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CEMR

**Response to the Consultation on the new
texts regarding the application of State aid
rules to Services of General Economic In-
terest (SGEI)**

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European Commission documents:

- Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest
- Commission decision 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
- Communication from the Commission: EU framework for State aid in the form of public service compensation
- Commission regulation 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

Key messages

1. The recognition of regional and local self-government in the TFEU as a part of the fundamental political and constitutional structure of the Member States, the principles of subsidiarity and proportionality and the Protocol on SGIs need to be better reflected in the Commission's texts.
2. In almost all cases local SGEIs don't have internal market relevance and their funding does not qualify as state aid.
3. The inconsistency of the proposed rules with the public procurement rules makes their application very difficult for practitioners. State Aid rules on SGEIs and public procurement rules should be consistent in relevant legislative elements, such as thresholds, exemptions, etc.
4. The application of the 4th Altmark criterion remains difficult and other means to compare the level of compensation should be discussed and explored.
5. CEMR is against the reductions of the annual compensation threshold (from €30m to €15m during 2 years) and the decrease of passenger threshold for airports (200,000 instead of 1 million) as proposed in the Decision on the application of Art. 106(2), which goes against the announced aim to distinguish between small-scale and large-scale services.
6. The introduction of a 10,000 inhabitants threshold in the de-minimis regulation does not make sense since the size of public authorities differs and depends on their internal administrative structure; the number of inhabitants does not reflect the amount of state aid.
7. Such an inhabitants threshold is not appropriate in relation to the growing number of public-public co-operations in all Member States which are essential to achieve efficiency savings and tackle demographic problems.

Main recommendations

1. Commission should make the rules simple to understand, easy to apply and possible to implement without having to engage costly external experts (consultants and lawyers).
2. Commission should provide clarification on the distinction between SGEIs and non-economic SGIs; a set of criteria that recognise the non-commercial nature of sub-national SGEI provision would be helpful.
3. We consider the threshold of the de-minimis regulation of €150,000 per annum, in place of €200,000 over three years, to be too low and suggest at least € 450,000 over a period of three years.
4. Instead of a limit of 10,000 inhabitants, the Commission should focus on the purely local impact of the aid as decisive rather than the size of the authority awarding aid.
5. The definition of what is 'intrinsically local' should be defined bottom-up and reflect the different economic circumstances and institutional settings.
6. The burden of proof should fall on the Commission or other complainant, not on the local or regional government concerned, to prove if there has been any 'manifest error' in the award of the aid.
7. The EU should only intervene in cases of local or regional SGEIs of substantial scale. The Commission should explore further ways to define when the trade between Member States would be affected by the State aid in question.

General remarks

1. Whilst welcoming on the one hand the fact that the European Commission consults stakeholders on its texts for new rules on State aid in relation to Services of General Economic Interest (SGEI), CEMR regrets the very short period of one month to react to such a complex and complicated set of important texts.
2. We therefore regret not having had sufficient time and capacity to comment on all elements of the texts, but wish to express our views on relevant parts hereafter.
3. Following the Commission's Communication on the 'Reform of the EU State Aid Rules on Services of General Economic Interest', published in March 2011, and further statements and comments of Commissioner Almunia on this issue, we had the impression that the Commission would take a pragmatic approach, in particular by looking to clearly exclude lower values of aid based on the nature and size of the services concerned. This would allow the Commission to concentrate its limited resources on reviewing larger amounts of aid.
4. Also, the Commission had indicated that it would provide further clarification on the question of when the functioning of the internal market would be adversely affected to such a significant extent that it would be contrary to the interests of the EU.
5. With the publication of the texts on 16th September, we were rather surprised to see that the Commission had in fact prepared more detailed and sometimes even more complicated rules, which may contribute to a lack of understanding and administrative complexities in particular at local and regional level.
6. The sub-national level is struggling hard to understand and apply the different aspects of both state aid and procurement rules. The CEMR calls on the European Commission to make an effort to make the rules simple to understand, easy to apply and possible to implement without public authorities having to engage costly external experts (consultants and lawyers).
7. We observe some inconsistencies between the European public procurement directives and the State aid rules and wish to urge the European Commission to align the relevant legislative elements (e.g. thresholds, exemptions, etc.) as much as possible to make the rules coherent for practitioners.
8. Finally, we want to highlight that the Treaty of the Functioning of the European Union recognises regional and local self-government as part of the fundamental political and constitutional structure of the Member States (Article 4), which is an essential cornerstone of the European multi-level system of democracy and governance, complementing the principles of subsidiarity and proportionality (Article 5) and the Protocol on SGIs, which provides wide discretion to national, regional and local authorities as regards how they commission and organise their services of general economic interest.

