The relationship between Altmark and Article 106(2) of the Treaty of the European Union with regard to public procurement procedures

THE RELATIONSHIP BETWEEN *ALTMARK* AND ARTICLE 106(2) OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION WITH REGARD TO PUBLIC PROCUREMENT PROCEDURES[1]

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1 This article is based on S. Schoenmaekers, 'EU Public Procurement and Services of General Economic Interest', in: C. Bovis (ed.), *Research Handbook on Public Procurement,* Edward Elgar, Cheltenham, 2016, pp. 295–323.

SAMENVATTING

In de zaak *Altmark* oordeelde het Hof van Justitie van de Europese Unie dat overheidssubsidies die worden toegekend aan een onderneming ter uitvoering van openbaredienstenverplichtingen, ook wel gekend als diensten van algemeen economisch belang (DAEB), niet vallen onder Artikel 107(1) van het Verdrag betreffende de Werking van de Europese Unie (VWEU) inzake staatssteun wanneer bepaalde voorwaarden zijn vervuld. Een van deze voorwaarden is dat wanneer de met de uitvoering van de diensten van algemeen economisch belang te belasten onderneming in een concreet geval niet wordt gekozen in het kader van een openbare aanbesteding, de noodzakelijke compensatie wordt vastgesteld aan de hand van de kosten die een gemiddelde, goed beheerde onderneming zou hebben gemaakt om deze verplichtingen uit te voeren, rekening houdend met de opbrengsten alsmede met een redelijke winst uit de uitoefening van deze verplichtingen. Het volgen van een openbare aanbestedingsprocedure is bijgevolg een belangrijk onderdeel om niet te vallen onder het toepassingsbereik van Artikel 107(1) VWEU. In deze bijdrage wordt betoogd dat het volgen van een aanbestedingsprocedure echter geen garantie is dat overcompensatie wordt vermeden of dat de economisch meest voordelige optie wordt gekozen. Wanneer voornoemde *Altmark*-voorwaarde niet vervuld is en er bijgevolg toch sprake is van staatsteun indien aan al de criteria van Artikel 107(1) VWEU is voldaan, kan toepassing van Artikel 106(2) VWEU ertoe leiden dat de betaalde compensatie alsnog als verenigbaar met de interne markt kan worden beschouwd wanneer aan bepaalde criteria is voldaan. Deze bijdrage analyseert het verband tussen de *Altmar*k-voorwaarden en de voorwaarden die vervuld dienen te zijn opdat staatsteun die wordt uitgekeerd in het kader van de uitvoering van een DAEB, als verenigbaar met de interne markt kan worden beschouwd op basis van artikel 106(2) VWEU. De rol van aanbestedingsprocedures staat hierbij centraal.

RÉSUMÉ

Dans l'arrêt *Altmark* la Cour de Justice de l'Union Européenne a jugé que des subventions publiques visant à permettre l'exploitation de services d'intérêt économique général (SIEG), ne tombent pas sous le coup de l'Article 107(1) du traité sur le fonctionnement de l'Union Européenne (TFUE) en matière d'aide d'État lorsque certaines conditions sont remplies. Une de ces conditions est que lorsque le choix de l'entreprise à charger de l'exécution d'obligations de service public n'est pas effectué dans le cadre d'une procédure de marché public, le niveau de la compensation nécessaire a été déterminé sur la base d'une analyse des coûts qu'une entreprise moyenne, bien gérée et adéquatement équipée afin de pouvoir satisfaire aux exigences de service public requises, aurait encourus pour exécuter ces obligations, en tenant compte des recettes y relatives ainsi que d'un bénéfice raisonnable pour l'exécution de ces obligations. Par conséquent, suivre une procédure de passation de marchés est un élément essentiel pour ne pas entrer dans le champ d'application de l'Article 107(1) TFUE. Cette contribution soutient que le fait de suivre une pro-

cédure de passation de marché n'est pas une garantie que la surcompensation est évitée ou que l'option économiquement la plus avantageuse est choisie. Si la condition *Altmark* susmentionnée n'est pas remplie et qu'une aide d'État est donc impliquée si tous les critères de l'Article 107(1) TFUE sont remplis, l'application de l'Article 106(2) TFUE peut conduire à ce que la compensation versée soit considérée comme compatible avec le marché intérieur lorsque certains critères sont remplis. Cette contribution analyse la relation entre les conditions *Altmark* et les conditions qui doivent être remplies pour que les aides d'État versées dans le cadre de la mise en œuvre d'un SIEG soient considérées comme compatible avec le marché intérieur sur la base de l'article 106(2) TFUE. Le role des procédures de marchés publics est mis central dans la discussion.

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I. Introduction

Public Services (generally identified as Services of General Economic Interest or SGEIs) occupy a vital role in the shared values of the Union: they promote social and territorial cohesion, foster the well-being of people across the EU and make an important contribution to Europe's economic development.[2] Examples range from large commercial services that are provided to the entire population at affordable conditions (network industries such as postal services, en-

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Reform of the EU State Aid Rules on Services of General Economic Interest*, COM(2011) 146 final, 23 March 2011, p. 2.

ergy security of supply, electronic communication services or public transport) to a wide range of health and social services (such as care for elderly or disabled people). These services are of great importance since they deliver outcomes in the overall public good that would not be supplied – or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access – by the market without public intervention. This definition of SGEIs which was delivered by the Commission in its 2013 Quality Framework[3], cannot be found in the EU treaties or in secondary legislation even though the concept appears in Articles 14 and 106(2) TFEU, Protocol No 26 to the TFEU, Article 36 of the Charter of Fundamental Rights of the European Union as well as in numerous Commission decisions, cases decided by the Court of Justice and the two SGEI Packages of the Commission.

When a public contract to provide SGEIs is awarded to a company, State aid comes into play. Indeed, public contracts are directly or indirectly attributable to public bodies and are generally financed through state resources. Since their award is by nature selective, they may generate competitive distortions which often have an appreciable effect on intra-EU trade. This Chapter aims to explain the role of public procurement in the financing of SGEIs by focussing on the link between the application of the State aid rules and the public procurement framework. The central question that will be answered is: Does the application of a public procurement procedure entail that the financing of a SGEI does not constitute State aid?

II. The concept of 'Services of General Economic Interest'

Certain goods and services are by nature so essential for the well-being, health and fundamental rights of European citizens, European economic, social and territorial cohesion and sustainable development, they deserve a special and adapted treatment in face of free market forces in order to ensure that each one can enjoy a high level of quality, safety and affordability of these services based on equal treatment.[4] These goods and services are known as Services of General Interest (SGIs). They can be considered as the backbone of the European economy as they provide essential infrastructures such as transport, energy or social services for both people and business and are an important aspect of the welfare State that is characteristic to most of the EU Member States.[5] SGIs are related to public markets. Public markets have monopsony structure tendencies – the state and its organs often appear as the sole outlet for an industry's output – and demand in such markets is institutionalized and operates mainly

3 European Commission, Quality Framework set out in the Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI of 29 April 2013, p. 21. The Commission's framework is not applicable to the land transport sector and the public service broadcasting sector.

4 Centre of Employers and Enterprises providing public services, *The Acquis Communautaire for Services of General Economic Interest,* 2013, p. II, available at www.ceep.eu/images/stories/ceep_acquis_glossary.pdf.

5 Ibid., p. 1.

under budgetary considerations rather than price mechanisms.[6] In public markets the public interest substitutes profit maximization.

SGIs can be economic (SGEIs) or non-economic in nature (NESGIs). Member States are fully in charge when it comes to the regulation of NESGIs, as long as the general EU principles (equal treatment, non-discrimination, proportionality and transparency) are respected. This follows from Article 2 of Protocol 26 of the TFEU which indicates that the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize NESGIs. SGEIs on the other hand, can be characterized as economic activities that public authorities identify as being of particular importance to citizens that would not be supplied – or would be supplied under different conditions – by the market without public intervention. An economic activity is defined as any activity consisting in offering (not just purchasing) goods and services on a market, regardless of whether this is for the purpose of generating profit or non-profit.[7] As held by the Court of Justice of the EU, SGEIs exhibit special characteristics as compared with the general economic interest of other economic activities since they comprise a general or public interest.[8] It follows that these services have a dual nature: they belong to the market, but other non-market values are applied to them since they are subject to specific public service obligations (PSO[9]).[10] It is held that SGEIs are in the middle of a clash between the antagonistic interests of competition versus welfare and social goals.[11]

Whether a service should be labelled as a SGEI has to be determined on a case-by-case basis. The processing of waste which is not only economic in nature but also deals with an environmental problem, electricity distribution, the transportation of sick persons and the basic postal services, services that bring about considerable investment costs, have all been qualified as SGEIs by the CJEU.[12] Social Services of General Interest (SSGIs) on the other hand are only covered by internal market rules as soon as they constitute an economic activity such as social security systems covering the main risks of life, depending on their eco-

6 C.H. Bovis, *Public Procurement, State Aid and Services of General Economic Interest*, speaker's contribution for ERA Academy of European Law, 23–24 May 2011, p. 2, available at www.era-comm.eu/UNCRPD/kiosk/speakers_contributions/111DV67/Bovis_paper.pdf.

7 Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* ECLI:EU:C:1997:160, §23.

8 Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* ECLI:EU:C:1991:464, §27; Case 172/80 *Züchner* ECLI:EU:C:1981:178, §7; Case C-7/82 *GVL* v *Commission* ECLI:EU:C:1983:52, §§31–32; Commission, 25 April 2012, State aid SA.25051 Germany – Aid to Zweckverband Tierkörperbeseitigung, §160.

9 PSO and SGEI are treated as interchangeable concepts for the purposes of this chapter.

10 Alison Jones and Brenda Sufrin, *EC Competition Law. Text, Cases and Materials* (OUP 2007) 621.

11 J. Kociubiński, 'Services of General Economic Interest – Towards a European Concept of Public Services', in: *Wroclaw Review of Law, Administration & Economics*, De Gruyter, Vol. 1:2, p. 49. See also the 2004 White Paper of the European Commission on SGEIs in which it is held that the concept 'SGEI' has a community meaning which entails that it cannot be interpreted with reference to existing national definitions.

12 See e.g. Case C-393/92 *Almelo* ECLI:EU:C:1994:171; Case C-320/91 *Corbeau* ECLI:EU:C:1993:198 and C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* ECLI:EU:C:1998:316. The management of waste deals with an environmental problem.

nomic nature.[13] This broad approach entails that activities that intrinsically form part of the prerogatives of official authority and are performed by the State, such as the army or the police, air navigation safety and control, maritime traffic control and safety, anti-pollution surveillance, the organisation, financing and enforcement of prison sentences, activities in the area of social security including health care if based on the principle of solidarity and public education, do not constitute economic activities.[14] On the other hand, it has been held that a financial contribution imposed on certain electricity generating undertakings for the purpose of financing saving and energy efficiency plans managed by a public authority does not constitute a public service obligation.[15] Indeed, such mandatory contribution does not impose any requirement on the undertakings concerned which would restrict their freedom to act on the electricity market and to supply goods or services which they would not have supplied, or which they would not have supplied to the same extent or under the same conditions, if they were considering only their own commercial interest.

The Lisbon Treaty recognises the essential role of SGEIs and, at the same time, their diversity in the European model of society.[16] As held by Article 14 TFEU, 'Without prejudice to Article 4 of the Treaty on European Union[17] or to Articles 93[18], 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.'[19] Since both Member States and the Union play an essential role regarding the proper functioning of these services, there is a shared competence for decision making in the field of SGEIs. In light of the principle of subsidiarity however, the Union will not take action, unless this would be more effective than action taken at national, regional or local level. So far, the

13 SGIs is an umbrella term for economic/market services which are subject to competition rules (unless the derogations encapsulated in article 106(2) TFEU apply) and non-economic services which are beyond the scope of EU competition law. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on 'A single market for 21st century Europe' – Services of general interest, including social services of general interest: a new European commitment ((2007) 725 final).

