

Opinion of the European Committee of the Regions — State aid and Services of General Economic Interest

(2017/C 088/05)

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THE EUROPEAN COMMITTEE OF THE REGIONS

General comments

1. refers in this own-initiative opinion to the following Commission initiatives: (1) the Commission notice on the notion of State aid under Article 107(1) TFEU ⁽¹⁾; (2) the consultation procedure on drawing up a proposal to extend the General Block Exemption Regulation (GBER) ⁽²⁾, under which certain investment aid for ports and airports is to be exempted from prior State aid assessment by the Commission; (3) the Commission's intended review of the Almunia package and revision of the regulation on *de minimis* aid for SGEIs, which is due to expire;

2. notes that EU State aid rules for services of general economic interest (SGEIs) should not be limited in their application to competition principles, but must be fully consistent with the broad discretion granted by the Treaties to the Member States in determining what represents an SGEI, as well as the principles of local and regional self-government, economic, social and territorial cohesion, and neutrality as regards ownership in the Member States (Article 3 TEU, and Articles 14, 106 and 345, and Protocol 26, TFEU). SGEIs must reflect the differences in needs, user preferences and public procurement systems that can result from variations in geographical location, social and cultural situations, and democratic processes in the Member States. It should be noted that State aid scrutiny may only be carried out if national, regional or local regulation or financing of an SGEI has cross-border effects or implications for the internal market;

3. would highlight the prominent role played by SGEIs in growth and employment, and the fact that they are often the condition for further public and private investment. They must therefore also be seen from the perspective of the EU investment agenda. The Commission's Annual Growth Survey 2016 is relevant here, as it states: '... it is essential that Member States promote social investment more broadly, including in healthcare, childcare, housing support and rehabilitation services to strengthen people's current and future capacities to engage in the labour market and adapt. [...] Social investment offers economic and social returns over time, notably in terms of employment prospects, labour incomes and productivity, prevention of poverty and strengthening of social cohesion';

4. therefore calls for more consideration of how to support SGEIs using EU aid within the State aid rules, for instance looking at whether the application of the State aid rules should be further simplified, perhaps through the introduction of a presumption — linked to simple criteria such as consistency with adopted operational programmes — that ESIF funding is compatible with State aid. This is because the unequal treatment of directly managed EU funds such as EFSI, Horizon 2020 and the ESIF in the field of State aid is unjustified, increases administration and impedes synergies between the funds, which the European Commission itself is also pursuing;

5. laments the Commission's continuing refusal to take Article 14 TFEU as the legal basis for State aid rules for SGEIs, as doing so would provide for a proper legislative procedure and consequently more legal certainty and democratic legitimacy;

⁽¹⁾ See notice of 19 May 2016: http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

⁽²⁾ http://europa.eu/rapid/press-release_IP-16-622_en.htm

6. observes that EU law governing State aid in relation to SGEIs has become too detailed and too abstruse because of its complex content, competing definitions of concepts, and adjustments over many years. Red tape must be reduced for the public authorities granting aid and for companies, and Commission resources should be targeted at applying State aid provisions in cases which have the most impact on the internal market. The complexity of the rules can also mean that they are insufficiently familiar and that the special conditions available for SGEIs are therefore not taken advantage of. The Commission is therefore urged to tighten up the multiplicity of secondary legislation and 'soft law' texts relating to aid (regulations, communications, guidelines, etc.) and, where appropriate, collate these;

7. reiterates its fundamental opposition to the European Commission's inclusion of additional quality and efficiency considerations in the compatibility test for financing of SGEIs. The Commission's remit as defined in the competition chapter of TFEU does not include setting quality and efficiency criteria which further restrict the discretion of local and regional aid providers. Decisions on quality and efficiency must be left to local and regional authorities⁽³⁾;

8. points out that EU trade agreements do not prejudice the right of the EU, its Member States and their local authorities to themselves regulate, provide or support services, and would expect the guarantees given by the European Commission in the negotiations on the TTIP agreement to also obtain for all other negotiations on trade agreements, i.e. that there should be no encroachment on countries' powers to introduce or retain provisions to protect the high quality of services and important objectives of general interest, such as health protection, public safety or environmental protection, that no privatisation of services should be provided for, that the public sector should be able to expand its existing range of public services, and that it should be possible to offer public services that were previously delivered by private providers⁽⁴⁾;

9. reiterates its concern, in view of the interplay between SGEIs and public investment, that no distinction is made between public expenditure and public investment in the accounting standards of the new European System of National and Regional Accounts (ESA 2010) from Eurostat, which has been in effect since September 2014. Moreover, in certain Member States these standards are being transposed into national law in a way that results in local and regional authorities being obliged to apply public investment ceilings per year and per inhabitant. These upper limits also hamstringing those local and regional authorities that have reserves which they could use to launch extensive SGEI investment projects. The European Commission is therefore urged to present a report on the implementation of ESA 2010⁽⁵⁾;

