Services of General Economic Interest and State aid: The evolution of the case-law of the European Courts before and after the Altmark ruling

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Abstract

The present paper deals with some of the main aspects of the regulation and functioning of services of general economic interest in the framework of EU competition law and EU State aid law.

After some introductory remarks about the concept of SGEI’s, their legal framework and their significance for the European legal regime, this paper refers to the relationship of SGEI’s with EU State aid law, which is based and depending on the fundamental issue of the legal evaluation of public funding granted to undertakings for the provision of public service obligations.

The main part of this paper focuses on the crucial contribution of the case-law of the European Courts on the issue, which decisively determined and set the legal rules and the criteria under which it is judged whether each State financing of a SGEI amounts to State aid or merely constitutes legitimate compensation for its performance.

The fundamental objective of this paper is to shed light on the rationale of the Court of Justice and the General Court, in several cases over the last years, and especially in rulings which formed and established the framework for the legal evaluation of SGEI’s and are regarded as cornerstones until nowadays.

Keywords: state aid, services of general economic interest, economic advantage, Altmark ruling, proportionality test
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Introduction

Services of general economic interest (SGEIs) are services of an economic nature that national, regional and local public authorities of the Member States consider to be necessary and important for their citizens. SGEIs cannot be supplied by market forces alone, or at least not to the extent and under the appropriate conditions requested by society and, therefore, their provision may require public intervention.

SGEIs aim to serve the general interest and, thus, their providers are always subject to specific public service obligations by the Member States. Under such conditions, the provision of SGEIs may not always constitute a sufficiently profitable activity for the relevant undertakings and, therefore, a form of public service compensation in some cases might be necessary in order to offset the additional costs arising from the fulfillment of the public service obligation.

However, State intervention is possible to cause distortion in the relevant market, except if this intervention is properly designed and targeted. The purpose of State aid control is exactly to ascertain that public service compensation is necessary and proportionate to the objective pursued, in order to avoid distortions of competition and trade.

Nevertheless, SGEIs are considered as belonging among the shared values of the EU, playing an important role in ensuring social, economic and territorial cohesion. In this context, SGEIs were found to be in the middle of a clash between two of the most fundamental interests of EU law, the establishment of free and undistorted competition within the single market and the accomplishment of public interest goals.

In their efforts to reconcile the above mentioned basic EU targets, the European Courts followed two manifestly opposite legal approaches, the state aid approach and the compensation approach. Under the state aid approach, every financial assistance granted by Member States for the provision of SGEIs is objectively classified as state aid within the scope of Art. 107(1) TFEU, irrespective of its reason or purpose, but can be justified under Art. 106(2) TFEU. On the contrary, under the compensation approach, a
public financial assistance constitutes state aid only if and to the extent that it exceeds
the amount of appropriate compensation granted for the provision of SGEI and, thus,
confers an economic advantage on the undertaking entrusted with public service
obligation.

The Court of Justice gave a definite answer to the question concerning the legal
evaluation of state funding of undertakings entrusted with the performance of SGEIs in
the famous Altmark case, by ruling that financial compensations for SGEIs do not
constitute State aid within the meaning of Art. 107(1) TFEU under certain restrictive,
cumulatively applied conditions. Consequently, when the four criteria of the Altmark
test are met, the application of the exemption provided by Art. 106(2) TFEU is
excluded.
Services of general economic interest in the European legal regime

The significance of SGEIs for the European legal order

Services of General Economic Interest (SGEIs) constitute a fundamental pillar of the European Union legal regime and a significant chapter of EU Competition Law and EU State Aid Law. SGEIs are placed among the shared values of the European Union and play an important role in promoting social and territorial cohesion.¹

SGEIs form an ingredient of the European social model, because they reflect the need of the EU to pursue social goals. The significance of SGEIs is indicated by the fact that, for this specific category of services, EU law allows for State intervention exceptionally, in an effort to bring together two of its fundamental targets: the protection of competition and public interest.²

The concept of SGEIs

The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation.

According to the Commission’s Communication on SGEI’s, the latter are defined as “market services which Member States or the Community subject to specific public service obligation by virtue of general interest criterion”.³

According to the Commission’s Green Paper on services of general interest, these are “Market and non-market services which the public authorities class as being of general interest and subject to specific public services obligations”. In addition, as it is mentioned in the Green Paper, it is no longer feasible to separate the non-economic

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¹ Art. 14 TFEU: “Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, 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”.

² Art. 106(2) TFEU: “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, 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union”.

services of general interest from the economic ones and to register them in a definite list, as there has been significant evolution through time, regarding the gradual change of many economic, technological and social factors that determine the categories of services that can be provided on a given market.\(^4\)

Another definition for SGEI’s is included in the White Paper on services of general interest, where it is mentioned that these are considered to be “... services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion”.\(^5\)

As it is clarified in the SWD (2013) final 53 / 2 / 29-04-2013 staff working document of the European Commission, “SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention”.

Additionally, as it is illustrated in the staff working document, due to the criterion of general interest, a public service obligation is imposed by the Member State on the provider. This imposition is accomplished through of entrustment, by which it is ensured that the service will be provided under conditions allowing it to fulfil its mission. As the ECJ consistently held, SGEIs are services that demonstrate special characteristics comparing with those of other economic activities. EU law does not include any requirement for formal designation of a task or a service as a SGEI, except when such an obligation is determined by EU legislation. Hence, the concept of SGEIs may apply to different situations and terms, depending on the Member States.\(^6\)

Buendia Sierra regards the concept of services of general economic interest as an EU law concept and writes that “A service of general economic interest is a service of an economic nature the provision of which to the general public is considered essential, which justifies a degree of intervention of the public authorities in order to show that a given service is actually provided and to control the conditions under which it is provided”.\(^7\)

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\(^7\) Jose Louis Buendia Sierra, Exclusive rights and state monopolies under EC law, Article 86 (formerly Article 90) of the EC Treaty, Oxford University Press, 2000, chapter 8, par. 23.
Furthermore, Buendia Sierra emphasizes on the dynamic character of the concept of SGEIs, constantly changing over time, depending on several factors related with technological evolution, EU integration, or alterations in society’s perception of the needs which must be covered by the State. He concludes by stressing that what is considered today to be a service of general economic interest, may be considered differently in the future and vice versa.  

Wolf Sauter defines SGEIs as “an EU legal category that provides an exception to the competition rules for the proportionate pursuit of legitimate public interest goals by private undertakings”. Regarding the issue of the non-definition of SGEIs in the Treaty, Sauter believes that it is reasonable, since the Treaty provides Member States with a wide discretion to define missions of general economic interest and to determine the organizational principles of the services intended to accomplish them.  

The Treaty distinguishes between SGEIs and Services of General Interest (SGIs). SGIs are non-economic services and, as such, fall outside the scope of EU competition law and EU State aid law.  

**Designation of SGEIs**  

As it is clearly stated in Protocol 26 TFEU, Art.1, national, regional and local public authorities of the Member States, enjoy a wide discretion in defining what they consider to be services of general economic interest, according to their needs, their preferences and the allocation of powers granted to them by their national law.  

The freedom of the Member States to define SGEIs is subject to review by the Union’s

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8 Jose Louis Buendia Sierra, Exclusive rights and state monopolies under EC law, Article 86 (formerly Article 90) of the EC Treaty, Oxford University Press, 2000, chapter 8, par. 47.  
9 Wolf Sauter, Services of general economic interest and universal service in EU law, Research Paper 2008/05.  
10 Protocol 26 TFEU, Article 2: “The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest”.  
11 Protocol 26 TFEU, Article 1: “The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular: — 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; — the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; — a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”.  

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courts and the Commission to check for manifest errors of assessment\textsuperscript{12}. The Commission assesses whether a service can be provided by the market and whether it can be characterized as service of general economic interest. The Commission holds the view that it can test designations of SGEIs for manifest error, especially where it concerns services that were hitherto provided by the market at adequate levels of price and quality.\textsuperscript{13}

According to the European Commission, “The Member States’ discretion cannot be exercised in the face of the applicable harmonisation rules, in sectors which have been harmonised at Union level, and where objectives of general interest have been taken into account”.\textsuperscript{14}

\textsuperscript{12} Case T-17/02 Fred Olsen vs Commission (2005), par. 216, Case T-289/03, BUPA and Others vs Commission and Others (2008), par. 166.

