

Chapter 5

The European Commission's Reform Strategy

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Abstract The complementary link between EU competition rules and SGEI is clearly confirmed by the Treaty of Lisbon 2009 with the new Article 14 TFEU, Protocol No 26 on SGI and Article 36 CFREU. Among the competition rules, State aid rules play a very important role in order to ensure a sustainable financing of SG(E)I by the Member States. Such a balanced approach is the key milestone of the European Commission's strategy to reform the rules applicable to public service compensation, by giving them more clarification and more adaptability, in order to promote higher quality of service. The question remains whether such a strategy is sufficient to ensure an effective implementation of these rules by the public authorities, notably local entities.

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5.1 Introduction

As underlined by the Commission, ‘the direct contribution of SGEIs to the GDP is of great importance’.¹ Pursuant to available statistics ‘expenditure in health and social services accounts for as high as 9.4 % of GDP’ and ‘The sectors of infrastructure networks have a contribution of 4.8 % of GDP, while research and recruitment have a contribution of 0.9 % of GDP’.² In parallel, the total State aid represented more or less 10 % of the GDP of the EU 27 in 2010, including financial crisis aid, notably guarantee and liquidity measures.³

As stressed by the European Parliament, in times of crisis, SGEI, and notably social services of general interest (SSGI) play an important role as instrument of economic, social, and territorial cohesion.⁴ On the other hand, control of State aid as laid down by Articles 107–109 TFEU is a key issue to financing SGEI and guaranteeing their existence for all EU citizens. Consequently, reforming the rules governing such a control, and known as the ‘Monti-Kroes Package’ adopted in November 2005⁵ in order to clarify the *rationale* and scope of the 2003 *Altmark* ruling of the CJEU,⁶ is a sensitive issue for both political and legal reasons.⁷

¹ See Commission Staff Working Paper—*Impact Assessment of the Reform of the EU Rules applicable to State aid in the form of public services compensation*: SEC(2011)1581 final of 20 December 2011, p. 12.

² *Ibidem*. See also Bauby and Similie 2010.

³ See Commission Staff Working Paper—*Autumn 2011 Update*: SEC(2011)847 final of 1 December 2011, accompanying the *State Aid Scoreboard*: COM(2011) 848 final of 1 December 2011.

⁴ See European Parliament resolution of 5 July 2011 on the future of social services of general interest; for a general comment on it by its own Rapporteur: see De Rossa 2011, pp. 18–21.

⁵ See Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC 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 (notified under document number C(2005) 2673), in *OJ* L 2005 312/67 and Community framework for State aid in the form of public service compensation, in *OJ* 2005 C 297/4. See also: Commission Directive 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 (codified version), in *OJ* 2006 L 318/17.

⁶ CJEU, Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] *ECR* I-7747.

⁷ See Szyszczak 2004.

The aim of this chapter is to explain how this reform is part of a wider strategy of reform and modernization of EU State aid law and how the world economic crisis has an impact on the implementation of this strategy regarding the specific issue of financing SGEI by the Member States.

In order to analyze these developments, this chapter will start by recalling the links between competition policy and SGEI (Sect. 5.2) and the main reasons put forward by the Commission to modernize the EU State aid policy since 2005 (Sect. 5.3), before matching the Commission's own objectives pursued by the reform of the SGEI Package and checking whether such objectives have been achieved by the new texts adopted in 20 December 2011 and entered into force on 31 January 2012 (Sect. 5.4). The last section will draw some conclusions as to whether this reform is not missing another key objective, namely to ensure more effective enforcement of the State aid rules by the Member States and, notably, by local authorities (Sect. 5.5).

5.2 Competition Policy and SGEI

As stated by Article 3.3 TEU: 'The Union shall establish an internal market' and 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (...)'. No specific and direct reference is made to competition. This is a result of the Treaty of Lisbon signed on 13 December 2007. However, the same Treaty introduced a Protocol No 27 '*on the Internal Market and Competition*' explaining that 'the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'. Without going into the details of a [maybe] sterile debate, it seems clear that competition must be considered as a tool to achieve the objectives of the EU, and not a goal in itself.⁸ Hence, the EU rules related to aids granted by Member States, as laid down by Articles 107–109 TFEU which are part of the chapter related to rules on competition (see Chapter I of Title VII of Part III of the TFEU), must also be considered as a tool to satisfy the aims of the EU.

