

## **The fourth Altmark criterion -**

Ensuring competition and transparency through Public Procurement procedures  
in SGEIs

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## **Abstract**

The European institutions have clarified over the years which requirements need to be met in order for compensation of SGEI to be considered as aid compatible with the internal market that does not have to be notified as State aid. Using a public procurement procedure when selecting an SGEI provider has become a requirement of more and more importance over the years. The peak of this development is then the requirement that public procurement procedures will have to be used whenever an SGEI provider is selected, to be found in the new SGEI package 2011. The goal of this paper will be to evaluate the usefulness of this requirement. In conclusion it can be found that public procurement procedures can indeed help increase transparency and non-discrimination, but there are also several weaknesses to the procedures. So in the end, the Commission will have to handle this obligation with flexibility.

## **I. Introduction**

Service of General Economic Interest (SGEIs) are identified by public authorities as economic activities which are of particular importance to the citizens and which would not be supplied, or would be supplied under different circumstances, if States would not intervene in the process. Examples of these kinds of services are: social services, postal services, transport services.<sup>1</sup> Often the responsibility for providing the service has been taken over by the public authority itself and is supplied through State owned entities.<sup>2</sup> But the provision of SGEIs can also be entrusted to private entities which will be heavily regulated by the State.<sup>3</sup> This will be done through authorisations and licences

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<sup>1</sup> European Commission Website, Competition, SGEI, 2012, [http://ec.europa.eu/competition/state\\_aid/overview/public\\_services\\_en.html](http://ec.europa.eu/competition/state_aid/overview/public_services_en.html) (last visited 03/06/2012).

<sup>2</sup> P. Trepte, *Public Procurement in the EU* (2<sup>nd</sup> edition, Oxford University Press, New York, 2007), p. 61.

<sup>3</sup> Ibid.

granted to the public or private companies where they undertake to provide a public service obligation (PSO) to ensure continuity of supply, even where this would be uneconomical.<sup>4</sup>

According to Article 14 TFEU Member States are requested to take care of the supply of such services. It must be ensured that they are provided at an affordable price everywhere for everyone. Therefore, SGEIs play a crucial role in promoting social, economic and territorial cohesion, as well as contributing to the overall competitiveness of the European industry.<sup>5</sup> According to Article 106(2) TFEU SGEIs will also be subject to the rules of the Treaties and therefore also to competition law as long as this does not hinder their performance.

The regulation and application of the provisions regarding SGEIs and competition law are an exclusive competence of the Commission.<sup>6</sup>

The relationship between Public procurement and State aid is a tight one. In the case *Bretagne Angleterre Irlande (BAI)*<sup>7</sup> the Court of Justice established that State aid rules would also be applicable to agreements for consideration concluded between the government, as a buyer, and a seller.<sup>8</sup> According to Article 107 TFEU, when there is (i) a State intervention and a transfer of finances, which is (ii) liable to affect trade between Member States, which (iii) confers an advantage on the recipient and which, (iv) distorts or threatens to distort competition, then also contracts for the provision of a PSO will be seen as State aid.<sup>9</sup> Therefore, it is important that the advantage given to the provider of a PSO through the economic help from the State may not distort competition: the public financing will be State aid where the amounts given exceed the value

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<sup>4</sup> Ibid.

<sup>5</sup> European Commission Website, Competition, SGEI, 2012 (see [http://ec.europa.eu/competition/state\\_aid/overview/public\\_services\\_en.html](http://ec.europa.eu/competition/state_aid/overview/public_services_en.html)) (last visited 03/06/2012).

<sup>6</sup> Article 106(3) and 108(4) Treaty on the Functioning of the European Union.

<sup>7</sup> Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission* [1999] ECR II-139.

<sup>8</sup> P. Trepte, *Public Procurement in the EU*, p. 56.

<sup>9</sup> Case C-142/87 *Belgium v Commission ('Tubemeuse')* [1990] ECR I-959, para. 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, para. 20; and C-482/99 *France v Commission* [2002] ECR I-4397, para. 68.

of the commitments which the recipient enters into, this would then be over compensation.<sup>10</sup>

The European institutions have clarified over the years which requirements need to be met in order for compensation of SGEI to be considered as aid compatible with the internal market that does not have to be notified as State aid. Using a public procurement procedure when selecting an SGEI provider has become a requirement of more and more importance over the years. The current legislation has been developed on the basis of the *Altmark* ruling<sup>11</sup>, which has listed the criteria to be fulfilled for aid not to be caught by Article 107(1) TFEU. In this paper we will first analyse the position which public procurement rules have in this legislation. The peak of this development is then the requirement that public procurement procedures will have to be used whenever an SGEI provider is selected, to be found in the new SGEI package 2011. The goal of our paper will be to evaluate the usefulness of this requirement.

