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Brussels, 25 October 2004

OPINION

of the Committee of the Regions

of 29 September 2004

on the

Draft Commission decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation, the draft directive amending Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings and the draft Community framework for state aid in the form of public service compensation

The Committee of the Regions

Having regard to the draft Commission decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation, the draft directive amending Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings and the Community framework for state aid in the form of public service compensation,

Having regard to the letter sent by **Mario Monti**, member of the European Commission responsible for competition policy, on 19 March 2004 requesting the opinion of the Committee under the first paragraph of Article 265 of the EC Treaty,

Having regard to the decision of its president of 26 May 2004 to instruct the Commission for Economic and Social Policy to draw up an opinion on the subject,

Having regard to Article 16 of the EC Treaty concerning services of general economic interest as well as Articles 2, 5, 73, 81, 86, 87, 88 and 295 of the Treaty,

Having regard to Article 36 of the European Charter of Fundamental Rights concerning access to services of general economic interest,

Having regard to Article III-6 of the draft European Constitution,

Having regard to the White Paper on services of general interest (COM (2004) 374 final),

Having regard to the judgment of the Court of Justice of the European Communities (hereinafter referred to as the CJEC) of 24 July 2003 in case C-280/00 (Altmark Trans),

Having regard to its opinion of 20 November 2003 on the Green Paper on services of general interest (COM (2003) 270 final, CdR 149/2003 fin)¹,

Having regard to its opinion on the Communication from the Commission on services of general interest in Europe (COM (2000) 580 final – CdR 470/2000 fin)²,

Having regard to the draft opinion (CdR 155/2004 rev. 1) adopted on 6 July 2004 by the Commission for Economic and Social Policy (rapporteur: **Mr Claudio Martini**, President of the Region of Tuscany (IT-PES)),

Whereas, according to the Altmark Trans judgement, compensation awarded for the provision of services of general interest does not constitute state aid and is therefore subject neither to the prior notification obligation nor to the approval of the Commission, provided four conditions are met:

- the recipient undertaking must actually be required to discharge clearly defined public service obligations;
- the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner;
- the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations less the relevant receipts (it may nonetheless include a reasonable profit);
- fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations;

Whereas the CJEC stated, inter alia, that, notwithstanding the further criteria listed in the Altmark Trans judgement, compensation does in any case not represent a notifiable type of state aid if the recipient is selected as part of an open and transparent public procurement procedure. In all other cases, the recipient is required to demonstrate that such compensation does not constitute state aid by proving that it received no more than the additional net costs less all receipts as would be incurred for the provision of the service at a reasonable price by any well-run undertaking with adequate personnel,

Whereas according to the Altmark Trans judgement, all other types of compensation fall into the category of state aid and are therefore subject to the rule governing prior notification,

adopted the following opinion unanimously at its 56th plenary session of 29 and 30 September 2004 (meeting of 29 September):

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1. General comments of the Committee of the Regions

On the Altmark Trans judgment

The Committee of the Regions

1. **feels that**, given that the Community legislative authority was unable to establish rules capable of providing adequate legal certainty with respect to services of general economic interest, the involvement of the Court of Justice was an absolute necessity and had considerable impact;
2. **welcomes** the first two criteria outlined in the Altmark Trans judgment, i.e. the need to clearly define the public service obligation with which the recipient undertaking is entrusted and to establish the parameters on the basis of which the compensation is calculated beforehand in an objective and transparent manner. These criteria require local authorities to define their public service contracts better and this in turn will lead to greater transparency and democratic accountability in the management of services of general economic interest;
3. **notes** that public undertakings which deliver services of general economic interest may be unsure of how to understand the fourth Altmark Trans criterion which stipulates that: *“where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”*;
4. **is unclear** as to the economic definition of an undertaking that is *“well run and adequately (equipped) (...) so as to be able to meet the necessary public service requirements”*, in particular given that in its judgment of 3 July 2003 on joined cases C-83/01, C-93/01 and C-94/01 (Chronopost SA), the CJEC indicated that undertakings entrusted with the management of a service of general economic interest can be *“in a situation which is very different from that of a private undertaking acting under normal market conditions”* (point 33);

5. **therefore feels** that a set of Community rules should be drafted in order to enforce the Altmark Trans judgment, and in particular its third and fourth criteria, and define those undertakings entrusted with the provision of a service of general interest that must comply with the requirements of that judgment, and **welcomes** the rapid action undertaken by the Commission to propose such rules;
6. **is concerned** that the CJEC's broad interpretation of the concept of potential allocation of intra-Community trade means that even those undertakings entrusted with discharging a public service at a strictly delimited local level may be subject to the provisions of Article 87(1);
7. **believes that** the administrative burden placed onto the shoulders of local authorities will be lightened in the medium term, once compensation in respect of public service obligations complying with the Altmark Trans criteria, and for which notification is not necessary, has been defined, but that this unfortunately will not guarantee full legal certainty. Rather, provision must be made for the reimbursement of state aid initially thought by a government authority genuinely to fulfil the Altmark Trans criteria and therefore to be exempt from notification, but later shown in court proceedings brought by a competitor undertaking to be illegal.