\textsuperscript{13} Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012, C8/4, par. 48. “As to the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error”.

Services of general economic interest and State aid

The notion of advantage

The grant of economic advantage constitutes one of the four cumulative criteria that determine whether EU State aid law is applicable. In order for a State measure to qualify as State aid, an economic advantage must be conferred from a public authority on one or more undertakings. The nature of the advantage conferred is broad and may constitute anything that is of economic value.

The advantage concerns the benefit which the recipient of the aid receives. This benefit is offered to him either without anything in return or in a particularly low price and, in any case, in a price lower than the market price. A more specific expression of the economic advantage, as element of the concept of State aid, concerns the compensation granted to undertakings entrusted with the provision of a SGEI under Art. 106(2) TFEU.\textsuperscript{15}

Compensation given to undertakings for the performance of public service obligations may in some cases be regarded as not conferring an advantage to undertakings, because it merely forms a proportionate consideration for the public service rendered and, thus, does not constitute State aid.\textsuperscript{16}

SGEIs interest EU State aid law as long as the offset for their provision confers an economic advantage on the undertakings entrusted with these obligations. The CJEU addressed the issue of whether a Member State is granting an advantage in the major Altmark case\textsuperscript{17}.

\textbf{Art. 106(2) TFEU}

Certain categories of State aid may be considered compatible with the internal market. State aid granted to undertakings entrusted with the provision of SGEI is one of them. Art. 106(2) TFEU is the instrument provided by the Treaty to strike a happy medium between market integration and economic efficiency objectives on one hand, and

\textsuperscript{15} Aikaterini Sgouridou, Recent case-law developments in the concept of State aid, DISKE 2/2004.


\textsuperscript{17} Case C-280/00, Altmark Trans GmbH, Regierungspräsidium Magdeburg vs Nahverkehrsgesellschaft Altmark GmbH (2003)
equity objectives identified on national level on the other. Art 106(2) is the central provision regulating the operations of SGEIs. This provision allows deviations from the Treaty, so far as are necessary in order to fulfill the particular public interest tasks assigned to undertakings.\textsuperscript{18}

The relationship between Article 107(1) and Article 106(2) TFEU is likewise that between the rule, and its Altmark-based rule of reason in one hand, and the exception for SGEI on the other\textsuperscript{19}.

Buendia Sierra writes that Art. 106(2) is an exception to the Treaty “\textit{concerning the restrictions necessary to guarantee services of general economic interest. The importance of the exception in Art. 106(2) is obvious. It must not be forgotten that exclusive rights are awarded to certain undertakings mainly because of considerations of general interest connected to the need to guarantee certain public services. Indiscriminately prohibiting monopolies could jeopardize the continuance of such tasks. Thus, it is necessary to find a balance between the Community objectives of economic integration on the one hand and the national objectives of public service on the other hand}”.\textsuperscript{20}

According to Wolf Sauter, “\textit{This exception applies only to the extent that it is strictly necessary to perform the functions of SGEI concerned. It serves to reconcile the public interest identified as such at national level as the reason for introducing a SGEI with respect for the Treaty rules by means of a proportionality test}”.\textsuperscript{21}

In comparison to the test established by the Altmark judgement, which was designed to verify the existence of State aid, the test under Art. 106(2) TFEU enables the Commission to examine whether the existing State aid measure is compatible with the internal market.\textsuperscript{22}

It is of crucial importance to emphasize that a case is notified to the Commission for

\textsuperscript{18} Jakub Kociubinski, Services of general economic interest – towards a European concept of public services, Wroclaw review of law, administration & economics.
\textsuperscript{20} Jose Louis Buendia Sierra, Exclusive rights and state monopolies under EC law, Article 86 (formerly Article 90) of the EC Treaty, Oxford University Press, 2000, chapter 8, par. 3-4.
\textsuperscript{21} Wolf Sauter, Services of general economic interest and universal service in EU law, Research Paper 2008/05.
\textsuperscript{22} Natalia Anna Fiedziuk, Services of general economic interest in EU law. The role of the “public service” exception in the light of recent developments in EU law, WLP, 2013.
the examination of its possible compliance with Art. 106(2) TFEU, after the CJEU has decided for that case that State funding to cover the costs of SGEI provision constitutes State aid\(^{23}\).

The conditions that have to be met in order for the State aid compatibility test of Art. 106(2) to be satisfied, are:

a) The SGEI needs to be genuine and correctly defined
b) Responsibility for the operation of SGEI needs to be entrusted to an undertaking by way of an act of entrustment
c) The compensation may not exceed what is necessary to cover the net costs of discharging the public service obligations, including a reasonable profit
d) The responsible authority, when entrusting the provision of SGEI to an undertaking, must comply or must commit to comply with applicable EU rules in the area of public procurement
e) In devising the method of compensation Member States must introduce incentives for the efficient provision of SGEI of a high standard.\(^{24}\)

Conclusively, Art. 106(2) TFEU contains an exception, which benefits certain undertakings, to the application of certain rules. This exception is subject to the fulfillment of various conditions.\(^{25}\)

**Legal evaluation of the payments for the provision of SGEIs**

Certain SGEIs, in order to be feasible for them to be provided under appropriate terms in quality and quantity, may require the grant of public financial support, which is intended to cover the whole or part of the specific additional expenses deriving from the fulfillment of the public service obligations.\(^{26}\)

In recent years the rules regarding State aid have moved to the center of the Europe-wide regulatory debate over defining and regulating SGEIs. The question of whether payment for SGEIs can amount to State aid has produced extensive debate in the

\(^{23}\) Case T-354/05, Television Francaise 1 SA (TF1) vs Commission (2009), par. 130, 135.


\(^{25}\) Jose Louis Buendia Sierra, Exclusive rights and state monopolies under EC law, Article 86 (formerly Article 90) of the EC Treaty, Oxford University Press, 2000, chapter 8, par. 11..

\(^{26}\) Antonis Metaxas, State compensation for the provision of services of general economic interest: Legal evaluation under the light of the European State aid law, DISKE 2/2004.
Commission and ECJ. The issue arises due to the broad definition given to the concept of State aid by the Commission and ECJ, and focuses on the effect of a measure rather than by reference to its causes or aims.\textsuperscript{27} The legal evaluation of the nature of the financial aid granted from the State to an undertaking entrusted with the provision of SGEI, intended to cover his additional expenses that derive from the fulfillment of his obligation to provide SGEI, has become an area of intense conflict in both judicial and theoretical level. The European Courts, in their legal assessment of State compensation for financing SGEIs, attempting to evaluate whether compensation granted by the State to undertakings for the provision of SGEIs constitutes State aid within the scope of Art. 107(1) TFEU, have adopted two different approaches. The relevant case law was for long dominated by these two sharply contrasting views, which have become known as the “State aid approach” and the “compensation approach”.

According to Bovis, under the State aid approach, state funding granted to an undertaking for the performance of a public service obligation is regarded as State aid within the meaning of Article 107(1) TFEU. However, this State aid is justifiable under Article 106(2) TFEU, provided that the requirements for that derogation are met and primarily that the state funding conforms with the principle of proportionality.

On the other hand, under compensation approach, state funding is regarded as compensation for the public services provided and constitutes an appropriate remuneration intended to cover the costs incurred in providing these services. In this case, state funding of SGEIs corresponds to State aid within the meaning of Article 107(1) TFEU, only if and to the extent that the economic advantage which it provides exceeds the level of an appropriate remuneration or of the additional costs.