14 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 (hereinafter: SGEI Communication), OJ C 8, 11.1.2012**,** §16–30. See also Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01 *AOK Bundesverband and Others v Ichtyol-Gesellschaft Cordes, Hermani & Co. and Others* ECLI:EU:C:2004:150, §63; Case 107/84 *Commission* v *Germany* ECLI:EU:C:1985:332, §§14–15; Case C-364/92 *SAT Fluggesellschaft* ECLI:EU:C:1994:7, §30.

15 Case C-523/18 *Engie Cartagena* ECLI:EU:C:2019:1129, §51.

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Reform of the EU State Aid Rules on Services of General Economic Interest,* COM(2011) 146 final, 23 March 2011, p. 2.

17 This article lays down the principle of constitutional respect of SGIs at local level.

18 According to Article 93 TFEU, aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

19 Article 16 EC also highlighted the specific place occupied by SGEIs in the Member States and the EU.

Commission has not proposed any legislation on the basis of Article 14 TFEU. Given the strategic importance of the sectors, the provision of SGEIs depends on policy choices that are generally taken at national level so that Member States enjoy a wide margin of discretion in defining a given service as a SGEI.[20] Indeed, Member States are entitled, while complying with EU law, to define the scope and the organisation of SGEIs, and may take into account, in particular, objectives pertaining to their national policy.[21] As held by Protocol n°26 Member States have a wide discretion in identifying SGEIs depending on their geographical, social and cultural situations. Hence, the definition of such services by a Member State are generally rubberstamped by the European Commission and can only be questioned in the event of manifest errors.[22] Nevertheless, the Member States' power to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector from the application of the competition rules. First of all, Member States may not exercise their discretionary powers contrary to the provisions of the Treaty rules on internal market and competition. Secondly, in order to be classified as an SGEI, the service in question must be of a general economic interest exhibiting special characteristics by comparison with the general economic interest of other economic activities so that a Member State has a duty to demonstrate why the specified service is distinguished from other economic activities.[23] Furthermore, responsibility for operation of the SGEI is to be entrusted to the undertaking concerned by way of one or more official acts (this is also known as the first *Altmark* criterion)[24], the form of which may be determined by each Member States, those acts being required to specify, in particular, the nature and the duration of the public service obligations and the undertaking and territory concerned.[25] Member States can decide to entrust to provision of a SGEI through a public contract (public procurement or service concession), but can also opt for specific regulation (a legal act falling outside the definition of public contract), authorisation schemes, exclusive rights or internal performance by the public authority (own division or in collaboration with other public authorities or a separate public entity (quasi in-house)). They can thus decide to reserve a given service to an emanation of the State. The condition to provide an official act is meant to ensure transparency and legal certainty which entails that minimum criteria should be met in relation to the existence of one or more acts of public authority defining, in a sufficiently precise manner, at least the nature, duration and scope of the public service obligations imposed on the undertakings entrusted with the performance of those obligations. In the absence of a clear definition of such objective criteria, it is not possible to verify whether a

20 See also article 1 Protocol n° 26 on services of general economic interest, OJ 115, 09/05/2008 P. 0308 – 0308.

21 Case C-242/10 *ENEL* ECLI:EU:C:2011:861.

22 This is only different with regard to harmonized sectors such as the telecom or postal sector. Case T-17/02 *Fred Olsen v Commission* ECLI:EU:T:2005:218, §175. See also Article 4(1) of Directive 2014/23/EU. See also Case C-70/16P *Comunidad Autónoma de Galicia* ECLI:EU:C:2017:1002, §76.

23 Joined Cases C-34 to C-38/01 *Enirisorse* ECLI:EU:C:2003:640, §33–34. A certain amount of market failure or the need for public services that are essential for the welfare of society are the main reasons to justify the introduction of a SGEI.

24 See paragraph 3.4 below.

25 Case T-462/13 *Comunidad Autónoma del País Vasco* ECLI:EU:T:2015:90.

particular activity may be covered by the concept of a SGEI.[26] Hence, the mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations. Laws that are very general in nature and do not allow to conclude that from that law undertakings had been actually entrusted with clearly defined public service obligations will in principle not be considered sufficient.[27]

The Lisbon Treaty also added Protocol 26 to the TFEU, specifically reflecting the essential yet diverse role of SGEIs in the EU. As held by Article 1 of this Protocol, 'The shared values of the Union include, in particular, the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.' In addition, reference to SGEIs is also made in Article 36 of the Charter of Fundamental Rights which indicates that the Union recognises and respects access to SGEIs in order to promote the social and territorial cohesion of the Union. This entails that access to SGEIs is recognised as a true fundamental right.

SGEIs are often entrusted by the State acting as a public authority to a private undertaking[28], for budgetary or technical reasons. As held by the Court in *BUPA*[29], in order to be classified as a SGEI, a service needs to be of universal and compulsory nature, assume a general or public interest and be entrusted to an operator by a public authority act. This does not require that the service be universal in the strict sense such as the public social security system or that it must respond to a need common to the whole population or be supplied throughout a territory. Rather, it is sufficient that the operator entrusted with a particular mission is under an obligation to provide that service to any user requesting it so that the compulsory nature of the service is established if the service provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party.[30] Hence, while the universal nature entails the *right* of everyone to access these services[31], the compulsory nature imposes obligations on service providers to offer defined services according to

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26 Joined Cases C-66/16P to C-69/16P *Comunidad Autónoma del País Vasco* ECLI:EU:C:2017:999, §72–73.

27 Joined Cases C-66/16P to C-69/16P *Comunidad Autónoma del País Vasco* ECLI:EU:C:2017:999, §102, 117–117.

28 An undertaking is every entity engaged in an economic activity, regardless of the legal status and the way in which it is financed. See Case C-41/90 *Höfner* ECLI:EU:C:1991:161, §21. See also Case C-475/99 *Ambulanz Glöckner* ECLI:EU:C:2001:577, §57 in which the Court held that also non-profit-making entities can be qualified as undertakings.

29 Case T-289/03 *BUPA and others v Commission* ECLI:EU:T:2008:29, §187.

30 C. Quigley, *European State Aid Law and Policy*, Hart Publishing, 2015, p. 239.

31 As held above, this right exists since these services are considered as essential. It is neither hampered by the fact that it is offered only in a restricted area or to a restricted group of people nor by the fact that this service is being reimbursed.

specified conditions, including complete territorial coverage at an affordable price.[32] This entails that the service provider is obliged to contract the other party so that his commercial freedom is restricted *or* that special or exclusive rights are granted.[33] It is not required that the service in question is free of charge or that it is offered without consideration of economic profitability but the service should be offered at uniform and non-discriminatory rates and on similar quality conditions for all.[34]

It follows that a PSO is imposed on the provider by way of a specific entrustment through an act of public authority (including contracts), which implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions.[35] In this regard, the Commission held for example with regard to geothermical heat distribution in Germany, that although alternative heat distribution could also be and is actually ensured by private companies, this does not preclude that the provision of geothermical heat distribution may constitute a genuine SGEI, since there is no evidence that market forces would be able to provide this kind of services at the conditions specified by the responsible bodies in Germany.[36] This leads to the conclusion that the Commission does not always merely rubberstamp the decisions of the Member States. When it verifies whether there is a market failure with regard to the specific service it is using its powers more firmly. Hence, the Commission will carefully examine consumer behaviour, rational factors and factual findings to verify whether there is an evolution in the competition for the service at hand or whether there is rather a shortage of private initiative so that the capacities offered are not sufficient to meet the real demand.[37] Such demands can be easily assessed through, inter alia, market research, public consultations or calls for projects. In its 200 Communication, the Commission pointed out that to meet the needs of society, the service must be provided with a high level of quality at

32 White Paper on Services of General Economic Interest (COM(2004)374 final). See also Article 3 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communication networks and services (Universal Service Directive); Article 3(3) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; Article 4 (2) of Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services.

33 The recognition of an SGEI mission does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. It is merely the instrument, possibly justified, which allows that operator to perform an SGEI mission. Case T-289/03 *BUPA and others v Commission* ECLI:EU:T:2008:29, §179.

34 C. Quigley, *European State Aid Law and Policy*, Hart Publishing, 2015, p. 240; Case T-289/03 *BUPA* ECLI:EU:T:2008:29, §203.

35 A PSO can thus not be attached to an activity which can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest as defined by the State, by other undertakings under normal market conditions. See 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 **(**SGEI Communication), OJ C 8, 11.1.2012, §48. See e.g. also case T-79/10 *Colt Télécommunications France v European Commission* ECLI:EU:T:2013:463.

36 European Commission, Case SA.31261 Municipal Guarantee for Loan for Geothermal Heat Distribution Network, §29.

37 Case T-454/13 *Société nationale maritime Corse Méditerranéé (SNCM)* ECLI:EU:T:2017:134, §49–50.

affordable prices to take into account the specific needs of certain categories of people, e.g. persons with disabilities, to ensure the availability of these services in a given territory and to take into account the requirements of health protection and environmental protection.[38] In case of a high degree (so not identical level) of substitutability there is no real public service need.[39] In such case market intervention would not pass the test of proportionality. It follows that if applied strictly, the market failure requirement could significantly limit the scope for Member States to introduce SGEIs.[40] It may disrupt the Member State's prerogative to determine whether or not a service is in the general interest. There is thus an inherent tension between the provisions that seek to preserve the public service traditions of the Member States based on the subsidiarity principle on the one hand and the competition rules, which belong since the entry into force of the Lisbon treaty to the exclusive competence of the EU, on the other hand.[41] Of course it should be noted that even in case there is no market failure, State aid provided to compensate for a public service obligation may be justified by the pursuit of a legitimate objective in the public interest in conformity with Article 107(2) or (3) TFEU.

III. SGEIs, State aid and public procurement

A. Introduction

The TFEU only expressly covers two particular types of *public* anti-competitive behaviour: the granting of State aid as meant in Articles 107–109 TFEU and the granting of special or exclusive rights to undertakings, particularly to those providing SGEIs (article 106 TFEU).[42]

As held by Article 107(1) TFEU, *'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'* Article 107 TFEU is the well-known general article that specifically forbids State aid if certain conditions are fulfilled. It is applicable to all sectors of the economy and is not limited to public services. This contribution will not detailly describe all conditions that have to be fulfilled in order for Article 107(1) TFEU to be violated and will focus

38 Communication on Services of General Economic Interest in Europe, COM(2000), 508 final, §8. See also A. Maziarz, 'Services of General Economic Interest: Towards Common Values?', in: *European State aid Law Quarterly* 1/2016, Lexxion, Berlin, p. 9.

39 It is possible that market interplay makes it possible to achieve a part of the public objective. The creation of such an SGEI is in such cases only justified in so far as it makes up for the corresponding market shortcoming. See also Case T-454/13 *Société nationale maritime Corse Méditerranéé (SNCM)* ECLI:EU:T:2017:134, §207 and 224.

40 W. Devroe and D. Gabathuler, 'The Evolving Treatment of Services of General Economic Interest under EU law', in: S. Schoenmaekers, W. Devroe and N. Philipsen, *State Aid and Public Procurement in the European Union,* Intersentia, Antwerp, 2014, p. 51.

41 Ibid., p. 47.

42 A. Sanchez Graells, *Public Procurement and the EU Competition Rules,* Hart Publishing, Oxford, 2011, p. 117.

on the relationship between Article 107(1) TFEU and SGEIs. In any case, to determine whether the financing of a SGEI constitutes State aid, one has to take into account the *effect* of the measure and verify whether competition is distorted or can be distorted when a certain undertaking or the production of certain goods is favoured and this affects trade between Member States. The reasons or motives for granting State aid are thus irrelevant. Nevertheless, competing views on the issue have been developed by the case law of the Commission and the Court.[43] These will now be discussed.

