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REPORT FROM THE COMMISSION

on the state of play in the work on the guidelines for state aid and services of general economic interest (SGEIs)

1. PURPOSE

In its conclusions, the Seville European Council "invites the Commission to report to the Copenhagen European Council on the state of work on the guidelines for state aids and, where appropriate, to adopt a block exemption regulation in this area". This report is in response to the request made by the Seville European Council and has been drawn up in the light of the case law developed by the European Court of Justice.

2. CONTRIBUTION OF COMPETITION POLICY TO THE DEVELOPMENT OF SGEIS

Article 16 of the Treaty reads as follows: "Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions." Under Article 86 of the Treaty, the competition rules apply to SGEIs in so far as they do not obstruct the performance of the particular tasks assigned to them. In discharging its duties, the Commission, where necessary, addresses appropriate directives or decisions to Member States.

SGEIs perform a fundamental function in all Member States, which, in the absence of Community rules in the matter, have wide discretionary powers when it comes to defining the nature and extent of the services they wish to introduce in the light of their political choices. It is for each Member State to decide what is the most appropriate level at which to define the services that the general public needs: the central, regional or local level.

The Commission has a duty to provide positive support for the introduction and development of SGEIs, notably in the interests of consumers, in order to contribute to attainment of the objectives referred to in Article 153 of the Treaty. It is in everyone's interests that they should dovetail harmoniously with the economic and social fabric in each Member State and contribute in particular to the objectives of strengthening economic and social cohesion, with steps being taken to ensure that their beneficial effects are not outweighed by indirect adverse effects on markets open to competition.

With regard to application of the competition rules, the Commission has three main objectives, namely to ensure:

- that SGEIs function efficiently;
- that services provided in the competitive sphere outside the scope of SGEIs and not pursuing a general-interest objective should not be classified as SGEIs;

- that any exclusive rights or financial compensation granted to undertakings entrusted with the operation of SGEIs are limited to what is necessary for the operators to perform that role on the markets concerned under conditions of financial equilibrium. In cases where these undertakings are also active on markets outside the scope of SGEIs, steps should also be taken to ensure that the rights or compensation granted for ensuring the operation of the SGEIs do not have adverse repercussions on markets outside the scope of SGEIs.

The success of liberalisation means that the rules of the game need to be clearly laid down and observed by all operators. The compensation that certain undertakings rightly receive for providing SGEIs must not constitute advantages that enable them to compete unfairly in the most profitable liberalised sectors. Such practices, which are not necessary for the operation of SGEIs, are harmful to the effective functioning of the economy and run counter to the general interest. To be sure, the undertakings providing SGEIs may operate on markets or market segments outside the scope of SGEIs but "on equal terms" with all undertakings.

The Commission considers that many of the difficulties could be avoided if there were greater transparency in assigning SGEIs and in the relationship between the undertakings providing SGEIs and the public authorities.

3. LEGAL SITUATION WITH REGARD TO PUBLIC SERVICE COMPENSATION

In its report to the Seville European Council, the Commission underscored the evolving nature of the case law developed by the Court of Justice in the matter of public service compensation. In its judgment of 22 November 2001 in *Ferring*,¹ the Court inclines to the view that compensation which does not exceed what is necessary to perform SGEIs does not confer any advantages on the recipient undertakings and does not, therefore, constitute state aid within the meaning of the EC Treaty.

Three cases dealing in whole or in part with this matter are pending before the Court. In one of them,² Mr Advocate-General Léger suggests that the Court reverse its judgment in *Ferring* and rule that public service compensation constitutes state aid even where such compensation simply offsets the costs of the public service. In the other case,³ Mr Advocate-General Jacobs proposes that a distinction be made between two categories of case based on the nature of the link between the financing granted and the obligations imposed by the State and on how clearly those obligations are defined. The analysis made by him was taken up by Mrs Advocate-General Stix-Hackl in *Enirisorse SpA*.⁴

In *Altmark Trans GmbH* the Court decided to re-open the oral procedure and held a new hearing on 15 October 2002.

Pending the Court's judgments in the aforementioned cases, the Commission takes the view that it is not possible to finalise a text on public service compensation that would provide the legal certainty expected by the Member States and undertakings performing SGEIs. However, work can continue on the matters not directly linked to the legal classification of compensation.

¹ Case C-53/00.

² Case C-280/00 *Altmark Trans GmbH*.

³ Case C-126/01 *GEMO SA*.

⁴ Joined Cases C-34/01 and C-38/01.

4. STATE OF PLAY IN THE WORK ON THE RELATIONSHIP BETWEEN SGEIS AND THE COMMUNITY COMPETITION RULES

A meeting is scheduled on 18 December 2002 for discussions with Member States' experts on the basis of a working paper drawn up by the Competition Directorate-General. The objective is to have an exchange of views on matters that will subsequently have to be addressed in detail in the text that the Commission will prepare once the case law of the Court has been consolidated.

Discussions should focus in particular on the following five matters:

4.1. Definition of SGEIs and freedom of choice for Member States

It follows from the case law developed by the Court that, in the absence of Community rules in this area, Member States have wide discretionary powers when it comes to defining their SGEIs in the light of their political choices and in line with the general principles of the Treaty. Such discretion does not, however, mean that any economic activity can be classified as an SGEI. In particular, the general-interest objectives should be spelt out. It is important to scrutinise the Court's relevant case law in order to enhance predictability and legal certainty.

4.2. Scope of the Community rules on state aid

Irrespective of how the Court's case law on the classification of public service compensation develops, it is important to spell out the conditions under which any excess compensation can constitute state aid. A Commission document should, therefore, describe the most recent developments in case law and in the Commission's decision-making practice, particularly as regards the criteria of economic activity and effects on trade between Member States, which determine the applicability of the Treaty rules on state aid.

4.3. Relationship between Member States and undertakings entrusted with the provision of SGEIs

Legal certainty requires a maximum degree of transparency in the relationship between the public authorities and the undertakings entrusted with the provision of SGEIs. The reciprocal obligations of the undertakings and the Member State assigning the public service in question need to be clarified in an official document e.g. a contract.

4.4. Procedures for selecting undertakings entrusted with the provision of SGEIs

Member States may decide to provide SGEIs themselves or to entrust them to undertakings. They must comply either with the Community public procurement directives in cases where the contract awarding the SGEI falls within their scope or with the general principles of the Treaty, notably as regards transparency, non-discrimination and competition, in cases where the procedures for awarding the SGEI are not covered by those directives. The scope of these principles would have to be spelt out.

4.5. Financing of public service

Regardless of developments in the case law on public service compensation, it has been established that any excess compensation is liable to constitute state aid. It is important, therefore, to define clearly the methods for calculating compensation in order to avoid any excess compensation.

The meeting on 18 December 2002 will be the first working meeting with Member States' experts. A second meeting will be organised once the Court's case law has been consolidated with a view to examining a new document that will also have to address the matter of public service compensation.