The new State Aid Package for SGEI

DG Competition

- Quality framework for Services of General Interest

- Commission proposal to modernise the European Public Procurement
  - Proposals for revised public procurement directives
  - Proposal for directive on the award of concession contracts

- The new State Aid package for SGEI
Objectives of the Reform

Addressed in particular by:

- Clarification → Communication
- Simplification → Decision
- Diversification → Framework
- De minimis Regulation
Communication

Clarification of key concepts of the notion of State aid relevant for SGEI

Boundary: Treaty as interpreted by the Court of Justice

General State aid concepts + SGEI specific concepts
Economic Activity

General Considerations

- Offering goods or services on a market

- Whether market exists depends on organisation by authority

- Irrelevant whether entity set up to generate profit
Examples

**Non-economic: exercise of public powers**
Activity forms part of the essential functions of State or closely connected to those activities
Examples: army or police, air navigation safety and control, etc.

**Social security schemes:**
schemes based on solidarity vs. economic schemes
- Affiliation compulsory?
- Scheme is non-profit?
- Benefits independent of contributions?
- Etc.

**Education**
- Payments by parents/pupils only cover fraction of costs or all costs?
- Competing private organisations?

**Healthcare**
Effect on the Trade

- Market opened up to competition by EU or national legislation or de facto by economic development

- Irrelevant: in-house situation [also irrelevant for whether economic activity+ whether service can be defined as SGEI]
SGEI Definition

- Special characteristics as compared to other economic activities

- MS have wide margin of discretion for definition

- Commission: only checks for manifest error

- Services are not and cannot be satisfactorily provided by the market “under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State” (Example: broadband sector)

- Addressed to citizens or in the interest of society as a whole
Entrustment Act

- Public service assignment that defines obligations of undertaking and authority
- Act: legislative instrument, contract,…
- Entrustment can be issued at request of the service provider
- Entrustment act has to specify certain core features

Avoidance of Overcompensation

- Limit for compensation: costs taking into account receipts and reasonable profit
  - Rate of return on capital required by typical company taking into account the risk level
  - If possible: compare to similar type of public service contracts under competitive conditions (e.g. contracts awarded under tender)
Selection of Provider

1. Compensation result of public procurement procedure
   - Often mandatory under EU law
   - “at the least cost to the community”
   - Procedures and award criteria: as defined in current public procurement directives

2. Compensation not assigned under tendering procedure
   - Typical well-run undertaking
What kind of public procurement procedures satisfy Altmark 4.1?

- Open – yes
- Restricted – in principle yes
- Negotiated with prior publication/competitive dialogue – only exceptionally
- Negotiated without publication - no

What kind of award criteria would fulfill the Almark test?

- Lowest price – yes
- Most economically advantageous offer – yes if criteria
  1. Have close subject matter link
  2. Allow for offer to match the value of the market

General safeguard clause

- Only one bid submitted
- Infrastructure owned by provider
De minimis Regulation

Compensation is deemed no-aid

Scope of application
EUR 500.00 over any period of 3 fiscal years

Cumulation
De minimis aid cannot be cumulated with other compensation for the same service, including aid-free compensation under Altmark

Cumulation with general de minimis aid
- Cumulation up to aggregate amount of Euro 500,000
- Identical reference period allows for easy and clear cumulation rule
De minimis Regulation

Aid instruments

Grants
For instruments other than cash grants
- Calculate gross grant equivalent

Special methodology for guarantees
- Guaranteed part of underlying loan below EUR 3.750.000 and max 80% of loan guaranteed OR
- Methodology approved by Commission
Decision
Compatible aid exempted from notification (safe harbour)

Scope of Application
Applicable to:
• Sectors other than transport
• Air and maritime transport
  • Airports < 200,000 passengers
  • Ports < 300,000 passengers
  • Air and maritime links to islands < 300,000 passengers

Applicable under the condition that the entrustment act less than 10 years except if a significant investment is required.

What does it mean? “meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups”
Decision
Compatible aid exempted from notification (safe harbour)

Compatibility rules

• SGEI
• Entrustment act including a references to the decision
• Amount of compensation
• Control of overcompensation
• Transparency requirements for aid > EUR 15 mil, granted to undertakings which have activities outside the SGEI
Amount of compensation

<table>
<thead>
<tr>
<th>Compensation</th>
<th>Net cost of providing the SGEI</th>
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<td>$\leq$</td>
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<td>+ Reasonable profit</td>
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- Multi-annual approach
- Methodology to calculate the net costs
- Reasonable profit
  - Profit indicators (ROC or other indicators if ROC not feasible)
  - Safeharbour / limit (ROC=swap rate+100 basis points)
- Efficiency incentives possible but not mandatory
- Provisions applicable to undertakings carrying out activities outside SGEI
Framework
Compatible aid which has to be notified

Scope of application

Temporal scope
Applicable from 31.01.3012 to:
- All notified projects (even if the notified before 31.01.2012)
- Unlawful aid (even if the aid was granted before 31.01.2012)
However, certain provisions do not apply where the aid was granted before 31.01.2012.

Sectoral scope
Does not apply to:
- Land transport
- Public service broadcasting

Undertakings excluded from the scope
Does not apply to firms in difficulty  Rescue and Restructuring Guidelines
Framework
Compatible aid which has to be notified

Compatibility rules

• Transparency
• Compliance with Public Procurement Rules
• Absence of Discrimination
• Amount of compensation
• Efficiency
• Simplified assessment for aid normally covered by the Decision
• In-depth assessment for serious competition distortions
Transparency

1. Compliance with Transparency Directive

2. Consideration to public service needs: public consultation or similar instrument

3. Publishing requirements
Compliance with Public Procurement Rules

Coherent application of State aid and public procurement law

• Public Procurement Directive

• Transparency, equal treatment and non-discrimination principles from the TFEU
Amount of compensation

| Compensation | ≤ | Net cost of providing the SGEI + Reasonable profit |

- Multi-annual approach
- Net avoided cost methodology
- Reasonable profit
- Mandatory efficiency incentives
- Provisions applicable to undertakings carrying out activities outside the SGEI
Efficiency

- MS must introduce efficiency incentives, unless duly justified
- High flexibility for MS for the design
- Cannot be achieved at the expense of quality
- Efficiency gains be retained as “additional reasonable profit”
Simplified assessment for aid normally covered by the Decision

In particular no requirement regarding:

• Compliance with Public Procurement rule

• Net Avoided Cost Methodology

• Efficiency
In-depth assessment for serious competition distortions

- Excessive duration of entrustment
- Bundling of tasks
- Market foreclosure without competitive selection procedure
- Special or exclusive right providing immaterial advantages
- Financing of a not replicable infrastructure without fair and non-discriminatory access to competitors
- Entrustment hindering enforcement of EU law aimed at safeguarding the proper functioning of the internal market

Possible remedy: Conditions or commitments