Specific comments

The Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest

9. We stress that local SGEIs in almost all cases don't have internal market relevance and their funding therefore does not qualify as state aid. We also ask for more coherence between public procurement rules and state aid rules.

10. Instead of a compilation of ECJ rulings which won't make a significant change for local and regional authorities in the understanding of EU rules, we need more clarification on the distinction between SGEIs and non-economic SGIs. A set of criteria that recognise the non-commercial nature of sub-national SGEI provision would be helpful.
11. We believe the Communication and the decision are not constant in relation to child care services; the Communication (pt. 22) considers kindergarten as non-economic whereas the decision (art. 1.1.c) exempts childcare from the notification requirement and this implies that here the Commission considers childcare services, which include kindergartens, to be of an economic nature.
12. We understand that with this Communication, the Commission intends to provide clarification on key questions in relation to State aid rules and SGEIs, based on CJEU jurisprudence, in particular the Altmark judgement.
13. Here, we still believe that the 4th criterion should be abandoned; the comparison analysis with a 'typical undertaking' as described in the ruling is very difficult to apply in practice, because companies do not release commercially sensitive data on their costs. Other means to compare the level of compensation should be taken in consideration. 'Testing the market' by a public procurement procedure should not be the only alternative because it creates more bureaucratic burdens for both contracting authorities and the undertakings bidding for the contract. The possibility to entrust an undertaking with SGEI without a public procurement procedure must always be available.
14. Furthermore, the 4th criterion refers to a public procurement procedure and the 'selection of the tenderer capable of providing those services at the least cost to the community'. With reference to the current discussions about the modernisation of public procurement legislation and the upcoming reform of the public procurement directives, we believe that the procurement option to focus solely on the 'lowest price' (Article 53, Directive 2004/18) should indeed be kept. Taking into account environmental or social criteria as increasingly advocated by the Commission however contradicts this approach of the 'lowest price' option, and means that the procurement reforms are not coherent with the 4th Altmark criterion. The approach to 'lowest price' from procurement law, and 'least cost to the community' from the Altmark package must remain and be made coherent with each other.
15. It must also be noted, that a service that complies with a public service obligation can also meet the definition of a service concession. Service concessions are not regulated under the Directive 2004/18/EC on public contracts, but the key legal principles of the Treaty, such as the principles of openness and non-discrimination, are applied to them in accordance with case law. Therefore, it is important that the Commission makes sure that the rules pursuant to Procurement Directives and the EU State aid rules are coordinated and that it conducts a parallel review. Since there are also features of market exploitation associated with the granting of public service obligations, for example, the SGEI arrangement should also be taken into account in connection with the preparation of the Concessions Directive.

Commission Decision on the application of Article 106(2)

16. To exempt certain levels of state aid from notification, the Commission reduces the annual compensation threshold for the service in question to EUR 15 million compared to the current EUR 30 million for undertakings with an average annual turnover of less than EUR 100 million during the two preceding financial years.

17. We are against this reduction and regret that there are no reasons provided for this halving of the thresholds which seems to go against the Commission's stated aim to focus only on larger aid cases. We believe that this, again, does not reflect the announced distinction between small-scale and large-scale services.
18. Equally we see the proposed maximum ten year entrustment term for most services as disproportionate. A longer term should be proposed.
19. CEMR welcomes the exemption of new categories of "services meeting essential social needs" from the notification requirement irrespective of the amount of compensation (health services, childcare, access to the employment market, social housing, care and social inclusion of vulnerable groups of population). However we want to make sure that local and regional authorities remain the ones who are responsible for defining what is an SGEI meeting "an essential social need" and that the Commission won't impose the very narrow interpretation it developed concerning 'social' housing. We also ask for cultural services to be exempted.
20. We also welcome that the current passenger threshold for compensation to ports, maritime or aviation providers of lifeline services has been maintained at 300,000 inhabitants but we regret the decrease of the passenger threshold for compensation to airports allowing exemption from notification from 1 million to 200,000. This goes against the logic to distinguish between the small-scale and large scale services.
21. With respect to public education we do of course welcome that public national education is not considered as a service of general economic interest. However when drawing the distinction between these and those 'private' educational facilities "financed predominantly by parents or pupils or commercial revenues" we fear that some schools or universities which as a result of the economic situation are attempting to secure resources from private or student sources could be unfairly included in the definition.
22. As far as the excluded services are concerned, we would request consistency between the services excluded in the public procurement directives (so far enumerated in Annex II B of the Directive 2004/18/EC), and those excluded in the Decision.

