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AK Position Paper

AK position paper on the Reform of the EU State aid rules on services of general economic interest

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

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Director

Executive Summary

The AK supports the guarantee of general, non-discriminatory, universal and affordable access to services of general interest, of a high level of employment, as well as a strengthening of users' rights

Public services have proven to be both a social buffer and shock absorber for the effects of the economic and financial crisis, in particular for those people, who have been hit hardest. The recent events should also have strengthened the belief of the Commission and the European decision-makers in a welfare model furnished with adequate financial resources. From the point of view of the Austrian Chamber of Labour (AK), the Commission, by presenting the State aid rules on services of general economic interest (SGEI), has definitely missed the chance to achieve a resounding success. The Commission only adapts the current approach; adopts, however, an increased market orientation, which hardly leaves any scope for quality considerations and makes primary economic cost efficiency requirements on the configuration of the SGEI. Individual improvements, such as expanding the exemption decision to social services or the new de minimis regulation for services of general interest only provide small comfort. The complexity of the entire regulations will continue to cause legal uncertainty for the public sector and legal practitioners.

The AK supports the guarantee of general, non-discriminatory, universal and affordable access to services of general interest, of a high level of employment, as well as a strengthening of users' rights. The AK understands the term 'services of general interest' in a broad sense; they include **all services, which** fulfill **the basic needs of people living in the 21st century.** From the point of view of the AK, the **responsibility** to fulfill these basic needs lies **with the State.** However, in order to ensure democratic control, the State should normally own the units providing the services of general interest. This is also consistent with the surveys of the European Commission concerning the opinion of European citizens. For example, the 2nd Biennial Report of the Commission on social services of general interest shows that 86 % of the European citizens are in favour of the public sector being responsible for long-term care and child care services (compare: 2nd Biennial Report, page 33: national level 45 %, regional/local level 41 %). Hence, services of general interest generally should not be subject to market principles. This would require a fundamental paradigm shift in European policy orientation.

After consultation with the Member States, the Commission intends to adopt the presented State aid package as **two Commission Communications:** as **Commission Decision** based on Art 106 (3) TFEU and as **Commission Regulation** based on Regulation (EC) No. 994/98 of the Council. This approach is correct under primary law; however,

it is lacking in legitimacy. As the provision of services of general interest is of considerable importance for European citizens, such a fundamental decision should not be taken without including direct democratic institutions and a relevant public process of discourse. Hence, the AK demands to adopt the services of general interest package within the scope of the **ordinary legislative procedure.** Art 14 TFEU, which states that "the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services", should form the legal basis.

The AK demands to adopt the services of general interest package within the scope of the ordinary legislative procedure

The European Union primary law contains an important limitation in respect to applying the State aid law provisions to services of general interest. **Art 106 (2) TFEU** states that "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition". However with the important addition, that the rules only apply "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". From the point of view of the AK, it would have been of fundamental importance in the submitted State aid package to make practical use of this important second part of the sentence in Art 106 (2) TFEU. However, unfortunately the statements of the Commission concentrate on debating economic efficiency considerations, such as the issue of overcompensation.

Quality considerations are also completely ignored by the State aid package. This is particular regrettable, as clear progress had recently been made in this area at the European level. Hence, the AK supports the Voluntary European Quality Framework for social services, which was adopted by the Social Protection Committee of the Council in October 2010. In this Quality Framework, agreement was reached in respect of overarching quality principles (availability, accessibility, affordability, person-centeredness, comprehensiveness, continuity, and outcome orientation), which from the point of view of the AK should not only apply to social services, but to all performances of the services of general interest. In the opinion of the AK, **high quality for users** (availability of clear and accessible information, dialogue with the users, regular review of the services, control mechanisms, access for disabled people etc.), **as well as for employees** (working conditions and adequate infrastructure, promotion of the selection of qualified employees, training programs, promotion of the social dialogue, inclusion of the social partners etc.) are of utmost importance. There is reason to fear that these quality considerations – as they have not been mentioned in the presented State aid package – compared to the clearly formulated business-management criteria are coming under pressure to be justified resp. that it will be impossible to sustain them.

The AK position in detail

On the drafts in particular:

1. Draft Communication of the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest

For reasons of legal certainty, there is an urgent need to make an **attempt to create a harmonised term for non-economic services.** There is no requirement for an exhaustive list, but it should at least be clarified, which are services are typically provided by the States and should therefore be exempt from EU State aid law in form of a minimum harmonisation. Beyond this minimum harmonisation, it is at the discretion of the **Member States** to exempt other non-economic services from State aid law according to their legal tradition and constitution. This would include in particular the **public administration of scarce goods such as water,** as well as the **safeguarding of public transport, of social services etc.** Another option would be the inclusion of these services in a de minimis regulation (compare under 3.). It remains altogether unclear what the Commission wants to achieve in stating that even in areas of absolute core responsibilities of the State (such as the army, the police or the organisation, financing and enforcement of prison sentences), these only "Generally speaking […] do not constitute economic activities".

