average mortgage of €228,996<sup>118</sup> This gives an indication of the levels of income required to participate in the home ownership market, which is really confined to those with the very highest incomes.<sup>119</sup>

The net (maximum) income levels for eligibility for social housing (2016), set out in three geographical bands, were €35,000 p.a. or €673.31 per week for a single person in the most expensive areas, up to €39,375 – €757.21 for a household with two adults and three children.<sup>120</sup>

The lack of affordability of private rented housing in Ireland, which has worsened for over the past eight years, can be seen as market failure.

## Market Failure

Two elements are required for a Member State to make lawful use of SGEIs: economic activity and market failure. The SGEI must consist in an economic activity, and European Commission Decisions since 2001 have held that providing rented housing in Ireland is such an economic activity. However, in order to commission an SGEI, a Member State must demonstrate that market forces have failed to meet a demand that, in its opinion, should be met as a matter of public interest, i.e. the existence of a market failure. While the concept of market failure has not yet been precisely defined in the European case law, it includes situations in which markets do not deliver goods or services at desirable (or affordable) levels, not only from an efficiency perspective (market failure narrowly defined), but also from an equity or social perspective (market failure broadly defined).

The essential characteristic of an undertaking providing an SGEI is that something is supplied whose provision serves the public good but which would not be supplied (or would only be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the free market in the absence of public intervention (the so-called 'market failure test'...<sup>121</sup>

It is noteworthy (but unsurprising) that the scope and organisation of SGEIs vary considerably from one Member State to another, depending on the history and culture of public intervention in each Member State. SGEIs are therefore very diverse. Users' needs and preferences will differ with the geographical, social and cultural surroundings. It is therefore (sensibly) for the public authorities in each Member State to determine the nature and scope of what they categorise as a service of general interest.<sup>122</sup>

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<sup>117</sup> See Corrigan, E., Foley, D., McQuinn, K., O'Toole, C. & Slaymaker, R. Exploring Affordability in the Irish Housing Market, *The Economic and Social Review*, Vol. 50, No. 1, Spring 2019, pp. 119–157 at p. 151. See <https://www.budgeting.ie/> The Vincentian Minimum Essential Standard of Living (MESL) measure allocates spending for the following: food, clothing, personal care, health, household goods, household services, communications, social inclusion, education, transport, household energy, personal costs, insurance, savings and contingencies. This measure excludes childcare and the effects of secondary benefits.

<sup>118</sup> Central Bank New Mortgage Lending Data 2020. <https://www.centralbank.ie/financial-system/financial-stability/macro-prudential-policy/mortgage-measures/new-mortgage-lending-data-and-commentary>

<sup>119</sup> Of course, this comparison only applies to new purchasers and the overall position of people in the top Income Deciles may be impacted by inheritances and other pathway factors. The access structure is path-dependent – effects of inheritance – subventions from parents – sites for building – variation in incomes, and of course, individual decisions to rent or buy also impacted on expectations of price rises, and housing as an asset, as well as meeting social/personal needs.

<sup>120</sup> See Appendix 2.

<sup>121</sup> See Anthony M. Collins & Martín Martínez Navarro, 'Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango' *Journal of European Competition Law & Practice*, 6 January 2021.

<sup>122</sup> The essential characteristic of an undertaking providing an SGEI is that something is supplied whose provision serves the public good, but which would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the free market in the absence of public intervention, (the so-called 'market failure test'). See Opinion of Advocate General Sharpston in Case C-413/15 *Elaine Farrell v Alan Whitty and Others*, EU:C:2017:492, paragraph 90.

It is widely acknowledged that private sector rents are unaffordable, except for a small proportion of the population, and this constitutes a market failure. In the Government Report Rebuilding Ireland – Strategy for the Rented Sector (2016) the Minister for Housing at the time stated that critical intervention (setting up of Rent Pressure Zones) would be necessary to alleviate conditions in areas where market failure in rented housing was particularly acute. Since then regular Reports from the Residential Tenancies Board have tracked rent increases across Ireland through the RTB Rent Index. This shows that Regional Standardised Average Rents in Ireland have risen between Q4 2010 and Q4 2019 from €979 to €1,716 – an increase of 75%, and from €626 per month to €922 per month outside Dublin – an increase of 47%. According to Eurostat, rents increased in Ireland by 62% between 2010 and 2020 the third highest rate in the EU.

Around one-third of all private sector tenants receive State support in order for the households to be able to afford their rents.<sup>123</sup> These figures exclude dwellings let by local authorities, as well as properties which are managed by AHBs. The State has been described as “a significant funder of activity in the private rental sector, with over one half of all rents received by private landlords coming from Rent Supplement, the Rental Accommodation Scheme and other schemes, at an annual cost to the Exchequer of over €500m.”<sup>124</sup> The *Final Report of the Oireachtas Committee on Housing and Homelessness* in 2016 stated that “[A] dysfunctional housing market (unaffordable rents, unaffordable purchasing prices) increases the need for social housing and frustrates efforts to accommodate people in the private rented sector.”<sup>125</sup>

The Summary of Social Housing Assessments (2020) by the Housing Agency found that there were 61,880 households assessed by Local Authorities as qualified for housing support as in November 2020.<sup>126</sup> Some 28,194 or 45.6% of these households live in the private rented sector (with or without Rent Supplement), making up almost half of those requiring State social housing support.

It is widely acknowledged that private sector rents are unaffordable, except for a small proportion of the population, and this constitutes a market failure.

**Table 2. Income Deciles and Affordable Rents<sup>128</sup>**

2019	Average net disposable income per week	Weekly affordable rent at 35% of net income
Income Decile 1	€213.05	€74.57
Income Decile 2	€284.34	€99.52
Income Decile 3	€330.51	€115.68
Income Decile 4	€374.70	€131.15
Income Decile 5	€428.91	€150.06
Income Decile 6	€491.00	€171.85
Income Decile 7	€556.81	€194.88
Income Decile 8	€641.76	€224.62
Income Decile 9	€767.18	€268.51
Income Decile 10	€1,266.16	€443.16

<sup>123</sup> DKM Economic Consultants (2014) *Future of the Private Rented Sector* (prepared for the Housing Agency on behalf of the Private Residential Tenancies Board). Available at [http://dkm.ie/en/news/dkm\\_reports\\_on\\_private\\_rented\\_sector\\_published1](http://dkm.ie/en/news/dkm_reports_on_private_rented_sector_published1)

