

European Commission adopts new rules on services of general economic interest

On 20 December 2011, the European Commission (the “Commission”) adopted measures reforming State aid rules for the assessment of public compensation for services of general economic interest (“SGEI”). These reforms clarify a number of State aid principles and are aimed at simplifying State aid rules for smaller SGEIs while increasing the scrutiny of larger companies to prevent large-scale distortion of competition. The new rules come into effect on from 31 January 2012 and replace the existing 2005 package of rules known as the “Monti-Kroes” rules which came into force following the *Altmark* decision (as further outlined below).

Services of General Economic Interest

SGEIs are services that public authorities identify as being of particular importance to their citizens. These comprise services which need to be supplied to citizens at an affordable price for social or other reasons even where the market for such services may not be profitable. Established examples of SGEIs include transport services and postal services.

State aid rules are relevant to such services as many of them are financed by the public budget and overcompensation of these services could potentially lead to distortion of competition in the relevant market. Member States have a wide margin of discretion in defining SGEIs but the Commission imposes certain rules so as to ensure such services do not distort competition contrary to EU Competition principles.

The Altmark Case

In the landmark 2003 judgment of *Altmark*, the European Court of Justice held that public service compensation does not constitute a State aid when the four conditions set out below are met:

- the public service obligation is clearly defined;
- the parameters for compensation are objective, transparent and established in advance;
- the compensation cannot exceed the costs incurred in the exercise of the public service obligations, plus a reasonable profit; and
- if the undertaking has not been chosen through public procurement, the undertaking should be compensated on the basis of a typical well-run company.

The new reform package

The new package is comprised of three instruments as follows;

1. a Communication which sets out the rules which will apply to compensation for SGEIs,
2. a Decision which sets out the conditions under which State aid in the form of a public service compensation granted to certain undertakings entrusted with the operation of SGEIs is compatible with the Internal Market and exempt from the requirement of notification as laid down in Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”), and,
3. a revised Framework setting out the conditions under which State aid for SGEIs not covered by the Decision can be declared compatible under Article 106(2) of the TFEU.

The key reforms include:

- Clarification of basic concepts of State aid rules such as the concepts of an undertaking and economic activity, state resources and effect on trade;
- Clarification of the conditions laid down in *Altmark* under which public service compensation does not constitute State aid;
- An exemption for all social services from the requirement of notification to the Commission, regardless of the amount of compensation received (previously only housing and social services were exempted);
- Greater scrutiny of the provision of SGEIs (other than for transport and transport infrastructure) involving compensation of more than €15 million a year where the potential for distortion of competition may be higher;
- A widening of the scope of the exemption from notification to the Commission, albeit with stricter conditions;
- Reasonable profits of an undertaking must now be assessed from an *ex ante* perspective; and,
- New reporting and evaluation requirements for Member States.

The Commission has indicated that Member States have until 31 January 2013 to make known their existing aid schemes regarding public service compensation which must now be brought into line with the new rules. Member States will then have until 31 January 2014 to bring such schemes into line with the proposed new rules.

The Commission is also proposing to set a minimum compensation amount for all other measures which do not constitute state aid under the TFEU. The Commission is proposing to set this *de minimus* amount at €500,000 over three years and it is hoped that this measure will reduce the administrative burden on smaller SGEIs. The Commission will adopt a final decision on this measure later in 2012.

The contents of this publication are for information and do not constitute legal or other advice. Readers should obtain their own legal and other advice as may be required. Philip Lee does not accept responsibility for information on third-party websites.