

Chapter 9

The Commission’s Modernisation Agenda for Procurement and SGEI

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Abstract This chapter focuses on the recent novelties introduced by the ‘Almunia’ Package in the regulation of activities at the intersection of the EU rules on State aid, public procurement and the financing of SGEI. Taking the uncertainties left by the fourth *Altmark* condition as the point of departure, this chapter describes and critically appraises the position of the European Commission regarding the use of procurement procedures as a device to exclude the existence of State aid or, in case it exists, to contribute to its compatibility with the internal market and, at any rate, as a mechanism of control of contracting entities’ ‘market’ behaviour. This chapter also stresses that there may be a disconnection between the two legs of the modernisation agenda, in that the reform of public procurement rules currently underway may diminish the effectiveness of the recent SGEI ‘Almunia’ reform or, in some instances, even be in frontal clash with some of its basic assumptions—which may call for a major revision of a system of oversight of public expenditure that is in crisis.

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9.1 Introduction

The aim of this chapter is to critically appraise the Commission's modernisation agenda for public procurement and services of general economic interest (SGEI) in view of the still unresolved questions that the interplay of State aid control, the award of public contracts for the provision of SGEI and the financing of SGEI raises—which were only partially tackled and insufficiently answered by the European Court of Justice in the *Altmark*¹ case,² and which have now been at the spotlight of the reforms introduced by the European Commission through the 'Almunia Package'.³

¹ Case C-280/00 *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

² For further commentary on the relevance of *Altmark* from a public procurement perspective, see the rest of the contributions to this book and, particularly, Clarke's. See also Schnelle 2002; Chérot 2007, pp. 196–202; Dethlefsen 2007; Szyszczak 2007, pp. 193–194. See also Arrowsmith 2005, p. 224; Bartosch 2002; Bovis 2005; Buendía Sierra 2008, pp. 210–214 and Karayigit 2009. With reference to a broader analytical framework, see also Sauter and Schepel 2009, pp. 189–191, 207–209. More recently, see Szyszczak 2011 and Szyszczak 2013.

³ The expression 'Almunia Package' refers to the instruments adopted by the European Commission between December 2011 and April 2012 for the modernisation of SGEI rules. These are: (1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Quality Framework for Services of General Interest in Europe*, Brussels, 20.12.2011, COM(2011) 900 final (the 'SGEI Quality Framework'); (2) the Commission Decision of 20 December 2011 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 2012/21/EU] (the 'SGEI Compensation Decision'); (3) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [OJ 2012/C 8/02] (the 'SGEI Compensation Communication'); (4) Communication from the Commission—*European Union framework for State aid in the form of public service compensation (2011)* [OJ 2012/C 8/03] ('2011 SGEI Framework'); and (5) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [OJ 2012/L 114/8] (the 'SGEI de minimis Regulation').

As indicated by the Commission, the *SGEI Compensation Communication* clarifies key concepts related to State aid for SGEIs, while the *SGEI Compensation Decision* and the *2011 SGEI*

The main objective in this chapter is to adopt a 'public procurement perspective' and to see whether the logic behind the ECJ and the Commission's use of procurement procedures as a device to exclude the existence of State aid or, in case it exists, to contribute to its compatibility with the internal market is consistent with current trends in public procurement reform.⁴ To that aim, the open issues that the so-called fourth *Altmark* condition left unanswered will be shortly revisited (Sect. 9.2) and will be followed by a critical review of the procurement-related rules and criteria included in the 'Almunia Package' (Sect. 9.3). The analysis will also include the potential inconsistencies between the new SGEI rules and the proposed amendments to the EU public procurement Directives (Sect. 9.4). Finally, as a conclusion, it will be of interest to critically appraise the consequences of trying to use public procurement as a mechanism of control of contracting entities' 'market' behaviour—i.e. as a device to unburden the Commission in its monitoring tasks of SGEI financing (Sect. 9.5).

9.2 The Unfinished Business of Supervising SGEI Procurement and Financing After *Altmark*

Even if the *Altmark* case was a significant development in the clarification of the relevance of public procurement procedures in the selection of SGEI providers and, more particularly, in the determination of the amount of their compensation that was covered by the 'public mission exception' in Article 106(2) TFEU⁵; the laconic and diverging references that the ECJ made to the use of procurement procedures left some questions unanswered⁶ (some of which have still not been expressly addressed, either in subsequent case law or in the 'Almunia Package').

Amongst the several requirements for the inexistence of State aid in any scheme for SGEI compensation, the ECJ made reference to public procurement procedures in the fourth *Altmark* condition, in the following terms:

(Footnote 3 continued)

Framework specify the conditions under which State aid in the form of public service compensation is compatible with the TFEU. The *de minimis* Regulation establishes a threshold below which compensation is deemed no aid.

⁴ EU public procurement rules are currently under reform. The European Commission published proposals for new substantive public procurement Directives in December 2011, which are currently being negotiated and should be adopted before the end of 2012. All information regarding reform proposals is at http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm (last accessed 28 May 2012).

⁵ On the scope of this exception, see Buendía Sierra 1999, pp. 271–360; Maillo 2007, pp. 604–612; Prosser 2005, pp. 132–141; and Sauter and Schepel 2009, 164–192. Cf. Baquero Cruz 2005, pp. 209 and 212.

⁶ For some additional discussion on the lack of clarity of the *Altmark* conditions and the connection with public procurement rules, see Hervey 2011, pp. 204–210; and Schweitzer 2011, pp. 28–42.

... where the undertaking which is to discharge public service obligations, 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...*⁷

However, in its final drafting of the conditions and in the operative part of the *Altmark* judgment, the ECJ dropped (or *rectius*, left implicit) the requirement for the procurement procedure to ‘allow for the selection of the tenderer capable of providing those services at the least cost to the community’. Indeed, in the final drafting, the ‘lowest cost for the community’ (or, indirectly, the minimisation of public expense, or maximisation of value for money) is not an express requirement:

... where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, 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 [material] means [...] so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.⁸

Therefore, even if there is a relatively clear hint that the main purpose for the use of public procurement procedures in the selection of the undertaking entrusted with the SGEI is to achieve competitive cost advantages, the requirement seems to be oriented towards excluding the existence of excessive compensation because the consideration/compensation that will be paid by the contracting entity has been *competed for* in the tender—hence, not necessarily oriented towards ensuring absolute minimum (ideal) costs, but rather the selection of the most efficient option actually available in the market. Such ‘most efficient actual option’ must not necessarily involve ‘least cost to the community’ in absolute terms (i.e. if compared against a theoretical, ideal standard), but ‘lowest available competitive cost to the community’.⁹

This seemed to be (implicitly) supported by the European General Court in the subsequent *BUPA* case, where it interpreted that:

⁷ Case C-280/00 *Altmark* at para 93, emphasis added. This is the wording chosen by the Commission in its design of the ‘Modernisation Package’, and as such is presented in the *SGEI Compensation Decision*, at recital (4) and in the *2011 SGEI Framework* at fn 2.

⁸ Case C-280/00 *Altmark* at para 95, emphasis added. See also operative part of the Judgment.

⁹ Along the same lines, see the contribution by Buendía Sierra and Panero Rivas to this book, where they indicate clearly that the purpose is not necessarily to achieve a result derived from a perfect competition model but rather that ‘if the selection is carried out correctly it should guarantee that the most efficient option is selected (both in terms of price and quality)’ (emphasis added). Such most efficient option must not necessarily involve ‘least cost to the community’ in absolute terms (ie if compared against a theoretical, ideal standard), but ‘lowest available competitive cost to the community’. That is particularly true, at least, in certain sectors such as public service broadcasting, where the Commission found that ‘it was possible for an undertaking to receive State aid which exceeded the costs of an ideal, efficient undertaking, without there being overcompensation to invoke the State aid rules’ Decision N46/2007 – *BBC Digital Curriculum*, of 1 October 2003; see the comment by Szyyszczak 2011, p. 307.

... the purpose of the fourth *Altmark* condition [is to ensure] *that the compensation provided for [... does] not entail the possibility of offsetting any costs that might result from inefficiency.*¹⁰

In my opinion, this understanding of the fourth *Altmark* condition would be consistent with the basic foundations of public procurement rules, which are oriented towards ensuring that contracting authorities benefit from efficient market conditions set through effective competition, but not necessarily obtain absolute (ideal) best contract conditions—since value for money is a goal or aspiration of public procurement rules, but not a *conditio sine qua non*, nor a guarantee.¹¹

Consequently, reading an absolute requirement for ‘lowest cost’ in the fourth *Altmark* condition seems highly contentious and at odds with the purpose and reality of public procurement rules.¹² In my opinion, therefore, it seems clear that a less restrictive approach, with a looser link to (absolute) ‘least cost’ implications can be extracted from the final findings of the ECJ in its reply to the preliminary questions put in *Altmark*, where *the only requirement is that the undertaking which is going to discharge public service obligations is chosen in a properly designed and adequately run public procurement procedure aimed at avoiding economic inefficiency through competition* (or, alternatively where that is at all possible, that the remuneration for the discharge of the public service obligations is determined against the benchmark of an efficient typical undertaking, well run and adequately provided with the relevant material means).

Therefore, the interpretation of the breadth of the reference to procurement in the fourth *Altmark* condition is not a trivial issue, for the array of public procurement procedures and decisions that allow for an effective, undistorted competition for the contract goes well beyond the public procurement instruments specifically or

¹⁰ Case T-289/03 *British United Provident Association Ltd (BUPA) and Others v Commission of the European Communities* [2008] ECR II-81, at para 249 (emphasis added). Along those lines, with an emphasis on the efficiency of the SGEI provider, see Santamato and Pesaresi 2004. In my view, however, the condition should be better understood in the terms of Opinion of Advocate General Jacobs of 30 April 2002 in Case C-126/01, *GEMO* at para 122, where he clearly explained that the purpose is basically to ensure that, by running adequate procurement procedures, the terms of the contract reflect normal market conditions.

¹¹ In this regard, it is important to stress that ‘value for money’ is not even seen as one of the main goals of the EU public procurement rules by main academic commentators. See Arrowsmith 2002, who clearly holds ‘*that it is not an objective of the directives to ensure value for money in procurement*’—as reiterated recently in Arrowsmith 2012, p. 74. Without going that far, I have personally indicated that competition (ie value for money) and efficiency of the procurement processes are key goals of public procurement regulations, and that even if ‘*public procurement is not designed to prevent distortions of competition between undertakings*’, ‘*the attainment of the competition goal requires developing a pro-competitive public procurement system that avoids publicly-generated distortions of competition*’—which, however, do not require an intervention in the market of a quasi-regulatory nature to impose perfect competition, since it would result in artificially created, unsustainable competition. For discussion on the goals of procurement, and further references, see Sanchez Graells 2011, pp. 97–110.

