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COMMISSION STAFF WORKING PAPER
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

**Reform of the EU rules applicable to State aid in the form of public service
compensation**

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Disclaimer

*This report commits only the Commission's services involved in its preparation and does not
prejudge the final form of any decision to be taken by the Commission.*

1. THE CONSULTATION WITH THE INTERESTED PARTIES

1.1. Identification

The State aid rules for SGEI are contained in a series of legal instruments adopted in 2005. These instruments seek to clarify the application of the Treaty's State aid provisions (in particular Articles 106, 107 and 108 TFEU) to SGEI. The two most important elements are:

The Decision 842/2005¹ provides that public service compensation payments fulfilling certain conditions are considered compatible with Article 106(2) TFEU and are exempted from the obligation to notify under Article 108 TFEU.

The Community Framework² explains the Commission's approach as regards cases that fall outside the scope of the Decision and must be notified and examined on an individual basis, in order to assess their compatibility.

The Framework expires on 28 November 2011, and the Decision continues to apply. The revision of the package is part of the Commission's Work Programme for 2011.

1.2. Previous steps in the revision process and the outcome of the public consultation

A Member State reporting exercise was conducted in 2008 and 2009³ and a general stakeholders' consultation in 2010⁴. Overall, the consultation confirmed that the existing legal instruments were a necessary and appropriate response in the light of the Altmark ruling. However, it also showed that there is scope for improvement.

Other important steps preceding the revision of the package include the publishing of a detailed report⁵ in March 2011, analysing its operation across a wide range of sectors and the outcome of the consultations. The report was made public at the same time as a Commission Communication⁶ setting out the broad political objectives of the reform. Discussions with the European Parliament, the European Economic and Social Committee, and the Committee of the Regions were also carried out.

2. PROBLEM DEFINITION

2.1. Background

Public services, generally identified in the Treaties as services of general economic interest (SGEI), are economic activities that public authorities identify as being of

¹ Commission Decision (EC) No 842/2005 of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p.67

² Community Framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005

³ http://ec.europa.eu/competition/consultations/2010_sgei/reports.html

⁴ http://ec.europa.eu/competition/consultations/2010_sgei/index_en.html

⁵ http://ec.europa.eu/competition/state_aid/legislation/sgei_report_en.pdf

⁶ http://ec.europa.eu/competition/state_aid/legislation/sgei_communication_en.pdf

particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. SGEIs range from large commercial services (network industries such as postal services, energy supply, electronic communication services or public transport services) to a wide range of health and social services (e.g. care services for elderly and disabled).

The essential role of SGEIs has been recognised by Article 14 of the TFEU, as well as Protocol 26. Regarding EU's right/obligation to act, the legal basis consists of Articles 106, 107 and 108 TFEU. Under these Articles, public funding of SGEIs which does not escape the qualification of State aid under the Altmark jurisprudence and fulfils the criteria of Article 107(1) TFEU is subject to State aid control.

The Court of Justice, in its Altmark judgment⁷, provided further clarification as regards the conditions under which public service compensation might not constitute State aid owing to the absence of any advantage. However, a clear Commission approach to measures that are not considered aid-free under Altmark is still needed.

2.2. The general problems raised by the current rules

Member States and stakeholders consider that the 2005 SGEI Package has made a useful contribution to the overall objective of legal certainty following the Altmark ruling and that the Decision contributed to a reduction in the administrative burden incurred in connection with the notification obligation. The Commission's own experience with the 2005 SGEI package was also generally positive. However, it has also raised certain difficulties:

- Incorrect/insufficient application of the rules – The evidence emphasises the two main drivers behind the implementation problem, i.e. difficulty in understanding the rules and the key concepts behind the rules, and insufficient knowledge of the rules.
- Administrative burden too heavy for small SGEIs – This problem can be driven by the extent to which different sectors are affected by the current rules, in the sense that these are too uniform. In this case, the rules are too complex for small SGEIs.
- Distortions of competition on the market – The current rules are not sufficiently fine-tuned for large SGEIs, withdrawing a large number of relatively sizeable compensation measures from State aid scrutiny. Furthermore, the current rules are limited to checking the absence of overcompensation, which in certain cases is not sufficient to ensure fair competition and good allocation of resources.
- Inefficient delivery of SGEIs – With the current approach for overcompensation, efficiency gains are not stimulated and it may sometimes be the case that public service compensation is awarded to an undertaking that does not ensure an efficient and qualitative delivery of the service.

