



## CLEARER AND SIMPLER STATE AID RULES FOR LOCAL PUBLIC SERVICES

### EUROCITIES OPINION ON THE REVISION OF THE SGEI PACKAGE

Access to high quality local public services is key to ensure economic, social and territorial cohesion. Public services such as drinking water supply, treatment of waste water, waste management, and social services are expected to be delivered efficiently, respecting sustainable development principles, at reasonable cost and, above all, on a regular basis for all.

European cities should be supported in their role as promoters of economic and social innovation. Today's demographic, social and economic trends pose new challenges to our society, create new forms of exclusion and put pressure on traditional social protection systems. Cities react by adapting and modernising their services, by introducing new programmes and policies to prevent social polarisation and exclusion, to promote health and well-being of young people and the elderly, as well as participation and diversity. They also work with an increasingly wide range of partners and providers to ensure they are able to continually adapt to new circumstances and needs.

The revision of the State Aid SGEI<sup>1</sup> Package is a major opportunity to simplify rules for local and regional authorities, by keeping administrative, legal and financial burdens to a minimum. This is all the more important given the financial pressures the public sector currently faces and the need for a smarter use of human resources.

EUROCITIES recommends that state aid rules:

- Are complementary to public procurement rules;
- Are simplified and more proportionate to the nature and size of local public services;
- Are more flexible so that local authorities can choose the most appropriate form of service provision;
- Assure the legal certainty and predictability needed for the provision of high quality public services.

The new rules must respect the principle of subsidiarity and with a view to ensuring freedom of local and regional authorities to decide how to organise, fund and carry out their public service obligations, in accordance with the provisions of national or regional legislation. Local and democratically accountable authorities are best placed to decide on the best form of provision of services, ensuring high quality and affordability. The Lisbon Treaty Protocol No 26 on services of general interest recognises both the specific nature and the diversity of public services, as well as the primary competence of member states and local and regional authorities.

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<sup>1</sup> *Services of General Economic Interest*

## 1) Better complementarity between state aid and public procurement rules

Under the new state aid package, the use of the tender procedure should automatically remove any state aid concern. If a city organises a tender for a service according to the procurement rules, there should be no need to provide notification under the state aid legislation.

Even with this development, it is still necessary to simplify state aid rules for all local public services (as we propose below). There are a range of other alternatives, including direct provision, provision via public-public cooperation, direct provision by a city-owned company, public purchase of the external delivery of a public service for a price, transfer of operating risk to an external operator with or without remuneration, granting exclusive or special rights in the form of authorisation schemes, mandating or providing financial support to a not-for-profit project in the general interest. These other alternatives can sometimes be better tailored to the specific characteristics of local public services. It is therefore essential that the rules treat all the options equally, ensuring the freedom to choose lies with the local authority.

Ensuring coordinated and streamlined rules for state aid and public procurement will alleviate the administrative burden for local public authorities and grant them greater flexibility in how they provide public services.

## 2) Adapting scrutiny to the size and nature of the services

Existing rules should be simplified and adapted to the specificities of public services provided locally.

### **Size of the compensation - raising the de minimis ceiling**

The de minimis ceiling of EUR 200 000<sup>2</sup> over three years, below which public aid is not regarded as state aid, should be raised substantially, for instance to EUR 500 000 over three years. This is necessary in order to exclude from the scope of state aid control all those local public services that rely on the local voluntary sector and local social micro-enterprises, including those relating to local social development (e.g. social inclusion, combating exclusion, community work, promoting cultural, sport and socio-educational activities).

We believe there is no risk of this kind of local public service affecting intra-Community trade. It is also impossible for local and regional authorities to subject this kind of local operator to state aid control, because there are so many of them. It would represent an excessive burden given the small scale of these services.

The proposal to introduce a threshold based on the population size, under which a public authority is deemed to be too small to raise state aid concerns, does not seem viable to us. It raises questions as to where the Commission would draw the line and what the implications would be for large cities that provide small-scale services. As a result, we believe that a range of indices need to be considered, in particular, the range of the public service users that would be involved. A single criterion of population size would be insufficient.