Bovis concludes by stressing that, under the compensation approach, state funding which does not qualify as State aid escapes the notification obligation to the Commission and the national courts have jurisdiction to pronounce on the nature of the state funding as State aid without being obliged to wait for the Commission’s assessment, whilst, under the State aid approach, the same measure would be characterized as State aid that should be notified in advance to the Commission”.\textsuperscript{28}

\textsuperscript{27} Erika Szyszczak, The regulation of the State in competitive markets in the EU (Hart 2007).
\textsuperscript{28} Christopher H. Bovis, Public Procurement, State Aid and Services of General Economic Interest
The pre-Altmark case-law

“Compensation approach” vs “State aid approach”

The CJEU originally took the compensation approach, later changed and followed the State aid approach, and finally returned to the compensation approach, which it specified in the famous Altmark case. Before Altmark, the State aid approach was generally favored by the Commission and the General Court.

The “compensation approach” was firstly adopted by the ECJ in one of its earliest decisions on the issue of the legal evaluation of the compensation for the provision of SGEI, in the ADBHU case29. The case concerned the public service obligation of the collection of waste oil, which was imposed by the French government on certain undertakings. The fulfillment of the public service obligation of disposal of waste oils generated some extra costs for those undertakings, for which they received an indemnity. Regarding the question of whether the indemnity was considered an aid measure, Advocate General Lenz held that “the indemnities must not exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit”30 and the Court ruled that these specific “indemnities do not constitute aid within the meaning of Article 107 TFEU, but rather consideration for the services performed by the collection of disposal undertakings”31. The ECJ did not examine the compensation from the aspect of its effects on competition and took the view that, since the French government paid to the collecting companies indemnities not exceeding their actual annual costs, as a form of compensation, those transfers representing payments for performance of public service obligations did not amount to an advantage to the undertaking and, therefore, did not constitute State aid under Article 107(1) TFEU.

The “State aid approach” was firstly adopted by the Court of First Instance in the FFSA case32. In this case, the CFI ruled that the tax reliefs granted by the State of France to

29 C-240/83 Procureur de la Republique v ADBHU 1985
30 Opinion of Advocate General Lenz, delivered on 22 November 1984 in Case 240/83 Procureur de la Republique v Association de defense des bruleurs d’huiles usagees (ADBHU)
31 C-240/83 Procureur de la Republique v ADBHU 1985, par. 18.
32 T-106/95 Federation francaise des societes d’ assurance (FFSA) and Others vs Commission
the public enterprise “La Poste” constituted State aid, even if they were aiming exclusively at the compensation for the company’s cost of providing universal postal service. It has to be noted that “La Poste” was obliged by the French government to maintain deficit branches in the French country. Furthermore, the CFI concluded that the measures in question did constitute State aid, even though they could be deemed compatible with the common market under Art. 106(2) of the Treaty. By this rationale, the CFI treated the provision of Art. 106(2) TFEU as an additional legal exception to Art. 107(1) TFEU, beyond the exceptions of par.2 and par.3 of Art. 107(1), and not as a provision that excludes on principle the application of Art. 107(1). The CFI confirmed the application of the “State aid approach” in the SIC case. The CFI ruled that the subsidies granted by the Portuguese State to its public television, despite the fact that they were characterized as compensatory allowance, constituted State aid under Art. 107(1) TFEU, which could be considered compatible with the common market, according to the provisions of Art. 106(2) TFEU. The CFI held that “Art. 107(1) of the Treaty does not distinguish between measures of State intervention by reference to its causes or aims but defines them in relation to their effects” and “the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings”. The CFI concluded that “the fact that a financial advantage is granted to an 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 Art. 107(1) of the Treaty.”

According to the rationale of the CFI in its decisions in FFSA and SIC, the fact that the grant of the financial advantage from the Member State tends to counterbalance the cost deriving from the undertaking of the public service obligation from the beneficiary enterprise, has no legal effect to the categorization of this measure as State aid. This

33 T-106/95 Federation francaise des societes d’ assurance (FFSA) and Others vs Commission, par. 172
35 T-46/97 Sociedade Independente de Communicacao SA (SIC) vs Commission.
36 T-46/97 Sociedade Independente de Communicacao SA (SIC) vs Commission, par. 83.
37 T-46/97 Sociedade Independente de Communicacao SA (SIC) vs Commission, par. 84.
rationale was based on the previously established jurisprudence of the European Courts, which considered as criterion of decisive importance for the categorization of a case as State aid under Art. 107(1) TFEU, the practical consequences of each beneficial state measure, as well as the repercussions that it has in a given market, and not the reasons or the expediencies which accompany it and impose its establishment. Therefore, the CFI, in the framework of this specific thesis of the jurisprudence, focused its legal evaluation exclusively on the financially beneficial character of the state measure for the undertakings providing SGEIs. On the contrary, the CFI considered the reasons for the establishment of each beneficial regulation (here, the grant of compensation for the provision of SGEIs) as simply the target or the feasibility of the compensatory allowance, which are two elements that, according to the previously mentioned established jurisprudence of the EU Courts, are not capable of abolishing the characterization of the controversial measure as State aid.38

The Ferring case
The big turn of the jurisprudence towards the full adoption of the compensatory approach occurred in the Ferring case39. In the Ferring case, the French government introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicine products. This contribution was called the “tax on direct sales”. The contribution, which was not levied on sales of medicine by wholesale distributors, was introduced to help finance a national insurance fund and to restore the balance of competition between the various medicine distributors. Competition in this particular field was considered to have been distorted, due to the fact that a public service obligation was imposed on wholesale distributors and not on pharmaceutical laboratories. Ferring SA, a pharmaceutical company, considered the tax on direct sales as being illegal and brought an action before the national court in France, seeking reimbursement of the sum paid. Ferring supported the view that the restriction of the tax imposition only on sales by pharmaceutical laboratories constituted State Aid granted to wholesale distributors.

38 Antonis Metaxas, State compensation for the provision of services of general economic interest: Legal evaluation under the light of the European State aid law, DISKE 2/2004.
39 C-53/00, Ferring SA vs Agence centrale des organismes de securite sociale (ACOSS).
The Court in its rationale referred that only wholesale distributors were required by the French legislation “to have at their disposal a permanent range of medicinal products sufficient to meet the requirements of a specific geographical area and to deliver requested supplies within a very short time over the whole of that area, in such a way that the population as a whole could be guaranteed an adequate supply of medicine at all times. Discharging those obligations entails additional costs for wholesale distributors, which pharmaceutical laboratories do not have to bear”.⁴⁰

Thereafter, the Court recalled its reasoning in the ADBHU case⁴¹ and stressed that “In like manner, provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 107(1) of the Treaty. Moreover, provided there is the necessary equivalence between the exception and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 107(1) of the Treaty, because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing”.⁴²

The Court adopted the opinion of Advocate General Tizzano that “public measures which are strictly necessary to offset the additional net costs arising from the performance of public service obligations do not constitute State aid within the meaning of Art. 107(1) of the Treaty”⁴³, took the view that a difference in treatment between undertakings did not automatically imply the existence of an advantage for the purposes of definition of State aid under Article 107(1) TFEU and held that “a measure, such as the tax charged only on direct sales of medicines by pharmaceutical laboratories, amounts to State aid to wholesale distributors only to the extent that the advantage in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligation imposed on them by national law”⁴⁴.

