



**Local & Regional
Europe**

State Aid

The European Commission is testing its boundaries by extending the definition of State aid

CEMR response to the Commission's consultation on the draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

14 March 2014

General remarks

1. CEMR welcomes that the European Commission is publishing a “Notice on the notion of State aid pursuant to Article 107(1) TFEU”, aiming at providing further clarification on the key concepts.
2. While we appreciate this motivation, we want to express our concern that the European State aid rules are still very complex and in particular for practitioners at sub-national level very difficult to understand and to apply.
3. The interdependencies of the different rules – regulations and guidelines – are not always clear and should be better explained.
4. Our comments on the ‘notion of State aid’ concentrate on elements which are relevant for local and regional governments. This is mainly the case for issues related to services of general economic interest (SGEIs), even though we acknowledge the fact that this consultation is not specifically focussed on SGEIs.

Services of General Economic Interest

5. Services of General Economic Interest, which is how in EU legal language, “public services” are known are regulated at EU level. The European Commission, as watchdog of the free EU Internal Market, has large powers to prevent undue protectionism and barriers to free competition in goods and services across the EU.
6. This however, also includes public services: a distinction is made in the treaties between SGI that are “economic” and non-economic. The former (SGEI) are considered public services that can be provided by either the public sector or by private operators. Therefore, they are subject to EU internal market rules so EU wide rules and thresholds apply to them.
7. CEMR wants to highlight that the Treaty of the Functioning of the European Union recognises regional and local self-government as part of the fundamental political and constitutional structure of the Member States (Article 4), which is an essential cornerstone of the European multi-level system of democracy and governance, complementing the principles of subsidiarity and proportionality (Article 5) and the Protocol on SGIs, which provides wide discretion to national, regional and local authorities as regards how they commission and organise their services of general economic interest. However, we are afraid that the Treaty still leaves vast scope of discretion to the Commission and therefore is not an unambiguous guarantee.
8. We believe that the responsible Directorate General Competition interferes more and more in local services. The Commission is increasingly putting itself in the position to define SGEIs, despite the fact that the Commission’s role in principle is restricted in this context to express itself on evident judgement errors. Undisputedly, and according to protocol 26 on SGIs of the Lisbon Treaty, the national, regional and local authorities have a wide discretion in defining what constitutes a SGEI.
9. Examples where the Commission exceeds its competence are the limiting definition of SGEI in the aviation guidelines or individual state aid cases such as the German animal abattoirs (Tierkörperbeseitigung) and social housing in the Netherlands where the Commission denied the national designation of an activity as an SGEI.

10. Moreover, the Commission is permanently expanding the notion of aid in its publications, which is regularly supported by the CJEU because of the Commission's wide scope of competence laid down in the Treaty.
11. With regard to the development outlined in the points above, we strongly request a reform of the Treaties in which SGEIs have to be generally excluded from State aid rules or in which SGEIs should at least enjoy a much more privileged position in comparison to internal market relevant services.

Local/Regional Government (re-)organisation

12. The recognition of regional and local self-government in the TFEU as a part of the fundamental political and constitutional structure of the Member States, the principles of subsidiarity and proportionality, the Protocol on SGIs and the Communication on the application of the EU State aid rules to SGEIs need to be better reflected in the "Notice on the notion of State aid".
13. CEMR is convinced that in almost all cases local SGEIs don't have internal market relevance and their funding does not qualify as state aid. So far, the European Commission does not provide an in-depth evaluation and analysis on this issue. We urge the Commission to issue a study on the effects of locally provided services of general economic interest and whether they contribute to the distortion of the internal market according to articles 101 and 102 of the TFEU.
14. We also ask the Commission to recognise the specificity of non profit organisations or third sector actors that are very often participating in the provision of local public services or developing activities linked to general interest.
15. Furthermore, we observe an inconsistency of the State aid rules with the public procurement rules, which makes their understanding and application very difficult for practitioners. State Aid rules on SGEIs and public procurement rules should be consistent in relevant legislative elements, such as thresholds, exemptions, etc.
16. For example, in-house provisions of public services do not fall under the scope of the public procurement directives, and therefore should also be exempted from the application of the State aid rules, since the objective of both provisions are the same: ensure competition between the operators.
17. An in-house exception also for State aid is of major importance to guarantee legal certainty and enable local and regional authorities to find the best suited way to provide SGEI. CEMR underlines that the CJEU acknowledges the possibility of in-house also in the field of State aid (Opinion of the General Advocate and judgement in the case C-134/03 Viacom Outdoor).
18. CEMR calls on the European Commission to make an effort to make the rules simple to understand, easy to apply, e.g. with the help of diagrams, web-based solutions, and possible to implement without public authorities having to engage costly external experts (consultants and lawyers).

