

NEW PUBLIC MANAGEMENT AND
SERVICES OF GENERAL ECONOMIC
INTEREST:
AN IMPACT ON UNION LAW?

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Tiivistelmä/Referat – Abstract			
<p>New Public Management (“NPM”) is a reform movement with the intent of increasing efficiency in the public sector. NPM reforms have had a great impact on organization of the public sectors in the EU Member States during the last 25 years. There has been considerable research done from a political science and economics point of view into the subject.</p> <p>The concept of public services in EU law is closely related to the legal concept of services of general economic interest (“SGEI”) which is mentioned in the treaties. The 2003 Altmark ruling and the 2009 BUPA ruling have shaped the way Member States finance SGEI. This thesis sets out to research the relationship between New Public Management and public services in a Union law context in the form of SGEI. One of the underlying questions is whether NPM ideas have affected the legal concept of SGEI.</p> <p>This thesis reviews the literature on the origins of, ideological background on and policy suggestions of the NPM movement. In turning to the law this thesis focuses on the treatment of public services in EU law, the legal basis of SGEI as well as the pre-Altmark case law regarding the application of Article 106(2) TFEU. In turning to the financing of SGEI the thesis reviews the Altmark and BUPA cases as well as other relevant and more recent cases. By using the information obtained from a review of literature on NPM this thesis analysis the relationship between NPM and SGEI.</p> <p>The main findings are that marketization reforms undertaken in EU Member States, such as privatization and liberalization, especially in such areas as health care, have opened up previously more “guarded” national competence areas to the scope of Union competition law. This situation has forced the courts to increasingly deal with concepts of non-market values in competition law and a specific area of law is beginning to form. The dismantling of monopolies through liberalization has also lead to a shift in from the use of Article 102 to the use of Article 107 when challenging state supported undertakings. Additionally, some of the criticism aimed at NPM regarding its compatibility with so called public service values, can be noticed in the legal debate, albeit within a legal context. Arguably NPM has had a great impact on shaping the environment in which EU law operates.</p>			
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1. Introduction: Reforming public management and law?

1.1 Background and research question

The public sectors in many EU countries have undergone huge reforms during the last 25 years. These changes are largely connected to the global trend of New Public Management (“NPM”). NPM consists of ideas which evolve around the notion of making government more efficient. Based on these ideas certain policy suggestions have been made which with the onus of achieving this goal. Academically, a great deal of research has been made into the subject of the ideas behind NPM, criticism towards it, and the effects of its implementation. In EU law the concept of services of general interest have increased in importance since the 2003 Altmark ruling concerning the financing of the compensation of the provision of services of general economic interests and the 2009 BUPA ruling. This relatively new case law on has made the Member States review the way they finance certain functions they consider to be in the public interest which are undertaken by undertakings. Services of general economic interest relate closely to the functions which states have the responsibility to provide and therefor it relates to the regulation of the public sector. In this context it becomes interesting to ask about the relationship between NPM and the law. Specifically, it becomes interesting to ask about the relationship between NPM and the law affecting the regulation of the public sector.

In this thesis I therefore set out to research the relationship between NPM and services of general economic interest in the context of state aid. The context of State aid is chosen partly to limit the field of research, as SGEIs are also relevant in the field of the fundamental freedoms as well, and partly because the recent development in case law has taken place in this field.

Further, if there is a relationship between the two, then what is the nature of this relationship? Has the NPM somehow affected and shaped the way the EU courts view the public sector through the field of services in the general economic interest? The way I will go about this research task is by first researching the topic of New Public Management. Chapter two and three focus on NPM and contain the historical origins, the ideology behind it which has shaped it as well as the policy suggestions stemming from it and how they have been implemented. Chapter five focuses on the treatment of public services in EU law and the legal basis for services in the general economic interest. Chapter six

reviews the case law based on Article 106(2) TFEU and the requirements for applying it and its role as an exception. Chapter six sets out in a brief way the foundations of EU State aid law and the test for qualifying State aid. In chapter seven I focus on the financing of services of general economic interest and review the important cases such as Altmark, BUPA, Chronopost and others. In chapter eight I analyse the relationship between services of general economic interests. This thesis will focus primarily on the case law of the General Court and the Court of Justice of the European Union. The state aid decisions by the European Commission will be left on the side lines. The reason is that the decisions by the Court are more legally significant, and therefore interesting, than the decisions by the European Commission.

1.2 Methodology

In this master's thesis I will use information through research obtain in the fields of political science and economic and apply it to the case law of the EU courts. I will review the research on NPM regarding its history, the ideas behind it based on economic theories as well as how NPM ideas have been implemented in practise. Using the results I get from this review I will apply these findings to the law in the field of SGEIs in a state aid context. By studying the case law of the European courts and by reviewing the existing legal literature I will try to set out any the elements of any possible relationship between NPM and SGEIS in a State aid context.

For this part of my thesis I will use a dogmatic method. In other words, I will review case law and legal literature on the subject to get a picture of the development of this field of law and where the current law stands. Having come to a conclusion regarding the development of the law I will attempt to review whether there is a connection between NPM and SGEIs. As the case law of the EU courts are very context bound and sometimes rich with information on the background of cases, especially AG opinions, I will use this information to try and understand the context. As NPM precedes the recent development in financing of SGEIs I hope that the history of NPM will provide me with a background to the many of the cases of the court.

2. A Global Wave of Administrative Reform: New Public Management

2.1 Where did it come from?

2.1.1 The nature of public management reform

New Public Management (“NPM”) is a wave of administrative reforms undertaken globally, under the last 25 years, which has affected the public sectors of many countries.¹ The goals of most NPM reforms has been to improve the effectiveness and efficiency of the public sector; to enhance the responsiveness of public agencies to their clients and customers; to reduce public expenditure; and to improve managerial accountability.² This was undertaken by “doing away with hierarchy, monolithic systems, politically neutral administrative bodies, standardized personnel system and standardized regulation of citizens and companies for the benefit of a market-like, deregulated system of pseudo-corporate, autonomous service providers and enthusiastic public managers.”³ NPM was a part of a new “time spirit” which in the words of Jorgensen and Andersen “changed [the] perception of humankind.”⁴ In the authors’ view neo-liberalism provided NPM development with an ideological soundboard which favoured values such as freedom of choice and individual in contrast to collective solutions and solidarity but in accordance with the rational choice model.⁵ NPM reforms can also be described as not making a distinction between the public and the private sector when it comes to how the public sector is managed; separating commercial activity from non-commercial activity and emphasizing financial reporting and accountability⁶.

Christensen and Laegried write that NPM puts economic values foremost and that other broader political concerns thereby become subordinated to economic values. NPM is focused is concerned with management and it assumes that management is generic and that all managers faces the same problems irrespective of their environment. NPM contains a

¹ Tom Christensen and Per Laegreid (eds.): *The Ashgate Research Companion to New Public Management*, Surrey 2011, Ashgate, p. 1.

² Ibid.

³ Torben Beck Jorgensen and Lotte Bogh Andersen: *An Aftermath of NPM: Regained Relevance of Public Values and Public Service Motivation in Tom Christensen and Per Laegreid (eds.): The Ashgate Research Companion to New Public Management*, Surrey 2011, Ashgate, p. 335.

⁴ Jorgensen and Andersen 2011, p. 355.

⁵ Ibid.

⁶ Zahirul Hoque and Jodie Moll: *Public Sector Reform: Implications for Accounting, Accountability and Performance of State– Owned Entities – An Australian Perspective*. *International Journal of Public Sector Management*, vol. 14, no. 4 (2001), p. 305.

tension as it holds that there is a need for both more managerial independence and for more political accountability. NPM has focused on strengthening certain concepts and values by at the expense of certain old public management values. Managerial accountability, based on output, competition, transparency and contractual relations have been strengthened, whereas accountability were based on input processes and procedures, hierarchical control, legality, trust, and cultural traditions have been weakened. The authors write that NPM is customer-driven believes that the customer is potentially able to shape policy. What NPM is less interested in is the influence on public bodies through the means of elections and the influence of public bodies as consumers. Christensen and Laegried argue that NPM is concerned with efficiency, quality and direct influence and less with democracy.⁷

In order to explain what New Public management is will look at the historical roots of NPM, the ideas behind NPM and some common traits behind NPM reforms. This process is made difficult by the fact that these three different questions are not easy to keep apart. The overarching question that these sub-questions attempt to answer is the question of what NPM is. Separating the “historical” origins from the “theoretical” origins might deviate from how reforms progress in reality. In addition to being the result of a set of ideas, NPM was the result of political, economic, social and technological forces.⁸ In addition to this, NPM reforms have always been constrained by local circumstances, so called path dependency.⁹ Therefore no meaning should be read into the division between ideas and history. However, for the sake of simplicity this chapter is divided as to separate these two aspects of NPM.

Gruening presents two hypotheses about NPM. He claims that decisions on how public administration shall be constructed are closely related to politics.¹⁰ Further he hypothesises that NPM is a mix of values seem to offer a solution to certain problems, but that it will not last forever.¹¹ Hood, Pollitt and Aucoin are the perhaps most cited authors on the traits of NPM. According to Hood the focus of the NPM movement “was firmly managerial in the

⁷ Tom Christensen and Per Laegried: Democracy and Administrative Policy: Contrasting Elements of New Public Management (NPM) and Post–NPM, *European Political Science Review*, vol. 3 no .1 (2011), pp. 125 – 146, p. 131– 132. The entire paragraph is cites the two pages mentioned.

⁸ Jonathan Boston: Basic NPM Ideas and their Development in Tom Christensen and Per Laegreid (eds.): *The Ashgate Research Companion to New Public Management*, Surrey 2011, Ashgate, p. 18.

⁹ *Ibid.*

¹⁰ Gernod Gruening: Origin and theoretical basis of New Public Management, *International Public Management Journal* 4:2001, p. 20.