⁷ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747

2.3. The baseline scenario

The baseline scenario is the continuation of the substantive rules under the present State aid package for SGEIs. This means that the Decision remains unchanged and continues to apply, while the Framework would be prolonged beyond its expiry date.

3. OBJECTIVES

3.1. General objective

The overall objective of the reform of the State aid rules for SGEI is to boost the contribution that SGEIs can make to the wider EU economic recovery, to ensure the competitiveness of the EU and economic cohesion between the Member States.

3.2. Specific objectives

Clarification: providing additional clarity on a number of key concepts relevant for the application of the State aid rules to SGEIs, including the scope of those rules and the conditions for the approval of SGEI aid by the Commission.

Diversified and proportionate approach: aimed at making the degree of State aid scrutiny dependent on the nature and scope of the services provided. One element of this strategy could be to simplify the application of the rules for certain small-scale public services of a local nature with a limited impact on trade between Member States and for certain types of social services. At the same time, the Commission could take greater account of efficiency and competition considerations in the treatment of large scale commercial services with a clear EU-wide dimension.

4. POLICY OPTIONS

4.1. Options relating to clarification of the rules

4.1.1. *No policy change*

This scenario would mean continuing to answer some questions raised by the citizens and stakeholders through the interactive information system and updating the Guide.

4.1.2. *Continue current action and develop cooperation with the Member States*

In addition to the interactive information system, cooperation of the Commission with the Member States could be developed by adopting national guidelines or developing training actions of national and local administrations.

4.1.3. *Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance*

The Commission could clarify certain key concepts as regards State aid control of public service compensation by adopting an interpretative Communication, in parallel with the actions outlined in the previous option.

4.2. Options relating to simplification for small, local SGEIs

4.2.1. No policy change

Compensation of up to 30 million EUR to undertakings with an annual turnover below 100 million EUR is compatible and block-exempted by the Decision when certain basic conditions are fulfilled. For social housing and hospitals, there are no thresholds. Compensations of up to 200.000 EUR over three years per undertaking fall under the de minimis Regulation, thus are not considered State aid.

4.2.2. Increase the ceiling of the general de minimis regulation

This option would be to increase the ceiling of the general de minimis Regulation which applies to all types of public funding to undertakings, i.e. is not limited to SGEIs. The general de minimis ceiling currently amounts to 200.000 EUR over three years and this option considers an increase to 500.000 EUR over three years.

4.2.3. Adopt a specific de minimis rule for small, local SGEIs

A specific de minimis Regulation for small local SGEIs could be adopted. The conditions for eligibility could refer to one or a combination of the indices of size of municipality (local authorities of less than 10.000 inhabitants), amount of compensation (maximum 150.000 EUR per year) and turnover of the undertaking providing the service (maximum 5 million EUR).

4.2.4. Very simplified compatibility conditions for small, local SGEIs

This option would entail very simplified compatibility conditions for small local SGEIs. These conditions can be part of the Decision and can consist of lifting the overcompensation test and only requiring the entrustment with an SGEI.

4.3. Options relating to the scope of the Decision

4.3.1. No policy change

Only hospitals and social housing are covered by the Decision regardless of the compensation size. Public compensations for other SGEIs are covered if they respect the ceilings of 30 million EUR for the compensation and 100 million EUR for the annual turnover.

4.3.2. Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds

The scope of the Decision as regards the application without any thresholds could be extended to certain social services. The two thresholds currently in place would be maintained outside of the social services field.

4.3.3. Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision

This option would be identical with the previous option as to certain social services, which would fall under the Decision regardless of the amount of compensation and

the annual turnover. However, it would lower the compensation threshold to 15 million EUR, while the threshold for the turnover would be eliminated.

4.4. Options relating to increasing competition considerations for large commercial SGEIs

4.4.1. No policy change

Under the current approach, compatibility is assessed through an overcompensation test, according to which the amount of compensation is limited to what is necessary to cover the costs incurred in discharging the public service obligations.

4.4.2. Test of compliance with public procurement rules and overcompensation test

This option, while maintaining the overcompensation test, also envisages the introduction of a test for compliance with public procurement rules. The requirement under the Framework to comply with public procurement rules applies insofar as the service concerned is subject to public procurement rules.

4.4.3. Test of compliance with public procurement rules, necessity test and overcompensation test

Under this option, if public procurement rules are complied with, the Commission examines whether the aid was necessary, i.e. whether it would have been possible for the Member State to avoid the granting of aid or to ensure the provision of the service with a less distortive form of aid, equally good at achieving the policy objective. Finally, the overcompensation test is carried out.

