



Altmark I vs. Altmark II

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Competition and Public Procurement Law Challenges in the Health Care Sector

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State aid in the health care sector

- ECJ case law:
 - Health care services are “services within the meaning of the Treaty (and the EEA Agreement)
 - There is a market for health care
- Health care as a service of general economic interest
- State aid rules also apply to health care sector - Public compensation must be
 - Either disbursed following a competitive tender on objective and transparent criteria
 - Or subject to assessment under the state aid rules

Is the compensation for an sgei state aid?

- Main element of assessment: advantage
- Confusing case law:
 - FFSA: aid
 - SIC: aid
 - Ferring: no aid
- Altmark

The Altmark judgement

- No aid if 4 conditions are met:
 - Clearly defined sgei obligations/mission
 - Parameters to calculate compensation are established in advance, objective and transparent
 - Payments do not exceed net costs plus a reasonable profit (no overcompensation)
 - Two options:
 - 1) choice of service provider following a tender procedure
 - 2) compensation based on costs of a typical, well-run and adequately equipped undertaking

The 2005 SGEI Package (Altmark I)

- Compensation of services that does NOT fulfil the Altmark criteria
- Substantive compatibility conditions (basically the first 3 Altmark criteria)
- Commission Decision (OJ 2005, L312 page 67)
 - exempt from notification “small” services (€ 30 mio/year if turnover below € 100 mio) / hospital, social housing
- SGEI framework (OJ 2005, C297, page 4)
 - “large” services / must be notified
- Transparency Directive
 - Separate accounts for sgei and commercial activities

The 2005 SGEI Package - EEA

- Decision - incorporated into point 1h in Annex XV to the EEA Agreement by Joint Committee Decision
- Framework – incorporated in Part VI of the Authority’s State Aid Guidelines: Rules on public service compensation, state ownership of enterprises and aid to public enterprises - State aid in the form of public service compensation
- Transparency Directive - incorporated into point 1a in Annex XV to the EEA Agreement

Evaluation of Altmark I

- 2008-2012 – Commission consults Member States and stakeholders. EFTA States also participate in the process.
- Issues of legal certainty (notion of economic activity, effect on trade, relation with public procurement, control of overcompensation, etc)
- Questionable whether the rules are always applied correctly
- Conclusion: need for clarification and more diversified and proportionate approach

The 2011 SGEI Package (Altmark II)

- 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 C8 11.01.2012 page 4)
- 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 (OJ L7 11.01.2012 page 3)
- European Union framework for State aid in the form of public service compensation (OJ C8 11.01.2012 page 15)

The 2011 SGEI Package (Altmark II) – cont.

- Commission Regulation 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 (OJ L114 26.04.2012 page 8)
- Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L318 17.11.2006 page 17)

The Altmark II Package in the EEA

- Communication: incorporated in Part VI of the Authority's State Aid Guidelines :
Application of the state aid rules to compensation granted for the provision of services of general economic interest
- Decision - incorporated into point 1h in Annex XV to the EEA Agreement by Joint Committee Decision
- Framework – incorporated in Part VI of the Authority's State Aid Guidelines :
Framework for state aid in the form of public service compensation)
- Transparency Directive - incorporated into point 1a in Annex XV to the EEA Agreement

The Communication

- Clarification:
 - Notion of aid: economic vs non economic activity, effect on trade
 - Altmark criteria: notion of sgei, entrustment, well run typical undertaking, relation to public procurement

The Decision

- Main features from 2005 Decision maintained:
 - The service must be clearly defined and entrusted
 - Compensation mechanism clearly established in advance (including arrangements to avoid and repay over-compensation)
 - Compensation limited to net costs plus a reasonable profit
 - Separation of accounts (if sgei and commercial activities are provided by the same undertaking)

The Decision - Simplification

- No threshold for the exemption of social services
- No turnover criterion
- Safe harbour for reasonable profit / flexibility for other profit indicators
- Check on over-compensation only every three years

The Decision - Strengthened control

- Lower ceiling for other than social services: € 15 mio/year
- Period of entrustment limited to 10 years

Transitional rules

- Existing aid schemes must be adapted within 2 years
- Existing individual aid entrustments remain exempted for the duration of the entrustment if lawfully implemented under the 2005 decision
- Unlawful aid is exempted if it complies with the new decision (social services)

The Framework

- Stricter compatibility conditions
 - Prior public consultation
 - Duration of the period of entrustment must be justified
 - Public procurement must be complied with
 - No discrimination between providers of the same service
 - Calculation of the amount of compensation
 - Net avoided cost methodology
 - Efficiency incentives

The new SGEI *de minimis* regulation

- For local services: compensation <€500 000 over three years
- Cumulation rules
 - Cumulation with other de minimis up to €500 000
 - No cumulation with state aid for the same eligible costs or compensation for the same service

Evolution of case law

- AOK C-264/01, C-306/01 *et al*
- Fenin T-319/99 & C-205/03P
- BUPA T-289/03
- Chronopost C-341/06P & C-342/06P

Some of the challenges ahead

- Identification of sgei
- Adjustment by the EU Member States & EFTA States of existing arrangements
- Interpretation of Altmark criteria
- Pending cases

Thank you very much for your attention!