¹¹ *Ibid.*

sense that it stressed the difference management could and should make to the quality and efficiency of public services. Its focus on public service production functions and operational issues contrasted with the focus on public accountability, ‘model employer’ public service values, ‘due process,’ and what happens inside public organizations in conventional public administration.”¹² Aucoin¹³, who is commonly cited¹⁴, summarized the central doctrine as being a mix of ideas relating to corporate management, institutional economics or public choice. There is however a tension between these ideas since the aims of the ideas differs between each other.¹⁵

2.1.2 NPM as a word, social movement and science

Christopher Hood describes the development of NPM in its relation to other concepts. He studies public management as a social movement and public management developed as a science. Instead, Hood defines public management.¹⁶ The definition rests on a three pillar foundation; public management as a word; as a movement; and as a science. Management as a word seem to have come into the English language in the sixteenth century, from the Italian word *maneggiare*, training or riding a horse with skill.¹⁷ Before its contemporary use, describing business administration, it was used to describe the conduct of public affairs and war in the eighteenth century.¹⁸ However, it is hard to pinpoint the origins of the modern public management tradition.¹⁹ In the nineteenth century the word “administration” was adopted in the English-speaking world (“to serve”).²⁰ Hood writes that “administration may have been favoured because in an age of democratization, rule-of-law constitutionalism and developing parliamentary government, it better conveyed the notion of subordination to constitutional authority and rule-governed institutional activity than the word drawn from the half-dead horse-mastering metaphor”²¹. In the late

¹² Ibid para. 11.

¹³ Peter Aucoin: *Administrative Reform in Public Management: Paradigms, Principles, Paradoxes and Pendulums*, Governance, vol. 3, no. 2 (1990).

¹⁴ Hood 2001, p. 12554.

¹⁵ Hood 2001, p. 12554.

¹⁶ Christopher Hood: *Public Management – The Word, The Movement, The Science* in Ewan Ferlie, Laurence E. Lynn Jr. and Christopher Pollitt (eds.): *The Oxford Handbook of Public Management*, Oxford 2005, Oxford University Press, pp. 7 – 27.

¹⁷ Hood 2005, p. 8.

¹⁸ Ibid.

¹⁹ Hood 2005, p. 9.

²⁰ Ibid.

²¹ Hood 2005, p. 10.

nineteenth century “administration became the most widely used term for the academic study of the executive branch in the English-speaking world.”²²

The term management did not disappear completely and was used in the US by the progressive modern managerial movement.²³ The movement advocated for professional conduct free of political intervention based on pre-set guidelines and an understanding of good practice.²⁴ Management ideas were still applied to public policy after WWII.²⁵ When the term “public management” was introduced as an academic subject at American universities in the 1960’s and 70’s the term was made known in by its contemporary use and created an academic movement. Hood writes that the movement distinguished itself from previous schools of public administration, and by the 1980’s the term public management had become indicative of both an activity and a field of study.²⁶ The distinction, however, between public management, public administration and general management was according to Wood difficult to find.²⁷

By being part of names of schools, courses, journal, books and conferences public management as a term became institutionalized, as had its predecessors become. In the 1980’s public management became a fashionable term to use by official bodies both nationally and internationally.²⁸ The 1984 New Zealand government document “Government Management” signified a landmark for NPM, containing ideas drawn from institutional economics and the application of ideas drawn from business management to public management and was the start of a massive outflow of official documents both academic and official using the term.²⁹ In the beginning of the 1990’s the term Public Management partially lost ground to so called “Third Way” at least in the terminology of such bodies as the OECD and the World Bank.³⁰ The term governance emerged, which Hood calls, commenting on the Greek origins of the term, “[...] another half-dead

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Hood 2005, p. 11.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

metaphor”.³¹ “Governance” has increased its popularity but public management has remained well-established.³²

Commenting on the two arguments that a change in terminology has few connections to actual change, and that new terminology is only a way to covertly operate politically, Hood asserts that there is some truth to the both. NPM contains elements which are not new and international bodies such as the World Bank the Asian Development Bank, which are banned from participating in politics, might have used the “neutral” language of NPM in order to implement certain policies.³³ Hood argues that that terminological change is part of an analytical and ideological change.³⁴ In government and bureaucracy the struggle for power over terminology is central, and linguistic change takes place for a reason, reflecting a struggle for power.³⁵

In contemporary public management, Hood finds the characteristics of a social movement, part of a broader “managerial” movement.³⁶ Social movements develop in opposition to one or more established movements, which in turns attracts opposition to it, is representative of variety of interests and interests, and manifests a worldview and a style of rhetoric.³⁷ Of NPM in the 1980’s and 1990’s Hood writes that “the [...] movement [...] was a reaction against those in public law public administration who put the focus on constitutional and institutional design of the machinery of government. It stressed production engineering and managerial leadership, rather than rule-bound bureaucracy, as the essence of executive government.”³⁸

Turing to public management as a science, Hood writes that there is no consensus on what the subject of study is. Hood writes that in order for a field to be considered a science, its researchers must engage in three types of activities.³⁹ The first one is descriptive and aims at describing and characterizing the work it is describing. An important task is the analysis and conceptualizing of institutional developments, and in the beginning of the 1990’s

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Hood 2005, p. 12.

³⁵ Ibid.

³⁶ Hood 2005, p. 13.

³⁷ Ibid.

³⁸ Hood 2005, p. 14.

³⁹ Hood 2005, p. 20.

researchers such as Hood, Flynn and Pollitt undertook this type of work.⁴⁰ The second characteristic Hood brings up is the systematic collection of data. This type of research has been undertaken by among others Aucoin, and Pollitt and Bouckert.⁴¹ They undertook research analysing the effects of NPM reforms in different countries.⁴² The third characteristic Hood mentions is the identification of anomalies, surprises and counter-intuitive observations.⁴³ Authors like Christensen and Laegreid and Peters have focused on this area.⁴⁴ Gregory identified the identified the “production paradox” which that applying the “production approach” into realms in areas in which results are not easily measurable will cause unintended effects, including the blurring of management’s responsibility.⁴⁵ Another important paradox which has been showed by many authors is the so called Tocuevillian paradox. This paradox holds that some NPM reforms intended to be deregulatory actually lead to more regulation and oversight.⁴⁶

2.1.3 Economic crisis and neo-liberalism

The origins in Europe of NPM were less related to academic trends and more related to politics and the economic crisis in the 1970’s.⁴⁷ Sahlin writes that the crisis lead to the questing of the public sectors in many Western countries, especially the ones with fiscal problems, and those countries turned to other societal sectors for experiences and models to imitate.⁴⁸ According to Lynn the economic crisis affected the development of new reform ideas regarding the public sector, and also issues such as managing the post-war welfare state.⁴⁹ In relation to the economic crisis Toonen agrees with Sahlin and Lynn in that NPM can “commonly [be] understood as a reaction against a perceived economic threat”⁵⁰. While Wood states NPM can be described as a policy response to economic

⁴⁰ Hood 2005, p. 21.

⁴¹ Hood 2005, p. 22.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Laurence E. Lynn: A Concise History of the Field in Ewan Ferlie, Laurence E. Lynn Jr. and Christopher Pollitt (eds.): *The Oxford Handbook of Public Management*, Oxford 2005, Oxford University Press, p. 42.

⁴⁸ Kerstin Sahlin– Andersson: National, International and Transnational Constructions of New Public Management in Tom Christensen and Per Laegreid (eds.): *New Public Management: The Transformation of Ideas and Practice*, London 2001, Ashgate. p. 49.

⁴⁹ Lynn 2006, p. 114.

⁵⁰ Theo Toonen: *The Comparative Dimension of Administrative Reform: Creating Open Villages and Redesigning the Politics of Administration* in Christopher Pollitt and Colin Talbot (eds.): *Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation*, New York 2004, Routledge, p. 188.

crises, it is equally an embodiment of the increasing influence of neo-liberalism.⁵¹ Lane acknowledges that the “radical nature of NPM may have served well the politics of the new right or neo-conservatism in the 1980s and the resurgence of neo-liberalism in a globalised world economy in the 1990s”⁵². Simultaneously, authors such as Friedman and Hayek brought fourth neoliberal ideas.⁵³ Some authors directly relate NPM to neo-liberalism, even going as far as claiming that NPM is often used as a positive term for neo-liberal reforms in the public sector.⁵⁴ However, this view is disputed by others.⁵⁵ The opposing argument is that NPM reforms have been adopted by centre-left governments as well.⁵⁶

The rise of neo-liberalism can be attributed to various social, economic and political reasons. The so called stagflation in many OECD countries of the 1970’s was one of them. There was a perception that Keynesian policies had failed in delivering growth and low inflation. Furthermore, there were worries about the perceived expansion of the public sector and its effect on deficits and an expanding bureaucracy. The perception was that expanding social programs failed in their missions of facilitating social mobility. Instead they created disincentives. Additionally there was evidence of poorly designed regulatory measures resulting in economic inefficiencies causing compliance costs. The solution was provided by neo-liberalism, a doctrine for a shrinking state and expanding markets. The recipe was one of greater fiscal discipline, a reduction in scale and scope of government activities, more “targeted” welfare programmes, a broadening of the tax base and cutting of marginal tax rates, the introduction of competition through liberalization and privatization, and the elimination of subsidies to commercial activities, abandonment of Keynesian demand-side economic policy and deregulation of worker protection.⁵⁷

The main neo-liberal policy advise that was offered to the field of public management consisted of components such as privatization of state enterprises, the separation of commercial and non-commercial activities, where commercial activities are subject to

⁵¹ Geoffrey Wood: *New Public Management and Europeanisation: Convergence or ‘Nestedness’?* in Pauline Dibben, Geoffrey Wood and Ian Roper (eds.): *Contesting Public Sector Reforms*, London 2004, Palgrave Macmillan, p. 167.

⁵² Jan– Erik Lane: *New Public Management*, London 2000, Routledge, p. 3.

⁵³ Boston 2011, p. 18.

⁵⁴ Dibben and Higgins: *New Public Management: Marketisation, Managerialism and Consumerism* in Pauline Dibben, Geoffrey Wood and Ian Roper (eds.): *Contesting Public Sector Reforms*, London 2004, Palgrave Macmillan, pp. 26 – 37, p. 35.

⁵⁵ See Lane 2000, p. 7.

