



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

on the status of work on the guidelines for state aid and services of general economic interest

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A. INTRODUCTION

1. As requested by the Nice European Council held on 7, 8 and 9 December 2000, the Commission presented the **Laeken European Council** of 14 and 15 December 2001 with a **Report on services of general interest** (COM(2001) 598 final). The Commission pointed out in its report that, in order to improve legal certainty in the field of public service compensation, "*as a first step, the Commission intends to establish during 2002, in close consultation with the Member States, a Community framework for state aid granted to undertakings entrusted with the provision of services of general economic interest. Such a framework will inform Member States and undertakings of the conditions under which state aid granted as compensation for the imposition of public service obligations can be authorised by the Commission ... thus alleviating the notification obligation for individual aid. As a second step, the Commission will evaluate the experience gained with the application of this framework, and, if and to the extent justified, the Commission intends to adopt a regulation exempting certain aids in the area of services of general interest from the obligation of prior notification.*"
2. **The Barcelona European Council** of 15 and 16 March 2002 asked the Commission in particular to "*report to the Seville European Council on the progress of work concerning the guidelines on state aid and to present if appropriate a proposal for a regulation on block exemption in this field*".

This report has been prepared in response to the request of the Barcelona European Council.

B. LEGAL NATURE OF PUBLIC SERVICE COMPENSATION

3. The Commission for a long time took the view that financial assistance granted by Member States to firms entrusted with the task of operating general economic interest services did not constitute state aid within the meaning of Article 87(1) of the Treaty where such assistance was intended only to offset the additional charges imposed by the state for public service reasons.¹
4. In its judgments in **FFSA** of 27 February 1997² and **SIC** of 10 May 2000,³ the Court of First Instance held that "*the fact that a financial advantage is granted to an*

¹ As the Commission stated in its 1996 and 2000 communications on services of general interest in Europe (OJ C 281, 26.9.1996 and OJ C 17, 19.1.2001), only public support for services which constitute economic activities and are liable to affect trade between Member States may be deemed to be state aid within the meaning of Article 87 of the Treaty.

² Case T-106/95, [1997] ECR II-0229.

³ Case T-46/97, [2000] ECR II-2125.

undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 87(1) of the Treaty, although that aspect may be taken into account when considering whether the aid in question is compatible with the common market under Article 86(2) of the Treaty (now Article 86(2) EC)."

5. The CFI points out, however, that Article 86(2) of the Treaty contains a derogation for firms entrusted with the operation of services of general economic interest, " *so that the grant of state aid may escape the prohibition laid down in Article 87 of that Treaty provided that the sole purpose of the aid in question is to offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium*".
6. By Order of 25 March 1998, the Court of Justice rejected the appeal against the CFI judgment in *FFSA*. Furthermore, in its judgment of 22 June 2000 in *CELF*,⁴ the Court stressed that Article 86(2) of the Treaty does not allow derogation from Article 88(3), which provides for prior notification and the suspension of aid.
7. On 22 November 2001, **the Court of Justice handed down its judgment in *Ferring***,⁵ which concerned the wholesale distribution of medicinal products in France. In its judgment, the Court stated that, where tax exemption granted to an undertaking entrusted with the operation of a public service simply offsets the additional costs of the public service, the recipients do not enjoy an advantage within the meaning of Article 87(1) and the measure in question does not therefore constitute state aid.

Public service obligations can entail additional costs that competitors do not have to bear and the compensation enables the recipient to be placed in the same position as its competitors. On the other hand, the amount of the exemption that exceeds what is necessary to discharge the public service tasks constitutes state aid. The Commission altered its decision-making practice in accordance with this new case law of the Court of Justice.

8. On 19 March 2002, **Mr Advocate-General Leger delivered his opinion in the *Altmark Trans* case**.⁶ This concerns the conditions in which a Member State may grant aid to firms operating a local public passenger transport service. In his conclusions, Mr Leger suggests that the Court reverse its judgment of 22 November 2001 in *Ferring* and return to the CFI rulings in *FFSA* and *SIC* which characterise public service compensation as state aid.
9. On 30 April 2002, **Mr Advocate-General Jacobs delivered his opinion in the *GEMO SA* case**,⁷ which concerns a public service for the collection and disposal of animal carcasses and slaughterhouse waste. Mr Jacobs proposes that a distinction be established between two categories of case, based on the nature of the link between

⁴ Case C-332/98.

