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Competition DG

Markets and Cases V: Transport, Post and other services
State aids Post and Other services

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To: Ms. Lilia Stoyanovich
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Cc: Ms. Sandrine de Buggenoms
Head of Unit, DG EMPL, Unit B5

Subject: Your letter of 28/02/2017

Dear Madam,

Thank you for your letter of 28/02/2017 in which you are requesting our views on the application of State aid/*de minimis* aid rules in the implementation of operations for social and economic integration of vulnerable groups under the Operational Programme "Human Resources Development" in Bulgaria.

In your letter you are explaining that the Bulgarian Ministry of Labour and Social Policy is developing support measures on the inclusion of vulnerable groups (e.g., disadvantaged people, people with disabilities etc.) through the Directorate General "European Funds, International Programmes and Projects". These measures can for instance include "stimulating activity in economically inactive people", "provision of intermediary services for finding a job" etc.

In addition you explain that:

- Bulgarian municipalities are responsible for the management and the provision of social services, including services to vulnerable groups;
- in doing so, municipalities may contract with private partners (e.g., non-governmental organizations, employers); such private partners appear to be selected on the basis of a public and transparent selection procedure, guaranteeing

free and fair competition, equality and non-discrimination to all organizations wishing to participate in the project as partners;

- the social services financed by the State budget are provided against payment of a fee or on the basis of contracts with the users; the fees for the services financed by the State are determined in a tariff approved by the Council of Ministers, and are established as a percentage of the income of the persons using the respective service (these services are free for children);
- the service in question appears to be non-profit making.

Your view is that:

- municipalities and the municipal districts support the activities of the central executive authority in the exercise of public powers and predominantly perform functions of a non-economic nature and would therefore not fall within the realm of State aid rules;
- there would be no real market in Bulgaria for the provision of the services concerned, with the exception of the cases when the public authorities intervene through transfers of State resources.

While thanking you for this general information, please find below some elements useful for the Bulgarian authorities to further conduct an in-depth assessment on the basis of the facts at hand.

I. Activity of economic nature

As a general remark, please note that *EU* State aid rules apply to the extent the recipients of State support are *undertakings*, i.e. entities performing an *activity of economic nature*. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed (paragraph 7 of the "NoA"¹).

The application of the State aid rules does not depend on whether the entity concerned is set up to generate profits (paragraph 9 of NoA). Non-profit entities can also offer goods and services on a market. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in *offering goods and services on a market* is an economic activity (paragraph 12 of NoA).

In your case, it appears that the social services in question are provided against payment of a fee which we understand – at least from your description – would be supported by the users. (It remains, however, unclear if the users are paying the entire fee, or just part of it.) Furthermore, the use of tenders suggests the existence of undertakings willing to provide the social service in question.

Hence, the economic nature of the service in question (provision of social services for vulnerable groups) cannot be *a priori* excluded. This seems to be reinforced by the inclusion of "Care and social inclusion of vulnerable groups" in the bi-annual report for

¹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1–50 ("NoA").

the period 2014-2015 provided by the Bulgarian authorities to the Commission services pursuant to Article 9 of the 2012 SGEI Decision².

Against this background, it is envisageable that, depending on the set-up (i.e., the characteristics of the social services at hand and who provides it), both municipalities and private partners could engage in providing the service as an activity of economic nature. However, to the extent municipalities are not providing the service in question themselves, but are rather limiting their activity to planning and programming, they could be seen as exercising an activity that forms part of the essential functions of the State (paragraph 17 of the NoA) and is therefore not of an economic nature. On the other hand, the undertakings providing the social service in question may, under certain conditions (service for a fee) be seen as engaging in providing an economic activity. An assessment on the basis of the facts at hand should be done by the competent authorities to verify if these parameters are indeed met.