⁵⁶ Christopher Pollitt: *The Essential Public Manager*, Berkshire 2003, Open University Press, p. 36.

⁵⁷ Boston 2011, p. 19.

competition from the market and where possible non-commercial agencies subject to competitive pressure, a stricter control of spending and an extension of management freedoms and a greater transparency and accountability for financial management. The policy recommendations were the basis of such NPM ideas as commercialization, corporatization, privatization, and budget cuts. Neo-liberalism was however not the only source of NPM.⁵⁸

Politicians like Margaret Thatcher, Ronald Reagan and the 1984 New Zealand Labour government, who pioneered NPM reforms were all inspired by neo-liberalism.⁵⁹ These politicians and their advisors advocated what in their minds was a more “business-like approach”.⁶⁰ These were the first governments to adopt NPM reforms well as local governments in the US.⁶¹ The early adopters had suffered the most from the economic crisis of the 1970’s.

New Zealand and Australia later followed suit, followed by most of the members of the OECD countries.⁶² In addition to certain countries embracing neo-liberalism, international organizations such as the IMF, the OECD, and the World Bank embraced these ideas. These institutions became powerful advocates of NPM ideas.⁶³ The Public Management Committee of the OECD also played an important role in spreading this message.⁶⁴

According to Pollitt “[g]radually, partly through doctrine and partly through trial and error, [the business-like approach became a] more specific set of recipes for public sector reform”.⁶⁵ In the beginning of the 1990’s a few influential commentators, with Hood coining the concept New Public Management⁶⁶, began spreading the message that this was part of a global trend with similar traits. In their influential work *Reinventing Government*, Osborne and Gaebler described what they called the entrepreneurial movement as global and “inevitable”.⁶⁷ Today, however, as Pollitt and Bouckert have shown, NPM reforms have shown considerable difference throughout the world depending on the country and

⁵⁸ The entire paragraph is a citation of Boston 2011, p. 18 – 19.

⁵⁹ Christopher Pollitt and Sorin Dan: *The Impacts of New Public Management in Europe: A Meta- Analysis*. COCOPS workpackage 2011, p. 3.

⁶⁰ Pollitt and Dan 2011, p. 4.

⁶¹ Gruening 2001, p. 2.

⁶² Lane 2000, p. 3.

⁶³ Boston 2011, p. 18.

⁶⁴ Pollitt and Dan 2011, p. 5.

⁶⁵ Pollitt and Dan 2011, p. 4.

⁶⁶ Laurence E. Lynn Jr: *Public Management: Old and New*. New York 2006, Routledge, p. 107.

⁶⁷ Davis Osborne and Ted Gaebler: *Reinventing government: how the entrepreneurial spirit is transforming the public sector*, New York, NY 1992, Addison Wesley Publishing Company, pp. 325 – 328.

local political, economic and cultural context in which they have been implemented.⁶⁸ NPM is not coherent and consistent, and there is no “official” programme of reform.⁶⁹ Reform in the public sector can however be defined as a global trend.⁷⁰

3. NPM in theory and in practise

3.1 Ideology

3.1.1 A mixture of ideas

NPM is neither made up of one unified theory, nor is it a random set of ideas about public management. Instead, it “embodies a particular kind of administrative argument based on upon specific doctrines and related justifications⁷¹.” Because of the diverse intellectual origins of NPM and the different settings it has found a home in NPM comes in many different forms, additionally, NPM was more driven by practitioners than by theory.⁷² Being aware of the theories behind NPM is vital, because, as Pollitt writes, the strength of the NPM will partly be dependent on whether the underlying theories are correct or not.⁷³ As it has turned out, some of these theories might be partially or wholly incorrect, such as schemes of performance related pay in the public sector, which has failed to produce the desired outcome of more efficient workers in the public sector.⁷⁴

Another aspect that is interesting in NPM is that underlying theories exhibit tension between one another. There is inherent tension in NPM between its two main theoretical fundamentals, economics and managerialism.⁷⁵ These tensions related to the underlying assumptions of individual behaviour. Whereas public choice base models of NPM reform view individuals as utility-maximising and selfish, and expresses a low trust view of individuals, modern management theory has a more optimistic view of individuals permitting more freedom to manage.⁷⁶

⁶⁸ Christopher Pollitt and Geert Bouckaert: Public Management Reform: A Comparative Analysis (2nd edition), Oxford 2011, Oxford University Press.

⁶⁹ Sahlin– Andersson 2001, p. 51.

⁷⁰ Ibid.

⁷¹ Michael Barzeley: The New Public Management, Berkeley, CA 2001, University of California Press.

⁷² Ibid.

⁷³ Pollitt 2003, p. 31.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

As opposed that what thoughts its name might awake many of the theoretical foundations of NPM are not “new” but have existed in earlier administration theory.⁷⁷ However, although some of the individual characteristics of NPM are not new, and could in fact be considered old, they have never been organized into a reform movement before.⁷⁸

Gruening states that NPM is a mixture of ideas drawn from such theories as public choice, management theory, classic public administration, policy analysis, principal-agent theory, property rights theory, the Neo-Austrian School, transaction cost economics and New Public Administration.⁷⁹ Groot and Budding further group Gruening’s findings on the theoretical basis of NPM into three categories.⁸⁰ These are neo-classical public administration and management, management sciences and new institutional economics.⁸¹ The first group is focused on the organization of the state and the application of scientific principles to governing.⁸² The second one focuses on introducing ideas from business and management into public service, whereas the third one views public servants as persons who are concerned with maximising their personal utility.⁸³

Groot and Budding write that these orientations introduce different themes into NPM inspired reforms.⁸⁴ Depending on the country and the specific problems it faces, the different orientations of NPM will be used as sources for solutions to national problems.⁸⁵ Boston further adds to the list of influences neo-liberalism and law and economics.⁸⁶ Whereas it might be easy to identify the ideas on which NPM is based, it is more difficult to assess the impact of them on NPM, either in a certain jurisdiction or generally.⁸⁷ According to Lähdesmäki NPM’s theoretical basis is scientific management, public choice theory and managerialism⁸⁸. These two ideological currents of managerialism are partly in conflict and their emphasis can differ from country to country in which NPM reforms have been undertaken. It might seem that the idea of the leader of a public body as a CEO is in

⁷⁷ Gruening, p. 18.

⁷⁸ Ibid, p. 19.

⁷⁹ Gruening 2001, p. 17.

⁸⁰ Tom Groot and Tjerk Budding: New Public Management’s Current Issues and Future Prospects, *Financial Accountability and Management*, vol. 24 no. 1 (2008), p. 2.

⁸¹ Gruening 2001, p. 17.

⁸² Groot and Budding 2008, p. 2.

⁸³ Ibid.

⁸⁴ Groot and Budding 2008, p. 3.

⁸⁵ Ibid.

⁸⁶ Boston 2011, p. 18.

⁸⁷ Ibid.

⁸⁸ Kirsi Lähdesmäki: *New Public Management ja julkisen sektorin uudistaminen*, *Acta Wasaensia* no 113, University of Vasa 2003, p. 36 – 52.

conflict with the NPM aim of increased political control. Even supporters of NPM reforms admit that the theoretical background contains potential conflicts and that it remains to be seen how these conflicts will play out in reality.⁸⁹ Lähdesmäki writes that “the central demand and message of public choice to NPM is the decrease in size of the public sector. The role of the public sector ought to be ‘back-stage’ from which it is hoped that the public sector will withdraw from service production.”⁹⁰

NPM’s managerialist approach provides a solution to the problem of management of the public sector by using private sector management models and techniques. However, it does not give a clear answer as to what these could be.⁹¹ Although the NPM discourse talks about “the private sector model” as one distinguishable model, it is hard to pinpoint one single specific model.⁹²

Reforms based on NPM ideas have globally changed the structure of government organizations in a significant way.⁹³ In the words of Grossi and Reichard: “[t]he State – at least to some extent – has moved from a monopolist producer of public services to the guarantor, enabler, co-ordinator and moderator of a complex institutional (or ‘governance’) setting of public service providers. We observe new, more complex and diversified patterns of service delivery, ranging from public administrations and public enterprises via mixed public/private organizations to private business or not-for-profit institutions.”

3.1.2 The ideas explained

3.1.2.1 Managerialism

The origins of the managerialist movement can be found in the 1880’s. The movement was pioneered by Frederick Taylor. In. Managerialism contains four specific features which have become central to NPM. The first one is that management is generic, meaning that the same type of management can be applied to any type of organization regardless of its status. This indicates that the same the same types of management techniques and measures can be used in any type of organisation. A second feature of managerialism is the

⁸⁹ Kirsi Lähdesmäki: *New Public Management ja julkisen sektorin uudistaminen*, Acta Wasaensia no 113, University of Vasa 2003. P. 51 – 52.

⁹⁰ *Ibid.*

⁹¹ Lähdesmäki 2003, p. 73.

⁹² *Ibid.*

⁹³ Giuseppe Grossi and Christoph Reichard: *Municipal Coporatization in Germany and Italy*, *Public Management Review*, vol. 10, no. 5 (2008), p. 600.

idea that managers should be given the authority and discretion in managing, by having power over budgets. The discretion is however restricted to a context in which clearly specific outcomes are set up, there are strong incentives for performance, monitoring and hierarchical control.⁹⁴ The ability to manage requires room for the manager to manoeuvre, which is materialized through the “right to manage” slogan.⁹⁵

An underlying assumption of managerialism is that individuals respond well to rewards and sanctions and those incentives can drive up efficiency. Performance-based pay and performance linked contracts. The incentives are financial as it is assumed that individuals are most responsive to such incentives. As a final aspect managerialism places a value on the idea that all tasks in any organization can be defined measured. This is executed in the name of efficiency, cost-effectiveness and accountability. A substantial portion of NPM can be attributed to managerialism, at least in part.⁹⁶ Managerialism advocates private over public organisations and single purpose over multipurpose.⁹⁷

Pollitt’s definition of managerialism is the idea that the management style of the private sector is the most effective management style and should be applied to the public sector. Specifically the public sector should strive towards a continuous productivity increase, the measurement of results and performance, a system which rewards that which is regarded as performance and the allocation of resources according to results. The success of the organization will dependent on the management skills of its leader.⁹⁸ In managerialism the value of leadership itself is placed high. Managerialism will enable bureaucratic organisations to increase their capacity through improvements in management. This will be accomplished through the dismantling of bureaucracy. The organisation should focus on its core task, its personnel and its clients.⁹⁹

3.1.2.2 Public Choice

Boston writes that “public choice theory has had a profound impact in the disciplines of economics and political science since the 1960’s, and has influenced policy formulation in many jurisdictions across numerous policy domains, including constitutional and

⁹⁴ Boston 2011, p. 22.

