

CEEP opinion on the evaluation of the Monti-Kroes package

Executive Summary

- CEEP very **much welcomed** the Monti-Kroes package when it was adopted for providing legal certainty and the necessary room for manoeuvre on state aids.
- However, CEEP members have encountered two main problems in the application of the Monti-Kroes package:
 - The persisting legal uncertainty regarding the definition of the Services of General Economic and Services of General Non-Economic Interest which hinders the use of the package
 - The existing asymmetry in terms of responsibility for not correctly applying the Monti-Kroes package, in which case local enterprises have to bear the costs of returning the unduly assigned aid without having a possibility to interfere with the assignment process.
- In addition to addressing the persisting problems with the application of the package, CEEP also suggests the Commission to introduce **further improvements** into the package. For example:
 1. Clarification of the 4th Altmark criteria
 2. Introducing a possibility for a financial buffer to ensure the Public Service Obligation (PSO)
 3. Introducing a possibility for a fund for investments and extraordinary costs
 4. Tackling the problem of paying back excessive compensation
 5. Clarifying the notion of “parameters”
 6. Extending the notion of net cost
 7. Introducing rules on unit costs and income accounting

CEEP very much welcomed the Monti-Kroes package when it was adopted, mainly for it gave authorities and providers of services of general interest more legal certainty and the necessary room for manoeuvre when it comes to state aids.

I. Main problems encountered

1. *Persisting legal uncertainty on the definition of SGI*

Not many enterprises – members of CEEP - have reported to have benefitted from the package. This may be due to the lack of information or the enforcement of rules by national governments on the one hand, but also to a persisting legal uncertainty surrounding services of general interest, namely as to the definition of a service of general economic interest and a service of general non-economic interest. The right of the Commission to declare that there has been a manifest error when defining a certain service of general economic interest also adds up to the uncertainty both for the public authorities and the enterprises providing services of general interest.

Therefore, the maximum legal certainty that Commission could provide in terms of the definition of the services of general economic or non-economic interest would increase the chances for the public authorities to support the public service providers without fearing the aid to be declared illegal.

2. *Asymmetry in terms of responsibility*

In some Member States, CEEP members have encountered another problem since the introduction of the package. There is indeed an **asymmetry in terms of responsibility for not applying correctly the Monti-Kroes package**. If the aid is assigned not following all the requirements, local enterprises have to bear the costs of returning the unduly assigned aid without having a possibility to interfere with the assignment process in the first place. In some Member States authorities at regional and local level seem to fail to align the entrustment to the 106 requirements (no clear definition, no formal entrustment ...). Reasons for such a conduct can be various:

- A lack of information and/or enforcement of rules by national governments;
- The need to get legal clearance from other instances, thus putting in potential jeopardy the control exerted by an individual authority;
- A reluctance to transform a mere corporate or executive control over an undertaking performing a Public Service Obligation into a formal entrustment thus recognising a formal obligation to cover the ensuing extra-costs.

In all these cases, the burden falls on the SGEI provider. Failure to comply with the requirements by its authority can deliver a fatal blow to the undertaking, should a national court rule the existence of illegal aids and order the pay back of the money in question.

The problem is more acute for small and medium size SGEI providers falling under the waiver from notification. The Commission survey has not entered into this territory and yet, should the 106 requirements fail to be met, the danger of action by third parties playing havoc with the very survival of these firms is a very real one.

Ways to solve problem:

- The Commission should invite Member States to take appropriate measures at all levels – national, regional and local - in order to fulfil their obligations under the block exemption SGEI Decision, and make sure they are met;
- The Commission should address reminders to Member States on their obligation to monitor the proper functioning of the national control of aids exempt from notification to the Commission.

II. Possible further improvements

The Monti-Kroes package failed to take fully on board a number of practical problems. CEEP proposes that the review should come to concrete solutions for them.

In general CEEP would like to invite the Commission to introduce a sweeping simplification of the notifying requirements, by exempting all SGEI providers that are fully financed by state resources as well as by raising the existing thresholds. Indeed, financing SGEIs through public service compensations should be considered compatible with State aid rules on a systematic basis, provided that no cross-subsidy of commercial activities takes place.

- *Clarification of the 4th Altmark criteria*

CEEP members would deem it important to further clarify certain aspects of the 4th Altmark criterion.