Communication from the Commission: EU framework for State aid in the form of public service compensation

23. There should be no requirement to check 'in-house' contracts for aid every two years. When 'in-house' criteria are met, 'in-house' relations should not be concerned by state aid rules. The term 'in-house agreement' is preferable to 'in-house contract'.

De minimis Regulation for aid granted to undertakings providing SGEIs

24. We welcome the introduction of a new and specific de minimis threshold for SGEI, as such amounts can be awarded without any further state aid considerations. However, we consider the threshold of €150 000 per annum (in place of €200,000 over three years) as being too low, and thus it does not really contribute to less administration, but probably an increase in particular for local and regional governments.
25. Within the logic of the Commission's March 2011 Communication to distinguish between small scale and large scale services, we would like to suggest raising the threshold to at least € 450 000 over a period of three years. This would al-

low public authorities to award up to €450,000 in any one year provided the cumulative total does not exceed €450,000 in any three consecutive years.

26. The limit of 10,000 inhabitants does not really make sense, since the size of public authorities differs in the Member States and depends on their internal administrative structure. There are countries with a high number of small municipalities, while others have reorganised their local authorities to increase their efficiency. The size of local authorities is a question of the internal administrative organisation of a Member State. Moreover, it will be difficult to apply the exact limit in practice.
27. Furthermore, the number of inhabitants does not at all reflect the amount of the state aid awarded by the local authority when providing compensation to service providers. The Commission should therefore take the purely local impact of the aid as decisive rather than the size of the authority awarding aid. This criterion of the “purely local nature” is already laid down in the jurisprudence of the ECJ and also the Communication of the Commission refers to it.
28. CEMR is concerned that the connection with a specific, and very low number of inhabitants in the State aid rules would have repercussions on the upcoming reform of the public procurement directives and wishes to recall the CJEU decision in the Coditel case: “a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities” (C-324/07; Commission vs Germany C-480/06). The growing number of public-public co-operations in all member states because of the need to make efficiency savings and tackle demographic problems is therefore another essential reason to abandon the inhabitants-limit. These co-operations are indispensable in member states to provide public services for the citizens and should be stimulated rather than hindered.
29. In many countries, where there are rural or remote municipalities, for the local services theoretically subject to State Aid, there is in practice rarely a “market” as very often the publicly-supported private provider is the only one available to deliver the service effectively, and often the provider itself would not exist without the aid being provided. This is a very different situation compared to a substantially commercial activity. There are occasions when public service obligations need to be imposed to preserve the public interest. The EU legal regime needs to recognise and respect these profound differences in role and content.
30. We do recognise that defining what is “intrinsically local” could be difficult and if this not properly done, it could result in unfair or untransparent situations. However rather than applying a broad criteria from the centre (population, fixed amount), the definition of what would be “intrinsically local” could be defined bottom up as to reflect the different economic circumstances and institutional settings. A €150,000 threshold would not necessarily affect more a municipality of 10,000 of a very developed country than one of 200,000 of a less developed Member State, in view of the different size of budgets, public service obligations and price levels. Ultimately the burden of proof should fall on the European Commission or other complainant, not on the local or regional government concerned, to prove if there has been any ‘manifest error’ in the award of aid. The EU should only intervene in cases of local or regional SGEIs of substantial scale, where the functioning of the internal market would be adversely affected to such a significant extent as to be contrary to the interests of the EU.

31. The raising of the general de minimis threshold to €500,000 as a temporary measure to support economic recovery should become a permanent feature of the state aid regime.
32. We want to invite the European Commission to explore further ways to define when the trade between Member States would be affected by the State aid in question.

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