Opinion of the European Economic and Social Committee on the ‘Draft 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
of financial relations between Member States and public undertakings’

(2005/C 157/06)

On 19 March 2004, the Commission decided to consult the European Economic and Social Committee,
under Article 262 of the Treaty establishing the European Community, on the abovementioned drafts.
The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for
preparing the Committee’s work on the subject, adopted its opinion on 5 October 2004. The rapporteur
was Mr Hernández Bataller and the co-rapporteur was Mr Burani.

At its 413th plenary session of 15 and 16 December 2004 (meeting of 15 December), the European
Economic and Social Committee adopted the following opinion by 140 votes with nine abstentions.

1. Introduction

1.1 Article 3(g) of the EC Treaty stipulates that the activities
of the Community shall include ‘a system ensuring that compe-
tition in the internal market is not distorted’. Maintaining effec-
tive control so as to guarantee that the aid granted by the
Member States does not distort competition is an essential part
of this system.

1.2 Several successive European Councils have confirmed
the need to monitor State aid. In its conclusions of 24 March
2001, the Stockholm European Council indicated that: the level
of State aids in the European Union must be reduced and the
system made more transparent … To that effect the Member
States should demonstrate a downward trend in State aid in
relation to GDP by 2003, taking into account the need to
redirect aid towards horizontal objectives of common interest,
including cohesion objectives.

1.3 The European Commission has presented a proposal for
regulating State aid in the form of public service compensation
granted to certain undertakings entrusted with the operation of
services of general economic interest. This proposal comprises
decision and an ad hoc Community framework, as outlined
in the amendment to Directive 80/723/EEC concerning the
transparency of financial relations between Member States and
public undertakings (1).

1.4 The aim of this proposal is to apply the rules contained
in the Treaty, and in particular those governing competition, to
the compensation paid by the Member States for specific
services of general economic interest (SGEI) to cover, in full or
in part, the costs that arise from these public service obliga-
tions.

1.4.1 However, the proposal does distinguish between
several different categories of compensation. This limits its
application. For example, those type of compensation that fulfil
the four criteria set out by the Court of Justice of the European
Communities in its Altmark (2) and Enirisorse (3) rulings
remain outside the new provisions. These stipulate that: the
company receiving the aid must also be entrusted with dischar-
ging the corresponding, clearly defined public service obliga-
tion; the parameters used to calculate the compensation must
be established in advance in an objective and transparent
manner; the compensation must not exceed the amount needed
to cover all or part of the costs incurred in discharging the
public service obligation, taking account of all relevant receipts
and a reasonable profit; and, lastly, where the company
entrusted with the fulfilment of the obligations was not
commissioned according to the best possible procedures for
public procurement contracts, the level of compensation is
calculated on the basis of an analysis of the costs which an
average, well-managed and suitably equipped company would
have incurred in discharging those obligations, plus a reason-
able profit. For the Court of Justice this compensation does not
fall under the Treaty provisions on State aid.

1.4.2 Similarly, the ‘de minimis’ economic aid provided in
accordance with Commission Regulation (EC) No. 69-2001 of
12 January 2001 (4) as well as all State aid provided to certain
public service broadcasters (5), are excluded here.

29.7.2000, p. 75).
(2) Ruling of 24 July 2003 in case C-280/00, publication pending in
case reports.
(3) Ruling of 27 November 2003 in cases C-34/01 to C-38/01, publica-
tion pending in case reports.
(4) OJ L 10 of 13.1.2001, p. 30. This is economic aid provided to
companies that does not exceed EUR 100.000 for a period of three
years. It is important to note that this Regulation does not apply to
the transport sectors and activities related to the processing or
marketing of the products listed under Annex I to the Treaty.
(5) Specifically those defined under points 49 to 56 of the Commu-
1.4.3 Furthermore, in accordance with the provisions of Article 73 EC Treaty and Council Regulations (EEC) No. 1191/69 (1) and 1107/70 (2), some types of aid granted within the land transport sector (rail, road and waterway) and in particular to companies that provide exclusively urban, suburban and regional transport services, are also excluded (3), with the exception of public service maritime links to islands on which annual traffic does not exceed 100,000 passengers.

1.4.4 Lastly, on the basis of points raised by the European Commission itself with respect to the specific objectives of the Common Transport Policy, compensation for public services in the air and maritime transport sectors are also excluded (4), with the exception of public service maritime links to islands on which annual traffic does not exceed 100,000 passengers.

1.4.5 Consequently, the scope of the proposal, in accordance with Article 1 of the decision, covers, in addition to the aforementioned island connection services, compensation for public services in the form of State aid granted to undertakings that work in all the sectors governed by the EC Treaty and which satisfy the following conditions:

1) An annual turnover before tax, all activities included, of less than a ‘threshold to be determined’ (5) for the two financial years preceding that in which the SGEI was assigned and with annual compensation for the service in question of less than ‘a threshold to be determined’ (6) and which, for credit institutions, is replaced by a ‘threshold to be determined’ in terms of balance-sheet total;

2) Public service compensation granted to hospitals that carry out activities involving SGEI;

3) Public service compensation granted to social housing undertakings that carry out activities involving SGEI.