<sup>124</sup> Department of the Environment, Community and Local Government (2014), *Social Housing Strategy 2020: Support, Supply and Reform* p.x-xi. Available at [http://www.environ.ie/sites/default/files/publications/files/social\\_strategy\\_document\\_2014112\\_6.pdf](http://www.environ.ie/sites/default/files/publications/files/social_strategy_document_2014112_6.pdf)

<sup>125</sup> [https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee\\_on\\_housing\\_and\\_homelessness/reports/2016/2016-06-16\\_final-report-june-2016\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee_on_housing_and_homelessness/reports/2016/2016-06-16_final-report-june-2016_en.pdf)

<sup>126</sup> <https://www.gov.ie/en/publication/970ea-summary-of-social-housing-assessments-2020-key-findings/>

<sup>127</sup> Daft.ie Housing Market Report, July 2020 available at <https://www.daft.ie/report/2020-july-housingmarket-draftreport.pdf>

<sup>128</sup> Based on the definition set out in the Section 84 of the Housing (Miscellaneous Provisions) Act 2009.

According to the RTB Rent Index for QTR 4 2019 (which corresponds with the Income Deciles set out by the CSO), average rents for as follows for apartments:

**Table 3. RTB Rent Index Standardised Average Rent Q4 – 2019 – Apartments**

	1 bedroom	2 bedroom	3+ bedrooms
National	1158	1298	1425
Dublin County	1434	1777	2127
GDA	961	1213	1284
Cork	891	1148	1246
Galway	929	1049	1233
Limerick	705	937	1038
RoC	588	746	816

This means that a one –bedroom apartment in Dublin City or Greater Dublin Area (GDA) had a monthly rent of €1,434 (#331 per week) or €961 (€222 per week), respectively, which would be only affordable for those in Income Deciles 10 and 8 respectively. The picture for Galway City and Cork Cities with weekly average rents for a one-bedroomed unit costing €214 and €206 per week respectively, again means that only those in Income Deciles 8-10 could afford to access this type of housing. For the rest of the country (RoC) weekly average rents €136 are affordable for those in Income Deciles 5-10.

The situation for larger properties is the same. For three bedrooned plus apartments the weekly rents for Dublin City and the Greater Dublin Area were €491 and €296 respectively, affordable only for those in Income Decile 10. Similarly, the figures for Galway and Cork Cities, with weekly rents at €285 and €288 respectively, show that these were only affordable for those in Income Decile 10. For the rest of the country (RoC) these larger units with a weekly average rent of €188 were affordable to those in Income Deciles 7-10.

All of this shows the extent of market failure in the private rented sector.

Since access to mortgage finance is largely confined to the top Income Deciles, and affordable (at 35% of net income) private sector rents were out of reach for Income Deciles 1–8, in Dublin, this leaves a significant number who require social housing support in line with the Housing (Miscellaneous Provisions) Act 2009.

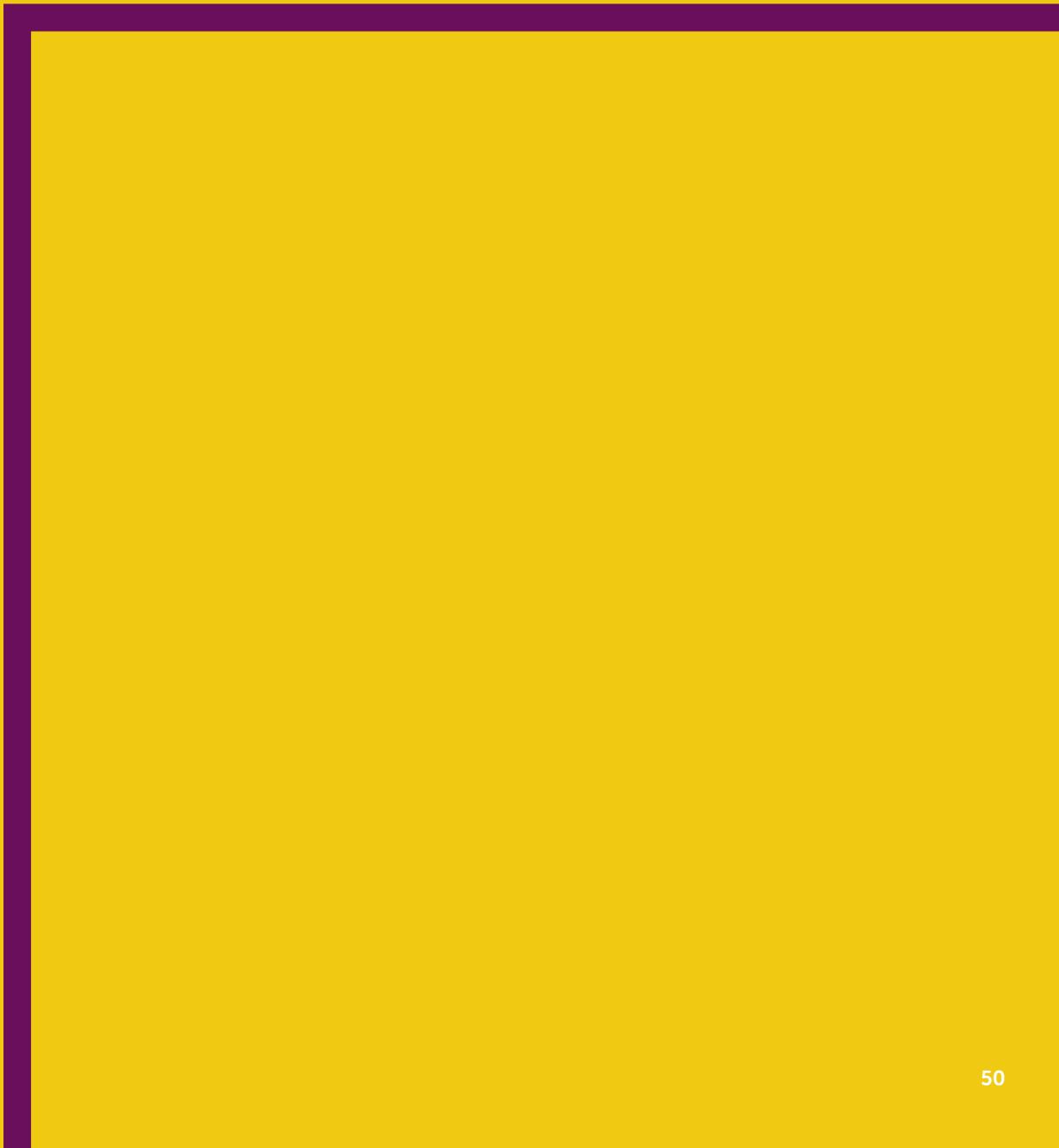
Eligibility for social housing support in Band A – the main cities, is confined to Income Deciles 1–4 for single person households, and for households with one or two adults and two children. For Band 3 social housing support is confined to Income Deciles 1–3/4 for single person households, and households with two children.