B. Competing views on whether compensation for SGEIs amounts to State aid

As held by the ***State aid approach***, financial compensation for SGEI operators constitutes State aid in the meaning of Article 107(1) TFEU[44] which may however be justified by Article 106(2) TFEU provided that the conditions are fulfilled and the funding complies with the proportionality principle.[45] Since the reasons for compensation are not relevant, it does in principle not matter that the aid is granted to compensate for the PSO that is imposed on the undertaker. It follows that authorities that want to grant aid, have to notify the Commission and wait for its approval while new aid cannot be implemented until the Commission has declared it compatible with Article 106(2) TFEU. The State aid approach, which was e.g. confirmed in *Chronopost*[46], does not apply the private investor principle since it assumes that the emergence and delivery of SGEIs do not take place in a normal, private market and take place in a separate, *sui generis* market.[47] The non-economic character of state intervention renders the private operator test immaterial for the reason that profitability, the *raison d'être* of private investment, is not present.[48] As held by Bovis, this lacunae is filled by the application of the public procurement regime since it sanitizes public subsidies as legitimate contributions towards PSOs and SGEIs.[49] This will be further discussed later.

The State aid approach was challenged by the Court in *ADBHU*[50] and *Ferring*[51] in which it held that transfers representing payments for performance of public service obligations did not amount to an 'advantage' to the undertaking and therefore did not constitute State aid under Article 107(1) TFEU.[52] Indeed, according to the ***compensation approach***, the compensation is not regarded as

43 See for an extensive overview C.H. Bovis, op. cit..
44 Cases T-106/95 *FFSA* ECLI:EU:T:1997:23, §167; Case T-46/97 *Sociedade Independente de Comunição (SIC) SA v Commission of the European Communities* ECLI:EU:T:2000:123, §84.
45 Case C-387/92 *Banco de Crédito Industrial S v. Ayuntamiento de Valencia* ECLI:EU:C:1994:100.
46 Joined Cases C-83/01 P, C-93/01 P & C-94/01 P *Chronopost v Ufex and Others* ECLI:EU:C:2003:388.
47 P. Nicolaides & S. Schoenmaekers, 'Public Procurement, Public Private Partnerships and State Aid Rules: A Symbiotic Relationships, *European Public Private Partnership Law Review,* Lexxion, Berlin, 2014/1, p. 16.
48 C.H. Bovis, op. cit., p. 26.
49 Ibid., p. 26 and 33.
50 Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* ECLI:EU:C:1985:59, §27.
51 Case C-53/00 *Ferring SA v ACOSS* ECLI:EU:C:2001:627, §27.
52 J. Kociubiński, op. cit., p. 60.

State aid, provided that it does not exceed the normal, appropriate remuneration for the costs of the service in question.[53] Hence, it also does not have to be notified to the European Commission. The compensation approach introduces an applicability threshold of State aid regulation and that threshold is determined by the perceived market price, terms and conditions for the delivery of the relevant service.[54] A problem with the compensation approach, which also accepts the *sui generis* character of SGEIs, is that one assumes that the 'appropriate' remuneration -the base line- can be found by a public procurement procedure. Nevertheless, when a contract is awarded by reference to the most economically advantageous tender (MEAT) criterion, it is very well possible that the market price is not at all equal to the price the contracting authority is willing to pay for the procurement of the relevant service, product or work.[55] The mere existence of a public procurement procedure cannot, therefore, reveal the necessary element of the compensation approach: the market price which will determine the 'excessive' State intervention and introduces State aid regulation.[56]

The ***quid pro quo approach***, as developed by Advocate General Jacobs in his Opinion in the *GEMO*[57] case, is held to be the middle way between the other approaches. When applying this approach, the Court distinguishes between two categories of situations. The first comprises cases in which there is a direct and manifest link between the State financing and clearly defined PSOs.[58] Such link can be demonstrated by the existence of a public contract concluded in accordance with the public procurement directives. The contract then defines the obligations of the undertakings entrusted with the provision of the SGEIs and the remuneration they receive in return. In those cases the sums paid by the State to the recipient undertaking do not constitute State aid but merely the consideration for the public service obligations assumed by the undertaking. Cases failing into this category should be analysed according to the compensation approach.[59] The second category of situations covers cases without a direct and manifest link between the State financing and the PSOs, as well as cases where those obligations are not clearly defined. This amounts to verifying that there are laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations. In those cases the sums paid by the public authorities do constitute State aid which as such is subject to the procedural obligations laid down in Article 108(3) TFEU. The quid pro quo approach which puts procedural requirements at the heart of the appraisal, presents a major shortcoming however since it introduces elements of the *nature* of public financing into the process of determining the legality of aid while according to State aid jurisprudence, only the *effects* of the measure are to be taken into consideration.[60] In State aid jurisprudence, the nature of the measure

53 Case C-44/96 *Mannesman* ECLI:EU:C:1998:4.
54 C.H. Bovis, op. cit., p. 28.
55 P. Nicolaides & S. Schoenmaekers, op. cit., p. 16.
56 C.H. Bovis, op. cit., p. 30.
57 Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* ECLI:EU:C:2003:622, §§117–129.
58 Case C-5/01 *Belgium v. Commission* ECLI:EU:C:2002:754.
59 C.H. Bovis, op. cit., p. 23.
60 Ibid.

is only relevant with regard to the assessment of the compatibility of the aid in line with the exemption provisions of the Treaty.

As the *ABDHU* and *Ferring* judgements were perceived as being unsatisfactory on the ground that they left too much uncertainty as to whether State aid may or may not be involved, a reappraisal was called for. In the landmark case *Altmark*[61] the Court took the opportunity to reconcile these approaches. This case will now be discussed.

C. Altmark

In its *Altmark* judgement, the Court set out four specific criteria that had to be met for compensation granted for the provision of SGEIs that affects trade between Member States to escape qualification as State aid:

– First, the recipient undertaking must actually have a ***PSO*** to discharge as opposed to a services provided to the pubic or a regulated service.[62] The mere fact that the Member State, acting in the general interest in the broad sense, imposes certain rules of authorisation, functioning or control on all the operators in a particular sector does not in principle mean that there is a SGEI.[63] In addition, as held before, the mission imposed upon the operator should be of universal and compulsory nature.
  In addition, this obligation must be ***clearly defined***.[64] This entails first of all that the PSO needs to be assigned to the provider of the service by an official and binding act of entrustment[65] so that it creates an obligation for the operator to provide it. The mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations. The mandate entrusting the public service tasks should for example encompass contractual acts, provided that they emanate from the contracting authority and are binding, a fortiori where such acts give effect to the obligations imposed by the legislation.[66] Mere authorisations to provide a service are not enough.[67] The act of entrustment should also indicate why the Member State considers the service in question to be a SGEI. It is up to the national court to examine whether the PSO in question was clear from the national legislation or the licences at issue in the national court proceedings.[68] PSO are generally assigned if the service is not fully or not adequately provided by the market in terms of price, quality or frequency which is

61 Case C-280/00 *Altmark* ECLI:EU:C:2003:415; Joined Cases T-202/10 & T-203/10 *Stichting Woonlinie* [2018] ECLI:EU:T:2018:795.
62 Case T-116/01 & T-118/01 *P&O European Ferries* ECLI:EU:T:2003:217, §136.
63 Case T-289/03 *BUPA* ECLI:EU:T:2008:29, §178; C. Quigley, *European State Aid Law and Policy*, Hart Publishing, 2015, p. 236.
64 Case C-114/17P *Kingdom of Spain v. Commission* ECLI:EU:C:2018:753, §76.
65 §12 of the 2005 SGEI Framework contains some minimum criteria that have to be satisfied by this act, such as criteria relating to the content and the duration of the PSO, the undertaking and the territory concerned and the nature of any exclusive rights assigned to the undertaking.
66 Case C-81/16P *Kingdom of Spain v. Commission* ECLI:EU:C:2017:1003, §40 and 48.
67 Case C-706/17 *Achema* ECLI ECLI:EU:C:2019:407, §107.
68 Case C-280/00 *Altmark* ECLI:EU:C:2003:415, §89.

mainly due to the market's focus on profit. In this regard it should be noted however that there is no SGEI which is not at all provided by the market.[69] Indeed, every SGEI provider offers a service that has some characteristics or is offered in some geographic markets which are supplied by the market and is made available to some consumers who are also served by the market. For this reason, the Commission will have to examine whether the public service delegation contract is necessary and proportionate to a 'real public service need' manifested by a shortage of the specific type of service in a situation of free competition.[70] It should be noted that even though both the case law and the SGEI package[71] require that Member States demonstrate the existence of a market failure to justify state intervention through the imposition of a PSO on one or more undertakings, such market failure is not relevant in determining whether the undertakings concerned were in fact entrusted with this PSO by a public act in which those obligations are clearly defined.[72] In this regard it is important to note that even if there is a user demand and even if that demand is not capable of being met by the interplay of market forces alone, the national authorities should still give preference to the approach which is least harmful to the essential freedoms for the proper functioning of the internal. For example, in the case of the maritime cabotage sector, the imposition of PSOs applicable to all carriers wishing to offer their services on a given route and which do not necessarily give rise to financial compensation entails less burdensome restrictions on the freedom to provide services than the granting of financial compensation to a particular carrier or to a limited number of carriers in the context of a public service delegation.[73]

– Second, the ***parameters*** on the basis of which the compensation is calculated must be established ***in advance*** in an ***objective*** and ***transparent*** manner. Member States enjoy a broad discretion for determing the compensation for the costs of providing that service. Thus, in the absence of EU rules on SGEIs, the Commission is not entitled to rule on the scope of the public service tasks assigned to the public operator, in particular the level of costs linked to that service, or the expediency of the political choices made in that regard ty the national authorities, or on the economic efficiency of the public operator.[74] It is precisely because the determination of the compensation is subject to only restricted control by the EU institutions that the second *Altmark* condition requires that those institutions must be in a position to verify the existence of previously defined objective and transparent parameters, which 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 having the effect of conferring on the public operator an economic advantage in

69 P. Nicolaides & S. Schoenmaekers, op. cit., p. 14.
70 Commission Decision 2013/435 on state aid implemented by France in favour of Société Nationale Maritime Corse-Méditerranée [SA.22843].
71 See §3.5 below.
72 Case C-91/17P *Cellnex Telecom v Commission* ECLI:EU:C:2018:284.
73 Case T-454/13 *Société nationale maritime Corse Méditerranéé (SNCM)* ECLI:EU:T:2017:134, §134.
74 Case T-309/12 *Zweckverband Tierkörperbeseitigung* v *Commission* ECLI:EU:T:2014:676, §148.

the form of compensation.[75] Member States free to choose how to comply with it in practical terms, provided that the rules for determining the parameters for calculating the compensation remain objective and transparent. The Commission's assessment for that purpose must be based on an analysis of the actual legal and economic considerations which governed the setting of the amount of the compensation.[76] In this regard it should be noted that only the costs that are directly linked to the provision of the PSO can be taken into account while any revenue has to be deducted. Hence, only compensation that relates to services in favour of end consumers will be covered.[77] With this requirement, the CJEU seeks to avoid a situation whereby the undertaking accumulates losses and is subsequently compensated for its losses, irrespective of whether these actually relate to the operation of the SGEI.[78] This would hamper efficiency. As held in *Regiona autonoma della Sardegna,* even though prior determination of the methods for calculating compensation is necessary, national authorities are free, if they see fit, to provide for a public service task, the financial balance of which is ensured through operating revenues, without recourse to public service compensation. When an economic operator receives discretion to adjust its fares so that it could maintain financial and economic balance in its activities under market conditions, without recourse to public financing is fine as long as subsequently public resources are not used to cover operating losses arising from that activity for which no provision was made beforehand.[79] The establishment of parameters constitutes an *ex post* control mechanism for Member States and the European Commission.

