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*State aids & Compensation for
Services of General Economic Interest*



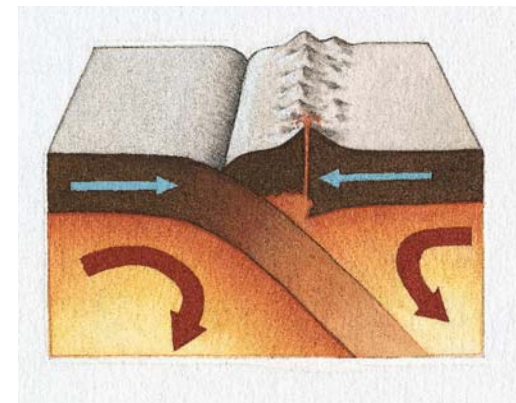

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Services of General Economic Interest



- SGEI: services whose provision to the public is essential. This justifies a degree of market intervention.
- It obviously distorts competition and affect trade between Member States.
- Politically “hot” topic: two tectonic plates (Market Integration vs. National Public Services Objectives)
- The current legal framework:
 - Article 87(1) EC – Prohibition of State aid
 - Article 86(2) EC – Derogation for SGEI
 - Article 16 EC
- Two questions:
 - Is it State aid?
 - If so, is it compatible?
- Finding the right balance



To be or not to be (State aid)?



- Is financial compensation to SGEI operator a “State aid”?
- If so:
 - Obligation to notify
 - Compatibility control by the Commission
 - Risk of recovery of unlawful aid
- If not: National sovereignty preserved.
- This became an issue after liberalisation of utilities
- Transparency Directive
- Case Law hesitant



The Pendulum Swings



- Is it a State aid or not?
 - It is not:
 - ECJ *Used Oils* (1985),
 - EC *La Poste* (1995)
 - It is:
 - CFI *La Poste* (1997),
 - ECJ *Banco Exterior* (1994),
 - CFI *SIC* (2000),
 - ECJ *CELF* (2000)
 - It is not:
 - ECJ *Ferring* (2001)
 - It rather is:
 - Advocate-general Jacobs in *GEMO*
 - Advocate-general Stix-Hackl in *Enirisorse*
 - Advocate-general Léger in *Altmark*
 - It depends:
 - ECJ *Altmark* (2003)



The Altmark Test (Case C-280/00, par 87-94)



- In principle compensation is not aid...

It follows from those judgments 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 favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) of the Treaty.

- ... provided that four conditions are fulfilled

However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied.

- First, the obligations must be defined and entrusted.
- Second, the parameters on the basis of which the compensation is calculated must be established in advance.
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred.
- Fourth, [either tender or benchmarking]
 - Either the undertaking is chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community,
 - or the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.
- Implicit efficient requirement
- Commission's practice
- *"It is easier for a camel to squeeze through the eye of a needle..."*



Life after Altmark - Compatibility



- The Commission resisted the temptation to (re)interpret *Altmark*.
- Instead the Commission adopted the “Post-Altmark Package”:
 - Commission Decision 2005/842/EC
 - For small and medium-size SGEIs
 - Block exemption – no notification
 - Based on Article 86(3) EC
 - It clarifies compatibility
 - More flexible than Altmark
 - Guidelines
 - For big SGEIs
 - Need to notify
 - Soft law instrument
 - It clarifies compatibility
 - More flexible than Altmark
- “Fishnet effect”
- The package was well received.
- The Commission comes to the rescue of SGEIs.



Defining and Entrusting SGEIs



- In principle, it is up to the Member State to define SGEI
- But there are limits
 - EU harmonized sectors
 - EU Law Concept: maximum standard
- Need of an act of the State to entrust an operator with the operation of a SGEI
- Tender: stick or carrot?
 - Under *Altmark*, it is a carrot: no aid if competitive tender.
 - Under Article 86(2): neutral
 - But public Procurement case law (*Parking Brixen*) shows the stick.
 - Commission rightly reluctant to follow that approach



Proportionality and the Efficiency Gap



- Traditional case law under Article 86(2) EC: the proportionality of the compensation allows to compensate the actual cost of the operator, irrespective of its level of efficiency.
- However, the 4th condition of *Altmark* only allows compensation of the costs that a typical well run – i.e. efficient – undertaking would have incurred.
- What if the actual costs of the operator are higher than those of the ideal model?
- Commission Decision 2005/842/EC considers that compensation of that “efficiency gap” is (aid but) compatible under Article 86(2) EC.
- Not an example of “refined economic approach” but reasonable.



BUPA: Ferring revisited?



- Some are waiting for another swing of the pendulum.
- Is the CFI *BUPA* judgement (2008) a kind of *Ferring* revisited?



- Risk-equalization scheme, not a classical SGEI compensation.
- The fourth Altmark condition is not applicable to such a scheme
- But it remains applicable to the classical compensation models
- The CFI *Deutsche Post* judgement (2009) confirms that the four Altmark conditions are to be applied strictly.

SGEI in the Lisbon Treaty



- Article 16 EC would become Article 14 TFEU if and when the Lisbon Treaty enters into force.
- No substantive changes, just a new legal basis to establish economic and financial conditions for the functioning of SGEIs.
- Paradox 1: the solidarity values behind SGEI should lead to enhanced integration at European level, not to closure behind national borders
- Paradox 2: an EU legal basis for SGEI without a positive EU competence on SGEI. What for?
- To adopt rule – a “framework directive” – protecting SGEI operators from the rigours of Competition policy, in particular State aid. The key element is that such rules – contrary to a Treaty revision – may be adopted by qualified majority.
- The Commission has refused proposing such a framework directive. Last time in November 2007.
- So, the only real new element as regards SGEI in the Lisbon Treaty is this new legal basis. Would it ever be used?
- It overlaps with existing legal basis.



Conclusions



- Applying State aid rules to SGEI is like belling the cat of Esopo's fable
- Everybody (but the cat) agrees that it is a good idea but...
- How to do it? Who does it?



- The combination of *Altmark* and the Post-Altmark package creates a much more balanced situation.
- The current economic and political context needs reasonable but also effective rules on public intervention in the economy.