According to these figures affordable rents (at 35% of net income) in average private housing in Dublin in 2019/2020 were out of reach of Income Deciles 1–9.<sup>129</sup> In Galway, those in Income Deciles 1–8 could not afford private sector rents. In the rest of the country, those in Income Deciles 1–7 could not access affordable housing in the private rented sector. This demonstrates that there is a significant requirement for increased affordable rental housing to cater for all those excluded from the private rented market, including people with disabilities.

<sup>129</sup> CSO, Average weekly household income by net disposable household income deciles and composition of net household disposable income, 2019. Table 2.6. <https://www.cso.ie/en/releasesandpublications/ep/p-silc/surveyonincomeandlivingconditionssilc2019/income/>

# Section 6

## The Irish Cost Rental Model



## The Irish Cost Rental Model

There is a commitment to cost-rental housing in the *Programme for Government 2020*.<sup>130</sup>

Improving the standards, security and affordability for renters is a priority for the Government.  
To achieve this, we will:

- Develop a cost rental model for the delivery of housing that creates affordability for tenants and a sustainable model for the construction and management of homes. In doing this, we will be informed by international experience of the delivery of cost rental, such as the 'Vienna Model'.<sup>131</sup>

The term 'cost rental' is defined by Kemeny as 'all rental housing, irrespective of ownership, the rents of which cover only actual incurred costs of a stock of dwellings'.<sup>132</sup> Cost rental housing is based on the principle of 'maturation' – i.e. the loans on earlier stock will have reduced over time, or have been paid off, and the costs of new developments can be pooled (cross-subsidised) over the total stock (or particular parts of it),<sup>133</sup> resulting in a small increase in rents overall.<sup>134</sup> The predominant source of finance can be secured through private borrowing, but the equity in, and security of charges on, the overall stock may result in lower borrowing costs. There may also be an element of public subsidy, or State Aid, free or cheap land, public guarantees on borrowing, interest subsidies, and housing benefits for tenants, in order to keep the rent levels at affordable levels. But maturation is the key in facilitating lower pooled rents, which still must cover management and maintenance costs. To make cost rental work and be truly affordable it must be provided on a larger and long term scale. Threshold points out that to ensure that State funds are paid toward a State asset, these developments cannot be sold in the future.<sup>135</sup> Tenant purchase schemes would fatally undermine the maturation element of the schemes.

Kemeny distinguishes rents created in this way as 'cost rental' (which also means non-profit rental), as opposed to 'for-profit rental', where landlords charge the maximum rent possible, even though their long term loans are diminished or matured over time, and servicing costs are reducing.

In Ireland, 'cost-rental schemes' can be understood as rented housing at affordable rents for those who may be above the income threshold for social housing, but yet are unable to rent affordable homes in the private rental market.

**Cost rental housing is based on the principle of 'maturation' of loans, resulting in a small increase in rents overall from new higher cost developments**

<sup>130</sup> See Appendix 6.

<sup>131</sup> *Programme for Government* (2020) p. 62. <https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf>

<sup>132</sup> Kemeny, J. (1992), *Housing and Social Theory*, (London: Routledge). p. 34.

<sup>133</sup> See NESC (2014) *Social Housing at the Crossroads: Possibilities for Investment, Provision and Cost Rental*. (Dublin: NES) p. 26; NERI Research in Brief, May 2018 (no. 55) *Cost Rental Housing – A Model for Ireland?* Paul Goldrick-Kelly.

<sup>134</sup> The NESC (2014) *Social Housing at the Crossroads: Possibilities for Investment, Provision and Cost Rental*. (Dublin: NES) at chapter 5 points to the benefits of a managed supply of cost-rental housing with public costs and subsidies at a manageable level rather than the need for demand side subsidies through long term leasing at market rents.

<sup>135</sup> See Threshold – *Saving Homes – Pre-budget Submission 2020*, p. 33. [https://www.threshold.ie/assets/files/pdf/threshold\\_pre\\_budget\\_submission\\_2020\\_saving\\_homes\\_web\\_version.pdf?issuust=ignore](https://www.threshold.ie/assets/files/pdf/threshold_pre_budget_submission_2020_saving_homes_web_version.pdf?issuust=ignore)

# Affordable Housing Bill 2020

The Affordable Housing Bill 2020 sets out a new legislative base of cost rental in Ireland.<sup>136</sup> This would define a ‘cost rental tenancy’ as:

- (a) where the rent is set by the landlord or provider at a cost-covering level, as may be prescribed in regulations, but in any case so as to include:
  - (i) delivery/capital development costs;
  - (ii) financing costs, including debt finance costs, interest charges and equity returns;
  - (iii) management costs of the properties; and
  - (iv) maintenance costs, including cyclical maintenance, life-cycling and sinking fund costs;
- (b) that meets any additional requirements as may be prescribed in regulations, and
- (c) is designated by the Minister by order under this section as a Cost Rental tenancy.<sup>137</sup>

There would be annual rent reviews with increases capped at the level of consumer inflation indices, but subject to the rules on Rent Pressure Zones.<sup>138</sup>

The proposed cost rental scheme is targeted at moderate-income households who are ineligible for, or who otherwise choose not to avail of social housing supports. It is not envisaged as part of the ‘social housing support’ provided under the 2009 Housing (Miscellaneous Provisions) Act 2009 and not subject to the provisions of the Housing Acts.<sup>139</sup> Instead, it is closer to a long term institutional rental model.

Cost Rental tenancies will be covered by the standard terms of the Residential Tenancies Act 2004–2020, excluding the provisions which allow a landlord to end the tenancy for reasons of selling, refurbishing, changing the use or requiring the unit for relatives. Regulations will prescribe the eligibility criteria in terms of maximum/minimum household income, household composition and size, specific housing development and/or specific unit, etc.<sup>140</sup> However, Housing Assistance Payment recipients will not be eligible, although a Cost Rental tenant may become eligible for HAP after six months occupancy should they experience income loss and will still be able to remain in the tenancy. Subletting by the tenant will be prohibited.