¹² Again, in substantially coincidental terms, see the contribution by Buendía Sierra and Panero Rivas.

narrowly designed to achieve minimum or lowest cost.¹³ Therefore, a strict reading of the fourth *Altmark* condition would exclude many public procurement tools from the generally available options for contracting entities looking to outsource SGEIs.

Such ambiguities and scope for interpretation of the *Altmark* ruling generated significant legal uncertainty, nonetheless because the European Commission has tended to apply changing standards, depending on the specific circumstances of the case and on the economic sector concerned. Indeed, the analysis of the ‘public procurement requirement’ moved rather quickly from a detailed, overall material assessment of whether procurement procedures actually allowed for the selection of the tenderer capable of providing those services at the least cost to the community (and, hence, excluded the existence of State aid);¹⁴ towards a more formalistic, box-ticking approach to the control of procurement procedures, where (formal) compliance with procurement legislation was considered to set a (hard to rebut) presumption of inexistence of State aid.¹⁵ In this regard, the further development of the Commission’s policy regarding the interplay of public procurement and SGEIs in the ‘Almunia Package’ was impatiently awaited.

9.3 The Commission’s Modernisation Agenda for Procurement and SGEI

In order to provide legal certainty and to clarify the applicable rules to the financing of SGEI and, in particular, its procurement-related dimension, the European Commission has recently adopted a number of hard and soft law instruments (the ‘Almunia Package’) and is pushing for the further modernisation of public procurement rules. As indicated in the *SGEI Quality Framework*—which sets the architecture of the modernisation agenda for procurement and SGEI—it encompasses:

¹³ Indeed, if properly designed, all public procurement devices can even be made pro-competitive and ensure effective competition for the contracts, as discussed at length in Sanchez Graells 2011, pp. 227–369.

¹⁴ See Decision N 475/2003—*Ireland, Public Service Obligation in respect of new electricity generation capacity for security of supply*, of 16 December 2003 at para 57, where it was stressed that ‘the Commission has to verify whether the characteristics of the procurement procedure at stake are such as to actually “allow for the selection of the tenderer capable of providing those services at the least cost to the community”. This is a material analysis which is different and goes beyond the mere respect of the applicable public procurement rules’ (emphasis in the original).

¹⁵ See Decision N 46/2007—*Welsh Public Sector Network Scheme*, of 30 May 2007 at para 18, where the Commission changes approach and is satisfied that ‘*The procurement procedure is compliant with the public procurement directives and suitable for achieving best value for money [because] the award is made in line with the national legislation transposing the EU procurement directives*’. See also Tosics and Gaál 2008, p. 18: ‘... in the case of pure procurement transactions, the use of a competitive procurement procedure which is in line with the EU public procurement rules and thus suitable to achieve best value for money, i.e. fair market price for the goods, services or infrastructure purchased, creates a presumption that no State aid will be involved to the economic operator concerned.’.

... reforms of two key sets of rules - for State aid for services of general economic interest and for public procurement - both of which will increase flexibility and simplification for Member States when providing these services. These reforms also aim at increasing consistency between both policies and *to deliver greater assurance to stakeholders who fully comply with the public procurement rules that, under certain conditions, they also fulfil the relevant State aid requirement under the Altmark judgment*. This should provide more legal certainty and simplification to public authorities and undertakings.¹⁶

Such a modernisation agenda is clearly driven by the understanding of the fourth *Altmark* condition by the European Commission, which permeates all documents in the 'Almunia Package'. In short, its understanding of the procurement requirement in *Altmark* has been clearly spelled out:

Based on the case law of the Court of Justice, *a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at "the least cost to the community"*.¹⁷

And, in even more detailed terms, the European Commission has generally indicated that:

... full compliance with *open or restricted public procurement procedures awarded on the basis of either the lowest price or, under certain conditions, the most economically advantageous tender* means that the contract is awarded at the "least cost to the community" as required by the Court as one of the conditions for excluding the existence of State aid.¹⁸

In my opinion, confronting the fourth *Altmark* condition with the Commission's reading, two main areas of concern can be readily identified. Firstly and for the reasons given above (*supra* Sect. 9.2), in such literal terms this reading seems unnecessarily restrictive regarding the requirement of 'least cost to the community' and the acceptable award criteria, since the Commission seems to be putting a strong emphasis on cost-related aspects of the provision of SGEIs and restricting the potential for taking other dimensions of SGEI provision into consideration in the award of contracts (*infra* Sect. 9.3.3).¹⁹

¹⁶ *SGEI Quality Framework*, p. 3 (emphasis added).

¹⁷ *SGEI Compensation Communication*, at para 65 (emphasis added).

¹⁸ *SGEI Quality Framework*, p. 6 (emphasis added). However, I tend to agree with the scepticism shown by Buendía Sierra and Panero Rivas in this book, where they clearly state that '*willingness to accept award criteria other than those that are purely economic is somewhat surprising given the strict economic criteria that underpin the whole package*'. My impression is that the European Commission retains significant discretion to interpret the 'certain conditions' under which the most economically advantageous tender award criterion is acceptable.

¹⁹ Which seems to imply that cost factors should control the award of public contracts in this area (over quality concerns)—whereas in other parts of the 'Almunia Package', non-cost concerns are claimed to be encouraged. Cf. *SGEI Quality Framework*, p. 7, where it is expressly emphasised that the reform of the rules on public procurement and concessions try to '*encourage a quality approach*', or that the reform '*will also help to ensure that contracts are not awarded on the basis of the lowest price only but adequately reflect increased environmental and societal considerations*'.

Secondly, even if initially the Commission's position does not necessarily exclude that public procurement procedures other than open and restricted can be considered suitable to ensure that the contract is awarded at the 'least cost to the community'; it can easily be argued that, with no explanation and for no good reason, the Commission's position would be (actually and implicitly) excluding the possibility to comply with the fourth *Altmark* condition in cases of procurement below EU thresholds (where no specific procedure is mandated at all and, therefore, represents procurement potentially unregulated, depending on the applicable national rules);²⁰ or in cases where procedures other than open or restricted are lawfully available to (and functionally preferable for) contracting entities, such as the competitive dialogue (on this, see more *infra* Sect. 9.3.2).

Further than that, at the same time, such orientation would perpetuate the highly formalistic, box-ticking approach adopted by the Commission concerning the actual conditions of the contracts awarded (particularly their 'consideration') and their potential implications in terms of (disguised) State aid.²¹ By focusing (solely) on the choice of procedure and award criteria, the Commission is concentrating on very specific characteristics of the procurement process that do not necessarily ensure actual competition for the contract (which could be prevented or distorted by rules on past experience, biased technical specifications, excessive financial standing requirements, or a large number of other factors). Moreover, it is signalling a preferred tender design choice that implies a very rigid procedure and evaluation and award processes—which is not necessarily consistent (or, rather, is in clear contrast) with the basic objectives of public procurement reform: namely, simplification and flexibility (on this, see *infra* Sect. 9.4).

As we will briefly analyse in the following sections, the position of the European Commission in the more specific guidance offered in the *SGEI Compensation Communication* offers further reasons for concern and makes it doubtful that its orientation can either help to ensure that the entrustment and financing of SGEIs is conducted in a practical and efficient manner, or guarantee consistency with public procurement reform (as we shall see *infra* Sect. 9.4).²² The *SGEI Compensation Communication* is the *clef de voûte* of the 'Almunia Package', as it serves the purpose of specifying the operational requirements that the Commission has set for an SGEI scheme that exceeds the *de minimis*

²⁰ On the issue of below-thresholds procurement, see Risvig Hansen 2012 and, for a comparative perspective, the collective book on the same topic edited by Caranta and Dragos (eds) 2012.

²¹ For a critique, and a claim for a more substantive, material appraisal of procurement procedures to exclude the existence of State aid, see Sanchez Graells 2012.

²² Similarly, Merola 2011; Sauter 2012; Sinnaeve 2012 and Buendía Sierra and Muñoz de Juan 2012.

thresholds to directly benefit from the *Altmark exemption*.²³ Therefore, understanding its shortcomings and rigidities seems highly relevant from a practical point of view, and may help anticipate areas of future litigation where the Commission may not be supported by the EU Courts.

9.3.1 The Discharge of Public Procurement Obligations as a Misunderstood Requirement

Even if all documents in the 'Almunia Package' are careful to indicate that they do not alter in any manner the general obligations derived from the EU public procurement rules—i.e., that they apply without prejudice of the requirements imposed by Union law in the field of procurement—one can wonder whether that is the case. A critical reading of the documents shows how *there is a significant push for an 'expanded application' of public procurement rules in full* (even when they are not directly applicable), *particularly in view of the 'preferred route' approach to procurement that the 'Almunia Package' shows vis-à-vis the alternative means of compliance with the fourth Altmark condition* (that is, a benchmark appraisal against a theoretical efficient SGEI supplier). This can clearly be seen in the *SGEI Compensation Communication*, where it is stated that:

The *simplest way* for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with [Directives 2004/17 and 2004/18 ... Moreover,] the conduct of such a public procurement procedure is often a mandatory requirement under existing Union rules. [...] Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid.²⁴

Such an approach to the use of public procurement as a device to exclude State aid can be misleading, since it presents the discharge of public procurement obligations as an advantage that contracting entities can benefit from (at their discretion)—whereas the conduct of procurement procedures that ensure the effectiveness of the Treaty principles is not optional, but a mandatory requirement under EU law even when the EU procurement Directives are not, or are only

²³ Buendía Sierra and Panero Rivas advance a coincidental analytical approach under the new rules, where they suggest evaluating whether non *de minimis* measures can benefit from the *Altmark* criteria as specified by the Commission in the new Communication before proceeding to their analysis under the *SGEI Compensation Decision* and the *2011 SGEI Framework*.

²⁴ *SGEI Compensation Communication*, at paras 63 and 64.

partially applicable.²⁵ Therefore, it is not the easiest way to meet the fourth *Altmark* condition, but the only way that contracting entities can meet their general obligations under EU public procurement law. Moreover, it suggests that the European Commission favours the full subjection of SGEI tendering to the rules of the EU public procurement Directives and the national rules that transpose them, but only in the specific terms of the *SGEI Compensation Communication* (which the Commission intends to amend once new Union rules on public procurement have been adopted, in order to clarify the relevance for State aid purposes of the use of the procedures foreseen in those new rules, *infra* 9.4).²⁶ Therefore, not any type of procurement-compliant procedure will suffice to (simply) benefit from the *Altmark* exemption, but only those tailored to the very restrictive guidelines of the *SGEI Compensation Communication* (that we will review *infra* Sects. 9.3.2–9.3.4).

