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Public Service Obligations and the State Aid Control

(The Altmark-criteria in practice in the European Union Courts)

The Communication from the Commission in 2012[1] established: "Services of General economic interest (SGEIs) not only routed in the shared values of the Union but also play central role in promoting social and territorial cohesion." In other respects, however, – as *Cruz* states – "SGEIs are complicated entities. There are at once economic and social, private and public."[2]

The SGEIs encompass important fields of the Member States' market economy. *Reghini* notes that in 2007 public services gave more than one fourth of the EU-27 GDP and that more than 30% of the total workforce was employed in this sector.[3] We mention a few fields under the sector relevant regulations such as: the transport industry (in 2007 it accounted for 4.6% of GDP in the EU-27)[4], the energy sector (around 7% of EU-27 GDP)[5], Waste and Water Services (equivalent to 2.5% of the EU's GDP)[6], Postal Services (0.7% of EU-27 GDP), Financial Services (accounted for 5.7% of EU-27), Public Service Broadcasting (accounted for 5% of European GDP), Health Care (which represented from 6 to 10% of EU countries' GDP depending on each Member State). The importance of these fields is clearly shown by the fact that between the period of September 2008 and the end of 2010 more than 10% of EU Member States' GDP was spent on redressing the stability of financial institutions in difficulties and re-establishing the normal functioning of financial markets.[7]

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1 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 (2012/C 8/02).

2 CRUZ, J.B. (2005) *Beyond Competition: Services of General Economic Interest and European Community Law*, in : DE BURCA, G. et al: Law and the Welfare State p. 169-212.

3 REGHINI, E.: *The Reform of the State Aid Rules on Financing of Public Services*. EStAL 2/2012 supplement p. 3.

4 Commission Staff Working Paper: SEC (2011) 397. p. 3.1.1.

5 *Ibid.* p. 3.2.1.

6 *Ibid.* p. 3.3.1.

7 Commission Staff Working Paper (Oct 2011) on "The effects of temporary state aid rules adopted in the context of the financial and economic crises." The document entitled "A DG competitions review of

The SGEIs (besides their importance) are also the centre of attention, because the effective and reliable functioning of these public services affects the broad sphere of citizens. In this respect, their activities are politically sensitive. Member States protect their related (and remaining) competencies very carefully.

As Advocate General *Poiares Maduro* emphasises in the definition of whether an activity exhorted by the State or by a public entity was of economic nature "The Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States. (...) The power of the State which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases. It is therefore essential to establish a clear criterion for determining the point at which competition law becomes applicable. In principle, the rules of competition law apply only to economic operators who participate on a market and not to States, save where they pay aid to undertakings (Articles 88 EC to 92 EC). However, the need for consistency means that if a State ratifies decisions taken by undertakings or if it conducts itself in practice as an economic operator, Articles 81 EC to 86 EC may apply to it. It should be added that Article 86(2) EC would be rendered redundant if competition law were no longer to apply as soon as the State is present on a market."[8]

In this sensitive field, it seemed particularly important to clarify under what conditions individual Member States can take part in the financing of general public sectors so that it would be not qualified as State aid. The answer is found in the judgement of *Altmark* case on 24. 7.2003. In this judgement, the Court ruled 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 (107(1) of the Treaty). However, for such compensation to escape qualification as State aid in a particular case, a number of conditions must be satisfied.

- (...) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. (...)

- (...) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. (...) Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been

guarantee and recapitalisation schemes in the financial sector in the current crises" 7 August 2009 2nd appendix presumes that EU public intervention in the banking sector is 12.6%.

[8] Opinion of Advocate General *Poiares Maduro* delivered on 10 November 2005, Case C-205/03P. FENIN, p. 26.

established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article (107(1) of the Treaty).

- (...) Third, 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 (...)

- (...) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not 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, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations'[9].