Notice on the notion of State aid⁽⁶⁾

10. points out that the authority to decide that an activity constitutes a service of general economic interest lies with the Member States based on their established cultural and political systems and the need for these activities to develop continuously, and that local and regional authorities have full autonomy to decide which services they regard as of general economic interest;

11. welcomes the publication on 19 May 2016, 2 years after the consultation procedure during the first half of 2014, of the Commission's notice on the notion of State aid under Article 107(1) TFEU, which sets out the scope of application of EU State aid rules. The European Committee of the Regions recognises that the Commission's intention is to focus its resources on ensuring State aid rules are applied in cases that have the greatest impact on the internal market, but would also point out that the notice does no more than provide an interpretation of the concept of State aid in those areas where the Court of Justice has already delivered a ruling, and therefore wonders whether this approach is perhaps too restrictive and fails to reflect various dynamics in the sphere of public investment, e.g. in relation to tax issues and the development of new social services;

⁽³⁾ See point (29) of the CoR opinion of 30 November 2012 on *EU State aid modernisation*.

⁽⁴⁾ http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm

⁽⁵⁾ See point (20) of the CoR opinion of 3 December 2014 on *Promoting quality of public spending in matters subject to EU action* (BUDG-V-009).

⁽⁶⁾ http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html

12. welcomes the confirmation in the notice that the concept of negative effects on intra-EU trade is limited. In fact, based on seven rulings on individual cases of 29 April 2015 ⁽⁷⁾ and in line with the recommendation in the original CoR draft opinion, aid for local infrastructure or local services that would have very little impact in other Member States and that has only marginal effects on cross-border investment is henceforward considered not to fall within the scope of EU State aid rules ⁽⁸⁾;

13. takes note of the Commission's position that public investment for building or modernising infrastructure does not constitute State aid if the infrastructure in question is not in direct competition with other infrastructure of the same type, while disagreeing with the Commission's simplistic view that this is generally the case for road and rail infrastructure, inland waterways and water supply and sewage networks, but not in areas such as energy, broadband, airports or ports;

14. welcomes the clarification that State aid rules do not apply to public support for certain cultural activities of a non-commercial nature that are made available to the public cost-free or for a charge that covers up to 50 % of costs; this will substantially reduce the high audit burden for local and regional authorities — although an audit remains necessary in individual cases — and lead to greater legal certainty in dealing with public support for culture;

15. would therefore like the European Commission to spell out that a local service does not pose a threat to trade and also that the burden of proof is on the complainant and/or the European Commission to demonstrate that a real or potential threat exists to intra-Community trade;

16. would like there to be legal certainty in future for local and regional authorities when deciding which activities they can support without breaching State aid rules;

17. with reference to the action plan *Towards a single EU VAT area* presented in April 2016, on which the Committee of the Regions is drawing up a separate opinion, is not in favour of limiting the scope of VAT exemption for SGEI activities;

General Block Exemption Regulation (GBER)

18. emphasises the usefulness of the FAQ guide to the current GBER ⁽⁹⁾, which summarises the questions of national authorities and answers from the European Commission, although it notes that sometimes these answers do not entirely resolve the doubts over interpretation in the Member States;

19. welcomes the European Commission's initiative to conduct a preliminary consultation, which will be open until 30 May 2016, on a further revision of the General Block Exemption Regulation (GBER) ⁽¹⁰⁾ with the aim of exempting State aid for port and airport infrastructure from the notification requirement, since the red tape for public authorities and final beneficiaries is being reduced in line with the increase in the GBER's scope;

20. notes, however, that in the case of ports there is no prior legal basis for compatibility criteria for investment aid which could have enabled the Commission to draw up a list on grounds of greater legal certainty, and therefore calls on the Commission to further explore the issue of whether or not State aid has been provided with reference to types of investment and size of ports, and to take account of the specific ways that ports are organised in the individual Member States, also bearing in mind their public role;

21. notes that various measures taken by the Member States with regard to inland ports may not constitute State aid because the beneficiary is not carrying out an economic activity or because the measures do not have an impact on trade between Member States. In some circumstances, this could be the case for aid for purely local inland port infrastructure or aid for infrastructure in inland ports which are landlocked and do not allow for trade or communication with other Member States by means of waterways and thus do not distort competition;

⁽⁷⁾ http://europa.eu/rapid/press-release_IP-15-4889_en.htm: Czech Republic/Hradec Králové public hospitals (SA.37432), Germany/Medical centre in Durmersheim (SA.37904), Germany/Städtische Projektgesellschaft 'Wirtschaftsbüro Gaarden — Kiel' (SA.33149), Germany/Landgrafen-Klinik (SA.38035), Netherlands/Investment aid for Lauwersoog port (SA.39403), United Kingdom/Glenmore Lodge (SA. 37963), and United Kingdom/Member-owned golf clubs (SA.38208).