One of the declared objectives of the Commission was to use the package to remove ambiguities concerning the **distinction between non-economic and economic services of general interest (SGI).** However, this goal could only be achieved within the framework of an ordinary legislative procedure and not within the scope of a Commission Communication. The AK does not share the opinion of the Commission that "an economic activity can exist where other operators would be willing and able to provide the service in the market concerned" (compare point 12). With this statement, the Commission contradicts the sovereignty of definition of the Member States on non-economic SGI and appears to intend to establish a power of definition of the market participants (and thereby the Commission?) (Also compare the declaratory statement in Art 2 of Protocol No 26 on the competence of the Member States to provide, commission and to fund non-economic services of general interest).

Unfortunately, the European Commission fails to remove the existing ambiguity concerning the application of State aid laws in respect of competition between public and private hospitals but perpetuates it by pointing out that the **provision by a public hospital alone is not sufficient to be rated as non-economic activity.** Although Art 1 Z 1 lit b of the draft, by applying Art 107 and 108 (compare under 2.), ex-

empts compensation for hospitals from the notification obligation to the Commission, the problem of mixed public-private systems remains unclear. Usually, these provide for public hospitals to receive annual loss compensation, whereas private hospitals are not receiving anything. Concerning this issue, there have been complaints of private hospitals pending before the European Commission for many years. From the point of view of the AK, a clear statement in the Communication is urgently required explaining that the provision of services by public hospitals, which due to legal provisions are obliged, to provide care for any patient independent of the existence of insurance, represents a non-economic activity.

The Commission correctly states that Member States have a "wide margin of discretion" in defining a given service as an SGEI and in granting compensation to the service provider (point 41) and that the Commission's competence is limited to checking whether a "manifest error" has been made. However, we cannot share the opinion of the Commission as to how such errors are defined. The Commission assumes that when a service **has been provided satisfactorily by undertakings operating in accordance with the rules of the market** (e.g. broadband network), setting up a parallel infrastructure can no longer be considered as a service of general economic interest. One can probably expect significant differences in opinion when a service of general interest has been provided "satisfactorily". The price is only one criterion; however, general, non-discriminatory and universal access as well as high quality standards for both employees and users must also be taken into consideration. It cannot be that only because a service in one Member State is subject to market rules, this standard should also apply to other Member States.

Overall, the statements of the Commission on the **amount of compensation** and the question of overcompensation, **lack** any **considerations in respect of quality.** Instead, considerations from a market economy perspective are made, without taking the special character of SGEI in the individual Member States into account. For example the Commission states that a "reasonable profit" should be determined by "comparisons made with undertakings situated in other Member States" or "if necessary, in other sectors" (Point 55). The Commission also interprets the concept of the "well run undertaking" from a market economy perspective, and states that "the Member States should apply objective criteria that are economically recognised as being representative of satisfactory management" (point 64).

The Commission also shows extreme **constraint** with regard **to qualitative standards to be met by all tenderers;** it states that "also ecological and social criteria can be used for the award decision, provided that these criteria are sufficiently closely related to the subject-matter of the service provided" (point 61). Here the Commission does not even adhere to its own formulations, such as the recently published **Guide on socially-responsible public**

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procurement; compare for example page 1: "Socially responsible public procurement (SRPP) is about setting an example and influencing the marketplace. By promoting SRPP, public authorities can give companies real incentives to develop socially responsible management. By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards".

2. Draft Commission Decision on the application of Article 106 (2) of the Treaty of 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

With the proposed Commission Decision – which is to replace the Commission Decision 2005/842 – the Commission exempts certain State aid from the notification obligation. The AK generally welcomes in the future additionally to hospitals and social housing the SGEI "meeting essential social needs as regards healthcare, childcare, access to the labour market, social housing and the care and social inclusion of vulnerable groups" will be exempt from the notification obligation. In order to avoid delineation problems it would have been better to exempt **all social services** from the notification obligation. For the purpose of terminological clarification, instead of just stating social housing, public "housing policy" should also be mentioned as an exemption.

The AK does not share the opinion of the Commission that the **notification threshold of currently EUR 30 million** should be reduced **to EUR 15 million.** In particular the reference to the internal market relevance of **"environmental services"** in FN 6 must be opposed vehemently. Previously, in the Reflection Paper on "Services of General Interest in Bilateral Free Trade Agreements", the Commission understood environmental services in a broad sense, also including water supply, wastewater and waste disposal.