## II. The *Altmark* ruling

The case *Altmark Trans GmbH* was an innovation in the treatment of SGEI in relation to State aid rules.<sup>12</sup> The Court of Justice clarified which conditions must be fulfilled so that SGEI compensation will be considered compatible State aid. The case saw as opposing parties in the national proceedings *Altmark Trans GmbH*, a local bus company which received State aid by the German government, and one of its competitors who asked for the annulment of the licences granted to *Altmark*. This claim was made on the basis that when the licences had been issued the financial solvency of *Altmark Trans* was no longer

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<sup>10</sup> C. Bovis, *EU Public Procurement Law* (1<sup>st</sup> edition, Edward Elgar Publishing, Glos, 2007), p. 169.

<sup>11</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim BVerWG* [2003] ECR I-07747.

<sup>12</sup> W. Sauter, 'The Commission's New SGEI Package: The Rules for State Aid and the Compensation of Services of General Economic Interest', 18 TILEC Discussion Paper 2012, available at <http://dx.doi.org/10.2139/ssrn.2044680> (last visited 03/06/2012), p.3.

guaranteed as it needed subsidies for operating the service. Also, the competitor claimed that the subsidies were incompatible with EU law, namely with Regulation No. 1191/69.<sup>13</sup> The German court referred questions to the European Court of Justice for a preliminary ruling, asking whether subsidies intended to compensate for the deficit in operating a public transport service always fall under Article 92(1)<sup>14</sup> or whether it could be the situation that, having regard to the service provided, and if appropriate to the significance of the field of the activity concerned, those subsidies would not be liable to affect trade between Member States.<sup>15</sup>

The Court stated that when assessing whether a state aid measure is compatible with the internal market only the effects of such measures must be taken into consideration.<sup>16</sup> The Altmark ruling then lays down four cumulative criteria which would have to be fulfilled in order for a State measure not to constitute incompatible aid but instead compensation for a public service obligation:

- *“first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;*
- *second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;*
- *third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;”*<sup>17</sup>

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<sup>13</sup> Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, [1969] OJ L 156, p. 1–7.

<sup>14</sup> Now Art. 107 TFEU.

<sup>15</sup>Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim BVerWG*, para. 31.

<sup>16</sup> C. Bovis, *EU Public Procurement Law*, p. 178.

<sup>17</sup>Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim BVerWG*: criteria as stated in the judgement.

- *“fourth, where the undertaking which is to discharge public service obligations is not **chosen in 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 has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”*<sup>18</sup> (emphasis added)

According to the fourth criterion the provider of a public service obligation is to be chosen either by a public procurement procedure or the cost structures of the recipient and the ones of a private undertaking, well run and adequately equipped to fulfil the PSO have to be compared.<sup>19</sup>

The most important point is that the service will be provided "at the least cost to the Community". From the fourth criterion we can see that the Court of Justice has assumed that a public procurement procedure will always be an appropriate instrument for ensuring the lowest possible costs for the service. Also, such a procedure will guarantee adequate compensation for the provider at market price and consequently there will be a lack of over compensation.

### **III. The SGEI package 2011**

The Altmark judgement is the landmark case but it also brought uncertainties concerning the criteria's application: they were not laid out with enough details and definitions, many issues concerning the application were left unanswered. Therefore, in 2005 the Commission adopted a package with guidance on the application of Altmark and SGEI. It contained two instruments, a Commission

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<sup>18</sup> Ibid. para. 93.

<sup>19</sup> C. Bovis, *EU Public Procurement Law*, p. 185.

Decision<sup>20</sup> and a Community Framework<sup>21</sup>. At the same time the Transparency Directive<sup>22</sup> was also amended anew.

