New EU State Aid Rules for Services of General Economic Interest

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Joachín Almunia

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New EU State Aid Rules for Services of General Economic Interest

Proceedings of the Conference
The Reform of State Aid Rules on Services of General Economic Interest

From the 2005 Monti-Kroes Package to the 2011 Almunia Reform

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Global Competition Law Center
College of Europe, Bruges
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## PREFACE

*Joachín Almunia*

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Preface

I am pleased to preface this special issue of the EStAL Quarterly devoted to the reform package on State aid rules for the Services of General Economic Interest – SGEI – that the Commission adopted upon my proposal in December 2011. The papers published in this special issue have been selected from the proceedings of the conference organised by DG Competition in October 2011 in cooperation with the Global Competition Law Centre of the College of Europe. The contributions offer a comprehensive review of the reform package, including the institutional and political background of the reform, its architecture and legal basis, and the economic approach to the compatibility assessment.

State aid has been a lively policy domain at the competition authority of the European Commission over the past few months even beyond the field of SGEI. In February 2012, I announced the overhaul of State aid rules across the board. I regard these initiatives as central in the present phase of my mandate as European Commissioner for Competition. These reforms turned out to be timely as well, since the latest stages of the crisis have been putting public services and the spending capacity of governments under unusual pressure.

Last year, a wave of austerity packages were adopted throughout Europe to consolidate public budgets hit by the sovereign-debt crisis and to restore the confidence of investors in the euro. Owing to these measures and to dwindling resources, public authorities struggle to cope with the increasing demands from the many European citizens who have seen their standards of living fall and are turning to them for services and support. In addition, it is now clear that Europe needs to complement its initial response to defend the euro, largely based on tighter fiscal discipline, with measures that can boost growth and create employment; and public authorities can bring these goals closer using public policies and smart spending decisions.

Both the recent and the upcoming reforms of State aid policies should be framed in this uncertain context for Europe’s economy and society. As to the SGEI package of last December, three keywords can be used to describe it: clarification, simplification, and a more proportionate approach to our control. The new package clarifies a number of concepts we use in our assessment – including basic notions such as when a public service constitutes an ‘economic activity’ – to make it easier for government authorities and stakeholders to comply with the law.

It also simplifies the rules for small local authorities that can hardly distort competition in the internal market to better respond to the needs of the myriad activities run at local level across Europe, such as child-care services and cultural centres. Finally – and correspondingly – the new regime shifts the focus of our control towards operations that have the potential to seriously distort competition. In sum, the SGEI reform is designed to make life easier for smaller operations and put large commercial services under a stricter scrutiny.

There is clear continuity between this package and the modernisation of State aid we have launched in 2012; not so much because they belong to the same domain of EU competition control, but because they share a few basic principles. One of the innovations of the SGEI reform were incentives to help public authorities make a better use of taxpayers’ money and promote efficiency. This is also the main aim of the drive to modernise State aid policy which, however, has a broader scope and a more strategic character. The main objectives of the modernisation of State aid control are fostering growth in a competitive internal mar-
ket; focussing the Commission’s \textit{ex ante} scrutiny on those cases that have a large impact on the internal market; strengthening the cooperation of Member States in State aid enforcement; and finally streamlining our rules and system for ease of implementation and faster decisions. State aid modernisation is intended to help public authorities take their spending decisions more wisely and use public funds more efficiently. The policy that will emerge from the reform will be better able to support well-designed, targeted and non-distortive aid; economic concepts will be used to this end, such as incentive effects, theories of harm and efficiency.

My vision is of a State aid policy that evolves to become a co-ordination tool for growth acceleration and enhanced competitiveness. We aim to encourage investments in research and development, support innovation, promote a greener economy, and make access to finance easier for SMEs. As with the SGEI reform, I intend to shift our control on the cases that are more relevant at the European scale and to remove the regulatory burden for the aids with little impact on the internal market. At the end of the day, we will have clearer and fewer rules; cutting red tape is a top priority – especially for SMEs. In practice, we plan to revise the guidelines related to the Europe 2020 objectives; namely the Regional, Environmental, Risk Capital, and Research, Development and Innovation guidelines.

We will also revise the General Block Exemption Regulation, Enabling Regulation, and the \textit{de minimis} Regulation to simplify and speed-up the treatment of the cases with limited impact on the internal market. Finally, the Procedural Regulation will be updated; especially as regards the handling of complaints. The legislative process started in earnest in the Spring of 2012 with a Commission communication, while the main elements of the package are slated for adoption by the end of 2013.

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Joachín Almunia
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Vice-President of the European Commission responsible for Competition Policy
The Reform of the State Aid Rules on Financing of Public Services

Paving the Way towards a Clearer, Simpler and more diversified Framework

Elisabetta Righini*

I. Introduction

On 20th December 2011, the European Commission approved the new rules for the control of State aid in the field of Services of General Economic Interest (SGEIs) or – as they are more commonly known – public services.

Public services represent an important feature of the European model of social market economy and, although they are defined and structured in very different ways across the 27 Member States of the European Union, the Lisbon Treaty considers them as part of “the shared values of the Union.”