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⁴⁰ C-53/00, Ferring SA vs Agence centrale des organismes de securite sociale (ACOSS), p. 24-25.
⁴¹ C-240/83 Procureur de la Republique v ADBHU 1985
⁴² C-53/00, Ferring SA vs Agence centrale des organismes de securite sociale (ACOSS), p. 27
⁴³ Case C-53/00, Opinion of Advocate General Tizzano, 8 May 2001, I-9069, par. 63
⁴⁴ C-53/00, Ferring SA vs Agence centrale des organismes de securite sociale (ACOSS), p. 29.
Subsequently, the Court held that, in the case that the advantage of wholesale distributors exceeded the additional cost that they bear in discharging the public service obligation that tax advantage cannot be considered necessary for the performance of the public service mission and, thus, could not be covered by Art. 106(2) TFEU. The Court’s last view caused a lot of criticism, because when the compensation for the provision of SGEI is judged to be State aid (and overcompensation always constitutes State aid), then should fall under the scrutiny of the Art. 106(2) TFEU test, in order to be ascertained if it is compatible with the common market, based on some of the Article’s exceptions. The Court’s last aspect has as a coincidence the avoidance of the notification obligation and the State aid ban. Regarding the impact of the Ferring ruling, it was strongly doubted whether the adoption from the Court in Ferring of the so-called “net approach” could have as a result the corrosion of the Commission’s powers in the area of State aid surveillance.\footnote{C-53/00, Ferring SA vs Agence centrale des organismes de securite sociale (ACOSS), p. 32-33.} \footnote{Andreas Bartosch, Clarification or confusion? How to reconcile the ECJ”s rulings in Altmark and Chronopost? EStAL 3/2003}
The landmark Altmark ruling

The Altmark test

After the Ferring ruling, the concept of the “equivalence test” needed to be clarified. The question about the elements determining when a state measure would be deemed to merely compensate and not confer an advantage on the recipient undertaking had remained unanswered. The groundbreaking Altmark ruling provided an answer to that question and clarified the relationship between SGEIs and their financing.

The Altmark case dealt with the public subsidies granted to Altmark Trans, a transport company, awarded with a nearly exclusive geographical license for operating local bus lines. The bus lines were not profitable and the regional authority granted the bus line operator with a subsidy. The legal issues regarded the financing of the public service obligation. The main issue was whether such public subsidies intended to compensate their recipient for his costs related to the operation of urban, suburban or regional scheduled transport services, conferred an economic advantage within the meaning of Article 107(1) TFEU on him.

The CJEU, after mentioning its rulings in ADBHU and Ferring, held that “It follows from those judgements that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favorable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU” . The CJEU adopted the “compensation approach” based on two conditions. Those conditions were that the measure does not grant the undertakings a financial advantage and does not put the recipient undertakings in a more favorable position than their competitors.

The CJEU held that the discharge of a public service obligation is not caught by Art. 107(1) TFEU, where it merely compensates the provider of a public service mission for

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47 Case C-280/00, Altmark Trans GmbH, Regierungsprasidium Magdeburg vs Nahverkehrsgesellschaft Altmark GmbH, 2003
48 Case C-280/00 Altmark Trans, 2003, par. 87.
the costs that arise due to the performance of the public service obligation. However, the Court went further and ruled that, for that to be the case, four cumulative criteria have to be met:49

1. The recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined.
2. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
3. The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
4. Where the undertaking is not chosen pursuant to a public procurement procedure which would allow for the selection of a tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

The CJEU based its reasoning on one of the four cumulative conditions of the concept of State aid, the financial advantage. The critical question that the Court posed was whether a financial advantage in practice exists, when the public authority merely compensates an undertaking entrusted with public service obligations for the additional costs deriving from the provision of the public service. What is at stake is the notification of the State measure. If the compensation is judged indeed to constitute financial advantage, Member States will have to notify every plan for funding of an undertaking performing public service obligations to the Commission and suspend the implementation of the measure until the Commission decides on the issue. On the contrary, if it is judged, under the above four cumulative conditions, that no financial advantage exists, then the concept of State aid is not founded and Member States are free to fund their public services, without needing to follow the EU State aid rules and, therefore, no prior notification is required.50

49 Case C-280/00 Altmark Trans, 2003, par. 89-93.
The ECJ therefore tries to identify situations in which there is ex-ante certitude that the public service is assured at the least cost to the community and that no advantage has been granted to the recipient. In such circumstances there would be no need for Commissions' scrutiny and the measures could be classified as non-aid.51

**Critical evaluation**

The four criteria set up in Altmark gave rise to numerous extensive debates. The first three of them were generally regarded as relatively straightforward to apply, although not without some interpretational difficulties.

As to the first Altmark criterion, it was supported that public service obligations should be included in the public service contract signed between the Member State and the undertaking by the time of the award of the SGEI. In this way, transparency is ensured, as Member States cannot use the argument of public service missions ex-post, in order to justify public funding.

The second Altmark criterion prevents the changing of the parameters of the calculation of the compensation ex-post, but it was doubted if it can provide solutions to certain problems, such as the exclusion of high compensation or the addressing of the possibility of an adjustment necessary for the continuation of the SGEI, which is due either to an initial miscalculation or to an unpredictable change of circumstances.

The third Altmark criterion extends the concept of “necessary” by including in it, for the first time, in addition to revenues, a reasonable profit. In this way, private undertakings, whose primary target is to make profit, are provided with a strong motive to be activated in the public services sector. Nevertheless, the concept of “reasonable profit” is not defined at all and, consequently, the free determination of the term from the Member States may lead to a high level of compensation.

The fourth criterion received the most severe criticism and remained the most challenging factor. Under the fourth Altmark criterion, public procurement is the main rule and constitutes the criterion for the non-existence of State aid. However, the most advantageous market offer, which arises through a public tender procedure, does not necessarily corresponds to the cost of the most efficient provider. Therefore, it is

supported that in cases where the compensation exceeds not merely the cost of the chosen undertaking, but mainly the cost of an efficient provider, this compensation should be considered as State aid.

Furthermore, the second alternative of the fourth criterion inserts a new element, the ideal model of a typical, well-run undertaking. The application of this part of the fourth criterion reveals inherent weaknesses and causes many problems, as it is questioned whether this comparison with the typical well-run undertaking is always feasible or who that typical well-run undertaking might be. This problem becomes more intense in cases where there is no competition in the market and, hence, no similar undertaking can be found. Max Klasse writes on the issue that “The concept has been criticised for being virtually impossible to accomplish in practice, because of a lack of comparable undertakings that could be used as benchmarks”.

The Altmark judgement was considered to link some procedural requirements, such as the ex-ante fixation of parameters, the tender procedure or the analysis of the costs of a typical undertaking, to the notion of aid. While this has the beneficial effect of preserving ex-ante Commission control in cases where the compensation is not entirely transparent, it has the consequence of labelling as aid all compensations not meeting those requirements, independently of whether they provide an advantage to the recipient or not. On the other hand, these procedural requirements - possibly refined to ensure the achievement of the desired outcome - should continue to provide guidance on the assessment of cases.

Bovis stands very critical on the Altmark ruling, stressing that the crucial element for the compensation approach is the market price, because the market price is the only factor capable to determine whether state intervention is excessive. The public procurement procedure of the fourth criterion cannot in itself lead to the market price, as in some cases the public contract is awarded to the lowest price, whereas in other cases the public contract is awarded to the most economically advantageous offer. In this case, the market price might be entirely different from the price the contracting authority was planning to pay for the award of a given service.

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According to Bovis, the result of the application of the public procurement procedures does not always reflect the real status of the market. He disagrees with the Court’s rationale to connect SGEIs with their proper amount of funding through public procurement, which he regards as being a procedural verification of competitiveness and cost authentication of market prices. He also finds the four Altmark conditions to be ambiguous and he believes that, by their establishment, the Court adopted a new kind of approach, positioned somewhere between the compensation approach and the quid pro quo approach.\(^{54}\)

On the contrary, Bartosch believes that the fourth Altmark condition has, to a very large extent, diminished the legal uncertainty that the Member States were facing in their attempt to determine whether a given compensation scheme was really necessary in order to prevent the frustration of a specific public service mission. Now, Member States have the possibility to choose the operator which will perform their public service obligations through a public procurement procedure. According to Bartosch, in that case, the existence of State aid is severely limited, though not completely excluded. On the other hand, he admits that, in case there is no public procurement procedure, the comparison of the costs of the beneficiary with those of a typical, well run undertaking, causes a kind of uncertainty.