The Commission Decision on the Application of Article 106(2) TFEU<sup>23</sup> basically grants a block exemption for SGEI which stay beneath a certain threshold value. The Community Framework for State aid in the form of public service compensation<sup>24</sup> applies to those cases falling outside the scope of the Commission Decision, but the contents are highly similar to the Decision. In addition to these two instruments, the Transparency Directive<sup>25</sup> requires an accounting separation for all SGEI for which public compensation is paid. All in all, the 2005 SGEI package fills in the first three conditions of Altmark. After 6 years of experience with the SGEI package 2005, the Commission drew up a new, revised package, finally published at the beginning of 2012. The new package contains a Communication from the Commission<sup>26</sup>, a revised version of the first Commission Decision<sup>27</sup>, a revised version of the Framework<sup>28</sup>, and a new regulation on *de minimis* aid<sup>29</sup>. The important changes concerning public

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<sup>20</sup> Commission Decision 2005/842/EC 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, [2005] OJ L 312/67.

<sup>21</sup> Community Framework for State aid in the form of public service compensation, [2005] OJ C 297/04.

<sup>22</sup> Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [2005] OJ L 312/47.

<sup>23</sup> Commission Decision 2005/842/EC 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, [2005] OJ L 312/67.

<sup>24</sup> Community Framework for State aid in the form of public service compensation, [2005] OJ C 297/04.

<sup>25</sup> Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [2005] OJ L 312/47.

<sup>26</sup> 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] OJ C8/4.

<sup>27</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) 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, [2012] OJ L 7/3.

<sup>28</sup> Communication from the Commission - European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15.

<sup>29</sup> 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, [2012] OJ L 114/8.

procurement rules are to be found in the Communication and the revised Framework, these will be discussed below.

#### **a. Commission Communication**

The new Communication from the Commission endeavours to explain in more detail the main concepts of application of the State aid rules in the context of SGEI and reflects the Commission attitude towards some of these rules and how it will interpret them.<sup>30</sup> These are often no new interpretations or rules, but more summaries of the *status quo* in State aid rules. In radical changes in the package are the encouragement of more efficiency<sup>31</sup> and the strengthening of public procurement rules. We will discuss the rules of the Communication and the Framework which strengthen and broaden the application of public procurement rules when a public service obligation is being entrusted to a provider. This is a change leading towards public procurement procedures as a mandatory requirement which we will highlight and then evaluate.

Concerning the purpose and scope of the Communication, in the first section the Commission repeats the basic principle in SGEI that the Member States are generally free to define themselves what SGEI are, how these will be organised and financed.<sup>32</sup> Member States are in principle given a wide discretion to define SGEIs themselves.<sup>33</sup>

However, when entrusting a third party with the provision of a public service Member States have to comply with EU rules on public procurement, and, where these are not applicable, with the Treaty requirements of

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<sup>30</sup> 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] OJ C8/4, para. 3.

<sup>31</sup> Efficiency incentives are being encouraged, see Commission Communication para. 61 and framework para. 39 et seq.

<sup>32</sup> 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] OJ C8/4, para 2.

<sup>33</sup> Case T-106/95 *Fédération française des sociétés d'assurances (FFSA) v Commission* [1997] ECR II-00229, para. 99 ; see also Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-02031, para. 209.



transparency, equality of treatment, proportionality and mutual recognition.<sup>34</sup> This is an important requirement. The named Treaty requirements are also referred to as ‘basic standards’.<sup>35</sup> Where public procurement rules are not fully applicable, authorities have to comply with the rules and principles of the Treaty whenever concluding public contracts.<sup>36</sup> These rules are similarly substantive norms as the ones included in the secondary law on public procurement. These principles include the free movement of goods<sup>37</sup>, the right of establishment<sup>38</sup>, the freedom to provide services<sup>39</sup>, non-discrimination and equal treatment, transparency, proportionality and mutual recognition.<sup>40</sup> Implied in, for example, the principle of non-discrimination on grounds of nationality and equal treatment there is also an obligation of transparency, a certain “degree of advertising”<sup>41</sup> so that competition in the market is possible and so that the impartiality in the procedure can be reviewed.<sup>42</sup> These basic standards and fundamental rules are applicable to the award of (public) service concessions below the thresholds of *de minimis* contracts, of an Annex II B contract (Directive 2004/18/EC) or an Annex XVII B contract (Directive 2004/17/EC).<sup>43</sup> So to all of these contracts, the basic standards will have to be

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<sup>34</sup> Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR-10745, para. 60; see also Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C 179, p.2.

<sup>35</sup> These Treaty requirements are being called the ‘basic standards’ in the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C 179, p.2.

<sup>36</sup> Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C 179, p.1.

<sup>37</sup> Article 28 TFEU.

<sup>38</sup> Article 49 TFEU.

<sup>39</sup> Article 56 TFEU.

<sup>40</sup> Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C 179, p.2.

<sup>41</sup> *Ibid.*

<sup>42</sup> Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, para. 62; Case C-231/03 *Coname* [2005] ECR I-07287, para. 16-19; Case C-458/03 *Parking Brixen* [2005] not reported, para. 49.

<sup>43</sup> Case C-59/00 *Bent Moustén Vestergaard* [2001] ECR I-9505, para. 20; see also for contracts below the thresholds: Case C-264/03 *Commission v France* [2005] I-08831 para. 32-33.

taken into account, which at this point can be seen as similarly substantive norms as the ones from the public procurement Directives for example.<sup>44</sup>

In section two the Commission then clarifies the meaning of many provisions relating to State aid in general. Concerning the concept ‘effect on trade’<sup>45</sup>, the Commission emphasises that in an open and competitive market the entrustment of an SGEI “by methods other than through a public procurement procedure”<sup>46</sup> may lead to preventing the entry to the market for competitors and therefore to a market distortion.<sup>47</sup> This reflects a strengthening of the public procurement rules; they should be applied in all cases where an SGEI is to be entrusted to an undertaking within a competitive market or in a non-liberalised market where the undertaking at hand is also active in other markets.

In section three the conditions from the Altmark judgement under which public service compensation will not constitute State aid are first repeated and then discussed again individually in sections 3.2 to 3.6. Section 3.6 concerns the fourth Altmark criterion, the selection of the provider of SGEI. It is recommended that the simplest way for public authorities to meet the fourth Altmark criterion would be to conduct an open, transparent and non-discriminatory public procurement procedure as specified in the Directives 2004/17/EC (for utilities) or 2004/18/EC.<sup>48</sup> Such a procedure will, in many cases, be either already a legal requirement or otherwise the most appropriate method for choosing a provider.

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<sup>44</sup> W. Sauter, ‘The Commission’s New SGEI Package: The Rules for State Aid and the Compensation of Services of General Economic Interest’, 18 TILEC Discussion Paper 2012, available at <http://dx.doi.org/10.2139/ssrn.2044680> (last visited 03/06(2012), p. 7; See also Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*; Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen en Stadtwerke Brixen AG*; Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, [2006] OJ C 179.

<sup>45</sup> 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] OJ C8/4, para. 37.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> 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] OJ C8/4, para. 63.

Then it is specified what kind of a tender should be conducted for selecting a provider.<sup>49</sup> In order to have an open, transparent and non-discriminatory procedure, it will be “acceptable”, on the one hand, to use the open procedure as the one which ensures these conditions best.<sup>50</sup> It solicits the greatest number of competitors since any interested economic operator may submit a tender<sup>51</sup> and it attracts maximum participation.<sup>52</sup> In the open procedure all tenders will be evaluated to assess the qualifications of the tenderers, some of which will be selected as a result, and to award the contract to the successful tenderer based on the Directives’ award criteria.<sup>53</sup> The evaluation stage and the award stage must, however, always be conducted separately.<sup>54</sup>

Also “acceptable” will be the restricted procedure unless interested operators are prevented to tender without valid reasons.<sup>55</sup> The restricted procedure will be a better option where the contracting authority would like to select tenderers from a range of selected candidates who have come forward.<sup>56</sup> The contracting authority will then invite these to submit their tender.<sup>57</sup> This makes the whole process more manageable and less costly for the authority as well as the tenderers. The selection of the candidates will be made according to the rules of selecting economic operators as provided in the Directive 2004/17 and 2004/18. This procedure will be used especially where the costs of evaluating the tenderers would be very high in relation to the value of the tender.<sup>58</sup> The purchaser will be spending less time and money on the evaluation of the tenders, and the tenderers who are probably not able to win the tender

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<sup>49</sup> Ibid., para. 66.

<sup>50</sup> Ibid.

<sup>51</sup> P. Trepte, *Public Procurement in the EU*, p. 376.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Case C-31/87 *Gebroeders Beentjes v The Netherlands* [1988] ECR 4635.

<sup>55</sup> 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] OJ C8/4, para. 66.

<sup>56</sup> P. Trepte, *Public Procurement in the EU*, p. 377.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid. p. 376.

will not have to spend time and money to prepare such a costly project. It is therefore an exercise in efficiency and cost-effectiveness.<sup>59</sup>

On the other hand, the competitive dialogue or a negotiated procedure with prior publication can be “acceptable” only in “exceptional cases”.<sup>60</sup> This is due to the fact that they confer a wider discretion upon the adjudicating authority and possibly restrict the participation of interested operators.<sup>61</sup> In both procedures the maximum number of candidates is three.<sup>62</sup> The competitive dialogue is a possible procedure where the public contract is very complex and the authority is not able to accurately define the technical means of the contract in advance.<sup>63</sup> Any economic operator will be allowed to request participation in the procedure and to present himself to the contracting authority. The authority will then enter into a dialogue with the admitted candidates to develop suitable alternatives to meet their requirements, after which the candidates chosen will be invited to submit a tender.<sup>64</sup>

The negotiated procedure knows two forms: with prior publication and without publication and only the former can satisfy Altmark, the latter has been excluded from application in the field of SGEI.<sup>65</sup> In negotiated procedures with publication, contracting authorities must first publish a contract notice. Then possible tenderers may come forward if they want to take part in the competition. The authority must then invite the candidates, selected from those who have come forward, to negotiate. This invitation must be sent in writing and at the same time to all candidates.<sup>66</sup> The process has the advantage that the tenders will through the negotiations be shaped according to the needs of the

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<sup>59</sup> Ibid. p. 379.

<sup>60</sup> 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] OJ C8/4, para. 66.

<sup>61</sup> Ibid.

<sup>62</sup> C. Bovis, *EU Public Procurement Law*, p. 228.

<sup>63</sup> Ibid., p. 237.

<sup>64</sup> Ibid., p.236-237.

<sup>65</sup> Communication para. 66.

<sup>66</sup> C. Bovis, *EU Public Procurement Law*, p. 243-244.

contracting authority.<sup>67</sup> But a disadvantage is that the negotiations can lead to the provision of information in a discriminatory manner which may give some of the candidates an advantage.<sup>68</sup> Therefore, the contracting authorities must ensure that all tenderers receive equal treatment.<sup>69</sup>

The negotiated procedure without prior publication has been excluded totally from application in SGEI. It is a procedure similar to a direct award or a single source procurement method, which may in general only be used in duly justified circumstances.<sup>70</sup> This is used where there is only one suitable candidate and it is therefore the least competitive procedure.<sup>71</sup> The exclusion of the procedure has to do with the instinctive distrust of the EU regulator of any procedure which suggests a lack of transparency and which appears to allow discussions between purchasers and economic operators.<sup>72</sup> The idea is that the more the tenderer and the authority will be able to negotiate the terms of the contract, the less transparency there will be and the higher will be the risk of abuse, overcompensation or a breach of EU law.

Paragraph 67 clarifies the award criteria for a tender in SGEI. Here, finally, the meaning of the criterion “least cost to the Community” is explained. The ‘lowest price’ will in every case fulfil this requirement. The ‘most economically advantageous tender’ will be deemed sufficient where “the award criteria are closely related to the subject-matter [...] and allow for the most economically advantageous offer to match the value of the market”.<sup>73</sup> It will also be possible for Member States to include environmental or social award criteria, however, the tender which fulfils these criteria will have to offer the service at the market value.<sup>74</sup> The awarding authority can also set quality standards and can take qualitative aspects of the tenders into account.<sup>75</sup>

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<sup>67</sup> Ibid., p. 243.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> P. Trepte, *Public Procurement in the EU*, p. 385.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., p. 385.

<sup>73</sup> Communication para. 67.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

Lastly, in section paragraph 68 we encounter two situations where conducting a tender, no matter which procedure was used, will not lead to the 'least cost to the community' and will not be able to satisfy the fourth Altmark criterion. This will be the situation where, either, the contract is of a very special nature, for example concerning existing intellectual property rights or where a necessary infrastructure is already owned by a particular provider. Also, there can be no satisfying tender where only one bid was submitted. In these situations, there is no sufficiently open and genuine competition from the beginning.<sup>76</sup>

All in all, these provisions from the Communication show that the Commission favours the use of the most transparent and the most competitive procedure in case of a PSO award. This transparency and competition will come at a high price though since the open and the restricted procedure cause much higher costs to the authority and the tenderer alike than the negotiated procedure or the simple direct award. Therefore, the Commission goes for the more expensive option and does not encourage austerity. This is a contrast to the economic thinking which the Commission asks from the authorities generally in the new package, such as the inclusion of efficiency incentives. Therefore, the Commission here wants to achieve more use of public procurement procedure, more enforcement of transparency and non-discrimination in these procedures and eventually more competition for the awarding of SGEI contracts.