⁹⁵ Christopher Pollitt: *Managerialism and the Public Service: Cuts or Cultural Changes in the 1990s* 2nd ed., Blackwell, Oxford 1993, p. 5.

⁹⁶ *Ibid.*

⁹⁷ Boston 2011, p.23.

⁹⁸ Pollitt 1993, p. 2

⁹⁹ Aucoin 1990, p. 117–118.

institutional design, regulatory policy and public management.¹⁰⁰ It was with NPM that the theory of public choice was implemented on a large scale¹⁰¹ Niskanen's contribution to applied public choice in government is that public servants aim to increasing their budgets in order to achieve certain personal aims they value.¹⁰²

The assumption made by public choice theory is that human behaviour is dominated by self-interest. This does not mean that humans are necessarily selfish, however, when there is a situation of conflict interests human will put their personal interest first and pursue them in the most efficient manner. This assumption is the basis for how public choice theorists view individuals' actions within an organisation. William Niskanen was an influential author in the field.¹⁰³ This image of public servants shaped the public perception of the public sector, although there is limited empirical support for the claims made by Niskanen.¹⁰⁴ Public choice theorists have however mostly been focused avoiding that politician's favour narrow and short term special interests. The perceived risk was that unless this behaviour of favouring certain lobbies could be controlled it would lead to an ever expanding, inefficient state.¹⁰⁵

The solution offered by public choice theory, or as Abernach and Christensen categorize it, new institutional economics, is the alignment of the interests of the individuals with the organization. Successful institutions will find ways to channel the self-interest into working towards the aims of the leaders of the organization whereas unsuccessful organizations will fail at this and the actions of the individuals will not be channelled towards the aims of the leaders.¹⁰⁶

On the basis of this assumption certain policy suggestions are made. The idea is to implement changes that will enable a system of reward and punishment for "selfish" individuals doing the right thing. Contracts are favoured because specific aims can be set up through and the fulfilment of these aims can be monitored. Reward or punishment can

¹⁰⁰ Boston 2011, p. 23.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ See for instance William Niskanen: *Bureaucracy and Representative Government*, Chicago, IL 1971, Aldine Atherton.

¹⁰⁴ Boston 2011, p. 23. For the empirical study see Andre Blais and Stephane Dion (eds.): *The Budget Maximizing Bureaucrat: Appraisals and Evidence*, Pittsburg, PA 1991, University of Pittsburg Press,

¹⁰⁵ Boston 2011, p. 24.

¹⁰⁶ Joel D. Aberbach and Tom Christensen: *Translating Theoretical Ideas into Modern State Reform: Economics Inspired Reform and Competitng Models of Government*. *Administration and Society*, vol. 35 no. 5 (2003), p. 499.

the given. Privatization is favoured because it is assumed that private companies are not as easily affected by competing interest groups as public organizations and that private companies are able to better reward employees than public sector organizations are. Competition is favoured in order motivate individuals to strive for the aims of the organization set by the leaders because of the fear of losing.¹⁰⁷

According to Lähdesmäki “[p]ublic choice created the impression that bureaucrats aim at increasing their budgets and increasing personal utility. Public spending has increased and the politicians have lost control of the economy and the public servants, which they control and govern.” The response was according to Lähdesmäki to increase political control of the public sector.¹⁰⁸ There was a perceived need to control the supposedly wasteful spending of the public sector. The solution was found in managerialism. The private sector provided the model of a strong CEO-like leader to guide the public body as a corporation.¹⁰⁹

3.1.2.3 Agency theory

Agency theory has influenced fields such as economics, accounting, management political science and sociology since the 1970’s. As with most social science theories its validity remains disputed. Agency theory’s focus is on the relationship between the agency and the principal in which one party (the principal) delegates tasks to another party (agent). This relationship is used through the metaphor of contract. Contracts in agency theory are interpreted broadly and can both refer to a formal, written contract and an implicit, non-formal contract. The second type of contract cannot be legally enforced and they therefore depend on the goodwill and commitment of both parties. Departing in problems with control in firms, the application of agency theory soon spread to other areas such as public management. The questions in agency theory are focused on is how to best construct, monitor and enforce contracts.¹¹⁰

There are certain problems that arise in principal-agent relationships. Discrepancies in the goals of the principal and the agent may arise. Conflicts in the instruments needed to achieve the goal of the principal in the most efficient way are can pose problems, which require long-term contracts. Monitoring agents can be difficult and principals and agents

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Boston 2011, p. 25 – 26.

may have different attitudes to risk taking. The scale of the problems that might arise depends on the assumptions made regarding the drivers of human behaviour and the context of the agency relationship. Like public choice theory, agency theory assumes that individuals are rational, self-interested, with the intent of maximizing value. Opportunistic behaviour on both sides will create problems, as well as asymmetric availability of information between the parties.¹¹¹

Adverse selection and moral hazard are concepts that interests agency theorists. Problems might arise in pre-contractual situations where information the agent does not disclose information on the agent's skills and knowledge required fulfilling the obligations of a contract, or the information is not readily available to the principal. This might lead to adverse selection by the principal. A problem with moral hazard may appear when the principal is able to monitor some but not all of the activities of the agent. The agent might be tempted not to perform equally well in all situations.¹¹²

Agency theory addresses how to best negotiate, specify and monitor contracts within the described context. Principals have three different options as to address these problems. The principal may try to align the interests of the parties by incentives, use monitoring, or negotiate an agreement where the agent is bound to the interest of the principal or pay compensation the obligations are not met. The costs that arise from failure to make the agent act in the interest of the principal are called agency costs. Agency theory focuses on minimizing these costs by designing contracts. There are outcome-oriented contracts and behaviour-oriented contracts. The first relate to market governance structures, performance based remuneration and the transfer of property rights. The second one relates to hierarchical governance arrangements, salaried employments and career structures. When results are easily specified and monitored, and the contract can be enforced easily, outcome-based contracts are suitable. In other situations behaviour-orientated contracts may be more suitable. According to agency theory contracting out may be the best option when the circumstances of the first contract type are at hand whereas in-house production is more favourable in the second situation.¹¹³

Agency theory's contributions to NPM have been especially significant for inspiring and justifying reforms such as corporatization and privatization as well as governance

¹¹¹ Boston 2011, p. 26.

¹¹² Ibid.

¹¹³ Boston 2011, p. 27.

arrangements for state-owned enterprises. Regarding the organizational design of the core public sector agency theory contributed to ideas of how the relationship between policy advice and service provision should be arranged. This was a part reason to the establishment of semi-competing, publicly-owned service providers in health care and research and development in NPM-pioneering New Zealand. Beyond New Zealand the effect was less direct. However, as many reforms were copied by other countries the effect was indirect.

3.1.2.4 Transaction cost economics

Transaction cost economics (TCE) focuses on the design of optimal governance structures for various kinds of transactions. This includes the best way of organizing the production the production and exchange of goods and services, or in other words, whether a good should be produced by the public sector unit itself or purchased through public procurement. TCE examines and compares the costs of planning, adapting and monitoring the completion of tasks. TCE shares the basic assumption of human behaviour with Agency Theory but differs in focus. The focus of TCE lies with organizational boundaries. The independent variables of TCE are asset specificity, transaction frequency and uncertainty with future unexpected costs.

An asset, labour, land or capital is specific when it makes a necessary contribution to the production of a certain good, and it has no or low alternative value in other use. An example is an investment in highly specialized equipment might result in an asset for which there is either no or a less productive use. An investment in a specific asset is considered a sunk cost. The owner of a specific asset may have an advantage in relation to competitors seeking to enter the market who might be deterred because of high entry-barriers. The occurrence of asset specificity or non-specificity is dependent on the specifics of the market in question. When asset specificity is high markets are relatively incontestable with high barriers to entry and exit. In markets with low asset specificity the opposite is true.¹¹⁴

TCE addresses the problem of small number bargaining which can arise in a market with asset specificity. This problem occurs when a supplier gains an asset specific advantage from winning a contract. This can relate to a unique location or skills which gives the

¹¹⁴ Boston 2011, p. 28.

supplier an advantage over other competitors. When another similar contract is up for tender, the amount of bidders might have drastically been reduced because of the advantage achieved by the winner of the previous contract. This enables the remaining bidders to extract monopoly rents or to reduce quality in order to increase prices.¹¹⁵

Therefore, according to TCE, certain transactions are more suited for market-based mechanisms (public procurement) whereas others are more suitable for in-house production. Contracting out is the best option when the goods sought after is part of a market that is easily contestable, with low transaction costs. Transaction costs are low when there is a small number of relatively simple transactions, significant external constraints on opportunism and a low risk of adverse selection. Contracting out can be used when the contract can be monitored and enforced easily. This requires that quality and quantity of the desired goods is easy to specify and measure. Examples are cleaning, catering, waste management, and laundry service. In situations where these conditions are not present in-house production is optimal. In-house production is adaptable to changing circumstances unexpected additional costs as it is not dependent on highly specific contractual terms, as with contracting out.

Problems associated with uncertainty and opportunism can be directly managed through traditional hierarchy, long term-relationships, policy learning and step-by-step adaptations to the goal of the organisation. Large public organizations may however face other problems such as coordination issues, organizational slack, projects expanding beyond their original plans and failing internal controls.¹¹⁶

Boston writes that TCE impacted on NPM in three different ways. It provided answers to how to best organize the provision of public services (contracting-out through public procurement or in-house), and provided an analytical framework for this. Existing contracts (not necessarily legally binding contracts) were rearranged in order to improve monitoring and enhance specification. This also includes contracting within the public sector, or, put differently, the relationship between purchaser and provider within public sector organizations. TCE thereby contributed to new types of contracts, or relationships

¹¹⁵ Boston 2011, p. 28.

¹¹⁶ Ibid.

within the public sector. It can also be seen as having given a reason to the limitation of contracting-out as some of the more radical branches of NPM advocates.¹¹⁷

3.1.3 The significance of ideas

The strength and importance of ideological currents that have affected NPM have differed from country to country.¹¹⁸ The influence of these is not equally strong in all countries and other factors have affected the development of NPM.¹¹⁹ Boston's claim is that the survival of many NPM reforms shows that there is consistency to the reforms and that they are not inherently illogical. He however, admits that the neither inconsistencies between managerialism and public choice cannot be disregarded, that NPM advocates sometimes use evidence selectively, nor that NPM sometimes produces unintended results. Additionally, Boston sees it as a problem that the theories are not applied appropriately. In situations where TCE would advocate in-house production, some more radical forms of NPM have used contracting-out in situations where the correct conditions are not present, which has created problems with specifying and monitoring tasks. Another issue relates to the assumptions made regarding principals in Agency Theory. Too little attention is paid to the principal and it is often assumed that the principal is automatically competent. Opportunism and lack of knowledge among principals can also pose a problem.

In Europe, NPM affected the delivery of public services and the organizations responsible for their delivery. The organizations that were affected were the ones whose tasks were repetitive, a similar to the tasks of business, or could be made similar to businesses. In scholarship NPM researchers have focused on the reform process and on applying the public choice theory in practice.¹²⁰

The reforms in the public sectors can be noticed through a change in language used of the public sector. Whereas the formerly the emphasis was on public law and focus on procedures and structures, the new language of public administration has become more "economic". Terms used are; markets, customers, transactions, competition, equilibrium

¹¹⁷ Boston 2011, p. 30.

¹¹⁸ Boston 2011, p. 30.

¹¹⁹ Boston 2011, p. 31.

¹²⁰ Lynn 2006, p. 115.

and value.¹²¹ New technical terms include such terms as transaction costs, principal – agent models and game theory/collective action.¹²²

There are however problems with this approach. The perhaps most general criticism is that individuals do not only act in self-interest. Cultural or moral aims control the actions of people in addition to “self-interest”¹²³. As a general criticism of homo economicus Robin Molloy argues that humans are affected by factors such as historical context, race, gender, age, class, income, education, and geographical location.¹²⁴ Further, it is difficult to set aims in a public organisation as the aim might be ambiguous and difficult to measure.¹²⁵ For the public sector the motive of economic efficiency is rarely the primary objective, but comes second to objectives such as equality of access and general equity.¹²⁶ It can also be claimed that the nature of the tasks provided by the public sector is service and not to achieve an economic gain and that imposing on an organization which bases its operations on a notion of service provision the goal of economic gain will only create more problems.¹²⁷

The individual economic model views politicians and bureaucrats with suspicion. Politicians are viewed as an obstacle to efficiency as they focus on their own interest of being re-elected, instead of focusing on solving actual problems. Inconsistently however, the individual economic model also tasks politicians with setting up incentive schemes for managers and setting up goals.¹²⁸ Bureaucrats on the other hand are viewed as self-interest maximizing individuals who aim at increasing the size of their agency and extend programs they administer.¹²⁹

Another aspect of individual economic thinking is the redefinition of citizenship. Whereas citizenship traditionally emphasizes the collective nature of citizenship, the economic individual approach views citizens as individuals with a weak connection to other individuals. Citizenship gives people rights and obligations. A good citizen is expected to participate in elections and public life. The role of the new citizen emphasizes individual

¹²¹ Lynn 2006, p. 167.

¹²² Lynn 2006, p. 168.

¹²³ Ibid.

¹²⁴ Robin Paul Molloy: *Law in a Market Context*, Cambridge 2004, Cambridge University Press, p. 20.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Molloy 2004, pp 499– 500.

¹²⁸ Aberbach and Christensen 2001, p. 501.

¹²⁹ Aberbach and Christesen 2001, p. 502.

rights and choice. It focuses less on the broader political context of citizenship and more on the isolated individual. If participating in an election would not further the self-interest of the individual, there is no reason for the individual to participate in them.¹³⁰

Ideas derived from new institutional economics also change the relationship between citizens and public authorities. The nature of the relationship emphasized is one of the consumer, user, or client and that of a service provider.¹³¹ If the government is unable to secure an individual's rights the preferred cause of action is bringing an action before a court instead of using methods such as the political and administrative process.¹³² The public sector is no longer legitimized in its own right as embodiments of the political community, but must be legitimated through their efficiency in delivering services.¹³³

Using elections as tools of changing the civil service is seen as inefficient and slow. Instead, by changing the role of the citizen to become customer, the citizen will be empowered to affect how the public sector is run. The view of the citizen as a consumer raises questions of how well this fits the idea democracy. The idea of the citizen as a consumer can be considered non-political or even anti-political. It can also be considered as furthering the role of democracy and bringing it to a new level that involves more direct democracy. Another question raised is whether the shift will increase or decrease inequality. Some economist would say that this is an irrelevant question whereas others say that it furthers the interest of citizens to define them as consumers. The counter argument is that there is a lack of empirical evidence on the presence of a strong consumer interest in the public sector. Another point is that the election model with one vote per person is more equal than a market-oriented system which creates biases between consumers based on their social or political resources.¹³⁴

3.2 Policy elements

There has been definitional dispute of the central elements of NPM.¹³⁵ Different scholars have listed certain elements which partially deviate from each other.¹³⁶ Hood, claims that

¹³⁰ Aberbach and Christesen 2001, p. 503.

¹³¹ Aberbach and Christesen 2001, p. 503.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Aberbach and Christesen 2001, pp. 503–504.

¹³⁵ Pollitt and Dan 2011, p. 5.

¹³⁶ Christopher Hood: New Public Management, in International Encyclopaedia of Social and Behavioral Sciences, Neil J. Smelser and Paul B. Baltes (eds.), Oxford 2001, p. 12553.

the reforms that have been undertaken in the name of NPM today differ to such an extent from the traits listed by scholars in the beginning of the 1990's that defining a reform as an NPM reform reveals little of the contents of the reform.¹³⁷ He even goes as far as claiming that the use of the term has it has lost its analytical relevance.¹³⁸

In defining the elements of NPM, many authors have chosen a two-tier system. For their meta-study in NPM reform in Europe Pollitt and Dan¹³⁹ lean on the definition developed by Dunleavy et al.¹⁴⁰ Dunleavy et al. define NPM being “a strongly developed and coherent theory of managerial change based on importing into the public sector central concepts from (relatively) modern business practises and public choice – influenced theory”¹⁴¹ Other authors have described NPM in a similar way. Interestingly enough, the authors argue that NPM as a set of ideas is intellectually dead.¹⁴² Dunleavy et. al.¹⁴³ state that separate from the scholarly aspects of NPM, reforms inspired by these sets of ideas are still actively implemented, and the cognitive element is still very much present.¹⁴⁴ According to the authors only a minority of the elements are still actively being developed.¹⁴⁵

They continue by arguing that that key parts of the reform message of NPM have been reversed as they lead to “policy disasters”, and other significant parts have been halted.¹⁴⁶ Reforms enacted in the past based on NPM ideas are extremely difficult to reverse, argue the authors.¹⁴⁷ NPM ideas have become institutionalized are still gaining momentum in certain countries such as India, although they perhaps are not known by that name, or where the result of an active reform movement.¹⁴⁸

Sahlin-Andersson describes it as both a general trend towards changing the style of government and administration as well as describing certain reforms carried out.¹⁴⁹

¹³⁷ Ibid.

¹³⁸ Hood 2001, p. 12555.

¹³⁹ Pollitt and Dan 2011, p. 5.

¹⁴⁰ Dunleavy et al. 2006, p. 496.

¹⁴¹ Dunleavy et al 2006, p. 499.

¹⁴² Patrick Dunleavy, Helen Margetts, Simon Bastow, and Jane Tinkler New Public Management Is Dead—Long Live Digital—Era Governance, *Journal of Public Administration Research and Theory*, vol. 16 no. 3 (2006), p. 468.

¹⁴³ Dunleavy et al. 2006, p. 496.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Sahlin– Andersson 2001, p. 43.

According to Christensen and Laegreid it can also be understood “as consisting of potential inconsistencies, a tension between centralizing and decentralizing economic ideas. It can be seen as consisting of more specific instruments and programs, brought in to solve problems with old ones”.¹⁵⁰ Peter Aucoin writes that NPM compromised “efforts to roll back the state through some combination of privatization, downsizing the public service, contracting out, deregulation, expenditure reduction, program termination, downsizing the public service, and measures to contain pressures on the public purse”¹⁵¹. Dunleavy’s definition consists of three main elements¹⁵²:

“1) Disaggregation—Splitting up large public sector hierarchies in the same way that large private corporations earlier moved from U-form to M-form (multifirm) structures; achieving wider, flatter hierarchies internally; and respecifying information and managerial systems to facilitate this different pattern of control. In the public sector this theme implied a strong flexibilization of previous government-wide practices in personnel, IT, procurement, and other functions (Barzelay 2000)[¹⁵³], plus the construction of management information systems needed to sustain different practices.

2) Competition—Introducing purchaser/provider separation into public structures so as to allow multiple different forms of provision to be developed and to create (more) competition among potential providers. Increasing internal use was made of competition processes to allocate resources (in place of hierarchical decision making). The “core” areas of state administration and public provision were shrunk, and suppliers were diversified.

3) Incentivization—Shifting away from involving managers and staffs and rewarding performance in terms of a diffuse public service or professional ethos, and moving instead toward a greater emphasis on pecuniary-based, specific performance incentives. In the public sector this shift implied a movement “down grid and down group,” in Douglas’s

¹⁵⁰ Christensen and Laegreid 2001, p. 94.

¹⁵¹ Peter Aucoin: Politicians, Public Servants, and Public Management: Getting Government Right in B. Guy Peters and Donald J. Savoie (eds.): Governance in a Changing Environment. Montreal 2005: McGill–Queens University Press, p.113.