The reform of State aid rules on the financing of SGEIs is the result of a long process of political interchange and dialogue both within the Commission and with stakeholders.

The political guidelines for the mandate of the current European Commission 2009 called for the establishment of “a quality framework for public and social services, thus recognising their importance in the European model of society.” And the Commissioner-designate for Competition, in his introductory remarks at the hearing of the European Parliament, stated that “competition policy must [...] help to guarantee accessible and affordable high-quality public services, which are fundamental to citizens' well-being and quality of life and which also contribute to social and territorial cohesion”.

The economic and financial crisis has stressed the importance of ensuring accessible and affordable access to high-quality services. Many people across Europe have since become more dependent on these services, at a time when Europe is facing increasingly severe budgetary constraints. According to a 2010 report, public services account for more than a quarter of the GDP of the 27 Member States and employ more than 30.1% of the Union’s workforce. In order to continue to guarantee essential services such as education, health, and social services, but also communications, energy and transport to the general population at affordable conditions, the Member States need to focus on the economic efficiency of public spending.

It is with these policy objectives in mind that the reform of the State aid rules was launched. The review process was concluded after an intense dialogue last 20th December when the Commission approved “A Quality Framework for Services of General Interest in Europe”, bringing together under a single framework the various actions pursued with regard to public services.

The scope of this overview is to describe the genesis of this reform and its deployment. After reviewing the changes introduced by the Treaty of Lisbon to the legal framework for public services and the terminology used in the Treaty, this paper will look at the main elements of the previous rules on the financing of SGEIs and their application, describe the different stages of the reform and its goals, and finally explain and assess how these have been translated into the texts that compose the new package.

* The author is a member of the Cabinet of the Commission’s Vice-president Joaquin Almunia. The opinions expressed are personal and do not necessarily reflect the views of the Vice-president or of the Commission.

1 Art. 14 TFEU.
4 “Public services in the European Union and in the 27 Member States”, Mapping of Public Services project, CEEP, May 2010.
II. Public services in the EU architecture

Public services were already mentioned in the Treaties establishing first the European Communities and then the European Union. However, the entry into force of the Lisbon Treaty in 2009 gave them a new and improved place in the overall architecture of the Union, by recognising and protecting both the fundamental role they play in our societal ties establishing first the European Communities and then the European Union.

This twin approach is reflected in particular in the new Protocol 26, devoted to setting out the “interpretative provisions” that apply to public services. But before illustrating the substance of the Protocol’s provisions, some clarification of the terminology is necessary.

The Protocol uses three different terms to designate public services. The title mentions that it deals with Services of General Interest (SGIs), but it provides no definition of such services. In practice, this term is used to refer to all those services which are considered to be in the interest of society as a whole, or – to use the definition given in the Quality Framework – those services that “public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO)”. Therefore, SGI is the Treaty term that better corresponds to the more common phrase “public services” and thus covers both economic and non-economic services of general interest, which are not defined by the Treaty.

Non-economic services of general interest are mentioned only in Protocol 26, which makes clear that EU law cannot “affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest”. Traditionally, activities such as the army or the police, air navigation safety, compulsory education funded from public resources and activities of a purely social nature, such as the management of compulsory employers’ liability insurance functioning under the principle of solidarity, are considered non-economic in nature because linked to the exercise of State prerogatives and to the fulfilment of State responsibility towards the population. As described in more detail below, the Commission has tried to identify more precisely the distinction between economic and non-economic activities in the new SGIs Package; however, it is bound in doing so by the case law of the Court of Justice, which is not always straightforward and has to adapt to a dynamic reality. Thus, although the Court has consistently held that “any activity consisting in offering goods and services on a market is an economic activity”, the existence of a market for certain services may vary from one Member State to another and thus the economic nature of certain services may also differ from one Member State to another. Furthermore, the definition of a given service as economic can change over time. The many liberalisations that have taken place in Europe demonstrate that even activities that were reserved to the exclusive exercise of public powers have, in time, turned into economic services. Examples include broadcasting, energy distribution, telecommunications and, more recently, public transport.

It is equally difficult to give a complete ex ante definition of economic services or SGIs. Apart from market evolution, in fact, the Member States have a very wide discretion in defining a service as an SGI. Article 1 of Protocol 26 recognises as a “shared value of the Union [...] the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”, as well as the diversity that exists across the Member States between various services and “the differences in the needs and preferences of users that may result from different geographical, social or cultural situations”. In practice, this confronts the European Commission with a wide variety of different SGIs across the twenty-seven Member States.

Last but not least, Article 1 of Protocol 26 also mentions as a shared value “a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”.

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7 Protocol No 26 on services of general interest, OJ 2008 L 115.
8 “A Quality Framework for Services of General Interest in Europe” (fn. 5), p. 3.
9 Protocol No. 26 on services of general interest, Art. 2.
10 Case 118/85 Commission v Italy [1987] ECR 2599, para. 7; Case C-35/96 Commission v Italy [1998] ECR I-3851, para. 36; joined Cases C-180/98 to C-184/98 Pavlov and Others, para. 75.