COSLA

Brussels Office

COSLA Response

Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

The Convention of Scottish Local Authorities (COSLA) is the national and international voice of all 32 Scottish municipalities. We have worked with our Scottish, UK and European partners notably CEMR in ensuring that the State Aid Modernisation package does respond to the needs of local communities and the need for Councils to enjoy wide discretion in the way they provide local services. The present submission is an officer level one based on longstanding politically agreed views at COSLA, and which can be accessed here.

General Comments

1. Services of General Economic Interest, which is how in EU legal language, "public services" are known are regulated at EU level. The European Commission, as watchdog of the free EU Internal Market, has large powers to prevent undue protectionism and barriers to free competition in goods and services across the EU.

2. This however, also includes public services: a distinction is made in the treaties between SGI that are "Economic" and non-Economic. The former (SGEI) are considered public services that can be provided by either the public sector or by private operators. Therefore, they are subject to EU internal market rules so EU wide rules and thresholds apply to them.

3. To remedy this, the Lisbon Treaty was annexed with a legally Protocol (No.26) that recognises the need for the EU to respect "*the wide discretion of national, regional and local authorities in providing, commissioning and organising Services of General Economic Interest*". However, we fear that the Treaty still gave vast scope of discretion to the Commission so it is not an unambiguous guarantee.

4. While we appreciate that a 'one-size fits all' approach cannot be feasible due the changing circumstances of services CEMR believes however that a more horizontal set of secondary legislation that could develop Protocol 26 would be welcome.

5. Indeed we were very much expecting Commissioner Barroso commitment ahead of its confirmation as Commissioner in 2009 for a Quality Framework for Services of General Interest.

6. This proposal has been finally tabled after two years of speculations. In the end it only amounts to a general policy guidance which confirms and updates specific guidance of interest for local authorities (the most recent one on shared services last October). What could have been a landmark proposal as to clarify the extent that local services should be subject to EU rules turns out to be as a policy update trying to clarify the existing rules. It confirms the line that the Commission can only provide exception from EU rules on a case by case, sectorial basis. Indeed, it mention the raising of thresholds and exceptions on social services that will be discussed elsewhere.

7. What it is more questionable is the view, especially mentioned, that securing a broad framework to ensure that the SGI protocol is effectively enforced in practice, ***is not seen as***

a priority by a majority of stakeholders. Indeed this is not a reflection of the state of play of the discussion that CEMR can share.

8. We can see the rationale of sectorial initiatives, is for an outcome-based approach to ensure quality public services regardless if the provider is a public or a private body and ensuring minimum criteria of quality. However, the real outcome would be to define, in more stable terms than at present, a predictable framework that local and regional authorities (but in particular local authorities as they are the ones with less capacity to follow the changes of EU case-law).

Local/Regional Government reorganisation

9. Most local and regional authorities across the EU are in the process of major structural reforms. These developments are partly due to the last few years of economic circumstances but they also reflect longer trends such as demographic change. It is clear that we will see structural reform continuing over the next years.

10. Unsuspected by most of national and local elected representatives this has a European dimension stemming from the *Altmark* ruling and subsequent such as *Stadtreinigung Hamburg* or *Lecce* cases to name just a few. Some of these rulings have been internalised into the Commission's guidance via the ongoing State Aid Modernisation process and Article 13 of the new Public Procurement Directive.

11. Indeed it is helpful that a number of guidance by the Commission made clear that structural changes sanctioned by legislation would not be considered state aid. Indeed the 2013 Guidance on SGEI [1] clearly states that "*Where financial transfers are made within state structures on the other hand (from the state to regions, or from a department to municipalities, for example), purely in line with the transfer of public powers and in a way that does not relate to economic activity, there is no transfer of state resources such as to confer an advantage on an undertaking".*

12. However this does exclude a significant amount of new ways of providing services such as co-production and shared services between administrations that are being tested at the moment. While the review of the Procurement Directive does include limits to which public-public cooperation can be excluded from EU law and the SGEI Decision would allow – subject to Commission assessment- some of these new practices to be compliant with EU state aid law the reality is that experimenting new ways of cooperation between public bodies are seriously constrained by EU law.