⁽⁸⁾ See points (196) and (197) of the *Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*.

⁽⁹⁾ http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

⁽¹⁰⁾ http://ec.europa.eu/competition/consultations/2016_gber_review/index_en.html

22. calls for the GBER to include an exemption for State aid for ports or at least for specific categories of ports, in tandem with the call regarding certain airports (see point (28));

23. is concerned that, once the case of port infrastructure is incorporated into the GBER, any public support which comes under the definition of State aid and cannot be exempted becomes subject to an extremely complex assessment with an uncertain outcome, with a view to possible direct approval on the basis of the Treaty, and therefore urges the Commission to propose the adoption of specific guidelines for this aid where it is above the exemption threshold;

24. explicitly supports the European Commission's approach to investment aid for regional airports, whereby: 'It is not appropriate to establish a notification threshold in terms of the amount of aid since the competitive impact of an aid measure depends mainly on the size of the airport and not on the size of the investment.'

25. trusts that the European Commission will ensure alignment with existing EU law in relation to the 'Definitions for aid for regional airports';

26. reaffirms the view it has previously expressed that the Commission should focus on large airports and that State aid measures for small airports with average traffic of less than 300 000 passengers per year should not fall within the scope of State aid, given that these airports can have no notable impact on trade between Member States, that they are unable for structural reasons to cover their capital and operating costs⁽¹¹⁾ and that public support is intended for the development of a safe and economically viable air traffic infrastructure in regions with poor transport connections⁽¹²⁾; this should, of course, go hand in hand with a significant increase in the exemption threshold for aid to airports providing SGEIs (currently set at 200 000 passengers per year), restoring the threshold of 1 million passengers per year which was in place before the Almunia package on SGEIs was adopted. The prerequisite for such action must nevertheless be that a reasonable level of connectivity cannot be achieved by any other means;

27. is doubtful that small airports are capable of covering a minimum 25 % of investment costs from their own resources, and asks the Commission to ensure that this aid is as a rule not targeted at increasing capacity but used mainly for infrastructure needs;

28. calls for the GBER to also include an exemption for State aid to airports, since the European Commission guidelines on State aid to airports and airlines (2014 guidelines, paragraph 112 ff.) contain clear requirements, for instance with regard to calculating the initial funding gap, which can also be complied with in the context of an exemption;

29. considers that the current provisions for ports and airports need to be adapted to the situation in the outermost regions, with regard to both investment aid and operating aid, given the poor access in these regions and their complete dependence on the maritime and aviation sectors, which represent the sole viable transport alternative in these isolated areas;

30. would be in favour of increasing the notification thresholds for investment and State aid for culture and heritage conservation by 100 % instead of only 50 % as proposed for a revised GBER (the Commission proposes increases of EUR 100 to 150 million per project for culture and EUR 50 to 75 million for heritage conservation per undertaking per year) and calls for greater alignment of GBER standards and provisions with the Communication on the notion of State aid: the communication has clarified a number of key points, a move welcomed by the Member States, but these clarifications do not have the same binding effect as a directly applicable regulation such as the GBER;

31. in line with the increase in the threshold requested in the previous point, as regards investment and State aid for culture and heritage conservation, calls for a EUR 1 to 2 million increase in the threshold below which the method for calculating aid described in Article 53(8) of Regulation (EU) No 651/2014 may be applied, with State aid set at 80 % of the project's eligible costs (as an alternative to the method described in Article 53(6) and (7) of Regulation (EU) No 651/2014);

⁽¹¹⁾ CoR opinion on *EU guidelines on state aid to airports and airlines*, 28 November 2013, COTER-V-043.

⁽¹²⁾ See European Commission decision on Angoulême airport, 23 July 2014: http://europa.eu/rapid/press-release_MEMO-14-498_en.htm

32. also asks the Commission to clarify the status of State aid for infrastructure measures in a revised GBER. Based on the Propapier/Eisenhüttenstadt decision of 1 October 2014⁽¹³⁾, it should always be considered in the case of general infrastructure measures whether the positive effects of the State aid for regional development do not outweigh the negative impact on competition;

33. looks forward to sports infrastructure and multifunctional recreational infrastructure being put on an equal footing in the revised GBER so that operating aid for the latter infrastructure is also exempted up to the level of EUR 2 million per infrastructure per year;

