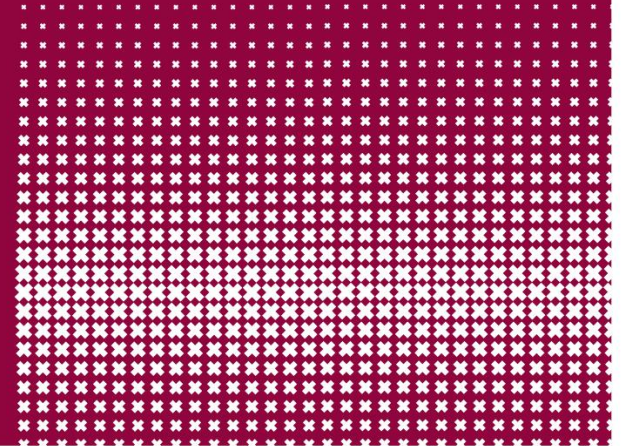




Dr. K. J.Cseres



Economic Advantage – Article 107 (1) TFEU

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What is state aid?

- Company sells land to the state at higher than market price
- Restructuring plan in order to restore the long-term viability of an energy company
- Compensation for farmers for various losses due to bad weather
- Recapitalization of national airline company
- Compensation of public service obligations
- Privileged access to infrastructure for certain companies
- Dual rate of corporation tax: 10% for manufacturing sectors, 45% for other sectors
- Aid to social housing corporations to compete with private housing agents on the market for housing for higher incomes or lower incomes



What is state aid?

■ State aid is

- a wide variety of ways in which states, governments provide assistance to the economy
- “worst area of competition law with regard to legal certainty”

■ Objectives:

- remedy market failure, pursue non-economic objectives
- Social (earthquake victims) – economic (high inflation)

■ Forms:

- state grants, interest relief, tax relief, state guarantee or holding, provision of goods and services on preferential terms



SGEI - State aid: Article 107 (1)

■ 5 elements:

- state resources
- economic advantage
- selectivity v. general measures
- effect on trade
- distortion of competition

■ Elements are interdependent

■ Several new elements of defining state aid

■ Dynamic development of case-law since 2000

■ Notice on the 'Notion of state aid' 2016



(2) Economic advantage

- It reflects difficulties in assessing sound balance between political interest, economic constraint and legal requirements
- Intervention of public authorities in economic transactions or provision of SGEI is one of the most debated areas
- Case T-157/01 Danske Busvognmænd :
 - “ Article 87(1) merely prohibits advantages for certain undertakings and the concept of aid covers only measures which lighten the burdens normally assumed in an undertaking’s budget and which are to be regarded as economic advantage which the undertaking would not have received in normal market circumstances.”

□ ,



Wide notion

- Provides relief from costs that should normally be born by the undertakings themselves
- Any advantage of monetary nature conferred by the state or its agents - any improvement in economic or financial position of an undertaking
 - Outright subsidies or grants offset partly or fully UT's costs
 - State forgoes dividends, taxes
 - Revenues from fees, prices or rents on goods, services and other assets it sells or leases to undertakings
 - Relief from economic burdens, mitigation of charges
- Effects based approach:
- objective of intervention is irrelevant –malfunction market irrelevant- (eg structural disadvantages) counterfactual
- Anything that the state gives up without objective justifications



Market economy operator test

- Test developed from 80s to closely monitor state intervention, as was seen as a last barrier to trade in internal market – liberalization agenda
- Principle of non-discrimination
- Transparency for dealings between public utis and MSs
- Address dual nature of state activities
- “Entrepreneurial activities” v. Obligations as public authority, powers
- State acting as a policy maker or state acting as a private investor --> when it pursues profits and ignores other public policies -> what counts is impact on the undertakings not source of state measure
- T-196/04 *Ryanair*



“Unmarketlike” advantage

- Compares a concrete State intervention with an analogous intervention undertaken by a hypothetical private entrepreneur
- The test distinguishes the entrepreneurial dimension of State intervention with analogous intervention by hypothetical private undertaking
- Necessary to determine what the costs of revenue may be under *normal* market conditions
- Market conditions in the absence of state intervention
- Incomparability of the state and private market operators
- Limitations: cannot address all state interventions
- see cases around LA Poste –C-39/94 *SFEI*