On the other hand, the Treaty of Lisbon 2009 offered an important contribution to the reinforcement of one of these aims we propose to name the sustainability of the SGEI. Given the place they occupy 'in the shared values of the Union as well as their role in promoting social and territorial cohesion', Article 14 TFEU imposes both to the EU and the Member States, 'each within their respective powers and within the scope of application of the Treaties', to 'take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions'. Such a

⁸ Idot and Gérardin 2008.

statement is developed from Article 16 EC, introduced by the Treaty of Amsterdam in 1997. The provision has been completed, with the Treaty of Lisbon 2009, by a new sentence:

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

It means that Article 14 TFEU is now a clear and unchallenged legal basis for EU secondary legislation with a horizontal perspective.⁹ This new approach, from derogation to obligation,¹⁰ is confirmed by the new Protocol No 26 on Services of General Interest (SGI) which introduces this concept in EU Primary Law for the first time and by the Charter of Fundamental Rights of the EU, which shall have now the same legal value as the Treaties (Article 6.1 TEU), and Article 36 CFREU is focused on the right of access to SGEI.¹¹ This latter provision confirms that, even in terms of competition policy, there is an evolution in the political and legal background ‘from Single Market to Citizenship Rights’.¹²

Considering this new context, we are convinced that the relationship between SG(E)I and competition has to be revisited. There is no conflict anymore but complementarity, as the CJEU has always stressed by interpreting Article 86 (2) EC (now Article 106 (2) TFEU) as follows: the key issue is to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the [EU] interest in ensuring compliance with the rules on competition and the preservation of the unity of the common.¹³ One may assume that Article 14 TFEU must be construed in the light of this assumption, the very beginning of this provision stating that it is *without prejudice* to Articles 106 and 107 TFEU.

The fact is, that such a balance is clearly pursued by the new reform of public aids to SGEI as far as it has been previously taken into consideration in the strategy of modernization for the EU State aid policy itself.

5.3 Which Strategy of Modernization for the EU State Aid Policy?

The strategy of modernization of the EU State Aid policy is a progressive and step-by-step process. It was initiated in 2005 with an Action Plan. Then the Monti

⁹ Rodrigues 2009, pp. 255–266.

¹⁰ Ross 2000, pp. 22–38.

¹¹ Bauby 2011, pp. 19–36 and Szyszczak 2011, pp. 13–16.

¹² Prosser 2005.

¹³ CJEU, Case C-202/88 *France v Commission* [1991] ECR I-1223, para 12, and CJEU, Case C-159/04 *Commission v France* [1997] ECR I-5815, para 55.

Report issued in 2010 took a position on the necessity to go further in the area of the State aid rules applying to SGEI and partly influenced the proposal of the Commission to reform the *Altmark* Package in 2011.

5.3.1 *The Action Plan for State Aids (2005)*

The State Aid Action Plan submitted by the Commission was a roadmap for the reform of State aid policy that was supposed to cover a 5-year period (2005–2009).¹⁴ The main objective of the reform was to encourage Member States to help achieve the objectives of the Lisbon Strategy by targeting State aid towards improving the competitiveness of European industry and creating sustainable jobs, and to contribute better to social and regional cohesion and environmental protection. Rationalization and simplification of the procedures were also pursued, in order to set up a clear and predictable framework in the area of State aid.

Regarding the specific issue of SGEI, one may stress that the Action Plan was based on a refined economic approach and the key concept of high quality SGEI.

As summarized by the Commission, a refined economic approach ‘involves finding out why, without public intervention, the market does not achieve an optimum result, whether it is because there is a “market failure” or because it produces social or regional inequalities which must be corrected’.¹⁵ It is therefore necessary to better evaluate whether State aid is justified, whether it represents the most appropriate solution, and how it can be implemented without distorting competition to an extent contrary to the common interest. This approach is supposed to facilitate and speed up authorization of the aid which least distorts competition and, at the same time, would focus attention on the aid likely to have the most serious distortive effect on competition. That will help us later to understand the *ratio legis* of the Almunia Reform regarding local and social public services (see *infra*).

