LITTLETON

La giurisprudenza della Corte di giustizia

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Aims

In the modernisation process there is a limited role for the Court: most policy is made, and Decisions taken, by the European Commission
But not all issues of reliance on procurement procedures to avoid state aid have been reconciled by the Court

La modernizzazione degli aiuti di Stato

14.30 II SESSIONE - Gli aiuti di Stato nel settore dei servizi di interesse economico generale

Altmark: the Emperor With No Clothes?

- Attracted a lot of academic comment
- Seen as a cornerstone of modernisation of state aid policy for public services (Hancher, Sauter)
- Cornerstone of EU Law (Thouvenin)
- BUT [for me]: created the political space for the Commission to create policy
- Focused attention away from *content* and *quality* of SGEI to issues on financing

Reinforced by the *Altmark* criterion

COMMISSION COMMUNICATION [65]

- Based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tender capable of providing the service at "least cost to the community""

FRAMEWORK [6]

- … full compliance with open or restricted public procurement procedures awarded on the basis of either the lowest price or, under certain conditions, the most economically advantageous tender 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

Not new

- First two criteria in CJEU case law
- 4th criterion used by the European Commission in the Communication in Public Service Broadcasting (2001)
- BUT proving to be problematic

Post-Altmark

- Majority of cases are complaints from competitors
- BUT used in the context of economic/non-economic activity: Case T-347/09 Germany v Commission
- In determination of whether there is a state aid: Case T226/09 *BT v European Commission*
- Used in the EFTA/EEA Court: E-10/11 & E-11/11 *Hurtigruten AS & Norway v EFTA Surveillance Authority*, 8 October 2012
- General Court: flexibility, but not provide clear guidance

Case 289/03 *BUPA*

- Healthcare: a special case?
- Appeal from a Commission Decision
- Irish risk equalisation scheme; insurers with a better risk profile than the average market risk profile paid a charge to the Irish Health Insurance Authority
- Irish Health Insurance Authority paid compensation to insurers with a worse than market average risk profile
- Aim: to create a level playing field, bad risk profile insurers would have to charge higher premiums and would be less competitive

General Court

- **First criterion**: will only review a Member State's choice of SGEI/pso for manifest errors of appraisal
- **Fourth criterion:** efficiency criterion could not be strictly applied because compensation scheme was neutral: scheme based on receipts and profits of insurers and the particular nature of the costs linked to a negative risk profile
- Level of compensation determined by reference to the costs incurred by the contributing and receiving company
- But at the time of the Commission Decision scheme had not been activated [BUPA claimed to be paying 1m euro per week to the Authority]

Consequences

- BUPA "pulled out" of the Irish healthcare market
- [cf. implications for English modernisation of healthcare where private operators may "contract in" to provide services]
- Irish Supreme Court hearing a judicial review appeal found the Irish scheme to be *ultra vires*
- BUPA claim for *Francovich* damages dismissed in 2013
- Case C-82/10 *Commission v Ireland*

Case C-79/10 *Colt Télécommunications France v European Commission*

- French compensation to Sequalum for fibre optic broadband services in the Hauts-de-Seine area outside Paris
- Complied with EU rules because used competitive bidding
- Complaints from Colt Telecommunications, France Telecom, Illiad and Free to the European Commission that project did not comply with state aid rules
- 15 month investigation

General Court

- … in respect of the Hauts-de-Seine department, no commercial operator had deployed a very high speed broadband network serving domestic and professional users as a whole Consequently, the Commission had not erred in law in finding that there was a market failure, which is a prerequisite for classifying an activity as a service of general economic interest, and therefore in finding that there was no state aid.

A Rare Case of Successful Compliance with the *Altmark* Criteria

- **Definition of a SGEI**: Member States have the discretion to determine what constitutes a SGEI but they still have to *prove* that a service that is designated as SGEI *is different from other services provided by the market.*
- The SGEI mission must be universal and compulsory in nature [119]
- The GC accepted that high-speed broad band connectivity of the whole population was a SGEI.
- **Market failure**: relevant to the assessment of the compatibility of state aid *but also* to determining the existence of state aid and the existence of SGEI [paragraph 150]
- "The existence of a market failure is a prerequisite for qualifying an activity as SGEI". [para 154]
- "Market failure" is an "objective concept" that depends on factual situation in the market [158]
- In *Colt*, market failure is equivalent to *under-supply* of the service in question.
- Support to the 2012 SGEI package

Cf Case T-309/12 *Zweckverband Tierkörperbeseitigung*

- German system of financial support for the maintenance of reserve animal disposal capacity in the case of an epizootic situation
- Not an exercise of public power (*FENIN*, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*
- The arrangement between the affected German Lander (and a multiplicity of regional and local authorities) and the public undertaking providing the reserve animal disposal capacity in the case of epizootic was covered by exceptions to the EU public procurement rules (either under the *Teckal* in-house exception or the *Hamburg* public-public cooperation exception) .
- Public authorities have no obligation to resort to the market in order to discharge their pso; they are fundamentally free to either cooperate with other public authorities (*Hamburg*) or entrust the execution of those activities *in-house* (*Teckal)* : Article 345 TFEU
- BUT this did not have any effect on the application of the *Altmark* criteria to the case

Epizootic

1. Denoting a temporal pattern of disease occurrence in an animal population in which the disease occurs with a frequency clearly in excess of the expected frequency in that population during a given time interval

2. An outbreak (epidemic) of disease in an animal population; often with the implication that it may also affect human populations

Art 12, Directive 2014/24

- Compromise solution by recognising that in a *Teckal* or *Hamburg* situation a public procurement procedure is not required

- Undertakings can even carry out market activities up to a 20% of their average total turnover

- Recognises possibility of a mix of pso and commercial activity

General Court

- The absence of a procurement procedure (despite the fact that it was not required) excludes the possibility to benefit from the presumption set out in the 4th *Altmark* criterion
- Creates a significant risk of breach of EU State aid rules
- Over-reliance/compliance with procurement procedures

Post-Danmark

- Existence of a dominant position is found in a former legal monopoly
- Post-Danmark had abused its dominant position by price discrimination towards former rival Forbruger-Kontakt
- Language of "special responsibility"
- Danish competition authority had used the incremental cost standard

Incremental Costs

- Costs which would disappear in 3-5 years if Post-Danmark stopped distributing unaddressed mail
- Used uso infrastructure for competitive sector of postal service
- Thus a portion of the common costs was included in the incremental costs
- Impacts on the efficiency of the uso sector
- 4th *Altmark* criterion a lack of efficiency in uso results in higher incremental costs because of higher common costs

An as Efficient Competitor

- Only the exclusion of an as efficient competitor would result in an abuse of a dominant position
- Exclusionary effects could be objectively justified on the basis of efficiencies that benefit consumers
- Thus inefficiency on the part of the uso provider would make it easier for competitors to show they "as efficient" and
- More difficult to show the abuse of a dominant position is objectively justified

Post-Danmark

- Efficiency criterion
- Addresses the commercialisation of state monopolies
- Highlights "special responsibility of dominant firms" and the special nature of state incumbents

Conclusions

- Case law always ad hoc
- GC and CJEU used as a vehicle for complaint by competitors
- *Altmark* promoted the use of procurement as antidote to risk of illegal state aid
- BUT unhappy marriage
- European Commission relies on soft law
- Use Article 14 TFEU?