Market economy operator test

- Private investor/vendor/creditor test
 - Has the state granted advantage to an UT by not acting as a market economy operator in a certain transaction?
 - Helps to ensure equal treatment between public-sector operators and private firms; equal treatment of the private and public sector Art.345 TFEU

- Assessment
 - Ex ante basis: any prudent MEO would do an *ex ante* assessment of strategy and financial prospects of project i.e. business plan

 - Empirical establishment on the basis of market data
 - *Pari passu* private and public entities carry out the transaction
 - Transparent, non-discriminatory and unconditional tender



Private investor test

- Benchmarking (comparable transaction, comparable private operators, comparable situations)
- Problems: no similar circumstances or comparable market conditions
- C-83/01 *Chronopost* paras 35-40:
 - La Poste entrusted with SGEI, which requires substantial infrastructure and resources
 - Creating and operating market network, which would not have been created by a private investor
- there is no obvious market benchmark against which to compare prices or interest rates
- BUT C-124/10 P EDF – waiving tax claim - not impossible to compare



C-280/00 Altmark: compensation for SGEI

- The grant of licences to a local bus company is challenged to the extent that that company needed public subsidies to discharge the public service obligations deriving from those licences
- Preliminary questions from the *Bundesverwaltungsgericht*:
 - “whether subsidies intended to compensate for the deficit in operating an urban, suburban or regional public transport service come under Article 87 (1) of the Treaty in all circumstances,
 - or whether, having regard to the local or regional character of the transport services provided and, if appropriate, to the significance of the field of activity concerned, such subsidies are not liable to affect trade between Member States”



Article 106 TFEU

- 1. 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.
- 2. 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.
- 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Article 106 (2)

Operation of SGEI requires exclusive right

- Either because necessary for financial balance or economic viability of undertaking
- Or if it is impossible otherwise to perform the particular public tasks entrusted to the undertaking
- Entrustment by an act of public authority to an undertaking/group of undertakings to operate **SGEI**
- “In so far”: proportionality test
- Causation, necessity, proportionality ‘strictly speaking’
- Restriction not contrary to EU interests
- Problem: interpretation and understanding of the provision has been unclear → tension between stakeholders

The interplay between Article 107 (1) and Article 106 (2) Case law before Altmark

State aid approach:

compensation for PSO has to be justified under Art.106 (2)

- CFI in T-106/95 FFSA, T-46/97 SIC, C-332/98 CELF
- **consequences:** notification, standstill clause, justification under Art.107 (2), (3) or Art.106 (2), Commission has control

Compensation approach:

if the compensation for PSO does not exceed the additional net costs incurred to fulfill the PSO it is no real advantage and thus does not constitute state aid

- C-240/83 ADBHU, C-53/00 Ferring
- **consequences:** no notification, no role for Art.106 (2), Commission does not have control



Compensation or economic advantage?

- What amounts to an economic advantage under Article 107(1)?
- State compensation for public service obligations (PSO)
- 4 cumulative criteria paras 89-93
 - definition of PSO
 - *ex ante* definition of parameters
 - compensation cannot exceed net additional costs plus a reasonable profit
 - benchmark of a typical well run company



Article 106 (2)

- The rationale behind Article 106(2)
 - exception to all Treaty provisions
 - balancing between EU competition rules and general economic interests of Member States
 - *ultima ratio* provision
 - Member States have freedom to define what they regard as SGEI
 - proportionality and necessity test
 - no efficiency test



***Altmark* implications**

- positive:
 - good governance in the operation of PSOs
 - transparency and legal certainty
 - preference for public procurement
 - efficiency should be part of the test
- problems:
 - benchmark of a typical well run company
 - what remains the role of Article 106 (2)?
 - what is reasonable profit?



What remains the role of Article 106 (2)?

- Overlap between 1st and 3rd Altmark criteria and Art.106 (2)
 - Compensation and proportionality considered under Art.107 (1)
 - Incorporate derogation into the notion of advantage
 - If a measure fails the Altmark criteria then Art.106 (2) will not apply either
- 2nd and 4th Altmark criteria departure from Art.106 (2)
 - *Ex ante* transparency
 - Efficiency
- BUT application of Art.107 (1) should not be determined on the basis of leaving room for the application of Art.106 (2)
- Can Art.106(2) be applied after the application of the Altmark criteria?