Furthermore, Bartosch proceeds in a comparison between the conditions contained in Article 106(2) TFEU and those established by the Court in the Altmark ruling, mentioning that “the latter does not seem to confer any more legal uncertainty than the former. In particular, the Court has clarified that in calculating compensations for public service fulfilment a reasonable profit margin may be included. Furtheron, it has replaced the requirement that the application of the Treaty’s rules must not jeopardise the fulfilment of the public service remit by some sort of “market economy test”.\(^{55}\)

The Altmark ruling established for the first time general criteria for the legal evaluation of the State compensation granted for the provision of SGEIs. Despite the generality, with which these criteria were formulated, their establishment is a fact that certainly

\(^{54}\) Christopher H. Bovis, Public Procurement, State Aid and Services of General Economic Interest.

\(^{55}\) Andreas Bartosch, Clarification or confusion? How to reconcile the ECJ’s rulings in Altmark and Chronopost? EStAL 3/2003.
contributes to the achievement of legal certainty. Undoubtedly, in practice those criteria need to be further specialized and systemized, but, in any case, it is clear that they reflect the attempt of careful balancing between two basic necessities: the need for avoidance of a problematic and unwanted enlargement of the concept of state aid and, on the other hand, the need for an effective restriction of any efforts for deviation from the State aid controls performed by the European Commission and circumvention from the Member States of the regulatory scope of the relevant community rules.  

56 Antonis Metaxas, State compensation for the provision of services of general economic interest: Legal evaluation under the light of the European State aid law, DISKE 2/2004.
The post-Altmark jurisprudence

**Chronopost**

A special decision is the one issued by the CJEU in the *Chronopost case*. 57 The French postal service, La Poste, had a legal monopoly on certain postal services and had an exclusive right to providing these services. La Post was also charged with public service obligations, such as the provision of postal services in the entire French territory. Unlike the main postal network, the express courier service sector was open to competition. La Post owned a subsidiary, Chronopost, operating in this competitive market. A competitor argued that the fees paid by Chronopost for the use of the postal network in its business constituted State aid, as the fees did not correspond to the amount a private undertaking, having set a similar postal network, would charge another undertaking for using its services.

The Court of First Instance decided that the logistical and commercial assistance provided by La Poste to its subsidiary company Chronopost, which was active in the market of express courier services, constituted State aid within the meaning of Art. 107(1) TFEU and annulled the previous opposite Commission Decision. 58 The CFI pointed out in its ruling that the remuneration received by La Poste in return for the provision of logistical and commercial assistance, was not sufficient to exclude any state aid element. La Poste would always be able to offer these services at lower prices than any private operator could ever do, because La Poste was the sole public undertaking operating in a reserved sector and there was no private undertaking enjoying the same privileges. The CFI indicated that the Commission should have examined whether the payment received by La Poste in return for its assistance could be comparable to that demanded by a private company not operating in a reserved sector, pursuing a structural policy, general or sectoral, and guided by long-term prospects. 59

However, the CJEU held that the CFI’s decision was based on an incorrect interpretation

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57 Joined Appeal Cases C-83/01, C-93/01, C-94/01, Chronopost SA, La Poste and others vs UFEX and others, 2003.
58 SFMI-Chronopost, Commission Decision 98/365
59 Case T-613/97 Ufex and Others v Commission
of the concept of normal market conditions. The CJEU’s rationale was that the CFI should have taken into account the fact that an undertaking such as La Poste was in a very advantageous position in comparison to any private undertaking acting under normal conditions. La Poste was operating in a market network with substantial infrastructures and resources, which a private undertaking could have never created. “That assessment, which fails to take account of the fact that an undertaking such as La Poste is in a situation which is very different from that of a private undertaking acting under normal market conditions, is flawed in law”\textsuperscript{60}. “Accordingly, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available”\textsuperscript{61}

The Court pointed out clearly that the public network made available to Chronopost was clearly not a market network and would have never been created by a private undertaking. Accordingly, cost calculation and allocation in search of possible cross-subsidisation have to be based on objective and verifiable elements on the factual basis of the existing network.\textsuperscript{62}

The CJEU concluded that La Poste was an undertaking entrusted with SGEIs to the benefit of all users in the French territory to be provided at certain fixed prices. As such, La Poste would have had to create a postal network for this purpose which was not in line with a purely commercial purpose. Such a network would never have been created by a private undertaking. The CJEU therefore held that if the costs payable by Chronopost to La Post were equivalent to the costs of providing the service, then there was no State aid. “On that basis, there is no question of State aid to SFMI-Chronopost if, first, it is established that the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from the use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost’s

\textsuperscript{60} Joined Appeal cases C-83/01, C-93/01, C-94/01, Chronopost SA, La Poste and others vs UFEX and others, 2003, par. 33.

\textsuperscript{61} Joined Appeal cases C-83/01, C-93/01, C-94/01, Chronopost SA, La Poste and others vs UFEX and others, 2003, par. 38.

competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion". Consequently, based on the above rationale, that there could not be any possibility to compare the situation with that of a private undertaking not operating in a reserved sector, the CJEU set aside the CFI judgment and upheld the Commission’s decision rejecting the existence of State aid in the provision of logistical and commercial assistance by La Poste to Chronopost.

Chronopost is a very significant case. The CFI, instead of applying the Altmark criteria, in order to assess the existence of State aid, decided to apply the criterion of the “private operator”. The principle of the private operator is based on a comparison, which must be always made between similar things, in order to be legitimate and effective. The CJEU disagreed with the CFI’s approach and took the view that such a comparison in this specific case was neither useful nor feasible. Hence, the CJEU concluded that the assistance granted to Chronopost could be granted only by a company similar to La Poste, which would be entrusted with the provision of a public service obligation. This assessment derives from the Court’s previous ascertainment that the public postal network, belonging to La Poste, is a network that cannot be created or supported under “normal market conditions”. As a result, it would not be reasonable for a private company, from a financial point of view, to acquire a similar network, which entails significant structural costs. Therefore, the comparison presented by the CFI, does not correspond to reality and is ineffective for the assessment of possible application of State aid.

By its ruling in Chronopost, the Court indicated its effort to define every time the market in which the undertaking operates. In case the specifics of this market do not allow the comparison with the typical average undertaking and, therefore, the market mechanisms cannot be fully applied, the Court is not inflexible, but is adapted to the circumstances.

In theory, the question whether Chronopost and the fourth Altmark criterion can be

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63 Joined Appeal cases C-83/01, C-93/01, C-94/01, Chronopost SA, La Poste and others vs UFEX and others, 2003, par. 40.
reconciled was raised. In other words, why the well run undertaking test was not applied to La Poste.

Von Danwitz sees the Chronopost ruling as a way to balance the interests of the general ban of State aid in Article 107 and the necessity of ensuring workable conditions for public services under Article 106(2) and that there should be no hierarchical relationship between them. “The opposing aims of the prohibition of any State aid in Art. 107(1) TFEU and the necessity of ensuring workable conditions for public services according to Art. 106(2) TFEU and Art. 14 TFEU have to guide our reflections... it seems quite inappropriate to strive a hierarchical understanding of both values in terms of Community law. The challenge is rather to achieve practical solutions designed for an equivalent realisation of both objectives... the rationale of the jurisprudence in Chronopost seems to be rightly based on this balancing approach”.

Bartosch argues that there is no real conflict between Altmark and Chronopost, as in Altmark there was a competitor interested in operating the bus transport services, whereas in Chronopost there were none. He considers Chronopost to be the exception to the rule provided in Altmark and writes that “On the one hand, Altmark sets the general framework under which measures intended to offset the costs linked to public service fulfilment may escape the prohibition laid down by Article 107(1) TFEU. On the other hand, Chronopost shows the limitations that the application of this general framework has in cases where for the services provided no market exits and, consequently, no comparable private operator can be found, the cost structures of whom can be used as suitable benchmarks”.

In contrast, Bovis disagrees with the Court’s rationale to accept a total price covering all kind of costs incurred by La Poste in order to provide its logistical and commercial assistance, and, in which the Court was based in order to reject the possibility of State aid under Article 107(1) TFEU. According to Bovis, in the Chronopost judgment the Court indirectly accepted the State aid approach and disapplied the private investor principle from the State aid rules, and therefore accepted “the existence of sui generis markets within which services of general interest emerge and being delivered and

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67 A. Bartosch, Clarification or Confusion? How to reconcile the ECJ’s Rulings in Altmark and Chronopost, ESTAL 3/2003.
which cannot feasibly be compared with private ones.\textsuperscript{68}

It arises from the above mentioned arguments that Chronopost must be seen as lex specialis and as an exception to Altmark.