19. Most local and regional authorities across the EU are in the process of major structural reforms. These developments are partly due to the last few years of economic circumstances but they also reflect longer trends such as demographic change. It is clear that we will see structural reform continuing over the next years.
20. Unsuspected by most of national and local elected representatives this has a European dimension stemming from the *Altmark* ruling and subsequent such as *Stadtreinigung Hamburg* or *Lecce* cases to name just a few. Some of these rulings have been internalised into the Commission's guidance via the ongoing State Aid Modernisation process and Article 13 of the new Public Procurement Directive.
21. Indeed it is helpful that a number of guidance by the Commission made clear that structural changes sanctioned by legislation would not be considered state aid. Indeed the 2013 Guidance on SGEI ^[1] clearly states that "*Where financial transfers are made within state structures on the other hand (from the state to regions, or from a department to municipalities, for example), purely in line with the transfer of public powers and in a way that does not relate to economic activity, there is no transfer of state resources such as to confer an advantage on an undertaking*".
22. However this does exclude a significant amount of new ways of providing services, such as co-production and shared services between administrations that are being tested at the moment. While the review of the Procurement Directive does include limits to which public-public cooperation can be excluded from EU law and the SGEI Decision would allow –subject to Commission assessment - some of these new practices to be compliant with EU state aid law the reality is that experimenting new ways of cooperation between public bodies are seriously constrained by EU law.
23. This is why that, failing a more robust protection and exceptions to be agreed in a future Treaty reform, it would be welcome that the Commission could work on the notion of "local services" and to set the parameters upon which a local service would not be deemed as having an impact on the EU Internal Market.
24. While we respect the fact that there should exist some limits defined at EU level to prevent arbitrary practices and artificial barriers to competition we dispute the assumption implicit in the Commission guidelines (and sometimes supported by the CJEU such as in the *Isle of Wight*) that any subsidy to a private company or a provision of a municipal service that could be *potentially* provided from a provider from elsewhere in the EU to be deemed state aid.
25. Instead, there should be a clearer distinction than at present of the sort of state aid issues that should be subject of EU law or CJEU case law (due to their manifest impact in the EU Internal Market) and what should be left to national legislation to look at with the European Commission only intervening if there is a manifest intention by national or local regulations to restrict access of operators from other Member States.

^[1] "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest"

Comments on specific points in the Notice

2.2. Exercise of public powers

It is not always easy to distinguish between an ‘economic activity’ and ‘non-economic activity’. **Paragraph 19** provides a very abstract definition, which is not helpful for practitioners. Clearer and pragmatic guidance would be useful.

4.1. The notion of advantage in general

4.1.1 General principles

Indeed, the Commission states the Altmark judgement and the criteria developed by the CJEU as regards compensation for public service obligations, and the relevant Communication of the European Commission on services of general economic interest. (**paragraph 72**)

However, CEMR would like to highlight that Protocol 26 of the Lisbon Treaty provides a wide discretion to national, regional and local authorities as regards how they commission and organise their services of general economic interest.

The Lisbon Treaty recognises regional and local self-government as part of the fundamental political and constitutional structure of the Member States (article 4), which is an essential cornerstone of the European multi-level system of democracy and governance, complementing the principles of subsidiarity and proportionality (article 5).

4.1.2 Indirect advantage

The European Commission should mention that beneficiaries of state aid can only be undertakings (**paragraph 74**).

The recipient can be a private person, but beneficiary can be only an undertaking, which is most often confused. The measure to the private person can be relevant for State aid rules, when certain companies or sectors are favored and that by the result the competition is distorted (which is the CJEU case cited by the Commission in footnote 115). However, we believe that the wording in paragraph 74 is abbreviated and gives the impression as if the grant to a private person may be legally relevant. This can be the case, but only under these limited circumstances, and these are rare!

4.2 The market economy operator (MEO) test

We believe that the Commission goes beyond existing legislation in requiring a public procurement procedure for the “sale and purchase of assets, goods and services (or other comparable transactions)” (**paragraph 91**). Article 16 (a) of the current public procurement directive 2004/18/EG (and article 10 (a) of the recently adopted directive) exclude “the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property”.

The European Commission in its Communication on “state aid elements in sales of land and buildings by public authorities” (OJ C 209, 10.07.1997, p 3-5) only requires a trans-

parent procedure with sufficient publicity, ensuring that any interested tender may participate.

We strongly oppose any 'definition' that exceeds the existing legal framework.

Furthermore, and again with reference to the public procurement directives, we believe that the notion of state aid should not interpret these directives as it does in **paragraph 98**.

Again, we believe that with its comment in footnote 150, the Commission goes beyond existing legislation: the acquisition of land only falls under the scope of the public procurement directive when a construction is foreseen; in that case, it constitutes a works contract. However, the Commission in its notion applies the rules on the purchase of goods and services equally on the purchase of land and "puts significant weight on the 'price' component of the bid". This is not required by the public procurement directives, which leave it up to the tenderer to define and weight the selection criteria.

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About CEMR

The Council of European Municipalities and Regions (CEMR) is the broadest organisation of local and regional authorities in Europe. Its members are over 50 national associations of municipalities and regions from 41 European countries. Together these associations represent some 150 000 local and regional authorities.

CEMR's objectives are twofold: to influence European legislation on behalf of local and regional authorities and to provide a platform for exchange between its member associations and their elected officials and experts.

Moreover, CEMR is the European section of United Cities and Local Governments (UCLG), the worldwide organisation of local government.

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