Most analysts considered this judgement to be a "Landmark decision"[10] and in general it was positively welcomed in academic writings. 10 years have passed since its pronouncement. It is worth examining what kind of difficulties have arisen in its application within EU Courts and what further questions need to be clarified.

I. Preliminary questions

a) The "retroactive" use of the Altmark-criteria

In more than one case the question arose[11] of whether it is possible to use the *Altmark* criteria in cases in which the Commission has already ruled its contested decision prior to the *Altmark* ruling. In response to this question, the *BUPA* judgement gave the following answer: "the interpretation which the Court of Justice gives of a provision of Community law (...) is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force. It follows that the provision as thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgement in question and it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relationships established in good faith."[12]

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[9] C-280/00 Altmark Trans GmbH et Regierungspräsidium Magdeburg v Nachtverkehrsgesellschaft Altmark GmbH, [2003] 87-93.

[10] As an example: BUENDIA SIERRA, J. L.-MUÑOZ DE JUAN, M.: *Some Legal Reflexions on the Almunia Package*. In: EStAL 2/2012.p. 64.

[11] For example in the judgements of the CFI, T-289/03 BUPA ea./Commission [2008], or in the T-388/03 Deutsche Post et DHL International/Commission [2009].

[12] T-289/03 BUPA ea. v. Commission [2008] 159.

b) Services regarded as SGEI

Court practice already clarified prior to the *Altmark* decision that: "SGEIs are services that exhibit special characteristics as compared with those of other economic activities."[13] The *Olsen* judgement[14] (arguments between parties) quotes the "Communication from the Commission on services of general interest in Europe" which says: "services of general interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. (...)However, if the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations." [15]

In connection with this, point 46 of the *Communication from the Commission 2012* quotes the statement from the *BUPA* judgement according to which: "In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI."[16]

If there is a debate whether certain services should have been qualified by their characteristic of general economics, competitors (or potential competitors) must prove their ability to deal with the task without rival political power. In the *Olsen* case the CFI established that in cases when the provider entrusted with SGEI tasks rendered its services in competition with other market players – in that particular case the applicant – competitors must prove that they would have been able to ensure similar services in terms of continuity, regularity and frequency on all the routes served by the company under the provisional arrangements.[17]

In other cases, when the task can be carried out by companies working under normal market conditions it is not justified to organize the work in the frame of SGEI. As laid down in the *Communication from the Commission in 2012*: "As for 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." In connection with this, point 49 of the Communication mentions the example of the broadband sector, for which the Commission has already made clear decisions that in areas where private investors have already invested in broadband network infrastructure and are already providing competitive structure, setting up parallel broadband infrastructure should not be considered as an SGEI.

Moreover, the *BUPA* judgement shows that the Member State's power to take action and its power to define SGEIs is not unlimited and cannot be exercised arbitrarily for

[13] See for example C-179/90 Merci Convenzionali Porto di Genova [1991] 27, C-266/96 Corsica Ferries France SA [1998] 45.
[14] T-17/02 Olsen/Commission [2005]. 205.
[15] OJ 2001 C17 4, p 14.
[16] BUPA judgement (n 12, above) 166-169, 172.
[17] Olsen judgement (n 14, above) 219.

the sole purpose of removing a particular sector from the application of the competition.[18]

Numerous questions aros in particular, for example, certain recognition as SGEI mission in the health sector. The *BUPA* judgement for instance shows the difference between the definition of state controlled market activity and an SGEI mission controlled by the relevant authorities. SGEI missions should by definition serve the general or public interest. In addition, the national legislature acting in the general interest in the broad sense imposes certain rules of authorisation, of functioning or of control over all the operators in a particular sector does not in principle mean that there is an SGEI mission. The recognition of an SGEI mission could impose an obligation on the same market on a large number of, or indeed on all, active market players.[19]