On the Commission methodology

The Committee of the Regions

8. **points out** that the Green Paper comprises a series of contributions, assessed in SEC(2004) 326 of 29 March 2004, which stress the urgent need to enhance both the certainty and stability of the legal framework for services of general economic interest (hereinafter referred to as SGEI);
9. **feels** that, in future preparatory work, the Commission needs to better assess the interactions between competition, public procurement and state aid legislation from the standpoint of implementation so that the opening – if desired – of service provision to private service providers can be effected smoothly and effectively;
10. **notes** that the CoR is bound to follow through its commitment to ensuring that greater account is taken of issues of public interest in relation to the organisation of services of general interest (hereinafter referred to as SGI), their specific nature and the responsibility of local authorities in this area. SGI are an integral part of the European social model and a balance must be established between the rights of each authority to directly oversee its own services and the requirements of CJEC case law, particularly insofar as they relate to transparency and tendering procedures;
11. **welcomes** the decision by the Commission to run, together with the Committee of the Regions, a series of consultations on the draft decision to exempt small-scale public funding and the draft directive amending Commission Directive

80/723/CEE on the transparency of financial relations between Member States and public undertakings;

12. **stresses** that this is the first time that the Commission has consulted the CoR on an area governed by Articles 81 to 93 of the EC Treaty on rules on competition;
13. **feels** that this consultation procedure implements for the first time the principles put forward by the Commission in the documents on the follow-up to the White Paper on European governance³ and that it meets the need for greater involvement of regional and local authorities in the EU decision-making system, and in particular in those processes carried out PRIOR TO a decision;
14. **believes** that the dialogue initiated should be continued as part of the debate on the Commission framework for large-scale funding of public services;
15. **questions** the logic of allowing the debate launched in February 2004 on the Commission proposals based directly on the Altmark Trans judgment and that dealing with the White Paper on Services of General Interest⁴, published on 12 May 2004, to coincide. Indeed, the White Paper outlines the Commission's intention to adopt a series of measures aiming to clarify and simplify the legal framework for the financing of public service obligations by July 2005, whilst the majority of these elements have already been submitted for consultation as drafts.

On the work of the intergovernmental conference

The Committee of the Regions

16. **welcomes** Article III-6⁵ of the draft Constitutional Treaty, which stipulates that: "*European laws shall define these principles and conditions (relating to the place and role of services of general economic interest) without prejudice to the competence of Member States, in accordance with the Constitution, to provide, to commission and to fund such services*"⁶. Given that article III-6 is a clause of general application, not curtailed by the rules on the single market and competition, and can therefore serve as an autonomous legal base, the Committee of the Regions also welcomes the scope which the Treaty provides for the adoption of common legal instruments for services of general interest.
2. **Comments on the draft Commission decision on the application of the provisions of Article 86 of the Treaty to state aid in the form of public service compensation**

The Committee of the Regions

1. **notes** that the purpose of the proposal for a decision is to strike a balance between competition rules and the performance of SGEI tasks. The proposal

defines compensation which does not comply with the Altmark Trans criteria but which can nevertheless be exempted from competition rules (Articles 87 and 88 TEC), provided that the state aid fulfils public service obligations and does not distort competition;

2. **notes** that, as the purpose of the decision is to define state aids exempted from the provisions of Article 88 TEC, the choice of Article 86(3) as the legal base and of a decision as the vehicle is appropriate. The undertakings concerned receive state aid, but, as suppliers of SGEI not likely to have an impact on trade, they do not have to comply with competition rules;
3. **endorses** the exemption from notification of the financing of hospital and social housing services, for the following reasons:
 - the high unit cost of services, given the nature of the investment in infrastructure and property, and the fact that the aid is intended for income redistribution and solidarity purposes, with no impact on competition;
 - the Commission's lack of administrative capacity to deal with the number of local notifications which it would receive in the absence of any exemption.
4. **considers**, however, that exclusion from the scope of application of the competition rules and consequent exemption from the notification requirement should be extended to services of general interest relating to essential public authority functions, in particular social housing and public hospitals, **education and services of general social interest**, where these services perform social security and social integration functions and their general interest function cannot be performed by the market. Commission supervision should be restricted to cases of clear abuse of discretionary powers in defining the services;
5. **calls** on the Commission to supplement its proposals submitted for consultation by defining, inter alia on the basis of the case law of the Court of Justice, not only services deemed not to be of an economic nature and therefore excluded from the notification requirement, but also activities which, despite being partly economic, could be acknowledged to have characteristics associated with services of general interest, and could therefore qualify for special status under Article 86(2) of the TEC. The Communication announced by the Commission for Summer 2005 on social services and health could serve as an opportunity for general discussion on how such characteristics can also be inherent in economic activities;
6. **proposes** that the threshold values be set in such a way that, when examining individual cases, the European Commission can, in future, concentrate on untypical groups of cases of unusual economic importance. Organisations traditionally providing services of general interest in the Member States and the costs typically incurred in carrying out these tasks should therefore fall within the threshold values. The scope of the decision could in principle be extended to businesses with an annual turnover before tax, all activities included, of less than €50 million and receiving an annual amount of

compensation for services provided of less than € 15 million; the Transparency Directive should therefore be amended accordingly.

