

Services of General Interest in Europe

Upon request by the European Council of Lisbon, the Commission adopted on 20.9.2000 an update of its Communication on Services of General Interest in Europe. It aims at addressing as concretely as possible concerns which have been raised and at improving legal certainty for the operation of services of general interest. To this end, the new text illustrates the scope of the existing EC law and the flexibilities which the current legal framework offers for taking account of the special features of these services. Two significant limitations of Community competence are that EC competition and internal market rules are not applicable where the activity concerned is of a non-economic nature or is confined to one single Member State because it has no effect on intra-Community trade or no cross-border aspects. Moreover, according to the *de minimis* rule, State support of up to a total of 100.000 Euro per undertaking over any three year period does not constitute State aid within the meaning of the EC Treaty. In practice, these limitations mean that many services of general interest at the local and regional level, with regard to which for example the German *Bundesländer* and municipalities have expressed concerns, will not be caught by EC rules at all. The fact that the Commission takes these limits of its competence seriously is evidenced by many cases such as a decision of 21.12.2000 in which it held that an annual allowance by the German town *Dorsten* for the operation of a local swimming pool did not constitute State aid within the meaning of the EC Treaty because there was no effect on intra-Community trade.

On the other hand, it is true that many services of general interest are, or have over time become, of an economic nature, and that due to the progressive integration of European markets the number of purely domestic cases without effect on intra-Community trade and without transborder aspects is likely to shrink. Against this backdrop, the new Communication comprehensively explains how, for the benefit of citizens, the proper functioning of services of general economic interest which are within the scope of EC law can be ensured.

The starting point of the Commission's approach is that in principle open and competitive markets, which the EC competition and internal market rules are designed to achieve, are not only compatible with the secure provision of services of general economic interest but often even improve the level of these services. Traditionally, Member States had largely assumed incompatibility and often reserved the performance of these services to one or a limited number of undertakings. However, over time, attitudes and consumer demands have changed, technical progress has facilitated market access of competing operators and, above all, more imagination has been developed at the European and national level to look for new ways of combining the advantages of open and competitive markets with the provision of services of general economic interest.

Where free competition does not provide sufficient results with regard to quality, regularity, territorial coverage, affordability and security of these services, the Member State may impose non-discriminatory regulation on all operators in the market, obliging them to meet certain standards as long as they are operating in the market. This competition-friendly way of ensuring services of general economic interest is foreseen in EC legislation for the liberalisation of various sectors of the economy. Alternatively, or in combination with State regulation, a Member State may specifically entrust, within the meaning of Article 86(2) EC Treaty, one or a limited number of undertakings with the provision of clearly defined services of general economic interest. The new Communication acknowledges Member States'

wide discretion to shape their policies by defining such services. However, it also stresses that the proportionality principle in Article 86(2) obliges the Commission to ensure that restrictions of competition and of the freedoms of the internal market are kept to the minimum which - taking account of the particularities of each sector - is strictly necessary to allow the entrusted undertaking to perform the particular task assigned to it. While Member States have traditionally granted exclusive and special rights to entrusted undertakings, the proportionality principle calls for exploring and implementing viable less restrictive means of ensuring the service of general economic interest. Within its scope of application, Community law thus guarantees that for the benefit of the citizens these services can function properly, it does however not guarantee that the structures in which they have traditionally been provided, in particular monopolies and oligopolies, remain untouched.

The concern for the proper functioning of services of general economic interest is also reflected in the treatment of State funding which may be relevant for them. Thus, State aid for the promotion of culture may be compatible with the common market under Article 87(3) EC Treaty. Moreover, frameworks, guidelines and block exemption regulations set out conditions for compatibility concerning aid for employment, environmental protection, R&D, regional development, undertakings in deprived urban areas, SMEs and training. These special exceptions are complemented by the general rule that the extra costs incurred by undertakings as a result of providing services of general economic interest entrusted to them under Article 86(2) may be compensated by State aid, provided that there is no overcompensation.

Under point 36 of its Communication, the Commission promises that where new issues arise in the field of services of general interest, it will endeavour, in close consultation with Member States, to provide further clarification in the interest of legal certainty. On this backdrop, the European Council of Nice has asked the Commission and the Council to submit a report on their efforts in this respect for the European Council in December 2001. While it is too early to say whether legislation or guidelines will be appropriate in this regard, it is clear that an important way of providing legal certainty will be through decisions in individual cases respecting the principles established in EC law and set out in the new Communication.

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