The *CBI* judgement, however, points out that: "although the conditions stated in the Altmark judgement (...) and in the SGEI package concern all sectors of the economy without distinction, their application must take into account the specific nature of the sector in question."[20] It is necessary to show flexibility with regard to the particular character of certain fields in which SGEI missions are treated. In the hospital sector the lack of general and commercial dimension must also be taken into consideration. The criteria laid down by the Court of Justice in the Altmark judgement concerning transport, which is unquestionably an economic and competitive activity, cannot be applied as strictly to the hospital sectors.[21] Moreover it points out that: "Article 86(2) EC in the hospital sector concerned must take account of respect for the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care. That consideration stems, inter alia, from Article 152 (5) EC."[22]

II. Clearly defined public service obligations

According to the *Altmark* judgement's first criterion, the company that receives compensation must be entrusted with obligations of general interests and these engagements must be clearly defined. The *CBI* judgement quotes under Article 4 of Decision 2005/842: "responsibility for operation of the [SGEI] shall be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State", such acts to specify, in particular 'the nature and the duration of the public service obligations' and 'the undertaking and territory concerned'."[23] The public service missions may be defined with legislative and regulatory acts, but the mandate may also encompass contractual acts, provided that they emanate from the public authority and are binding.[24] It also notes that: "in that

[18] BUPA judgement (n 12, above) 168.
[19] BUPA judgement (n 12, above) 178-179.
[20] T-137/10 Coordination bruxelloise d'institutions sociales et de santé (CBI)/Commission [2012] 85.
[21] CBI judgement (n 20, above) 88-89.
[22] CBI judgement (n 20, above) 92.
[23] CBI judgement (n 20, above) 102.
[24] CBI judgement (n 20, above) 105-109.

regard, (...) a body may be regarded as endowed with the exercise of public power if it is composed of a majority of representatives of the public authority and if, when adopting a decision, it must satisfy a certain number of criteria of general interest."[25]

The *Olsen* judgement also states that: "it is not apparent either from the wording of Article 86(2) EC or from the case-law on that provision that a general interest task may be entrusted to an operator only as a result of a tendering procedure."[26] Here it must be mentioned that according to the *Olsen* judgement "a public service task may be entrusted to an operator [if the operator so requests,] through the grant of a public service concession".[27] The clear definition of public service obligation is never the object of questions, even if the provider changes its schedule of services and the table of rates prior to the approval from the competent authorities.[28]

III. Parameters of compensation

According to the second criterion in the *Altmark* judgement, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.[29]

The Member State has wide discretion not only when defining an SGEI mission but also when determining the compensation for the costs connected with the SGEIs.[30] The *BUPA* judgement, however, states that these "transparent parameters must be defined in such a way as to preclude any abusive recourse to the concept of an SGEI on the part of the Member State".[31] In the *TV2 Denmark* cases the Court of First Instance noted that: "the second Altmark condition leaves Member States free to choose how to comply with it in practical terms, if the determination of the amount of licence fee was objective and transparent"[32] It adds, however, that: "The Commission's actual legal and economic considerations on which governed the setting of the amount of licence fee income payable must be based on these respects."[33]

In certain cases the Commission doesn't have the required data that would allow the objective and transparent calculation of the basic parameters of the contributions, with the result that the Commission's decision must be annulled. This happened in the *Deutsche Post AG* case,[34] in which the CFI judged that the Commission did not carry out an examination of the cost of the services of general interest provided by *La Poste* compared with the costs which a typical undertaking would have borne and to prove

[25] CBI judgement (n 20, above) 111.
[26] Olsen judgement (n 14, above) 239.
[27] Olsen judgement (n 14, above) 188.
[28] Olsen judgement (n 14, above) 202.
[29] CBI judgement (n 20, above) 189.
[30] CBI judgement (n 20, above) 91.
[31] BUPA judgement (n 12, above) 214.
[32] T-309/04., T-317/04., T-329/04, and T-336/04 TV2/Denmark ea. v. Commission joint cases judgement 227-228.
[33] TV2/Denmark judgement (n 32, above) 230.
[34] T-388/03 Deutsche Post and DHL International v. Commission [2009] 116 and following.