⁵ Case C-53/00.

⁶ Case C-280/00.

⁷ Case C-126/01.

the financing granted and the general interest duties imposed, and on how clearly those duties are defined. The cases where the link between, on the one hand, the state financing granted and, on the other, clearly defined general interest obligations imposed is direct and manifest should be analysed according to the compensation approach, as taken in the *Ferring* judgment. Such would be the case where the obligations and the compensation are allocated following an open, transparent and non-discriminatory procedure for the award of a public service contract. On the other hand, cases in which it is not clear that the state financing is granted as a *quid pro quo* for clearly defined general interest obligations must be regarded as involving state aid.

10. The Commission report to the Laeken European Council was drafted in the light of the case law that regards compensation as state aid. The latest developments show, however, that the case law is evolving and that it would be advisable to await the Court's judgments in *Altmark* and *GEMO* before finalising a Community position.

C. EFFECT OF EVOLVING CASE LAW ON FURTHER COMMISSION WORK ON COMPENSATION

11. If, in its forthcoming judgments, the Court of Justice does not uphold *Ferring* but considers that compensation for public service constitutes state aid, the two-stage procedure proposed by the Commission in its report to the Laeken European Council may be continued, i.e. in a first stage, preparation of a Community framework then, in a second stage, in the light of experience acquired in applying that framework and, if necessary and guided by experience, preparation of a regulation exempting some forms of aid for general economic interest services from the prior notification obligation.
12. If in its forthcoming rulings the Court of Justice upholds *Ferring*, public service compensation will have to be regarded as not constituting state aid under Article 87(1) of the Treaty, provided it does not exceed the amount necessary to allow the public interest services to operate. In that case, compensation would not be subject to the prior notification obligation provided for in Article 88(3) of the Treaty.
13. It must, however, be stressed that, in *Ferring*, the Court of Justice held that the amount of compensation in excess of that required to carry out the public service task constitutes state aid that may not be authorised under the provisions of Article 86(2) of the Treaty. The possible compatibility of such aid would have to be examined by the Commission in accordance with the general Community provisions on state aid.
14. The Commission therefore considers that, if *Ferring* is upheld, a text, the legal form of which would be defined at the appropriate time, would still help to increase legal certainty, in particular as regards the methods for calculating compensation and the arrangements for selecting the firms to be entrusted with the operation of general economic interest services.
15. As regards substance, it should be noted that, in any event, the legal debate on the definition of public service compensation in relation to Article 87 of the Treaty does not affect the smooth operation of services of general economic interest since, if *Ferring* is upheld, correctly calculated compensation does not constitute state aid. If *Ferring* is not upheld, correctly calculated compensation will constitute state aid, but it will be compatible with the Treaty under Article 86(2) of the Treaty provided that

the development of trade is not affected to an extent contrary to the interests of the Community. It should be borne in mind that if compensation constitutes state aid within the meaning of Article 87(1) of the Treaty, it must be notified in advance to the Commission pursuant to Article 88(3). If, however, the compensation does not constitute state aid, the notification requirement imposed by Article 88(3) does not apply.

D. CURRENT AND PROJECTED ACTIVITIES WITHIN THE COMMISSION

16. The Commission is working on a draft text based on the lines and options set out in points 11 to 15 above. The Commission must thus take account of the evolving nature of the case law in this field. It considers it would be prudent to await the forthcoming Court of Justice judgments on public service compensation before finalising its position on these matters in a Community context.
17. As announced in the Commission's report to the Laeken European Council, this work should be carried out in close cooperation with the Member States. To that end, the Commission departments will be holding a first meeting with experts from the Member States in the autumn of 2002, on the basis of a departmental working paper. This document will have to be finalised in the light of the evolving case law with a view to the adoption of a text by the Commission if possible by the end of 2002.

The text will in particular take stock of the relevant case law, in particular as regards the concepts of economic activity and effects on trade, and clarify the methods for calculating compensation, notably in connection with public contracts, in order to avoid excess compensation.

The text will naturally be without prejudice to the specific provisions applicable to the rail, road and inland waterway transport sector.

18. As for the question of an exemption regulation, the Commission will examine the extent to which it is necessary and feasible in accordance with the guidelines set out in its report to the Laeken European Council.