In particular, CEEP would call for a clarification of the notion of ‘well run and adequately equipped undertakings’, which should be based on cost references of public service or universal service obligations. CEEP would also deem it necessary to further clarify the notion ‘the least cost to the community’ by bringing it closer to the notion of ‘most economically advantageous offer’ which would allow public authorities to take into account also the qualitative criteria.

- *Introducing a possibility for a financial buffer to ensure the Public Service Obligations*

All too often, Public Service Obligations (PSO) are covered by a budgetary compensation lacking enough flexibility to adapt itself to the needs of covering the public service. In many cases the PSO is financed to a large extent by income related to the provision of the service (payments made by users). Should these receipts fall behind expectations, or extraordinary costs appear, the need to fill in the gap with a higher compensation than budgeted meets with great difficulties linked to the lack of flexibility of public budgets.

Thus, it would appear most reasonable to introduce into the guidelines a buffer reserve earmarked for financing exclusively the PSO, following the lines of the rules on public broadcasting recently approved by the Commission. Authorities could fund such buffers with their SGEI providers (as long as they are public undertakings controlled by the mandating authority) up to 10% of budgeted costs. This in turn would require a review every 4 years to adapt the level of the compensation taking into account the buffer fund, the record of financial coverage of PSO, volatility of other income linked to the provision of PSO and prospects in the medium term.

- *Introducing a possibility for a fund for investments and extraordinary costs*

Annual compensations do not cover investment needs deemed essential to cover a public service. Following the lines of the public broadcasting new guidelines, rules governing SGEIs should envisage the possibility to finance a special fund to be earmarked for investment and other extraordinary costs (for instance indemnities in case of a reduction of the workforce) devoted to PSO. Special attention should be made to avoid that amortisation of such investments are included in annual compensations to avoid double accounting, plus the need to engage the investments in a maximum period of time. This special facility could be preserved to publicly owned SGEIs as private ones are supposed to compete offering enough coverage for investments to be made.

- *The problem of paying back excessive compensation*

Under current rules every 4 years the excess of overcompensation has to be paid back. Supposing that in the future regime it is envisaged under certain circumstances that sums have to be paid back, it is essential to avoid any damaging side-effect such a rule might exert.

In any going concern, any compensation excess does not have to be in a liquid account. It can (and should if the undertaking is a diligent one) be invested in stock and other short term operational accounts. Thus the payment back of a sizeable amount can disrupt the normal functioning of an enterprise. It should be possible to affect that excess to the following year's compensation, reducing it, without damaging the going concern.

- *Clarifying the notion of "parameters"*

This requirement proves ill-fitted to most SGEIs and it should be noticed that in the public broadcasting guidelines it was replaced by a more general reference to the need to set the conditions for having access to the compensation, a formula which seems much more adapted to SGEIs not following a formal tendering process.

Parameters convey the idea of quantitative conditions and in most cases the key issue is to preserve the defined Public Service Obligation. Specifying the obligation imposed as SGEI proves to be equivalent to the so-called "parameters". CEEP takes the view that the Commission fully acknowledges this fact, but competitors many times take this issue in litigation procedures to make life more difficult to SGEI providers.

- *Extending the notion of net cost*

Many SGEI providers financed through compensations (in full or partially) cover a single Public Service Obligation. It would seem advisable to make clear that compensation in those cases amount to net cost, namely total costs less commercial income (plus the reasonable benefit and financing for a buffer and investment funds), in order to simplify the requirements and make them easier to understand.

- *Rules on fair commercial conduct*

Many SGEIs financed with State resources enter into direct or indirect competition with other private players. It seems advisable that whenever such a public service is offered in an organised market where private agents are present, the SGEI provider should follow a number of rules of good and fair commercial practice avoiding gross distortions financed by public money.

- *Rules on unit costs and income accounting*

The Transparency directive rules on separation of accounts should be coupled with some guidance (to be introduced into the guidelines) on how to make imputation of costs and income for Public Service Obligation activities. They should be stated in a simple way asking for such an analytical accounting to be conducted on an objective and stable basis. There are no common rules on analytical accounting (only balance sheet and results accounts being listed in the corresponding directives), but this should not prevent the Commission from asking SGEIs to follow broadly admitted principles that are essential if transparency is to be effectively enforced.
