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## **Services of General Economic Interest Public Procurement and State Aid**

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## **Public Services under EU Law**

- Art 106 TFEU (ex Art 86 EC) =  
the foundation of public services
  - Public service obligations
  - Universal service obligations
  - Services of general economic interest
  - Social services of general interest

## Public services as services of general interest

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### What is a (SGI)?

Protocol No 26 to the TFEU

The concept of SGI refers to services, whether 'economic' or not that the Member States regard as being of general interest, and are subject to specific public service obligations

- SGI cover:
  - services of general economic interest (SGEIs) [TFEU applicable]
  - non-economic services of general interest [TFEU not applicable]

## The characteristics of public services

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- Economic nature
  - Cost and value considerations
- Lack of industrial or commercial character
- Sui generis market place
  - Limited use of anti-trust
  - State aid regulation
  - Procurement as competition benchmark

## The Conceptual premise of SGEI

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### Services of General Economic Interest

- Articles 14 and 106(2) TFEU
- Protocol No 26

### Non-commercial nature *versus*

- Demand
- Frequency of supply
- Quality of service
- End user charges
- Profitability of operator

## SGEIs

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- “services of an economic nature that the public authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law, subject to specific **public service obligations** through an act of entrustment on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions”.
- **Examples of acts of entrustment**
  - Concession contract and tender documents
  - Ministerial programme contracts
  - Ministerial instructions
  - Laws and Acts
  - Yearly or multiannual performance contracts
  - Legislative decrees, regulatory decisions, municipal decisions or acts.

## Public Service Obligations

- State financing not state aid
  - Art 14 TFEU (ex Art16 EC)
  - Art 106(2) TFEU (ex Art 86(2) EC)
  - Altmark ruling

## The concept of social services of general interest (SSGI)

- *Commission Communication: Implementing the Community Lisbon programme: Social services of general interest in the European Union*
- *Commission Communication: Services of general interest, including social services of general interest: a new European commitment*
- SSGIs may be of an economic or non-economic nature
- SSGIs that are economic in nature are SGEIs

## SSGIs

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health services;

statutory and complementary social security schemes;

life assurance

health

ageing

occupational accidents

unemployment

retirement

disability

## SSGIs

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other essential fundamental right services of social cohesion and social inclusion directly provided

assistance for persons faced by personal challenges or crises (debt, unemployment, drug addiction or family breakdown)

social integration activities (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration).

services to integrate people with long-term health or disability problems.

social housing, housing for disadvantaged citizens or socially less advantaged groups.

## **Public Services and Competition: Principles of Public Procurement Regulation**

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- Transparency
- Accountability
- Objectivity
- Non-discrimination

## **What does public procurement stand for?**

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- Procedural safeguard of competition
- Conceptual instrument
  - Public policy
  - Public services

## Public Procurement and public services

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- Contracting authorities
  - Bodies governed by public law

“it must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character”

## General public interest needs

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- requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons
- C-179/90, *Merci Convenzionali Porto di Genova*, [1991] ECR 1-5889

## The industrial or commercial character

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- intention to achieve profitability
- pursuit of objectives through commercially motivated decisions
  
- C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*
- C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*

## ■ Acid test:

the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision



## Conceptual approaches of financing public services by the ECJ and the Commission

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- the state aid approach
- the compensation approach
- the quid pro quo approach

## The state aid approach

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- All public funding regarded as state aid within Art 107(1) TFEU (ex Art 87(1) EC)
  - Could be justified under Art 106(2) TFEU (ex Art 86(2) EC)
  - Must comply with proportionality principle

## The state aid approach (cont)

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Article 107(1) TFEU: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"

Principle: state aid in any form is in general incompatible with the internal market

Procedure: notification, standstill, authorisation

European Commission has sole power to assess compatibility of state aid

## The state aid approach (cont)

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Concept of aid is wider than subsidies and includes any public measure that reduces costs normally borne in budget of undertakings and although they are not subsidies have similar effects [Italy v Comm, C-66/02, Chronopost, C-341/06]

## The state aid approach (cont)

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Advantage is any relief from **normal** costs = inherent in economic activity of beneficiary undertaking [Kahla, T-20/03; GEMO, C-126/01]

“Normal costs” are determined within prevailing legal context of Member States

## The state aid approach (cont)

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Advantage includes supply of goods and services on preferential terms [GEMO, C-126/01; UFEX, T-613/97]

Use of **public procurement** eliminates advantage for provider of goods/services to a public authority [Welsh public sector broadband network, N46/2007]

## The state aid approach (cont)

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■ "... a tender procedure guaranteeing full competition can be taken as an important indicator that the services entrusted through a public contract or a concession are rendered at a market price and that there is no state aid. Complying with procurement rules will in these cases therefore also help in ensuring respect of the state aid provisions."

[Commission staff working document, Frequently asked questions concerning the application of public procurement rules to social services of general interest, accompanying document to the Communication on "Services of general interest, including social services of general interest: a new European commitment" SEC(2007) 1514, 21/11/2007

## Application of the state aid approach

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- Existence of public markets  
*C-94/01 Chronopost and Others*
- Inapplicability of private investor principle
- Public procurement as authentication instrument of public expenditure

## The compensation approach

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- Reflects upon a “compensation” for an appropriate remuneration
- Public funding regarded as state aid within Art 107(1) TFEU (ex Art 87(1) EC), if only and to the extent that any economic advantage exceeds such appropriate remuneration
- Appropriate remuneration = market price

## Application of the compensation approach

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- Real advantage theory
  - Any alleged advantages conferred must be examined in parallel to obligations
  - Synergy with transport regime and PSO
- Threshold benchmarking
  - Base line costs = market price (verified through public procurement)

*C-44/96, Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdruck GmbH*

## The *quid pro quo* approach

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- Public funding not regarded as state aid within Article 107(1) TFEU (ex Article 87(1) EC) if

a direct and manifest link between

state financing and

clearly defined public service obligations

## Application of the *quid pro quo* approach

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- Departure from “effect of measures”
- Reliance upon formalities and procedure
- Market price = conceptual threshold
- Procurement verifies market price

C-107/98, *Teckal Srl v Comune di Viano*

## *Altmark*

- Hybrid between compensation and *quid pro quo* approaches
- Public funding not state aid if
  - Private sector to discharge public services which are clearly defined
  - Calculation for compensation established objectively and transparently
  - Compensation does not exceed costs plus reasonable profit
  - In the absence of public procurement, compensation to be determined by analysis of costs / profit structure of a typical undertaking

## Is Public Procurement a safeguard for SGEI?

- The presence of public procurement
  - Reveals relevant markets
  - Provides for cost basis ?

Erosion of safeguard and false sense of security

## Inapplicability of public procurement

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- Dependency of undertaking
- Similarity of control
- Category 2 Services of the Services Directive
- Concession Services
- Affiliation of undertaking
- Special or exclusive rights
- Competitive markets in utilities (telecoms)
- Institutional Public-Private Partnerships

## Inherent flexibility

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- Award criteria
  - MEAT (most economically advantageous tender)
    - Opens the door for policy pursuit
      - *Beentjes (C-31/87, Gebroeders Beentjes B.V. v. Netherlands)*
      - *Nord-Pas-de Calais (C-225/98, Commission v. France)*
      - *OPAC (C-237/99, Commission v. France)*