



Services of general economic interest

JASPERS Networking Platform

State Aid Legal Framework for the 2014-2020 programming period

8 July 2014

Treaty provisions

Article 107(1) as interpreted by *Altmark* (C-280/00)

Article 106(2):

Undertakings entrusted with the operation of services of general economic interest ... 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.

Outline of Altmark

No advantage (and therefore no state aid) if the four Altmark conditions are met:

- Entrustment with clearly defined public service obligation
- Parameters for calculating the compensation are established in advance in an objective and transparent manner
- No overcompensation (compensation limited to net costs, taking into account the relevant receipts and a reasonable profit)
- Tender or compensation based on costs of a typical, well-run undertaking



Aims of the "SGEI package"

Help clarify when compensation to SGEI providers is and is not aid

Set out compatibility conditions for compensation that does constitute aid

Many common features across the package



The 2011-2012 SGEI package

Communication:

Guidance on whether support constitutes state aid

De minimis regulation:

Very small amounts deemed not to be state aid

Decision:

Exemption for small amounts and social services

Framework:


Compatibility rules for large, non-social services

I. SGEI Communication

- Clarifies key concepts underlying the application of the State aid rules to public service compensation
- "This Communication is without prejudice to the relevant case law of the Court of Justice of the European Union" (point 7)
- Key elements:
 - General elements of the notion of aid: undertaking, state resources, effect on trade
 - The four *Altmark* conditions

Undertaking

"Entities engaged in economic activity"

- Offering goods or services on a market
- Whether market exists depends on organisation by authority  Differences between MS
Developments over time
- Irrelevant whether entity set up to generate profit

Examples

Non-economic: exercise of public powers

Activity forms part of the essential functions of State or closely connected to those activities

Examples: army or police, air navigation safety and control, etc.

Social security schemes:

schemes based on solidarity vs. economic schemes

- Affiliation compulsory?
- Scheme is non-profit?
- Benefits independent of contributions?
- Etc.

Healthcare

- Universal free coverage vs. competition to provide services against remuneration

Education

- Serviced financed primarily by public funds or commercial revenues?

Effect on Trade

- Market opened up to competition by EU or national legislation or de facto by economic development
- Irrelevant: in-house situation [also irrelevant for whether economic activity+ whether service can be defined as SGEI]

Altmark 1: SGEI Definition

- Special characteristics as compared to other economic activities
- MS have wide margin of discretion for definition
- Commission: only checks for manifest error
- Services are not and cannot be satisfactorily provided by the market “under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State” (Example: broadband sector)
- Addressed to citizens or in the interest of society as a whole

Altmark 1: Entrustment act

Has the SGEI been entrusted to the provider?

Flexibility as to form

- One or more acts
- Legislative, regulatory and/or contractual

Requirements as to content

- Content and duration of obligations, undertaking and territory concerned, special or exclusive rights
- Parameters for calculating, controlling and reviewing compensation and avoiding overcompensation

Altmark 2: Parameters of compensation

Must be clear how compensation will be calculated

Does not have to be clear in advance exactly what the amount will be

Altmark 3: No overcompensation

Compensation must not 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

What does this mean in practice?

Altmark 3: Check for overcompensation

$$\begin{array}{r} \text{Revenues} \\ + \text{ Compensation} \\ - \text{ Costs} \\ \hline \text{Reasonable profit} \end{array}$$

Altmark 4: Efficiency

Selection of provider through a public tender procedure

or

Benchmarking of costs against those of a well-run provider

II. *De minimis* regulation

Aid not exceeding EUR 500 000 over three years

Must be for provision of SGEI

Compensation that meets the conditions is deemed not to be aid

No cumulation with other compensation for the same service

III. SGEI Decision

Compensation that complies with the Decision is compatible and exempt from notification

Decision: scope

- Aid for hospitals and social services, regardless of amount
 - *meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups*
- Aid below EUR 15 million annually, except in transport
- Aid for air and maritime transport
 - Links to islands (below 300 000 passengers p.a.)
 - Ports (below 300 000 passengers p.a.)
 - Airports (below 200 000 passengers p.a.)

Decision – key compatibility rules

- Must be an SGEI
- Maximum duration 10 years (unless significant investment required)
- Entrustment act with reference to Decision
- Compensation = net costs + reasonable profit
- Overcompensation checks every 3 years and at the end of the entrustment
- Transparency for compensation above EUR 15m to an undertaking with activities beyond the SGEI

Check for overcompensation

- Methodology to calculate the net costs
 - Cost allocation or net avoided costs
- Reasonable profit
 - Profit indicators (ROC or other indicators if ROC not feasible)
 - Safe harbour / limit (ROC=swap rate+100 basis points)
- Efficiency incentives possible but not mandatory
- Separate accounting for undertakings carrying out activities outside SGEI

IV. SGEI Framework

Sets out the conditions for the Commission's compatibility assessment of notified aid

Exclusions:

- Land transport
- Public service broadcasting
- Undertakings in difficulty

Framework – basic compatibility rules

- Must be an SGEI
- Duration set by reference to objective criteria (depreciation)
- Entrustment act
- Compensation = net avoided costs + reasonable profit
- Overcompensation checks every 2/3 years and at the end of the entrustment
- Transparency: publication and compliance with Transparency Directive

Framework – additional compatibility rules

- Public consultation to take account of users' and providers' interests
- Compliance with public procurement rules
- No discrimination in calculation of the compensation
- Efficiency incentives
- In-depth assessment for serious competition distortions

Check for overcompensation

- Methodology to calculate the net costs
 - Net avoided costs (cost allocation only where net avoided costs not feasible or appropriate)
- Reasonable profit
 - Profit indicators (ROC or other indicators if ROC not feasible)
 - Safe harbour / limit (ROC=swap rate+100 basis points)
- Efficiency incentives mandatory
- Separate accounting for undertakings carrying out activities outside SGEI

Efficiency incentives

MS must include efficiency incentives, unless duly justified

High flexibility in design

Cannot be achieved at the expense of quality

Efficiency gains can be retained as "additional reasonable profit"

In-depth assessment for serious competition distortions

- Excessive duration of entrustment
- Bundling of tasks
- Market foreclosure without competitive selection procedure
- Special or exclusive right providing immaterial advantages
- Financing of a non-replicable infrastructure without fair and non-discriminatory access to competitors
- Entrustment hindering enforcement of EU law aimed at safeguarding the proper functioning of the internal market

Possible remedy: Conditions or commitments



V. Transparency Directive

Commission Directive 2006/111/EC consolidates Commission Directive 80/723/EEC and its subsequent amendments

Financial relations between public authorities and public undertakings

Transparency for undertakings entrusted with SGEI (whether public or private)

References

- Communication:
 - OJ C 8, 11.1.2012, p. 4.
 - *De minimis* regulation:
 - OJ L 114, 26.4.2012, p. 8.
 - Decision:
 - OJ L 7, 11.1.2012, p. 3.
 - Framework:
 - OJ C 8, 11.1.2012, p. 15.
- Transparency Directive:
- OJ L 318, 17.11.2006, p. 17.



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