In this context, the Commission considers that State aid measures will fulfill their public service aims by providing effective high-quality SGEI, implying that the Commission has to specify under which conditions public service compensation which constitutes State aid are compatible with the Treaty and to grant an exemption of notification for small-scale compensation. This link between *quality* of service and public aid is confirmed by the Commission in its communication of 20 December 2011 on a *Quality Framework for Services of General Interest in Europe*.¹⁶ Recalling the aim ‘to ensure that the EU regulatory framework which has an impact on the way SGEI are organised, financed and provided, enables them to accomplish their public service mission’, the Commission underlines the fact

¹⁴ See COM(2005) 107 final of 7 June 2005. On this Action Plan, see: Chérot 2005.

¹⁵ See http://europa.eu/legislation_summaries/competition/state_aid/l26115_en.htm.

¹⁶ See COM (2011) 900 final.

¹⁷ See sect 1.1 of COM(2011)900.

that the 2005 Package of EU rules which apply to the public financing of SGEI can be made clearer, simpler, and more proportionate to ensure an easier application and, hence, ‘to promote a more efficient delivery of high quality services, to the benefit of citizens’.¹⁷ The same conclusion was reached by the Monti Report, released one year earlier.

5.3.2 *The Monti Report (2010)*

The former Commissioner for the Internal Market and then for Competition, Mario Monti, was charged by the President of the European Commission, José Manuel Durão Barroso, to draw up a ‘new strategy for the Single Market’.¹⁸ Issued on 9 May 2010, the Monti Report addresses the issue of SI(E)G in Chapter 3 related to *Initiatives to build consensus on a stronger single market*. According to Mario Monti, the fundamental challenge for the provision of the social and local public services is to maintain their quality and scope in the context of increasing pressure on public finances. Consequently, the EU must assist the Member States in modernizing these services and adapting them to a changing environment and to the evolving needs of citizens regarding their scope and quality. In order to do so, the Report identified two key elements: legal certainty and inclusivity.

Legal certainty implies the predictability and flexibility of rules, in particular as regards the application of State aid rules, which are important for ensuring that SI(E)G can fulfill their missions. This is why the Monti Report invited the Commission to examine the possibilities to further increase the flexibility of the rules applicable to financial compensation, including through an increase of the thresholds and/or through expanding the list of activities for which compensation does not have to be notified irrespective of the amounts involved. Moreover, the Commission was also asked to review the procurement rules to align them with the rules on compensation in order to ensure a consistent approach concerning small SGEI.¹⁹

Regarding the issue of inclusivity, the main concern of the Monti Report was to ensure that all citizens could benefit from the Single Market. To achieve this, the Report considered that if the Commission should *not* present a proposal for a Framework Regulation based on Article 14 TFEU (because it would have limited added value), the Commission should consider proposing a Regulation ensuring that all citizens are entitled to a number of basic banking services, along with examining the case for extending the universal service obligation in electronic communications to the provision of broadband access.

¹⁷ See sect 1.1 of COM(2011)900.

¹⁸ On this report, see: Rodrigues 2010.

¹⁹ See the chapters by Clarke and Sánchez Graells on the procurement rules. See also: Bovis 2005 and Sánchez Graells 2011.

Thus, the way to reforming the *Altmark* Monti Kroes Package was clearly paved.

5.3.3 *The Communication Proposal for Altmark Reform (2011)*²⁰

In its Communication on the Reform of the EU State Aid Rules on SGEI of 23 March 2011, the Commission underlines the overall objective to boost the contribution that SGEI can make to the wider EU economic recovery.²¹ In the Commission's view, efficient and high quality public services support and underpin growth and jobs across the EU. To achieve this key objective, the Commission was considering basing the upcoming reform on two main principles: clarification and proportionality.