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<sup>2</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid.

## **Nature of the services - extending exemptions**

The SGEI package currently exempts compensations for hospitals and social housing from notification. We believe this should be extended to all social services including elderly care, services for disabled people and healthcare. Social services are crucial to citizens' basic needs and play an important role in achieving social cohesion and inclusion within the EU. They focus on people's welfare, are grounded in the specific local situation and have no impact, or run a very low risk of impacting, on intra-Community trade. We also believe that waste and sewage disposal, as well as water supply provided by local providers should be exempted. They also do not affect competition in the internal market.

## **Reducing the number of checks for overcompensation**

When a service provider is granted financing to fulfil its mission of general interest or public service, it must be fair compensation for the costs incurred for the mission. Beyond that, the financing is considered as overcompensation, which then constitutes state aid incompatible with the single market. The commission currently asks public authorities to check the compensation once every year, even when the contract covers a much longer period. In some cases, large profits in one year are offset by heavy losses in the next. In others, a heavy investment at the outset is distributed over the life of the contract.

It would therefore be simpler to check for overcompensation once only, when the contract comes to an end, as proposed by Commissioner Joachim Almunia.

## **3) Clarifying key concepts**

There remain a number of concepts, used in state aid control, that require clarification, in particular 'economic activity', 'reasonable profit' and 'well run undertaking'.

### **Clarifying 'reasonable profit'**

The issue is what can be considered as 'reasonable profit', and currently it depends on who is carrying the commercial risk. A high number of cases are being investigated at the moment. These processes create excessive administrative burden for local authorities. It is clear that the commission must check unreasonable profit. However, it would be useful to introduce thresholds in some sectors, below which profit would always be treated as reasonable. This would substantially reduce the administrative costs for the local authority. For instance if a city is awarding a contract for waste management, it would only have to check that the premium it is paying on top of costs stays below the threshold.

### **Clarifying 'economic activity'**

Due to the complex nature of local public services and the fact that they are increasingly provided in different ways, an activity which is economic in one member state might not be economic in another. For instance basic education services are generally not an economic activity, but higher private education paid by students or their parents is.

Local authorities have the right to define what is economic and what is not. However, the notion of 'economic activity' is difficult to define. In the event of a conflict between the European Commission and a local authority, the European Court of Justice must decide whether or not an activity is economic. For this reason, guidance from the commission would be useful to avoid lack of legal certainty. For instance, the commission could provide an indicative list of public services. The list would specify the economic or non-economic nature of the activity and would be updated annually, so as to provide a practical illustration of the scope of the concept

and the objective reasons for classifying services as economic or non-economic.

### **Clarifying the notion of a ‘typically well-run undertaking’**

The ‘fourth Altmark criterion’ to determine if a public service compensation is or not a state aid also needs to be clarified. It reads that the level of compensation should be calculated on the basis of a typical well run undertaking in case the service provider is not selected by a public procurement procedure. The issues are: what is a “well run undertaking”? What kind of entities are covered? This needs to be clarified by the European Commission in the revised package.

#### **4) Enabling Inter-municipal cooperation**

More and more municipalities pool their resources to organise services together, such as waste or water treatment. This inter-municipal cooperation should not be subject to public procurement rules and it should not necessarily be considered as unlawful state-aid. Public-public cooperation between local authorities offers great potential for economic efficiency, for ensuring optimal allocation of public resources and best use of taxpayers’ money, and for modernising public services in response to changes in the basic needs of people in their local areas. All the recommendations mentioned above should also apply to inter-municipal cooperation.

#### **5) Providing more supportive instruments**

The Interactive Information Service on services of general interest is a useful tool but we would also welcome training run by the Commission for local authorities, in all EU languages, on how to deal with state aid rules.

An explanatory ‘toolbox’ aimed at local and regional authorities would also help clarify the laws applicable to the various forms of public service provision, ranging from direct provision to public procurement.