## AHBs are Central to the Success of Cost Rental

Irish AHBs are expected to play a key role in the development of the cost rental model in Ireland – a role for which they are particularly suited. The *Initial Call for Proposals for Cost Rental Equity Loan Scheme* (CREL)<sup>141</sup> outlined the nature of the scheme, to be managed by the Housing Agency, with €35 million being made available by the Government in the form of long-term loans at a preferential rate. Schemes will comprise a minimum of 20 units, in Dublin, Cork, Galway, Limerick and Waterford cities and suburbs, as well as in urban areas of Kildare, Louth, Meath and Wicklow with a population in excess of 14,500. The long term funding is intended to cover up to 30% of the development or acquisition cost to AHBs for new cost rental homes, with a further €100 million of loans from the HFA. This will allow cost-covering rents to be set at 25% or more below market levels. The Government has announced that this fund will support AHBs to deliver approximately 350 cost rental homes in 2022 prior to delivery of further homes by the Land Development Agency.

<sup>136</sup> See file:///Users/padraickenna/Downloads/119753\_2b717580-2160-41e0-bd84-5519b817217e%20(3).pdf. This would insert a new Part 5A into the Housing (Miscellaneous Provisions) Act 2009 – The 2009 Act

<sup>137</sup> Proposed new Section 96C in the 2009 Act.

<sup>138</sup> Proposed new Section 96D in the 2009 Act.

<sup>139</sup> Proposed new Section 96F of the 2009 Act.

<sup>140</sup> Proposed new Section 96E of the 2009 Act.

<sup>141</sup> 14/12/2020 – [https://merriionstreet.ie/en/news-room/releases/minister\\_obrien\\_announces\\_call\\_for\\_proposals\\_to\\_ahbs\\_for\\_delivery\\_of\\_350\\_cost\\_rental\\_homes\\_in\\_2021.html](https://merriionstreet.ie/en/news-room/releases/minister_obrien_announces_call_for_proposals_to_ahbs_for_delivery_of_350_cost_rental_homes_in_2021.html)

The tenants will be chosen from applicants for particular schemes advertised rather than through the social housing support waiting lists. The Housing (Standards for Rented Houses) Regulations 2019<sup>142</sup> will apply, but with white goods (fridges, washing machines etc), floor finishes, fitted kitchens, wardrobes and blinds and window coverings supplied.

Rents will be set to cover management, maintenance and life cycle costings. Management costs cover staffing/organisational day to day management costs, such as rent collection, tenancy issues, water, local property tax, RTB registration costs and insurance. Maintenance costs cover day to day response maintenance issues, as well as long term planned maintenance (funded from a sinking fund). Life cycle costings approaches for each scheme include life cycle future proofing replacement costs of the buildings and components.

In any discussion of affordable cost rental housing the nature and public interest mission of the provider is a major issue. This is particularly important for the security of tenants, long term affordability and the need to protect and preserve State investment. Housing providers who can sell their ‘investment’, close down, or cut back housing services, or who are not publicly accountable, constitute an unacceptable risk.

Some private for-profit entities offer to provide ‘affordable’ homes, often in situations of a transfer of State land, or existing housing stock, at below market value. The business model is to manage homes as real estate assets, rather than housing as a home, which is secure, affordable and of a high standard. The extraction of profits is the primary objective, and tenant ‘quality’ is often defined in terms of income levels which will impact on maximum rent revenues. The ultimate ownership and control of the entity may be obscure, and not subject to the public interest, but driven in terms of assets, liquidity and revenue. Significant tax relief could constitute a major hidden State subsidy to these entities.<sup>143</sup> There is a clear conflict between promoting shareholder values and the long-term interests of tenants of secure, well managed and maintained affordable housing. Julie Lawson has described this:

Global investors, such as private equity firms, have no long-term commitment to addressing local housing needs, building community partnerships or neighbourhood improvements. They are short term players, whose focus is the extraction of surplus revenue from managing and selling housing assets for the benefit of trust managers and REIT unit holders.<sup>144</sup>

Approved Housing Bodies (AHBs) on the other hand have long term commitments to their housing.<sup>145</sup> The emphasis on the non-profit nature of Irish AHBs ensures that there is no conflict of interest between shareholders and the interest of tenants.

Legislation in the Housing (Regulation of Approved Housing Bodies) Act 2019<sup>146</sup> ensures that Irish AHBs are highly regulated through the Approved Housing Bodies Regulatory Authority,<sup>147</sup> and must comply with quite rigorous governance standards –ensuring that Boards provide effective leadership and direction to deliver good outcomes; providing clarity around roles and responsibilities in governance structures and arrangements; building and strengthening Board effectiveness; conducting affairs with honesty and integrity, and with a commitment to openness and accountability; ensuring effective financial and risk management; complying with legal and statutory requirement.<sup>148</sup> Performance standards are monitored for the delivery of tenancies, housing and asset

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<sup>142</sup> S.I. No 137/2019.

<sup>143</sup> See Joe Brennan ‘Overseas funds paid 1.37% tax on IREF income after clampdown’ *The Irish Times*, 16 January 2020. The €32.5 million tax haul from so-called Irish real-estate funds (IREFs) equated to 0.24 per cent of the €13.5 billion of assets in such vehicles, according to an Irish Times analysis of figures obtained from the Revenue Commissioners. IREFs recorded €2.36 billion of income from property sources in the 18 months to June 2018, according to the document.

<sup>144</sup> See Lawson, J. & Ruonavaara, H. (2020) *Land policy for affordable and inclusive housing an international review*, p.55. <https://smartland.fi/wp-content/uploads/Land-policy-for-affordable-and-inclusive-housing-an-international-review.pdf>

<sup>145</sup> AHB rules require that their assets may be applied solely to their charitable objectives. See Commission Decision on State Aid N89/2004 paras 32-34.

