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Clarification or Confusion? How to reconcile the ECJ's rulings in *Altmark* and *Chronopost*?

Introduction

On 3 July 2003 the Court of Justice (hereinafter the *"ECJ"*) set aside an earlier ruling of the Court of First Instance (hereinafter the *"CFI"*) in the *Chronopost* case.[1] Therein the ECJ ruled – following the Opinion of Advocate General Tizzano delivered on 12 December 2002 – that a *market* for offering the services of a universal service network, just as the one maintained by the French postal organisation La Poste, did not exist; consequently any assessment of a hypothetical market price for the provision of services linked to such a network would – in the Court's view – produce excessively abstract and arbitrary results ill-suited to determine any economic advantage within the meaning of Article 87(1) EC. Exactly three weeks after that ruling the ECJ presented its final judgment in the famous *Altmark Trans* case[2] specifying the conditions under which the compensation for burdens associated with the fulfilment of a public service would not be caught by the prohibition laid down by Article 87(1) EC.

In a first step of the analysis presented in this article the 'historical' background of both judgments will be explained in some detail. In a second step a number of questions will be posed analysing whether – after the rulings in *Altmark* and *Chronopost* – the answers have become clearer or more obscure. Some of the issues covered by this analysis include. How can it be ascertained with a sufficient level of legal certainty whether in cases of public service fulfilment the prohibition laid down in Article 87(1) EC comes into play or not? Will the derogation provided by Article 86(2) EC cease to exist in the field of State aid or will its material substance moreover continue to exist under the disguise of the general provision of Article 87(1) EC? Do *Altmark* and *Chronopost* contain two different legal standards and, if so, which is the one to rely on in a specific case scrutinised under State aid law?

The "historical" background of the judgments in *Altmark* and *Chronopost*

The ECJ's ruling in Altmark Trans

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[1] Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* [2003], not yet reported; see as to the earlier judgment of the CFI Case T-613/97 *Ufex and Others v Commission* [2000] ECR II-4055.

[2] Case C-280/00 *Altmark Trans* [2003], not yet reported.

In the case of *Altmark Trans* the German Bundesverwaltungsgericht (Federal Administrative Court) referred a number of questions to the ECJ that arose in a dispute centring around a public authority's decision to grant and then extend the licenses for an operator of scheduled bus transport services in the *Landkreis* Stendal that was in receipt of public subsidies enabling it to perform these services. The central question of this dispute was whether such public subsidies intended to compensate for the costs associated with the operation of urban, suburban or regional scheduled transport services conferred an economic advantage within the meaning of Article 87(1) EC on their recipient, in the case at hand on the Altmark Trans company. For a better understanding of the various arguments exchanged within this particular legal dispute and within the wider debate it fuelled amongst both practitioners and academics it might be helpful to recall the historical development of the jurisprudence of the Community courts relating to compensations for public service fulfilment. However, I will not stop at merely reporting this jurisprudence, but I will also present further arguments voiced in legal literature as well as my own comments.

The early ruling in ADBHU

In a case referred by the *Tribunal de Grande Instance* of Créteil for a preliminary ruling the ECJ had to answer the question whether indemnities granted to certain companies for the services they performed in collecting and/or disposing of waste oils constituted State aid within the meaning of Article 87(1) EC.[3] Advocate General Lenz who had delivered his Opinion on 22 November 1984 took the view that as long as the indemnities granted out of public funds did not, "exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit", no economic advantage within the meaning of Article 87(1) EC could be present.[4] Advocate General Lenz therefore proposed to exclude what he referred to as a mere, "quid pro quo for obligations imposed on certain undertakings in the public interest" not to be caught by the prohibition on State aids. The Court followed his reasoning and responded to the question referred by the national court as follows:

> "In that respect the Commission and the Council, in their observations, rightly argue that the indemnities do not constitute aid within the meaning of Articles 92 et seq. of the EEC Treaty (now Articles 87 et seq. EC), but rather consideration for the services performed by the collection or disposal undertakings."[5]

The jurisprudence of the CFI in FFSA and SIC

In its subsequent practice the Commission took the view that financial benefits granted by Member States merely to compensate the additional burden incurred by discharging the costs connected with public service obligations did not constitute State aid.[6] Therefore it

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[3] Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531.

[4] Opinion of Advocate General Lenz, delivered on 22 November 1984 in Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531 (536).

[5] Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531, para. 18.

[6] This is for example well reflected by the Community Guidelines on State aid to maritime transport, OJ 1997 C 205, p. 5, para. 9 where it reads inter alia as follows: "The Commission's practice in assessing contracts relating to PSOs (Public Service Obligations) is generally to consider that reimbursement of operating losses incurred as a direct result of fulfilling certain public service obligations is not State aid within the meaning of Article 92 (1) of the Treaty". However, it is remarkable that these guidelines required for such public service contracts to fall outside the ambit of Article 87(1) EC and therefore outside the obligation to notify pursuant to Article 88(3) EC that a number of further criteria were met, i.e. the organisation of a public tender ensuring adequate publicity and leading to the award of the contract to the bidder asking for the lowest financial compensation. This is obviously due to the fact that in the *ADBHU* case the entrusted undertaking

must have come as a surprise as the CFI – in its famous *FFSA* ruling[7] – took the opposite approach both to the *ADBHU* case and to the Commission's practice and concluded that such compensatory measures did in fact fall under the prohibition as laid down by Article 87(1) EC, even though they might be declared compatible with the common market under the derogation provided by Article 86(2) EC.[8] This exercise of catching compensations for burdens associated with public service obligations under Article 87(1) EC and subsequently subjecting them to the legal test under Article 86(2) EC was repeated in the *SIC* case.[9] In the latter case, the private TV broadcaster Sociedade Independente de Communicação had asked the CFI to annul the Commission's decision of 7 November 1996 whereby the latter had declared various financial advantages granted by the Portuguese State to the public broadcaster RTP not to constitute State aid within the meaning of Article 87(1) EC. The Commission had therefore decided not to open formal proceedings pursuant to Article 88(2) EC. The Court regarded this approach to be wrongful and expressed its view that financial advantages granted by the State to an undertaking in order to compensate it for the fulfilment of certain public service tasks had no bearing whatsoever on the qualification of these measures as State aid. It expressly hinted to its abovementioned judgment in the *FFSA* case, as confirmed by Order of the Court of Justice,[10] and declared Article 86(2) EC to be the relevant material provision to rule on the compatibility of these aids with the common market.[11]

It is however surprising that on the one hand in *FFSA* the Court declared the derogation provided by Article 86(2) EC containing a number of restrictive requirements, such as in particular the frustration of the performance of the public service task and the proportionality test, as to be the decisive material provision, but, on the other hand, refrained from interfering too much with the Commission's economic assessment. The CFI stressed the Commission's "power of assessment". It then conceded that because of La Poste's lack of an internal accounting system containing separate accounts for services falling within the reserved sector and for non-reserved services some degree of uncertainty had been created, but still accepted the Commission's assessment. Finally, it merely concluded that the arguments brought forward by the applicants had not "produced any evidence or arguments to show that the Commission exceeded the bounds of its discretion in the matter".[12] Therefore the Court ruled in essence that despite the fact that the Commission had wrongfully regarded the relevant tax concessions granted by the French State to its postal organisation to fall outside the ambit of Article 87(1) EC its material assessment of the facts of the case had not suffered from any shortcomings. It concluded that the application for annulment of the Commission's decision had to be rejected.