– Third, the compensation ***cannot exceed what is necessary*** to cover all or part of the costs incurred in the discharge of PSOs, taking into account the relevant receipts and a ***reasonable profit***. This criterion, which is a reflection of the proportionality test applied within the framework of Article 106(2) TFEU, is important to determine whether the compensation is not providing an economic advantage to the undertaking. The compensation (e.g. monopoly rights, financial support, free rent) that is granted to the undertaking has to be related to the burden that is placed on it in the public interest (quality, affordability, continuity, consumer protection) to provide the SGEI and cannot go further. The amount of compensation can be established on the basis of either the expected costs and revenues or the costs and revenues actually incurred or a combination. Proportionality of costs will be presumed where the selection has been effected on the basis of an adequate public procurement process (see fourth *Altmark* criterion).[80] Since the Commission does not look at the lowest offer a private operator makes but at what a reasonable profit would be, the third *Altmark* criterion is rather objective. To deter-

75 Case T-309/12 *Zweckverband Tierkörperbeseitigung* v *Commission*, ECLI:EU:T:2014:676, §104 and 148.
76 Case T-137/10 *CBI* v *Commission* ECLI: EU:T:2012:584, §192.
77 Case C-706/17 *Achema* ECLI:EU:C:2019:407, §12.
78 M. Klasse, 'The Impact of *Altmark:* The European Commission Case Law Responses', in: E. Szyszczak & J.W. van de Gronden (eds.), *Financing Services of General Economic Interest,* Asser, The Hague, 2013, p. 41.
79 Case T-219/14 *Regione autonoma della Sardegna* ECLI:EU:T:2017:266, §107.
80 Case T-235/10 *Iliad* ECLI:EU:T:2013:2, §192; Case T-258/10 *Orange* ECLI:EU:T:2013:471, §202.

mine whether a profit is reasonable, account is taken of the rate of return on own capital that would be required by a typical company considering whether or not to provide the SGEI, taking into account the level of risk. The Commission allows a case-by-case approach by comparing the respective profit with the profit which is common in the respective economic sector.[81] The Member State may introduce incentive criteria relating to, among other things, the quality of service provided and gains in productive efficiency.[82] The Commission performs thus a full review of the actual costs *ex post*. The third Altmark criterion reflects the compensation approach.

– Fourth, where the undertaking which is to discharge PSOs 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, well run and adequately equipped undertaking*** would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[83] This is also referred to as benchmarking. The reference to this procedural element indicates the link between this criterion and the quid pro quo approach as discussed above. It should be noted that contracts awarded in breach of the applicable public procurement rules may entail State aid even where reasonable payment is made for the services.[84] In case of benchmarking the Commission is required to satisfy itself that the compensation does not entail the possibility of offsetting any costs that might result from inefficiency on the part of the service provider.[85]

Athough the *Altmark* judgement identifies four distinct conditions, those are not totally independent of each other. As regards the last three, there is an internal consistency and, in that sense, a certain degree of interdependence: 'The establishment of objective and transparent parameters for calculating compensation, as required by the second *Altmark* condition, is a necessary prerequisite for the purpose of answering the question as to whether or not that compensation exceeds what is necessary to cover all or part of the costs incurred in discharging the public-service obligations, as required by the third *Altmark* condition. In order to answer the question as to whether the compensation exceeds what is necessary, it must first be determined what is necessary. In order to monitor compliance with the third *Altmark* condition, objective and transparent parameters must be used, as required by the second *Altmark* condition. As regards the

81 See e.g. Commission, 16 November 2004, State Aid N 381/2004 Broadband Infrastructure Project-Pyrénées-Atlantiques, paras 76 et seq., para 82.

82 Article 5(5) and 5(6) Decision 2012/21/EU.

83 The Altmark case specifically referred to situations in which the EU public procurement legislation is applicable. In case a contract is not covered by EU legislation (e.g. if the threshold is not reached), there should be compliance with national procurement legislation or at least certain general principles like transparency and equal treatment (and the treaty principles if there is a transboundary effect) in order to achieve best value for money.

84 Commission Decision 2001/156/EC, *Transmed*, OJ 2001 L57/32.

85 Case T-289/03 *BUPA* ECLI:EU:T:2008:29, §249.

fourth *Altmark* condition, this supplements the second *Altmark* condition. It is not enough that the parameters established for calculating the compensation to be paid to an undertaking entrusted with discharging public-service obligations are objective and transparent, as required by the second *Altmark* condition. Except where the choice of the undertaking in question is made in the context of a public procurement procedure which would allow for the selection of the tenderer which is capable of providing those services at the lowest cost to the community, the fourth *Altmark* condition requires that those parameters should be based on the example of a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public-service requirements.'[86]

Verification of the *Altmark* conditions occurs upstream, that it so say in the examination of the issues of whether the measure at issue must be characterized as State aid. As the four conditions are cumulative, the Commission is not required to examine all of them if it finds that one is not met.[87]

If all these criteria are fulfilled the compensation for the PSO is no State aid and is thus not caught by article 107(1) TFEU. Indeed, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, those undertaking do not enjoy a real financial advantage and the measure does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them. Hence, as recently confirmed in *Achema*[88], in such cases there is no question of State aid and hence no obligation to notify the Commission as what is normally the situation in case of new aid nor an obligation to cooperate with the Commission in the case of existing aid.[89]

This entails that the scope of application of State aid law is limited by the *Altmark* judgement. This is not consistent with the overall structure of competition law as such criteria normally serve as exemption grounds at best.[90] Nevertheless, since the Commission applies these criteria very strictly, scarcely any public service compensation granted by Member States has met all criteria and been regarded as aid-free.[91] Indeed, if one of the criteria is considered not to be fulfilled, the SGEI in question is potentially State aid and requires *ex ante* notification to the Commission. The compensation is then also subject to the standstill obligation as laid down in article 108(3) TFEU. Nevertheless, even if the *Altmark* criteria are not fulfilled and the compensation in question could possibly be qualified as State aid, the aid can still be declared compatible under

86 Case T-125/12 *Viasat* ECLI:eU:T:2015:687, §80–82.
87 Case T-354/02*TF1* v *Commission* ECLI:EU:T:2009:66, §142–16.
88 Case C-706/17 *Achema* ECLI ECLI:EU:C:2019:407, §100.
89 Member States are competent to decide whether a PSO qualifies as State aid. Case T-219/14 *Regione autonoma della Sardegna* ECLI:EU:T:2017:266,§89; Case T-568/08 and T-573/08 *M6 and TF1* v *Commission* ECLI:EU:T:2010:272, §128–129.
90 W. Devroe and D. Gabathuler, op. cit., p. 75.
91 M. Klasse, op. cit., p. 36.

Articles 107(2) and (3) TFEU. Furthermore, Article 106(2) TFEU can provide for an exemption.[92] This later aspect will be discussed in more detail in paragraph 3.5.

When it comes to the application of the criteria, specifically the fourth criterion has gained much attention. First of all, it is important to stress that State aid law does not impose an actual obligation on contracting authorities to tender a SGEI. Nevertheless, to be relieved from the State aid qualification, the compensation offered must either be the result of a public procurement procedure or be the result of a benchmarking exercise with a typical well-run undertaking criterion. In this regard the Commission and the CJEU are of the opinion that a public procurement procedure allows for the selection of the undertaking providing the service at the least cost to the community and does not entail excess compensation. At least there is a presumption that the transaction will necessitate the least costs for the State. Hence, conducing a procurement procedure is considered to be a device to relieve the Commission of its monitoring task relating to the financing of SGEIs. Compliance with public procurement rules thus objectivises the award of the contract and hence, excludes the element of an undue economic advantage as meant in Article 107(1) TFEU.[93] Important to note is however that the fourth *Altmark* criterion specifically refers to a public procurement procedure which allows for *the selection of the tenderer capable of providing those services at the least cost to the community*.[94] Hence, a public procurement procedure as such does not necessarily include the selection of the tenderer with the lowest costs. In this regard it should be noted that not all public procurement procedures will lead to the selection of the tenderer that can provide the service *at the lower cost*. In order to verify whether a specific procedure actually allows for this, the Commission has indicated that it needs to undertake a 'material analysis' going beyond the mere consideration of the applicable public procurement rules.[95] Such material analysis may come to the conclusion that the tender does not suffice to meet the fourth criterion (first limb), or even where it does, the resulting compensation cannot per se be considered necessary (within the meaning of the third criterion).[96] However, it should first be noted that the 'lowest cost' aspect does not entail that one can only take into account the undertaking providing the service at the lowest price. In a public procurement procedure, contracting authorities should base the award of public contracts on the most economically advantageous tender (MEAT) which is identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may

92 Commission Decision of 16 December 2003,*CADA Ireland* (N 475/2003) Commission Staff Working Document, Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI of 29 April 2013, p. 39.

93 A. Sanchez Graells, 'Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts', in: *The Competition Law Review,* 2014 10(1), p. 6; Case T-116/01 & T-118/01 *P&O European Ferries* [2003] ECR II-2957, §118.

94 It should be noted that the phrase 'which would allow for the selection of the tenderer capable of providing those services at the least cost to the community' is not mentioned in the operative part of the judgement.

95 Commission, 16 December 2003, State aid N 475/2003 Security of supply Ireland (CADA); M. Klasse, op. cit., p. 47. This is specifically the case if a specific SGEI market is immature or where there are few similarities to the service required in the private sector.

96 M. Klasse, op. cit., p. 47.

include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. The MEAT criterion will allow for the most economically advantageous offer to match the value of the market.[97] Specifically with regard to SGEI and their importance for the community, wider quality, environmental and social goals are relevant when assessing tenders. Such criteria can be taken into account as long as they are defined in advance to allow for effective competition. Indeed, a procurement procedure needs to allow for competing bids which provide for credible alternatives to be assessed.[98] In addition, as held by the Court in *BUPA,* the purpose of the fourth *Altmark* condition is to ensure that the compensation provided for does not entail the possibility of offsetting any costs that may results from inefficiency.[99] It should be noted in this regard that public procurement procedures, which are oriented towards ensuring that contracting authorities benefit from efficient market conditions set through effective competitive conditions, do not necessarily lead to absolute (ideal) *best* contract conditions since value for money is a goal or aspiration of public procurement rules, but not a *conditio sine qua non*, nor a guarantee.[100] Indeed, by running a procurement procedure one aims that the terms of a contract reflect *normal* market conditions. For the reasons mentioned above, it is argued by some that the fourth *Altmark* criterion should be interpreted loosely without a firm focus on 'the lowest cost' outcome, hereby supported by the Commission who moved in its analysis rather quickly from a detailed, overall material assessment of whether procurement procedures actually allowed for the selection of the tenderer capable for providing those services at the least cost to the community toward a more formalistic, box-ticking approach where formal compliance with procurement legislation was considered to set a (hard to rebut) presumption of the inexistence of State aid.[101] In short, in the viewpoint of the Commission, complying with public procurement rules leads to a rebuttable presumption of compliance with State aid rules. In order to rebut that presumption one should be able to prove that even though a procurement procedure took place, the economic operator entrusted with the public service obligation received an economic advantage as the contract does not reflect normal market conditions which will be the case when there is a clear disproportion between the obligation of the parties involved. In *Land Burgenland*, the Court held that where a public authority buys a product by way of a tender procedure, it can be presumed that the market price corresponds to the lowest bid (objective element), provided that it is

97 Commission Staff Working Document, Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI of 29 April 2013, p. 48. Of course, such award criterion may give rise to favouritism more easily.

98 Commission Decision 2013/435 on state aid implemented by France in favour of Société Nationale Maritime Corse-Méditerranée [SA.22843], §173.

99 Case T-289/03 *BUPA* ECLI:EU:T:2008:29, §249.

100 A. Sanches Graells, 'The Commission's Modernisation Agenda for Procurement', in: E. Szyszcak & J.W. van de Gronden, *Financing Services of General Economic Interest',* Asser Press, The Hague, 2013, p. 165.