¹⁵² Dunleavy et al. 2006, p. 470.

¹⁵³ Michael Barzelay: The new public management: a bibliographical essay for Latin American (and other) scholars International Public Management Journal, vol. 3, no. 2 (2000), pp. 229–265.

cultural theory terms. Its impact has been particularly marked for professional groups (Kirkpatrick, Ackroyd, and Walker 2004) [¹⁵⁴].”

Disaggregation, competition and incentivization are part of the first tier and are overarching ideas which are underpinned by the second tier.¹⁵⁵ The second tier is made up of NPM-badged or incorporated ideas and specific policies which are constantly changing and developing NPM.¹⁵⁶ Changes at this level are primarily driven by the application of economics, business and public choice ideas to pragmatic problems in the public sector.¹⁵⁷ Focusing on the core NPM reformers¹⁵⁸, Dunleavy et al write that, the reforms were only implemented when they were adapted to seem managerially or legally fit for implementation in the public sector.¹⁵⁹ In their meta-study, Pollitt and Dan add to Dunleavy et al’s definition Robert’s two additional elements of NPM. According to Roberts NPM reforms have a way of thinking of the organisation of government. These reforms view the democratic process with scepticism for being short sighted and optimism regarding the outcome of removing certain processes from the democratic process¹⁶⁰.

In two widely cited articles from 1990 and 1995 Hood listed the central traits of NPM reforms.¹⁶¹ Hood listed seven distinguishable traits¹⁶²: unbundling public sector into corporatized units organized by product, more contract-based competitive provision, with internal markets and term contracts, stress on private sector management styles, more stress on discipline and frugality in resource use, visible hands-on top management, explicit formal measurable standards and measurement of performance and success and greater emphasis on output controls

¹⁵⁴ Ian Kirkpatrick, Stephen Ackroyd and Richard Walker: *The New Managerialism and Public Service Professions: Change in Health, Social Services and Housing*, London 2004, Palgrave.

¹⁵⁵ Dunleavy et al 2006, p. 471.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ The United States, the United Kingdom, Canada, Australia, New Zealand and the Netherlands, Dunleavy et al 2006, p. 468.

¹⁵⁹ Dunleavy et al 2006, p. 471.

¹⁶⁰ Roberts, A: *The logic of discipline; global capitalism and the architecture of government*, Oxford 2010, Oxford University Press, p. 140.

¹⁶¹ The articles are *Public Management for All Seasons*, *Public Administration*, Vol. 6 no. 3 (1991) and *The NPM in the 1980s: Variations on a Theme*, *Accounting, Organizations and Society*, Vol. 20 no. 2 (1995)

¹⁶² Christopher Hood: *The NPM in the 1980s: Variations on a Theme*, *Accounting, Organizations and Society*, Vol. 20:2:3 (1995), p. 96.

The first point implies corporatization leading to separate units as individual cost centres with their own organizational identity, either in fact or in law.¹⁶³ The intention of corporatization is to increase budgetary and managerial autonomy.¹⁶⁴ Competition is to be increased between both public sector units as well as between the public and the private sector.¹⁶⁵ One example of the implementation of private sector management style is the introductions of private sector pay and working conditions models in the public sector.¹⁶⁶ Public units are forced to maintain a stricter budget discipline and by actively searching for more cost-efficient ways of delivering public services, costs are to be kept at a minimum.¹⁶⁷ “Hands-on” management is linked to the idea of the manager having more freedom to manage. This implies more active control by visible top managers and freedom to use discretionary powers.¹⁶⁸ The move towards measurable standards implies more explicit standards of performance in terms of range, level and content of services to be provided.¹⁶⁹ Output measures are controlled through pre-set output measures, rather than on an ad-hoc basis with “orders of the day”.¹⁷⁰

Lapsley neither interprets Hood’s list as being intended to be normative, nor meant to be a pamphlet for reform. Rather, it should be viewed as a reflection of the events in the UK in the 1980’s. It is impossible to exactly pinpoint when NPM actually began. Hood places NPM in an international context, and identifies the UK as pacesetter for NPM reform.¹⁷¹

German scholar Gernod Gruening offers in a 2001 article a similar list based on later literature on the subject.¹⁷² These are: Budget cuts privatization, contracting out, user charges, vouchers, competition in the public sector, “Freedom to manage”, the separation of politics and administration, decentralization, accountability for performance, techniques of performance measurement and improved accounting, strategic planning and changed management styles and personnel management systems and incentives.

¹⁶³ Ibid.

¹⁶⁴ Ibid. p. 97.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Irvine Lapsley: *New Public Management: The Cruellest Invention of the Human Spirit?* ABACUS, Vol. 45, no 1. (2009), p. 2.

¹⁷² Gruening 2001, p. 17.

3.3 Criticism of NPM

Around the turn of the millennium European authors on NPM started challenging and rejecting the reforms and ideas of NPM.¹⁷³ Axel van den Berg provides an interesting critique of public choice theory in NPM.¹⁷⁴ Van den Berg claims that the application of public choice theory to public administration is part of a larger movement aiming at applying economic theories to all social sciences.¹⁷⁵

Van den Berg focuses on public choice theorists' relationship to the markets as the solution to the problem of the "ever expanding" public sector.¹⁷⁶ Public choice theory sets its point of origin in assumptions of human behaviour. The foremost interest of voters is to gain as much as possible from the vote they cast.¹⁷⁷ Voters are "rationally ignorant", i.e. well-informed of only those issues that personally affect them.¹⁷⁸ Politicians are seen as entrepreneurs seeking power, and who will "pay" voters in public services to stay in office.¹⁷⁹ Similarly bureaucrats will try to maximise the size of their own agency in the process of increasing their own benefits.¹⁸⁰ Lobby groups are seen as rent seekers who try to obtain privileges and protection from the government.¹⁸¹ By starting from these assumptions the result will be that the public sector will grow uncontrollably, leading to waste through unnecessary bureaucracy which drains the taxpayer's purse and increases the deficit.¹⁸² Politicians will align themselves with powerful lobbies that can provide them with the resources to get re-elected and to maintain the benefits they derive from holding a public office.¹⁸³ Lobby groups will "buy" policy that is beneficial to them such as tax rules, subsidies and favourable regulation.¹⁸⁴

¹⁷³ William Dunn and David Miller: A Critique of New Public Management and the Neo- Weberian State Advancing a Critical theory of Administrative Reform, *Public Organization Review*, vol. 7 (2007), p. 345.

¹⁷⁴ Axel van den Berg: Public Choice, the Public Sector and the Market: the Sound of One Hand Clapping? in Pauline Dibben, Geoffrey Wood and Ian Roper (eds.): *Contesting Public Sector Reforms*, London 2004, Palgrave Macmillan,

¹⁷⁵ Van den Berg 2004, p. 13.

¹⁷⁶ Van den Berg 2004, p. 15–16.

¹⁷⁷ *Ibid.*, p.18.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Van den Berg 2004, p. 19.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

In the words of van den Berg describing public choice theory “[t]hus, politics effectively become a market in which powerful actors exchange favours at the expense of the powerless majority”¹⁸⁵.

The response by public choice theory is that, assuming human nature will remain the same, limiting the role of government is the sole effective remedy.¹⁸⁶ Van den Berg concludes that the unanimous response in public choice literature, as to who should replace the retiring public sector, is the private sector.¹⁸⁷ Van den Berg, however, asks the question of how we can be sure that the selfish interest which leads to destructive results in the public sector will not lead to the same results if the private takes over some of the tasks of the public sector.¹⁸⁸ Van den Berg’s criticism relates to the fact that public choice theorists do not compare existing government run programmes to private sector alternatives but instead they assume that private alternatives automatically will be more efficient.¹⁸⁹

According to Van den Berg it is as if the public sector is the only source of problems, whereas public choice disregards markets problems such as collusions between enterprises.¹⁹⁰ Further, van den Berg points to the fact that markets are almost never perfectly competitive, that there might exist monopolies and harmful oligopolies, as well as principal-agent problems in the private market.¹⁹¹ The reason for the lack of an equally critical inquiry into the private sector is according to van den Berg that the comparator is the perfect market that only exists in textbooks.¹⁹²

Pauline Dibben and Paul Higgins write that “NPM reforms imply changes to both the internal working of the public sector and to external relationships.”¹⁹³ The author consider it problematic that NPM reforms are implemented without regard to the local context in which implementation takes place and that some groups who are already advantaged will benefit more from NPM reforms, and whether disadvantaged groups might actually

¹⁸⁵ Ibid.

¹⁸⁶ Van den Berg 2004, p. 20.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Van den Berg 2004, p. 21.

¹⁹⁰ Van den Berg 2004, p. 22.

¹⁹¹ Ibid.

¹⁹² Van den Berg 2004, p. 23.

¹⁹³ Pauline Dibben and P. Higgins: *New Public Management: Marketisation, Managerialism and Consumerism* in in Pauline Dibben, Geoffrey Wood and Ian Roper (eds.): *Contesting Public Sector Reforms*, London 2004, Palgrave Macmillan.

become more marginalised.¹⁹⁴ The authors argue that NPM reforms have their ideological base in neo-liberalism and that NPM have general animosity towards the provision of service by state monopolies.¹⁹⁵

The authors examine the implications of marketization. Although the most extreme case of marketizations involves the full privatization of state assets, the more common form is the introduction of private sector culture values and practises.¹⁹⁶ The difference between the private and the public sectors are however often underestimated. Significant differences are attitudes towards risk taking, accountability and the distinction between client and citizen.¹⁹⁷ One of the features of the public sector that distinguishes it from the private is that it mistakes by officials, working in a very public setting, are not tolerated by the public. Such mistakes cannot be outweighed by massive profits.¹⁹⁸ Unlike in the private sector where company officers ultimately are accountable to stockowners, civil servants are accountable to both politicians and the public.¹⁹⁹ Furthermore, unlike clients, citizens cannot choose a different service provider of government service if they are dissatisfied.²⁰⁰

Partnerships between the private and the public sectors may function as function as an alternative to outright privatisation. Depending on the nature of the partnership the influence of government on the provision of services may vary.²⁰¹ The result can be the creation of a so called quasi-market. Such a market can be operated through a public procurement mechanism where the government purchases services from the market such as in the case of health care in certain situations.²⁰² The quasi-market is signified by the purchaser/provider split where the government acts as purchaser and the private sector, or an organizationally separate public sector unit, acts as the provider of services.²⁰³ The public sector still maintains control of funding through taxation.²⁰⁴ In the view of the authors' the paradox of these quasi-markets is that they require regulation to be set up.²⁰⁵ Additionally, regulation usually requires a supervising regulator to enforce rules and

¹⁹⁴ Dibben and Higgens 2004, p. 27 – 28.

¹⁹⁵ Dibben and Higgens 2004, p. 28.

¹⁹⁶ Ibid.

¹⁹⁷ Dibben and Higgens 2004, p. 29.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

punish violators, which amounts to increased bureaucracy. Public bureaucracy is replaced by contract bureaucracy.²⁰⁶

Dibben and Higgens view critically the way managerialism shapes the workforce. Linked to microeconomics, managerialism focuses on measuring performance of employees.²⁰⁷ According to the authors the introduction of performance measures in order to ensure accountability leads to an increase in stress among public sector workers.²⁰⁸ However, the authors argue that there is tension between the controls to ensure accountability and managerialism's move towards a more entrepreneurial public sector.²⁰⁹ Coming out of the public choice theory, bureau-maximising was considered an issue. Microeconomics and managerialism provided an answer to the problem. By breaking up public monopolies and allowing alternative service providers competition was introduced into the public sector with the intention on bringing about more efficiency.²¹⁰

Because the introduction of alternative service providers leading to more efficiency is based on microeconomic models which do not always function according to theory, managerialism was needed to introduce make microeconomic models work in practise.²¹¹ It is believed that by making a distinction between operational and strategic level that efficiency gains will occur.²¹² The authors claim that the twin use of microeconomics and managerialism seem have a neutrality about it, however, they claim that the microeconomic and managerialist discourses are hostile towards the traditional notion of the public sector as a "good employer".²¹³ Under microeconomic discourse the monopoly position is seen as negative, and under managerial discourse interference and control is seen as something positive. The conclusion is according to the authors that the introduction of economic models of competition will negatively affect public sector personnel.²¹⁴ The authors argue that tighter controls lead to a more pressure on public sector workers which

²⁰⁶ Ibid.

²⁰⁷ Dibben and Higgens 2004, p. 31.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Dibben and Higgins 2004, p. 32.

²¹⁴ Ibid.

supposedly will lead to a better result for citizens. Questions have been raised regarding the validity, reliability and consistency of performance measures.²¹⁵

As previously mentioned, some of the criticism relating to NPM relates to the alleged redefinition of the citizen as nothing more than a consumer. NPM is concerned with involving members of the public in the decision-making process.²¹⁶ However, the private sector being used as a model, the citizen is usually viewed as a consumer. A problem with this approach identified by the authors is that it doesn't take into account citizens with fewer resources.²¹⁷ Such groups have difficulties voicing their concerns compared to other groups with stronger resources and in areas such as public health, safety and social work this might lead to competition between different customer groups.²¹⁸

4. Public services in Union law: Services of General Economic Interest

4.1 Public services and Union law

4.1.1 Public services in the Member State and their development in EU law

The concept of public service is a diverse concept which has historically been defined in different ways in the European countries.²¹⁹ Its definition has been dependant on the development of society, tradition, culture, institutions, social movements and the relation of force structured to it.²²⁰ In attempting to create a unified European definition of public services the term services of general economic interest has been developed.²²¹ According to Bauby there is often confusion regarding mission, objectives, finalities and organisation of public services.²²² In other words; how; why; with what result and by whom should a public service be provided? Bauby writes that there are two different concepts of public

²¹⁵ Ibid.

²¹⁶ Dikken and Higgens 2004, p. 33.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Pierre Bauby: From Rome to Lisbon: SGIs in Primary Law in Erika Szyszczak, Jim Davies, Mads Andeneas, Tarjei Bekkedal (eds.): Developments in Services of General Economic Interest, The Hague 2011, T.C.M. Asser Press, p. 20.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

services. There is a functional concept, emphasising the objectives and finalities, and an organic concept, assimilating public services to the entity providing them.²²³

The “public” in public services is sometimes understood as the meaning that a task is undertaken by a public body, whereas a public service mission can be provided by a private actor.²²⁴ Another aspect is that different levels of government within a state may apply different systems. At national, regional and local level service provision can be of a market or non-market nature, the providers may be of different legal nature, corporation, public entity or association, and doctrines or concepts may be more or less formalized.²²⁵ The French legal concept of public service is formalized, whereas the concept is not formalized in Sweden, Finland and the Netherlands.²²⁶ Bauby, however, writes that despite national differences there are unitary aspects to public services in all Member States. Some activities should not be subject to competition and market rules but to other specific rules with shared objectives. The objectives are the right to basic services and goods, such as education, health et al, promote the common interest of a community and to take into account long term interests for future generations through e.g. sustainable development.²²⁷ These values are according to Bauby at the centre of the system of values characteristic to all member states.

4.1.2 The Evolution of EU law and public services

The power to regulate public services was to a large extent in the hands of the member states. De Cecco writes that internal market law had left the area of public service alone and primarily focused on obstacles to the free movement of goods and the anticompetitive conduct of undertakings. This however changed as internal market law “infiltrated areas in which had previously not been characterised as markets and became subject to EU economic law. The role of competition law was instrumental of liberalisation was instrumental.²²⁸ Freedland argues that this spillover effect was a result of a change in the division of social and economic organization and activity within the Union relating to the

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Bauby 2011, p. 22.

²²⁸ De Cecco 2013, p. 137.

clear division between public and private sector within the Member States.²²⁹ Public services and public utilities were clearly part of the public sector. During the first decades of the existence of the Union the Member States relied on this division and had created a regulatory system around this binary system. Freedland argues that within Union law a field of public services law²³⁰, separate from public and private law, was created which he attributes to two factors.²³¹

First, the reconceptualization of the divisions of the sectors of the economy started in the 1980's with the movement towards privatization and liberalization (which has been discussed previously). There was, however, a movement back towards the public sector relating to the demand of recognition of the public service interest. The pressure of these two movements on the boundary between the private and the public sector caused the boundary to disintegrate or at least create a third public service sector. Within this sector the kind and degree of regulation would be different from other the purely private and the purely public sector. Freedland's argument is that this is the reason for the recognition of both the public service sector on both Union and Member State level.²³²

The other reason was a change on EU level which was distinct from the development in Member States. This relates to the relationship between the Union and the Member States and the creation of the internal market and its aims. Freedland's argument is that where the Union was created for the purpose of free and competitive markets and the conceptual pillars on which the Union rested was based on these values. The public sector was of the Member States whereas there was to be a European private sector.

On the one hand there was change within the Member States towards more neoliberal policies. Freedland writes that "this threatened to created private-sectors of de-regulated trade competition which would be more fiercely neo-liberal than was readily compatible with the [Union] model"²³³. With the nearing of the completion of the Single market the Union needed other bases of self-legitimization than free trade. Freedman argues that these

²²⁹ Mark Freedland: *Law, Public Services and Citizenship – New Domains, New Regimes?* in Mark Freedland and Silvana Sciarra: *Public Services and Citizenship in European Law*, Oxford 1998, Oxford University Press, p. 12.

²³⁰ Tony Prosser also uses this term He however emphasizes the difference between continental and Anglo-Saxon traditions of public service. See Tony Prosser: *Public Service Law: Privatization's Unexpected Offspring*, *Law and Contemporary Problems* 63:2000, pp. 63–83.

²³¹ *Ibid* no 328.

²³² *Ibid.*.

²³³ Freedland 1998, p. 14.

were the reasons why the Union acquired an enhanced capacity for public interest regulation. However, with this new problems have come up such as the clash of Member States with Union rules in trying to preserve the integrity of their public service sectors or trying to protect the integrity of their liberalized sectors from Union rules.²³⁴ It is in this context Freed land places SGEIs.

4.2 The legal basis of services of general economic interest

4.2.1 Article 106

In the original EEC Treaty²³⁵ the objective was to eliminate obstacles to trade but lacked any objectives relating to the harmonisation of public services in the member states.²³⁶ The intention was to embrace economic integration through a “Common market” instead of direct political integration.²³⁷ The EEC reinvented the concept of public service as SGEI, constituting derogation from fundamental economic policy provisions of the EEC.²³⁸ In order not to confuse the member states as to the meaning of “public service”, as there was a different meaning in Germany and France, the new concept was introduced.²³⁹

The original text was as follows:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

²³⁴ Ibid para 380.

²³⁵ Treaty establishing the European Economic Community of 1957.

²³⁶ Bauby 2009, p. 24.

²³⁷ Bauby 2009, p. 22. However, Bauby writes that economic integration was a means of eventually achieving political integration.

²³⁸ Erika Szyszczak in Erika Szyszczak and Johan Willem van de Gronden (eds.) in *Financing Services of General Economic Interest*, The Hague 2013, T.M.C. Asser Press, p. 7.

²³⁹ Bauby 2011, p. 22.

