

The Commission Consults Stakeholders on the Application of EU State Aid Rules to Services of General Economic Interest

By Dr. Michael Sánchez Rydelski (Steptoe & Johnson LLP)

Introduction

On June 10, 2010, the European Commission (the Commission) launched a public consultation on the application of its 'Package on Services of General Economic Interest' (SGEI Package).¹ The SGEI Package sets out guidance as to when State funding of SGEIs is compatible with the EU State aid rules. The SGEI Package was adopted in July 2005 following the 'Altmark ruling' of the Court of Justice.² The purpose of this consultation is not only to assess the possible benefits of the SGEI Package, but also to identify the difficulties Member States and stakeholders might have encountered when applying it.

The Commission invites all citizens and organizations to contribute to this public consultation. The Commission welcomes in particular input from public service providers and their associations, public service users and their associations, local and regional authorities. The consultation period is from June 10 to September 10, 2010.

Definition of SGEIs

Services of General Economic Interest are, for example, provided in areas of public broadcasting, energy, transport, postal services, hospitals and social housing.

The Treaty on the Functioning of the European Union ('TFEU') does not provide a definition of what constitutes a SGEI. Member States enjoy wide discretion when defining, providing, commissioning and organizing SGEIs to the needs of their citizens. Despite the Member States' wide discretion, regarding the nature of services that could be classified as being SGEIs, this discretion is not unlimited. It is ultimately up to the Commission (and the EU Courts) to assess whether the Member State concerned committed a manifest error in classifying a particular service as a SGEI.

Article 14 TFEU states that given the role SGEIs play in promoting social and territorial cohesion, the EU and

the Member States take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their public service missions. Further, Protocol 26 TFEU states that the diversity between various SGEIs and the differences in the needs and preferences of users may result from different geographical, social or cultural situations. Protocol 26 TFEU also refers to SGEIs as services of a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

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As the Commission's Vice President and Competition Commissioner Joaquín Almunia recently stated: 'Public services play a key role in Europe's model of society. Certain areas of activity certainly can't be left to market forces alone and Member States are largely free to decide which services are to be considered as services of general interest. However, in the context of the EU single market, we must ensure that the provision of such services is done within the rules established by the Treaty to avoid distortions of competition. This is even more important in a period, as the current one, when budgetary consolidation is an essential condition if we are to overcome the crisis, to stimulate growth, and to improve social cohesion.'

Background of the SGEI Package

In its Altmark ruling, the Court of Justice held that State funding of SGEIs does not constitute State aid within the meaning of Article 107(1) TFEU, and is thus not subject to control by the Commission, when the following four cumulative conditions are fulfilled:

- The beneficiary must be entrusted with a clearly defined public service mission.
- The parameters for calculating the compensation payments must be established in advance and in an objective and transparent manner.

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- Compensation must not exceed the costs incurred in fulfilling the public service less the revenues earned by providing the service (the compensation may, however, include a reasonable profit).
- The beneficiary is chosen in a public tender or compensation is calculated on the basis of the costs of a well-run undertaking that is adequately equipped with the means to provide the public service.

If one of the above ‘Altmark conditions’ is not met (and the other State aid criteria in Article 107(1) TFEU are fulfilled), the public service compensation at stake will constitute State aid. In such a situation, the question remains, how this State aid can be declared compatible with the EU State aid rules. In order to address this question, the Commission subsequently adopted the SGEI Package, consisting of:

- A Commission Decision, based on Article 106(3) TFEU, specifying the conditions under which compensation to companies for the provision of SGEIs is compatible with State aid rules and does not have to be notified to the Commission in advance (‘the Decision’).³ The Decision applies to hospitals and social housing irrespective of the amount of compensation, as well as other sectors where the compensation does not exceed EUR 30 million per year and if the beneficiary’s annual turnover does not exceed EUR 100 million. Also covered by the Decision are air and sea transport to islands within the EU, as well as airports and ports below specific passenger volume thresholds.⁴
- A Framework specifying the conditions under which compensation not covered by the Decision can, nevertheless, be considered as compatible with the EU State aid rules after having been notified to and examined by the Commission.⁵ Compensation that exceeds the costs of the public service, or is used by companies on other markets open to competition, is not justified, and is incompatible with the EU State aid rules.
- Commission Directive 2005/81/EC of November 28, 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. This Directive imposes the separation of accounts for undertakings receiving public service compensation independently of their State aid character.⁶

The Consultation Process

Both the Decision and the Framework foresee that the Commission will undertake an evaluation report based on its knowledge of the operation of the SGEI Package, together with the results of wide consultations conducted by the Commission on the basis in particular of data provided by the Member States in their reports on the implementation of the Decision.