101 A. Sanches Graells, 'The Commission's Modernisation Agenda for Procurement', in: E. Szyszcak & J.W. van de Gronden, *Financing Services of General Economic Interest',* Asser Press, The Hague, 2013, p. 166, referring to Commission Decision N 475/2003 of 30 May 2003 and Commission Decision N 46/2007 of 30 May 2007.

established, first, that that bid is binding and credible and secondly, that the consideration of economic factors other than the price is not justified (subjective elements).[102] This presumption can be rebutted however. As the Court did not overrule *Altmark,* it then has to be demonstrated that, *despite* having complied with procurement rules, the economic operator did not actually receive an economic advantage because the terms of the contract did not reflect normal market conditions.[103] This can happen because certain factors may have discouraged or even prevented potential candidates from participating in the call for tenders. Examples are the fact that a certain bidder had an important competitive advantage because of its position as an incumbent operator, short time periods which do not allow new operators to meet the requirements of the tender specifications or only after taking a very high economic risk, restrictive technical specifications or performance requirements.[104] It follows that for the purpose of the fourth *Altmark* condition, it is not enough to simply use one of the procedures recognised under the EU public procurement directives as it still needs to be demonstrated that the terms of the procedure actually used are such as to enable effective competition. Hence, contracting authorities that fully complied with the rules on public procurement may still have to notify the award as State aid. Even though in the absence of a clear disproportion between the obligations imposed on the economic operator and the consideration paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc) state aid rules impose a very limited constraint on the development of anti-competitive public procurement[105], this is rather unsatisfactory and does not contribute to making the rules easier to apply.

The benchmark for compensation in the absence of public procurement that is based on the costs which a typical undertaking, well run and adequately provided bears, could be 'market remuneration' (comparison with the costs on the market) or 'analytical ratios representative of productivity' such as turnover to capital employed, total cost to turnover, turnover per employee, value added per employee or staff costs to value added.[106] In this regard the Commission will verify whether the price paid is actually corresponding to the costs of a well-managed undertaking that provides comparable services in the same sector on the market. According to the Commission, statistical data based on the actual cost in a sector cannot be considered sufficient proof that an average of these costs represents the costs of an efficient undertaking, and

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102 Joined cases C-214/12P, C-215/12P & C-223/12P *Land Burgenland, Grazer Wechselseitige Versicherung AG and Republic of Austria v. European Commission* ECLI:EU:C/2013:682. See also P. Nicolaides and S. Schoenmaekers, 'The Concept of 'Advantage' in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New General Block Exemption Regulation, *European State Aid Law Quaterly* 2015/1, Lexxion, Berlin, pp. 143–156.

103 A. Sanchez Graells, *Public Procurement and the EU Competition Rules,* Hart Publishing, Oxford, 2011, p. 121.

104 Case T-454/13 *Société nationale maritime Corse Méditerranéé (SNCM)* ECLI:EU:T:2017:134, §240–251.

105 Ibid.

106 E. Szyszczak, 'Introduction', in: E. Seyszcak, J.W. van de Gronden, 'Financing Services of General Economic Interest', Asser, The Hague, 2013, p. 22. See also SGEI Framework, §34.

hence does not suffice to meet the fourth criterion.[107] The benchmark is the would-be price, had the public service been assigned by way of a competitive tender.[108] Of course such assessment is only possible if there are suitable and genuine benchmarks that allow for comparison. Only in very exceptional circumstances, this benchmarking exercise has been successful. Indeed, many Member States have as part of their austerity measures privatised some public sector organisations that previously held a monopoly position.[109] The lack of competition in the market suggests that by entrusting a SGEI to a new undertaking little or no benchmark data will be available to determine if it is well run and therefore if the level of compensation is appropriate.[110] With regard to compensation paid in the bus transport sector in the Austrian Lienz District for example, the Commission held that since the sector was dominated by monopolies and since contracts were awarded without tenders for a long time, comparisons could not be made so that an undertaking operating in this market is not necessarily a well-managed undertaking. In *Chronopost,* the CJEU held that in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.[111]

In can be concluded that the *Altmark* conditions provide a link between the *compensation* and the *quid pro quo* approach. While on the one hand the parameters of the compensation approach are accepted, the need for a public procurement procedure (or benchmarking exercise) is of importance for reasons of transparency and in order to verify whether there is true competition and to authenticate market prices. However, it is not simple to determine whether in a given case the *Altmark* criteria are fulfilled. It is often claimed that the ruling raised more questions than provided answers. In an attempt to clarify the application of State aid rules, the Commission adopted the *Altmark* or Monti-Kroes package in 2005[112] in which it specified under which conditions public service compensations can be considered compatible with primary law. Since this package did not address all questions raised by the *Altmark* ruling, it was modified and updated in 2011 by the Almunia-package. The most important features of this last package will be discussed in part 3.5.

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107 Commission, 26 November 2008, State aid C 3/08 Southern Moravia Bus Companies OJ 2009 L 97/14, paras 82, 83; M. Klasse, op. cit., p. 49.

108 Commission, 26 November 2008, State aid C 3/08 Southern Moravia Bus Companies OJ 2009 L 97/14, paras 82, 83; M. Klasse, op. cit., p. 49.

109 I. Clarke, *The Role of Procurement and SGEI After* Altmark, in: 'Financing Services of General Economic Interest', Asser Press, the Hague, 2013, p. 76.

110 Ibid.

111 Joined Cases C-83/01 P, C-93/01 P & C-94/01 P *Chronopost* ECLI:EU:C:2003:388.

112 The Altmark-package consists of a Decision exempting SGEI in certain sectors (Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty 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 L 312, p. 67) and a Community Framework for State aid in the form of public service compensation, OJ C 297, p. 4.

D. The connection between Altmark and 106(2) TFEU

Application of the *Altmark* criteria will take place before Article 106(2) TFEU is considered. Indeed, while satisfaction of all four *Altmark* criteria will lead to the conclusion that there is no State aid as such, Article 106(2) TFEU is used to examine whether, in case not all *Altmark* criteria are fulfilled incompatible aid is nevertheless necessary to the performance of the tasks assigned to the recipient of the measure at issue.[113] As such, Article 106(2) TFEU is specifically applicable to SGEIs and provides for an exception to the application of the competition rules to SGEI by providing that: '*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly 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.*'

Hence, whenever a private company provides a SGEI, the competition rules including the State aid provisions may be applicable. Indeed, the granting of a SGEI may lead to the distortion of competition and State aid may come into play whenever a company is financed through public resources to provide a SGEI. As indicated above, Article 14 TFEU indicates explicitly that the EU and the Member States have to take care that SGEIs operate 'without prejudice to Articles 106 and 107 TFEU'.

Nevertheless, undertakings entrusted with the provision of SGEIs are exempted from the prohibition to violate State aid rules by Article 106(2) TFEU if the application of Article 107(1) would obstruct the provision of the services. As held by the Court in *Corbeau,* article 106(2) TFEU thus permits Member States to confer on undertakings to which they entrust the operation of SGEIs, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.[114] Indeed, since the pursuit of a public interest may render the service in question less competitive than comparable services provided by other private undertakings, State aid is usually granted for the compensation of the provision of public services. Important to note is that for Article 106(2) TFEU to be successfully invoked it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a SGEI should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under

113 Case C-660/15P *Viasat* ECLI:EU:2017:178, §34; Joined cases C-66/16P to 69/16P *Comundad Autónoma del País Vasco* ECL:EU:C:2017:999, §55.

114 Case C-320/91 *Corbeau* ECLI:EU:C:1993:198, §14.

economically acceptable conditions.[115] Article 106(2) TFEU reflects the balance between the internal market and free competition on the one hand and Member States and EU regulations intervening in the market in order to safeguard the public interest on the other hand.[116] In allowing derogations to be made from the treaty in certain circumstances, Article 106(2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Union's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.[117] It follows that while compensation granted to any undertaking is subject to State aid control (including where the market has been reserved for a single undertaking, including an in-house provider[118]), disadvantages arising from public service obligations can justify exclusive rights or compensation payments.[119] The application of EU competition law is thus the rule and the compensation granted by public authorities for the performance of a SGEI is in principle subject to State aid scrutiny. Only if the application of the competition rules would obstruct the provision of the service, an exception can be made and the public interest shall prevail. Despite the lack of direct effect, Article 14 TFEU represents thus a significant step in the concretising of non-economic concerns in both the psyche and legal hierarchy of the European Union since it upgraded SGEIs from a mere defence in article 106(2) TFEU to a fundamental value shared by the whole Union.[120]

Important to note though is that Article 106(2) TFEU provides that the derogation it allows from the application of the rules contained in the treaties should not affect the development of trade to such an extent as would be contrary to the common interest of the EU. Of course, since any exemption from the competition rules needs to be proportionate to the legitimate aim pursued and limited to what is absolutely necessary, State aid is only considered compatible with the internal market if it is proportionate to clearly defined objectives of general interest. In this regard the General Court has held that, in order for an aid scheme to infringe this provision, it must alter trade and competition in a substantial manner and in a manifestly disproportionate measure in relation to the objective sought to be achieved by the Member States.[121] It is irrelevant whether an undertaking may fulfil its public service obligations at lowest cost for assessing compatibility of the State funding of that services. Instead, Article 106(2) TFEU seeks to prevent, through an assessment of the proportionality of the aid, an operator from benefiting from funding that exceeds the net costs

115 Case C-162/06 *International Mail Spain* [2007] ECLI:EU:C:2007:681, §35.
116 Centre of Employers and Enterprises providing public services, op. cit., p. 4.
117 Case C-159/94 *Commission v. France* [1997] ECLI:EU:C:1997:501, §55. It should be noted that Article 106(2) TFEU is not applicable to the land transport sector.
118 SGEI Communication, §33.
119 Case C-67/96 *Albany* ECLI:EU:C:1999:430, §86.
120 J. Kociubiński, op. cit., pp. 54–55; Leo Flynn, 'Competition Policy and Public Services in EC Law after Maastricht and Amsterdam Treaties' in David O`Keeffe and Patric Twomey (eds), *Legal Issues of the Amsterdam Treaty* (OUP 1999) 185; Hans W Micklitz, 'Universal Services: Nucleus for a Social European Private Law' in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (OUP 2011) 95.
121 Case T-533/10 *DTS c Commission* ECLI:EU:T:2014:629, §155.

of the public service.[122] Nevertheless, even though exceptions should in principle be interpreted strictly, the Court held in *Corbeau* that Article 106(2) TFEU can be invoked whenever normal competition rules 'obstruct' the performance in law or in fact, of the particular tasks assigned to the undertaking.[123] It follows that a mere obstruction is already enough. Normal performance of the tasks should not necessarily have become impossible.

Since the conditions laid down in *Altmark* and those necessary for the application of article 106(2) TFEU thus generally pursue different objectives, the Commission is as such not required to examine whether the *Altmark* conditions are satisfied in order to assess an aid measure under article 106(2) TFEU. Nevertheless, the Court has held that as regards the application of Article 106(2) TFEU three conditions must be satisfied in order for State aid granted as compensation for discharging public-service obligations to be regarded as compatible with the internal market. The first condition, relating to the definition of a public service, requires that the service at issue actually be a service of general economic interest and be clearly defined as such by the Member State.[124] The second condition, relating to the public-service mandate, requires that the recipient undertaking be explicitly entrusted by the Member State with the provision of the public service in question. Finally, the third condition is based on the concept of proportionality. Under that condition, the financing of an undertaking entrusted with public-service obligations must be considered to be compatible with the internal market in so far as the application of the competition rules of the treaty would obstruct the performance of the particular tasks assigned to that undertaking, and the exemption from the competition rules should not affect the development of trade to an extent that would be contrary to the interests of the European Union.[125]

This leads to the conclusion that if State aid is to be exempted under Article 106(2), it must in any case satisfy the first *Altmark* condition as the condition is comparable under *Altmark* and Article 106(2) TFEU. With regard to the second and fourth *Altmark* condition, the Court has held in *Viasat* that the fact that if a measure does not satisfy these conditions, it does not prevent such measures, while classified as State aid, from being regarded as compatible with the internal market under Article 106(2) TFEU.[126] Hence, the Court has ruled that Article 106(2) does not require that the SGEI provider is efficient or that it is selected on the basis of a public procurement procedure so it is not necessary.[127] While the third *Altmark* condition broadly coincides with the criterion of proportionality as established by the case-law in the context of Article 106(2) TFEU, it must be noted that the context and the purpose of its application are different. If follows that while fulfilment of the *Altmark* criteria leads to the conclusion that a SGEI is

