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First remarks on the "Almunia package" drafts

This first analysis addresses only the content of the 4 projects of the package published by the European Commission on 16 September 2011. It does not revisit their adoption procedure, which the Commission relies only on Article 106-3 TFEU which gives her the opportunity to decide alone, while Article 14 TFEU emphasizes the conditions «particularly economic and financial», in accordance with «the ordinary legislative procedure», so the co-decision Council – European Parliament. For measures that will affect hundreds of thousands of national and subnational authorities, this legal basis would allow a much greater legitimacy of the new provisions.

The Communication of 23 March 2011, defining the course of the European Commission to prepare the revision of the "Altmak" or "Monti-Kroes" package of 2005, stated objectives of clarification, simplification, alleviation of procedures, in particular for local public authorities and SSGI, and a proportionate and differentiated approach.

This paper engages in the analysis of the first package of 4 projects presented by the Commissioner Joaquin Almunia on 16 September 2011. We call them "Communication" for the Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, "Framework" for the EU framework for State aid in the form of public service compensation, "Decision" for the Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and "De minimis" for the Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing Services of General Economic Interest.

1/ These projects take unacceptable liberties in relation to the treaties

The Communication starts by recalling what SGEI are: "Services of general economic interest (SGEIs) are not only rooted in the shared values of the European Union but also play a central role in promoting social and territorial cohesion. The EU and the Member States, each within their respective powers, must take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions".

This sentence is copied from Article 14 TFEU. Why not make explicitly reference to this Article? Why cut the sentence and not mention the «particularly economic and financial conditions» that are subject of the package?

For its part, the Decision refers to article 14: "Article 14 of the Treaty on the Functioning of the European Union (TFEU) requires the European Union, without prejudice to Articles 93, 106 and 107 TFEU, to use its powers in such a way as to make sure that services of general economic interest (SGEIs) operate on the basis of principles and conditions which enable them to fulfil their missions".

As in the Communication, the sentence was cut and it does not mention "particularly economic and financial conditions".

Article 106 is clearly mentioned. The Framework specifies that: "Article 106(2) TFEU provides the legal basis for assessing the compatibility of State aid for SGEI. It states that undertakings entrusted with the operation of SGEI or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 106(2) TFEU provides for

an exception from the rules contained in the Treaty for cases where the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. This exception only applies where the development of trade is not affected to such an extent as would be contrary to the interests of the Union"

Why make a point after competition rules? Article 106-2 adds: "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." These elements are resumed but they are considered as an "exception" while it is a possible "exemption", whitch is by no means identical. Why not mention the «particular» tasks?

The same diversion is resumed in the same terms in the Decision: "Article 106(2) TFEU states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 106(2) TFEU provides for an exception from the rules contained in the Treaty insofar as the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. This exception only applies where the development of trade is not affected to such an extent as would be contrary to the interests of the Union".

The Framework adds that "At the current stage of development of the internal market, State aid falling outside the scope of Decision xxx may be declared compatible with Article 106(2) TFEU if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. The following conditions must be met in order to achieve this balance."

Again confusion: Article 106-2 does not mean «necessary to the operation» but refers to «the performance of the particular tasks assigned to them». As for the notion of "balance", it is an invention.

In the same spirit, the Decision specifies that: "In order to ensure that the criteria set out in Article 106(2) TFEU are met, it is necessary to lay down more precise conditions that must be fulfilled in respect of the entrustment of the operation of services of general economic interest."

Again, there is no "criteria" in Article 106.

Then, the Decision refers to Article 106-3: "Article 106(3) TFEU allows the Commission to specify, by adopting directives and decisions, the meaning and extent of the exception under Article 106(2) TFEU, and to set out rules intended to enable effective monitoring of the fulfilment of the criteria set out in Article 106(2) TFEU".

Article 106-3 does not refers to "the meaning and extent of the exception", but it requires the Commission to "ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States". The project appears to exceed the powers given to the Commission by the treaties. It does not enunciate any "criterion". How the Commission could control them?

The Framework refers to the 4th Altmark criterion: "Aid will only be considered compatible with the internal market on the basis of Article 106(2) TFEU where the responsible authority, when assigning the provision of the service to the undertaking in question, has complied or commits to comply with the applicable EU rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the TFEU and, where applicable, secondary EU law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interest of the Union within the meaning of Article 106(2) TFEU".

But the Communication is surreptitiously passing from «public procurement procedure» to «tendering procedure»: "3.6.1. *Amount of compensation where the SGEI is assigned under an appropriate tendering procedure*. The simplest way for public authorities to meet the fourth *Altmark* condition is to conduct a transparent, open and non-discriminatory tendering procedure in line with the applicable public procurement rules, insofar as the tender allows for the selection of the tenderer capable of providing those services at the least cost to the community. *3.6.2. Amount of compensation where the SGEI is not assigned under a tendering procedure*".

The European Court of Justice refers to the public procurement procedure. This shift is unacceptable.

At no time these 4 texts do not explicitly refer to the Protocol 26 annexed to both treaties.

2/ The package invents a new definition of SGI and SGEI

The Framework tries to define a "Genuine services of general interest within the meaning of Article 106 TFEU".

Where does this new adjective "genuine" came from? What does it refer to?

The Framework specifies that "The aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) TFEU."

There is no definition in the primary law, except the reference to "the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest" (Protocol 26).

The Communication specifies that "The Commission thus considers that it is not possible to attribute compensation to services that are already provided or can be provided satisfactorily and under conditions, such as price and access to the service, consistent with the public interest, as defined by the State, by undertakings operating in accordance with the rules of the market. The Commission also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole."

This sentence is completely new! and can have different meanings. An undertaking that operates «in accordance with the rules of the market» is banned from all compensation?

The Framework adds that "In its Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest, the Commission has provided guidance on the requirements concerning the definition of a service of general economic interest. In particular, services that are already provided or can be provided satisfactorily and under conditions, such as price and access to the service, consistent with the public interest, as defined by the State, by undertakings operating in accordance with the rules of the market cannot be defined as services of general economic interest."

Since when a Communication defines "requirements"? Moreover, after banning the possibility of compensation, the text prohibits the existence not only of SGEI but of SGI! Why this reference to SGI while title 2.2 concerns SGEI? An undertaking which operates «in accordance with the rules of the market» sees itself banned to be a SGI? What provisions of primary law allow the Commission to advance such prohibitions? This prohibition reduces to almost nothing «the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest».

The Communication specifies that for "the broadband sector, for which the Commission has already given clear indications as to the types of activities that can be regarded as SGEIs. Most importantly, the Commission considers that in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as an SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions".

Why to distinguish "private investors"? Why limit SGEI qualification to only "failure" of private investors?

The Framework creates a new obligation for the Member States: "For the scope of application of the present framework, Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account".

Where does this injunction came from? Is it in the Commission's power to impose it?

In the same restrictive spirit, the Framework adds that "The Commission proposes as appropriate measures for the purposes of Article 108(1) TFEU that Member States bring their existing schemes regarding public

service compensation into line with this framework, within 12 months following its publication in the *Official Journal*. Member States should confirm to the Commission within one month of publication of the framework in the *Official Journal* that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree".

Is this a new legislative procedure? What is the legal basis for this injunction?

3/ A simplification that seems to be an illusion

De mimimis specifies that "In the light of the Commission's experience, compensation for the provision of services of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that it is granted by a local authority representing a population of less than 10000 inhabitants, that it benefits an undertaking with an annual turnover of less than EUR 5 million during the two preceding financial years and provided that the total amount of compensation for services of general economic interest received by the beneficiary undertaking does not exceed EUR 150 000 per fiscal year".

What percentage of the EU population does it represent? Taking into account intercommunalities, what SGEI competences remains for communes with less than 10.000 inhabitants? The amount of EUR 150000 does not have the same significance in all EU Member States.

The Decision specifies that "Hospitals and undertakings in charge of certain social services, which are entrusted with tasks involving services of general economic interest, have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that, at the current stage of development of the internal market, the intensity of the distortion of competition in those sectors is relatively minor even if the amount of compensation they receive exceeds the general notification threshold laid down in this Decision. Accordingly, provided the activities of the undertakings in question are essentially limited to the provision of health care and social services, they should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision".

Why «certain social services»? Why maintaining the uncertainty?

The Decision specifies that "Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a riskfree investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the fact that an SGEI provider that invests capital in an SGEI contract commits this capital for the duration of the entrustment act and will be unable to sell its stake as rapidly and cheaply as is the case with a widely-held and liquidity risk-free asset".

This criterion seems non applicable by many sub-national public authorities.

Pierre Bauby, 22 septembre 2011