<sup>146</sup> <https://www.oireachtas.ie/en/bills/bill/2019/61/>

<sup>147</sup> <https://www.gov.ie/en/press-release/bdb32-minister-obrien-announces-establishment-of-approved-housing-bodies-regulatory-authority-and-appointment-of-board-members/>

<sup>148</sup> The Governance Standard and Assessment Framework for the Regulation of Approved Housing Bodies in Ireland. [https://www.housingagency.ie/sites/default/files/2019-05/GOVERNANCE-STANDARD-AHB-SECTOR-2017-ONLINE\\_0.pdf](https://www.housingagency.ie/sites/default/files/2019-05/GOVERNANCE-STANDARD-AHB-SECTOR-2017-ONLINE_0.pdf)

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management.<sup>149</sup> This includes Stock Condition Surveys and Sinking Fund Provisions for long term maintenance issues, something which for-profit property companies are not obliged to do. Significant and responsible financial standards must be achieved.<sup>150</sup>

The ICSH was established in 1982 and is the national social housing federation of non-profit voluntary and other national housing associations in Ireland.<sup>151</sup> The Federation represents approximately 270 member organisations that manage 40,000 homes and house 90,000 people. In 2019, AHBs delivered some 4,127 homes for people on social housing waiting lists. The work of the ICSH is supported by funding from Department of Housing, Planning and Local Government through the Scheme to Support National organisations.<sup>152</sup>

AHBs are entrusted by local housing authorities to provide accommodation, which is in line with their non-profit Articles of Association and charitable status. This has been accepted by the European Commission as meeting the criteria for social housing SGEIs, and does not require notification. Indeed, the CSO and Eurostat.

... considers that [Irish] AHBs have a non-market nature due to their principal aims and other existing provisions. Furthermore, the prices charged for renting cannot be seen as being economically significant, due to the fact, among others, that they do not seem to respond to change in the market or to economic signals and have little influence on how much the producer is prepared to supply and on the quantities demanded.<sup>153</sup>

The Eurostat classification of AHB borrowing as part of government borrowing was based on its conclusion that "the AHBs are controlled by government due to several reasons which include the degree of financing, contractual agreement, special regulations and risk exposure (in particular, in the context of the new P & A agreements, via the Continuation Agreement)."<sup>154</sup> There are now twenty Tier 3 AHBs in Ireland.

## Enniskerry Road, Stepaside, County Dublin

The first cost-rental scheme in Ireland to go on site comprises 50 two-bedroomed units within a development of 155 homes in the South Dublin suburb of Stepaside, due to complete in 2021.<sup>155</sup> The partners in the scheme are RESPOND and Tuath AHBs, Department of Housing Planning and Local Government (funding), Dun Laoghaire Rathdown Council, Housing Agency (land, control over cost rents) and the Housing Finance Agency (HFA) (long-term finance). The rents are based on the cost of construction, management and maintenance costs, on the basis of a State Aid subsidy in the form of land supplied by the Housing Agency, and State guaranteed finance at low rates. There is no maturation factor included in the calculations, as it is in fact the first such scheme. Initial rents are expected to be €1,200 per month for these two bedroom apartments, which is significantly below current local private market rents. Rent increases will be linked to general consumer price increases only. Tenancies will be governed by the Residential Tenancies Acts. This rent level is achieved as a result of land being provided at no costs (reducing rents by €150 per month); site service funding from the State (reducing rents by €250 per month); low-cost long-term finance from the HFA (reducing rents by €300 per month) and reduced margins and other savings (reducing rents by €100 per month).

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<sup>149</sup> The Performance Standard and Assessment Framework for the Regulation of Approved Housing Bodies in Ireland. [https://www.housingagency.ie/sites/default/files/2019-03/Performance-Standard-2018-Online\\_1.pdf](https://www.housingagency.ie/sites/default/files/2019-03/Performance-Standard-2018-Online_1.pdf)

<sup>150</sup> The Financial Standard and Assessment Framework for the Regulation of Approved Housing Bodies in Ireland. <https://www.housingagency.ie/sites/default/files/2019-03/HA-Financial-Standard-FINAL-WEB.pdf>

<sup>151</sup> See <https://icsh.ie/about-icsh/>

<sup>152</sup> The objectives of the ICSH are: Promoting the role of housing associations in meeting housing need and addressing homelessness on local, regional, national and EU fora; Acting as the representative body for members with Government, statutory agencies and other stakeholders; Promoting best practice amongst members in relation to planning, provision and management of social housing; and Providing a comprehensive information, advice, education and training service.

<sup>153</sup> See Appendix 5. <https://ec.europa.eu/eurostat/documents/1015035/8683865/Advice-2018-IE-Sector-classification-Approved-Housing-Bodies-pdf/4813b7be-a51b-4952-bbb2-46906aacbbdd>.

<sup>154</sup> Letter from Eurostat to CSO ref: ESTAT/D-1/LA/GD/gh D(2018); Letter from CSO to Eurostat 20/12/2017. Available at: <https://www.cso.ie/en/methods/governmentaccounts/classificationdecisions/classificationofapprovedhousingbodies/>.

<sup>155</sup> <https://www.housingagency.ie/sites/default/files/Affordability%202020Cost%20Rental%20Model%20-%20Daragh%20McCarthy%20and%20Jim%20Baneham%2C%20Housing%20Agency.pdf>

## **Shanganagh Co. Dublin**

Dun Laoghaire County Council and the Land Development Agency plan to provide 306 cost rental units at Shanganagh Co. Dublin.<sup>156</sup> Rents are expected to be €1,000 per month for one-bedroomed apartments, and €1,200–€1,300 for two-bedroomed apartments.

## **St Michaels Estate, Inchicore, Dublin**

There is also a planned cost rental scheme of some 400 units being developed by Dublin City Council at St. Michael's Estate, Inchicore, Dublin 8.<sup>157</sup> Rents are expected to average €1,300 per month, or less, if longer term funding to cover development costs were available.

Of course, the development costs for each project can vary, and meeting the targeted rents might require the externalisation of some costs, or applying a greater level of subsidy, lower interest rate or longer term loan. This makes the viability of each cost rental scheme quite site specific.



**The non-profit nature of Irish AHBs ensures that there is no conflict of interest between shareholders and the interest of tenants**

<sup>156</sup> <https://www.rte.ie/news/business/2020/0129/1111705-land-development-agency-shanganagh/>

<sup>157</sup> <https://wwwirishtimes.com/news/social-affairs/plans-to-be-submitted-for-dublin-city-s-first-cost-rental-scheme-1.4433286>

# Conclusions

## Conclusions

Affordable cost rental housing is now being developed by AHBs in Ireland, although the number of units involved are unlikely to have a significant effect on market rents. Nevertheless, it is important to consider the relevance of EU rules on State Aid. These have established that AHB are undertakings, and are active in the housing ('real estate') market. State Aid is provided in the form of preferential lending, serviced sites and other State Aid.