4.4.4. Test of compliance with public procurement rules, overcompensation test and competition test limited to most serious competition distortions

In addition to the test of compliance with public procurement rules and the overcompensation test, the Commission conducts an in-depth assessment of the impacts on competition for measures that have the potential to create serious distortions of competition in the internal market. The Commission could assess whether these distortions can be remedied by conditions or by commitments by the Member State.

4.4.5. Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions

This option entails all the measures previously mentioned.

4.5. Options relating to increasing efficiency considerations for large commercial SGEIs

4.5.1. No change

The current version of the Framework envisages that Member States can introduce incentive criteria relating, among other things, to the quality of the service provided and gains in productive efficiency. However, the compatibility of State aid has so far been independent of any efficiency consideration.

4.5.2. *Incentivise efficiency*

This option would require the Member States to provide for efficiency incentives for the service provider unless the Member State can duly justify that the use of such incentives is not feasible or appropriate.

4.5.3. *Introduction of an efficiency test*

This option would mean the introduction of an efficiency test, which would evaluate whether the undertaking is sufficiently efficient.

5. ANALYSIS OF IMPACTS

The different options have important direct economic and social impacts, especially on administrative burden and competition in the internal market. The impacts on competition are inextricably linked with social impacts because a less competitive market will result in higher prices or lower quality and will be detrimental to users.

5.1. Impacts of options relating to clarification of the rules

5.1.1. *No policy change*

This would have a clear positive impact, but would be of limited value.

5.1.2. *Continue current action and develop cooperation with the Member States*

Cooperation with Member States would have a direct impact on budgets because of higher costs and use of resources. This would be useful, but certainly not sufficient. Guidelines would be very specific, thus having a limited impact on the correct and uniform application of EU State aid rules, while the organisation of trainings at national level would have a limited scope and coverage.

5.1.3. *Adopt a Commission Communication to clarify the State aid rules applicable to SGEIs, while providing additional information and guidance*

A Commission Communication would give a clearer overview of relevant EU State aid concepts and a better understanding of key issues in a single, comprehensive document that would improve legal certainty. The added value is also that it would be more transparent, more visible and better accessible than individual actions.

5.2. Impacts of options relating to simplification for small, local SGEIs

5.2.1. *No policy change*

No policy change would result in the maintenance of the current administrative requirements that are often too high having regard to the relatively small nature of service. This has an implicit negative effect for citizens as beneficiaries.

5.2.2. *Increase the ceiling of the general de minimis regulation*

This would have a negative impact on competition and would create distortions since relevant state aid cases other than SGEIs would be overlooked. The authorities might

give more money under the de minimis, which would negatively impact cohesion between Member States, because measures are given within the budget constraints of each Member State. It could also create legal uncertainty.

5.2.3. *Adopt a specific de minimis rule for small, local SGEIs (based on 107(1) TFEU)*

A specific de minimis Regulation for small local SGEIs would acknowledge their lack of (or negligible) effect on trade and categorise the compensation as non-aid, making compliance with the rules easier for national, regional and local authorities. A direct positive impact would be the elimination of unnecessary administrative burdens, thus leading to a more proportionate approach.

5.2.4. *Very simplified compatibility conditions for small, local SGEIs*

This scenario would also have little negative effect on competition in the internal market, but there seems to be limited scope for simplification since the requirements under the Decision are already limited. The administrative burden on small authorities might remain quite high.

5.3. Impacts of options relating to the scope of the Decision

5.3.1. *No policy change*

The key impact would be general dissatisfaction from different public service operators because scrutiny is too uniform. The main negative impact would be the unnecessary administrative burden for small social SGEIs. As for the large-scale commercial SGEIs, many important cases would escape control, which might lead to a certain degree of competition distortion.

5.3.2. *Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, without changing the thresholds of the Decision*

A direct impact would be that social services are no longer notified, leading to a lower administrative burden. This option would better take into account the importance of SGEIs that truly serve social needs of society. Taking into account the fact that the thresholds are too high for other SGEIs, their maintenance would have a significant negative impact, leading to competition distortions.

5.3.3. *Enlarge the scope of social services that are covered by the Decision regardless of a compensation and turnover threshold, while changing the thresholds of the Decision*

This option would have the same impacts as the previous one with respect to social services. However, it would take into account the need to scrutinise more state aid cases for large commercial SGEIs, for which the risk of creating distortions of competition in the internal market is particularly high. Renouncing the turnover threshold would give equal opportunities to all undertakings, regardless of size. This might lead to an increase in the number of notifications or complaints received. High quality public services and an efficient allocation of resources could be ensured.