In my view, the position of the Commission in the *2011 SGEI Framework* for those cases where SGEI compensation does not meet the criteria in the *SGEI Compensation Communication* has a similar defect in the way it conceptualises the relationship between public procurement compliance and the existence of State aid.²⁷ The *2011 SGEI Framework* states:

Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty *only where the responsible authority*, when entrusting the provision of the service to the undertaking in question, *has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law.* Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.²⁸

Even if the wording of the *2011 SGEI Framework* is clearer in presenting the non-discretionary obligation to comply with primary and secondary EU procurement law, the consequences that it attaches to non-compliance can create a circular test. If compliance with EU procurement rules ensures meeting the fourth *Altmark* criterion (i.e., no State aid) and non-compliance with EU procurement rules (primary and/or secondary, where applicable) determines that the SGEI scheme cannot benefit from Article 106(2) TFUE; then, the analysis seems limited to

²⁵ Again, on the mandatory application of the general principles of TFEU to all procurement activities and the positive obligations that it implies, see Risvig Hansen 2012 *in totum*. Regarding the type of arrangements that must be considered a ‘contract’ and, therefore, subjected to procurement rules, see Skovgaard Ølykke 2011. *Cf.* with Clarke’s concluding remarks in his contribution to this book, where he considers that ‘*the contracting authority will need to choose between implementing a public procurement exercise and adopting the more subjective compensation benchmarking mechanism when considering the financing of the [SGEI]*’. In my view, in most cases, it will not be optional at all.

²⁶ *SGEI Compensation Communication*, at para 63 and fn 88.

²⁷ For a similar criticism, see Geradin 2012, pp. 5–7.

²⁸ *2011 SGEI Framework* at para 19 (emphasis added).

whether procurement rules were complied with or not. Non-compliance will imply the double, simultaneous breach of procurement and SGEI rules, while compliance with EU public procurement rules would be a safeguard for the application of the SGEI rules—as long as the other *Altmark* conditions are met, which seems relatively easy (inasmuch as the terms of the tender and the contract are clear regarding the definition of the SGEI as the contractual object, the conditions of the entrustment and the design of the compensation mechanism).

As already mentioned in passing, this tends to perpetuate the very formalistic approach adopted by the European Commission in the analysis of public procurement as a tool to grant disguised State aid.²⁹ According to the Commission's practice, compliance with the EU public procurement rules in the tendering of a contract that would otherwise raise *prima facie* concerns about its compatibility with the State aid rules establishes a rebuttable presumption of compliance with the State aid regime (*rectius*, of the inexistence of illegal State aid).³⁰ To rebut such a presumption, it would be necessary to determine that, despite having complied with mandatory (primary and secondary) public procurement rules, the public contractor entrusted with the SGEI actually received an economic advantage because the terms of the contract did not reflect normal market conditions.³¹ As was properly stressed by Advocate General Jacobs,

... bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid *only if and to the extent that the price paid exceeds the market price*.³²

It follows that, in the absence of a clear disproportion between the obligations imposed on the public contractor (in this case, the undertaking entrusted with the SGEI, such as the ensuing universal service obligations) and the consideration or SGEI compensation paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc.);³³ State aid rules applied in accordance with the *SGEI Compensation Communication* and the *2011*

²⁹ With similar concerns, see Heuninckx 2009.

³⁰ Such an approach is consistent with the understanding that these rules hold a common control device, ie that competition for a public contract is an indication of fair and equal market access in accordance with the procurement rules and, likewise, as regards State aid, of a fair balance of the obligations imposed and the economic advantages granted to the public contractor. However, a less formalistic approach to the analysis of procurement is desirable; see Buendía Sierra 2008, p. 211.

³¹ As regards the importance of the analysis of 'consideration' in public contracts to exclude the existence of a gratuitous advantage to the government contractor, see Winter 2004, pp. 487–501.

³² Opinion of AG Jacobs in case C-126/01 *GEMO* at para 122 (emphasis added). See also Opinion of Advocate General Fennelly of 26 November 1998 in case C-251/97 *France v Commission* at para 19.

³³ In similar terms, Doern 2004, p. 117; Arrowsmith 2005, pp. 224–227.

SGEI Framework impose a very limited constraint on the development of public procurement that results in inappropriate SGEI compensation. That is, determining whether an award was (formally) properly made according to the public procurement rules will generally be the acid test to decide whether State aid has been granted, which results in a circular test to establish in the first place whether the award of the public contract constitutes State aid in and by itself.³⁴

Therefore, this restriction of the scope of the State aid rules to (only) cases where public contractors obtain an undue economic advantage through excessive SGEI compensation (which should be proven directly and in full by the Commission, and which would face the hurdle of the difficult interpretation of the fourth *Altmark* condition, see *supra* Sect. 9.1) significantly restricts their effectiveness—unless the conduct of competition-distorting public procurement is itself considered to generate a situation that excludes ‘normal market conditions’ and, as a result, the award of the public contract for the SGEI scheme under those circumstances is considered an undue economic advantage *per se* (which, in my view, is a highly unforeseeable development of EU State aid law).