122 Joined Cases T-568/08 & T-573/08 *Metropole Television* ECLI:EU:C:2010:751, §139–140;. Quigley, *European State Aid Law and Policy*, Hart Publishing, 2015, p. 247.
123 Case C-320/91 *Corbeau* [1993] ECLI:EU:C:1993:198, §13.
124 Case C-127/73 *BRT* ECLI:EU:C:1974:25, §22.
125 Case T-442/03 *SIC v. Commission* ECLI:EU:T:2008:228, §44; Case T-125/12 *Viasat* ECLI:EU:T:2015:687, 61.
126 Case T-125/12 *Viasat* ECLI:EU:T:2015:687, §76.
127 Case T-356/15 *Austria v. Commission* ECLI:EU:T:2018:439, §687.

provided under normal market conditions (and the existence of a procurement procedure or a benchmarking exercise is presumed to lead to that conclusion if the other conditions are fulfilled as well), the application of Article 106(2) TFEU already presupposes that there are no normal market conditions as it presupposes the existence of State aid. What Article 106(2) TFEU seeks to prevent, through the assessment of the proportionality of the aid, is that the operator responsible for the service of general economic interest benefits from funding which exceeds the net costs of the public service. Hence, whether an undertaking responsible for a SGEI may fulfil its public service obligations at a lower cost is irrelevant as the costs to be taken into account when applying Article 106(2) TFEU are the actual costs of the service such that they are, and not as they could have been or ought to be, on the basis of objective and transparent calculation criteria, founded on the example of a typical undertaking which is well run and adequately equipped.[128] It can be concluded that any failure to comply with the second and fourth *Altmark* conditions, although relevant to the examination of the question as to whether such a service is provided under normal market conditions, is not relevant to the assessment of the proportionality of the aid in the context of the application of Article 106(2) TFEU. It should be noted however that in practice, the Commission's is of the opinion that the first three *Altmark* conditions and the requirements of Art 106(2) TFEU coincide.[129]

EU rules and practices on State aid, SGEIs and public procurement have been further developed in secondary legislation and case law. Specific rules for State aid granted to SGEIs can be found in the Commission's Monti-Kroes and Almunia Package as well as in case law. These will be discussed in the following paragraphs.

E. The Almunia package

The discretion of the Member States and the Commission may be limited by the directives and decisions that the Commission is competent to adopt on the basis of Article 106(3) TFEU. Thus, in 2005 the Commission adopted the 'first *Altmark* package' with a view to defining *inter alia* the conditions in which public service compensations may be held to comply with Article 106(2) TFEU and may, consequently, be exempt from the obligation of notification of new aid provided for in Article 108(3) TFEU. The principles of the 2011 (published in 2012) Almunia package, also called 'the second *Altmark* package' are a clarification of the case law and a simplification in terms of an exemption for social services and proportionality (stricter rules for certain sectors and for compensation above 15 million EUR).[130] It aims to clarify key State aid principles and in-

128 Case T-125/12 *Viasat* ECLI:EU:C:2015:687, §86–90.

129 See point 16d of the Communication from the Commission of 11 January 2012 'European Union framework for State aid in the form of public service compensation (SGEI framework), 2012/C 8/03' and art 4d 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 (SGEI decision) OJ L 7, 11.1.2012, p. 3–10.

130 It should be noted that the package does in principle not apply to certain sectors, such as the transport sector.

troduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective while taking competition considerations for large cases into account. These new State aid rules have been introduced against a backdrop of economic uncertainty across Europe with many Member States implementing challenging austerity measures which include privatisation and restructuring public service delivery.[131] The most important features of this package will now be discussed.

The package consists of:

1. an interpretative Communication that clarifies key concepts related to State aid for SGEIs and the meaning of the four Altmark conditions.[132] This Communication is a non-binding document issued by the European Commission in which the Commission confirms that if the Altmark criteria are fulfilled, there is no State aid so that the Commission should not be notified. As the Communication aims to clarify certain concepts, it puts much emphasis on the definition of 'economic activity' by referring to the case law of the CJEU in order to determine whether the service concerned is a SGEI. In this regard, the liberalisation of markets and the fact that services can also be provided in-house raise particular challenges.[133] In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers.[134] If an authority wishes to provide a service in-house, this does hence not entail that the provision of this service is not an economic activity.
   The SGEI Communication confirms the link with public procurement. As held in §5, where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with Union law governing public procurement, stemming from Articles 49 to 56 of the Treaty, the Union Directives on public procurement and sectoral rules. Even if the Directives are wholly or partially inapplicable (e.g. if the threshold is not reached) the award may nevertheless have to meet Treaty requirements of transparency, equality of treatment, proportionality and mutual recognition. Furthermore, §37 specifically indicates that the decision to provide a SGEI by methods other than through a public procurement procedure that ensures the least cost to the community may lead to distortions in the form of preventing entry by competitors or making easier the expansion of the beneficiary in other markets. Of course a benchmarking exercise can also be accepted.[135] Of strategic importance is that with regard to the first limb of the fourth Altmark criterion, the Communication indicates that not

131 I. Clarke, op. cit., p. 71.
132 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 C 8, 11.1.2012, p. 4.
133 W. Devroe and D. Gabathuler, op. cit., p. 56.
134 Case C-113/07 P SELEX Sistemi Integrati v Commission ECLI:EU:C:2009:191, §72 et seq.
135 SGEI Communication, §62.

every award procedure provided for in the procurement directives will satisfy State aid rules. Interestingly, it holds that an open procedure that is in line with the requirements of the public procurement rules is acceptable, but also a restricted procedure, unless interested operators are prevented to tender without valid reasons.[136] Nevertheless, since 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, the increased use of negotiations in these procedures may lead to disguised State aid.[137] Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases.[138] Since the negotiated procedure without publication of a contract notice cannot ensure that the tenderer capable of providing those services at the least cost to the community is selected for there is no competitive selection possible, this procedure may only be allowed if only one operator is able to provide the service.[139] This is also laid down in the SGEI Quality Framework[140] in which the Commission holds that full compliance with open or restricted public procurement procedures awarded on the basis of either the lowest price or, under certain conditions, the MEAT criterion means that the contract is awarded at the least cost to the community as required by the Court as one of the conditions for excluding the existence of State aid. This confirms that the Commission is still holding the view that formal compliance with (certain) public procurement legislation is in principle enough to presume there is no State aid without any additional material assessment in terms of State aid is warranted.

It follows that by only fully approving some procurement procedures the public procurement exemption regarding the existence of State aid is significantly reduced by the European Commission. This is rather peculiar, since this goes against the spirit of the new procurement package that was proposed by the same institution and adds additional flexibility for contracting authorities to negotiate and explicitly allows for these procedures if certain conditions are fulfilled. Indeed, the new public procurement package specifically allows for the use of the competitive dialogue and the negotiated procedure with prior publication if recourse to an open or negotiated procedure with prior publication would either be impossible or not useful. As held by Carranta, the suspicion the Communication is showing towards these procedures is probably unwarranted, since the same law maker has avowed that 'a greater use of these procedures is likely to increase cross-bor-

136 SGEI Communication, §66.

137 See also Commission Decision N 282/2003 Cumbria Broadband, Project Access, Advancing Communication for Cumbria and Enabling Sustainable Services, Brussels, 10 December 2003, C(2003)-4480fin.

138 Commission Decision N 381/04 – France, Projet de réseau de télécommunications haut débit des Pyrénées-Atlantiques, and Commission Decision 382/04 – France, Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (DORSAL).

139 Commission Decision SA.33054: UK Post Office Compensation for net costs incurred to keep a non-commercially viable network, §41.

140 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, 20 December 2011, COM(2011) 900 final, p. 6.

der trade, as the evaluation has shown that contracts awarded by a negotiated procedure with prior publication have a particular high success rate of cross-border tenders.'[141] In any case, to date, the content of the Communication does not appear to have led in practice to reluctance on the part of awarding authorities to use the competitive dialogue procedure or the negotiated procedure with prior publication because of the risk that the transaction might not be compliant with the EU State aid regime.[142] Caution is warranted however, since additional restrictions can make the provision of SGEIs more difficult.

In any case, taking into account was has been mentioned in the preceding paragraph, the fourth Altmark criterion will not be satisfied by procurement procedures that appear to be open or competitive but do not result in actual competition between credible bids which allow for choosing the tenderer capable of providing the services at the lowest cost.

With regard to the benchmarking option, the Communication clarifies that it should be ensured that the high costs of an inefficient undertaking are not taken as the benchmark. As regards the comparison with a 'well run undertaking', Member States should apply objective criteria that are economically recognised as being representative of satisfactory management. Simply generating a profit is not a sufficient criterion for deeming an undertaking to be 'well run'.[143]

2. a Decision, which is in fact a binding block exemption Regulation, indicating that Member States are exempted to notify specific categories of public service compensations that constitute State aid to the Commission -although notification is still allowed- since they are held to be compatible with the internal market, more specifically with Article 106(2) TFEU.[144] Although the 2011 SGEI Decision does not expressly require that the public service in question serves a general economic interest presenting specific characteristics as compared with that served by other economic activities, it is, in any event, a precondition for the application of Article 106(2) TFEU arising from, inter alia, the not unlimited discretion the national authorities have in defining what constitutes public service.[145] SGEIs are exempted provided the compensation amount is less than an annual amount of EUR 15 million.[146] Important to note however, is that this compensation should only cover the net costs for carrying out the PSO which are estimated on the basis of the

141 R. Carranta, 'General report' in: U. Neergaard, C. Jacqueson & G. Skovgaard Ølykke, 'Public Procurement Law: Limitations, Opportunities and Paradoxes, The XXVI Fide Congress in Copenhagen, 2014, Congress Publications Vol. 3', DJØF Publishing, Copenhagen, 2014, p. 148. See also recital 42 of Directive 2014/24/EU.

142 M. Burnett, 'The New European Directive on the Award of Concession Contracts – Promoting Value for Money in PPP Contracts?', in European Public Private Partnership Law Review, Lexxion, Berlin, 2/2014, p. 17.

143 SGEI Communication, §71.

144 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 L 7, 11.1.2012, p. 3.

145 Case T-219/14 Regione autonoma della Sardegna ECLI:EU:T:2017:266, §154.

146 There are exceptions if the compensation related to transport and transport infrastructure.

precisely defined parameters contained in the act of entrustment, including a reasonable profit. Social services are exempted from the obligation of notification to the Commission, regardless of the amount of the compensation received if they meet 'social needs as regards health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups'.[147] There are also exemptions for certain air or maritime links to islands and for certain SGEIs as regards airports and ports. Important to note is that the Decision is only applicable to SGEIs that make reference to it in the formal entrustment Act and have a maximum duration of ten years. Next to the fact that it contains reporting requirements it indicates in recital 29 that it applies without prejudice to the Union provisions in the field of public procurement.

3. a Framework with criteria for compensation payments, which will be the tool for assessing large compensation amounts granted to providers which are not exempted under the Decision.[148] The Framework, which is a non-binding document, will apply a more favourable regime to aid which in principles falls within the scope of application of the Decision but does not fulfil all of its conditions (such as the act of entrustment or the risk of overcompensation). While the compensation amounts should be qualified as State aid, they can be declared compatible with the internal market on the basis of Article 106(2) TFEU. In this regard, the Framework contains a set of criteria that have to be fulfilled for a positive compatibility assessment. First of all, the Framework leads to a systematic investigation of SGEIs from the perspective of public procurement rules.[149] Indeed, as held by §19, aid will be considered compatible with the internal market on the basis of Article 106(2) TFEU only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement.[150] This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law.[151] It should be noted that this does not necessarily mean that only open or restricted procedures are allowed and specifically entails that exceptions in the scope of application provided for in the procurement directives should be applied. Hence, §19 of the of the Framework is applicable to situations in which it is clear that State aid has been granted but in which it is justified due to special obligations imposed on an economic operator. In addition, it should be noted that it does not ensue from the wording of

147 Article1(c) of the Decision.

148 Communication from the Commission – European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15, hereinafter: Framework. The Framework will be applicable to SGEIs of large dimensions apart from social SGEIs and to those of a medium scale. It is not applicable to land, air and maritime transport or public broadcasting. Instead, the sector-specific rules apply.

