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Legal Issues of Services of General Interest

Financing Services of General Economic Interest

Reform and Modernization

Erika Szyszczak
Johan Willem van de Gronden *Editors*



Springer

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Legal Issues of Services of General Interest

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

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Editors' Note

We have used the modern referencing introduced by the Treaty of Lisbon 2009, referring to the European Court of Justice as 'CJEU' and the General Court as 'GC' and using the Treaty Articles from the TFEU and TEU throughout, with only occasional references to old numbering of the Treaties. We have used the term European Union (EU) to denote the political entity—with only occasional references to 'Community' or 'European Economic Community' or 'European Community'. We feel this makes the text easier to read for a modern audience.

We are aware that the four criteria/conditions of the *Altmark* are repeated in every chapter of the book. We have not edited this duplication because the chapters may be read as 'stand alone' chapters by some readers.

On a final reading of the chapters it became clear that the detailed analysis of the Almunia Package required an in-depth explanation of its content in the **Introduction** and this explains why the **Introduction** is much longer than is normally the case in the books in this series.

We have also used a 'light touch' in editing individual chapters, changing linguistic phrases and language only where we felt it was necessary to ease the reading and understanding of the text.

Tristan Naber compiled the Table of European Court cases and Commission Decisions. We also thank him, along with Dr Anne Witt, for help in translating some of the German language titles.

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Abbreviations

AG	Advocate General
CFEU	Charter on the Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ERP	Equity risk premium
GC	General Court
NACM	Net avoided cost methodology
MEAT	Most economically advantageous tender
OJ	Official Journal of the European Union
PSC	Public service compensation
PSO	Public service obligation
SGEI	Service of general economic interest
SGI	Service of general interest
SME	Small & medium sized companies
SSGI	Social service of general interest
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USO	Universal service obligation
WACC	Weighted average cost of capital

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Chapter 1

Introduction

Erika Szyszczak

Abstract This chapter provides an introduction to the background to recent reforms for financing SGEI, known as the ‘Almunia package’. It traces the reaction to the *Altmark* ruling from the European Commission and the European Courts and sets the legal and political debate on how to finance SGEI in its modern economic and constitutional context. The chapter introduces and summarises the arguments made in the subsequent chapters of the book.

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1.1 Introduction

On 20 December 2011, the Commission adopted a package of measures to regulate the relationship between the State aid rules and the financing of services of general economic interest (SGEI) in the EU. The measures comprise two Communications¹ and a Decision.² There was also the promise of a Regulation on *de minimis* aid,³ after further consultation. Such a Regulation was adopted on 25 April 2012.⁴ Accompanying the measures was an Impact Assessment⁵ and a Quality Framework.⁶ The Package of measures was also explained in a Press Release and a

¹ *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8/4; Communication from the Commission, European Union framework for State aid in the form of public service compensation, OJ 2012 C 8/15.*

² Commission Decision of 20 December 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 2012 L 7/3.*

³ Draft Commission Regulation 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 2012 C 8/23.*

⁴ Commission Regulation 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 2012 L 114/8.*

⁵ Available at: http://ec.europa.eu/governance/impact/ia_carried_out/cia_2011_en.htm#comp.

⁶ The idea of a quality framework, avoiding binding legislation, was mooted by the Commission as part of the initial ideas for modernising the single/internal market: European Commission, *services of general interest, including social services of general interest: a new European commitment* COM (2007) 725 final. See the chapter by Maxian Rusche.

powerpoint presentation, an analysis tree and a table comparing the new and old rules, but oddly there was no document of ‘Frequently Asked Questions (FAQs).’⁷

This has become known as the ‘Almunia Package’.⁸ According to the Press Release of the Commission:

The new package clarifies key state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while taking account of competition considerations for large cases.⁹

The measures were implemented in a changing economic and constitutional climate as well as a modernisation process and a ‘more economic’ approach towards regulating the financing and operation of SGEI in Europe. The measures also reflect the changing policy towards the regulation of state aid by the European Commission, and, indeed, were described by the Vice President of the Commission Almunia as part of the Commission’s learning process.¹⁰ The measures are also part of a process, beginning with the landmark ruling of *Altmark*,¹¹ and followed up in the Monti Report 2010,¹² of initiatives to reboost the single market and the subsequent modernisation of state aid and procurement programmes, by integrating SGEI into the broader framework of EU law and policy.

This book analyses the ‘Almunia Package’ from different perspectives, legal, political and economic, analysing how new regulatory frameworks for the modernisation of SGEI in the European Union (EU) are emerging. The book is divided into three Parts. The **Introduction** sets the context for the original *Altmark* ruling and the reactions to the ruling by the Commission and the European Courts, outlining the Almunia Package. **Part I** examines the legacy of the *Altmark* ruling. **Part II** examines, from various critical perspectives, the new Almunia reforms of the initial measures taken by the Commission in what is

⁷ Available at: http://ec.europa.eu/competition/state_aid/legislation/sgei.html. Articles were also published in the Competition Policy Newsletter 2012:1: http://ec.europa.eu/competition/publications/cpn/cpn_2012_1_en.html.

⁸ For commentary see: Sinnaeve 2012, Buendía Sierra 2012. This Introduction is based (in part) upon Szyszczak 2012a.

⁹ *State aid: Commission adopts new rules on services of general economic interest (SGEI)* IP/11/1571, 20/12/2011. For an early application of the new package see: State aid SA.33054 (2012/N)—United Kingdom Post Office Limited (POL): Compensation for net costs incurred to keep a non-commercially viable network for the period 2012–2015 and the continuation of a working capital facility, C(2012) 1905 fin. 28 March 2012.

¹⁰ Joaquín Almunia Vice President of the European Commission responsible for Competition Policy, ‘The State Aid Modernisation Initiative’, speech at The State Aid Modernisation Initiative ESTALI—European State Aid Law Institute 10th Experts’ Forum on New Developments in European State Aid Law Brussels, 7 June 2012. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/424&format=HTML&aged=0&language=EN&guiLanguage=en> (last accessed on 1 August 2012).

¹¹ CJEU, Case 280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

¹² Mario Monti, *A New Strategy for the Single Market, At the Service of Europe’s Economy and Society*, Report to the President of the European Commission Jose Manuel Barroso, May 9 2010.