what kind of benefits may have occurred from the free disposal of real assets that were reserved for pension payments. In this case, to ensure the security of the pension rights interest of *La Poste* workers employed as public officials, *La Poste* in 1992, after its transformation into an autonomous public undertaking, had a reserve of EUR 100 million, which was withdrawn in 1997. As counter-compensation, the State provided *La Poste* with real assets free of charge. The Commission should have asked the Belgian State for clarification concerning the worth of these real assets. Without this data it is possible that *La Poste* would have been given significant increase of capital without cause. On appeal the Court of Justice upheld that decision.[35]

On the other hand, it accepted the transparent and objective characters of the so-called *risk equalisation scheme* created by the Irish authorities and mentioned by the CFI in the *BUPA* case. It lays down the frequency of data communication that private insurance companies must provide about their risk profile and the corresponding costs according to age groups and gender of the persons insured. In the light of that information, the Health Insurance Authority (HIA) makes a comparative assessment on what method of calculations and mathematical formulae is needed to calculate the method of adjustment. The CFI stated that the complexity of the economic and mathematical formulae which govern the calculations to be carried out does not in itself affect the precise and clearly-determined nature of the relevant parameters.[36]

IV. Amount of compensation and control of overcompensation

According to the third *Altmark* criterion, the compensation given cannot be higher than the measure needed to cover the whole or partial public service obligation costs, bearing in mind the income and reasonable gains of the fulfilment of that commitment.

The jurisprudence following the *Altmark* judgement emphasises first and foremost that, in connection with this series of questions, the Commission's scope and the following court revision is necessarily limited. As regards the scope of control of "Member States in defining an SGEI mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts, the scope of the control which the Commission is entitled to exercise in that regard is limited to one of manifest error".[37] The Commission must carefully evaluate all the information available at the moment of decision in the given case regarding the size of SGEIs and it must make a precise calculation in order to evaluate the direct proportion of the required counter value.

In the *Valmont* case[38] for example, the Commission examined whether the local municipality signed an agreement for the sale of some three hectares of undeveloped land intended for industrial purpose to build a car park, below its commercial value, to the company Valmont, and whether these parking lots could be used by third parties, or

[35] C-148/09-P Kingdom of Belgium (applicant) v. Deutsche Post AG and DHL Int., (applicants at first instance) and the European Commission (defendant at first instance).
[36] BUPA judgement (n 12, above) 216-217.
[37] BUPA judgement (n 12, above) 220-221.
[38] T-274/01 Valmont v. Commission [2004].

companies and under what conditions. The CFI established that if, with regard to the company which bears a burden in the public interest,[39] in order to discharge public service obligations, the use of land which it owns, so that those undertakings do not enjoy a real financial benefit, then the measure does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them. Since the Commission did not take this into consideration, it couldn't prove that that the construction of the car park contained an element of State aid.[40]

The Commission cannot simply estimate the amount of compensation, being aware of the actual amount of the net proceeds of disposal at the time of the adoption of the decision.[41] In such cases "it cannot be accepted that the Commission is entitled to rely on mere forecasts, even though they do not reflect the true position, so as not to delay the adoption of its decision."[42] Therefore the CFI stated that the contested decision is vitiated by a manifest error and it annulled the decision.[43] In the *Deutsche Post AG* case[44] the General Court stated that the net additional costs associated with the provision of an SGEI obligation must be counted and they must be compared with the resources transferred in respect of compensation for those same obligations of calculation. "It is only in the light of the result of that comparison that the existence of possible overcompensation can be established." If the Commission failed to examine (...) that (...) the total amount of the transfer payment exceeds (...) the amount of overcompensation, the Commission is using a defective method and the decision must be annulled.[45] It requires careful consideration whether a company or system entitled to an SGEI mission gets overcompensation on the ground that their service is secured by another already existing infrastructure. In the *Iliad* judgement the General Court stated that in these cases the plaintiff must bear the burden of proof.[46]