New package on SGEI

- Replaces "Monti-Kroes" Package of July 2005
 - Conditions under which State aid in the form of public service compensation can be considered compatible with the EU rules
- Commission Decision 2012/21/EU
- Communication on the application of the state aid rules to compensation granted for the provision of SGEI
 - Clarify key concepts on application of state aid rules to public service compensation (undertaking, economic activity, effect on trade, state resources, entrustment, compensation)
- Communication for state aid in the form of public service compensation
 - State aid public service compensation not covered by the decision



Commission Decision 2012/21/EU

- Exempts Member States from the obligation to notify public service compensation for certain SGEI-categories to the Commission
 - Exemption is extended from hospitals and social housing to a much wider range of social services and a lower compensation threshold applies for triggering notifications for other SGEI activities
 - Notification threshold was lowered from €30 million to €15 million
- More precise methodology to determine the amount of compensation
- Introduce efficiency incentives in compensation mechanisms, comply with EU public procurement rules and equal treatment of providers of the same service for determining compensation



Legal context of SGEI

- Article 5 TEU: principle of subsidiarity
- Article 14 TFEU: cohesion principle
 - Explicit legal basis for secondary law, co-decision, prerogatives and duties of MS, applied in all EU policies, regulation as legislative tool
- Article 106 TFEU: competition issues in interplay with Articles 101,102 and 107
- PROTOCOL (No 26) on services of general interest
 - Distinction between economic and non-economic activities
- Charter of Fundamental Rights Article 36





General principles of SGEI

- Principle of subsidiarity
 - Shared responsibility of the Member States and EU
- Neutrality with regard to public or private ownership Article 345 TFEU
 - Providers : public or private undertakings
 - Strong advocacy of privatization by Commission, Council
- Proportionality
 - No unnecessary distortions of competition and limitations of freedoms of internal market
 - See C-320/91 *Corbeau*





Services of general economic interest (SGEI)

- No clear, precise, authoritative definition
- Article 16 EC (now Article 14 TFEU) put SGEI among shared values of Union + social territorial cohesion → distinction between public services and SGEI blurred
- Political considerations made legal interpretations inconsistent, interpretational discretion politically motivated
- ‘Public-service’ based approach v. ‘Competition’ based approach
- Develops through soft law no legislative act secondary legislation on SGEI → legal uncertainty



What are SGEI? I.

“[...] in Community practice there is broad agreement that the term refers to services of an **economic nature** which the Member States or the Community subject to **specific public service obligations** by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications.”

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Green Paper 2003





What are SGEI? “public service obligation”

- “Services of general economic interest are **different from ordinary services** in that public authorities consider that they **need to be provided** even where the market may not have sufficient incentives to do so. This is not to deny that in many cases the market will be the best mechanism for providing such services.”

Communication (2001) point 14



What are SGEI? “economic”

- Concept of ‘Undertaking’ = economic activities
 - Offering goods or services on the market
 - Activity of a profit oriented entity facing potential competition on the market – functional approach
- Subject to competition and internal market rules
- Excluding
 - state prerogatives (security, administration of justice, environmental protection)
- Can public and economic activities be separated?
- Liberalisation blurred the boundaries between economic and non-economic activities
- Article 14 TFEU SSGI
 - market, public administration and social economy increasingly



Minimum criteria SGEI

- “even though the Member State has a wide discretion when determining what it regards as an SGEI, that does not mean that it is not required [...]to ensure that that mission satisfies **certain minimum criteria common to every SGEI mission** [...] These are, notably, the presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission. [...]Furthermore, it follows from the case-law on Article 86(2) EC that the Member State must indicate the reasons why it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities [...]” Case T-289/03 **BUPA** para 172
- “SGEIs are distinguished in particular from services in the private interest, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial” Case T-289/03 **BUPA** para 178

Public service obligation

- “Community legislation on services of general economic interest contains a number of common elements that can be drawn on to define a useful Community concept of services of general economic interest. These elements include in particular: **universal service, continuity, quality of service, affordability, as well as user and consumer protection.** These common elements identify Community values and goals.”
 - Green Paper 2003 point 49 see also White Paper 2.1, 3.5
- Universal service: roots in US and adopted in EU-> US pursued under competitive **circumstances**