One of the significant outcomes from the CJEU Dutch SGEI case in 2018<sup>158</sup> was confirmation that the burden of proof in defining a social housing SGEI, and the precise target group, rests with the Member State. The target group for cost rental housing in Ireland is clearly defined as those who cannot afford to rent housing in the private market. Average private sector rents per month are not affordable for Income Deciles 1–8 in Dublin. One third of private sector tenancies receive State subsidies. Of the 61,800 households who were assessed as qualified for social housing support in 2020 almost half lives in private rented housing.

Clearly, there is a significant requirement for affordable rented housing, which has been recognised by the European Commission in the European Semester *Country Report Ireland 2019*:

Severe shortages in housing supply and social housing have created a very challenging situation. The rapid increase in rents... combined with rising house prices, creates an affordability constraint for households which can increase poverty risk, in particular for women, and further exacerbate homelessness...<sup>159</sup>

Another European Commission Report on Ireland points to the problems created by demand side subsidies to the private rented sector.

A further 17,000 persons are to be assisted through Ireland's Housing Assistance Payment or Rental Accommodation Scheme, but this risks exacerbating rent increases in the private rental market where supply is already constrained... The inadequate mix in the types of social houses provided together with the very limited amount of affordable and cost-rental accommodation are factors further aggravating the situation. This has resulted in a steady rise in the number of people and families living in emergency accommodation with homelessness figures reaching new highs in February 2019.<sup>160</sup>

Clearly, there is a public/general interest mission in providing cost rental housing in Ireland, which has been accepted by the European Commission. For State Aid to be compatible with the SGEI rules, the general/public interest mission must be defined precisely by the appropriate authorities. In Ireland, this general/public interest mission is entrusted to AHBs, in a manner comparable to the situations considered in Commission Decisions N209/01 and N89/2004. These Decisions held that although social and housing providers (Local Authorities and AHBs) operated in the 'real estate' market, and the subsidies amounted to State Aid, nevertheless, these subsidies could be regarded as compensation for the services provided by the providers in order to discharge public service obligations. AHBs and Local Authorities did not enjoy a real financial advantage which put them in a more favourable competitive position than any undertakings competing with them. The non-profit nature of AHB activities is also relevant, having objects for the relief of housing needs, hardship, or other charitable purposes. Surpluses are not distributed to shareholders and assets can only be used towards the objectives.<sup>161</sup>

Cost rental schemes with rents of €1,200 per month will facilitate those in the Income Deciles which cannot afford to rent in the private market, and also involve the supply of new housing. The approach does not cover the whole market, or even a significant part of it. In the context of approximately 340,000 private tenancies,<sup>162</sup> the provision of 500 cost rental units would have very limited impact on market rents. However, to achieve affordable rents of €1,200 per month requires State Aid.

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<sup>158</sup> Joined Cases T-202/10 RENV II and T-203/10 RENV II *Stichting Woonlinie and Others v European Commission* ECLI:EU:T:2018:795.

<sup>159</sup> COMMISSION STAFF WORKING DOCUMENT *Country Report Ireland 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances*, Brussels, 27.2.2019 SWD(2019) 1006 final. [https://ec.europa.eu/info/sites/info/files/file\\_import/2019-european-semester-country-report-ireland\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-ireland_en.pdf) p. 38/39

<sup>160</sup> COUNCIL RECOMMENDATION on the 2019 National Reform Programme of Ireland and delivering a Council opinion on the 2019 Stability Programme of Ireland, Brussels, 5.6.2019 COM(2019) 507 final, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0507&from=EN>, para 16.

<sup>161</sup> Commission Decision on State Aid N89/2004 paras 32-34.

<sup>162</sup> file:///Users/padraickenna/Downloads/RTB\_2019\_Annual\_Report\_English.pdf

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Finally, it is worth recounting that the Draft Report *On a strong social Europe for Just Transitions*<sup>163</sup> submitted for a European Parliament Resolution, calls for affordable housing to be made available for 60% of the population:

29. Stresses that the EU and its Member States have an obligation towards citizens to ensure their universal access to decent and affordable housing; calls on the Commission and the Member States to maximise efforts of investing in affordable housing to cover the housing needs of the low and middle-income groups (the three bottom quintiles) [60% of population], ensuring that at least 30% of all newly built houses constitute affordable housing for both of these income groups, and to eliminate energy poverty by 2030...



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<sup>163</sup> (2020/2084(INI)) Committee on Employment and Social Affairs. Rapporteurs: Dennis Radtke, Agnes Jongerius (2020). [https://www.europarl.europa.eu/doceo/document/EMPL-PR-657413\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/EMPL-PR-657413_EN.pdf)

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# Appendices

# Appendix 1. Forms of Social and Affordable Housing Support in Ireland

Name	Description	Administered by
LA completions and acquisitions	Dwellings owned by the local authorities through direct build or acquisition under Part V of the Planning and Development Acts 2000–2015 or otherwise (e.g. purchase of second-hand dwellings).	LA (DHPLG)
AHB completions and acquisitions	Dwellings owned by the Approved Housing Bodies (AHBs). These are organisations with charity status; AHBs have been required to register tenancies with the Residential Tenancies Boards since 2015.	Charity, registered with RTB
Local authority or AHB long-term leased dwellings	Dwellings acquired on a long-term lease by the local authorities or AHBs and let to households assessed by local authorities as in 'housing need' (i.e. on the 'waiting list'). Funded by the DHPLG through the Social Housing Current Expenditure Programme (SHCEP, formerly known as the Social Housing Leasing Initiative). Leases can last from 10 to 20 years (10 to 30 years for leasing by AHBs) or a Rental Arrangement of up to 10 years may be put in place. AHBs may lease units they own to the local authorities.	LA and AHBs. Funded by DHPLG
Medium- to long-term financial support for renting in private sector (RAS)	The Rental Accommodation Scheme (RAS) was introduced in 2004, to provide housing through the private market for long-term recipients of Rent Supplement (RS) that had been assessed as needing social housing. The scheme is delivered by LAs which source accommodation from the private market and enter into a tenancy agreement with the landlord and the RAS recipient. There are tenancies which are linked to the current tenant only and there are also agreements based on availability over a defined period, typically 4 years. The LA makes a monthly payment to the landlord linked to market rates (typically 8% lower than market rate, to represent the level of risk transferred to the LA). The tenant pays differential rent to the LA, which takes account of their ability to pay. Each contract includes a periodic rent review, typically every two years.  As the RAS is now deemed to be a social housing support, LAs retain the responsibility to source further accommodation for a RAS household, should the dwelling that the household is living in become unavailable through no fault of their own. Households may source alternative accommodation themselves, subject to it meeting their needs and conforming to standards for rental accommodation. RAS will be gradually replaced by HAP.	LA, DHPLG
Medium- to long-term financial support for renting in private sector (HAP)	Housing Assistance Payment (HAP) was introduced on a phased basis to replace long-term RS and RAS. Like RAS, dwellings are provided through the private sector, the tenant must be assessed as being in 'housing need', the rent (which is subject to limits depending on the area) is paid directly to the LA. HAP tenants may take up full-time employment while retaining the support. RS recipients who are assessed as being in long-term 'housing need' will be transferred to the HAP on a phased basis. Tenants source their own accommodation; once approved for HAP the LA expects tenants to remain in the property for at least two years.	Local authorities, DHPLG
Short-term financial support for renting in private sector (RS)	Rent supplement (RS), first introduced in 1977, provides financial support for renting in the private sector to existing tenants who have a short-term difficulty in affording the rent. The tenant must have been living in the rented accommodation (or homeless accommodation) for at least 6 months of the last year; have been able to afford the rent at the beginning of the tenancy and have difficulty affording it now due to a substantial change in circumstances (e.g. unemployment). This payment is administered by the Department of Employment Affairs and Social Protection. It is not available to people who are in full-time employment and is typically paid to people who are receiving a social protection payment.	Department of Employment Affairs and Social Protection (DEASP)