The AK rejects these statements by the Commission on market relevance of environmental services, in particular for the **water supply and wastewater disposal** sector. The EU Water Framework Directive, which was adopted in 2000, already explicitly states that water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such. In addition, on 27 July 2010, the UN General Assembly incorporated access to clean drinking water in the Universal Declaration of Human Rights. For the aforementioned reasons, the AK questions why water supply and wastewater disposal are not mentioned in more detail as significant aspects of the SGEI in the present drafts of the EC have significant impact on this sector. Issues concerning drinking water supply and wastewater disposal are always of great public interest and need to be handled with special care and sensibility. In Austria, coun-

tries, communities, water boards and cooperatives are subsidiarily aware of the existing general assignment to guarantee the universal supply of the population with high-quality water and to minimize negative environmental effects caused by wastewater. So far, the provided structure of regionally restricted, democratically organised and self-dependently acting units has taken the principle of services of general interest optimally into account. Against this background, the BAK is in support of considering water within the framework of a d**e minimis regulation;** however, **at least** water supply and wastewater disposal should be included in **Art 1 of the Exemption Decision.**

The AK also criticises that the Decision should be limited to **entrustments not exceeding 10 years.** For reference to the criticism on economic efficiency considerations, the issue of overcompensation as well as ignoring quality criteria, which are also repeated in the present Exemption Decision, see above under 1. The Commission Decision also attaches too much importance to the question of **"reasonable profit";** the Commission completely overlooks the actual objective of public services: to grant people general, non-discriminatory, universal and affordable access to services of general interest. The statements of the Commission also lack clarity and understandability for legal practitioners (among them for example smaller towns and communities), compare Art 4 (6):

"For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial or contractual risk for instance because the ex post net costs are essentially compensated in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points"".

3. Draft Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Function of the European Union on de minimis aid granted to undertakings providing Services of General Economic Interest

The AK generally welcomes that the special situations of undertakings, which provide services of general economic interest, is reflected by a **separate de minimis regulation.**

However, from the point of view of the AK, the scope of the Regulation appears to be too restrictive. Based on Art 2 (2) of the draft, State aid can only be granted to undertakings that generate an average annual turnover before tax of less than EUR 5 million (based on the two financial years preceding that in which the aid was granted). Another restriction to local authorities, representing a population of less than 10,000 inhabitants, seems to be exaggerated and unjustified. Any cross-border dis-

tortion of competition, which would be caused by State aid for services of general interest paid to an undertaking with the stated turnover is very unlikely. The **additional restriction in respect of the number of the represented inhabitants** should be deleted, or in any case expanded.

We also consider the maximum **amount of compensation of EUR 150,000 per fiscal year** as inadequate to be able to grant sufficient State aid in the sector of services of general interest. In particular in view to Art 106 (2) TFEU as well as Protocol No 26 to the Treaty of Lisbon, this specific de minimis regulation for undertakings providing services of general interest should provide local but also regional and national authorities with a far larger framework, in which aid can be granted to such undertakings. In this sense, the AK also suggests including particularly **sensible sectors such as water supply, wastewater disposal or social services** in the **de minimis regulation, which are not suited to affect competition between the Member States.**

Sensible sectors such as water supply, wastewater disposal or social services should be included in the de minimis regulation

4. Draft Communication from the Commission: EU framework for State aid in the form of public service compensation

Concerning the Draft for a new EU framework, the AK is opposed to the new definition of the Commission of **"genuine and correctly defined service of general economic interest"** (point 12). This once again is aimed at limiting the discretionary powers of the Member States. This cannot only be recognized by the terminology, but also by the request according to which the Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation (point 13, 14). The AK is also opposed to the statement of the Commission according to which a service can no longer be defined as a service of public interest if it is already satisfactorily provided by an undertaking operating in accordance with the rules of the market (point 13). The proposed obligation must also be criticised, according to which the Member States must in the future increasingly provide for **efficiency incentives,** and where in addition the amount of the compensation based on **productive efficiency** has to be determined (point 36-43). Once more, it has to be pointed out that such business vocabulary is unsuitable to the sector of services of general interest, as the focus is not on profit generation.

The AK is also vehemently opposed to the **additional conditions,** that the Commission wants to hinge the granting of aid. Possible conditions by the Commission include reducing the entrustment, the obligation to implement award procedures, the reduction of compensation, the limitation of any special or exclusive rights, or the obligation to grant access to third parties to the infrastructure (point 51). Also,the Communication is not clear on when such additional conditions exist. On the one hand "certain circumstances" (point 49) are mentioned; however, some cases are listed in a declarative manner, which in turn include large sectors of the services of general interest on the other.

Should you have any further questions please do not hesitate to contact

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