II. Application of the EU State aid rules

According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), a measure amounts to State aid only if the following cumulative conditions are fulfilled: the measure (i) is granted by the State or through State resources, (ii) constitutes an advantage for the recipient; (iii) is selective, in the sense that it favours certain undertakings or the production of certain goods (or services); (iv) distorts competition on the respective market(s); and (v) affects trade between Member States.

It is important to note that an *advantage* may not exist and hence a State aid may not be present, if the State decides to outsource the provision of the social services in question through a competitive, transparent, non-discriminatory and unconditional tender in accordance with the public procurement rules (paragraph 84 of NoA³). This should be assessed by the competent authorities on a case by case basis.

Furthermore, an *effect on trade* may not exist in case of local measures. The Commission has in a number of decisions considered, in view of the specific circumstances of the cases, that the measure had a purely local impact and consequently had no effect on trade between Member States. In those cases the Commission ascertained in particular that the beneficiary supplied goods or services to a *limited area* within a Member State and was *unlikely to attract customers from other Member States*, and that it could not be foreseen that the measure would have more than a *marginal effect on the conditions of cross-*

² Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on 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 ('2012 SGEI Decision'). The Bulgarian authorities have included in their report covering the period 2014-2015 "social services under Article 36 of the Implementing Regulations of the Social Assistance Act (PPZSP)".

³ Paragraph 89 of NoA reads: *If the sale and purchase of assets, goods and services (or other comparable transactions are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement (see paragraphs 90 to 94), it can be presumed that those transactions are in line with market conditions, provided that the appropriate criteria for selecting the buyer or seller as set out in paragraphs 95 and 96 have been used. In contrast, if a Member State decides to provide support, for public policy reasons, to a certain activity and tenders out, for example, the amount of funding provided, such as in the case of support to the production of renewable energy or to the mere availability of electricity generation capacity, this would not fall in the scope of this sub-section (ii). In such a situation a tender can only minimize the amount granted but cannot exclude an advantage.*

border investments or establishment (paragraph 196 of NoA⁴). This necessitates a case by case assessment as well.

Also, it is conceivable that the measures in question may – depending on the circumstances - fall under the general *de minimis* Regulation⁵ or the SGEI *de minimis* Regulation⁶ (essentially if the undertakings providing the social service in question have been entrusted with an SGEI). These Regulations are stating that under certain circumstances, a limited amount of support does not distort trade and competition and therefore does not amount to a State aid.

Eventually, even if all the constitutive elements of Article 107(1) TFEU are met and the measure in question amounts to a State aid, social support measures for vulnerable groups may fall under the 2012 SGEI Decision (see e.g. Article 2 c) thereof concerning compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups). In such situation, to the extent all the conditions of the 2012 SGEI Decision are met (in particular the existence of an entrustment act containing all the elements indicated in Article 4 of the 2012 SGEI Decision as well as the avoidance of overcompensation and cross-subsidization according to Articles 4 and 5 of the 2012 SGEI Decision), the compensation of such services providers will be compatible with the internal market and exempted from notification to the Commission. This can be easily ensured *ex ante* by the Bulgarian authorities.

We hope the above is useful for the Bulgarian authorities when conducting further assessments of the facts at hand.

Yours faithfully,

E-Signed
Monique NEGENMAN
Head of Unit

4 See also e.g., Commission Decision of 9.8.2016 in SA.38920 Portugal, Alleged grant support to Santa Casa da Misericórdia de Tomar (SCMT)), OJ C/406/2016, N 258/2000 Leisure Pool Dorsten, OJ C 172, 16.6.2001, p. 16; C10/2003 Netherlands – Non-profit harbours for recreational crafts, OJ L 34, 06.02.2004, p. 63; N 458/2004 Editorial Andaluza Holding OJ C 131, 28.5.2005, p. 12; SA.33243 Jornal de Madeira, OJ C 131, 28.05.2005, p. 12; SA.34576 Portugal – Jean Piaget North-east Continuing Care Unit, OJ C 73, 13.03.2013, p. 1; and N 543/2001 Ireland – Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4.

5 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid.

6 Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest.