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Survey

Services of General Economic Interest and State Measures Affecting Competition

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I. European Commission communications complementing the Almunia Package

The last year has seen the initial stages of the operation of the Almunia Services of General Economic Interest (SGEI) Package¹ to regulate compensation for SGEI. The Package, it will be recalled, is part of a wider set of measures to modernise the European Commission's Single Market 'Europe 2020' programme.² The proposed measures to modernise the procurement rules have not materialised in as coherent a form as the State aid rules and yet it is clear from the European Commission's Staff Working Paper³ and discussions of the marketisation of social services that the procurement and State aid rules are closely inter-related.⁴

The Decision (Article 5(7))⁵ and the Framework (paras 36 and 38)⁶ refer to swap rates in the context of reasonable profit of the SGEI framework and the European Commission added to the initial Almunia Package with an announcement on the Europa web pages, of what the European Commission terms, an online 'instrument' to determine swap rate proxies which are valid from 1 July 2013 to 31 December 2013.⁷

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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 C8/4; 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, L7 p.3; Communication from the Commission, European Union framework for State aid in the form of public service compensation OJ 2012 C8/15; 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 p.8. See Erika Szyszczak and Johan van de Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization* (TMC Asser Press, 2012).

2 Initiated from the Monti Report, *A New Strategy for the Single Market*, 2010. Available at: <http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf> accessed 13 September 2013.

3 European Commission, Brussels, SWD(2013) 53 final/2.

4 European Commission Reform Proposals available at: <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm> accessed 13 September 2013.

5 Article 5 (7) of the Commission Decision states: 'For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap

Key Points

- The last year has been a typical year in this survey of Services of General Economic Interest (SGEI) and state measures affecting competition where the report is a series of *ad hoc* measures relating to SGEI.
- Two new soft communications have been published to complement the Almunia Package of measures to regulate compensation for SGEI: a European Commission instrument to determine swap rates and a Commission Staff Working Paper.
- There are a few European Commission Decisions, particularly in the postal sector, involving financing SGEI that fall outside of the new Almunia Package, but are assessed according to the new methodological approach.
- The General Court (GC) has asked the European Commission to take greater care to analyse the funding of ancillary services to health care schemes; a rebuke that is also seen in applying Article 106 TFEU in the Greek Lignite case.
- Of a wider significance for European Union (EU) economic law, the Court of Justice of the EU (CJEU) and the European Commission have provided analysis of the definition of 'economic activity' which triggers the application of EU law generally.
- Two cases have considered the application of Article 106 TFEU, with the GC providing greater analysis of when, and how, Articles 106 and 102 TFEU may be used together.

rate plus a premium of 100 basis points shall be regarded as reasonable in any event. The relevant swap rate shall be the swap rate the maturity and currency of which correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.

6 Para. 36 of the Framework states: 'A rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act'. Para. 38 of the Framework states: 'Where the provision of the SGEI is not connected with a substantial commercial or contractual risk, for instance because the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36. Such a compensation mechanism provides no efficiency incentives for the public service provider. Hence its use is strictly limited to cases where the Member State is able to justify that it is not feasible or appropriate to take into account productive efficiency and to have a contract design which gives incentives to achieve efficiency gains.'

7 <http://ec.europa.eu/competition/state_aid/legislation/swap_rates_en.html> accessed 13 September 2013.

Another communication from the European Commission adds to the growing body of ‘soft law’ which crystallises the central role for the European Commission in the explanation of how the free movement, procurement, and competition rules apply to SGEL.⁸ On 29 April 2013 the European Commission published a revised and updated version of the *Commission Staff Working Document Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*.⁹ This document is some 110 pages in length¹⁰ and contrasts with the brief Frequently Asked Questions communications from earlier years.¹¹ It is a Handbook, outlining the new legal framework and how it interacts with other areas of European Union (EU) law, particularly procurement and the Services Directive.¹² This raises the question of its legal status and how much reliance could be placed on the Staff Working Document in litigation. Increasingly local and regional administrations are being asked to apply EU competition law as a result of de-centralisation and the use of *de minimis* rules and safe havens to free up the European Commission’s workload. While the trigger for EU law to apply exempts smaller and local forms of State aid for SGEL, there is a debate over how much central guidance from either the European Commission or the European Courts should be available for local competition authorities to apply EU competition law.¹³ One case study relating to healthcare in the Netherlands suggests that, in the absence of EU guidance in the form of Court of Justice of the EU (CJEU)/General Court (GC) case law, the local competition authority is forging a national response of applying EU law and principles rather than wielding an autonomous national application of competition law.¹⁴

II. European Commission Decisions and the General Court on compensation for SGEL

The first year of operation of the Almunia Package, the European Commission’s modernisation of the *Altmark*

Package, has generated few Decisions from the European Commission. This could indicate that the Member States are fine tuning financial support to fall within the new framework. This in turn frees up the European Commission to undertake a closer investigation of the more problematic cases, and several cases under review here are investigations of older forms of State aid.

Of significance are three Decisions relating to finance of the postal sector undergoing the next stages of opening up the liberalisation of the postal market and ensuring the viability of universal service obligations (uso). The European Commission authorised two tranches of compensation received by Poste Italiane for delivering two uso in the period 2009–2011. The measures had not been notified to the European Commission until June 2012. Because the two measures had not been notified before their implementation they constituted State aid. However, the European Commission was willing to assess the measures in the light of the new Almunia Package for compensation of SGEL. The first measure concerned compensation of €1.1 billion for the universal postal service and the second measure covered the same period and was compensation of €458 million for reduced postal tariffs offered to publishers, not-for-profit organisations, and electoral candidates. The European Commission found the measures were compatible with EU rules on public service compensation because they did not overcompensate Poste Italiane for providing these services, and therefore did not lead to cross-subsidisation of commercial activities.

A review of the continuation of compensation to the postal sector in the UK took place under an application under Article 108 TFEU by the UK government.¹⁵ The European Commission found the scheme to be compatible with Article 106(2) TFEU. This was the first Decision using the Almunia Package as a framework for a case that did not fall within the *Altmark* criteria. The Post Office was granted two forms of aid: a loan to cover its working capital and a grant to cover the deficit between the costs and revenue of the postal network.

8 Erika Szyszczak, ‘Soft Law and Safe Havens’ in Ulla Neergaard *et al.* (eds), *Social Services in the EU* (TMC Asser Press, 2012).

9 European Commission, Brussels, SWD(2013) 53 final/2.

10 Commission Staff Working Document, ‘Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest’, SEC(2010) 1545 final, Brussels. This Guide comprised 84 pages.

11 Cf the first Press Release: IP/04/235, Brussels, 18 February 2004, *Commission proposes new rules to increase legal certainty for services of general economic interest*.

12 Directive 2006/123, OJ 2006 L 376 p.36.

13 Christopher Townley, ‘Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)’ (26 July 2013) SSRN

paper, Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298588> accessed 13 September 2013.

14 Johan van de Gronden and Erika Szyszczak, ‘Introducing Competition Principles into Health Care through EU Law and Policy: A Case Study of the Netherlands’ (27 June 2013) Paper presented to School of Law, University of Sheffield Health Law and Policy Research Group Inaugural Workshop: Old Markets, New Markets: Health Law After the 2012 Act.

15 SA.33054 Compensation for net costs incurred to keep a non-commercially viable network for the period 2012–15 and the continuation of a working capital facility, OJ 2012 C 121. In previous decisions, the Commission had authorised comparable financing measures for the Post Office Ltd (see Press Release IP/07/288 (available at: <http://europa.eu/rapid/press-release_IP-07-288_en.htm> accessed 13 September 2013) and SA.31156 (N508/2010), Press Release IP/11/346 (available at: <http://europa.eu/rapid/press-release_IP-11-346_en.htm>) accessed 13 September 2013.

The European Commission authorised UK plans to grant €1383 million as a network subsidy to the UK Post Office Ltd. The purpose of the aid was to maintain and modernise non-commercially viable post offices, especially in rural areas. The European Commission found the measure did not exceed the net cost for providing the public service obligations (psos) entrusted to the Post Office Ltd. The European Commission also endorsed the continuation, under stricter conditions, of a working capital facility of up to €1377 million which provides the Post Office Ltd with sufficient liquidity to carry out its psos, because this facility is provided on market terms.

The Decision is of significance in relation to the examination of procurement procedures and State aid. The European Commission examined the fourth *Altmark* criterion¹⁶ and para. 2 (6) of the Almunia Package which requires competition between bids. The entrustment of the psos to the Post Office used a negotiated procedure. The European Commission decided that this was not compatible with the fourth *Altmark* criterion. The lack of a transparent and open, publicly advertised procedure would not ensure that the negotiated procedure would lead to the selection of the tenderer capable of providing the psos at the least cost to the community.¹⁷ The UK government had not adduced any evidence to show that the costs incurred by the Post Office corresponded to the cost of a well-run undertaking. Thus the European Commission found that there was State aid. The European Commission was willing to justify the State aid because the Post Office was the only operator with a network and contractual relationships that satisfied the requirements for the provision of the SGEL. In these circumstances the European Commission resorted to Article 31(1)(b) of Directive 2004/18¹⁸ which justifies the use of a negotiated procedure in situations, *inter alia*, where a public service contract, ‘...for technical... or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.’

The European Commission found that the entrustment letter and funding agreement governing the payment of the compensation contained appropriate provisions to incentivise an efficient provision of the

public service, in line with the strategic plan of the Post Office for the period 2012–2015 which aims at modernising and improving the provision of services over its network according to yearly efficiency milestones.

In May 2013 the European Commission took a Decision to authorise finance of €300 million p.a. for a psos in the Belgian postal sector operated by bpost for the period 2013–2015. The calculation of the compensation complied with the new Almunia Package methodology and contained incentives to boost efficiency and quality of postal services, without the possibility of cross-subsidisation of commercial activities. The psos comprised the distribution of newspapers and periodicals, the home delivery of pensions, basic banking services, and the maintenance of a widespread network. In accordance with the Almunia Package, Belgium had organised a public consultation which confirmed the essential social and economic role of the psos entrusted to bpost for Belgian citizens. On methodology, Belgium committed to organise a competitive, transparent and non-discriminatory tender for the delivery of newspapers and periodicals in Belgium and will award a concession to the selected operator to take over the provision of this service from 1 January 2016.

In a Decision in January 2012, the European Commission had approved a pension relief of €3800 million for bpost, but ordered Belgium to recover €417 million of incompatible aid from bpost, resulting from overcompensations for its psos in the period 1992–2010.¹⁹ The May 2013 Decision was based upon Belgium’s commitment to promptly recover the previous overcompensation.

The maritime sector has attracted investigations by the European Commission. In June 2012 the European Commission opened an investigation into aid received by SNCM and CMN to operate transport links between Corsica and Marseille.²⁰ The Decision sheds light on the question of the definition of an SGEL. France argued that there was a psos in providing a basic service of permanent passenger and freight transport and the additional service of a passenger service for peak traffic during holiday periods and the summer vacation season. France was asked to explain why there was a public need for

16 The fourth criterion is: ‘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 undertaking, well run and adequately provided with the necessary means, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.’

17 Para. 41.

18 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134 p 114.

19 IP/12/45 and Memo/12/38.

20 Commission Decision of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée (notified under document C(2013) 1926) (2013/435/EU), OJ 2013, L220 p.20.

such services and to show that the additional pso could not be provided by the market.

The European Commission was concerned to show that the selection procedure for the pso ensured effective and sufficient competition so that the pso holder was able to provide the pso at the least cost to the community. The European Commission was also concerned about transparency issues, whether the parameters of the compensation was pre-determined objectively and in a transparent manner. The initial request for information also asked for the amount of compensation paid for the pso in order to investigate if there was overcompensation. The European Commission found that the compensation received by SNCM and CMN under the basic service constituted State aid but it was compatible with the internal market under Article 106(2) TFEU. In contrast the compensation received by SNCM for the additional service provided under the pso contract for the period from 1 July 2007 to 31 December 2013 was illegal and France was ordered to recover the aid. The European Commission found that there was a manifest error in deciding that the Marseille–Bastia and Marseille–Ajaccio lines were in need of a pso because the volume of traffic showed that services could be provided on a competitive basis, thus the use of a pso was neither necessary nor proportionate:

that Member States may not impose specific public service obligations for services that are already provided or can be provided satisfactorily in conditions (price, objective quality features, continuity and access to the service) that are compatible with the public interest, as defined by the State, by companies operating under normal market conditions.²¹

The contract for the pso had been awarded using a negotiated procedure. The European Commission found that the fourth *Altmark* criterion was not satisfied. The contract to SNCM was awarded following a negotiated procedure. Here, in theory, there was the possibility of competition between bids since one other bid had been submitted in addition to the bid from SNCM. However, the European Commission found that the alternative bid was not able to offer a credible alternative to the SNCM bid. It had not been evaluated according to the award criteria but on the basis of one selection criterion: the ability to operate from a certain date. This was made even more restrictive in that there was a very short timeframe of three weeks between the date of awarding the pso to the start of the services. The European Commis-

sion found that SNCM had a significant competitive advantage over the incumbent operator: it already had ships adapted to the requirements of the specifications of the pso. The procedure therefore did not satisfy the fourth *Altmark* criterion and did not allow the Corsican Transport Board to compare several offers and to select the most economically advantageous bid to deliver the pso.

On 5 October 2011 the European Commission notified Italy that it was opening a wide-ranging investigation into various forms of State aid granted to the former Tirrenia group (which had been privatised).²² The investigation was extended in November 2012.²³ One aspect of the investigation is the nature of the pso granted to the companies of the former Tirrenia Group for operating certain maritime routes.²⁴ The European Commission is concerned that the pso compensation granted by Italy to the companies for operating certain maritime routes could create an unfair economic advantage over competitors. The European Commission had received complaints concerning the prolongation of the pso contracts after the expiry, in December 2008, of the Conventions that governed the services, as well as aspects of the privatisation process. One aspect of inquiry will be whether the prolongation of public service contracts beyond 2008 was carried out according to the EU rules on SGEI.

A case where the European Commission found a long-standing breach of the State aid rules is seen in the German Disposal of Animal Carcasses Decision.²⁵ This was a complaint to the European Commission by Saria Bio-Industries AG & Co KG of annual payments to the Zweckverband Tierkörperbeseitigung (ZT), a special-purpose association for animal carcass disposal, in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis, and Landkreis Limburg-Weilburg. The complainant had also initiated legal proceedings in the national court which had found that there was illegal State aid.

The complainant argued that the ZT could not survive economically if its members did not cover the annual losses of disposing of animal carcasses by paying annual contributions. The ZT had a monopoly for the disposal of internal animal material (and thus no competition) and offered below-market prices on the open market for external animal material. The ZT's price policy was only oriented towards maximising utilisation at its plants, which had high spare capacity. Germany

21 Para. 166.

22 European Commission—IP/11/1157 05/10/2011.

23 OJ 2013 C 84 p.58.

24 See European Commission—IP/12/1184 07/11/2012.

25 Commission Decision of 25 April 2012 on State aid SA.25051 (C 19/10) (ex NN 23/10) granted by Germany to the Zweckverband Tierkörperbeseitigung in Rhineland-Palatinate, Saarland, Rheingau-Taunus-Kreis and Landkreis Limburg-Weilburg, OJ 2012, L236 p.1.

argued that the aid was used to comply with EU rules and to contain animal diseases, such as BSE, and to fulfil environmental goals and therefore fell within the concept of a SGEI.

The aid was granted before the Almunia Package came into effect and the European Commission applied paragraph 69 of SGEI Guidelines, that states that after 31 January 2012, the Guidelines must be applied to unlawful State aid. The European Commission found that there was no entrustment of an SGEI, and that an SGEI did not exist. Furthermore the European Commission found that the second *Altmark* criterion²⁶ was not met for the period 1979–2009, and the third *Altmark* criterion²⁷ was not met for the entire period. Consequently section 2.3 of the SGEI Guidelines (for the period 1979 to 2009) and section 2.8 (for the entire period) were not met. Thus Germany was found to be in breach of Article 108(3) TFEU and a recovery order for the illegal State aid issued.

In a Decision of 20 January 2013 the European Commission found that public compensation to La Banque Postale in France from 2009 to 2014, aiming to improve banking accessibility for poorer segments of the population was compatible with EU State aid rules.²⁸ The compensation for La Banque Postale was granted before the adoption of the Almunia Package and thus the transitional provisions of the new Package applied, with any compensation granted after 2014 falling under the new framework.

On 10 May 2007, the Commission opened proceedings on the exclusive right of *Crédit Mutuel*, *Caisses d'Épargne*, and *La Banque Postale* to distribute the savings books 'Livret A' and 'Livret Bleu'.²⁹ On 1 January 2009, France decided to liberalise the distribution of the 'Livret A' allowing all banks to distribute it. The European Commission therefore closed its investigation.³⁰ At the same time France entrusted *La Banque Postale* with an SGEI mission to improve banking accessibility in France by creating additional obligations on its 'Livret A' funded by state compensation. *La Banque Postale* is obliged to open, without a fee, a 'Livret A' for every client who asks for such a savings account. Other examples of the SGEI obligation included certain free banking services: free cash deposits and withdrawals, including for very low amounts. The European Commission

accepted that a significant number of economically disadvantaged people rely on the 'Livret A' of *La Banque Postale* for access to basic banking payment services. The European Commission found that the compensation granted to *La Banque Postale* did not exceed the net cost for discharging the pso but if overcompensation should occur, a procedure was in place obliging *La Banque Postale* to repay any excess compensation. The European Commission also concluded that any distortions of competition in the banking sector would be limited since the 'Livret A' of *La Banque Postale* was unlikely to affect current accounts offered by the market, because it offers only limited payment possibilities and therefore clients of another bank would be unlikely to close a current account to manage their payments and transactions from a 'Livret A' of *La Banque Postale*.

The European Commission and the GC are taking a stricter approach to the financing of healthcare schemes. Healthcare is one of the areas in the Almunia Package where special measures may be taken in the context of providing healthcare as an SGEI. However the complexity of the mix of public and private provision of healthcare requires close analysis to ensure that proper compensation is awarded for providing an SGEI and that cross-subsidisation does not allow for the distortion of emerging competitive markets. The European Commission proposed measures for Ireland to abolish the unlimited state guarantee enjoyed by the Voluntary Health Insurance Board (VHI) by the end of 2013. The VHI was set up in 1957 by the Voluntary Health Insurance Act as a statutory body, with the aim of offering voluntary health insurance. By virtue of this status, VHI cannot be forced into bankruptcy and, as a consequence, it is able to obtain loans on preferential terms and its business partners need not be concerned with VHI's ability to perform its obligations, as its credit or commercial risks are borne by the State. The relevant provisions remained in place after the opening up to competition of the Irish market for private medical insurance in 1994. This, the European Commission argues, provides VHI with an undue advantage over its competitors.³¹

The GC has taken a strict approach to financing health care in the *CBI* case.³² The issue concerned aid given to public hospitals in Brussels. Belgium law creates a framework to allow hospitals to be funded by the state in order to provide particular medical services. Public

26 'The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.'

27 'The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.'

28 Service d'intérêt économique général (SIEG) d'accessibilité bancaire du Livret A de la banque postale, OJ 2013, C81/3

29 IP/07/641.

30 IP/09/1482.

31 European Commission—IP/12/844 25/07/2012.

32 Case T-137/10, *Coördinatie van Brussels instellingen voor welzijnswerk en gezondheidszorg (CBI)*, 7 November 2012, not yet reported.

hospitals in Brussels were also granted aid for carrying out particular social services, such as treating patients who cannot afford medical treatment ('social patients'). The obligation to give assistance to social patients was laid down in programmes drawn-up by the hospitals in close cooperation with the public authorities. The State aid measures were notified to the European Commission, which approved these measures.³³ The European Commission was of the opinion that the task to provide medical services constitutes an SGEI, and this was set out in Belgian legislation. The task to give assistance to social patients was also an SGEI, given the involvement of public authorities in creating the programmes. When the European Commission examined whether the aid measures were justified, it found that the fourth condition of *Altmark*³⁴ was not met but the aid fell within the scope of the European Commission Decision³⁵ and there was no overcompensation because over-payments were adjusted.

The approval of the Belgian scheme covering the social service element was challenged by a group of Belgian private hospitals. The GC assessed whether the public hospitals were entrusted with an SGEI mission. In relation to the task to provide assistance to social patients, the GC pointed to the general duty in Belgian law, according to which every hospital is obliged to treat persons in need. Consequently, it was questionable whether giving assistance to social patients was the sole responsibility of the public hospitals. On the issue of avoiding overcompensation, the GC found that the conditions for giving subsidies to the public hospitals were unclear and left a wide margin of appreciation to the public authorities involved. Overcompensation could not be avoided, as no mechanisms for preventing overcompensation were in place. Accordingly, the GC found that the European Commission had failed to examine properly whether problems of overcompensation existed. Therefore, it annulled the European Commission Decision approving the social aid given to the public hospitals in Brussels with an admonishment to examine with greater care whether the aid given to these hospitals is compatible with the EU rules for State aid.

III. Economic activity

When analysing the relationship between SGEI and other state intervention in competitive markets, a crucial legal tool is the concept of 'economic activity'.³⁶ The

boundary between economic and non-economic activity has become even more significant as liberalisation and cutbacks to the welfare state in Europe have created new concepts of public services provided by state and non-state actors and new hybrid bodies. It is acknowledged that a body may be exercising public powers and not be engaged in economic activity but also may offer goods and services on a market and engage in economic activity, triggering the application of EU economic law. At stake for the purposes of EU law is the question of whether the public and economic activities can be separated. The processes of liberalisation and marketisation may have blurred the boundaries of EU law, but, at the same time the Treaty of Lisbon 2009 has constitutionally entrenched a boundary between economic and non-economic activities in Article 14 TFEU where a distinction is made between SGEI and *non-economic* services of general interest (NESGI). This distinction is reinforced in Protocol No. 26 on Services of General Interest (SGI), setting a means of dividing competences between the EU and the Member States. Thus, it is of some interest and significance to examine Commission Decisions and CJEU rulings on the way in which this boundary is being determined.

In *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência (AdC)*³⁷ we see that where a non-state regulatory body sets out professional rules that directly determine the market and the opportunity for access to the market in professional training, the Court is not willing to exclude the activities from the application of the competition rules or to create a wide concept of public duties. The CJEU applied *Wouters*³⁸ and held that there was no issue in finding that chartered accountants carry out an economic activity and therefore the manner in which their profession is regulated also relates to an economic activity. On the question of whether OTOC, the regulatory body for chartered accountants was exercising an economic activity, the CJEU dismissed the idea that this was a public body which could fall outside of the competition rules. It was composed of members of the profession it regulated and was a professional association where the appointment of its members was unaffected by national authorities. It was immaterial that OTOC was regulated by public law. OTOC had a wide discretion on how to organise the profession. Thus the impact of its rules relating to the training of the profession of chartered accountants in Portugal could be scrutinised under EU competition law.

33 Commission Decision of 28 October 2009 in case NN 54/2009, Financing the public hospitals of the IRIS network of Brussels, C(2009)8120 final.

34 See n16.

35 See n 1.

36 Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, para. 25.

37 Case C-1/12, judgment of 28 February 2013 (Second Chamber).

38 Case C-309/99 [2002] ECR I-1577.

The perennial question of whether there should be consistency across the EU Treaties and secondary legislation of core concepts invites a discussion of *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz, in the presence of: Thomas Fuchs*.³⁹ In a very different context from competition law, the Court has provided an interpretation of ‘economic activity’ in a case concerning the recovery of VAT from an alternative energy supply provided by a domestic household. In 2005 Mr Fuchs had a photovoltaic installation fitted to the roof of his home. The installation had no storage capacity and allowed all of the electricity produced in the home to be supplied to the electricity network. The dispute arose when Mr Fuchs applied for the reimbursement of the VAT on the purchase of the photovoltaic installation. The Finanzamt decided that Mr Fuchs was not entitled to the VAT rebate because he did not carry out an economic activity: a criterion that was required under the EU Sixth VAT Directive 77/388. The CJEU held that a residential house could be used as a residential dwelling as well as performing economic activity. It added that the scope of economic activities is very wide and that the term is objective in nature without regard to the purpose or results as to why it is carried out. The Court went on to find that the installation of a photovoltaic device would fall within the concept of economic activity if it was installed with the purpose of providing an income on a continuing basis. The concept of income was explained further as ‘consideration for the activity carried out’.⁴⁰ The Court held that it was not relevant that the amount of electricity produced was always lower than the amount of electricity consumed by Mr Fuchs. This reinforces the functional approach towards the definition of economic activity used by the CJEU in competition cases. It implies that even if there is no likelihood that operating costs can be fully covered, or the possibility of making a profit, there is an economic activity where income is generated. The result is a wide definition of economic activity.

The European Commission took a Decision as to whether there was State aid relating to three sets of Italian tax exemptions for non-commercial entities performing specific activities (IMU), or providing social assistance, welfare, health, cultural, educational or recreational activities (ICI), or exercising ecclesiastical or amateur sporting club activities (TUIR).⁴¹

On the ICI exemptions, Italy argued that the tax exemptions did not amount to State aid because the bodies were not ‘undertakings’ but carried out duties of a high social value and in the public interest. However, the government had granted the exemptions on a general basis without carrying out a detailed assessment of the scope of economic and non-economic activities as understood in EU law. The European Commission challenged this classification drawing upon established principles that the status of the body under national law was not relevant, that the application of the State aid rules is not dependent upon whether the body is created to generate profit; not-for-profit bodies can carry out an economic activity by offering goods and services on a market; the classification of a body is always relative to a specific activity. This is an important issue given the increased attempts by the state across Europe to create new and hybrid bodies to deliver social services.

The European Commission found that the alleged ‘non-undertaking’ characteristics put forward by Italy were not present in all of the bodies under scrutiny. Thus the European Commission decided that the ICI measure was State aid. Surprisingly, the European Commission took the view that the aid could not be recovered because it was absolutely impossible to do so; there were insufficient records separating the economic and non-economic activities of the beneficiaries of the exemption.

In contrast the European Commission found that that IMU and TUIR measures were not an illegal form of State aid. The beneficiaries of the IMU were not classified as ‘undertakings’ because they were not free to choose the recipients of their services and were compelled to offer their services for free (or at least for a symbolic fee) which had no relationship to the cost of the service. In relation to the TUIR measure, the Italian law defined the non-commercial activities of the beneficiaries of the tax exemption and it was possible to lose the exemption if other commercial activities were undertaken.

In *Compass-Datenbank GmbH v Republic Osterreich*⁴² the question of an alleged abuse of a dominant position by a public authority (the Firmenbuch) authorised to collect data focused upon whether there was an ‘undertaking’ carrying out ‘economic’ activity. However, the CJEU appears to depart from its functional approach to

39 Case C-219/12, judgment of 20 June 2013. I am grateful to Phedon Nicolaides for making me aware of this ruling: ‘The Flexible Boundary between Economic and Non-economic Activities (part I)’ available at: <<http://www.lexxion.eu/training/stateaidblog/2013/07/29/51-the-flexible-boundary-between-economic-and-non-economic-activities-part-i>> accessed 13 September 2013.

40 Para. 23.

41 Commission Decision 2013/84 on municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy, SA 20829, OJ 2013, L166 p 24.

42 Case C- 138/11, judgment of 12 July 2012.

examining whether or not there is economic activity. The Austrian government brought an action seeking, *inter alia*, to prevent Compass-Datenbank from using the Firmenbuch data, including storage, reproduction or transmission of that data to third parties. Compass-Datenbank required access to daily updates of extracts from the Firmenbuch concerning entries or deletion of information by undertakings. It provided information services based on information contained in the Firmenbuch, supplemented by information resulting from searches carried out by Compass-Datenbank's own editorial services and by other information from Chambers of Commerce.

The Court reiterates its case law on the nature of economic activity and an 'undertaking', and, citing *SELEX*,⁴³ discusses the severability of economic activities from public duties: if an economic activity could not be separated from the exercise of its public powers, the activities exercised by that entity as a whole remained activities connected with the exercise of those public powers. Even if the public duty involved payment of a fee, this would not detract from the status of a public body in EU law. Similarly in this instance the creation of intellectual property rights to protect the stored data did not detract from the public authority nature of the activity. Thus the Court concluded that the Firmenbuch was acting as a public authority and was not engaged in economic activity for the purposes of EU law. The outcome from this case suggests that if a public authority was charging disproportionate fees, or preventing new services from emerging, it would be difficult to apply competition rules to redress the issues. The ruling was criticised by Sanchez-Graells:

In my view, this reasoning falls again in the defect (or misleading argument) of pegging an activity that is clearly economic (ie maintenance and exploitation of the database) to a non-economic activity (creation of the database by mandatory disclosure and reporting) and considering them non-separable despite the fact that there is no technical or economic hurdle to do so. It is quite telling that the CJEU does not provide any reasons for the finding that the creation of the database and its ulterior economic exploitation 'are activities which cannot be separated'.⁴⁴

As Sanchez Graells points out, in other Member States there are private companies successfully using the databases created by public authorities (or Chambers of

Commerce) as a result of the mandatory disclosure and reporting of corporate statements and accounts—and there appears to be no clear technical or economic barrier for this market not to flourish.

A similar kind of issue arose in two European Commission Decisions. In a Decision involving an extension of a support scheme for libraries in the Czech Republic⁴⁵ to digitalise older publications to create wider on-line access the European Commission cites the *Compass* case.⁴⁶ The European Commission states that: 'one of the main criteria for deciding whether a given activity is economic in nature, [is] whether such activity may be carried out at least in principle by a private enterprise for profit. The activities of the libraries . . . would not therefore be undertaken by any private entity seeking profit.'⁴⁷ Arguably, however, the heavy subsidisation by the state of such projects would make competition unworkable, alongside current demands for greater open access of publishing.

The European Commission also states that the fact that an amount up to the real cost of the service is paid by the user for certain services is not relevant. Any remuneration is not in itself sufficient for the activity carried out to be an economic activity. It is the not-for-profit function and the legal obligation to provide most services without payment by the consumer that determined that there was no economic activity to categorise the libraries as 'undertakings' for the purposes of EU law.

The European Commission also refers to *Compass-Datenbank* in a Decision relating to a national (German) website for publicising auctions in insolvency proceedings: the ZVG Portal.⁴⁸ The portal was created and financed by all of the German Länder. It facilitated the publicity of compulsory auctions being carried out by the lower courts involved in the insolvency proceeding. The lower courts paid a nominal fee of €1 to publicise the auction. A commercial undertaking had already created a system for providing information on compulsory auctions in Germany and made a complaint to the European Commission that the ZVG Portal was funded by illegal State aid. At the heart of this discussion is the question of whether the ZVG Portal was an exercise of official authority.

The complaint was that the Länder had concluded an agreement that was a voluntary market transaction, not

43 Case C-113/07P, *SELEX Sistemi Integrati v Commission* [2009] ECR I-2207.

44 'Another step back in the definition of (public) undertakings for the purposes of EU competition law', *How To Crack a Nut Blog*, 16 July 2012, available at: <<http://howtocrackanut.blogspot.co.uk/2012/07/another-step-back-in-definition-of.html>> accessed 13 September 2013.

45 Notified to the European Commission in the interest of 'legal security'.

46 SA.35529 (2012/N)—Czech Republic Digitization of books in libraries, Brussels, 16 April 2013, C(2013) 1893 final.

47 *Ibid.*, para. 24.

48 C(2013) 2361 final.

an act of public authority. The European Commission dismissed this complaint by finding that the Länder worked under a voluntary agreement and there was no compulsion to fund the ZVG Portal. The European Commission then went on to state that ‘... generally speaking, unless the member state concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities.’⁴⁹ Referring to the *Compass-Datenbank GmbH* ruling the European Commission states:

the mere fact that private operators are already offering the service to publish certain information, when requested by public authorities, does not mean that, if the State carries out the same or similar activity, this activity automatically has to be considered ‘economic’ in nature. This should be judged rather on the kind of activity concerned, considering also the context in which it takes place. The State does not forgo the right to carry out a task, which is ‘public authority’ in nature, by acting at a point in time when private operators—perhaps due to a lack of action by the State—have already taken the initiative to offer services to the same end.⁵⁰

The European Commission held that publicising compulsory auctions forms part of the prerogative of official authority, is as such performed by the state, and does not constitute, not even in part, an economic activity. The nominal amount of €1 that was paid for the publicity by the lower courts was not sufficient to make the activity economic. Thus, the Decision respects the competence of the State to determine its public and economic spheres of activity.

IV. Article 106 TFEU

After a long investigation, the Commission took an unusual step,⁵¹ which attracted much critical comment in its use of Article 106 TFEU and Article 102 TFEU, to tackle an alleged abuse of a dominant position in the Greek electricity market.⁵² The GC was given the opportunity to clarify the relationship between Article 102

TFEU and Article 106(1) in a detailed and analytical judgment which casts greater light on how Article 106 TFEU should be used in combination with other Treaty provisions. DEI, an electricity company, owned by a majority share holding by the Greek government was left as an incumbent after the liberalisation of the Greek electricity market. DEI owned all of the Greek electricity power stations that used lignite. The European Commission alleged that DEI held a monopoly in the grant of rights to exploit lignite in Greece and brought an infringement action against Greece based upon the ‘inequality of opportunity’ case law.⁵³ This case law, with the exception of *France v Commission*, has developed through preliminary rulings, which lack the detailed factual investigation that is central to a European Commission Decision. The European Commission’s interpretation of the case law was that by using Article 106(1) TFEU in combination with Article 102 TFEU, it did not need to show a specific abuse of a dominant position had taken place. The European Commission argued that the Greek government, through DEI, had exclusive access to lignite in Greece, providing an opportunity to use the lowest cost method of running electricity power stations, giving Greece an advantage over other operators in the liberalised electricity market.

Contrary to the European Commission’s interpretation of the factual situation the GC found that almost 50 per cent of the Greek exploitable lignite resources were still free for exploitation by third parties; that DEI enjoyed exploitation rights prior to the liberalisation of the electricity markets in Greece; that DEI sells electricity in the downstream compulsory daily market for the wholesale of electricity complying with the conditions determined by the regulatory framework and the European Commission had never questioned the effectiveness of the regulatory framework. The GC went on to find that DEI was unable to manipulate the downstream market merely by exercising its lignite exploitation rights.

The GC analysed the legal and regulatory background underpinning the case law on Articles 106(1) and 102

49 Ibid., para. 29.

50 Case 13/11, para. 32.

51 Cf. In the energy sector the European Commission conducted an inquiry and published a Report in 2007: Commission Communication COM(2006)851; Commission Staff Working Paper (SEC(2006)1724). Subsequent follow up investigations of individual undertakings resulted in the adoption of Article 9 Commitments: Distrigaz COMP/37966, 2007; German Electricity Wholesale Market, COMP/30389; E.ON, COMP/39.388, 2008; E.ON, COMP/39.317, 2010; GdF Suez, case COMP 39316, 2009; RWE, COMP/39.402, 2009; EDF, Case COMP/39.386, 2010; ENI, Case COMP/39.315, 2010; *Swedish interconnectors* Case COMP/39351, 2010. Generally, the use of such commitments has become the practice in recent Article 102 TFEU Decisions, see the Survey by Éric Barbier de La Serre and Eileen Lagathu, ‘The Law on Fines Imposed in EU Competition

Proceedings: Faster, Higher, Harsher’ (2013) 4:4 Journal of European Competition Law & Practice 325.

52 The case is usually referred to as the Greek Lignite case: Case T-169/08 *DEI v Commission*, judgment of 20 December 2012. The European Commission’s case is put by *Philippe Chauve and Polyvios Panayides* ‘The importance of access to fuels for competition in the electricity sector: the case of lignite in Greece’ (2008) Competition Policy Newsletter, No 3, 37. For discussion see the comments on the Chillin Competition blog: ‘Ménage à trois: The General Court’s judgment in Case T-169/08 *PPC v Commission*’, Available at: <<http://chillingcompetition.com/2012/11/20/menage-a-trois-the-general-courts-judgment-in-case-t-16908-ppc-v-commission/>> accessed 13 September 2013.

53 Case C-163/96, *Raso and Others* [1998] ECR I-533 Case C-202/88, *France v Commission* [1991] ECR I-1223; Case C-18/88, *GB-Inno-BM* [1991] ECR I-5941; Case C-462/99, *Connect Austria* [2003] ECR I-5197.

TFEU. The GC concluded that in the case law the CJEU did not assess the state measures in a vacuum, but analysed the actual or potential abuse that could arise from the state measures. Thus the GC ruled that the European Commission must do more than establish that a state measure leads to the creation of a situation of ‘inequality of opportunity’; the European Commission must also identify the actual or potential aspect of a state measure that results in an abuse of a dominant position under Article 102 TFEU.

The case of *OTOC v AdC*⁵⁴ has been discussed in Section III in relation to economic activity. This raised the interaction of the free movement rules in Article 56 TFEU and the competition rules of Article 101 TFEU and Article 106(2) TFEU and was referred to the CJEU by the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon). This case also addressed the equality of opportunity principle. In *OTOC v AdC* the dispute concerned a Training Regulation adopted in 2007 by the Chamber of Chartered Accountants (succeeded by OTOC) to regulate the compulsory training of chartered accountants. The Regulation distinguished institutional training and professional training and gave OTOC a monopoly in the provision of institutional training. Two training bodies had been refused accreditation of their training courses and claimed that the 2007 Training Regulation unduly restricted their freedom to provide training for chartered accountants. The AdC found that the Training Regulation infringed Articles 101 and 102 TFEU and imposed a fine on OTOC. On appeal the lower Lisbon Commercial Court also found that the Training Regulation distorted competition on the market for compulsory training for chartered accountants and that the Training Regulation was likely to hinder trade between the Member States. It rejected a justification for the Regulation that restrictions on competition were necessary in order to ensure the proper exercise of the profession of accountant. However, it also held that there was no infringement of Article 102 TFEU. OTOC appealed this decision to the Lisbon Court of Appeal, arguing that it held a public service mission, derived directly from law, which consisted of the promotion and contribution to training of chartered accountants in Portugal. Thus, its training activities fell outside of the scope of ‘economic activity’ and consequently outside of the scope of Article 101 TFEU. Furthermore, OTOC argued that the *Wouters* case applied: any restrictive effects on the conduct of OTOC were justified by the need to ensure the proper exercise of the profession of chartered accountants in Portugal. Add-

itionally OTOC put forward the argument that an exemption derived from Article 101(3) TFEU applied: the Training Regulation contributed to improving the provision, distribution, and promotion of technical or economic progress, giving users a fair share of the benefit. Finally, OTOC argued that the creation of a system of compulsory training for chartered accountants was a SGEI within the scope of Article 106(2) TFEU.

As discussed above, the CJEU found that OTOC was carrying out an economic activity. The Court found that the Training Regulation applied to the whole territory of Portugal and the effect of the rules was liable to affect trade between the Member States. Article 56 TFEU was not relevant to the appeal brought under the competition rules. The nature of the Training Regulation would affect the decision to access the training market in Portugal of a provider from another Member State. Even though the aim of the Regulation was to maintain quality of training and did not have an anti-competitive objective, it was necessary to examine the actual and potential effects of the Regulation on competition in the internal market. The CJEU found that the monopoly over institutional training gave OTOC a significant part of the market of compulsory training for chartered accountants but was also liable to give OTOC a competitive advantage in the provision of professional training. It was for the referring court to examine the market and the conditions for access to the market for bodies in competition with OTOC. However, citing *MOTOE*,⁵⁵ the Court made it clear that the regulatory system controlled by OTOC made it very difficult for competitors to enter the training market and therefore the contested Regulation did not ensure equality of opportunity. While the Court accepted the aims of the Regulation, to ensure the quality of training services offered to chartered accountants, it was not convinced that the restriction on competition was proportionate, according to the *Wouters*’ criteria. The Regulation resulted in the elimination of competition in a substantial part of the internal market and the fixing of discriminatory conditions on the other part of the market and thus the restrictions went beyond what was necessary to achieve the objective of the Training Regulation. Furthermore the CJEU found the Regulation to not satisfy the four cumulative conditions of Article 101(3) TFEU since the Regulation was liable to make it possible for OTOC to eliminate competition in a substantial part of the market for the training services of chartered accountants and the restrictions imposed were not to be regarded as essential.

54 Case C-1/12, judgment of 28 February 2013.

55 Case C-49/07 ECR I-4863 [2008].

The CJEU gave short shrift to the argument that OTOC was entrusted with an SGEI. It did not conduct a detailed assessment of whether the Regulation and supply of training services was capable of being an SGEI. Instead it stated that it had received no evidence that the services provided by OTOC exhibited special characteristics as compared with other economic activities, or that the application of the competition rules of the Treaty would obstruct the performance of an SGEI task. In any event, from the discussion of the application of Article 101 TFEU, the Court had found that the restrictions on competition went beyond what was necessary to ensure the performance of the particular tasks assigned to OTOC, and therefore Article 106(2) TFEU would not

apply. The sharp dismissal of the SGEI argument leads us not to dwell too much on the theoretical methodology of the relationship between SGEI and competition rules contained in Article 101 TFEU. Article 106(2) has been applied in different ways by the European Courts,⁵⁶ but is conventionally viewed as a derogation from the fundamental competition and free movement rules of the Treaty and should be interpreted restrictively and the principle of proportionality applied. In contrast, Article 101(3) TFEU is an exemption from the competition rules and applies in a more technical manner.

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⁵⁶ An analysis can be found in the Opinion of Advocate General Jacobs in Joined Cases C-67/96, C-115-17/97, and C-219/97, *Albany Int BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.