9.3.2 *Excessively Limited Choice of Procurement Procedure*

One of the main distortions that the *SGEI Compensation Communication* introduces in the interplay between public procurement and SGEI rules is the exclusion of an important number of public procurement tools from the alternatives that would ensure compliance with the fourth *Altmark* condition. Regarding the selection of procurement procedures, as already anticipated (*supra* Sect. 9.3), the *SGEI Compensation Communication* almost rejects the use of public procurement procedures other than the open and restricted (although with an important caveat), in a reductionist approach to the design of public procurement procedures that can promote effective competition³⁵:

Concerning the characteristics of the tender, an open procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted procedure can satisfy the fourth *Altmark* criterion, unless interested operators are prevented to

³⁴ Again, for criticism and a claim for a more substantive analysis, see Sanchez Graells 2012.

³⁵ For further discussion on how to choose a procurement procedure to prevent restrictions of competition, see Sanchez Graells 2011, pp. 234–246, where I adopted a less aggressive approach to the choice of procedure than the one included in the *SGEI Compensation Communication*, and submitted that ‘contracting authorities are under an obligation to avoid restrictions of competition derived from the choice of procurement procedures. This obligation should be discharged by having recourse to open or restricted procedures when not doing so would be disproportionate if compared to the administrative complications or the increased costs implied by the imposition of a more competitive procurement procedure—ie, when the negative effects of the restriction of competition associated with the conduct of the tender by procedures other than open or restricted ones are larger than the additional costs associated to such competitive procedures’.

tender without valid reasons. On the other hand, a competitive dialogue or a negotiated procedure with prior publication confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases. The negotiated procedure without publication of a contract notice cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the least cost to the community.³⁶

The position of the Commission boils down to require unlimited participation possibilities for potentially interested tenderers in a procedure that excludes (or substantially restricts) the discretion of the contracting entity in the choice of the undertaking to be entrusted with the SGEI. In my opinion, this is at odds with the general trend towards increased flexibility in the current revision of the procurement rules (*infra* Sect. 9.4) and creates a shadow of suspicion in the use of the competitive dialogue or a negotiated procedure with prior publication (which are procedures that may be particularly useful in the case of SGEI, where the scheme envisaged by the contracting entity may require specific technical or financial negotiations with interested tenderers, as well as the possibility to accept alternative methods to deliver the services concerned). Tendering SGEI through open procedures requires a very detailed set of technical and economic specifications that may be difficult to draft by the contracting entity and that may, in any case, stifle innovation in the discharge of the SGEI by innovative undertakings that cannot meet them (particularly in cases where variant tenders are not accepted). In short, this position seems excessively rigid,³⁷ and a more permissive approach where the Commission required that the procedure chosen (whichever it was) promoted and allowed for sufficient competition for the SGEI entrustment contract would have been preferable—which would not have been at odds with a recommendation to choose open or restricted procedures where feasible and not excessively burdensome in economic and technical terms.

9.3.3 Cost-Biased Choice of Award Criteria

A similarly restrictive approach can be seen in the position of the *SGEI Compensation Communication* regarding the choice of award criteria, which indicates that:

... the 'lowest price' obviously satisfies the fourth Altmark criterion. Also the 'most economically advantageous tender' is deemed sufficient, provided that the award criteria, including environmental or social ones, are closely related to the subject-matter of the service provided *and allow for the most economically advantageous offer to match the*

³⁶ *SGEI Compensation Communication*, at para 66 (footnotes omitted).

³⁷ Buendía Sierra & Panero Rivas also consider that the Commission '*seems to make stricter the conditions for a measure to escape its classification as State aid by fulfilling the fourth Altmark condition*'.

value of the market (sic). Where such circumstances occur, a claw-back mechanism may be appropriate to minimise the risk of overcompensation *ex ante*. The awarding authority is not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in its award decision.³⁸

In general terms, the Commission seems to adopt a position substantially in line with the rules in the EU public procurement Directives and their interpreting case law, which require that the inclusion of non-cost related criteria in the determination of the most economically advantageous tender (MEAT) is limited to those that are closely linked to the specific characteristics of SGEI to be entrusted (regardless of the environmental, social or different nature of the specific award criteria).

Nonetheless, the caveat that the use of the MEAT allows for the most economically advantageous offer ‘to match the value of the market’ seems to indicate that non-cost criteria can only be used as award preferences or devices to undo ties between equally priced offers (which are a rare occurrence and, in some instances, could deserve scrutiny to exclude that they are the result of bidder collusion). Therefore, it is clear to see that the Commission has a clear ‘pure (lowest) cost’ approach to the appraisal of the choice of award criteria that generates an unjustified restriction of the scope of the fourth *Altmark* condition (*supra* Sect. 9.2).³⁹

9.3.4 *Distrustful Assessment of Particular Circumstances*

The Commission also maintains the restrictive approach in the assessment of particular (and rather infrequent) circumstances that could concur in the tendering of SGEIs and that, under the EU public procurement rules, would justify the conduct of a less than full-open procurement process. In the terms of the *SGEI Compensation Communication*:

³⁸ *SGEI Compensation Communication*, at para 67 (emphasis added).

