

Opinion of the Committee of the Regions on 'EU State aid rules on services of general economic interest' (revised opinion)

(2012/C 9/09)

THE COMMITTEE OF THE REGIONS:

- is pleased that the European Commission is on the same wavelength as the CoR proposal that a distinction be made between: 1) situations where *de minimis* public service compensation does not affect intra-Community trade; 2) compensation granted to local and social public services that exceeds the *de minimis* thresholds but which, because of the way these services are organised and the current state of internal market development, does not affect intra-Community trade; and 3) compensation granted to other EU or cross-border public services governed by sectoral directives or regulations;
- requests once again that the threshold be raised to EUR 800 000 per year;
- calls on the Commission not to include the local authority population criterion among the conditions for applying the new *de minimis* regulation;
- opposes the introduction by the Commission of an assessment of economic efficiency in SGEI compensation; in the Committee's view, neither Article 106 nor a unilateral decision or directive from the Commission, on the basis of paragraph 3 thereof, provide sufficient legal basis for any such legislative proposal. The remit of the Commission, in its capacity as European competition authority, by no means extends to the conditions for the efficient allocation of public resources by Member States' public authorities.

Rapporteur-general	Mr Karl-Heinz LAMBERTZ (BE/PES), First Minister of the Belgian German-speaking Community
Reference documents	<ul style="list-style-type: none"> — Draft Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (SGEI) — Draft Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to <i>de minimis</i> aid granted to undertakings providing Services of General Economic Interest — Draft Communication on the EU framework for State aid in the form of public service compensation (2011) — Draft 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 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Reform of the EU State aid rules on services of general economic interest <p>COM(2011) 146 final</p> <p>Revised opinion of the Committee of the Regions in connection with document CdR 150/2011 fin, in accordance with Rule 52 of the Rules of Procedure – ECOS-V-016</p>

I. POLICY RECOMMENDATIONS

THE COMMITTEE OF THE REGIONS:

1. welcomes the Commission's proposal for a legislative package on State aid in the form of public service compensation;

2. considers this proposed revision to be a major political initiative for local and regional authorities in that it aims to frame new, clear and proportionate rules on the compatibility of the various forms of funding public services, with the internal market and thus to provide the legal certainty and predictability needed for the development of public services in the EU; regrets, however, that the Commission has not achieved its own goal of (i) providing more clarity as regards issues of applicability and implementation and (ii) minimising the administrative burden, especially for those concerned;

3. considers that the general architecture of the mechanism for monitoring State aid proposed by the European Commission should take better account of the local, cross-border and EU dimensions of the public services, the various ways in which they are organised and the real extent of the risk that they might negatively affect intra-Community trade, and feels that the proposals only partially reflect this;

4. is pleased that the European Commission is on the same wavelength as the CoR proposal ⁽¹⁾ that a distinction be made between: 1) situations where *de minimis* public service compensation does not affect intra-Community trade and is thus not subject to State aid control; 2) compensation granted to local and social public services that exceeds the *de minimis* thresholds but which, because of the way these services are organised and the current state of internal market development, does not affect intra-Community trade to an extent that would be detrimental to the EU's interests; and 3) compensation granted to other EU or cross-border public services governed by sectoral directives or regulations, or in cases where the undertakings concerned have a cross-border or supra-national structure;

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

5. is pleased that the draft communication clarifies and updates various notions and concepts in EU law which apply to SGELs, especially as regards developments in the case-law of the EU Court of Justice; regrets, however, that the Commission has failed to establish clear criteria based on the requirements of the ECJ for determining what is an economic activity, its local reference and its relevance to the internal market, with the result that there is broad scope for interpretation when carrying out checks and legal uncertainty remains;

⁽¹⁾ CoR opinion 150/2011, point 44.

6. emphasises, in this connection, that Article 14 TFEU, which is part of the Treaty's provisions of general application, provides a new legal basis for the European Parliament and the Council to establish – by means of regulations – the principles and conditions enabling services of general economic interest to fulfil their particular purpose; therefore calls on the Commission to place the process of clarifying the key concepts, which are not set out in the Treaty, on a formal footing with a proposal for a Council and European Parliament regulation based on Article 14 TFEU;

7. considers that the present proposal for a communication does not release the Commission from its commitment to present a quality framework for services of general interest;

Draft 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

8. welcomes the Commission's intention to raise the threshold set by the *de minimis* regulation⁽²⁾, below which State aid is not subject to State aid control, so as to exclude from the scope thereof all local public services relying on the local voluntary sector and local social microenterprises, which relate in particular to social development, such as social inclusion, the prevention of exclusion, care for the elderly, community work and the promotion of cultural, sporting and socio-educational activities. This proposal is based on the fact that there is zero risk of this kind of public service affecting trade between Member States;

