

STATE AID IN THE FORM OF PUBLIC SERVICE COMPENSATIONS
OBSERVATIONS SUBMITTED BY UNICE

A. INTRODUCTION

A.1. SGEI, European competitiveness and achievement of the Lisbon strategy objectives

UNICE supports achievement of the Lisbon strategy objectives and insists on the respect of the market as a force for innovation and modernisation for services of general economic interest.

UNICE addressed this issue in its message "Growth strategy urgently needed"¹ and its comments on the Commission Green Paper on Services of General Interest².

UNICE decided, in the wake of the Green Paper on Services of General Interest, to pursue its work on state aid in the area of services of general economic interest (SGEI) with respect to the fundamental principles of EU law.

UNICE stresses the importance not so much of the definition of the service (service of general interest or service of general economic interest) but of how these services are managed, the goal being that their management enables an increase in the economic productivity of public service activities in Europe.

In fact, there is no need for further definition of SGI or SGEI.

The principles of the Treaty should be applied to define a SGI or a SGEI as an economic activity, and respect the jurisprudence of the European Court of Justice.

Furthermore, free competition and transparency are key to promote the European social model and to succeed in the Lisbon objectives.

UNICE approves the Commission's view and strongly believes that a competitive internal market is not incompatible with a) the provisions of the EC Treaty and b) high-quality services of general interest.

¹ 15 June 2004 - message to European Council

² 15 September 2003 - comments to the Commission

A.2. Respect the Treaty's principles

The present contribution is submitted in the context of the preparation by the Commission, on one hand, of a Community framework for State Aid in the form of public service compensations and, on the second hand, of a draft decision on the application of the provisions of Article 86 of the Treaty to state aid in the form of public service compensations.

In general, UNICE would like to avoid reducing the issues in hand to technical management of state aid, while the practices concerned have consequences weighing on public finance and on private enterprises' ability to invest in a globalised economic environment.

UNICE does not challenge the legal rules governing state aid in the form of public service compensation when the grant of such aid does not entail any distortion in economic mechanisms and in particular in the choice of the management modes and operators of SGIs/SGEIs.

UNICE would like to have **control of such aid strengthened**, in terms of grant complying with the Treaty principles of transparency, non-discrimination, neutrality and free competition.

B. DETAILED COMMENTS ON DRAFT DECISION AND ON DRAFT COMMUNITY FRAMEWORK

1. Need to target not only enterprises providing SGEIs but also all economic entities likely to benefit from compensations (point 2.3 of the draft Community framework)

All types of entities, and not only private companies strictly defined, may supply SGEIs and thus benefit from compensations granted by public authorities: such entities may be associations, local authorities and their groupings (and in particular all public entities ensuring cooperation between local authorities), etc.

According to Article 295 of the Treaty for the application of Community law, it is legally irrelevant if SGEIs are provided by private or public undertakings.

It is therefore necessary to revert to an autonomous definition of national characterisations in order to ensure that the provisions of the decision and Community framework have all the necessary effect.

UNICE asks the European Commission to ensure that Member States uniformly apply the Community definition of the notion of enterprise as set out in the *Höfner* case³.

2. Determine the terms of the thresholds triggering the obligation to give notice of the aid scheme (first point of the draft decision)

As regards the importance of the thresholds to be used, it seems logical not to exceed the threshold above which bidding procedures must be organised for services, i.e. **EUR 230,000** over the duration of the decision and **within a limit of four years**, regardless of the nature of this decision (unilateral or contractual), authorising the operation of the SGEI and granting the relevant economic aid.

³ ECJ 23 April 1991 Höfner Case C-41/90 R. IP. 1979

The case states that: "*the notion of enterprise includes any entity conducting an economic activity, regardless of such entity's legal status or financing mode.*"

In addition and regardless of the amount of the aid, no ex-post control is justified if the aid has been granted through a contract awarded after a competitive bidding procedure. **In that case, the grant of the aid, in any event, complies with the Treaty's essential principles.** In addition, the draft provisions do not allow for a monitoring of the aid schemes or their amounts.

3. Impose the obligation to give notice of compensations in “social sectors” (first point of draft decision dated 16 January 2004 and point 2.3. of the draft Community framework)

UNICE considers that large-scale aid granted to hospitals, and even more so to economic entities active in the activities, may possibly distort competition. Indeed, these are competitive areas where many private operators are likely to trade and where aid granted to certain of them is likely to be detrimental to their competitors.

UNICE supports the position adopted in 2000 by the European Commission in respect of this communication on services of general interest.

In order to avoid any ambiguity, UNICE urges the European Commission not to exempt these sectors from general competition rules and from the aid notification system, except as regards activities involving small amounts as indicated under Article 1 i) and subject to the need to clarify the calculation mode.

4. Indicate the nature of the official decision to award the SGEI and to guarantee that the decision is the result of a transparent procedure ensuring full neutrality for all competitors (points 2.3 and 3 of the draft community framework and points 3 to 6 of the draft decision)

It would be preferable if these draft decisions are not restricted solely to unilateral decisions and public procurement but also apply to other types of administrative decision such as concessions and other forms of public-private partnerships.

The mere reference to application of the “public procurement” directives is not sufficient to ensure transparent treatment of the state aid scheme and to ensure that the scheme is secure from a legal point of view, in particular in view of observed in-sourcing trends.

It is thus necessary that the provisions concerned define specifically the mode of award of service concessions without being restricted to the sole public procurement procedure, even though substantive EU law does not yet recognise service concessions and refers to the need to comply.

5. Strengthen the transparency of the terms of the compensation (points 5 and 6 of the draft decision)

UNICE opposes any definition of the notion of reasonable profits in this provision, because reasonable profits are specific to each enterprise, sector and each economic philosophy or culture.

It is indispensable to have this definition clarified in the texts by reducing its scope to companies where the official decision to grant aid has not been submitted to a transparency procedure.

UNICE is very concerned about the current drafting and asks the European Commission to alter it while taking into account (1) economic regulation mechanisms organised before adoption of decisions (other than public procurement decisions) awarding the compensation; and (2) principles essential to free enterprise on EU territory such as the transparency, neutrality and proportionality of decisions entrusting management of SGIs/SGEIs.

In addition, the utilisation of the “quality of services rendered” criterion is highly subjective and therefore contradicts the very purpose of the provisions. This introduces a measure of uncertainty that is incompatible with the transparency requirement that is indispensable in order to regulate compensations.

Furthermore, **it is highly advisable to broaden the notion of compensation to any type of aid, whether in cash or in physical or human resources, or based on a legal provision or on the legal nature of the beneficiary’s status with respect to the financing of the contract. The draft should include provisions in accordance with the latest sanctions imposed by the Commission on illegal state aid⁴.**

6. Tighten control of surplus compensation (point 3 of the draft Community framework and point 5 of the draft decision)

Use of surplus compensation to cross-subsidise other activities must not be allowed as a matter of principle.

While the allocation of a surplus compensation in order to finance an SGEI may be a source of complexity, it most importantly creates the possibility of accounting transfers that run counter to the spirit of the provisions concerned. It would therefore be indispensable to prohibit any surplus compensation being used to cross-subsidise other activities.

UNICE fails to see why the state as a shareholder would be granted such preferential treatment, while the above comments prove the difficulty of setting up a secure legal framework.

C. IMPORTANT ISSUES NOT YET ANSWERED BY THE COMMISSION'S DRAFTS

- (i) UNICE calls for a clarification concerning the application of the framework and the decision and its **legal consequences for the existing Community provisions in the field of public procurement and all sectoral provisions**, specially in the field of telecommunications.
- (ii) In investigations by the European Commission and European Court of Justice, the question with fund solutions is generally the role of the state. The state is always deemed to play a role if the fund has been set up by public authorities, the basis for levies is prescribed by public authorities and specific enterprises benefit from the fund's resources. In cases where fund solutions to finance services of general economic interest meet these conditions, no distinction as to the existence of state aid should be made as compared with **other financing mechanisms such as fiscal mechanisms or tax regulation**. As with compensation payments, this would leave the distinction between measures which do not represent state aid in accordance with the European Court of Justice’s decision in the Altmark Trans case, and measures which qualify as state aid within the scope of the European Commission’s draft documents.
- (iii) In addition, the “priority rule” for existing sector-specific EU provisions (see recital 22 and article 2 of the draft decision; points 3 and 4 of the draft Community law framework) and its effects are unclear, and need to be explained.

UNICE proposes that the European Commission deletes the term “stricter” where it occurs, since this is not a completely unambiguous legal concept. In this way, rules already established for compensation payments for services of general economic interest would be broadly exempt from the new rules.

⁴ For example : France Telecom and Electricité de France sanctioned by the Commission for illegal state aid on account of their legal status of public companies