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Opinion.10

CEEP OPINION ON THE EU STATE AID MODERNISATION AGENDA

Executive summary

- European state aid rules are of great relevance for the quality and affordability of Services of General Economic Interest (SGEI) in Europe. In particular they can be a significant source of administrative burden and legal uncertainty for public authorities in their task of fulfilling missions of general interest.
- Building on the State Aid Modernisation Agenda, CEEP encourages the European Commission to pursue its efforts towards more administrative simplification, including through a comprehensive assessment and review of the Almunia package as called for by the Committee of the Regions¹.
- CEEP took note of the Notice on the Notion of State Aid. Clarifications over the European Commission's line on local services and financing of infrastructure are particularly relevant for public services' providers. However, CEEP is generally concerned that the exercise in itself contains a risk of a biased approach and may add rigidity in the Commission's approach.
- The existing State Aid Framework Rules for Services of General Economic Interest (so-called 'Almunia package') plays a fundamental role in the provision of public services. The European Commission should seize the evaluation of the Almunia package by the 31th of January 2017 as an opportunity to enhance and further simplify existing rules.
- Next to specific state aid rules for SGEIs, the GBER is certainly the second most important state aid framework for SGEIs' providers. CEEP welcomes the on-going initiative to broaden its scope and calls on the Commission to pursue this exercise.
- Regarding sectoral state aid guidelines, CEEP would especially like to stress the need to make EU state aid broadband guidelines fit for purpose to support achieving EU broadband development targets, as recommended by the REFIT Platform.

European state aid rules are particularly relevant for the quality and affordability of Services of general economic interest (SGEI) in Europe. In particular, it can be a source of significant administrative burden and legal uncertainty for public authorities in their task of fulfilling missions of general interest. The revised package of EU state aid rules for the assessment of public compensation for Services of General Economic Interest (SGEI) [so-called ‘Almunia package’] adopted in 2011 has been a major step in increasing legal certainty and reducing administrative burden for public services providers.

CEEP has also acknowledged the importance of the State Aid Modernisation Agenda which has been guiding the work of the European Commission Directorate-General for Competition on state aid since May 2012. The implementation of the State Aid Modernisation Agenda has resulted in a series of amendments or new regulations, including a recently published Communication on the Notion of State Aid.

As a general comment, CEEP encourages the European Commission to pursue its efforts towards more administrative simplification, including through a comprehensive assessment and review of the Almunia package as called for by the Committee of the Regions¹. CEEP is committed to fully support this exercise, also as member of the REFIT platform.

However, CEEP regrets that the European Commission has been increasingly using soft law in state aid matters which can be a factor of legal uncertainty and raises questions of democratic legitimacy. CEEP notably stressed this point in its reply to the European Commission public consultation on the Notice on simplified procedure.

CEEP would like to underline the necessity for the European Commission to provide some coherence to public authorities between all the existing frameworks on state aids. The co-existence of various regulations which could be implemented at the same time for one activity/project (as regional aid’s framework and SGEI decision) could lead to uncertainties for public authorities in their notifications obligations and to SGEI providers. Some clear support from the EC should be proposed to help the member states to use that diversity clearly and with legal certainty

The Notion of State Aid Notice: source of legal (un)certainty?

The Notice on the Notion of State Aid is meant to indicate and clarify the European Commission’s line on how it will approach general aspects related to the notion of state aid. Clarifications over the European Commission’s approach on local services and financing of infrastructure are particularly relevant for public services’ providers. However, CEEP is more generally concerned that the exercise in itself contains a risk of a biased approach and may add rigidity in the Commission’s approach. In particular, CEEP sees several shortcomings in the Communication which might become a source of legal uncertainty. It appears that the Commission’s line is sometimes based on a selection and interpretation of jurisdiction and case practice that can be questioned, such as on following notions:

When addressing **selectivity** in the field of fiscal measures no mention is made of key sentences such as the [T-219/10 *Autogrill/Commission*](#) and [T-399/11 *Banco de Santander & Santusa/Commission*](#). No reference is neither entered on the cumulated cases [T-515/13 *Spain/Commission*](#) and [T-719/13 *Lico/Commission*](#). The forthcoming cases on tax ruling decisions will shed further light on this key principle enshrined in jurisprudence, however it is unknown how they will be considered in the

¹ <http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%201460/2016>

Commission's policy. Furthermore, the High Court will also shortly rule on the Lübeck Airport case (C-524-14 P). The General Court previously annulled the Commission decision claiming that fully transparent tariffs open to any operator stood as an aid simply because Lübeck was a public enterprise and other airports offered different tariffs.