9. regrets, however, that the Commission is content merely to propose raising the threshold from EUR 200 000 over three years to EUR 150 000 per year, which would only cover local facilities with fewer than four employees; therefore, requests once again that the threshold be raised to EUR 800 000 per year, in order to cover all local facilities with fewer than 20 employees whose only funding is compensation granted by public authorities, provided that the local services concerned are provided free of charge within a defined area;

10. calls on the Commission not to include the local authority population criterion among the conditions for applying the new *de minimis* regulation. Population size is largely irrelevant when it comes to measuring the impact of an authority's economic activity on trade between Member States. Moreover, it would be wrong to take as a basis reasoning which would be liable to lead to discrimination

between entities (municipalities, regions, state, etc.). If population were taken as the sole criterion, this would also fail to take into account the fact that these local services can be part-financed by several public authorities of varying size and at different levels, in keeping with the principle of freedom to organise and provide public services, enshrined in the Treaty. Lastly, it would be wrong to penalise pooling of services, particularly where there are joint municipal authorities. Thus, steps to ascertain the local, limited nature of services must be based on a range of indicators that take account, in particular, of the geographical location of an authority and the range of potential public service users involved. Such steps should take account of the situation of regions that suffer from severe and permanent natural or demographic handicaps, in accordance with Article 174 of the Treaty on the Functioning of the European Union, and provision thus made for differentiation of support measures. The EUR 5 million restriction on turnover should be lifted;

11. is pleased to note that the Commission takes transparency very seriously and excludes all non-transparent aid that cannot be precisely calculated from the scope of its regulation;

Draft 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

12. in line with the proportionality principle enshrined in the Treaty, endorses the Commission's approach of taking into account the exclusively local nature of certain public services, and the proposal to extend the *a priori* compatibility decision beyond hospitals and social housing bodies to include other social services as well;

13. feels that the introduction of the new concept of 'essential social needs' is a source of considerable confusion for local and regional authorities and their partners, because it overlaps with the existing concepts of social services of general interest and social services excluded under Article 2(2)(j) of the Services Directive; therefore urges the Commission to give preference to the concept of social services within the meaning of Article 2(2)(j) of the Services Directive, which leaves it up to the Member States and local and regional authorities to define the boundaries in accordance with the subsidiarity principle, and to specify that the list of services given by way of example in the proposal for a decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union is neither definitive nor exhaustive;

14. calls on the Commission not to halve the annual compensation threshold for application of this decision but to keep it at EUR 30 million per year;

⁽²⁾ Commission Regulation (EC) No 1998/2006 of 15.12.2006 on *de minimis* aid.

15. calls on the Commission not to make exemption from notification dependent on a maximum duration of the act of entrustment, in line with the principles of free administration and free organisation of public services by Member States' public authorities;

16. calls on the Commission not to make exemption from notification for social services dependent on these services being performed solely by undertakings specifically entrusted with this task, provided that the provisions of the Directive on the transparency of financial relations between Member States and public undertakings (see references) are applied and cost accounting is carried out by the undertakings concerned;

17. considers that, when local and regional authorities launch a call for tenders in a bid to comply with the fourth criterion of the Altmark judgment for public service compensation, they must be able to set quality criteria to determine the most economically advantageous tender, rather than opt for the tender offering the lowest price;

18. feels that the proposed new definition of 'reasonable profit' on the basis of the rate of return on capital and other profit level indicators is so complex that it will be unusable for a large number of sub-national authorities;

19. calls on the Commission: to include in its definitive review proposals all of the forms that public service compensation can take, given the wide discretionary power of local and regional authorities as regards funding public services, including compensation in the form of long-term investment aid required for funding local public service infrastructure; not to limit its compatibility rationale just to annual operating subsidies; and to clarify the specific conditions for assessing the absence of overcompensation in the case of long-term investment aid, particularly in property and land infrastructure;

20. points out to the Commission that other objective criteria should also be taken into consideration, which in principle offset the risk of negatively affecting intra-Community trade, distorting competition or creating cases of cross-subsidisation; such objective criteria include the limited territorial remit of certain operators governed by local and regional authorisation schemes, the limited scope of some public or private operators set up specifically to provide a particular public service in a given area and not pursuing any commercial activity on the market, and the not-for-profit nature of certain social undertakings which re-invest their profits in funding for the public service they operate, this being deductible from future compensation;

21. suggests that, in accordance with the subsidiarity and proportionality principles set out in the Treaty, the Commission's final decision make it incumbent on the public authorities granting the compensation to take all necessary steps

to prevent, detect and offset any overcompensation, given that it is directly in the interests of the local and regional authorities to prevent any such situation from occurring. By the same token, the appeals procedures available in the event of overcompensation being detected should be simplified for undertakings which are actually and directly penalised;

22. proposes to the Commission that implementation of these provisions be conditional on:

- the existence of a 'public service contract' ⁽³⁾, i.e. of any official document: 1) acknowledging that the task performed by the operator is a service of general interest and falls within the scope of Articles 14 and 106(2) of the TFEU and Article 2 of Protocol 26; 2) setting out the nature of the specific obligations arising and the geographical area concerned; and 3) setting out the parameters for calculating the public service compensation granted; and
- this public service contract being published in the *Official Journal of the European Union* in a specific register set up for this purpose.

