



Det Juridiske Fakultet



Altmark I vs. Altmark II

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Overview

- State payment for performance of SGI
 - Compensation or state aid within art. 107(1) TFEU?

- Field of application of Altmark criteria.
 - Limiting the scope of Altmark.

- Altmark II
 - Clarification of first Altmark criteria.
 - Clarification of fourth Altmark Criteria.

- Clarification obtained by Altmark II.



Field of application of art. 107 TFEU

- Article 107 is concerned with competition on the Internal Market
 - Financial advantages from the state not being the outcome of normal market behavior.
 - Such advantages distorts competition.
 - Obligation to notify to the Commission.
 - Altmark
 - Deals with exactly the question of when a compensation for performing a SGI amounts to a financial advantage and therefore should be notified to the Commission
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- Public Procurement rules are concerned with
 - Opening up the internal market for competition,
 - safeguarding equal access to the internal market,
 - reducing public expenditure.



Altmark I

- Before Altmark
 - Either, all compensation is considered state aid and it is for the Commission to authorize?
 - Or, only compensation exceeding costs is state aid?
- Altmark – merged compensation and state aid
 - Whether the procedure undertaken by the state guarantees that no financial advantage is given to the undertaking performing the SGI
- If all four Altmark criteria are not fulfilled => member state has an obligation to notify



Altmark I – the four criteria

- The content of the contract – 1., 2. and 3. criteria
 - How is the task set out?
 - How is the compensation calculated?
 - How large is the compensation relative to the costs?
- The award of the contract – 4. criteria
 - Was the contract tendered?
 - Safeguards supply of the service at market price/lowest possible costs for society (as well as equal opportunity for undertakings).
 - Was an efficiency benchmark used?
 - Safeguards that SGI was performed at the lowest possible costs for society.



Field of application (of Altmark criteria)

- When is a public service obligation present?
 - For the member states to decide at the outset.
 - SGI, SGEI, SSGI and others – not well defined.
 - The practice of the member states has widened the field of application.
- The competitive conditions of SGI's varies in the EU
 - Network services, social services and others.
 - Non-economic and economic services.
 - Local and cross border services, small and large suppliers.
 - Differences as to use of markets in supplying SGI.
- BUPA and TV2
 - Risk equalization schemes do not fit easily with Altmark criteria.
 - Compensation might be outside 107 (1) even if none of the Altmark criteria are fulfilled.



Limiting the scope of Altmark

- Altmark – obligation to notify if all four criteria are not met
 - 2011 notice interprets Altmark criteria.
- Commission decisions exempts from obligation to notify
 - 2005: Relieving hospitals etc.
 - 2011: Wideness the scope to include social services.
 - 2011: Lowers the threshold for other services to 15 mio. € /year.
- Conditions for being exempted from obligation to notify
 - Compensation must not exceed costs + profit.
 - Obligation to verify that no overcompensation + claw back.
 - Obligation to inform the Commission.
- 2011 de minimis regulation exempts local services.
 - Compensation below 500.000 € over a 3 year period.



Limiting the scope of Altmark

- The Commissions field of scrutiny
 - Large compensation amounts outside the social and health sectors, that do not fulfill the Altmark criteria.
- Decentralizing state aid control
 - State aid control of SGI-compensation is to a large extent left to the member states – guidelines are set out.
 - Member states safeguard market access and competition
 - In the Health care and Social services sectors.
 - In fields with compensation below 15 mio. € /year.
 - Services are not necessarily provided at lowest cost
 - No obligation to tender.
 - No efficiency requirements.



First Altmark criteria

- A public service obligation should be entrusted by a public act
- Judgment in case C-437/09, AG2R
 - A SGI mission can be entrusted in a different manner than set out in Altmark and the 2005 guidelines.
 - Great margin of discretion for the member states when organizing and delivering SGI's.
- 2011 notice on interpretation para. 51-53
 - Emphasis on the public act of entrustment.
- 2011 guidelines for compatibility para. 15-16
 - Wider scope for different types of entrustment.



Fourth Altmark criteria – a well run company

- Compensation to an inefficient provider picked by the state.
 - The SGI is potentially not provided at the lowest cost to society.
- Fourth criteria is difficult to apply in practice
 - Guidance in Q&A and 2011 notice on interpretation.
- 2005 Commission package (decision and guidelines)
 - Did not require the fourth criteria to be met.
- 2011 Commission package
 - Decision and guidelines do not require the fourth criteria being met – the provider does not have to be cost efficient.
 - Guideline requires the member state to impose efficiency incentives on the provider.



Fourth Altmark criteria – the use of tenders

- Award of a contract by the use of a tender procedure
 - Presumption that no financial advantage as the contract is awarded on market conditions.
 - The SGI is delivered at the lowest cost to society/market price.
- The 2011 interpretation notice – fourth Altmark criteria
 - Flexibility as to procurement procedures and award criteria.
- The 2011 decision – do not require tendering the contract.
- The 2011 guidelines for compatibility
 - Observance of procurement rules is a condition for exemption.
 - De facto pressure for using tender procedures.
 - Draft procurement directives – Annex IIB to be abolished.



Clarification obtained by Altmark II

- Altmark I
 - Four conditions which make it possible to rule out that compensation for SGI amounts to a financial advantage and therefore no obligation to notify measure to the Commission.
 - Covers a varied field of activities, conditions difficult to apply.
- Altmark II
 - Social services not to be notified if conditions are fulfilled.
 - Local services are exempted up to 500.000 €/ 3 years.
 - Clarification of the effect for the obligation to notify of using tender procedures when awarding the contract.
 - Clarification of key concepts – net avoided costs, profits etc.



Clarification obtained by Altmark II

- Competition issues after Altmark II
 - Member states safeguard market access and competition.
 - In Social services and Health care Sectors.
 - In other sectors with compensation below 15 mio. € /year.
 - Increased use of procurement procedures might safeguard this.
 - Duration of a SGI-contract.
 - The decision – 10 years, unless special circumstances.
 - Guidelines – the duration of the depreciation period.



Clarification obtained by Altmark II

- Efficiency issues not solved by Altmark II
 - SGI's are not always provided at least cost to society.
 - This issue is probably outside the powers of the Commission vested in article 106 (TFEU).
 - Increased use of procurement procedures when awarding the contract might remedy this.