**BUPA**

Another landmark ruling was that issued in BUPA\textsuperscript{69}. The case concerned private health insurance. RES, the risk equalization scheme of Ireland, was established in 1997 after the liberalization of the private health insurance sector and its aim was the compensation of the “above average” risk insurers, through the grant to them of the revenues of a levy, collected from the “below average” risk insurers. In other words, RES was created in order to equalize the losses that health insurance providers had, due to their high risk profile. Insurers with low risk profiles would compensate insurers with high risk profiles by monetary transfers through the RES.

BUPA, a British health insurance company entering the market after its liberalization, rejected its payment obligations and supported that the imposition of this levy was contrary to EU State aid rules.

However, the Commission decided that RES constituted compensation for the provision of a SGEI and, therefore, was not equivalent to State aid.\textsuperscript{70} The Commission based its decision on the criteria set out in the Altmark judgment. BUPA sought annulment of the Commission decision before the Court of First Instance. It argued, amongst others, that the Commission erred in concluding that RES fell within the scope of the Altmark ruling. The CFI rejected BUPA’s claim.

The CFI’s rationale was that Member States enjoy a wide discretion in defining what they consider to be SGEIs. The Commission may only challenge the designation of a service as SGEI by a Member State for manifest error of assessment\textsuperscript{71}. The Commission examined Ireland’s evaluation of the specific service for the purpose of its designation as SGEI, as well as the subsequent imposition of the relevant public service obligation, and found that they were not vitiated by manifest error. Thus, the CFI decided that “the

\textsuperscript{68} Christopher H. Bovis, Public Procurement, State Aid and Services of General Economic Interest.

\textsuperscript{69} Case T-289/03, British United Provident Association Ltd (BUPA) and Others vs Commission and Others, 2008.


\textsuperscript{71} T-289/03, BUPA and Others vs Commission and Others, 2008, par. 166.
Commission’s finding ... that the attribution of a SGEI mission may also consist in an obligation imposed on a large number of, or indeed on all, the operators active in the same market, is not vitiated by an error”.72

The CFI’s assessment of the fulfilment of the minimum criteria required for every SGEI mission, meaning the presence of an act of the public authority entrusting the operators with a SGEI mission and the universal and compulsory nature of that mission, is interesting.

The CFI took the view that the legislation establishing the RES includes a clear and precise definition of the relevant public service obligation. Furthermore, the CFI held that the demand that each insurer should have been separately entrusted with this public service mission by an individual act or mandate, was not required.73

BUPA argued that there was no public service obligation, because the services provided by the insurers were not universal and compulsory in nature. The CFI disagreed and held that, according to EU law, in order for a service to be considered as a SGEI, it is not mandatory for this service to constitute a universal service in the strict sense. The Court ruled that “… the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or must be supplied throughout a territory”74. Hence, the first Altmark criterion could be fulfilled by public service obligations with limited territorial or material application or by public service obligations which are connected to services provided only to a relatively limited group of users.

BUPA also argued that the acting of the government to determine the parameters for the payment of compensation led to the non-fulfillment of the second Altmark criterion. The CFI rejected that argument and held that it was not necessary for the real level of payments to be determined by the relevant legislation, since the latter had established a powerful and transparent process for the determination of payments, based on evidence provided by insurers, which the Court found to be sufficient. Therefore, there was no requirement for the real level of payments to be determined by the relevant legislation.

72 T-289/03, BUPA and Others vs Commission and Others, 2008, par. 179.
73 T-289/03, BUPA and Others vs Commission and Others, 2008, par. 183.
74 T-289/03, BUPA and Others vs Commission and Others, 2008, par. 186.
Regarding the fulfillment of the third Altmark criterion, the CFI clarified that it does not have the competence to assess the necessity and proportionality of the compensation provided to insurers by RES and that the Court’s review on the Commission's decision extends only to ascertaining whether the Commission has made a manifest error of assessment in it. In the context of the plausibility review of the economic facts, the Court also clarified that it is not competent to assess complex economic elements, and that the scope of its review is limited only in ascertaining that the Commission has not committed an error of law or a manifest error of assessment and has not misused its powers. ⁷⁵ Within the above framework, the CFI found the Commission’s decision sufficient.

Furthermore, the Court, although it noticed that the RES compensation system was significantly different from the compensation systems in Ferring and Altmark, and admitted that the RES system cannot fulfill the third Altmark criterion in the strict sense, it nonetheless concluded that the comparison between the actual risk profile of an insurer and the average market risk profile satisfies the purpose and the spirit of the third Altmark criterion. ⁷⁶

Finally, The CFI considered that the requirements for the fulfillment of the fourth Altmark criterion were also met. According to the Court’s rationale, the Commission should be able to guarantee that the compensation was not destined to offset costs that derive from an RES insurer’s inefficiencies. The Commission was satisfied that the RES system took into account the average claim costs of the insurers, so that the latter were prevented from keeping the benefit of their own inefficiencies. In this context, the comparison between the costs of a potential recipient of a compensation payment and an efficient operator was not needed.

The conclusion of the Court was that all of the requirements of the Altmark criteria had been met and that the Commission had not erred in its finding of no manifest errors.

Bartosch writes on BUPA: “The judgment is outstanding for two reasons: first, it came to the conclusion that the equalization scheme satisfied the entirety of the Altmark requirements even though the Commission decision had based its assessment - prior to the ruling in Altmark - on the early Ferring judgment that had been subject to a major

⁷⁵ T-289/03, BUPA and Others vs Commission and Others, 2008, par. 220-221.
⁷⁶ T-289/03, BUPA and Others vs Commission and Others, 2008, par. 237.
overhaul by Altmark. Second, the ruling in BUPA essentially says that Altmark provides very useful guidance on how to assess national schemes designed to compensate costs linked to the fulfilment of SGEI, but does not fit in each and every case and therefore has to be modified accordingly”77.

De Cecco sees BUPA in the light of the social value of solidarity, as the objective of RES was to ensure generational solidarity, and draws from BUPA the conclusion that “For the purpose of State aid law, SGEIs are, at the current state of development, requirements to which Member States ascribe special significance, a significance which the EU recognizes and promotes as being a manifestation of its own values clustered under the label of solidarity, values to which the EU law attaches no specific prescriptions”78.

The BUPA case suggests that the GC may be applying a more permissive standard than it did in the Altmark case. The BUPA ruling suggests that, according to the GC, there is considerable leeway for interpretations within the Altmark conditions79.

**GEMO**

The GEMO case80 concerned the financing from the French government of private undertakings, which were responsible for providing the public service obligation of free collection and disposal of animal carcasses and slaughterhouse waste, essentially for the benefit of farmers and slaughterhouses. The financing of this PSO was supported by the imposition of a tax on the sales of the meat market. GEMO was a medium-sized supermarket that marked meat and, in that capacity, was liable to the meat purchase tax. GEMO claimed that that tax was contrary to EU law and applied for reimbursement of its sums paid. In this case, the Court did not evaluate the application of the Altmark criteria and did not base its ruling on the relation between State aid and public service obligations, but on the evaluation of the criterion of the effect on trade between Member States. The Court’s reasoning was that the service of the collection and disposal of animal carcasses and slaughterhouse waste was provided free of charge and

hence was relieving farmers and slaughterhouses of an expense, which should be considered as an inherent cost of their economic activities. The Court took the view that this constituted an economic advantage liable to distort competition and ruled that “the fact that in France the costs of carcass disposal are borne neither by farmers nor by slaughterhouses necessarily has a positive impact on meat prices, thus making that product more competitive on the markets of the Member States where such costs are normally paid out of the budget of competing traders”\textsuperscript{81}. The Court judged that a measure like that constitutes an advantage for French exports, affects intra-Community trade and, thus, must be classified as State aid.