Draft Communication from the Commission: EU framework for State aid in the form of public service compensation (2011)

23. points out that it opposes the introduction by the Commission of an assessment of economic efficiency in SGEI compensation; in the Committee's view, neither Article 106 nor a unilateral decision or directive from the Commission, on the basis of paragraph 3 thereof, provide sufficient legal basis for any such legislative proposal. The remit of the Commission, in its capacity as European competition authority, by no means extends to the conditions for the efficient allocation of public resources by Member States' public authorities. This exclusive role exercised by the Commission, under the supervision of the European Court of Justice, is limited to ensuring the conformity of public service compensation that does not meet the conditions laid down by the Court in its Altmark judgment and thus falls under the rules governing the prohibition and control of State aid;

24. rejects the requirement that the Member States provide proof of the need for a public service in the form of a market survey, on the basis that it constitutes an encroachment on the exclusive right of the Member States to organise and design services of general interest.

II. RECOMMENDATIONS FOR AMENDMENTS

Draft 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

⁽³⁾ As defined in the aforementioned Regulation (EC) No 1370/2007.

Amendment 1

Recital 4

Text proposed by the Commission	CoR amendment
(4) In the light of the Commission's experience, compensation for the provision of services of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that it is granted by a local authority representing a population of less than 10 000 inhabitants, that it benefits an undertaking with an annual turnover of less than EUR 5 million during the two preceding financial years and provided that the total amount of compensation for services of general economic interest received by the beneficiary undertaking does not exceed EUR 150 000 per fiscal year.	(4) In the light of the Commission's experience, compensation for the provision of services of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that it is granted by a <u>public local</u> authority representing a population of less than 10 000 inhabitants, that it benefits to an undertaking with an annual turnover of less than EUR 5 million during the two preceding financial years and provided that the total amount of compensation for services of general economic interest received by the beneficiary undertaking does not exceed EUR <u>800 000</u> 150 000 per fiscal year.

Reason

See points 9 and 10 of the opinion.

Amendment 2

Recital 16

Text proposed by the Commission	CoR amendment
The Commission has a duty to ensure that State aid rules are respected and in particular that aid granted under the <i>de minimis</i> rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 4(3) TEU, Member States should facilitate the achievement of this task by establishing the necessary tools in order to ensure that the total amount of <i>de minimis</i> aid granted to the same undertaking for the provision of services of general economic interest does not exceed the annual ceiling of EUR 150 000. (...)	The Commission has a duty to ensure that State aid rules are respected and in particular that aid granted under the <i>de minimis</i> rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 4(3) TEU, Member States should facilitate the achievement of this task by establishing the necessary tools in order to ensure that the total amount of <i>de minimis</i> aid granted to the same undertaking for the provision of services of general economic interest does not exceed the annual ceiling of EUR <u>800 000</u> 150 000 . (...)

Reason

See point 9 of the opinion.

Amendment 3

Article 1(2) - Scope

Text proposed by the Commission	CoR amendment
2. This Regulation only applies to aid granted by local authorities representing a population of less than 10 000 inhabitants.	2. This Regulation only applies to aid <u>procuring local benefits</u> , granted by <u>local public</u> authorities representing a population of less than 10 000 inhabitants in a geographically limited area.

Reason

See point 10 of the opinion.

Amendment 4

Article 2

Text proposed by the Commission	CoR amendment
2. Aid can only benefit from this Regulation if (i) the total amount of aid granted to an undertaking providing services of general economic interest does not exceed EUR 150 000 per fiscal year, and (ii) if this undertaking has an average annual turnover before tax, all activities included, of less than EUR 5 million during the two financial years preceding that in which the aid was granted.	2. Aid can only benefit from this Regulation if (i) the total amount of aid granted to an undertaking providing services of general economic interest does not exceed EUR 800 000 ^{150 000} per fiscal year, and (ii) if this undertaking has an average annual turnover before tax, all activities included, of less than EUR 5 million during the two financial years preceding that in which the aid was granted.

Reason

See point 9 of the opinion.