149 R. Carranta, op. cit., p. 150.

150 §10 Framework indicates that it is applicable without prejudice to requirements imposed by Union law in the field of public procurement.

151 Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) TFEU.

Article 106(2) TFEU or the case law of the Court that a general interest task may be entrusted to an operator only as a result of a tendering procedure.[152] For this reason, it can be held that by establishing a criterion of compliance with the applicable public procurement rules for State aid to be found compatible, the Commission seems to be transgressing the limits of its broad discretion in shaping the application of Article 106(2) TFEU.[153]
Furthermore the Framework contains some provisions on how to calculate the amount of compensation and a reasonable profit.[154] It contains some detailed provisions on the 'net avoided cost methodology'[155] to calculate the net cost necessary, or expected to be necessary to discharge the public service obligations and refers to calculations based on a swap rate[156] or the rate of return on capital that would be required by a typical company regarding the calculation of profit.[157] This will not be further discussed within the scope of this chapter. In any case, the Framework, which includes reporting requirements, obliges Member States to introduce incentives for the efficient provision of SGEIs of a high standard, unless they can duly justify that it is not feasible or appropriate to do so. Indeed, mechanisms for incentivising efficiency improvements contribute to reducing the risk of overcompensation. They should be based on objective and measurable criteria set out in the entrustment act and be subject to transparent ex post assessment carried out by an entity independent from the SGEI provider.[158]

4. a de minimis Regulation specifically applicable to SGEIs, stating that under the threshold of 500,000 EUR for over a period of three fiscal years, compensations do not fall under State aid scrutiny.[159] This is based on the assumption that compensation that falls below this threshold is not likely to affect trade between Member States and/or have an appreciable effect on competition. Since the undertaker has to be compensated for the extra costs incurred in providing a public service, the threshold is higher than the one in the general de minimis Regulation.[160] Aid that exceeds the threshold will have to be investigated under the Decision and, failing that, under the Framework.[161] As held by recital 21 of the Regulation, it is applicable without prejudice to the requirements of Union law in the area of public procurement.

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152 N. Fiedziuk, 'Putting Services of General Economic Interest Up for Tender: Reflections on Applicable EU Rules', Common Market Law Review, 50, 2013, p. 99. See also Case T-17/02 Olsen v. Commission ECLI:EU:T:2005:218.
153 Ibid.
154 Framework, §21–22.
155 Framework, §24–25.
156 Framework, §36.
157 Framework, §33.
158 Framework §39 and 42.
159 Commission Regulation (EU) No 360/2012 of 25 April 2012 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 L 114, 26.4.2012, p. 8. It should be noted that this Regulation is only applicable to transparent aid which is defined as aid of which the gross grant equivalent can be calculated ex ante without the need to undertake a risk assessment.
160 Regulation No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p.1.
161 E Szyszczak, 'Modernising State Aid and the Financing of SGEI' (2012) 3(4) Journal of European Competition Law & Practice, p. 332.

It can be concluded that while the Altmark judgement establishes when a measures comes within the scope of the concept of State aid (Article 107(1) TFEU), the Decision and the Framework establish the conditions under which compensation constituting State aid is compatible with the internal market. It follows that if a public procurement procedure is in line with the fourth Altmark criterion and the other Altmark criteria are fulfilled as well, there is no State aid so the Decision or the Framework cannot be applied and there is no need to examine the compensation under Article 106(2) TFEU. As a consequence, whenever the Altmark test is not satisfied, the test is to be repeated under Article 106(2) TFEU.[162] Hence, the obligation to follow a tender procedure (or benchmarking exercise) imposed by public procurement rules may be overridden by the SGEI objectives inscribed in the provision of Article 106(2) TFEU.[163] Nevertheless, important to note in this regard is that the Almunia package, and specifically §19 of the Framework, also mandates compliance with public procurement rules as a condition for exemption of the aid granted to the undertaking entrusted with the SGEI. It follows that on the one hand it can be argued that failing to comply with the public procurement requirements will imply that compensation granted to an undertaking cannot be exempted under Article 106(2) TFEU.[164] On the other hand, it can be claimed that it does not ensue from the wording of Article 106(2) TFEU or the case law of the Court that a general interest task may be entrusted to an operator only as a result of a tendering procedure.[165] In this regard it should be noted that tendering is not a miraculous remedy for all the ills of SGEIs and in many cases it may, in fact, be undesirable to follow tendering rules.[166] As held by Fiedziuk, 'if Member States have to follow a public procurement procedure, this has a negative impact on their high level of discretion which may in turn have a negative impact on the proper functioning of the public service. Furthermore, as opposed to direct awards, tendering procedures generate high transaction costs for both the contracting authority as the undertaker. In addition, tenderers often have to make high investments which may impose a disproportionate risk with regard to short-term contracts while a long-term contract may render the authority becoming 'locked-in' to an inefficient service provider for the period of the contract.'[167]

In any case, while Altmark allows for a self-assessment by Member States of public service compensations, the assessment of whether compensation that qualifies as State aid meets the requirements for compatibility under Article 106(2) TFEU is a matter for exclusive competence of the Commission.[168] As held by Klasse, in its practice, the Commission has had the tendency to find that the

162 M. Klasse, op. cit., p. 38.
163 N. Fiedziuk, 'Putting Services of General Economic Interest Up for Tender: Reflections on Applicable EU Rules', Common Market Law Review, 50, 2013, p. 89.
164 A. Sanchez Graels 2014, op. cit., p. 18.
165 N. Fiedziuk, op. cit., p. 99. See also Case T-17/02 Olsen v. Commission ECLI:EU:T:2005:218. According to the Commission, the Decision does not set efficiency requirements and the amount of the compensation does not necessarily have to be determined through a public procurement procedure or benchmarking exercise. See Commission Staff Working Document, Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI of 29 April 2013, p. 61.
166 N. Fiedziuk, op. cit., p. 93.
167 Ibid., p. 95.
168 M. Klasse, op. cit., p. 50.

state-financing of public service missions does not comply with the Altmark criteria, thereby bringing it within the ambit of Article 107(1) TFEU, and then, subsequently, declaring it compatible with the common market on the basis of Article 106(2) or Article 107(3) TFEU.[169]

In January 2019 the Commission launched in line with its Better Regulation Guidelines the evaluation of the rules, which were adopted as part of the State aid Modernisation. The evaluation takes the form of a fitness check and aims to provide a basis for decisions, to be taken by the Commission in the future, about whether to further prolong or possibility update the State aid Regulations and Guidelines. It should be noted however that the 2012 SGEI package is not on the list of regulations scheduled for reform.[170]

F. Public procurement

1° Introduction

State aid law and public procurement law both want to ensure fair competition in the internal market. Indeed, both sets of regulation are based on the same economic principle – that, in the long term, competitive markets generate the most efficient outcomes and contribute to social welfare and are oriented towards correcting similar market failures – and so, both focus on curbing the undesirable market behaviour of different market agents.[171] However, both fields use different mechanisms to reach this aim. State Aid law aspires to achieve more competition by creating a level playing field for all the undertakings active in the internal market and ensure that they do not obtain an unwarranted advantage. Public procurement law aims to enhance competition by opening up national procurement markets and creating better value for money for public authorities. Public authorities wishing to set up a SGEI should therefore comply with the State Aid rules and the rules relating to the award of public contracts or concessions.

Of course, in 'normal' public procurement procedures, the State acquires a specific good or services in exchange for the payment of a price. In the case of SGEIs, a public authority entrusts economic operators with the management of a public service in return for financial compensation being paid to them. In such situation, the Altmark criteria have to be applied.

While the State aid rules apply from the moment that an undertaking is financed, the mere financing of an activity is usually not covered by the public procurement rules which mainly focus on the award of the contract that contains an obligation to provide a service. Another difference between both areas of law is that while in State aid law, economic considerations always have priority, public procurement law is increasingly focussing on social and environmental concerns and connects the activities of the state with the pur-

169 Ibid.

170 See for more information https://ec.europa.eu/competition/state_aid/modernisation/fitness_check_en.html, last visited on 27 January 2020.

171 A. Sanchez Graells 2011, p. 110.

suit of public interest. On the one hand this entails that both areas of law can pursue conflicting interests. On the other hand it may mean that specifically with regard to the tendering of SGEIs, there may be similar objectives since by definition public interest concerns are of great importance when it comes to SGEIs.

As has been demonstrated above, in principle the financing of SGEIs when channelled through public procurement reflects market value. A breach of public procurement rules will, in a significant number of cases (and almost in all cases involving SGEI) imply the existence of (potential) unlawful State aid. Public contracts should thus not be considered as potential instruments for granting disguised illegal State aid. However, while EU State aid law tries to incentivize tendering of SGEIs by providing for less rigorous treatment when the award of a contract is preceded by a public procurement procedure, public procurement law disregards the significance of the SGEI concept and adopts its own standards on when an agreement should follow a public procurement procedure and whether it merits derogation.[172] Indeed, SGEIs are as such not regulated by the procurement Directives. The general procurement Directive 2014/24/EU only indicates that it does not deal with the liberalisation of SGEIs and that Member States are free to define SGEIs, their scope and the characteristics of the services to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives. Furthermore, the Directive is without prejudice to the power of national, regional and local authorities to provide, commission and finance SGEIs in accordance with Article 14 TFEU and Protocol No 26. It also does not deal with the funding of SGEIs or with systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition.[173] It follows that only if Member States decide to outsource the provision of SGEIs, public procurement law may apply. Member States are indeed not obliged to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts.[174]

Until now the Court has not explicitly acknowledged whether and how Article 106(2) TFEU would apply in the context of EU public procurement rules. As held by Fiedziuk, in Commission v. Ireland Advocate-General Stix-Hackl indicated in her opinion that Article 106(2) TFEU could, in principle, be relied on by Member States if the application of the provisions on public procurement would have obstructed the performance, in law or in fact, of the tasks assigned to it.[175] This view seems to be correct since Article 106(2) TFEU, as opposed to other Treaty exemptions which are mostly domain-specific, is holistic in nature which entails that it has a capacity to derogate, as indicated by its wording, from 'the rules contained in the Treaties'.[176] It can thus also be invoked with regard to the inter-

172 N. Fiedziuk, op. cit., p. 88.
173 Recitals 6 and 7 and Article 1(4) of Directive 2014/24/EU. See also Article 4(1) of Directive 2014/23/EU on concession contracts.
174 Recital 5 Directive 2014/24/EU; Case C-107/98 Teckal [1999] ECR I-08121.
175 Opinion of A.G. Stix-Hackl of 14 September 2006 in Case C-532/03 Commission v. Ireland ECLI:EU:C:2006:560; N. Fiedziuk, op. cit., p. 112.
176 N. Fiedziuk, op. cit., pp. 110–111.

nal market rules and the general principles of law which form the legal basis of the procurement Directives.

In the following paragraphs some aspects of public procurement law that deserve specific attention in the light of Article 106(2) TFEU will be briefly discussed. It concerns the existence of service concessions, the in-house provision of SGEIs and the concept of 'contracting authority' and the focus on flexibility in the new procurement package.

2° Service concessions

As held by Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. Public contracts do not generate significant exclusionary effects on market competition as meant in this Article. For this reason, Article 106(1) TFEU is not really relevant with regard to public contracts, except for concessions. Indeed, concessions have inherent exclusivity and quasi-monopolistic features which have a negative impact on (or completely exclude) the ability of other tenderers to compete with the concessionaire in the same geographical area under substantially equivalent conditions during the lifespan of the concession contract; thus resulting in a special or exclusive right for the purposes of Article 106(1) TFEU.[177] It follows that if a special or exclusionary right has been provided, Member States cannot enact or maintain in force any measure contrary to the Treaties.

Concessions are generally used to award SGEIs. Since they concern large contracts of long duration, they often require considerable infusions of public money even though in many Member States the provision of SGEIs has recently been privatised.[178] It follows that privatisation was often only in form and concessions have generally been awarded to domestic undertakings without advertisement at EU level. In this regard it should be noted that even though traditionally service concessions were not regulated by the public procurement directives, the fundamental principles of EU law (equal treatment, non-discrimination, transparency) and Treaty provisions have always been applicable, at least if there is some cross-border interest. The new public procurement package that was adopted in parallel to the adoption of the new SGEI package contains a Directive[179] that specifically concerns the award of concession contracts.