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had been selected by way of a public tender procedure fulfilling the requirements of Council Directive No. 75/439/EEC on the disposal of waste oils. It is possibly for this reason that the Commission – in its submission in the *ADBHU* case – had argued that financial contributions aimed at covering the additional costs associated with public service obligations did not constitute State aid.

[7] Case T-106/95 *Fédération Française de Sociétés d'Assurances and Others v Commission* [1997] ECR II-229.

[8] Case T-106/95 *Fédération Française de Sociétés d'Assurances and Others v Commission* [1997] ECR II-229, para. 172.

[9] Case T-46/97 *Sociedade Independente de Communicação (SIC) v Commission* [2000] ECR II-2125.

[10] Case C-174/97 P *FFSA and Others v. Commission* [1998] ECR I-1303; however, the ECJ did not have to discuss whether the approach taken by the CFI as to the concept of an aid had been the legally correct one.

[11] Case T-46/97 *SIC v. Commission* [2000] ECR II-2125, para. 84.

[12] Case T-106/95 *FFSA and Others v. Commission* [1997] ECR II-229, paras. 180 et seq.

Subsequent to this new line of jurisprudence the Commission's practice in public service cases changed. Of particular interest are its two decisions declaring certain grants made to public broadcasters to be compatible with the common market pursuant to Article 86(2) EC. It declared the financing of both one BBC and two ARD/ZDF special-interest channels to be lawful on the basis of the derogation provided by Article 86(2) EC.[13] First, the Commission required that the compensation of certain public service obligations fulfilled by the broadcasters had to be fixed by market conditions.[14] In the second part of its reasoning it regarded the consideration to be fixed by market conditions only where the entrusted undertaking had been selected according to objective and appropriate criteria. Therefore it concluded as follows: If the public broadcaster had not been forced to compete with other bidders for access to the State revenues, and had not been selected according to such criteria, it was *presumed* that the consideration had not been fixed on the basis of market economy considerations, consequently leading to the emergence of State aid. If, however, the selection (of the public broadcaster) had been conducted in the form of a bidding process, it was *presumed* that no State aid was involved.[15]

The Court's judgment in *Ferring/ACOSS*: A return to the *ADBHU* jurisprudence

In the case of *Ferring/ACOSS*[16] it was again a French court from the town of Créteil, just as in the 1985 *ADBHU* case, that gave the ECJ the opportunity to judge on the question of whether undertakings that receive financial benefits in return for the performance of specific public-interest tasks are in receipt of illegal State aid. According to French law wholesale distributors of pharmaceutical products were charged with certain public-interest obligations as they had to keep a permanent stock of certain medicinal products sufficient to ensure supply to the pharmacies in their distribution areas for a certain period of time. These obligations did not apply to pharmaceutical laboratories, such as the plaintiff of this case, that made direct sales to pharmacies. Whilst the latter had to pay a tax on their direct sales, this obligation did not apply to pharmaceutical wholesale distributors. The plaintiff of this case, belonging to a multinational pharmaceuticals group, took the view that a tax levied on its direct sales was illegal and argued that a tax exemption granted to pharmaceutical wholesalers amounted to State aid within the meaning of Article 87(1) EC.

Advocate General Tizzano, in his Opinion delivered on 8 May 2001, took a very careful approach. He first pointed to the diverging views expressed by the Court of Justice in the *ADBHU* case on the one hand, and the later rulings of the CFI in both *FFSA* and *SIC* on the other. He continued to find that even in the case where the *ADBHU* judgment was

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[13] Commission Decision of 22 March 1999, Case NN 70/98 – Phoenix/Kinderkanal and Commission Decision of 29 September 1999, Case NN 88/98 – BBC News24.

[14] In the BBC News24 decision the Commission applied the following reasoning (p.5): "The Commission considers that any financial measure granted by the State to an undertaking which, in various forms, would mitigate the charges normally included in the accounts of the undertaking, has to considered as State aid within the meaning of Article 87. In this particular case the license fee constitutes a direct cash inflow for BBC, similar to commercial revenues, for which the undertaking does not need to compete on the market. In this sense there is no doubt that the license fee providing an economic and financial advantage to the beneficiary compared to other competitors not receiving the same funds has to be regarded as favouring an undertaking in the sense of Article 87."

[15] See in particular Commission Decision of 22 March 1999, Case NN 70/98 – Phoenix/Kinderkanal, para. 6.1.1.; compare also the *"Report of the European Commission to the Council of Ministers: Services of general economic interest in the banking sector"* of 17 June 1998, para. 3.2 as well as the Commission's Communication, *"Services of general interest in Europe"*, COM (2000) 580 final, para. 26; see, however, its subsequent *"Communication on the application of State aid rules to public broadcasting"*, OJ 2001 C 320, p. 5 where this aspect of an objective, open and non-discriminatory bidding procedure was no longer mentioned.

[16] Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067.

preferably not seen to be a decisive precedent, a State measure which merely covered the additional net costs incurred by specific public service obligations did not confer any competitive advantage on the recipient in question. The particular objective of the French tax on direct sales had, moreover, been to restore the balance of competition between the two distribution channels, wholesalers and pharmaceutical laboratories, a balance which had been distorted by the imposition of certain public service obligations on wholesalers alone.[17] Alternatively, Advocate General Tizzano regarded the tax exemption in favour of wholesalers to be, in any event, compatible with the common market pursuant to Article 86(2) EC as long as it did not confer a financial advantage greater than the additional burdens associated with the specific public interest obligations.[18] The Court took an even bolder stance. It made an express reference to the *ADBHU* ruling the reasoning of which it fully applied to this new case. It therefore found as follows:

> "In like manner, provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations not assessing wholesale distributors to the tax may be regarded as compensation for these services they provide and hence not State aid within the meaning of Article 92 of the Treaty. Moreover, provided there is the necessary equivalent between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing."[19]

Whether these conditions were satisfied, in particular whether the tax benefits corresponded to the "net additional costs" involved for the wholesalers, was left to the national court to decide upon. When looking at the derogation provided by Article 86(2) EC, the Court added an additional interesting aspect to its ruling. In the case that the tax advantages enjoyed by pharmaceutical wholesalers, indeed, were beyond the financial burdens they had to bear, this provision of the Treaty would not be capable of rendering these "excessive advantages" compatible with the common market.[20]

The discussion around the correctness of the *Ferring* approach

The solution provided by the Court in *Ferring* caused an avalanche of criticism as well as support voiced by both various Advocate Generals[21] in their opinions delivered in parallel cases and in legal literature.[22] Just about one month before the final judgment in the *Altmark* case was delivered the President of the Court of First Instance had presented his point of view on the correctness of the *Ferring* approach.[23]

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[17] See Opinion of Advocate General Tizzano of 8 May 2001 in Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067, paras. 50 et seq.