Draft 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

Amendment 5

Recital 9

Text proposed by the Commission	CoR amendment
Provided a number of conditions are met, small amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below an annual amount of compensation of EUR 15 million, provided the requirements of this Decision are met.	Provided a number of conditions are met, small amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below an annual amount of compensation of EUR 30 ¹⁵ million, provided the requirements of this Decision are met.

Reason

See point 12 of the opinion.

Amendment 6

Recital 17

Text proposed by the Commission	CoR amendment
Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a risk-free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the fact that an SGEI provider that invests capital in an SGEI contract commits this capital for the duration of the entrustment act and will be unable to sell its stake as rapidly and cheaply as is the case with a widely-held and liquidity risk-free asset.	Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a risk free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the fact that an SGEI provider that invests capital in an SGEI contract commits this capital for the duration of the entrustment act and will be unable to sell its stake as rapidly and cheaply as is the case with a widely-held and liquidity risk-free asset.

Reason

See amendment relating to the new point 15a – reference: recital 17 of the Commission decision.

Amendment 7

Article 1(1)(a)

Text proposed by the Commission	CoR amendment
(a) compensation for the provision of services of general economic interest for an annual amount of less than EUR 15 million. Where the amount of compensation varies over the duration of the entrustment, the threshold may be calculated using the average of the different annual amounts of compensation;	(a) compensation for the provision of services of general economic interest for an annual amount of less than EUR 30 ¹⁵ million. Where the amount of compensation varies over the duration of the entrustment, the threshold may be calculated using the average of the different annual amounts of compensation;

Reason

See point 12 of the opinion.

Amendment 8

Article 1(1)(c)

Text proposed by the Commission	CoR amendment
compensation for the provision of services of general economic interest meeting essential social needs as regards health care, childcare, access to the labour market, social housing and the care and social inclusion of vulnerable groups. This paragraph only applies where compensation is granted to undertakings whose activities are limited to one or more of the services referred to in this paragraph or in paragraph (b). The pursuit of ancillary activities directly related to the main activities does not, however, prevent the application of this paragraph.	compensation for the provision of <u>social</u> services of general economic interest meeting essential social needs within the meaning of Article 2(2)(i) of the Services Directive, especially as regards health care, childcare, <u>care for the elderly</u> , access to the labour market, social housing and the care and social inclusion of vulnerable groups. This paragraph only applies where compensation is granted to undertakings whose activities are limited to one or more of the services referred to in this paragraph or in paragraph (b). The pursuit of ancillary activities directly related to the main activities does not, however, prevent the application of this paragraph.

Reason

See amendment relating to point 11a. Reference: Commission decision.

Amendment 9

Article 1(2)

Text proposed by the Commission	CoR amendment
2. This Decision only applies where the period of entrustment with the service of general economic interest is limited to a maximum of 10 years. Entrustment acts which extend over longer periods are only covered by this Decision where a significant investment is required from the service provider that needs to be amortised over the full duration of the entrustment in accordance with generally accepted accounting principles. If during the duration of the entrustment the conditions for the application of this Decision cease to be met, the measure needs to be notified in accordance with Article 108(3) TFEU.	2. This Decision only applies where the period of entrustment with the service of general economic interest is limited to a maximum of 10 years. Entrustment acts which extend over longer periods are only covered by this Decision where a significant investment is required from the service provider that needs to be amortised over the full duration of the entrustment in accordance with generally accepted accounting principles. If during the duration of the entrustment the conditions for the application of this Decision cease to be met, the measure needs to be notified in accordance with Article 108(3) TFEU.

Reason

See point 13 of the opinion.

Amendment 10

Article 4(6)

Text proposed by the Commission	CoR amendment
For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, for instance because the <i>ex post</i> net costs are essentially compensated in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.	For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, for instance because the <i>ex post</i> net costs are essentially compensated in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.

Reason

See amendment relating to the new point 15a. Reference: Commission decision.

Amendment 11

Article 4(7)

Text proposed by the Commission	CoR amendment
In case the use of the rate of return on capital is not feasible, Member States can rely on other profit level indicators than the rate of return on capital to determine what the reasonable profit should be, such as accounting measures of profit (such as the average return on equity (ROE), return on capital employed (ROCE), return on assets (ROA) or return on sales (ROS)). Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.	In case the use of the rate of return on capital is not feasible, Member States can rely on other profit level indicators than the rate of return on capital to determine what the reasonable profit should be, such as accounting measures of profit (such as the average return on equity (ROE), return on capital employed (ROCE), return on assets (ROA) or return on sales (ROS)). Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

Reason

See amendment relating to the new point 15a. Reference: Commission decision.

Brussels, 11 October 2011.

*The President
of the Committee of the Regions*
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