³⁹ This also generates uncertainty regarding the use of competitively tendered SGEI contracts’ conditions as a benchmark to appraise the potential existence of excessive compensation. More specifically, the 2011 *SGEI Framework* indicates that: ‘Where the provision of the SGEI is connected with a substantial commercial or contractual risk, for instance because the compensation takes the form of a fixed lump sum payment covering expected net costs and a reasonable profit and the undertaking operates in a competitive environment, the reasonable profit may not exceed the level that corresponds to a rate of return on capital that is commensurate with the level of risk. That rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts awarded under competitive conditions (for example, contracts awarded under a tender)’, 2011 *SGEI Framework* at para 37. However, if not all tenders are actually acceptable for the Commission (depending on choice of procedure, awarding criteria, etc.) it may be difficult to find valid benchmarks to be used with a sufficient degree of certainty.

... there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition. This could be the case, for example, due to the particularities of the service in question, existing intellectual property rights or necessary infrastructure owned by a particular service provider. Similarly, in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community.⁴⁰

Even if there can actually be circumstances where the procurement procedure does not give rise to a (theoretically) sufficient open and genuine competition, the two circumstances identified by the Commission seem to be clearly at odds with the purpose of public procurement of SGEI—which is to allow for their outsourcing (first) in the most efficient possible conditions (second).

On the one hand, regarding the existence of intellectual property rights or necessary infrastructure owned by a particular service provider, it is difficult to see how the contracting out of the SGEI would be possible (in legal form) without resorting to the undertaking that owns the IP or infrastructure. In this case, the position of the Commission simply seems to block the possibility to procure the SGEI in compliance with Article 106(2) TFEU in those cases, which clearly cannot be the proper interpretation of the situation—and, at any rate, is fundamentally unsatisfactory.

On the other hand, the Commission fails to take into account that, in some circumstances (basically, as long as the tenderer did not know that it would be the only one submitting a bid) and in the absence of bid challenges that would show unjustified exclusion of other potential tenderers, one single offer is enough to reflect competitive market conditions.⁴¹ Therefore, also in the appraisal of such particular or exceptional circumstances in the tendering of SGEI entrustment contracts, the Commission seems to have adopted an exceedingly formal and narrow approach that might not allow for the best results (and therefore, this guidance can be self-defeating).

9.3.5 Additional Procurement-Related Incentives in the Appraisal of SGEI Financing

Finally, and in line with the above-mentioned ‘preferred route’ approach to procurement shown by the Commission in the ‘Almunia Package’, the *2011 SGEI Framework* offers additional incentives to use procurement procedures even in those cases where State aid exists and needs to be declared compatible with TFEU rules. More specifically, the *2011 SGEI Framework* flexibilises the oversight obligations of contracting entities when they have used procurement procedures with publication:

⁴⁰ *SGEI Compensation Communication*, at para 68.

⁴¹ For discussion of the possibility of obtaining competitive results with only one contractor, see Keisler and Buehring 2005. See also Sanchez Graells 2011, pp. 341–342.

Member States must ensure [...] that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. *For aid granted by means other than a public procurement procedure with publication*, checks should normally be made at least every two years.⁴²

As we can see, this is yet an additional procurement-related incentive in the appraisal of SGEI financing schemes that do qualify as State aid—and, however, it is hard to understand the logic to draw such a difference in *ex post* oversight duties, regardless of the method of selection of the undertaking entrusted with the SGEI *ab initio*.

9.4 The Likely Impact of New Procurement Rules on the Control of SGEI Financing

As has evaporated from the analysis in the prior sections, in my opinion, the procurement-related rules and guidelines of the ‘Almunia Package’ clearly point towards the use of relatively inflexible, cost-oriented procurement procedures where the contracting entity retains the minimum possible room for discretion—so that procurement is basically understood as a *deus ex machina* that excludes the existence of State aid, either due to a lack of selectivity of the measure or, most likely, given that the *competition for the contract* excludes any undue economic advantage.⁴³ However, this blunt exclusion of State aid control in the field of public procurement (which has not been free from criticism) may be about to require re-examination if the push for more flexibility and increased scope for negotiations in the 2011 Commission’s proposal for new procurement Directives gets approved.⁴⁴

Indeed, the 2011 European Commission Proposal for new EU public procurement Directives strongly relies on three main principles: simplification, modernisation and increased flexibility of the public procurement rules, with the fundamental goal of promoting increased efficiency of the procurement system and, ultimately, economic growth—as part of the Europe 2020 Growth Strategy. Throughout the process of modernisation and simplification of the procurement Directives, the Commission stresses the relevance of preventing distortions of

⁴² 2011 SGEI Framework at para 49 (footnote omitted, emphasis added).

⁴³ However, it is to be stressed that the absence of a tendering procedure does not preclude a finding that State aid and other competition rules have not been violated; see Case T-17/02 *Olsen v Commission* [2005] ECR II-2031 at paras 237–239, confirmed on appeal by the ECJ, Case C-320/05 P *Olsen v Commission and Spain* [2007] ECR I-131.