The most important element in the GEMO case is the opinion of General Advocate F. Jacobs, who suggested a third, interim approach (the so-called “quid pro quo” approach). This approach was an attempt to bring together the two opposed theories of the compensation approach and the approach that any state contribution for the provision of SGEI constitutes State aid. General Advocate’s opinion was that none of the two approaches was ideal for every case and, thus, he suggested that there should be a separation into two categories of cases, based on the criterion of the clarity of the connection between the granted state economic compensation and the public service obligations for which it is granted. The judge would decide which approach to apply, depending on the assessment of this specific criterion in every case. According to the opinion of the General Advocate F. Jacobs, when there is a direct and obvious connection between the State measure and the public service obligation, like in the case of the award of a SGEI through public tender, where the public service obligations and the amount of financial compensation are clearly determined in advance, then the State measure should not be considered as State aid. On the contrary, in occasions where it is not clear that public funding aims exclusively at the compensation for the implementation of clearly defined public service obligations, the state measure should fall under the state aid scrutiny.\textsuperscript{82}

\textsuperscript{81} C-126/01 Ministre de l’ économie, des finances et de l’ industrie vs GEMO (2003), p. 42.
\textsuperscript{82} Case C-126/01, Opinion of Advocate General Jacobs, 30 April 2002, I-13772.
ENIRISORSE

The CJEU applied the Altmark criteria in the Enirisorse case\(^{83}\) which concerned the transfer to public undertakings responsible for operating ports of a proportion of port charges paid to the State. The Italian government imposed a tax burden on the handling in state ports, for the benefit of the public organizations that had the management of the handling machinery by the Italian law. The CJEU ruled that there was State aid, as the 3 of the 4 Altmark criteria were not fulfilled. More specifically, as to the first criterion, it was not clear to the Court that the port operators had been entrusted with the performance of a public service duty. The Court held that “it does not follow from its case-law that the operation of any commercial port constitutes the operation of a service of general economic interest. Such activity does not therefore automatically involve the performance of public-service duty”\(^{84}\). Furthermore, as to the second criterion, the Court noted that the Italian authorities did not give details of the cost of the services supposedly covered by a public service obligation, or of the basis on which their cost was calculated. Finally, as to the third criterion, the Court ruled that, since the amount paid to the port operators was linked to the amount of goods transferred by all users in each port separately, the amount of compensation varied in every port, depending on the level of activity of the port. Hence, the requirement that the compensation must not exceed what is necessary to cover the costs incurred in the discharge of the public service obligation, could not be satisfied. The Court decided that the SGEI and its content was not clearly defined, while the compensation has not been calculated in advance in an objective and transparent manner. The Court did not proceed to the evaluation of the fourth criterion.

It is worth noticing that Advocate General Stix-Hackl adopted General Advocate’s F. Jacobs theory of the interim approach of categorization in the basis of the existence of direct and obvious connection between the state measure and the clearly defined public service obligation. Advocate General Stix-Hackl stressed that “In result, it is to be considered that the allocation of a significant part of the proceeds of a port charge to a public undertaking constitutes State aid within the meaning of Article 107(1) TFEU if the allocation of funds has no direct and manifest link to the burdens resulting from the

\(^{83}\) Joined Cases C-34/01 to C-38/2001, Enirisorse SpA vs Ministero delle Finanze, 2003

\(^{84}\) Joined Cases C-34/01 to C-38/2001, Enirisorse SpA vs Ministero delle Finanze, 2003, par. 33.
supply of clearly identifiable services of general economic interest”.

Further case-law

The Danske Busvognmoend case concerned the state subsidies system established by the Danish government, in order for Combus, a public undertaking entrusted with the provision of services of mass transportation, to diminish its deficits, caused by its privatisation. The applicant sought the annulment of a Commission Decision, which contended that Combus provided a transport service encompassing public service obligations financed by the agreed-upon compensation and that this public funding is covered by Regulation 1191/69. The Court of First Instance held that Combus was not entrusted with public service obligations and the relevant payments did not satisfy the conditions of Regulation 1191/69 and annulled the contested Commission Decision. However, the interesting feature in this ruling is the rationale of the CFI. The CFI held that the Commission could no more rely on the case-law of the FFSA case, as the FFSA case-law did not apply because “…the undertaking concerned in the FFSA and Others vs the Commission...had performed public service tasks in a reserved sector, which was not as such exposed to competition”. “In this case, by contrast, all of the transport activities performed by Combus and by all of the other bus transport undertakings active in the Danish market in public transport by road were open to competition. It was not a sector reserved to a single undertaking whose specific costs resulting from the provision of a public service had to be compensated in order to eliminate the financial burden on the undertaking as compared to undertakings competing with in other sectors.”

This was considered as being a weird rationale, inconsequent to the Altmark criteria. Apart from that, as it is generally accepted, the grant of compensation is much more necessary when the public service obligations are provided in a market open to competition, than in the protective environment that the exclusive rights provide in the entrusted undertaking.

86 T-151/01 Danske Busvognmoend vs Commission, 2004
The Valmont case\textsuperscript{89} concerned the cost for the configuration of a private parking space, owned by a commercial enterprise. In its decision\textsuperscript{90}, the Commission supported the view that the parking space, although it belonged to a private company, was partially a public space and, since its configuration was financed by public funds, it was a case of state aid. The Court of First Instance held that the Commission did not examine the potential fulfillment of the Altmark criteria and the possibility that the granted financing constituted compensation for the provision of public service. The CFI applied the Altmark criteria, indicated that "Valmont bears a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded, in the public interest, as much as in that of the third parties concerned, with a territorial authority" and held that the portion of the financing could in fact be regarded as compensation for the burden borne by Valmont\textsuperscript{91}. For this reason, the Court annulled the Commission’s decision.

In the Fred Olsen case\textsuperscript{92} the CFI dismissed a plea against a Commission decision, which approved compensation for the provision of public service obligations in the sector of maritime transport, based on Art. 106(2) TFEU. The CFI did not make any reference to the Altmark criteria and formed its reasoning based exclusively on the legal base of Art. 106(2).

The Corsica Ferries case\textsuperscript{93} concerned the provision of public financing granted for the restructuring of a deficient maritime enterprise, entrusted with public service obligation related to the maritime transport between continental France and Corsica. The CFI annulled the Commission’s decision, based on the reasoning that the Commission did not examine the potential application of the Altmark criteria.

The CJEU applied the Altmark criteria in the Servizi Ausiliari Dottori Commercialisti case\textsuperscript{94}, which dealt with the payment of remuneration from State funds to tax advice centers, for giving tax advice and assistance on the annual declaration of income,

\textsuperscript{89} T-274/01 Valmont Nederland BV vs Commission, 2004  
\textsuperscript{91} T-274/01 Valmont Nederland BV vs Commission, 2004, par. 132-134  
\textsuperscript{92} T-17/02 Fred Olsen SA vs Commission, 2005  
\textsuperscript{93} T-349/03 Corsica Ferries vs Commission, 2005  
\textsuperscript{94} Case C-451/03 Servizi Ausiliari Dottori Commercialisti Srl vs Giuseppe Calafiori, 2006
activities for which the centers had an exclusive right to provide those services. As to
the first criterion, the Court ruled that the relevant tax assistance services could be
characterized as public services. “A Member State could conceivably characterize as a
public service the tax assistance services provided by CAF to employees and persons
treated as such and intended to help taxpayers to fulfil their tax obligations and to
facilitate the accomplishment of the tasks for which the tax authorities are
responsible”95. As to the second criterion, the Court held that “the compensation which
has been fixed at about 14 euro for each declaration completed and filled with the tax
authorities may satisfy that condition”96. Hence, the Court accepted that the first two
Altmark criteria were satisfied. As to the last two criteria, concerning whether the level
of remuneration gave rise to overcompensation, the Court let the national court decide
if they were satisfied.

