

27 May 2011

Resolution of the Bundesrat

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Reform of the EU State Aid Rules on Services of General Economic Interest COM(2011) 146 final.

In accordance with Articles 3 and 5 of the EUZBLG (Act on cooperation between the Federal Government and the Länder in matters relating to the European Union), The Bundesrat adopted the following opinion at its 883rd session, held on 27 May 2011:

1. The Bundesrat welcomes the Commission's intention to open a discussion on reform of the EU state aid rules on services of general economic interest (SGEI). The Commission's aim of clarifying matters and further simplifying the rules with reference to smaller amounts of aid and compensation for social services is noted with interest.
2. The Bundesrat believes that the Monti package has absolutely proved its worth. It views the Commission communication as an announcement and welcomes the intention to further develop the previously positive approach of the SGEI package and thereby strive to simplify the rules.
3. In this respect, the Bundesrat supports the aims of the reform to provide greater clarity for services of general economic interest in the application of state aid rules and ensure diversified and appropriate treatment that corresponds to the various factors relating to the different types of services of general economic interest.
4. The Bundesrat notes that the scope of the SGEI decision and the thresholds it establishes for state aid in the area of services of general interest exempted from notification have proved their worth. However, the Bundesrat considers that the question of whether the thresholds ought to be raised should be examined and further evaluated.
5. The Bundesrat considers it imperative that the rules on state aid for public services that are provided by local councils and have little impact on trade between Member States be simplified so as to make the administrative costs incurred by local councils proportional to the (often very limited) impact of the measure on trade between Member States.
6. The Bundesrat therefore welcomes the Commission's announcement that it will examine the possibility of a *de minimis* rule for services that have only a limited impact on trade between

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Member States, as well as for certain types of social services. By derogation from the existing state aid framework, significant facilitations for local services of general interest can only be achieved if an enlarged *de minimis* framework is developed for these measures, taking account of the fact that local services provided for local people have a significantly lower impact on the single market than do the competitive activities of commercial enterprises. The Bundesrat therefore advocates a sector-specific *de minimis* rule for such services. As the Bundesrat understands it, this cannot refer to services with a purely local impact, as these do not in any case impair trade between Member States and thus do not, by their nature, come under the definition of state aid within the meaning of Article 107(1) TFEU.

7. The Bundesrat requests that, in addition, economic services in the culture and education sector be included in consideration of a sector-specific *de minimis* rule.
8. The Bundesrat requests the Commission to exempt further areas of social services, such as healthcare, care for the elderly (in particular care homes for the elderly), assistance to disabled and elderly people, and home help, by analogy with the arrangements for hospitals and/or social housing, and thus create clarity and legal certainty.
9. In this context, the Bundesrat emphasises the particular importance of social services for social cohesion. It must be ensured that social services, which in many cases are provided through active citizenship, are fit for purpose. Single market and competition policy must therefore consider the social impact from the outset, shape the single market to take account of social factors and thus give Europe a "social face". In particular, the diversity of and differences between national social models must be taken into account (see Bundesrat document 865/07 (resolution)).
10. In this context, the Bundesrat calls on the Commission to pay more attention to the commitment to local and regional autonomy, enshrined for the first time in the Treaty of Lisbon (Article 4(2) TEU), when developing the rules on state aid. The contracting parties correctly assumed that regional and local authorities were best placed to know the diversity of the situations in the Member States, provide for the welfare of their citizens and promote social cohesion.
11. The Bundesrat would welcome it if the explanations announced by the Commission of the key concepts in the SGEI state aid rules and of whether a measure falls under Article 107 TFEU led to greater clarity. In this context, it should be borne in mind that classification within the constituent elements of the concept of state aid is susceptible to change with changes in the economy. This militates against overly detailed delimitations.
12. The Bundesrat requests that the question of the conditions under which an effect on trade should be assumed, or when an activity has no internal market dimension, be considered as part of the reform process.

13. The Bundesrat underscores the fact that the Member States have a great deal of discretion/room for manoeuvre in terms of what they define as services of general interest. Monitoring by the Commission is thus limited to cases of legal abuse or arbitrary definitions by Member States in individual cases.
14. The Bundesrat therefore welcomes the fact that the Commission expressly states in its communication that it is the task of Member States to ensure that certain services, such as social housing, are accessible to the general population at affordable conditions.
15. The Bundesrat notes with concern, however, that the Commission runs counter to this principle in its decision on state aid to housing corporations in the Netherlands (No E 2/2005 and No N 642/2009 of 15 December 2009) by stressing that social housing can only qualify as a service of general economic interest if that housing is restricted to a target group of disadvantaged citizens or socially less advantaged groups.
16. The Bundesrat takes the view that this is too narrow an understanding of the concept. The specific mention of social housing in the SGEI decision and the above-mentioned decision of the Commission on state aid to housing corporations in the Netherlands implies that the universal nature of a service cannot in itself be considered abusive or arbitrary.

The concept of social housing cannot be defined solely by an income threshold. The aim – also recognised by the Commission – of creating and maintaining socially stable mixes of residents should be given equal consideration. However, this aim requires a balance between different social groups. Creating an appropriate social mix and – hand in hand with this – setting income thresholds within a comprehensive system of support for housing are, on the basis of the subsidiarity principle, a core part of Member States' room for manoeuvre. The description used by the Commission of the target group for social housing infringes this room for manoeuvre, as it calls for a low income threshold and takes inadequate account of social mix.
17. The problem of gentrification is also neglected if tenant households – especially in inner-city areas – have difficulty affording their homes after major (energy-related) modernisations have been carried out.
18. The Bundesrat considers that these issues must also be taken into account during the reform of the SGEI package.
19. The Bundesrat stresses that the principle of conferral and the subsidiarity principle in accordance with Article 5 TEU must be taken into account in the clarifications and explanations proposed by the Commission concerning the simplification of the application of the rules on state aid for SGEIs and in the definition of the concept of social housing, as must the broad room for manoeuvre of Member States in defining services of general economic interest.

20. The Bundesrat further stresses that the Protocol on Services of General Interest specifically grants Member States wide discretion in providing, commissioning and organising services of general economic interest. The application of the rules on state aid to services of general interest must not curtail this discretion more than is necessary.
21. The Bundesrat is concerned that the Commission, by placing greater emphasis on quality and efficiency aspects in relation to large commercial services, is limiting this discretion and that this may give rise to new administrative costs. The Bundesrat is also critical of these ideas for the following reasons. Quality and efficiency aspects fundamentally do not fall within the Commission's competence, which has its basis in the competitiveness chapter of the TFEU. The Bundesrat takes the view that compliance with the first three Altmark criteria alone usually rules out any distortion of competition. Judgment about efficiency is not necessary and would run counter to the rights of Member States to define the scope of their mission of general interest, to determine whether non-measurable tasks give rise to additional costs, and to assess the quality of the service. This view is also in line with the Commission's practice to date. In recital 14 of its decision on exemption, the Commission assumes that, where the first three Altmark criteria are complied with, the development of trade is not affected to an extent that harms the interests of the Community. It should be borne in mind that the advantage of both the decision on exemption and the Community framework is that the fourth Altmark criterion does not have to be proven. The Bundesrat therefore requests the Commission to maintain the facilitations of the decision and the Community framework in full. In addition, inconsistencies with case law of the European Court of Justice arise: if undertakings tasked with SGEI are selected in accordance with efficiency criteria – by means of a call for tender, for example – the fourth Altmark criterion is fulfilled and, if the remaining three Altmark criteria are fulfilled, there is, in the absence of favourable treatment, in fact no state aid within the meaning of Article 107(1) TFEU (see ruling of 24 July 2003 in the Altmark case, C-280/00, ECR 2003, p. I-7747).
22. The Bundesrat points out that, in practice, as well as ongoing compensation payments, one-off state aid for investment in the capital stock needed to provide SGEI plays an important role. Such aid is not explicitly dealt with in the current legal framework. The Bundesrat requests the Commission to close this loophole when revising the legal framework.
23. The Bundesrat considers that there is an urgent need for action in relation to activities with a purely social function. According to ECJ case law, these activities are usually to be categorised as non-economic activities. The Bundesrat recalls that the Commission has described constant evolution of Court case law as a source of uncertainty (COM(2006) 177). Against this background, the Bundesrat calls on the Commission to bring about legal clarity and certainty.
24. The Bundesrat considers that clarification is needed in connection with the recently published guide (SEC(2010) 1545 final). According to point 3.5.14 of the guide, tax benefits, irrespective of their nature, must be taken into account when determining the amount of compensation. There is no reference to the Commission Notice on the application of the State aid rules to measures

relating to direct business taxation (OJ C 384, 10.12.1998, p. 3). In this general context, there are concerns about the above statement, for example in connection with the not-for-profit status of undertakings. In Germany at least, the rules on not-for-profit status are part of the general tax system, which applies to all undertakings. There is thus no preferential treatment of particular undertakings. These are general tax rules, not arrangements for state aid.

25. The Bundesrat supports the greater consistency, called for in the communication, between the application of rules on state aid and those on public procurement. However, it is concerned that these two areas of law differ in their approach. In any case it must be ensured, in the course of the analysis under rules on state aid, that the advantageous nature of a measure can be ruled out by other means than evidence of a tendering procedure within the meaning of the European directives on coordination in the award of public contracts. By way of example, the Bundesrat refers here to the possibility laid down in the communication on land (OJ C 209, 10.7.1997, p. 3), as an alternative to a bidding procedure, of obtaining a prior expert evaluation to establish the market value.
 26. It also points out that in the guide on services of general interest (SEC(2010) 1545 final) an important change has been made to the way in which the commissioning of service providers is looked at. This also affects the three-way relationship in the German social system. Under point 4.2.17 of the guide, licensing and authorisation procedures – such as exist in the three-way relationship of the social system – are deemed under certain conditions to be transparent and non-discriminatory, such that a tendering procedure for awarding contracts for social services of general interest can quite rightly be dispensed with. The correct assessment of licensing and authorisation procedures as transparent and non-discriminatory can also be applied to the fourth Altmark criterion, for which tendering is also a prerequisite.
 27. The Bundesrat considers the interactive information service to be a useful tool for directly resolving questions and issues relating to EU rules. However, it points out that it would be helpful for all those involved if the questions and answers were made available in anonymous form in all official languages.
 28. The Bundesrat is submitting this opinion directly to the Commission.
 29. The Bundesrat notes that there are no plans to consider the communication in the Council. However, it points out that the areas of legislation covered by the communication to a large extent fall within the legislative powers of the Länder and that, in accordance with Sections 10(2)(1) and 5(2)(1) EUZBLG, opinions of the Bundesrat should be taken into consideration accordingly.
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