Provisions designed to avoid overcompensation often demand the use of complicated control and calculating methods, for instance during the examination of risk clearing procedures of private health insurance systems[47], or in the *CBI* case. In the latter, the General Court stated that within the mechanism for financing hospital missions, the law on general disposition of hospitals that defines the methods of avoiding non-refunded costs is not sufficient; the same norms should exist for the definition of the Brussels regional subventions used to refinance municipalities.[48] According to the General Court, "in particular, where different requirements are imposed on the public and private bodies entrusted with the same public service, which presupposes a different level of costs and compensation, those differences, must be

[39] Valmont judgement (n 38, above) 124.
[40] Valmont judgement (n 38, above) 129, 133, 137-138.
[41] T-349/03 Corsica Ferries France v. Commission [2005] judgement. 275.
[42] Corsica Ferries judgement (n 41, above) 292.
[43] Corsica Ferries judgement (n 41, above) 300.
[44] C-399/08P Commission v. Deutsche Post judgement [2010] 37.
[45] Deutsche Post judgement (n 44, above) 46-48.
[46] T-325/10 Iliad ea. v. Commission [2013] 224, 228-231.
[47] See BUPA judgement (n 12, above) 220-244.
[48] CBI judgement (n 20, above) 253-257.

clearly shown in their respective mandates."[49] Similar problems may occur with the methods preventing overcompensation in the financing of social services.[50]

V. Selection of the SGEI provider

We distinguish two sub-cases in the fourth *Altmark* criterion: a) the provider is chosen through a public procurement procedure, or b) the level of compensation determined is based on an analysis of the costs of an average "well-run" undertaking which is adequately provided with the necessary means.

a) Amount of compensation where the SGEI is assigned under an appropriate tendering procedure

One possible method to fulfil the fourth *Altmark* criterion is if the authorities indicating public functions use an open, transparent and discrimination-free public procurement procedure to choose the company they want to entrust with this task. The Directive 2004/17/EC of the European Parliament and of the Council contains[51] the public procurement procedure in the fields of water, energy, transport and postal services sectors. A separate Directive exists for public works contracts, public supply contracts and public service contracts.[52] In these fields public procurement procedures are compulsory for most cases. Authorities charged with the fulfilment of public procurement procedures can use this solution even if there isn't an EU regulation.

The *Olsen* judgement – as mentioned earlier – also states that: "it is apparent either from the wording of Article 86(2) EC or from the case-law on that provision that a general interest task may be entrusted to an operator only as a result of a tendering procedure."[53] In these circumstances the Commission cannot be asked to account for the lack of proceeding separately in the contested decision.

In the *Iliad* judgement the General Court found a multi-step public procurement procedure acceptable.[54] In the first step, local authorities conducted an initial study on a given field with the help of service providers, of the possibility to cover a given area with broadband network, what the characteristic of this service would be, the project's estimated costs and the possible method of public co-financing. On the basis of these studies, the department already fixed the total amount of subvention at the beginning of the procedure. In the second step, the local authorities called for tenders and in the consultation phase specified for the six candidates the different parameters of the

[49] CBI judgement (n 20, above) 95.
[50] CBI judgement (n 20, above) 277.
[51] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector OJ L 134 2004.04.30 pp. 1-114.
[52] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector OJ L 134 2004.04.30 pp. 114-240.
[53] Olsen judgement (n 14, above) 239.
[54] T-325/10 Iliad ea. v. Commission judgement [2013] 244.

planned investment, the future tender's public service obligations and the selection criteria. The authorities then compared the quantitative and qualitative aspects of the candidates' offers and finally chose the company that won the assignment (paying attention to which tender requested the lowest subvention).[55]

The *Communication from the Commission* 2012[56] states that: "an open procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted procedure can satisfy the fourth Altmark criterion, unless interested operators are prevented to tender without valid reasons". It states that: "a competitive dialogue or a negotiated procedure with prior publication confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases". According to the Communication, however, an open procedure without prior publication does not satisfy the fourth Altmark criterion.