5.4. Impacts of options relating to increasing competition considerations for large commercial SGEIs

5.4.1. No policy change

This would provide for relatively low administrative costs and would be relatively easy to administer, thus creating some legal certainty. However, the assessment under State aid law would be entirely independent from the assessment under public procurement law, which might be regarded as inconsistent.

5.4.2. Test of compliance with public procurement rules and overcompensation test

The negative impact described above because of the missing check of compliance with existing public procurement rules would be avoided. At the same time, it would increase neither legal uncertainty nor administrative burden. In addition, compliance with public procurement rules would be reinforced. However, the negative impacts of not performing a more sophisticated analysis of the effects on competition in the internal market – even in very serious cases – would persist.

5.4.3. Test of compliance with public procurement rules, necessity test and overcompensation test

The negative impacts of not checking compliance with existing public procurement rules would be avoided and distortions of competition would be limited due to a strict necessity test. Thus, this option would better achieve the objective to limit State aid to the minimum necessary and thus contribute to efficient allocation of resources and to economic cohesion of Member States. However, this option would require Member States to tender out most of their in-house contracts, and would also bring along high administrative costs. A sophisticated analysis in all cases would be disproportionate and would constitute an inefficient use of administrative resources.

5.4.4. Test of compliance with public procurement rules, overcompensation test and competition test limited to the most serious competition distortions

This option avoids the negative impacts of not checking for compliance with public procurement law and it would also allow the Commission to conduct an in-depth analysis in cases that raise serious competition concerns. In addition, it would not have the negative impacts of a full necessity test performed in all cases, and would leave more flexibility. This option closely adjusts the administrative costs to the competition concerns and leads to an efficient use of administrative resources. On the negative side, it creates a certain degree of legal uncertainty because a clear delineation of the cases in which the in-depth economic assessment will be performed is not possible.

5.4.5. Test of compliance with public procurement rules, necessity test, overcompensation test and competition test limited to most serious competition distortions

This option does not avoid the negative impacts of the necessity test and thus leads to disproportionate administrative costs in a number of cases.

5.5. Impacts of options relating to increasing efficiency considerations for large commercial SGEIs

5.5.1. No policy change

Under this option, rules are relatively easy to apply and, to the extent Member States and stakeholders already know the current rules. However, this option would not address the problem of compensations given to inefficient undertakings at the expense of society.

5.5.2. Incentivise efficiency

This directly addresses the need to improve the efficiency of the providers of SGEI benefiting from State aid. It would lead to a certain increase in competition, due to an increase in the efficiency of all providers, while respecting the discretionary power of Member States. It also offers a high degree of flexibility for designing the incentives. In addition, an efficient allocation of public resources for SGEIs contributes to the general objectives of increased competitiveness and economic cohesion at EU level.

5.5.3. Impose efficiency test

Under this option, there would normally be no scope for "compatible aid" for SGEIs. If the compensation is based on the costs of an efficient provider, the fourth Altmark criterion would be complied with, leading to the qualification of the compensation as "no aid" if the other Altmark conditions are also met. Conversely, in case the Member State would not have been able to prove the efficiency of the provider, the aid would not be allowed. This option may be considered to impact too much on Member States' discretionary power and may give rise to new administrative costs.

6. COMPARING THE OPTIONS

Following a comparison exercise, one can identify a possible package of policy options that score best in terms of effectiveness, efficiency and coherence. Compared to the baseline scenario and to other alternatives, this package would be the most suitable to achieve the objectives of the reform. First, a Communication, together with additional information and guidance, would be the most effective and efficient way of clarifying key concepts related to the rules. The specific *de minimis* Regulation and the exemption of social services under the Decision would clearly simplify the application of the rules for those SGEIs which incur most problems with regard to the application of the rules, either because of their size and/or their nature. Moreover, lowering of the threshold of the Decision and the new competition and efficiency considerations would ensure more thorough scrutiny for compensation to large commercial SGEIs, which is likely to lead to greater distortions of competition on the internal market. This choice of options would ensure a coherent package, as well as consistency with the overarching objectives of EU State aid policy.

7. MONITORING AND EVALUATION

In order to ensure transparency and to allow the Commission to monitor developments in the field of SGEI, as well as the impact of the new package, several transparency and monitoring provisions are foreseen.