

**Mr. Alexander Italianer,**  
Director General for Competition of the European Commission

18 November 2011

Dear Mr. Italianer,

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France are very attached to the revision of the Monti-Kroes package which sets the rules concerning the funding of public services, especially with regards to competition law.

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France wish the public consultation on the four drafts launched by DG Competition on September 16<sup>th</sup>, 2011 had lasted more than one month. They hope that all the meetings necessary to an in-depth consultation between Member States will be organised. As a consequence, Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France ask for a new multilateral meeting on the four drafts of the “Almunia package”.

The adaptation of those rules must in priority promote both a simplification and a clarification in order to get to a better appropriation of the rules by all the actors (public authorities, providers, undertakings, etc.). A close scrutiny of the four DG Competition drafts shows these goals are far from being achieved. Thus, Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France ask for these drafts to undergo in-depth modifications so that the rules would become simple and effective. In particular, without prejudice of requirements made by other delegations, Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France would like to underline the following points:

**The Austrian, German, Hungarian, Luxembourgish, Dutch, Spanish and French authorities’ commitment to the principle of subsidiarity relating to Services of General Economic Interest (SGEI)**

Article 1 alinea 1 of the 26<sup>th</sup> Protocole of the Lisbon Treaty highlights the principle of subsidiarity as concerns SGEI when underlining “*the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*”.

Consequently, the EU rules must promote and preserve the SGEI since they are essential to the social and territorial cohesion of the EU as well as to its attractiveness.

**Reservations about the Commission’s additional criteria for an aid to be compatible with the internal market**

The Austrian, German, Hungarian, Luxembourg, Dutch, Spanish and French authorities are committed to a high level of quality for SGEI. However, they consider the European Commission goes beyond its mandate to preserve competition when imposing binding rules for an aid to be compatible with the internal market.

The Austrian, German, Hungarian, Luxembourgish, Dutch, Spanish and French authorities make reservations on:

- the compulsory introduction of incentive measures to encourage the efficient provision of SGEI of a high standard (§ 36 to 40 of the framework). The effectiveness of the

public expenses is evidently an objective shared by any public authority. However, the introduction in the draft framework of a compatibility criterion related to the efficiency of the provider of SGEI raises legal matters as regards to the Commission's competence. Moreover, the ECJ already takes the efficiency of the provider of SGEI criterion in consideration when qualifying a State aid ;

- the right to impose a non exhaustive list of remedies to guarantee the necessity and the proportionality of the aid (§ 48 to 51) ;
- the existence of a compulsory public consultation in order to demonstrate the reality of a need to public service ; the criterion to the required recourse, by the granting authority, to a procedure of competitive call at the time of the attribution of the service;
- the 10-year limit of the duration of the mandate related to the SGEI ;
- the increase of the frequency of the reporting to be made by Member States and the additional administrative charge accordingly.

### **Absence of a State aid in an in house relation with the SGEI provider**

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France consider that a public funding granted in an in-house relation with the SGEI provider cannot be qualified as a State aid pursuant to article 107 §1 TFEU. Indeed, such a relation, because it is internal, is deemed not to affect competition, in accordance with the ECJ's criteria<sup>1</sup>.

### **Complexity of the « de minimis » regulation – Amount of the aid criterion**

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France welcome favourably the principle of a « de minimis » regulation specifically to SGEI. However, they deplore its complexity unsuitable for local authorities. Consequently, pursuant to the Commission's objective of simplification of the rules, Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France suggest sticking to the amount of the aid criterion, calculated on three years, the latter being the only criterion to be easily applied and understood.

### **Consideration of the specific nature of social services**

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France are very pleased that the Commission is taking into account the specific nature of social services. However, in order to improve and simplify the practical enforcement of the exemption, Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France strongly wish that cultural services benefit from a similar treatment to social services and consequently that they also benefit from the notification exemption regime.

### **Opposition to the lowering of the notification threshold**

Austria, Germany, Hungary, Luxembourg, The Netherlands, Spain and France are not in favour of DG Competition intention to lower the notification threshold from 30 M€ to 15 M€. Such a lowering does not pursue the objective of simplification of the rules. Moreover, this measure has not been the subject of any impact assessment. However, we are welcoming the withdrawal of the turnover threshold.

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<sup>1</sup> For instance CJEU, 18 November 1999, *Teckal*, case C-107/98.

To conclude, the Austrian, German, Hungarian, Luxembourgish, Dutch, Spanish and French authorities reassert their commitment to the simplification and clarification of the rules and to the proportionality of the administrative steps to be completed both by public authorities and undertakings. This objective is not reached by the Commission drafts, which mainly focus on the strengthening of the Commission's tools to assess the way the Member States define the SGEI they intend to finance, going beyond the Lisbon Treaty's objectives.



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