As to the award criteria, the 'lowest price' obviously satisfies the fourth *Altmark* criterion and as the Communication states the 'most economically advantageous tender' is also deemed sufficient.[57] In the *Iliad* judgement the General Court stated that the tender winner made the lowest bid and the applicants didn't provide any arguments that would have proved that the tender winner had the economically most advantageous offer. Therefore judgement in this case could be pronounced even without the further questioning of the General Court whether the lowest rate or the economically most advantageous proposal better corresponds to the fourth Altmark criterion's "at the least cost to the community" part.[58]

b) Amount of compensation if the SGEI is not assigned under tendering procedure

In cases, when a company's SGEI task assignment does not occur within the public procurement procedure, the level of compensation must be defined on the basis of an analysis of the costs which a typical well-run undertaking adequately provided with the necessary means to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.[59]

If in a certain case there was not such detailed analysis, the Commission cannot state – as in the *TV2 Denmark* case – that the Kingdom of Denmark did not respect the fourth *Altmark* criterion.[60] The CFI also had a similar point of view in the *Deutsche Post AG* case. It stated that the Commission did not carry out an examination which enabled it to determine whether the level of compensation paid to *La Poste* was fixed on the basis of an analysis of the costs which a typical well-run undertaking, adequately provided with the necessary means to be able to meet the necessary public service requirements,

[55] Iliad judgement (n 54, above), 244.

[56] The *Communication from the Commission* 2012/C 8/02 p. 66.

[57] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services on general economic interest 2012/C 8/02 p 67.

[58] Iliad judgement (n 54, above) 252.

[59] Exception, if the given service has a commonly accepted market rate. See Communication from the Commission 2012 69p. and under the same point mentioned Commission Decision.

[60] TV2/Denmark 231-234.

would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Commission did not carry out an examination of the cost of the services of general interest provided by *La Poste* compared with the costs which a typical undertaking would have borne, an appraisal which might have enabled it to find that the measures examined did not constitute State aid.[61]

In the *BUPA* judgement the CFI stated that: "the fourth Altmark condition, in that it requires a comparison of the costs and receipts directly linked to the supply of the SGEI, cannot be strictly applied to the present case."[62] From the point of view of the Commission, the risk equalisation scheme (RES) is not intended to compensate for an identified cost occasioned by the supply of a private medical insurance (PMI) service. The RES payments reflect the risk profile differentials of those two insurers by comparison with the average market risk profile. With regard to the neutrality of the compensation system constituted by the RES by referring to the receipts and profits of the PMI insurers and to the particular nature of the additional costs linked with a negative risk profile on the part of those insurers, the Commission was entitled in this case to consider the existence of State aid, there was no need to draw a comparison between the potential recipients of the RES payments and an efficient operator.[63] Finally, the CFI stated that the Commission – in the light of the purpose of the fourth Altmark condition – was none the less required to satisfy itself that the compensation provided for by the RES did not entail the possibility of offsetting any costs that might result from inefficiency on the part of the PMI insurers subject to the RES. In that regard, the Court considered it sufficient that the Commission expressly found in the contested decision that the RES took into account the PMI insurers' own average claim cost, thus avoiding an equalisation of their average costs per cell of insured population and allowing the insurers to keep the benefit of their own performance.[64]

Conclusions

Since the *Altmark* judgement's introduction the European Court of Justice and the General Court have used the *Altmark* criteria in about 20-25 cases.[65] The cases analysed clearly show that the criteria provide an excellent basis in the judgement of similar cases. The first three criteria in particular could be applied with the usual judicial interpretation techniques without greater difficulties.[66]

[61] T-388/03 Deutsche Post and DHL International v Commission [2009] 114-116.