To this end, the Commission published both the reports received from Member States on the application of the rules, as well as a questionnaire⁷ addressed to public service providers, public service users, stakeholders, citizens and all other interested parties. The results of this public consultation will serve as a basis for evaluating the SGEI Package and for eventually proposing improvements.

The questionnaire gives guidance on the feedback the Commission wishes to receive through this consultation. However, the Commission welcomes any further information which is considered useful for the evaluation report of the SGEI Package.

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The Commission plans to publish the replies to this public consultation on its website after completion of the consultation period. Therefore, the replies have to indicate whether they contain information that should not be disclosed, such as sensitive business information. In such cases, non-confidential versions should be submitted at the same time.

Initial Comments

At the origin of the SGEI Package is the Altmark ruling. The Altmark ruling was criticized by many as blurring the criteria for examining the existence of State aid with the criteria for assessing its compatibility. Indeed, the ruling created more confusion than clarity and legal certainty. Also in practical terms, the ruling established criteria, which in most cases are never met.

The SGEI Package has added very little to the Altmark ruling. The Framework just summarized the case-law after Altmark. However, a step further was the Decision, which has block-exempted the compensation to some SGEIs, however, without clearly defining which services would be covered and would qualify as SGEIs under the Decision. In this respect, the Decision lacks a degree of legal certainty.

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1. More details on the public consultation is available on the Commission’s website at: http://ec.europa.eu/competition/consultations/2010_sgei/index_en.html

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2. Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg [2003] ECR I-7747. This judgment is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0280:EN:HTML>

3. Commission Decision No. 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, page 67). The Decision is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:312:0067:0073:EN:PDF>

4. For air and maritime links to islands with an average annual

traffic of less than 300,000 passengers, as well as airports and ports with an average annual traffic of less than 1,000,000 passengers for airports and 300,000 passengers for ports.

5. Community framework for State aid in the form of public service compensation (OJ 2005 C 297, page 4). The Framework is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:297:0004:0007:EN:PDF>

6. Which has been consolidated into Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, page 17). The Directive is available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_318/l_31820061117en00170025.pdf

7. The questionnaire is available at: http://ec.europa.eu/competition/consultations/2010_sgei/index_en.html

Round-up

By Reuters

UK Regulator Sticks to Timetable on Bank Liquidity

Britain's banking watchdog said it will stick to its timetable for tough liquidity rules despite a scaling back on similar measures at the global level, raising the prospect of an uneven market.

The Financial Services Authority moved unilaterally in 2008 to outline a new liquidity regime even though Britain is part of the Group of 20 leading countries that have agreed to coordinate their response to the financial crisis.

Banks have changed systems to control and monitor liquidity but the FSA has delayed until the end of this year details on actual levels of liquidity the banks must hold and by when. An FSA spokeswoman said "everyone knows it will be a tougher standard."

The final standard would be implemented through amending the existing European Union capital requirements directive "which could take some time to complete", the FSA added.

EU Mulls Centralized Databank on Listed Companies

European Union regulators are looking at how to make it easier for investors to find and analyze information on the bloc's 8,000 listed companies. The Committee of European Securities Regulators (CESR) is also looking at whether companies should file reports using a computer language known as eXtensible Business Reporting Language (XBRL) which is being adopted in the United States and some Asian countries.

CESR's consultation puts forward two options for a

one-stop shop databank -- using a single search engine for all the national information depositories, or centralizing all data into a European database.

The outcome of the consultation will be passed on to the EU's executive European Commission in the fourth quarter.

Separately, CESR will conduct a cost and benefit analysis of requiring companies to use XBRL phased in over five years.

Headhunters are confident London will maintain its position as one of the world's top financial centers, in spite of discontent on Wall Street over the one-off UK tax on bankers' bonuses for last year.

Greece Must Now Focus on Bank, Energy Reforms

Greece will prepare a strategic review of its banking sector next month and submit a plan to liberalize its energy sector by the end of 2010, a senior European Commission official said.

Servaas Deroose, deputy director general for economic and financial affairs at the European Commission, told Reuters one of Greece's key tasks following its financial