The TF1 case97 concerns a plea against a Commission decision, determining that the
financing of France Television from radio and television charges, according to the
Altmark test, constitutes State aid, which nevertheless may be justifiable under Art.
106(2). The applicant considered that the Commission erred in law regarding the
applicability of Art. 106(2) TFEU to aid resulting from overcompensation for the cost of
public service obligations and submitted that “contrary to the Commission’s contention,
the Court of Justice does not, in the Altmark judgement, implicitly confirm that an aid
which compensates, or rather over-compensates, for the costs incurred by an
undertaking in providing a SGEI may be declared compatible with the common market
if the conditions laid down by Art. 106(2) TFEU are fulfilled”.98
The General Court stressed that in the Altmark judgement the CJEU, by establishing the
four criteria, had no intention to create confusion regarding the possibility of
application of Art. 106(2) TFEU in cases where it is necessary to estimate the compatibility of
measures of state financing of SGEI with the common market.
Furthermore, according to the General Court, the Altmark rules aim at determining
whether there is state aid, within the scope of Art. 107(1) TFEU, whilst the rules in Art.

95 Case C-451/03 Servizi Ausiliari Dottori Commercialisti Srl vs Giuseppe Calafiori, 2006, par. 63.
96 Case C-451/03 Servizi Ausiliari Dottori Commercialisti Srl vs Giuseppe Calafiori, 2006, par. 65.
97 Case T-354/05, Television Francaise 1 SA (TF1) vs Commission, 2009
98 Case T-354/05, Television Francaise 1 SA (TF1) vs Commission, 2009, par. 113.
106(2) provide the possibility to verify if a measure that consists state aid can be regarded as compatible with the common market. “It is clear from the entirely unequivocal terms of the Altmark judgment...that the sole purpose of the four conditions mentioned above is the classification of the measure in question as State aid, and more specifically the determination of the existence of an advantage”\textsuperscript{99}.

“The decisions of the Court of Justice and of the Court of First Instance which, since the Altmark judgment...refer to the conditions laid down in that judgment do not detract from the fact that those conditions relate to the classification of State aid within the meaning of Article 107(1) TFEU and they do not indicate that the Court of Justice wished, by enunciating those conditions, to cease applying Article 106(2) TFEU when assessing the compatibility with the common market of State measures for the financing of SGEIs”.\textsuperscript{100}

Hence, the General Court clarified that there should be no confusion between the two instruments. The General Court, based on the above argument, dismissed the plea against the Commission’s decision.

Another interesting case is the TV2/Danmark case\textsuperscript{101}, which concerned the definition of SGEIs. An applicant which dealt with aid to a public broadcaster had questioned the SGEI mission of TV2. TV2, a Danish public broadcaster, received its funding partly from license fees and partly from selling air time for commercials. The applicant argued that since TV2 also broadcasted programming, which was broadcasted by purely commercial networks, that programming should be excluded from the public service mission and as such could not receive compensation. According to the applicant, the Commission should have assessed which programming was public service and then should have compared it with the programming of private actors. The Commission on the other hand, refuted that submission by stating that its task was limited to finding manifest errors. The General Court agreed with the Commission in this view and referred to the discretion of Member State in defining the contents of a SGEI mission, which in this context was based on the SGEI Communication and the Amsterdam

\textsuperscript{99} Case T-354/05, Television Francaise 1 SA (TF1) vs Commission, 2009, par. 130.
\textsuperscript{100} Case T-354/05, Television Francaise 1 SA (TF1) vs Commission, 2009, par. 135.
protocol on public broadcasting. The General Court held that the applicant confused the financing with the definition of SGEIs. An SGEI could consist in both the broadcasting of commercial and non-commercial content. The Commission had not erred in finding that there was no manifest error.

In the Essent case\textsuperscript{102} the Court, regarding the classification of the State measure as State aid under Art. 107(1) TFEU, confirmed the application of its previous settled case-law (cases Altmark, Chronopost, Servizi Ausiliari Dottori Commercialisti, Enirisorse) ruled that each one of the four Altmark criteria should be applied proportionally, in order to ascertain whether compensation paid to a designated electricity distribution firm for “stranded costs”, meaning non-market compatible costs incurred prior to liberalization of the sector, imposed on that firm by the public authorities, constitute State aid. “With the aid of those criteria, which may be used, mutatis mutandis, to assess whether the compensation in respect of non-market compatible costs for which the State is responsible constitutes aid, it is for the national court to ascertain whether, or to what extent, the amount of NLG 400 million may be regarded as compensation for the services provided by the designated company in order to discharge public service obligations or whether that amount was to be used for the purpose of paying non-market compatible costs of another kind, in which case it would be an economic advantage corresponding to the definition of aid within the meaning of Art. 107(1)”.\textsuperscript{103}

\textsuperscript{102} Case C-206/06, Essent Netwerk Noord BV vs Aluminium Delfzijl BV, 2008
\textsuperscript{103} Case C-206/06, Essent Netwerk Noord BV vs Aluminium Delfzijl BV, 2008, par. 86.
Conclusions

The major Altmark ruling may be regarded as the first step towards the decentralisation of the EU’s state aid policy, since for the first time an instrument was provided to the Member States for their self-assessment of public financing to SGEIs. As it was indicated in the present paper, the EU Courts gave effect to the Altmark ruling and in most cases applied the Altmark criteria, even in a more relaxing way, like in the BUPA case.

The Altmark test decreased legal uncertainty regarding the legal evaluation of public funding in SGEIs, but did not eliminate it. The Commission in its case-law interpreted and applied the Altmark criteria in a very strict manner. This approach had as a consequence that one or more of the criteria have not been fulfilled in the Commission’s decisions. As a result, scarcely any public service compensation granted by Member States has been regarded as not constituting State aid by the Commission. Subsequently, the Commission had the exclusive competence to apply the compatibility test of Art. 106(2) and declare the compensation compatible with the internal market or not. As Klasse writes on the Commission’s approach, “The Commission has seized control over Member States’ spending in the context of what they consider to be a public service remit”\(^\text{104}\). The Commission’s attitude has increased legal uncertainty for Member States and public service providers.

During the last years, and particularly due to the financial crises and its social effects on the weaker parts of the European societies, the significance of SGEIs for Member States has grown, as increasingly bigger parts of the European population lost access to basic public services. Member States have become particularly interested in being able to determine the concept of their SGEIs and provide them to their citizens. Hence, the demand for decentralization of the state aid scrutiny on SGEIs has grown.

Member States claim the reconsideration of Art. 106(2), arguing that it has proven to

\(^{104}\text{Max Klasse, the Impact of Altmark: The European Commission Case Law Responses, Financing Services of General Economic Interest, Legal Issues of Services of General Interest, Asser Press, 2013}\)
be ineffective in the enforcement of state aid rules and that it is no more following the changing reality. Therefore, they request a more active role and more competences for their national courts and their national authorities, in the field of enforcement of state aid rules to SGEIs.

Moreover, Member States claim that according to Art. 14 TFEU, which they consider that should be the legal basis for SGEIs, Protocol 26 TFEU and the principle of local and regional self-government, EU state aid rules should be fully consistent with the broad discretion granted by the Treaty to the Member States in determining what represents a SGEI. Member States assert for their local and regional authorities the right to decide which services they regard as of general economic interest and to widen the concept of SGEIs, as new social services, such as assistance to refugees or digital infrastructure in regions where a market failure is apparent, could qualify as SGEIs, owing to the need for a comprehensive service to citizens.

Additionally, Member States claim that decisions on quality and efficiency regarding SGEIs should also be left to local authorities, whilst the Commission resources should be targeted at applying state aid provisions in cases which have the most impact on the internal market.

Furthermore, local and regional authorities face the problem that no benchmark is available for the second alternative of the fourth Altmark criterion (a typical undertaking, well run and adequately provided with means), in cases where there are no private companies operating in the sector concerned. They also consider that the definition of reasonable profit of a provider of a SGEI should be revised, in order to reflect the fact that such profit is often reinvested in SGEIs.

Therefore, a form of decentralization of state aid policy as regards the financing of SGEIs seems rather necessitated and is expected to be seriously considered in the near future.

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