First, addressing a concern already identified, the Reform is supposed to clarify a number of key concepts relevant for the application of the State aid rules to SGEI (including the scope of the rules and conditions for the approval of SGEI aid by the Commission). This is not really new. The Commission services had already launched (in 2007) an Interactive Information Service (IIS) and published in 2007 a Frequently Asked Questions (FAQ) document which was up-to-dated in December 2010.²² But the consultation process has nevertheless highlighted that uncertainties and misunderstandings may be among the reasons why the rules are sometimes applied incorrectly. The request for more clarity goes beyond the provisions of the *Altmark* Monti-Kroes Package and also relates to the nature of the activity and the question whether a measure falls under Article 107 TFEU at all. Particularly, the issues concern the distinction between economic and non-economic activities, the limits of the Member States under State aid rules when defining an economic activity as an SGEI, the conditions under which compensation for certain SGEI provided at local level affects trade between the Member States, the requirements which public authorities have to follow under State aid rules when they entrust an undertaking with the performance of an SGEI, the conditions under which compensation for SGEI does *not* involve State aid because the tender selects the provider at the least cost for the community or because the price charged is in line with that of an efficient and 'well-run' undertaking, how to increase convergence between the application of State aid and public procurement rules, and the interplay between the rules of the Package and other sector-specific SGEI rules.

On the other hand, the reform is intended to promote a more diversified and proportionate approach to the different types of SGEI depending on the extent to which State aid in these economic sectors poses a serious risk of creating

²⁰ For an overview of this proposal, see: Chérot 2011.

²¹ See COM (2011) 146 final.

²² See: SEC(2010) 1545 final of 7 December 2010; on this document: see Rodrigues 2011.

distortions of competition in the Internal Market. One way of adopting a more diversified approach could be to simplify the application of the State aid rules for certain types of services organized by local communities that are of a relatively limited scale and thus only have a minor impact on trade between the Member States.

To avoid distortions of competition in the Internal Market (ensued from the fact that some of the costs incurred by the provider of SGEI may be generated by low efficiency levels), the Commission seemed to be ready to consider to what extent greater account of both efficiency and quality should be taken when deciding on the approval of State aid measures in relation to SGEI (including measures aimed at achieving appropriate transparency in relation to public expenditure for SGEI, identification and definition of SGEI obligation and measures aimed at taking into account efficiency over the life of an entrustment with the provision of an SGEI).

5.4 Are the Objectives Pursued by the New SGEI Package Achieved?

Adopted by the College of the Commission on 20 December 2011 and published in the *Official Journal of the EU* on 11 January 2012,²³ the new SGEI Package (also called the ‘Almunia Reform’) is composed of three definitive texts and (at that time) a draft Regulation: a Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (the Communication)²⁴; a Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI (the Decision)²⁵ and an EU framework for State aid in the form of public service compensation (the Framework).²⁶ The draft text was a proposal for a Commission Regulation on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing SGEI.²⁷ Due to requests for further consultation by the Member States, this Regulation was expected to be adopted during Spring 2012 and was finally adopted on 25 April 2012.²⁸

²³ See OJEU No. L-7 and No. C-8. Szyszczak 2012.

²⁴ See C (2011) 9404 final.

²⁵ See C (2011) 9380 final.

²⁶ See C (2011) 9406 final.

²⁷ See C (2011) 9381 draft.

²⁸ 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, *OJ* 2012 L 114/8.

Entering into force on 31 January 2012, it is obviously difficult to assess whether the main general objective of the reform, i.e., boosting the economy in a context of crisis, is achieved; *a fortiori* considering that the economic crisis is still on-going with little sign of abatement. A long-term perspective is needed to adopt an objective and useful position on this question. However, regarding the two more specific objectives, i.e., clarification and adaptability/proportionality, a first assessment may be made on the basis of the texts themselves. Without making an in-depth legal analysis, our opinion, in terms of policy strategy, may be expressed as a 'half/half' achievement as far as if the reform implies more adaptability indeed for some SGEI, it entails also more complexity in other areas.

More adaptability: this looks to be real for two kinds of SGEI, i.e., for local public services and for social services. Indeed, the scope of the Decision, for the exemption from notification, includes compensation not exceeding an annual amount of EUR 15 million for the provision of an SGEI in areas other than transport and transport infrastructure (a threshold supposed to correspond to a large number of situations involving local entities) and compensation for the provision of SGEI 'meeting social needs as regards health and long term care, childcare, access to and reintegration into the labor market, social housing and the care and social inclusion of vulnerable groups' (which would address the most sensitive social services of general interest, but not necessarily all of them).²⁹

More complexity: for public service compensation which constitutes State aid not covered by the Decision, it seems that new rules are imposed by the Framework, i.e., more complex requirements to be met. Three examples can be given: first, for the scope of application of the principles set out in the Framework, 'Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account'.³⁰ That would probably imply more red tape and maybe more national regulation to guarantee that such consultation process is objective and transparent. Does it mean simplification and less control? Let us be skeptical...