[62] BUPA judgement (n 12, above) 246.

[63] BUPA judgement (n 12, above) 246-248.

[64] BUPA judgement (n 12, above) 249.

[65] In this study cases that only mentioned the Altmark criteria in a formal way without the criteria being significantly used in the final judgement were not mentioned.

[66] KLASSE, M. came to similar conclusions analysing the decision-making process of the Commission in the study entitled: "*The Impact of Altmark: The European Commission Case Law Reponses*". In: SZYSZCZAK, E. – GRONDEN, J. W. (eds.): Financing Services of General Economic Interest. TMC Asser Press, The Hague, The Netherlands, 2013. p 50.

The application of the fourth *Altmark* criterion is somewhat different. The *BUPA* case in particular shows, that in situations where State intervention concerns the whole of an economic sector (e.g. private medical insurance), where neither the possibility for tender nor of well-organised competing companies' benchmark is available in the estimation of compensation costs, alternative solutions must be found. In the *BUPA* judgement the CFI accepted a solution that had the same goal and the same ideal as the fourth *Altmark* criterion, which is to ensure that the SGEI in question is supplied at the least cost to the community.[67]

Serious complications may occur in practice in the use of the fourth criterion as the 2011 Commission consultation by the Member State representatives and other stakeholders on the applications of the new SGEI package indicates.[68] The observation demonstrates that a large number of consultation participants would welcome additional clarification in relation to a number of key concepts. They have drawn attention to the fact, that the application of the "well-run" undertaking benchmark is creates difficulties for both the acting authorities and the service providers. They found very complicated to choose a company with the right benchmark in certain market segments.

The participants have identified difficulties arising from the tender branch of the fourth Altmark criterion. Most of them mentioned that relevant tender procedure results responding to EU provision of law should be established in a such way that it excludes the possibility of otherwise forbidden State aid at a later stage. Many of them proposed that the standard applied by the Court of Justice ("provision of the service at the least cost to the community") should be interpreted as being fully in line with the requirements under EU procurement law ("most economically advantageous tender").[69]

Despite all the difficulties and criticism, it can be stated that the Altmark criteria established in 2003 met all expectations. It made it clear when, under Article 106 (2) TFEU, public contributions should not be regarded as State contributions. Therefore, the *Altmark* judgement can rightly be regarded as a "Landmark decision". Furthermore, since the *Altmark* criteria were incorporated[70] into the new revised State Aid rules for SGEI package[71] in 2011, there is high hope that it will remain a beacon of light in numerous legal disputes concerning State aid for a long time.

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[67] BUPA judgement (n 12, above) 246, 249, 255–257.

[68] The experience of the consultation found in the Commission Staff Working Paper: The application of the EU State Aid rules on services of general economic interests 2005 and The Outcome of the Public Consultation. (SEC 2011 397 23.03.2011. document) p. 4.3.

[69] 2011 Staff Working Paper p. 4.3.2

[70] Sources for example Merola and Ubaldi study, state that "both the 2005 SGEI package and the 2011 reform have derived from the Altmark criteria". MEROLA M. – UBALDI T.: *The 2011 Almunia Package and the Challenges Ahead: Are the New Rules Flexible Enough to Fit the Wide Variety of SGEI?* EStAL 2/2012. p. 31.

[71] The new package contains four elements: Communication from the Commission on the application of the EU state aide rules to compensation granted for the provision of service of general economic interest (OJ , 11.01.2012, pp 4–14); Commission regulation EU no 360/2012 of 25 April 2012 On the application of Article 107 and 108 of the Treaty of the Functioning of the European Union to the *de minimis* aid granted to undertaking providing service of general economic interest (OJ L114 26 pt. 4. 2012, pp 8–13); Commission decision of 20.12.2011, (OJ L7, 11. 01.2012, pp 3–10); Communication from the Commission, EU framework state aid in the form of public service compensation (2011) (OJ C8, 11. 01. 2012, pp 15–22).