#### **b. Revised Framework<sup>77</sup>**

The act replaces the Community Framework for State aid in the form of public service compensation.<sup>78</sup> The principles of the Framework are to be applied to public service compensation classified as State aid which is not covered by Decision 2012/21/EU (the *de minimis* exemption), which has to be notified to

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<sup>76</sup> Communication, para. 68.

<sup>77</sup> European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15.

<sup>78</sup> Community framework [2005] OJ 297, p. 4

the Commission<sup>79</sup>. It must be specified that the Framework applies only to public service compensation in the field of air and maritime transport, but not to the land transport sector nor to the public service broadcasting sector<sup>80</sup>, nor to SGEIs in difficulty<sup>81, 82</sup>.

The revised Framework for State aid in the form of public service compensation now provides in paragraph 19 that aid for SGEI will only be considered compatible with the internal market where the authority has complied the Union rules on public procurement. This is a new *conditio sine qua non*, otherwise such aid will be incompatible aid under Article 108 TFEU. This is the most important new provision which irreversibly connects the use of public procurement procedures to the entrustment of public service obligation in SGEI. Furthermore, as we have seen earlier, even where there is no formal requirement to apply the public procurement rules, then the transparency case law and standards apply, with essentially similar substantive norms.<sup>83</sup>

In section 2.9 of the Framework, the Commission also works out additional requirements for ensuring that the development of trade is not affected to an extent contrary to the interest of the Union.<sup>84</sup> Therein it is stated that it would also be distortive to competition if a Member State entrusts a public service provider without a competitive selection procedure with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI.<sup>85</sup> Here it is repeated that a public procurement

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<sup>79</sup> European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15, para 7.

<sup>80</sup> The public service broadcasting sector is covered by the Communication from the Commission on the application of State aid rules to public service broadcasting, [2009] OJ C 257.

<sup>81</sup> SGEIs in difficulties are regulated in the Community guidelines on State aid for rescuing and restructuring firms in difficulty, [2004] OJ C 244.

<sup>82</sup> European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15, para. 8 and 9.

<sup>83</sup> W. Sauter, 'The Commission's New SGEI Package: The Rules for State Aid and the Compensation of Services of General Economic Interest', 18 TILEC Discussion Paper 2012, available at <http://dx.doi.org/10.2139/ssrn.2044680> (last visited 03/06(2012), p. 7.

<sup>84</sup> European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15, para. 56.

<sup>85</sup> Ibid.

procedure will essentially guarantee competitive conditions and that there is no overcompensation. Where an SGEI is offered at a tariff “below the costs of any actual or potential provider”<sup>86</sup> because there was no competitive selection procedure used in a non-reserved market where similar services are already provided or can be expected to be provided in the near future, this is considered a pronounced adverse effect on trade since this would cause market foreclosure.<sup>87</sup> In such a case the Commission, while of course fully respecting the Member State's wide margin of discretion to define the SGEI, may therefore require amendments in the SGEI scheme.<sup>88</sup> This, again, suggests a strong position of the Commission in evaluating the Member States financing and organisation of SGEIs.

From the rules in the Communication and the Framework it seems that the obligation to follow a public procurement procedure has apparently become, in the eyes of the Commission, a standard requirement for awarding contracts in SGEI. Therefore, we see a new obligation to follow this requirement emerging, an obligation which the Communication lays down in two (non-binding) instruments which explain the application of article 106(2) TFEU and which also reflects the attitude of the Commission when handling cases of State aid and SGEI. This means that the Commission has essentially changed the Altmark criterion as it was laid down by the Court. So we see that the entrustment of public service obligations will now, where public procurement rules are applicable, have to be done with a tender of one of the “acceptable” procedures. The Commission has, furthermore, even introduced the possibility of asking the Member State to change their organisation or financing of the SGEI.<sup>89</sup>

But also where the use of the procedures will in future not only be mandatory in certain situations, the procedures will be seen more often also in

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> European Union framework for State aid in the form of public service compensation (2011), [2012] OJ C8/15, para. 56.



cases where the Union's secondary law is not applicable, but the Treaty requirements of transparency, equality of treatment, proportionality and mutual recognition.<sup>90</sup> As these rules are to be seen as similarly substantive rules, it can be assumed that also in these cases, in future public authorities will use tenders to entrust a PSO. For example, this is also important to in-house contracts. Where the contract is concluded with an incorporated company subject to private law, which is seen as a separate legal entity, this is for all intents and purposes a public contract.<sup>91</sup> These are also then contracts to which the new obligation of using public procurement procedures will apply.

