



**COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS
CONSEIL DES COMMUNES ET REGIONS D'EUROPE**

CEMR Position paper

**Response to the Monti package
on rules governing compensation
for public service obligations**

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Conseil des Communes et Régions d'Europe • Council of European Municipalities and Regions

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Background documents

1. Commission decision on the application of Article 86 of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest
2. Community framework for state aid in the form of public service compensation
3. Draft amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

Executive Summary

1. CEMR strongly believes in the need of a general and well-informed political debate about the future of public services at European level. We are concerned about the current fragmented approach of the European Commission, which puts forward several individual initiatives (White Paper on SGIs, Green Paper on PPPs, state aid regulations, etc.) that are closely linked to the very important question of the future of public services in general. For us it is vital to have a clear vision of the role of public services in European society and within the member states. Local and regional governments should be strongly involved in this debate.
2. The debate should not only focus on economic aspects of the respective services, but also social and environmental aspects as well as their wider impact on society. A long-term perspective is required.
3. CEMR also believes that a clear distinction between Services of General Interest (SGIs) and Services of General Economic Interest (SGEIs) is required. Services delivered by public authorities usually are based on the decision by the democratically legitimated body (council) and achieved in a transparent way (public meetings, media coverage, published and / or documents available to the public).
4. In our opinion, not all services, which could be provided by the private sector, automatically constitute a Service of General Economic Interest and therefore are subject to the European rules of competition. The Commission itself exempts the hospital and social housing sector from the application of the proposed decision and community framework for state aid. This shows that the Commission attributes some kind of special status to services in these areas. There is a need for more information about the reasoning behind this decision. Based on these reasons, it is probable that more services of a similar social nature should be exempted from the application. CEMR believes that only services, which are primarily commercial in their purpose, should be considered SGEIs.
5. CEMR strongly questions the Commission's assumption that public financial compensation constitutes state aid and that public authorities often over-compensate SGEIs (i.e. it is assumed that it is unlikely that they fulfil all four Altmark criteria).
6. CEMR would welcome a better analysis of the effects of the Altmark ruling and the meaning of the fourth Altmark criteria. We look forward to the forthcoming clarification in this regard and strongly urge the Commission to publish a draft of such a communication for consultation.
7. With reference to the principles of subsidiarity and proportionality and Article 5 (1) of the European Constitution, we want to stress the importance of local and regional self-government, which also includes the right to provide these services directly to the citizens.
8. The majority of the local services provided by public authorities within their territory usually have no, or no significant, effect on the internal market and the risk of market distortion can be excluded.
9. CEMR would welcome a single document from the Commission on the future of public services and covering all the questions of SGIs, SGEIs and state aid, in order to provide a well-informed basis for the political debate.

Introduction

1. CEMR welcomes the European Commission's objective to increase legal certainty for services of general economic interest. It appreciates the intention to exempt 'small-scale' aid for services of general economic interest (SGEIs) from the prior notification requirement.
2. As the Commission states in its press release on 18 February 2004, these proposals are complementary to the wider debate on the services of general interest, which has been launched with the Green Paper on services of general interest (SGIs) in May 2003. After the adoption of the Commission's White Paper on services of general interest (12 May 2004), the discussion about SGIs and SGEIs is now entering into an important phase. The White Paper – which also addresses certain aspects of SGEIs – explores general political issues, e.g. the European model of society, European values, social and territorial coherence, etc. These aspects cannot be ignored when dealing with SGEIs. Furthermore, we believe that the Commission must clarify the distinction between SGEIs and SGIs to make it clear that public services that are not primarily commercial in their purpose (but rather social or environmental) should not be considered as SGEIs. We note that precisely such a distinction is made at article 1 (9) of the new Public Procurement Directive (2004/18/EC) in which a *'body governed by public law'* means any body: (a) *established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.*
3. As far as the European Commission's draft decision on the application of Article 86(2) and its draft for a community framework is concerned, it seems to CEMR that the European Commission acts on two assumptions:
 - Public financial contribution for services of general economic interest, even for services delivered by public utilities, generally constitutes state aid (i.e. it is assumed to be unlikely that all four of the Altmark criteria will be fully met)
 - Public authorities often or in general over-compensate SGEIs.

We strongly question these assumptions. With reference to the principles of subsidiarity and proportionality, and Article 5(1) of the European Constitution, CEMR wants to stress the importance of local and regional self-government, which also includes the right to provide these services directly to their citizens. If we followed the Commission's logic, it would mean that any public compensation (in the absence of a public tender) has to be proven not to be state aid. However we think that the logical approach would be to have a clear definition of what constitutes state aid on the one hand and, on the other to acknowledge the freedom of local authorities to organise (internally or via external providers) and finance their public services.

4. CEMR wants to point out that the majority of the local services provided by a public authority to the citizens within its territory will have no, or no significant, effect on the internal market and that the risk of market distortion can be excluded. We propose the establishment of a clear definition of these purely local public services (operating wholly or mainly on the authority's territory) and criteria to be met in order to be excluded from the state aid regime. In general, clearly defined criteria would help to clarify the application of the competition rules.