Article 106(2) TFEU is an exception to Article 106(1) TFEU. This entails that in cases where Article 106(1) TFEU applies, Article 106(2) TFEU can be invoked to set aside the application of public procurement rules if this would jeopardise the performance of the specific SGEI. However, as held by Sanchez Graells,

177 A. Sanchez Graells 2011, p. 123.

178 R. Carranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law Review, Kluwer, vol. 52, issue 2, p. 410.

179 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of, concession contracts, OJ L 94, 28.3.2014, p. 1–64.

since compliance with public procurement rules and principles concerns the contracting authority (not the undertaker) and must take place before the undertaking starts rendering the SGEI, it does not obstruct the performance, in law or in fact, of the particular tasks (which at the time of conducting the procurement process still do not exist) assigned to them as meant in Article 106(2) TFEU.[180] It follows that the award of the special or exclusive right to provide SGEIs in breach of public procurement rules will hardly ever fulfil the conditions of Article 106(2) TFEU. On the other hand it has been held that the reliance on Article 106(2) TFEU could become a viable option to overcome the new regime of Directive 2014/23/EU and restore public authorities' freedom to choose the most suitable mode of public service provision.[181] In this regard it should be noted however that since many concession contracts are of long duration, it might be wise to look for alternative ways to prevent corruption, such as more costly but effective monitoring.[182]

3° 'In-house' provision of SGEIs and the concept of 'contracting authority'

As held above, SGEIs are often entrusted by the State acting as a public authority to a private undertaking. This can be done by way of a public procurement procedure. The procurement directives establish rules on the procedures for procurement by contracting authorities with respect to public contracts.[183] Contracting authorities include the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.[184] Bodies governed by public law are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. Even though there might be needs of general interest, which have an industrial and commercial character and even though it is possible that private undertakings can meet needs of general interest which do not have industrial and commercial character, the acid test for needs in the general interest not having an industrial or commercial character is that the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision.[185] As held above, in public markets the public interest substitutes profit maximization. The fact that a body must have been established for the `specific' purpose of meeting needs in the general interest does not mean that it should be entrusted only with meeting such needs.[186] The procurement directives do not make a distinction between public contracts awarded by a contracting authority in the general interest and those which are unrelated to that task.[187] In

180 A. Sanchez Graells 2011, p. 127.
181 N. Fiedziuk, op. cit., p. 105.
182 Ibid., p. 96.
183 See e.g. Article 1(1) Directive 2014/24/EU.
184 Article 2(1) Directive 2014/24/EU.
185 C.H. Bovis, op. cit., p. 5.
186 Case C-44/96 Mannesmann ECLI:EU:C:1998:4, §26.
187 The applicability of the directives cannot be excluded owing solely to the fact that the tasks in the general interest having a character other than industrial or commercial which it carries out in practice were not entrusted to it at the time of its establishment. See Case C-470/99 Universale- Bau AG ECLI:EU:C/2002:746.

assessing whether or not a need in the general interest is present, account must be taken of all the relevant legal and factual elements, such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.[188] In this regard, the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, not having an industrial or commercial character.[189] However, it is an indication that it is highly likely that the respective entity is not a body governed by public law.[190] The key issue is whether the organisation primarily intends to achieve profitability. It follows that the concept 'body governed by public law' includes commercial companies under public control who fulfil the requirements of Article 2(1) of the Directive.[191] In this regard it should be avoided that the application of the Directives is circumvented by contracting authorities who use private undertakings under their control to award contracts. If the realisation of a project does not contribute to the aims and objectives of an undertaking, it is assumed that the project in question is awarded 'on behalf' of another undertaking, and if the latter beneficiary is a contracting authority under the framework of public procurement law, then the relevant Directives should apply.[192] An entity's private law status does thus not constitute a reason to exclude it from being classified as a contracting authority.

Important to note is that the procurement Directives are not applicable to in-house situations.[193] A public contract awarded by a contracting authority to a legal person governed by private or public law falls outside the scope of the Directive where all of the following conditions are fulfilled: (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.[194] It follows that if the entity becomes market-oriented or in case of participation, even as a minority shareholder, of a private undertaking in the capital of a company

188 Case C-18/01 Korhonen ECLI:EU:C:2003:300, §59.
189 Case C-373/00 Adolf Truley ECLI:EU:C:2003:110, §66.
190 Case C-223/99 Agora ECLI:EU:C:2001,259, §42.
191 It should be noted that the Court uses a functional test to assess the relationship between an entity and the state. In addition to the element of management or financial control the Court also considers factors such as the intention and purpose of establishment of the entity in question and as such approaches the issue in a flexible manner. See C.H. Bovis, op. cit., p. 21 and Case C-306/97 Teoranta ECLI:EU:C:1998:623.
192 C.H. Bovis, op. cit., p. 8.
193 Case C-107/98 Teckal ECLI:EU:C:1999:562.
194 Article 12(1) of Directive 2014/24/EU.

in which a contracting authority is also a participant, the dependency/control criterion is not met and the Directives will be applicable.[195]

With regard to the provision of SGEIs in particular, it has to be repeated in this regard that if the one of the Altmark criteria is not fulfilled, the compensation for the PSO in question is potentially State aid and requires ex ante notification to the Commission. This is also the case if the funding is provided to an in-house body within the meaning of the rules on public procurement which provides SGEIs. It follows that if a situation is not covered by the EU public procurement rules, this does not automatically entail that it is also excluded from the State aid rules.[196] As held above, the application of the competition rules does not depend on the legal status of the body providing the SGEIs but on the economic character of the activity performed.

4° The focus on flexibility in the 2014 public procurement package

As has been mentioned above, the new public procurement package puts a lot of emphasis on flexibility and has emphasised the use of negotiations in this regard. As held by Article 26(4) of Directive 2014/24/EU, Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. This is for example the case if the needs of the contracting authority cannot be met without adaptation of readily available solutions or if those needs include design or innovative solutions. As already indicated, this clashes with the statements of the Commission in §66 of its SGEI Communication which pre-date the entry into force of the procurement package. However, important to note is that the Court of Justice agreed in SNCM with the Commission's view that a negotiated procedure with prior publication confers broad discretion on the contracting authority and may restrict the participation of interested operators. The Court held that such a procedure can therefore be deemed sufficient to satisfy the fourth Altmark criterion only in exception cases.[197]

Moreover, Article 72 of Directive 2014/24/EU provides for the modification of contracts during their terms without the need for a new tender procedure as long as these modifications are not substantial and article 72(2) even introduces a de minimis threshold of substantiality.[198] Given that the contractual conditions can be altered after award, those changes, while compliant with EU procurement law, could be a form of disguised State aid if they were not justified by the operative needs of the implementation of the contract or resulted in excessive (supra-competitive) compensation to the public contractor.[199]

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195 Case C-26/03 Stadt Halle ECLI:EU:C:2005:5.
196 Commission Staff Working Document, Guide to the application of the EU rules on State aid, public procurement and the internal market to SGEI of 29 April 2013, p. 39.
197 Case T-454/13 Société nationale maritime Corse Méditerranéé (SNCM) ECLI:EU:T:2017:134, §241.
198 A. Sanchez Graells 2014, p. 8.
199 Ibid.

As held by Sanchez Graels, the increased flexibility both at award phase and during the execution of public contracts imposes the need to adopt a new method in order to find an infringement of the State aid rules (or rectius, in order to reverse the presumption that compliance with public procurement rules excludes the existence of any undue economic advantage).[200] It is thus necessary to determine whether, despite having (formally) complied with procurement rules, the economic operator actually received an economic advantage because the terms of the contract (either originally, particularly if negotiated or as amended) do not reflect normal market conditions.[201]

IV. Conclusion

When a public authority externalizes the provision of a public service, the private service provider will have to be motivated through a financial compensation from the public purse. Public authorities wishing to set up SGEIs must comply with the State Aid rules and the rules on the award of public contracts or concessions. As held by the Court in Altmark, several conditions have to be fulfilled before compensation paid for the provision of a public service is not considered to be State aid under Article 107(1) TFEU. One of these conditions is the selection of the undertaking that will discharge the PSO by means of a public procurement procedure that allows for the selection of the tenderer capable of providing the services at least cost to the community or a benchmarking exercise (fourth Altmark criterion). In this way, public procurement has emerged as an essential component in the process of determining the parameters under which public subsidies and state financing of public services constitute State aid.

Nevertheless, even though there is a tendency to incentivize tendering of SGEIs to ensure they are provided at the least cost, a tender procedure is not in itself sufficient to exclude overcompensation and cannot always depict the true status of the market.[202] It is for example possible that even the lowest bid turns to be too high, for example as a result of agreements, decisions or concerted practices within the meaning of Article 101 TFEU. Contacting authorities should thus always check whether a certain bid is credible which is not an easy task. Furthermore, there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition. This can for example happen in case of existing intellectual property rights or necessary infrastructure owned by a particular service provider or in procedures where only one bid is submitted.[203] It follows that even if a contacting authority has complied with the rules on pub-

200 Ibid.

201 Ibid., p. 9; Opinion of AG Jacobs in case C-126/01 GEMO ECLI:EU:C:2003:622, §122. See also Opinion of AG Fennelly in case C-251/97 France v Commission ECLI:EU:C:1999:480, §19.

202 See e.g. Commission, 16 May 2006, State Aid N 604/2005 Busverkehr Landkreis Wittenberg, §60 and the subsequent decision clearing the measure as State aid free: Commission, 15 September 2009, State Aid N 207/2009; Commission Decision 2014/197, Mutliarena Copenhagen, as published in OJ L152, 22.05.2014.

203 SGEI Communication, §68.

lic procurement and conducted a public procurement procedure, the award might still have to be notified as State aid.

The Commission's Almunia or SGEI package, which is a confirmation of the indissoluble link between State aid and public procurement, was designed to clarify key issues of State aid. It held that the fourth Altmark criterion is not fulfilled by procedures that appear to be open or competitive but do not result in actual competition between credible bids. In its SGEI Communication the Commission held that a competitive dialogue or a negotiated procedure with prior publication confer a wide discretion upon contracting authorities and may restrict the participation of interested operators so that they only satisfy the Altmark ruling in exceptional cases. This is very peculiar in light of the 2014 procurement package that saw the light on the basis of Commission proposals and is highly based on flexibility and negotiations.

If not all Altmark criteria are fulfilled, compensation for a PSO that is regarded as State aid might still be exempted under Article 106(2) TFEU. This is not an automatic exemption however as it is limited to situations in which the application of the Treaty would obstruct the performance of the particular tasks assigned to the undertakings entrusted with the provision of the SGEI. As indicated in this contribution, the Commission's practice and the Court's judgements are not moving into an identical direction. While the Court holds that the second and fourth Altmark criteria do not prevent measures, while classified as State aid, from being regarded as compatible with the internal market under Article 106(2) TFEU the Almunia package clearly demonstrates that the Commission considers itself not to be prevented from asking compliance with at least the first three Altmark criteria. In terms of procurement, the SGEI framework merely demands compliance with the 'applicable Union rules in the area of public procurement' which is much broader than the fourth Altmark criterion and its application by the Commission to find that there is no State aid, as it allows to resort to procurement procedures that provide room for negotiations and dialogues and to apply the exceptions to resort to a procurement procedure as provided for in the procurement Directives. In any case, asking for compliance with at least the first three criteria is common practice for the Commission. This means that the absence of a procurement procedure or a benchmarking exercise will lead to a violation of Article 107(1) TFEU (if all other State aid conditions are fulfilled) but is not necessarily a problem to successfully invoke Article 106(2) TFEU.

As it has been demonstrated that the link between SGEIs and public procurement is highly complex and the approaches taken by the Commission and the Court do not always correspond, it is regretted that the SGEI package is not included in the list of rules scheduled for evaluation in the framework of the Commission's Better Regulation Guidelines.