Then there are the contracts falling beneath the thresholds of the block exemption decision (hospital services, aid below 15 million Euros per year) and the *de minimis* regulation (less than 500.000 Euros of compensation over 3 years). These contracts are exempted from notification and Member States will only be requested to ensure that there is no overcompensation.<sup>92</sup> These will still have to take into account either the public procurement rules or the basic standards of the Treaty, namely the principle of non-discrimination on grounds of nationality and equal treatment in which there is also an obligation of transparency included. But how would authorities apply these basic standards correctly then? It can be claimed that this would be best achievable also during a public procurement procedure because this successfully, in the opinion of the Commission and the Court, ensures these principles. Therefore, not only will the use of public procurement procedures be obligatory, but this will happen more often and in other areas as well.

**c. Is the obligation to use Public Procurement the right instrument to ensure competition and transparency?**

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<sup>90</sup> And the case law on these principles.

<sup>91</sup> Case C-107/98 *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I-8121.

<sup>92</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) 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, [2012] OJ L 7/3, Articles 1, 3 and 4.

The obligation and broader use of public procurement procedures is not welcomed by everyone though. There are three criticisms from an economic and procedural point of view, and two from a European law point of view. We will discuss these concerns and then see which counter arguments can be made.

There are two criticisms concerning the instruments of the SGEI package themselves. Firstly, it has been argued that paragraph 19 of the Framework is actually inconsistent with the case law of the European Court of Justice, which does not call for obligatory public procurement as a condition for compatibility of State aid with the internal market.<sup>93</sup> Secondly, it has been criticised that the Commission is actually enforcing public procurement rules through Article 108 TFEU, an article which actually provides the enforcement of the State aid rules. Article 108 provides a much faster means to do this than by taking action against Member States for failure to fulfil their obligations under Article 258 TFEU. Article 108 confers extensive powers to the Commission; it can regulate matters alone in the area of State aid, so this is a strong enforcement instrument. But it has been pointed out that using these powers to enforce actually different EU rules (the ones of public procurement) could be perceived as an abuse of power and could also raise institutional issues.<sup>94</sup>

However, it must be highlighted that it is the Commission which is competent to regulate the legislation concerning Article 106(2) and 107 TFEU<sup>95</sup>. It is therefore competent to enforce legislation against the case law, the Court's interpretation regarding particular terms is not absolute.<sup>96</sup> Also, in

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<sup>93</sup> D. Geradin, 'Public Compensation for Services of General Economic Interest: An Analysis of the 2012 European Commission Framework' TILEC Discussion Paper 30 March 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031564&http://papers.ssrn.com/sol3/paper\\_s.cfm?abstract\\_id=2031564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564&http://papers.ssrn.com/sol3/paper_s.cfm?abstract_id=2031564) (last visited 03/06(2012), p. 6.

<sup>94</sup> J. Buendia Sierra, 'Finding the right balance: State Aid and Services of General Economic Interest', in *EC State Aid Law: Liber Amicorum in Honour Francisco Santaolalla*, Alphen aan den Rijn: Kluwerlaw, 2008, p. 191 and 213.

<sup>95</sup> See Article 106(3) TFEU and 108(4) TFEU.

<sup>96</sup> Calliess/Ruffert (eds), *Kommentar zum EU-Vertrag und EG-Vertrag* (1st edition, Luchterhand Literaturverlag, Neuwied, 1999), Article 87 No. 1a.

practice the Commission is the institution which monitors the application of the rules,<sup>97</sup> which reviews complaints and which will bring possible breaches to Court.<sup>98</sup> The competence of the Commission in this field is therefore broader than anywhere else in the Treaty. Therefore, finally the Member States will have to prove to the Commission they did not breach EU law. The Commission's interpretation of the rules is obvious from the package. They will try to ensure that public service obligations will be efficient and that the providers have been selected through public procurement so that competition and transparency are being ensured. This will in their opinion lead to the provision of the service "at the least cost to the Community". That this is an abuse of power is therefore far fetched; the rules on SGEI, State aid and public procurement in this field are very closely interlinked that it seems only reasonable to regulate and enforce them together. How high the compensation of an SGEI provider will be is inextricably linked to the selection of an SGEI provider, the procedure for the selection will determine how high the compensation will be. Consequently, this is where Member States can take care that there is no over compensation and they can do this best by using competitive selection procedures, which the public procurement rules provide. Also, the development that State aid rules and public procurement are steadily being interlinked and co-dependent can be seen in many areas. Therefore, the Commission has to take this into account when regulating SGEI.