## Appendix 2. Table of maximum net income limits in Social Housing Assessment Regulations, 2011<sup>164</sup>, as amended<sup>165</sup>

Band	City and County Councils	Maximum Net Income Threshold – Single person	Maximum Net Income Threshold – 3 adult, 4 children family
1	Cork City	€35,000	€42,000
1	Dublin City	€35,000	€42,000
1	Dún Laoghaire Rathdown	€35,000	€42,000
1	Fingal	€35,000	€42,000
1	Galway City	€35,000	€42,000
1	Meath	€35,000	€42,000
1	South Dublin	€35,000	€42,000
1	Kildare	€35,000	€42,000
1	Wicklow	€35,000	€42,000
2	Cork County	€30,000	€36,000
2	Kerry	€30,000	€36,000
2	Kilkenny	€30,000	€36,000
2	Limerick City and County	€30,000	€36,000
2	Louth	€30,000	€36,000
2	Wexford	€30,000	€36,000
2	Waterford City and County	€30,000	€36,000
3	Carlow	€25,000	€30,000
3	Cavan	€25,000	€30,000
3	Clare	€25,000	€30,000
3	Donegal	€25,000	€30,000
3	Galway County	€25,000	€30,000
3	Laois	€25,000	€30,000
3	Leitrim	€25,000	€30,000
3	Longford	€25,000	€30,000
3	Mayo	€25,000	€30,000
3	Monaghan	€25,000	€30,000
3	Offaly	€25,000	€30,000
3	Roscommon	€25,000	€30,000
3	Sligo	€25,000	€30,000
3	Tipperary	€25,000	€30,000
3	Westmeath	€25,000	€30,000

<sup>164</sup> S.I. No 84 of 2011.<sup>165</sup> S.I. No 288/2016, Social Housing (Amendments) Regulations 2016 and S.I. No. 116/2021.

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These income bands are expressed in terms of a maximum net income threshold for a single-person household, with an allowance of:

- 5% for each additional adult household member, subject to a maximum allowance under this category of 10%, and 2.5% for each child, subject to a maximum allowance under this category of 10%.

Net income is defined in the Household Means Policy which also specifies what kinds of income are assessable for the purposes of the Regulations.

See the table below for examples of the limits for different sizes of household.

These limits are the current maximum thresholds set by the Minister in Regulations.

Note that a housing authority may set a lower limit if appropriate.

## **Appendix 3. *Decent and affordable housing for all – Report to the European Parliament – Rapporteur Kim Sparrentak MEP<sup>166</sup> – extracts***

A. whereas access to adequate housing is a fundamental right must be seen as a precondition for the exercise of, and access to, other fundamental rights and for a life in conditions of human dignity; whereas the national, regional and local authorities of the Member States have the obligation to define their own housing policy and to take the necessary measures to ensure that this fundamental right is respected in their housing markets;

B. whereas, as stated in Article 151 TFEU, the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high levels of employment, and combating exclusion;

C. whereas the EU and its Member States have an obligation to ensure access for all to decent and affordable housing in accordance with fundamental rights such as Articles 16, 30 and 31 of the European Social Charter and the European Pillar of Social Rights;

D. whereas, according to Article 36 of the Charter of Fundamental Rights of the European Union, the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union; whereas services of general interest are classified as such by the public authorities of the Member States, and are therefore subject to specific public service obligations; whereas these services can be provided by the state or the private sector; whereas these services include social housing as a social service of general interest; whereas social services of general interest respond to the needs of vulnerable citizens, in line with the principles of solidarity and equal access; whereas, the Commission Communication on the Quality Framework for Services of General Interest in the EU guarantees access to essential services for all citizens and promotes quality in the field of social services;

E. whereas SDG 11 calls for specific targets for 2030 to ensure access for all to adequate, safe and affordable housing and basic services, for the upgrading of slums and for the enhancement of inclusive and sustainable urbanisation and capacity for participatory, integrated and sustainable human settlement planning and management in all countries;

F. whereas a growing number of low- and middle-income people living in the EU have difficulty affording housing, are overburdened by housing and maintenance costs, live in housing where there are safety concerns, that is unhealthy, of low quality, inaccessible, energy-inefficient or overcrowded, or is homeless or at risk of eviction;

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<sup>166</sup> [https://www.europarl.europa.eu/doceo/document/A-9-2020-0247\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2020-0247_EN.html)  
P9\_TA(2021)0020 (January 2021)

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## **... Investing in social, public, affordable and energy-efficient housing**

51. Stresses that the investment gap for affordable housing amounts to EUR 57 billion per year(44); calls on the Commission and the Member States to close the investment gap in affordable housing as a matter of priority; calls in this regard for a reform of the economic governance framework allowing Member States to make the green and social public investments needed, including those related to the development and improvement of social, public, affordable and energy-efficient housing; calls, furthermore, for a harmonised accounting for amortisation methodology for affordable housing investments;