7. **questions** the exemption proposed in Article 1(iv) for compensation for maritime transport to islands covered by sectoral rules, provided that annual traffic does not exceed 100,000 passengers:
 - Given the specific features of maritime transport within the Member States (maritime cabotage), would it not be more appropriate to adopt a separate legal act on the basis of Article 73 of the Treaty?
 - If the principle of the exemption proposed in Article 1(iv) is accepted, will the annual volume of traffic be calculated by reference to a) the link or b) the volume transported by the public service undertaking?
 8. **considers** that, where compensation satisfies the conditions set out in Article 5 of the proposal for a decision, there is no clear need for prior notification;
 9. **notes** that the definition of compensation in Article 5 is liable to misinterpretation, as the term refers exclusively to transfers between the public authority and the SGEI enterprise, intended to cover structural or cyclical operating deficits. Land costs and amortisation of operating tariffs should, however, also be covered;
 10. **considers** that the separate accounting requirement of Article 6 is likely to give rise to additional costs for small and medium-sized enterprises which are covered by the exemption provided for in this decision. The obligation should therefore be dropped;
 11. **notes** that Article 7 requires that the Commission be provided with information on the definition of compensation. This appears unnecessarily demanding, in view of the timescales involved. Moreover, requiring public authorities to lay down rules defining compensation, or to set up compensation databases seems excessively bureaucratic.
3. **Comments on the draft Commission Directive amending Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings**

The Committee of the Regions

1. **considers** that the Altmark Trans judgment has effects on the transparency obligations which render the directive currently in force partially ineffective, as it is no longer possible to establish whether compensation is effectively used to fulfil public service obligations and not also to cover the costs of commercial activities. The case law of the Court of Justice allowing compensation to be deemed not to constitute state aid vitiates the provisions of the directive requiring the assessment of transparency in relation to all SGEI undertakings

receiving compensation not classified as aid. Hence the need to reform the directive and replace the concept of state aid with that of public service obligation compensation;

2. **disapproves** of the Commission's proposal to abrogate Article 4(2)(c), as this would extend the scope of the separate accounting obligation, even to undertakings receiving compensation meeting the Altmark Trans criteria or covered by exemptions proposed by the Commission.
4. **Draft Community framework for state aid in the form of public service compensation**

The Committee of the Regions

1. **notes** that point 5 of the draft framework stipulates that it should apply "without prejudice to the Community provisions in force in the field of public procurement". There is also a similar reference in Recital 22 of the draft decision.

With regard to assigning a public service obligation to a company, these references should be taken to mean that whenever a company is chosen under a transparent and non-discriminatory public procurement procedure, it is presumed that over-compensation has not taken place and that state aid is therefore legal.

However, the use of a public procurement procedure to impose a public service obligation on a company is optional, and is not a requirement for fulfilling the conditions for the legality of state aid.

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2. **questions** the proposal that the parameters for calculation (point 10, 5th paragraph) could "include the specific costs actually borne by the undertakings in the regions referred to in Article 87(3)(a) and (c) of the EC Treaty".
 3. Such a proposal could easily create unnecessary confusion, given that the objective of the draft framework should always be to reflect "specific costs actually borne" by a company in fulfilling a public service obligation, irrespective of location.
 4. In addition, the proposed wording could be taken to mean that compensation for public service obligations is comparable to regional state aids.

Brussels, 29 September 2004

The President

The Secretary-General

of the Committee of the Regions

of the Committee of the Regions

Peter Straub

Gerhard Stahl

¹ OJ C 73, 23.3.2004, p. 7

² OJ C 19, 22.1.2002, p. 8

³ Cf. opinion of the CoR of 2 July 2003 on the Follow-up to the White Paper on European governance (rapporteur **Michel Delebarre** (PES/FR): COM(2001) 428 final, COM(2002) 704 final, COM(2002) 705 final, COM(2002) 709 final, COM(2002) 713 final, COM(2002) 718 final, COM(2002) 719 final, COM(2002) 725 final²

⁴ COM(2004) 374 final

⁵ Due to renumbering of the draft constitutional treaty as proposed by the Intergovernmental Conference in document CIG 87/1/04, 13 October 2004, Article III-6 has become Article III-122.

⁶ See Presidency document 76/04 of 13 May 2004.

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CdR 155/2004 fin FR/MR/SW/hm

CdR 155/2004 fin FR/MR/SW/hm