General remarks

5. CEMR believes that the Altmark Trans case ruling, which confirmed that compensation for the provision of SGEIs does not constitute state aid, is an important contribution to the debate about SGEIs.
6. We also agree that it is important that compensation for the provision of public services must, henceforth, satisfy some clear and transparent conditions so as to avoid over-compensation, which might threaten to distort competition.
7. We remain concerned however that there is still a considerable lack of legal certainty in this field. The many different instruments and texts relating to State Aid and SGEIs do not provide a clear overall picture of the rules affecting the provision and financing of public services.
8. CEMR would welcome a better analysis of the effects of the Altmark ruling and the meaning of the fourth Altmark criteria. We look forward to the forthcoming clarification in this regard and strongly urge the Commission to publish a draft of such a communication for consultation.¹

Specific comments as regards the Draft Decision

9. As regards the annual threshold for public service compensation granted to undertakings, CEMR questions the reference made in the draft decision to the thresholds for state aid provided to SMEs (footnote to Article 1), since unlike the case of SMEs, what is at issue here is compensation for a service provided. While we appreciate that in accordance with the Altmark ruling, compensation that does not satisfy the four criteria that it sets out may be considered as state aid, we consider that is only the fraction of that amount corresponding to the over-compensation that would or should in principle constitute “state aid” within the meaning of the Treaty. The remaining part (normally the overwhelming majority) indeed only serves to remunerate the undertaking for services that it has provided on behalf of the public authority. Unless it is made absolutely clear that it is only the overcompensation that constitutes state aid, the figure that appears to be suggested by the Commission of €15 million would cover far too few cases of compensation for the provision of services of general economic interest, meaning that most would have to be notified, in particular services provided by cities. We therefore believe that a higher figure, such as €30 million, would be more appropriate so as to ensure freedom and flexibility for public authorities, and a minimum of administrative burden on the authorities and the Commission.
10. We do not believe that EU law in this field should be about micro-analysis of all elements of the costs of an undertaking. Public services sometimes have a higher cost base for fully justifiable reasons. In this regard we believe that the word “reasonable” should be used in Article 5.1. of the Draft Decision instead of the word “necessary”. In line with general principles of public law, the Commission or Court should only intervene if a public authority acts beyond the boundaries of what is reasonable; in effect if what is called “compensation” is in reality a state aid.
11. We welcome the proposal to exempt hospitals and social housing undertakings irrespective of their turnover or the compensation granted to them. With reference to the Commission’s comments in its White Paper on SGIs concerning these two sectors, we await the announced Communication to be

¹ White Paper on services of general interest, chapter 4.2.

published in the course of 2005². However, the draft decision and community framework do not offer a rationale as to why these two particular sectors have been identified as against other services of a dominantly social character. We recommend that a more general exemption is used in particular given the problem of defining the SGI/SGEI borderline (see paragraph 2 above).

12. We welcome the fact the Decision covers low volume maritime transport services, as a recognition of the importance of improving accessibility and promoting social cohesion.
13. Although Art. 73 EC Treaty under the Transport title provides a separate legal provision, nevertheless the principle is effectively the same: a) in non-transport areas, genuine compensation for public service obligations does not constitute state aid and is therefore not subject to an obligation to notification; b) in the field of transport under Art. 73 any aid is compatible with the treaty if it represents "reimbursement for the discharge of certain obligations inherent in the concept of a public service." The final effect of these is, or should be, therefore almost identical. Accordingly, CEMR believes a) that it would be possible to have a single legislation that covers both cases in an identical or similar manner, or at least b) that the sectoral legislation in relation to transport should not place transport undertakings in a less favorable situation. By the same logic, the exemptions proposed in the current Monti package should be available to all modes of local and regional public transport.

Recommendations

14. We note from the White Paper on SGIs that the Commission intends to adopt the Monti package in July 2005. We therefore hope that the ongoing discussion on SGIs will be taken into account in the evolution of the package;
15. With reference to the principles of subsidiarity and proportionality, and Article 5(1) of the Constitution, CEMR wants to invite the Commission to consider another approach: 1) Setting a framework, which ensures that local authorities are free to organise and finance their public services and 2) establishing a clear definition of state aid as far as SGEIs are concerned. These regulations should incorporate a definition of purely local public services and criteria to be met in order to distinguish them from the state aid regime;
16. We call on the Commission to clarify the distinction between SGEIs and SGIs to make it clear that public services that are not primarily commercial in their purpose (but rather social or environmental for example) are excluded from the scope of SGEIs;
17. We would urge the Commission to explain the rationale behind its approach as regards state aid and SGEIs and its choice of criteria for what it considers state aid compatible with the Treaty. We would also welcome a general "interpretative" communication, following consultation with stakeholders, which would provide more clarity and precision as regards the Altmark criteria and how they apply;
18. We strongly recommend that the Commission makes it clear that when compensation for the provision of SGEIs does not fully meet the criteria set out in the Altmark ruling, it is only the fraction of that compensation corresponding to the "over-compensation" that constitutes state aid;

² White Paper on services of general interest, chapter 4.4.

19. We also urge the Commission to set the threshold for exempting public service compensation from the notification requirement, high enough to ensure sufficient flexibility and minimum administrative burden and to enable most essential local services to fall within the exemption. We would also welcome more clarification as to whether the turnover threshold relates to the undertaking as a whole or to the individual activities;
20. In addition, we call upon the Commission to ensure that these rules will not preclude the possibility for providing additional compensation to cover extra costs relating to social and environmental aspects;
21. In looking at the issue of compensation, costs should be estimated on the basis of what is “reasonable” rather than what is “necessary”, avoiding micro-analysis of all the elements the undertaking’s costs have;
22. Since the Treaty provisions for transport reflect the same principle in relation to permitting compensation for public service obligations, local and regional public transport undertakings should be treated no less favourably than other public services, for the purpose of the Commission’s current proposal;
23. CEMR looks forward to an on-going dialogue with the Commission on this and other issues related to the development and delivery of high quality of public services.

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