52. Recalls that as a service of general economic interest (SGEI), social housing is exempted from State aid notification requirements; recalls that social housing is the only sector in the SGEI Decision for which the Commission mentions a target group (disadvantaged citizens or socially less advantaged groups), and that this is not the case for other social services; believes that this may limit the possibility to deliver social and affordable housing for all; acknowledges that there is no agreed common definition of social housing at EU level; warns, however, that a narrow definition of social housing limiting it only to 'housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions' is restrictive and hinders Member States' ability to define their SGEIs and services of general interest; stresses that SGEIs in housing should be principally guided by specific requirements determined by national, regional or local authorities, since these authorities have the competence to identify and address the housing needs and living conditions of different groups, which can differ greatly between rural and urban areas, and since these authorities play crucial roles in well-targeted decision making; urges the Commission to adapt the target group definition of social and publicly funded housing in the rules on SGEIs, so as to allow national, regional and local authorities to support housing for all groups whose needs for decent and affordable housing cannot be easily met under market conditions, while also ensuring that enough funding is allocated to the most disadvantaged, in order to unblock investment and ensure affordable housing, housing tenure neutrality and sustainable urban development, and to create socially diverse neighbourhoods and enhance social cohesion;

## Appendix 4. Articles of the Charter for Fundamental Rights of the European Union which are relevant for social housing<sup>167</sup>

- Article 7 Everyone has the right to respect for his or her private and family life, home and communications.
- Article 8 Everyone has the right to the protection of personal data concerning him or her.
- Article 24 1. Children shall have the right to such protection and care as is necessary for their well-being...  
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- Article 25 The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.
- Article 26 The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.
- Article 33(1) The family shall enjoy legal, economic and social protection – which includes access to adequate and affordable housing.
- Article 34(3) In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices. [The Explanations state that Article 34(3) applies only 'in the context of policies based on Article 153 TFEU – where the Union 'shall support and complement the activities of the Member States in the relevant fields including the combating of social exclusion.']
- Article 36 The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

## Appendix 5. Principles of the European Pillar of Social Rights applying to housing<sup>168</sup>

### Principle 19: Housing and assistance for the homeless

- Access to social housing or housing assistance of good quality shall be provided for those in need.
- Vulnerable people have the right to appropriate assistance and protection against forced eviction.
- Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion.

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<sup>167</sup> Charter of Fundamental Rights of the European Union, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

<sup>168</sup> European Pillar of Social Rights, available at: [https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf)

## Appendix 6. Common Metrics to Assess Housing Affordability. (OECD Report)<sup>169</sup>

Type of measure	Example of indicators	Advantages	Limitations	OECD data and examples
Price-to-income ratios	<ul style="list-style-type: none"> <li>• House-price-to-income ratio</li> <li>• Rent-price-to-income ratio</li> </ul>	<ul style="list-style-type: none"> <li>• Relatively straightforward, intuitive</li> <li>• Relies on data that are generally readily available in most countries</li> <li>• Shows, at aggregate level, how the association between prices and income varies over time and/or across markets, such as across countries</li> </ul>	<ul style="list-style-type: none"> <li>• Does not provide any indication of the distribution of housing costs and housing affordability (e.g. who has/does not have access to affordable housing)</li> <li>• Does not provide any indication of housing quality</li> <li>• Does not take into account borrowing costs</li> </ul>	OECD Affordable Housing Database, Indicator HM1.2
Housing expenditure-to-income ratios	<ul style="list-style-type: none"> <li>• Housing cost burden</li> <li>• Housing cost overburden rate (e.g. share of households spending over 40% of disposable income on housing costs)</li> </ul>	<ul style="list-style-type: none"> <li>• Relatively straightforward, intuitive</li> <li>• Relies on data that are generally readily available in most countries</li> <li>• Can be disaggregated to measure actual housing spending at household level</li> </ul>	<ul style="list-style-type: none"> <li>• 'Overburden' threshold is set at an arbitrary level that remains fixed, regardless of household characteristics or their position in the income distribution</li> <li>• Does not provide any indication of housing quality</li> </ul>	OECD Affordable Housing Database, Indicator HC1.1 and HC1.2
Residual income measures	<ul style="list-style-type: none"> <li>• Shelter poverty</li> <li>• Housing-induced poverty</li> </ul>	<ul style="list-style-type: none"> <li>• Captures the level of income a household has left after paying for housing costs, to assess the extent to which households have sufficient income left for non-housing expenses after paying for housing</li> <li>• Can be useful to measure affordability gaps among vulnerable low- and middle-income households</li> </ul>	<ul style="list-style-type: none"> <li>• Can require extensive additional data collection on the cost of the minimum basket of non-housing expenses</li> <li>• Arbitrariness with respect to what constitutes the minimum income a household needs for non-housing expenses</li> <li>• Does not provide any indication of housing quality (e.g. what households are paying for)</li> <li>• Can misdiagnose general cost-of-living problems as cost-of-housing problems</li> </ul>	See OECD (2020 <sup>(9)</sup> )
Housing quality measures	<ul style="list-style-type: none"> <li>• Rooms per person</li> <li>• Overcrowding rate</li> <li>• Housing deprivation rate</li> </ul>	<ul style="list-style-type: none"> <li>• Overcrowding can be assessed based on a very simple (or more complex) definition</li> <li>• Provides insights into a key dimension of housing affordability (e.g. what households are paying for)</li> </ul>	<ul style="list-style-type: none"> <li>• Potential trade-offs between social and environmental objectives when interpreting indicators relating to dwelling size</li> <li>• Cross-country/cultural differences in what characteristics are most relevant to assess housing quality</li> <li>• Some quality metrics require up-to-date data on technical characteristics of dwellings, which may not be readily available</li> </ul>	OECD Affordable Housing Databases, Indicators HC2.1, HC2.2 and HC2.3
Subjective indicators of housing affordability	<ul style="list-style-type: none"> <li>• Satisfaction with the availability of good, affordable housing</li> <li>• Housing as a key short-term concern</li> </ul>	<ul style="list-style-type: none"> <li>• Can complement other measures of housing outcomes and can help better understand the determinants of housing satisfaction</li> </ul>	<ul style="list-style-type: none"> <li>• Perceptions and expectations about what constitutes good-quality affordable housing differ across individuals, countries and cultures, and may also depend on socio-demographic characteristics</li> <li>• Satisfaction levels may depend on country-specific factors, including the overall economic environment, and/or the level of social protection policies</li> </ul>	OECD Affordable Housing Database, Indicator HC1.4

<sup>169</sup> OECD (2021), 'Building for a better tomorrow: Policies to make housing more affordable', Employment, Labour and Social Affairs Policy Briefs, OECD, Paris, <http://oe.cd/affordable-housing-2021>. Appendix 7

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