13. This is why that, failing a more robust protection and exceptions to be agreed in a future Treaty reform, it would be welcome that the Commission could work on the notion of "local services" and to set the parameters upon which a local service would not be deemed as having an impact on the EU Internal Market.

14. While we respect the fact that there should exist some limits defined at EU level to prevent arbitrary practices and artificial barriers to competition we dispute the assumption implicit in the Commission guidelines (and sometimes supported by the CJEU such as in the *Isle of Wight*) that any subsidy to a private company or a provision of a municipal service that could be *potentially* provided from a provider from elsewhere in the EU to be deemed state aid.

[1] "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest"

15. Instead, there should be a clearer distinction than at present of the sort of state aid issues that should be subject of EU law or CJEU case law (due to their manifest impact in the EU Internal Market) and what should be left to national legislation to look at with the European Commission only intervening if there is a manifest intention by national of local regulations to restrict access of operators from other Member States.

Amicus Curiae

16. Article 15(3) of Regulation 1/2003 enables the Commission, acting on its own initiative, may submit written observations **("*amicus curiae*" observations) to courts** of the Member States where the coherent application of Article 101 or 102 TFEU so requires. With the permission of the court in question, it may also make oral observations. This has been reinforced further by Implementing Regulation 2013 goes a step further as in Article 23 (a) *"**Cooperation with national courts**" .* consistent with the above statement it would be questioned question whether this is proportionate. While we note that it might help clarify some situations in political terms it represent a serious alteration of the balance of competence between the EU and national institutions as would enable the European Commission to interfere directly over the way national Courts operate cases on State Aid.

17. While the existing rules do make clear the sovereignty of the Courts the reality is that as the Commission will be able to pick and choose which cases it would intervene. Coupled with its far superior knowledge of EU State Aid case law than most domestic courts it might use the reinforced amicus curiae provisions as to legislate by inception, by influencing national case-law.

Comments on specific points in the Notice:

2.2. Exercise of public powers

It is not always easy to distinguish between an 'economic activity' and 'non-economic activity'. **Paragraph 19** provides a very abstract definition, which is not helpful for practitioners. Clearer and pragmatic guidance would be useful.

4.1. The notion of advantage in general

4.1.1 General principles

Indeed, the Commission states the Altmark judgement and the criteria developed by the CJEU as regards compensation for public service obligations, and the relevant Communication of the European Commission on services of general economic interest. (**paragraph 72**)

However, CEMR would like to highlight that Protocol 26 of the Lisbon Treaty provides a wide discretion to national, regional and local authorities as regards how they commission and organise their services of general economic interest.

The Lisbon Treaty also recognises regional and local self-government as part of the fundamental political and constitutional structure of the Member States (article 4), which is an essential cornerstone of the European multi-level system of democracy and governance, complementing the principles of subsidiarity and proportionality (article 5).

4.2 The market economy operator (MEO) test

We believe that the Commission goes beyond existing legislation in requiring a public procurement procedure for the "sale and purchase of assets, goods and services (or other comparable transactions)" (**paragraph 91**).

Article 16 (a) of the current public procurement directive EC(2004)18 (and article 10 (a) of the recently adopted directive) exclude "*the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property".*

The European Commission in its Communication on “state aid elements in sales of land and buildings by public authorities” (OJ C 209, 10.07.1997, p 3-5) only requires a transparent procedure with sufficient publicity, ensuring that any interested tender may participate.

We strongly oppose any ‘definition’ that exceeds the existing legal framework.

Furthermore, and again with reference to the public procurement directives, we believe that the notion of state aid should not interpret these directives as it does in **paragraph 98**.

Again, we believe that with its comment in footnote 150, the Commission goes beyond existing legislation: the acquisition of land only falls under the scope of the public procurement directive when a construction is foreseen; in that case, it constitutes a works contract. However, the Commission in its notion applies the rules on the purchase of goods and services equally on the purchase of land and “puts significant weight on the ‘price’ component of the bid”. This is not required by the public procurement directives, which leave it up to the tenderer to define and weight the selection criteria.

For more information please contact:

Serafin Pazos-Vidal **March 2014**
Head of Brussels Office
COSLA
serafin@cosla.gov.uk