[18] Ibid., paras. 64 et seq.

[19] Case 53/00 Ferring v. ACOSS [2001] ECR I-9067, para. 27.

[20] Ibid., paras. 32/33.

[21] See Opinions of Advocate General Léger of 19 March 2002 and 14 January 2003 in Case C-280/00 *Altmark Trans* [2003], not yet reported; Opinion of Advocate General Jacobs of 30 April 2002 in Case C-126/01 *GEMO*, not yet reported and Opinion of Advocate General Stix-Hackl in Joined Cases C-34/01 – C-38/01 *Enirisorse v. Ministerio delle Finanze*, not yet reported.

[22] See as to an overview of the articles published in this respect: Eberle, AfP 2001, 477 (479/80); v. Brevern, EuZW 2001, 586-588; Bartosch, NVwZ 2002, 174/75; Gundel, RIW 2002, 222-230; Ruge, EuZW 2002, 50-52; Nettesheim, EWS 2002, 253-263; Reuter, ZIP 2002, 737-747; Koenig/Kühling, ZHR 166 (2002), 656-684; Alexis, RDE 2002, 63-108; Bacon, ECLR 2003, 54 (56-57).

[23] Vesterdorf, *"A New Model Drafted by the Community Courts?"*, in: New Developments in European State Aid Law (European State Aid Law Institute, Proceedings of the Experts' Forum, held in Brussels, 19 June 2003), pp. 13-21.

The (first) Opinion of Advocate General Léger in the *Altmark* Case

In the Altmark case Advocate General Léger asked – in his (first) Opinion delivered on 19 March 2002 – the Court not to follow the *Ferring* solution criticising the latter one on three different grounds:

First, he argued that *Ferring* confused the question of classifying a specific measure as State aid and the further one of its justification or compatibility with the common market. In the view of the Advocate General such was not compatible with the Court's earlier rulings that Article 87(1) EC did not distinguish between measures of State intervention by reference to their causes or their aims, but defined them in relation to their effects only. In his conclusions in the *Ferring* case Advocate General Tizzano had stated that, "leaving aside the public service obligations provided for by French law, the non-imposition of the tax at issue on wholesale distributors should be regarded as a State aid"[24] Advocate General Léger – in his Opinion in the *Altmark* case – moreover took the view that the concept of State aid was not to be subject to any modifications depending on whether the financial advantage granted was meant to cover any "net additional costs" linked to a public service task. Such would inevitably lead to entangle both the Commission and the Community courts into having to distinguish different State measures by reference to their underlying (public service) aims.[25] Some commentators did not find this reasoning too convincing arguing that looking at whether a financial advantage is meant to offset the costs associated with a public service remit did not deprive the concept of State aid of its objective character, but, moreover, tried to take account of the economic situation of the recipient, in other words the differences between his position and those of its competitors not burdened with any public service task.[26]

Second, Advocate General Léger considered *Ferring* to deprive the derogation pursuant to Article 86(2) EC of a substantial part of its effect. If the *Ferring* judgment were to be followed, an advantage being either inferior or equal to the "net additional costs" of public service obligations would not be caught any longer by the prohibition as laid down by Article 87(1) EC. Hence, any compatibility concerns related to Article 86(2) EC would no longer arise. If, contrary to that, the advantage granted by the authorities of a Member State exceeded these "net additional costs", Article 87(1) EC would come into play without, however, Article 86(2) EC being capable of rendering it compatible with the common market.[27] The seriousness of this loss of importance of the derogation pursuant to Article 86(2) EC in the field of State aid law was however interpreted differently with some arguing that this horizontal provision was still capable of applying to a number of other provisions of the Treaty, in particular the general antitrust rules and the ones governing the fundamental freedoms.[28]

Third and finally, both Advocate General Léger and other commentators of the *Ferring* judgment expressed serious doubts about whether this new "net approach" would finally render State aid control ineffective. The first reason given for this apprehension was the difference in the legal standard applying under Article 86(2) EC setting out all in all six

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[24] Opinion of Advocate General Tizzano of 8 May 2002 in Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067, para. 49.

[25] Opinion of Advocate General Léger of 19 March 2002 in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 76-78.

[26] See e.g. Nettesheim, EWS 2002, 253 (260).

[27] Opinion of Advocate General Léger in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 79-82; note also Koenig/Kühling, ZHR 166 (2002), 656 (658), taking the view that the horizontal provision of Article 86(2) EC has its biggest effect in the field of State aid law, thus hinting at the particularly serious consequences of the *Ferring* ruling.

[28] Nettesheim, EWS 2002, 253 (260/61).

conditions for its application[29] on the one hand and under the *Ferring* rule on the other that merely asked that national legislation imposes public service obligations on the recipient undertaking (1) and that the amount of the aid should not exceed the "net additional costs" linked to the fulfilment of the public service obligations (2).[30] However, when looking at the CFI's judgment in *FFSA* the Court's willingness to interfere with the economic assessment conducted by the Commission – that had denied to re-calculate whether the contested tax exemptions granted to the French postal administration overcompensated the financial burden linked to the operation of La Poste's offices – under State aid perspectives looks somewhat limited. The *FFSA* ruling refrained from any sort of efficiency control imposed on the recipient undertaking that might have been drawn from the requirement of Article 86(2) EC that the application of the Treaty's rules, in that case Article 87(1) EC, would have to frustrate the performance of the particular public service task.[31]

The second reason given for the fear that following the *Ferring* rule State aid control might become largely ineffective was the consequential loss of the Member States' duty to notify compensatory measures pursuant to Article 88(3) EC.[32] Owing to the fact that numerous grants by Member States were based on considerations of public service interests, such as for example combating unemployment, equality for women, special assistance for very young or very old people, etc. a preventive review of such schemes or individual grants safeguarded only by Article 88(3) EC was regarded to be essential in order to maintain an effective State aid surveillance.[33] Such fears have however been regarded to be possibly exaggerated owing to the fact that the most serious and controversial cases of

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[29] These conditions are that: the undertaking concerned has actually been entrusted with the task of operating a service of general economic interest by an express act of the public authority; the activities carried out by the undertaking in fact constitute a public service task in the sense that it is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities; the application of the Treaty rules frustrates the performance of the particular task of the undertaking; the specific task of the undertaking cannot be performed by measures which are less restrictive of competition; and, the contested measure has no substantive effect on intra-Community trade.

[30] Opinion of Advocate General Léger of 19 March 2002 in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 86-90.

[31] In this context it is noteworthy that following the four so-called "electricity judgments" of the ECJ of 23 October 1997 (Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v Italy* [1997] ECR I-5789; Case C-159/94 *Commission v France* [1997] ECR I-5815 and C-160/94 *Commission v Spain* [1997] ECR I-5851) it has been highly controversial whether the material standard of the frustration of the public service task had become less strict (see hereto, interpreting these judgments as to render Article 86 (2) EC less strict, Ehricke, EuZW 1998, 741 (744-746) as well as Bartosch, EuZW 1999, 176 (178/79); see, however, as to the opposite point of view Koenig/Kühling, EuZW 2000, 197 (198) as well as Magiera, *"Gefährdung der öffentlichen Daseinsvorsorge durch das EG-Beihilfenrecht?"*, in: FS für Dietrich Rauschning (2000), 280).

[32] In this context it is also noteworthy that the ECJ had – prior to the *Ferring* ruling – held that grants qualifying for the derogation under Article 86(2) EC must not be implemented without prior notification pursuant to Article 88(3) EC and without a decision on the compatibility with the common market having been taken (Case C-332/98 *France v Commission* (CELF) [2000] ECR I-4833). This judgment has been interpreted as an – however implicit – confirmation of the CFI's rulings in *FFSA* and *SIC* (see hereto Vesterdorf (fn. 23), pp. 14-15).

[33] See in particular Opinion of Advocate General Léger of 19 March 2002 in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 91-98; see also Gundel, RIW 2002, 222 (225) as well as Koenig/Kühling, ZHR 166 (2002), 656 (660).

compensatory schemes have not been notified, but have moreover come to the Commission's services' attention by way of complaints and media reports.[34]

The appropriateness of notifying compensatory schemes has been extremely controversial. So it has been argued that subjecting all compensatory schemes to an *ex ante* control would render public service fulfilment by the Member States inappropriately difficult and would thereby endanger the fulfilment of public remits as such. In his (second) Opinion delivered on 14 January 2003 in the *Altmark Trans* case Advocate General Léger rejected these fears to be unfounded. He argued as follows: First, there were a number of compensatory measures that – owing to the fact that they were not of an economic nature, but moreover constituted the exercise of public powers of the State or that there were not liable to effect trade between Member States – did not fall within the ambit of Article 87(1) EC.[35] Second, the Advocate General regarded the procedural rules on the time limits for notification and the possibility to give priority treatment to a case of particular urgency making use of the provision of Article 5 EC that states the duty of sincere co-operation between the Community institutions and the Member States to be sufficient safeguards against any risk that services of public interest had to be suspended due to the examination process conducted by the Commission.[36] Finally, the Advocate General regarded the possibilities of aid schemes and block exemption regulations to be further efficient safeguards against any such fears.[37]

When it comes to the impact of the duty to notify pursuant to Article 88(3) EC on the functioning of public service remits in the Member States it is – in my own view – particularly noteworthy to pay attention to the compromise proposed by Advocate General Tizzano in the *Ferring* case. He suggested to subject compensatory schemes to the duty to notify pursuant to Article 88(3) EC sentence 1, but not to the standstill obligation pursuant to Article 88(3) EC sentence 3. Looking at the very harsh jurisprudence of the Community courts relating to the breach of the standstill obligation he regarded the illegality of the grant merely arising from such a breach to be an inappropriate and unproportionate legal consequence.[38] Advocate General Tizzano took the view that such a compromise would not

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[34] Nettesheim, EWS 2002, 253 (261) who at the same time concedes that a mere *ex post* control is less effective than an *ex ante* one on the basis of a Member State's notification (see hereto also Koenig/Kühling, ZHR 166 (2002), 656 (660)).

[35] Opinion of Advocate General Léger of 14 January 2003 in Case C-280/00 *Altmark Trans* [2003], not yet reported, para. 63; a second Opinion delivered by Advocate General Léger had become necessary as the Court had reopened the oral procedure in that case, the reason for that being that the parties' oral observations had been delivered prior to the *Ferring* judgment of 22 November 2001. By such reopening of the oral procedure the Court intended to give the parties an opportunity to state their positions on the effect of the *Ferring* judgment.

[36] Ibid., paras. 64-67; see in this context also Koenig/Kühling, ZHR 166 (2002), 656 (660) who argue that the practice relating to the authorisation of rescue aids that is conducted in a very speedy and efficient manner shows that it is not the duty to notify, but moreover the organisation of the examination and authorisation process that is capable of paralysing the functioning of public services.

[37] Ibid., paras. 68-74.

[38] See hereto in particular Case C-354/90 *Fédération Nationale du Commerce Extérieur de Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France* [1991] ECR I-5505, para. 12 where it reads as follows: "In view of the foregoing considerations it must be held that the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93 (3) of the Treaty. National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures." This view was restated in Case C-39/94 *Syndicat Français de l'Express International (SFEI) and Others v La Poste and Others* [1996] ECR I-3547, para. 40. In the light of the extremely

weaken the Commission's State aid control over compensatory measures. Under his solution the Commission would moreover continue to be informed about all measures and national courts could of course rule on the invalidity of compensatory measures wherever any of the conditions of Article 86(2) EC were not fulfilled, in particular where the performance of public service remits was overcompensated.[39] This compromise solution was of course based on the abolition of the Commission's monopoly to apply Article 86(2) EC in State aid cases and on the understanding that the Commission would share its competence to declare aids to be compatible with the common market on the basis of this provision with the national courts – something which might be regarded as rather unorthodox in the Community-centred field of State aid law.

The (second) Opinion in the *Altmark* case

In the second oral hearing in the *Altmark* case those supporting the *Ferring* approach argued that where the State simply reimbursed the normal market price of the services provided there could be no aid as such situations were comparable to those where the State purchased goods or services and the remuneration paid did not exceed the normal market price.[40] In his second Opinion delivered on 14 January 2003 Advocate General Léger responded to this argument by making two assertions: First, the comparison of public authorities' commercial conduct with that of a private market operator would only be feasible if the State intervention had an *economic character.* If, on the contrary, the State did not adopt the role of a private operator, but moreover exercised its public powers the question of whether a normal market price had been paid or not would become irrelevant.[41] Second, the financing of public services was – in the Advocate General's view – an activity that typically fell within the exercise of public powers as it would be "hard to imagine a private operator embarking on his own initiative on such financing activity".[42] Other critics have argued that whilst identifiable market prices existed where the State bought certain goods or services from an undertaking, services lying in the general public interest did not have such a market price.[43]

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harsh consequences of these rulings and the consequences drawn herefrom under national law (see as to a particularly good example the recent judgment of the German Bundesgerichtshof of 4 April 2003) Advocate General Tizzano proposed as follows: "Furthermore, it must be understood that if national authorities (including courts) apply the exemption in question to aid which is in fact not eligible, the Commission may always exercise the powers conferred on it by the Treaty to re-establish compliance with Community law, including its power to adopt interim measures such as those mentioned in *Boussac*. On the other hand, it seems to me to be highly debatable, even as regards the functionality and coherence of the system, that a merely formal irregularity should cause a national court to declare illegal aid which (possibly after seeking clarification from the Commission or even following a Commission decision) it has itself regarded from the outset as compatible with the common market on the ground that it is necessary in order to guarantee public services of primary importance to the general public." (see Opinion delivered on 8 May 2001 in Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067, para. 83).

[39] Opinion of Advocate General Tizzano of 8 May 2001 in Case C-53/00 *Ferring v. ACOSS* [2001] ECR I-9067, paras. 82-84.

[40] See to this argument in particular the Opinion of Advocate General Jacobs delivered on 30 April 2002 in Case C-126/01 *Ministre de l'Economie, des Finances et de l'Industrie v. GEMO*, not yet reported, para. 122.

[41] Opinion of Advocate General Léger of 14 January 2003 in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 20-24.

[42] Ibid., para. 25.

[43] Koenig/Kühling, ZHR 166 (2002), 656 (661); see, however, President Vesterdorf (fn. 23), p. 18 who holds as follows: "Given these examples, it may be difficult to explain why such a purchase of a 'private service' should be treated differently from the purchase by the State of a 'public service'. This is all the more so since, in the first situation, the State pays a price reflecting 'market

The approach taken by Advocate General Léger in his Opinion of 14 January 2003 seems however somewhat radical and consequently unconvincing. First, he alleges that it were "hard to imagine a private operator embarking on his own initiative on such financing activity". This argument seems rather far-fetched. Even a private operator would do so if – at least in the long term – he could expect these services to become profitable which at the beginning they might not have been. He might also be interested in benefiting from the synergies his role of a public service provider would generate for other parts of his business. Second, if an undertaking entrusted with public service tasks were to be held to exercise public powers on behalf of the entrusting authority it could no longer be qualified as an "undertaking" within the meaning of the Treaty's competition rules, in particular its Article 87(1) EC.[44] The consequence of equating the exercise of services lying in the public interest with the exercise of public powers would therefore be that the former could never – not even in cases of blunt overcompensation – be caught by the ban on State aid. An unacceptable enforcement gap would arise. The solution presented by Advocate General Léger in his second Opinion in *Altmark* still faces another criticism. There is a vital difference between the examples of the exercise of public powers quoted by the Advocate General on the one hand, i.e. the contribution of capital to an undertaking, the grants of loans or of facilities for the payment of social security contributions, on the one hand and the fulfilment of public service remits on the other. When looking at the complaints launched by third parties against compensatory schemes it becomes obvious that in those cases the complainant does not normally direct his arguments against the compensatory mechanism as such, but moreover alleges the overcompensation of burdens associated with these tasks. However difficult it may be to distinguish the exercise of public powers from those open to private actors,[45] the categorical classification of all public service activities to fall under the former category can hardly be regarded as to be an acceptable way out of the problem.

Interim summary

The discussion around whether the Court's approach in *Ferring* was to be regarded as correct or flawed may therefore be briefly summarised as follows: There is a series of arguments speaking in favour of the approach followed both by the CFI's rulings in *FFSA* and *SIC* and also fervently supported by Advocate General Léger in his two Opinions in the *Altmark* case.[46] Whether or not the adoption of the so-called "net approach" followed by the Court in *Ferring* would really lead to an erosion of the Commission's powers in the field of State aid surveillance has been heavily debated with valid arguments being voiced by both sides. Unfortunately, the compromise suggested by Advocate General Tizzano in the *Ferring* case, that is to say subjecting compensatory schemes to the duty to notify, but not to the standstill obligation has possibly not been fully explored in this discussion. The solution offered in *Ferring* might yet have been regarded as to be too extreme in its consequences. So one may rightly question the correctness of the *Ferring* approach that merely asks for the "net additional costs" of public service obligations not to be overcompensated by State resources without containing any further limitations, such as the

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conditions', thus including a profit element, whereas, in the latter case, the State's remuneration is limited to cover the production costs of the undertaking concerned (thus likely to exclude any profit element)."

[44] See hereto Case C-364/92 *Eurocontrol* [1994] ECR I-43, paras. 18 et seq.; Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, para. 23; Case C-387/93 *Banchero* [1995] ECR I-4663, para. 49.

[45] See hereto in particular the analysis conducted by Koenig/Kühling, ZHR 166 (2002), 656 (663-668) as well as the earlier one by Schwarze, EuZW 2000, 613 et seq.

[46] See as to a particularly concise listing of these arguments both Advocate General Jacobs in his Opinion delivered on 30 April 2002 in Case C-126/01 *GEMO*, not yet reported, para. 116 as well Vesterdorf (fn. 23), pp. 18-20.

ones that can be found in Article 86(2) EC. Applying *Ferring* to any sort of compensatory mechanism or scheme would therefore have possibly posed too many dangers. Advocate General Jacobs still regarded *Ferring* to be correct on the merits of the case arguing that "there was a strong nexus between the tax advantage granted and the obligations imposed, which were moreover clearly defined."[47] Therefore he proposed to draw a distinction between two categories of compensatory schemes. Such a distinction should be made looking at whether or not the financing measures were clearly intended as a "quid pro quo" for clearly defined general interest obligations. He asked whether the link between, on the one hand, the State financing granted and, on the other hand, clearly defined general interest obligations was direct and manifest. If such a "quid pro quo" could be established, the solution proposed by *Ferring* should be followed. If, however, either the general interest obligations were not clearly defined or no direct and manifest link between them and the financing granted could be established, the advantages granted should be classified as State aid within the meaning of Article 87(1) EC with the further material analysis being transferred to Article 86(2) EC.[48] Whether or not this approach could work in practice or not, different views have however been expressed.[49]

The *Altmark* judgment

The ECJ's judgment of 24 July 2003 referred in its core part dealing with the concept of the economic advantage under Article 87(1) EC only to the *ADBHU* and *Ferring* rulings without mentioning the *FFSA* and *SIC* judgments of the CFI and without presenting any arguments at all. In essence the Full Court follows the solution provided by its Sixth Chamber in *Ferring* and takes the view:

> "that, where State measures must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and a measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty."[50]

However, the ECJ does not stop here, but moreover attaches four conditions to be fulfilled in order to make a compensatory scheme escape the prohibition laid down by Article 87(1) EC and, consequently, to liberate the Member State from its duty to notify it. These conditions are the following:

- First, the recipient undertaking must actually have public service obligations to discharge which have to be clearly defined.
- Second, 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 ones.

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[47] Opinion of Advocate General Jacobs of 30 April 2002 in Case C-126/01 *GEMO*, not yet reported, para. 128.

[48] Ibid., paras. 118-120.

[49] See, on the one hand, the favourable comments by Koenig/Kühling, ZHR 166 (2002), 656 (662) and, on the other hand, the criticism voiced by Advocate General Léger in his Opinion on 14 January 2003 in Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 75 et seq. as well by President Vesterdorf (fn. 23), pp. 20/21; see also in this context the Opinion of Advocate General Stix-Hackl in the *Enirisorse* case (Joined Cases C-34/01 – C-38/01) following the approach taken by her colleague.

[50] Case C-280/00 *Altmark Trans* [2003], not yet reported, para. 87.

- Third, the compensation must not 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 the reasonable profit for discharging those obligations.
- Fourth, where the undertaking which is to discharge public service obligations 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 means of transport so as to enable it to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and the reasonable profit for discharging the obligations.[51]

The ECJ's ruling in Chronopost

The ECJ's judgment in *Chronopost* of 3 July 2003 put an end to a legal dispute fought both before the national (French) courts and the Commission as well as the two Community courts. As early as on 21 December 1990 the Syndicat Français de l'Express International (in the following referred to as "SFEI") lodged a complaint with the Commission arguing inter alia that certain logistical and commercial assistance afforded by the French postal administration, La Poste, to its affiliate company offering express courier services which at that time carried the name Société Française de Messagerie Internationale (SFMI) and later – after some corporate restructuring – was re-named SFMI-Chronopost (in the following referred to as: "Chronopost"), constituted State aid within the meaning of Article 87(1) EC. The complainant alleged that the remuneration paid by SFMI, respectively Chronopost for the assistance provided by the mother entity did not correspond to normal market conditions. On 16 June 1993 both the complainant and five of its member undertakings active in the provision of (private) courier express services brought an (additional) action before the Paris Commercial Court against SFMI, La Poste and others seeking a declaration that the logistical and commercial assistance afforded by the French Post Office to SFMI and Chronopost constituted illegal State aid and that the implementation of that assistance without prior notification to the Commission was in breach of Article 87(3) EC sentence 3. Accordingly, they sought, first, an order that La Poste should refrain from continuing to grant such assistance, and, second, an order that all unlawfully granted State aid should be repaid to the French Post Office. These events led to two judgments of the Community courts which form the basis of the ruling provided by the ECJ on 3 July 2003.

The *SFEI* judgment of the ECJ of 11 July 1996

The *Tribunal de Commerce de Paris* referred a number of questions concerning the interpretation of Articles 87 and 88 EC for a preliminary ruling under Article 234 EC to the Court of Justice. In its ruling given on 11 July 1996, that has become particularly famous because of its interpretation of the direct effect of Article 88(3) EC sentence 3 under national law, the ECJ held inter alia that the provision of logistical and commercial assistance by a public undertaking to one of its subsidiaries carrying on an activity in free competition with private operators is capable of constituting State aid within the meaning of Article 87(1) EC if the remuneration received in return is less than that which would have been demanded under normal market conditions.[52] The determination of what was to be considered as a normal remuneration for these services in question was left to the national court to decide on. The Court merely declared that "such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal

[51] Case C-280/00 *Altmark Trans* [2003], not yet reported, paras. 88-93.

[52] Case C-39/94 *SFEI and Others v La Poste and Others* [1996] ECR I-3547, paras. 57 et seq.

market conditions should have taken into consideration when fixing the remuneration for these services provided".[53]

The *Chronopost* judgment of CFI of 14 December 2000

Subsequent to the complaint lodged on 21 December 1990 the Commission's handling of the case was somewhat confusing. At first the Commission decided to take no action at all, then it reopened the case and, finally, it adopted its decision of 1 October 1997 in which it took the view that both the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost and a number of other measures did not constitute State aid within the meaning of Article 87(1) EC.[54] In the Commission's view the relevant question was whether the terms of the transaction between the French Post Office on the one hand and its subsidiary Chronopost on the other were comparable to those of an equivalent transaction between a private parent company that might very well have held a monopoly and its subsidiary. If the subsidiary, in the case at hand Chronopost, had however paid full-cost prices meaning total costs plus a mark-up to remunerate equity capital investment there was – in the Commission's view – no State aid. It furtheron considered that in the start-up period of the subsidiary it still corresponded to normal market conditions if the remuneration provided covered at least the entirety of the variable costs of the services provided. Once the subsidiary had stabilised its position on the market, normal market conditions required that the remuneration had to be in excess of variable costs so as to make a contribution to the fixed costs. As the payment made by Chronopost to its mother entity had covered not only variable costs, but also some fixed costs, the Commission – in its decision of 1 October 1997 – concluded that the logistical and commercial assistance had been provided according to normal market conditions thus not containing any element of illegal State aid.

SFEI that had in the meanwhile been re-named Union Française de l'Express asked the CFI in proceedings pursuant to Article 230(4) EC to annul the Commission's decision. The Court of First Instance – in its judgment of 14 December 2000 – followed the applicants' arguments and annulled the Commission's decision of 1 October 1997.[55] At first the Court referred back to the *SFEI* judgment of 11 July 1996 that had left the question of what exactly "normal market conditions" should be entirely open. The CFI then took the view that the fact alone that SFMI-Chronopost had paid its mother entity's full costs could not be sufficient to exclude any State aid element as La Poste, by virtue of its position as the sole public undertaking operating in a reserved sector, had been able to provide some of the logistical and commercial assistance at lower costs than a private operator not enjoying the same rights would have been able to do. Therefore the Commission should have examined "whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided". It should at least have checked:

> "that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy, whether general or sectorial – and guided by long-term prospects."[56]

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[53] Ibid., para. 61.

[54] Commission Decision of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost, OJ 1998 L 164, p. 37.

[55] Case T-613/97, Ufex and Others v. Commission [2000] ECR II-4055.

[56] Ibid., paras. 74/75.

On the basis of these considerations the CFI annulled the part of the Commission Decision of 1 October 1997 insofar as it found that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost did not constitute State aid to the latter.

The judgment of the ECJ of 3 July 2003

Chronopost, La Poste and the French Republic that had intervened in support of the Commission in the proceedings before the CFI appealed against that judgment of 14 December 2000 requesting the ECJ to set it aside.

In his Opinion delivered on 12 December 2002 Advocate General Tizzano reasoned as follows: The establishment and maintenance of a public postal network such as the one offered by La Poste to its subsidiary Chronopost was not a "market network". This was because "under normal conditions" it would not have been rational to build up such a network with the considerable fixed costs such would have implied merely in order to provide third parties with the assistance of the kind at issue in that case. Therefore – in the Advocate General's view – demanding the Commission to find out the "normal remuneration" a private operator would have asked would have constituted an entirely hypothetical exercise. Therefore he regarded the standard required by the CFI to be inappropriate.[57] Subsequent to this conclusion the Advocate General expounded on what the normal market conditions pursuant to the 1996 *SFEI* judgment should be in the case at hand. As the universal network offered by La Poste was not a "market network" there were no specific and objective references available in order to establish what normal market conditions should be. On the one hand, there was only one single undertaking, i.e. La Poste, that was capable of offering the services linked to its network. On the other hand, none of Chronopost's competitors had ever sought access to the French Post Office's network. Consequently, objective and verifiable data on the price paid within the framework of a comparable commercial transaction did not exist. With this being so Advocate General Tizzano concluded that the Commission's solution of accepting a price that covered all the additional costs, fixed and variable, specifically incurred by La Poste in order to provide the logistical and commercial assistance, and an adequate part of the fixed costs associated with maintaining the public postal network, represented a sound way in order to exclude the existence of State aid within the meaning of Article 87(1) EC.[58]

The Court of Justice followed the approach taken by the Advocate General and criticised the CFI's "purely commercial approach". "In the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector," the Commission's approach in excluding the existence of State aid was accepted and, consequently, the judgment of the Court of First Instance of 14 December 2000 set aside.[59]

Comments

Looking first at the judgment in *Altmark* and then at the one in *Chronopost* or vice versa leaves the commentator a little confused of how to reconcile the two rulings. In *Altmark* the Court – by inserting its fourth efficiency criterion – bases its analysis on the comparability of the costs charged by an undertaking entrusted to fulfil certain public service remits with those charged by a typical (private) undertaking, well run and adequately provided with the means to fulfil the respective public service tasks. Contrary to that, the *Chronopost* ruling

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[57] Opinion of Advocate General Tizzano of 12 December 2002 in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others*, not yet reported, paras. 45-48.

[58] Opinion of Advocate General Tizzano of 12 December 2002 in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others*, not yet reported, paras. 49-63.

[59] Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Other*s, not yet reported, paras. 31 et seq.

denies in the case of a national postal organisation's universal service network such comparability with any other network offered by private operators (see below). Furtheron the question arises whether following the judgment in *Altmark* it has become any clearer in which cases of public service fulfilment and its compensation the prohibition laid down in Article 87(1) EC comes into play. This analysis also tries to touch upon the question which practical consequences should or might be drawn at the present moment (see below).

How to reconcile the Court's rulings in Altmark and Chronopost?

As briefly explained above, the two rulings of the ECJ in *Altmark* and *Chronopost* seem to be at conflict with each other at first sight. The fourth condition required by the Court of Justice for a compensation scheme to escape the prohibition as laid down by Article 87(1) EC represents some sort of efficiency criterion based on the comparability of the cost structures of the entrusted operator on the one hand and those of a typical private one that is well run and adequately equipped to fulfil the public service remit. By implementing this fourth condition the ECJ apparently accepted the criticism of those that had regarded both the CFI's approach in *FFSA* and the one taken in *Ferring* as to leave too wide a discretion to the Member States. Moreover, these critics had pleaded in favour of an efficiency control in the field of the fulfilment of public service remits.[60] Contrary to that, the *Chronopost* ruling stated that there was no market for the provision of services linked to a universal network just as the one provided by the French Post Office.

In my view, there is no real conflict between the two rulings of the European Court of Justice. *Altmark* merely serves to set out the general framework under which the compensation for public services is not caught by Article 87(1) EC. Hereby the Court confirms the approach taken in *Ferring* in principle, but at the same time bows down to those who criticised this judgment of being too lax and rendering State aid control over Member States' compensatory measures ineffective. Although the Court's approach in *Altmark* is no longer based on the derogation provided by Article 86(2) EC, consequently avoiding the Member States' duty to notify, attention has obviously been paid to the criticism of those, most prominently Advocate General Léger, that had pointed out the difference in material standards between Article 86(2) EC on the one hand and the *Ferring* approach on the other. By implementing the said efficiency criterion the Court expressly introduces a "market economy test" into the field of State aid surveillance over the fulfilment of public service tasks and their compensation. In the *Altmark* scenario this approach was feasible as besides the company Altmark Trans another competitor was actually interested in and capable of operating the scheduled bus transport services in the *Landkreis* Stendal. Consequently, the Court was able to assume the existence of a market for the operation of such scheduled bus transport services. After the *Altmark* ruling it will therefore no longer be feasible to justify losses of an operator caused by its low efficiency as "net additional costs" linked to public service fulfilment.[61] In that regard the *Chronopost* case was different. Here there was only one operator offering services linked to a universal network, i.e. the French Post Office. Consequently, there was – contrary to the situation in *Altmark* – no market for the services the remuneration for which was under the Commission's scrutiny.

A comparison of the facts underlying the two judgments thus merely reveals the shortcomings and imitations of any sort of "market economy (investor) test". As Advocate

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[60] See hereto in particular Nettesheim, EWS 2002, 253 (262/63) who argues that the so-called "cameralistic point of view" of the Community courts fosters inefficiencies and squandering of public moneys.

[61] This has indeed been assumed by the Commission in its Decision of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA, OJ 2002 L 282, p. 29, paras. 131/32; see hereto also the annulment action lodged by Deutsche Post AG and DHL International S.r.l. v Commission in Case T-358/02, OJ 2003 C 44, pp. 32/33.

General Tizzano had pointed out in his conclusions in the *Chronopost* case no private operator would have undertaken to build up a network comparable to the one of the French Post Office in order to provide third parties with services linked to this network. The relationship between the two rulings has therefore to be defined as follows: On the one hand, *Altmark* sets the general framework under which measures intended to offset the costs linked to public service fulfilment may escape the prohibition laid down by Article 87(1) EC. On the other hand, *Chronopost* shows the limitations that the application of this general framework has in cases where for the services provided no market exists and, consequently, no comparable private operator can be found the cost structures of whom can be used as suitable benchmarks.

Has the state of the law really become any clearer?

Although the rulings in *Altmark* and *Chronopost* do not contradict each other, but can moreover be reconciled, the reason for this being the general shortcomings of any sort of "market economy test", the question remains whether subsequent to *Altmark* and the four criteria this judgment lists legal certainty has been achieved in the area of public service fulfilment.[62] In answering this question one has to look at each of these four criteria individually.

As far as the first condition is concerned, i.e. requiring that the public service obligations have been clearly defined and entrusted to the beneficiary of the compensatory payments the risk of legal uncertainty seems rather limited. The same has consistently been asked for when applying Article 86(2) EC where the jurisprudence of the Community courts has required an express act of the public authority to entrust the task of operating a service of general economic interest.[63]

The second condition, i.e. the establishment of the parameters on the basis of which the compensation is calculated in advance *in an objective and transparent manner*, creates of course some risk that its evaluation by the Member State and the one in a later Commission investigation initiated for example by the complaint of a competitor might differ. Here the *Altmark* judgment introduces a legal standard which is even stricter than the one applied under Article 86(2) EC. The latter merely asks for the application of Article 87(1) EC to frustrate the performance of the particular public service task, allowing for the examination being conducted on an *ex post facto* basis. Contrary to that the *Altmark* ruling intends to impose a higher degree of discipline on the Member States' regulation of compensatory schemes by forcing them to conduct an *ex ante* control.

The third criterion, i.e. that the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations, likewise corresponds to the proportionality test embedded in Article 86(2) EC. It clarifies for purposes of interpreting Article 87(1) EC the meaning of this proportionality test. Hereby, the Court has accepted that any compensation for public service obligations may comprise a profit element. This reminds of the Opinion delivered by Advocate General Lenz on 22 November 1984 in *ADBHU* case who had held that the indemnities granted must not "exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit".[64] In the *ADBHU* case, however, the Court did not mention the permissibility of taking into account such a profit element. Contrary to that, the CFI's approach based on Article

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[62] These risks have been voiced in particular by Advocate General Léger in his second Opinion of 14 January 2003 in Case C-280/00 *Altmark Trans* [2003], not yet reported, para. 48.

[63] Case 127/73 *BRT v SABAM* [1974] ECR 313, para. 20; Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, para. 55.

[64] Opinion of Advocate General Lenz, delivered on 22 November 1984 in Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531 (536).

86(2) EC has never allowed any profit element to be taken into account, but has merely asked whether without the compensation at issue being provided the fulfilment of the specific public service tasks would have been jeopardised.

When it comes to the fourth criterion established by the Court's *Altmark* ruling, i.e. the comparison of the cost structures of the recipient on the one hand and of a private undertaking, well run and adequately provided to fulfil the public service tasks, it becomes apparent that the new material standard may well be harsher than the one applied under Article 86(2) EC merely asking for the danger of the performance of the particular public remit being frustrated or jeopardised. In my view, this last criterion has eliminated a great deal of the legal uncertainty that Member States have so far encountered when trying to find out whether a particular compensation scheme was really necessary in order to prevent the frustration of a specific public service task. First, the Member State is free to accept the Court's hint to choose the operator fulfilling the public service obligations in a public procurement procedure. If such is the case, the existence of any State aid element becomes very unlikely, though not impossible.[65] If the Member State chooses not to follow such a procedure,[66] some sort of uncertainty admittedly arises when comparing the costs of the beneficiary with the ones of a typical, but well run undertaking. In case, such a comparison is not feasible, the *Chronopost* ruling of 3 July 2003 has however shown the limitations of the general rule set up in *Altmark*.

In essence, the four conditions applied by the Court in *Altmark* appear as a sophistication of the conditions embedded in Article 86(2) EC in the area of State aid surveillance over public service fulfilment. When comparing the two legal standards, i.e. the one pursuant to Article 86(2) EC and the other taken in the *Altmark* judgment, the latter does not seem to confer any more legal uncertainty than the former. In particular, the Court has clarified that in calculating compensations for public service fulfilment a reasonable profit margin may be included. Furtheron, it has replaced the requirement that the application of the Treaty's rules must not jeopardise the fulfilment of the public service remit by some sort of "market economy test". When looking at the *Chronopost* judgment that had been issued just three weeks before, it would however have been helpful if the Court could have clarified the relationship between these two rulings. Unfortunately, *Altmark* does not contain anything on this aspect. Article 86(2) EC has been regarded as to be directly applicable by the Member States' courts – at least outside the field of State aid.[67] Advocate General Tizzano – in his Opinion in the *Ferring* case – had furtheron argued in favour of a direct applicability of this provision even in the area of State aid law.[68] Therefore the four conditions set by the *Altmark* ruling do not give the impression to create more legal uncertainty than the (all in all six) requirements of the (likewise directly applicable) Article 86(2) EC.

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[65] See hereto the explanations by Hankin (*"Final Conclusions from the Commission's Perspective"*, in: New Developments in European State Aid Law (European State Aid Law Institute, Proceedings of the Experts' Forum, held in Brussels, 19 June 2003), p. 48) who hints at the example of very complex public-private-partnership agreements where even the observance of an open, transparent and non-discriminatory selection procedure might not be sufficient to exclude any doubts as to the existence of State aid; see hereto also Bartosch, CMLR 2002, 551 (554/55) citing a number of practical examples where despite the observance of a bidding procedure State aid elements existed.

[66] See as to a very critical evaluation on bidding procedures in cases of public service fulfilment Schnelle, EStAL 2002, 41 (48 et seq.).

[67] Case C-320/91 *Corbeau* [1993] ECR I-2533, para. 20; Case C-393/92 *Almelo* [1994] ECR I-1477, para. 50.

[68] Opinion of Advocate General Tizzano, delivered on 8 May 2001 in Case C-53/00 *Ferring v ACOSS* [2001] ECR I-9067, para. 72.

In my view, the (limited) legal uncertainty created by the four *Altmark* conditions is therefore acceptable. However, this does not mean that one should or must accept the legal uncertainty created. The Commission's Green Paper on Services of General Interest[69] has initiated a discussion as to the suitability of a block exemption regulation covering compensatory schemes for public service fulfilment. At first sight the ruling in *Altmark* might have brought such a project to an end: If such payments do not infringe Article 87(1) EC, then there is of course no need to declare them compatible with the common market. However, the four conditions that make up the general framework for State aid surveillance over public service fulfilment require further clarification and interpretation. Such could be done in the form of Community "soft law", i.e. a communication or a notice. However, it could also be done by a "negative clearance regulation" that would then be directly applicable in the Member States. Besides this direct applicability and the legal certainty provided by it would further give the Member States the opportunity to contest the Commission's assessment by way of annulment proceedings pursuant to Article 230 EC.

[69] COM (2003) 270 final.