Furthermore, in the **notion of enterprise/economic activity** the Communication does not acknowledge in point 14 that according to the case law the existence of such an activity does not only require the provision of goods and services but also the fact they are delivered to the market. In so far as in-house fails to meet the latter requirement, it seems a contradiction that the Communication considers that it might involve an economic activity. If so, internal relations in any Group could rank as marketable activities as third parties could always be in a position to offer competing goods or services. Yet the competition policy openly rejects this claim, as otherwise companies could be liable of anti-competitive behaviour should they run on a preferential basis, operations within their Group perimeter. Treating in-house differently does not seem grounded.

Reducing Administrative Burden - The Way Forward

Evaluation and Possible Review of the Almunia Package

The existing State Aid Framework Rules for Services of General Economic Interest (so-called 'Almunia package') plays a fundamental role in the provision of public services. All parts of the Almunia package (De Minimis, SGEI Decision, SGEI Communication) are potentially relevant for CEEP's members which certainly acknowledge the benefits of the existence of such a framework.

After five years of enforcement, CEEP believes that there is room for improvement and further simplification of existing rules on following aspects:

- The thresholds: CEEP sees room for increasing the thresholds included in the De Minimis Regulation and SGEI Decision for reasons of proportionality. Five years of practice have indeed shown that most problematic cases arise only for much larger amounts than 15 million per year. Therefore, state aid control should be focusing on state aid amounts above 30 million euros, which would significantly reduce the administrative burden for both the Commission and contracting authorities.
- The principle of subsidiarity: CEEP joins the calls of other stakeholders in the need to broaden the notion of social housing by not linking it to a specific category of people, in order to safeguard the freedom of choice of public authorities in this area.
- More guidance: CEEP joins the Committee of the Regions in its calls for appropriate guidance by the European Commission on the implementation of the State aid rules, notably on notions such as "well-run undertaking", while taking into account already existing work developed by managing authorities at sub-national levels.
- Concerning social housing, considering that its scope can vary from one member state to another, depending on the history and culture of public intervention in each member state and on the prevailing economic and social conditions, CEEP proposes to remove the reference to "disadvantaged citizens or socially less advantaged groups"

CEEP is aware that the European Commission has a legal obligation only to review the De Minimis Regulation by the end of 2018. However as foreseen by the SGEI Communication paragraph 65, the European Commission shall carry out an evaluation of the Almunia package by the 31th of January 2017 at latest. This opportunity should be seized to carry out a comprehensive exercise and assess to what extent further simplifications could be introduced, in line with the Better regulation agenda.

General Block Exemption Regulation (GBER)

Next to specific state aid rules for SGEIs, the GBER is certainly the second most important state aid framework for SGEIs providers. Therefore, CEEP welcomes that the European Commission is currently considering enlarging the GBER to ports and airports, as well as increasing thresholds of investment and operation costs in culture. Stakeholders had the opportunity to give their feedback through a public consultation until end of May 2016.

There is a potential to broaden the scope of the GBER even more. The European Commission needs to pursue its efforts and engage in an even more comprehensive enlargement of the GBER notably by looking into operational and investment costs. Potential for regulatory burden reduction also exists in areas such as research and development² and sports and leisure centres³.

Sectoral State Aid Guidelines

Next to the Almunia package and the GBER, public services also rely for their activities on sectoral state aid guidelines. CEEP would especially like to stress the necessity to make existing EU state aid broadband guidelines fit for purpose to support EU broadband development needs. Their use could be facilitated through appropriate clarifications which consider the specific needs of municipalities. CEEP calls on the European Commission to build on the adopted recommendations of both the stakeholders' and government groups part of the REFIT Platform calling to further simplify those rules⁴.

² Assessment of the incentive effect in research/development and investment aid: The burden of proof should be reviewed, above all for research/development and investment aid. Next to large enterprises, also SMEs with public ownership are currently not exempted from the requirement of providing additional documentation.

³ Investment and operation costs in sports and leisure centres (article 55 GBER): there is evidence that investments in sports and multi-functional recreational centres often go beyond the existing threshold of 50 Mo. EUR. Therefore, the Commission should explore the possibility to increase this threshold.

⁴ http://ec.europa.eu/smart-regulation/refit/refit-platform/docs/recommendations/opinion_comp_4a.pdf