The first argument against the obligation to use public procurement procedures in itself is that it is not certain that this will lead to the most efficient outcome due to information asymmetries.<sup>99</sup> Even though a tender will pressure companies to come forward with their best offer, there can be significant

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<sup>97</sup> Article 108(1) TFEU.

<sup>98</sup> Article 108(2) TFEU.

<sup>99</sup> D. Geradin, 'Public Compensation for Services of General Economic Interest: An Analysis of the 2012 European Commission Framework' TILEC Discussion Paper 30 March 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031564&http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564) (last visited 03/06/2012), p. 6.

asymmetries of information between them.<sup>100</sup> In areas where it is difficult to estimate the potential costs, like for example in the network industries, tenderers will not be able to participate in the procedure well informed with realistic bids.<sup>101</sup> Then the contract will be awarded to the tenderer with the most optimistic expectations regarding the likely costs, this is known as the “winner’s curse”.<sup>102</sup> The problems which can arise out of this are financial difficulties for the SGEI provider and a drop in quality for the users of the service unless the public authority is willing to renegotiate or pay more after the awarding.<sup>103</sup>

The second argument is that public procurement does not automatically have to lead to ensuring the “least cost to the community”. When a contract is being tendered, there will only be an efficient outcome where the bidders perceive a real risk of losing the SGEI should they fail to bid at or very near their true expected valuation.<sup>104</sup> However, where the likely costs of the service are significantly higher for new entrants in case of economies of scale, the biggest provider may use this opportunity to bid up the costs of the provision of the SGEIs and receive over compensation again.

Thirdly, it is argued that public procurement procedures can also fall victim to collusive conduct of the candidate SGEI providers.<sup>105</sup> The risk of collusion is higher where there are few candidates or where the competitors can learn about the proposals of their competitors. This then actually minimizes the competitive threat and again leads to over compensation. So where there are

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<sup>100</sup> “Services of General Economic Interest – Opinion prepared by the State Aid Group of EAGCP”, June 29, 2006 (See [http://ec.europa.eu/competition/state\\_aid/legislation/sgei.pdf](http://ec.europa.eu/competition/state_aid/legislation/sgei.pdf) (last visited 30/05/2012), p.6.

<sup>101</sup> D. Geradin, ‘Public Compensation for Services of General Economic Interest: An Analysis of the 2012 European Commission Framework’ TILEC Discussion Paper 30 March 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031564&http://papers.ssrn.com/sol3/paper.s.cfm?abstract\\_id=2031564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564&http://papers.ssrn.com/sol3/paper.s.cfm?abstract_id=2031564) (last visited 03/06/2012), p. 6.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

actually not many potential providers of a PSO, but still a public procurement procedure will have to be used, there is a high risk of collusive conduct.

All of the above arguments show that using a public tender for SGEI contract awarding cannot be the miracle cure for enforcing competition in the public sector and for achieving SGEI “at the least cost to the Community”. The use of a public procurement procedure also has weaknesses of course. But in the end it will be better to use one of the public procurement procedures than to leave the award to the public authority, as with direct awards there is very low transparency mostly and the risk of overcompensation and discrimination will be very high. In conclusion, the Commission should handle the obligation to use public procurement procedures (which, in the end, is an obligation laid down in a non-binding instrument) with the right amount of flexibility. But it definitely will encourage more transparency and non-discrimination when a public service obligation is entrusted. Also, enforcing the alternative and allowing the direct awards of SGEI, would discourage competition and efficiency.

#### **IV. Conclusion**

This paper has brought us to several conclusions. First of all, it is clear that public procurement procedures have taken on a significant role in the entrustment of a public service obligation in SGEI. This has led to the adoption of a new standard, namely to the obligation to use a public procurement procedure for the entrustment of an SGEI. On the one hand, the public procurement procedure can indeed help increase transparency and non-discrimination, but on the other hand, there are also several weaknesses to the procedures. So in the end, the Commission will have to handle this obligation with flexibility. But one can assume that this will also happen since the obligation is laid down in non-binding instruments, so that it is up to the Commission to enforce the implementation of the new standard.