Services of general economic interest

34. advocates actively widening the concept of SGEI: new social services, such as social services in connection with the initial reception and integration of refugees and migrants, or digital infrastructure in regions where a market failure is apparent, such as regions facing the challenges of demographic change, could qualify as services of general interest owing to the need for a comprehensive service to citizens. New developments in the future should also be subject to appropriate regular appraisals and it should likewise be possible at Member State level to regard them as SGEIs if necessary;

35. takes issue with the Commission's attempt in the current communication on SGEIs to widen its room for manoeuvre with regard to what can be classified as an SGEI by referring to 'normal market conditions'⁽¹⁴⁾. This not only conflicts with the principles of local and regional self-government but is also a condition that is almost impossible for public authorities to prove they are compliant with in practice;

36. points out that the fourth criterion set out in the *Altmark* judgment only created an incentive for the Member States to use the provisions to put services out to tender rather than encouraging them to adopt an SGEI-based approach. In fact, local and regional authorities face the problem that no benchmark is available for the second alternative of the fourth *Altmark* criterion — i.e. a typical undertaking, well run and adequately provided with means — in cases where there are no private companies operating in the sector concerned. The Commission is therefore asked to draw up detailed guidelines, with a view to meeting the fourth *Altmark* criterion, as to what a typical, well-run and adequately resourced undertaking is, drawing on market studies which will make it possible to identify certain standard costs, so as to make it easier for public authorities and thus exempt an SGEI activity from State aid assessment;

37. considers it essential for the definition of reasonable profit of an SGEI to be revised, in particular so as to reflect the fact that, through incentives or an increase in the percentage of recognisable reasonable profit, such profit is often reinvested in SGEIs;

38. repeats its call for the *de minimis* thresholds to be increased in the case of State aid for SGEIs. The thresholds for assessing the admissibility of aid for SGEIs should be set at EUR 1 million per case per 3 tax years. Below this threshold it would be assumed that the aid does not meet all the criteria for State aid given that, in view of the often local context of SGEIs, there can be no cross-border distortion of trade or competition that would harm the internal market;

39. believes that the threshold for exemption from the notification obligation under Article 108(3) TFEU of State aid in the form of a public service compensation for companies entrusted with delivering SGEIs should be increased from no more than EUR 15 million per year to the threshold in effect before 2011, which was EUR 30 million per year;

40. is in favour of an extension of the normal duration of entrustment acts to more than 10 years so as to better allow for the cost of entrustment and recouping of investment by entities entrusted with SGEI provision;

⁽¹³⁾ State aid register, DG Competition, case SA.23827.

⁽¹⁴⁾ See point (48): '(...) it would not be appropriate to attach specific public service obligations to an activity which is 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'.

41. also advocates widening the definition of social housing contained in the Commission Decision of 20 December 2011: to give the Member States more discretion in planning, delivering, financing and organising the construction of social housing and guarantee the democratic right to choose, the restriction of social housing to 'disadvantaged citizens or socially less advantaged groups' should be removed. The right to adequate and affordable accommodation should be given more priority, because the inability of the housing market to meet everybody's accommodation needs affects not just people who have no access to housing at all, but also the occupants of housing that is hazardous to health, inadequate or overcrowded, as well as people who are paying most of their income on rent or their monthly mortgage payments;

42. calls for capacity-building between the European Commission and the Member States to improve understanding of State aid as it affects SGEIs. There must also be direct dialogue between the European Commission and local and regional authorities, and assistance should be provided;

43. urges all the Member States to work with the European Commission to introduce appropriate communication and coordination procedures and develop guidelines making the complex assessments of State aid in relation to SGEIs easier for local and regional authorities. The Member States should also involve local and regional authorities and their associations when drawing up their national reports on implementation of the Almunia package, so as to ensure a realistic assessment of actual difficulties and challenges relating to SGEIs;

44. calls for legal certainty to be established for local and regional authorities by setting a limitation period of 5 years for appeals from the start of the compensation payment or investment, since the current deadline for the Commission to open proceedings leading to a recovery decision (10 years from the day on which unlawful aid was granted to the recipient), which is also the de facto limitation period for State aid appeals, is too long. Local and regional authorities, as well as the companies receiving aid, need more legal certainty. A 10-year period, plus the time needed for the procedures, resulting in aid having to be recovered which was provided as much as 20 or 25 years before, is disproportionate and prevents a fundamental need of local and regional authorities and their undertakings, which are often unable to afford legal advice, from being met. It also thwarts one of the purposes of recovering State aid, i.e. restoring the pre-existing competition situation;

45. considers it necessary to provide that appeals may only be lodged by parties who may be directly financially affected. The range of interested parties to date, i.e. 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations', under Article 20 in conjunction with Article 1(h) of the procedural regulation, is still too broad.

Brussels, 11 October 2016.

*The President
of the European Committee of the Regions*

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