1.4.6 The application of the decision to these areas does not alter the compatibility of State aid with Article 86(2) of the EC Treaty provided specific conditions are met. Thus the Commission proposes making a distinction between State aid which involves significant amounts and could severely distort competition on the one hand and State aid of a more modest nature on the other.

1.4.7 The proposal sets even greater store by the need for transparency in terms of the financial relations between the Member States and public undertakings or undertakings that are entrusted with public service obligations, modifying current Directive 80/723/EEC by introducing a new definition of ‘undertakings required to maintain separate accounts’ which, irrespective of the legal classification of public service compensation, covers undertakings that maintain separate accounts and receive such compensation and which also carry out activities that are not SGEI.

1.4.8 Lastly, the provisions of the proposal will apply without prejudice to the more stringent and specific provisions concerning public service obligations contained in sector-specific Community legislation and in the current Community provisions governing public procurement contracts.

1.4.9 At all events, the scope of the proposal is limited to services that constitute services of general economic interest within the meaning of Article 86(2) of the EC Treaty, although no definition of that concept is provided.

1.4.10 Some of the other provisions of the proposal, such as those governing compatibility and exemption from notification, the requirements placed on public service missions and how compensation is calculated, are more concrete.

1.4.11 Thus Article 2 of the draft decision stipulates that public service compensation which meets the necessary conditions is compatible with the common market and shall be exempt from the obligation of prior notification provided for in Treaty Article 87(3).

1.4.12 Under Article 4 of the draft decision, the public service task shall be assigned by way of an official act (legislative or regulatory instrument or contract) specifying the precise nature of the public service obligations, and the undertakings and territory concerned.

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(4) The relevant thresholds will be set once the results of the consultation launched by the Commission in relation to the proposal have been obtained.
(5) This last threshold will be fixed by taking an annual average representing the present value of the compensation granted during the term of the contract or over a period of five years.
2. General comments

2.1 This proposal follows on from the undertaking made by the Commission to the Laeken European Council in December 2001 to improve legal certainty in the field of public service compensation and, in more concrete terms, to establish a Community framework for State aid granted to undertakings entrusted with the management of SGEI (1).

2.2 There is no doubt that the rules applicable to the financing of services of general interest and, more specifically, the application of the rules governing State aid are shrouded in legal uncertainty, despite the additional legal criteria for the discharge of public service obligations set out in the case law of the Court of Justice, namely in its Altmark and Enirisorse rulings.

2.3 Nevertheless, there is a need to clarify these criteria, more specifically the methods used to calculate costs (in terms of transparency and the parameters used) and the nature of those public service obligations for which compensation is provided (2).

2.4 In this respect the proposal is especially needed for economic operators in that, until the regulatory framework enters into force, any State aid received by these operators as providers of a service of general economic interest which has not been notified to the Commission, irrespective of the amount involved, may be illegal.

2.5 Hence they would not be protected against any action which challenged its legality before the courts of the Member States.

2.6 This need for clarification is all the more urgent given that in two particular areas — financing and the award of contracts — the Member States’ discretion to define and design SGEI missions tends to clash with a series of basic rules of Community law.

2.7 The Member States enjoy a wide margin of discretion when deciding whether and in what way to finance the provision of services of general economic interest. In the absence of Community harmonisation, the main limit to this discretion is the requirement that such financing mechanisms must not distort competition (3), without prejudice to the discharge of their social tasks and with full respect for the principle of subsidiarity which is a binding legal requirement under the Constitution that both the Union and the Member States must respect, and which must not lead to the Community acquis being called into question.

2.8 The Commission should examine how to explain clearly why each of its proposals is being presented (legal base, necessity, proportionality) and why — in the interests of good practice and conformity with the protocol on the application of the principles of subsidiarity and proportionality — it should be at Community level (subsidarity criteria, qualitative and/or quantitative indicators).

(1) See the ruling of the Court of Justice of 3 July 2003, CRONOPOST, as. ac. C-83/01P, C-93/01P and C-94/01P, publication pending in case reports.

(2) According to Article 3(4) of the Decision, any exclusive or special rights granted to an undertaking are of particular importance in determining its reasonable profit and the Member State concerned may introduce incentive criteria relating, in particular, to the quality of the service provided.

2.9 These and other reasons favour support for the Commission proposal which, in essence, urges the government authorities of the Member States to comply with some basic requirements, such as to ensure the procedures used to award public contracts are transparent and to monitor any potential damage to free competition caused by companies not fulfilling their SGEI mission effectively.\(^1\)

3.4 However, the scope of application of the proposal is not clear. In the case of the decision especially, it is determined according to disparate criteria which either exclude specific situations or sectors (see 1.4.2-1.4.4 above) or delimit these in a general manner using quantitative rather than qualitative criteria (see 1.4.5 above).

2.10 The EESC welcomes a legislative proposal which serves to extend the criteria advanced by the Court of Justice in order to remove public service compensation from the Treaty provisions governing State aid.