⁴⁴ Nonetheless, the actual potential for simplification and flexibility of the Commission’s proposal has been rightly criticised by Arrowsmith 2012 *passim*.

competition. Given that public procurement strongly relies on competitive markets, there is a strong need to ensure that the design of public procurement rules and administrative practices, while fit and appropriate to promote competition in a narrow sense (i.e. competition within the specific tender or procurement process), do not generate unnecessary distortions to competition in its broader sense (i.e., competition in the market where public procurement activities take place). This has been recently emphasised in the framework of the revision of the current EU public procurement rules, which stresses that:

[t]he first objective [...] is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided. At the same time, it is crucial to increase the efficiency of procurement procedures as such.⁴⁵

Therefore, it seems clear to me that the revision of the current EU public procurement rules have a clear orientation towards promoting (or, at least, safeguarding) competitive neutrality as a booster for enhanced competition and, in the end, achieve value for money through increased procurement efficiency—including in the field of SGEIs. In this regard, it is interesting to stress that the Commission has itself identified (new) competition risks associated with the simplification of the procurement rules and the increased room they aim to create for negotiations between contracting authorities or entities and tenderers. More specifically, the Commission has acknowledged the risks that increased flexibility in the choice of procedures, the possibility to conduct negotiations in almost all procurements, and the possibility to introduce (or give greater importance) to considerations unrelated or only tenuously connected with the subject matter of the contract (to name only a few of the relevant proposals) can generate in terms of State aid control—which, at the same time, ‘*may present certain opportunities to increase convergence between the application of the EU public procurement and State aid rules*’.⁴⁶

On the one hand, as stressed in the *Green Paper*, the increased flexibility for contracting authorities to use the competitive procedure with negotiations generates significant (new) risks:

The possible advantages of more flexibility and potential simplification must be weighed against the increased risks of favouritism and, more generally, of overly subjective decisions arising from the greater discretion enjoyed by contracting authorities in the

⁴⁵ Commission, *Green Paper on the modernisation of EU public procurement policy—Towards a more efficient European Procurement Market*. COM(2011) 15 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=556316:EN:NOT> (last accessed 28 May 2012).

⁴⁶ *Green Paper on the modernisation of EU public procurement policy*, p. 5. See also *Communication from the Commission on the Application of the EU State aid rules to compensation granted for the provision of services of general economic interest* [2012] C8/4, paras 63–68.

negotiated procedure. Such subjectivity would in turn make it harder to show that the resulting contract did not involve State aid.⁴⁷

Along the same lines, but in relation with the integration of environmental and social considerations in the array of award criteria, the *Green Paper* also emphasised that:

... public procurement policy must ensure the most efficient use of public funds. At the same time, this guarantee of purchases at the best price ensures a measure of consistency between EU public procurement policy and the rules in the field of State aid, as it makes sure that no undue economic advantage is conferred on economic operators through the award of public contracts. Loosening the link with the subject matter of the contract might therefore entail a risk of distancing the application of EU public procurement rules from that of the State aid rules, and may eventually run counter to the objective of more convergence between State aid rules and public procurement rules.⁴⁸

Finally, the *Green Paper* identified concerns about the use of State aid in innovation-promoting mechanisms; although the approach has been rather optimistic and the European Commission has indicated that the use of “pre-commercial” procurement:

enables public authorities to share the risks and benefits of designing, prototyping and testing a limited volume of new products and services with suppliers, without involving State aid.⁴⁹

In my opinion (and substantially in line with the European Commission’s except in relation with pre-commercial and innovative procurement), the main sources of increased risks in connection with State aid are the increased scope for negotiations that broaden the discretion of the contracting authority or entity, and the public finance of R&D projects by means of the new ‘innovative partnership’—which goes further in flexibility than the current ‘competitive dialogue’.⁵⁰

As already follows from this short discussion, the feeble justification for the current position of the Commission that compliance with EU public procurement rules excludes the risk of disguised State aid—because current procurement rules prevent the granting of contracts that imply an (undue) economic advantage for the public contractor—is in crisis, particularly in view of the proposal for new EU public procurement Directives and the significantly expanded room for discretion and for the use of procurement procedures other than open and restricted. The introduction of increased flexibility and the broadening of the scope for negotiations require guidance as to the limits within which contractual conditions must remain for them to comply with EU State aid law (and, therefore, potentially outdates significant parts of the ‘Almunia Package’).

⁴⁷ Ibid, para 15.

⁴⁸ Ibid, para 39.

⁴⁹ Ibid, paras 45–46.

⁵⁰ For a more detailed analysis, see Sanchez Graells [2012](#).

Therefore, it looks like the two legs of the Modernisation Agenda for Procurement and SGEIs promoted by the European Commission are trying to move in opposite directions and, in that respect, it is difficult to envisage an scenario where the numerous questions that the interplay between State aid, public procurement and SGEI financing pose can be answered in a consistent and legally predictable manner, or that allows for the required adoption of lasting guidance criteria that help overcome the state of constant flux (or permanent crisis) in which this area of EU law has been immersed already for too long a period.

9.5 Concluding Remarks

As a conclusion, I personally think that the system of control of public expenditure is in crisis—which has been slightly slowed down by the financial downturn but that, more than ever, requires an effective solution to ensure the wise and efficient expenditure of public funds and their appropriate control. Regarding the competition implications of public expenditure, I think that there is a fundamental gap in competition policy and enforcement that concerns the development and adoption of a reliable ‘market economy buyer’ test that helps appraise procurement decisions and their outcomes—both in the field of SGEIs, and more generally. Otherwise, trying to discharge State aid control on public procurement rules and their enforcement only generates legal uncertainty. If EU public procurement rules finally move towards increased flexibility and expanded discretion for contracting authorities, it is foreseeable that there will be a retreat by the Commission from reliance in public procurement procedures (or a further narrowing down of those considered acceptable)—which, in turn, will generate a negative pressure against the use of more innovative and flexible procurement procedures if there can be State aid implications. A more fundamental revision of the system seems, then, necessary—but probably it must wait until public procurement rules are modernised and there is time to regain a broader perspective on this area of EU law and policy.

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