Secondly, the Framework refers to the obligation for Member States, when devising the method of compensation, to introduce 'incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so'.³¹ More efficiency is a good thing. Who would be against such a stimulating objective? But, does it mean that the European Commission is the right body to assess such efficiency, or that the EU is the relevant jurisdictional level to drive a test of 'efficient provision of SGEI of a high standard'? Does efficiency automatically imply more satisfaction for SGEI users? Must the welfare of the final consumer be considered as the main purpose of EU

²⁹ See Article 2.1 (a) and (c) of the Decision and the chapter by von de Gronden and Rusu.

³⁰ See para 14 of the Framework.

³¹ See para 39 of the Framework.

competition law,³² one may assume that it is not an efficiency objective in itself.³³ This is why the EU judge has insisted on the fact that:

...in the absence of any harmonized rules governing the matter, the [EU] institutions are not entitled to rule on the basis of the public service tasks assigned to the public operator (...), such as the level of costs linked to that service, or the expediency of the political choices made in this regard by the national authorities or... [the] economic efficiency of the undertaking.³⁴

Thirdly, the Commission may decide additional requirements if they are considered as ‘necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union’.³⁵ Such additional requirements may be consisting on imposing a more limited entrustment in terms of duration or scope or on requiring amendments in the allocation of the aid, ‘where it can reasonably show that it would be possible to provide the same SGEI at equivalent conditions for the users, in a less distortive manner and at lower cost for the State’.³⁶ Dealing with such additional requirements, as well as with the two other instruments (public consultation review and efficiency test) would not be easy for the Commission, considering what the Protocol No 26 refers to as ‘the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing SGEI as closely as possible to the needs of the users’. This is not only a problem of subsidiarity, but also the expression of a collective responsibility to achieve a common goal: the existence of sustainable public services for every EU citizen.

5.5 Conclusion: Is Enforcement the Missing Objective?

The success of the reform will not be only focused on the achievement of the objectives of clarification and adaptability, but also on the way the rules on public compensations will be better understood by all the stakeholders and applied well by the public authorities, notably by the local authorities. Are such public bodies ready and ‘adequately provided with means’ (by reference to the 4th *Altmark* criteria) of legal support/assistance to implement the new SGEI Package?

It is well known that the main challenge for State aid rules is their appropriate enforcement. Information and training will be key issues to meet that challenge

³² As stated in GC, Case T-168/01 *GlaxoSmithKline* [2006] ECR-II 2969, para 118.

³³ See: Odudu 2009.

³⁴ See Opinion of AG Tizzano delivered on 8 May 2001 in CJEU, Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067, para 51 and GC, *Métropole télévision (M6) and Télévision française 1 SA (TF1) v European Commission* nyr; GC Joined Cases T-568/08 and T-573/08, nyr, paras 139–140.

³⁵ See Sect 2.9 of the Framework.

³⁶ See para 56 of the Framework.

and the 2010 Guide of the Commission or its Interactive Information Service would probably not be sufficient. The role of national courts is also essential, as underpinned by the Commission in its 2009 Notice on the enforcement of State aid law by national courts.³⁷ But the challenge may be also an internal challenge for the Commission. Is there the necessary and adequately trained staff to proceed with the new procedural requirements laid down by the Reform? In a recent Special Report, the European Court of Auditors found that: if the Commission has made efforts to ensure that all relevant State aid cases are handled, 'its systems do not guarantee that all aid is captured'; the procedures for notified State aid take a long time; complaints continue to take a long time to resolve and the procedure is not transparent; and that the Commission does not assess the ex post impact of its State aid control in a comprehensive way.³⁸ These aims perhaps rely on a different issue, part of another strategy and of another debate...

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³⁷ *OJ* 2009 C 85/1, replacing a previous notice published in 1995.

³⁸ See European Court of Auditors, *Do the Commission's procedures ensure effective management of State aid control?*, Special Report, No 15-2011.

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