3.1 Having analysed the proposal, it is worth raising some questions as to its content and layout.

3.2 The three main objectives of the proposal can be summed up as follows: (i) to ensure that State aid of a relatively limited amount granted to undertakings entrusted with discharging an SGEI is compatible with the common market; (ii) to enhance legal certainty regarding compensation for provision of SGEI exceeding that amount by means of a Community framework establishing criteria for evaluating the compensation; (iii) to establish the criteria according to which such compensation can be considered to be State aid.

3.6 In the Committee’s view, all island cabotage should, like other modes of transport, be excluded from the scope of the proposal unless the Commission can adequately justify its inclusion.

3.7 Consequently, and in view of the markedly technical and instrumental nature of the objectives of the proposal, it would seem reasonable to ask the Commission to clarify the notion of SGEI so as to distinguish it from other similar concepts, such as public services and services of general interest, which prevail in the constitutional traditions of the Member States.\(^2\) Indeed, the general terms currently used by the Commission to describe SGEI fail to cover some activities that are of utmost social interest, including the funding of research into improving health and consumer protection.\(^3\)

3.9 Furthermore, the proposal does not address the classification of certain methods of financing of SGEI, such as solidarity-based financing, given the problems of access to certain national markets (insurance is one example), or lay down criteria for assessing best practice at Community level, which would offer the particular advantage of clarifying the legality of the practice known as ‘cream-skimming’.\(^4\)

3.10 The proposal applies the same criteria for compliance with the basic framework of rules governing the internal market to all sectors without distinction and without considering the different responses of the operators.

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\(^3\) See Annex 1 (Definition of Terms) to the White Paper on services of general interest, COM(2004) 374, cit. p. 23.

\(^4\) The averaging of tariffs and cross-financing between profit- and loss-making services could be called into question above all in the liberalised sectors.
3.11 Hence it applies the principle of equality of treatment wrongly to very different situations. The supply of drinking water, urban drainage and waste recycling are treated in the same way as the supply of electricity or gas. And yet these sectors neither operate according to the same conditions (in terms of environment protection, infrastructures and so on), nor on comparable markets: some are restricted to the local and regional level, whilst others are based at the national, trans-national and even international level. Applying the same supranational financing rules to all of these sectors is inappropriate.

3.12 Similarly, the appeal of SGEI for operators is not the same across the different sectors. Some services require specific infrastructures and equipment which, logically, results in an increase in the costs incurred and in some cases failure to attract private investment due to a poor return in the short and medium terms.

3.13 In addition, the proposal, the legal basis of which is Article 86(3) EC Treaty, perpetuates the current asymmetry in the Treaties between the regulation of competition law, which interprets SGEI as derogations from Article 86(2) EC Treaty, and the positive recognition of SGEI in Article 16 EC Treaty and Article 36 of the Charter of Fundamental Rights. This approach diminishes somewhat the essential value of SGEI both in EU policymaking — social and territorial cohesion — and as a guarantee for the citizens of the Union of basic rights such as freedom of movement.

3.14 The problems raised by the proposal relate to the very basis of the legislative strategy employed by the Commission, at the very least in terms of its instrumental aims and regulatory effectiveness. With respect to the former, the approach on which the proposal is based calls to mind the well-known typology of exemption by category which is widely used in the Community legal system for competition on the internal market. By lumping together diverse situations in this way, there is a risk of a hidden form of harmonisation which seeks, through regulation, a one-size-fits-all solution to the complex realities of SGEI, when what is really needed is a more detailed and further-reaching legal approach.

3.15 This remark leads us to consider the issue of regulatory effectiveness. In the absence of a prior proposal for a framework directive, as recommended by the Committee (1), which would consolidate the basic regulatory objectives and principles of SGEI as well as clarifying (a) the concepts used by the Treaties and sector-specific directives and (b) the conditions governing the different operators (2), this proposal does not guarantee the level of legal certainty necessary for this sector of the internal market.

3.16 Without any such aforementioned legal infrastructure, a number of conflicts will undoubtedly arise in terms of application and interpretation, leading potentially to a breakdown of the competent legal bodies. This in turn could result in infringements of the subsidiarity principle which, in the current context of the integration process, has achieved a new level of protection as demonstrated in Article I-9 of the ad-hoc protocol appended to the Draft Treaty establishing a Constitution for Europe, drawn up by the European Convention.

3.17 The EESC is keen to ensure that the process of strengthening economic, social and territorial cohesion is not hampered by the introduction of the planned framework. State aid which promotes the economic development of those regions in which the standard of living is abnormally low or the unemployment rate is seriously high, as well as aid which promotes the development of specific activities or of specific economic regions, must be maintained, albeit reoriented towards the objectives of cohesion, as established in the Treaty.

3.18 It may indeed be necessary to adopt a new approach to State aid policy at Community level, in particular given that the relationship between the Commission and regional and/or local authorities, with whom the Commission is required to deal directly for all matters relating to the aid they dispense, may well become increasingly complex.


The President
of the European Economic and Social Committee

Anne-Marie SIGMUND

(2) See points 3.1 to 3.5 of the opinion of the European Economic and Social Committee of 11 December 2003; cit. supra.