Prior to the Lisbon treaty what is now Articles 106 and 93 TFEU and were the only basis for SGEIs in the treaties.²⁴⁰ Between 1957 and 1986, when the European Single Act came into force, there was consensus that member states were the responsible for defining, organising, implementing and financing its services of general economic interest according to their own national traditions, and there was almost no integration regarding public services.²⁴¹ During this time article 106 was interpreted as allowing derogations from the community rules, in particular the rules on freedom of movement and competition, subject to the derogation being justified and proportionate.²⁴² Public monopolies were subject to sporadic litigation regarding their anti-competitive effects, during this time.²⁴³

The Single Act of 1986, which, amended the Treaty of Rome, did not contain any changes to the concerning SGEIs. However, with the introduction of the single market, the European institutions were given the task to implement the four freedoms and to realize of the single market, which included the aim of creating an internal market for services.²⁴⁴ During the time of the single act liberalisation programmes were enacted in the member states followed by liberalisation on EU level.²⁴⁵ Simultaneously public sector reforms were undertaken in a large number of the member states. Universal service obligations were introduced, requiring companies in the liberalized sectors to provide certain services to certain groups of consumer, such as the disabled, and to provide services in remote areas.²⁴⁶

According to Bauby, the consensus at that time limited services of general economic interest to the four freedoms of movement, communications, energy and transport and key infrastructure networks.²⁴⁷ Bauby names this the start of the Europeanization of public services. He writes that the strategy was “[t]o use the arms of the treaty, developed since 1957, (competition, free trade) to break frontiers and improve efficiency of often inefficient services”.²⁴⁸

²⁴⁰ Tim Maxian Rusche: The Almunia Package in Erika Szyszczak and Johan Willem van de Gronden (eds.) in *Financing Services of General Economic Interest*, The Hague 2013, T.M.C. Asser Press, p. 101.

²⁴¹ Bauby 2011, p. 24.

²⁴² Bauby 2011, p. 24.

²⁴³ Szyszczak 2013, p. 4.

²⁴⁴ Bauby 2011, p. 24. Article 13, Single European Act, OJ L 169 of 29 June 1987.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

Bauby lists several reasons for this development which he views as essential changes of the 1980's and 90's. The reasons were “[r]apid technological changes, internationalisation of economies and societies, diversification and territorialisation of needs, questioning burdens and efficiencies of public services, the strategies of major industrial and financial service groups, the development of the influence of the neo-liberal theories and the virtues of competition”.

Debate on Article 106 was sparked after some landmark decisions by the CJEU in the early 90's.²⁴⁹ There was fear that EU law would cause liberalization and privatisation, especially from public sector trade unions and political allies.²⁵⁰ Some of this fear was offset by some of the landmark cases of the early 90's. During the time after the enactment of the Single European Act there was debate on how SGEIs should be regulated, whether it should be a case law driven approach or a regulatory approach.²⁵¹ In an analysis of the Commission's soft law²⁵² on SGEIs Neergard concludes that the Commission has never been the driving force in setting up secondary law legislation on SGEIs and that the Commission has prevented legislative proposals from being drafted.²⁵³

Article 106 provides a “particular regime” for revenue producing monopolies and undertakings granted special rights in relation to the other provisions of the treaty.²⁵⁴ It

²⁴⁹ Wolf Sauter: Services of general economic interest and universal service in EU law, *European Law Review* 2:2008, p. 170.

²⁵⁰ Sauter 2008, p. 171.

²⁵¹ Sauter 2008, p. 171.

²⁵² As a definition of softlaw Neergaards uses Senden's definition: Soft law can be defined as “‘rules of conduct’ or ‘commitments’ are concerned, which are not devoid of all legal effect despite the fact that they have been laid down in instruments that have no legally binding force as such, and which aim at or may lead to some practical effect or influence on behavior” (Linda A.J. Senden: *Soft Law and its implications for institutional balance in the EC*, *Utrecht Law Review*, Vol. 1:2 2005, p. 81.) in Ulla Neergard: *The Commissions Soft Law in the Area of Services of General Economic Interest* in Erika Szyszczak, Jim Davies, Mads Andeneas, Tarjei Bekkedal (eds.): *Developments in Services of General Economic Interest*, The Hague 2011, T.C.M. Asser Press, p. 39.

²⁵³ Neergaard 2011, p. 50. Neergaard refers to Temple Lang's analysis (Neergaard 2011, p. 57): “However, Article 86(2) allowed Member States to exempt enterprises responsible for services of general economic interest from Treaty rules. For this reason, and because Article 86 was potentially applicable to a diverse range of politically sensitive situations in different Member States, the Commission made very little use of Article 86 until the late 1980s, and the questions which arose were referred to the Court of Justice from national courts. These questions were answered without the CJEU or the Commission finding it necessary to formulate general principles. The result was to develop several legal rules on a case– by– case basis, which have not been explicitly related to one another, which overlap, and which have not clearly answered several foreseeable questions which, due to accidents of litigation or to the prudence or tactics of plaintiffs, have not so far been raised.” (John Temple Lang: *State measures that restrict competition*, *Finnish Yearbook* 2003, p. 1. Retrieved from https://www.coleurope.eu/sites/default/files/uploads/event/288536_2.pdf on 31 March 2014.)

²⁵⁴ Sauter 2008, p. 3. Here Sauter seems to refer to the CJEU in Case 94/74 IGAV v ENCC [1975] ECR 699, para. 34. According to Baquero Cruz this is the best characterization of the nature of the provision. Citing:

contains a general rule and an exception, regarding SGEIs.²⁵⁵ Both the rule and exception are subject to supervision by the Commission.²⁵⁶ Article 106(2), which is the focus here must, be viewed in the context of paragraphs (1) and (2). As Baquero Cruz points out these provisions are not independent norms but must be read in relation to other norms of the Treaties. Their substance will therefore be determined by the content of other provisions. According to Baquero Cruz paragraph (1) enshrines the principle that private and public undertakings must be treated equally.²⁵⁷ Article 106(2) states that:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Its scope is defined by the concepts of the notion of economic activity, “undertaking entrusted with a service of a general interest” and by the notion of obstruction.²⁵⁸ The Article is both addressed to Member States as well as the undertakings themselves because of the public nature of the task performed by them.²⁵⁹ Baquero Cruz’s interpretation of the nature of Article 106(2) is that: “[it] appears not to be a justification nor an exception, but rather a binary– or switch–rule that establishes the conditions for the applications or non–application of the Treaty with regard to situations involving undertakings entrusted with the operation of services of general economic interest.

4.2.2 SGEIS in the Lisbon Treaty and Article 14 TEU

When the Treaty of Amsterdam came into force services of general economic interests were referred to as a part of the common values of the Union, unlike it previously had

“[...] Article 86 ‘lays down a *particular system* [*un régime particulier*] in favor of undertakings entrusted with services of general economic interest’.” (Baquero Cruz 2005, p. 176).

²⁵⁵ The general rule found in Article 106(1) is that: In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

²⁵⁶ Sauter 2008, p. 3. Article 106(3): 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

²⁵⁷ Julio Baquero Cruz: *Services of General Interest and EC Law in Gráinne de Búrca* (ed.): *EU Law and the Welfare State – In Search of Solidarity*, Oxford 2005, Oxford University Press, p. 172.

²⁵⁸ Baquero Cruz 2005, p. 173. Baquero Cruz argues that it is debatable whether the concept of development of trade is an autonomous criterion.

²⁵⁹ Baquero Cruz 2005, p. 174.

been.²⁶⁰ The definition of services of general economic interest was however more general than legally specific.²⁶¹ In Bauby's view the Amsterdam treaty of 1997 contained several elements which pointed towards the birth of a concept of a European concept of a service of general interest.²⁶² The Amsterdam treaty had the potential of for taking better care of and legitimising public service missions even if most of the provision continued to be subject to the priority of competition rules.²⁶³ Sauter, however takes a more sceptical view of its significance and refers to the French Senate calling the Article a "consolation prize."²⁶⁴ Buendía Sierra argued that Article 16 EC "does not modify Article 86(2) but rather reaffirms the logic behind the provision."²⁶⁵ Baquero Cruz argued that the Article 16 EC did not amend Article 106(2) but rather served as an element in the interpretation. In BUPA the GC referred to Article 14 TEU in its ruling, giving it relevance for the case law on SGEIs.²⁶⁶

With the Treaty of Lisbon Article 16 EC was amended. SGEIs were placed in Article 14 TFEU. The new provision contained a provision on competence for and Article 14 TFEU is now a clear and unchallenged legal basis for secondary legislation.²⁶⁷ The Article emphasizes the economic and financial conditions relevant to the mission of SGEIs.²⁶⁸

Article 14 TFEU

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

²⁶⁰ Ibid.

²⁶¹ Bauby 2011, p. 27.

²⁶² Bauby 2011, p. 26

²⁶³ Ibid.

²⁶⁴ Sauter 2008, p. 2008

²⁶⁵ Jose Luís Buendía Sierra: Article 86: Exclusive Rights and Other Anti-Competitive State Measures, in Jonathan Faull and Ali Nikpay, Oxford 1999, Oxford University Press, p. 313.

²⁶⁶ T-289/03 BUPA and Others v Commission [2008] ECR II -81, para. 167.

²⁶⁷ Stéphane Rodrigues: Towards a general EC framework instrument related to SGEI? Political considerations and legal constraints in Markus Krajewski, Ulla Neergaard, Johan Van de Gronden (eds.): The changing legal framework for services of general interest in Europe – Between competition and solidarity, The Hague 2009, T.C.M. Asser Press, p. 255.

²⁶⁸ Bauby 2011, p. 34.

Added to the Treaty of Lisbon was Protocol 26 on Services of General Interest which has the same value as the Treaties.²⁶⁹

Protocol (No 26) on Services of General Interest

The High Contracting Parties, wishing to emphasise the importance of services of general interest, have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional, and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;*
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

Unlike earlier treaties the, the text not only mentions SGEIs, but also so called non-economic services of general interest, NESGIs.²⁷⁰ According to the protocol the Union does not have competence over these services. The definition of an economic service is of course dependent on how the CJEU interprets the protocol.

4.2.3 Article 36 of the Charter of Fundamental Rights of the European Union

When the Charter of Fundamental Rights of the European Union was introduced in 2000, services of general economic interest were included in Article 36. Since 1 December 2009 the Charter has had the same legal status as the treaties according to Article 6 TEU. The article states “[t]he Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial

²⁶⁹ Article 51 TEU.

²⁷⁰ Bauby 2011, p. 33.

cohesion of the Union.” Before its entry into force Prosser wrote that Article 36 reinforces the view that the Article represents the basis for developing a European concept of citizenship rights.²⁷¹ Writing before its entry into force Baquero Cruz stated that the introduction of Article 36 Charter would not change much.²⁷²

In 2004 the Commission published a White Paper on services of general economic interest.²⁷³ The paper expressed the views of member states that had crystallized in the debates on SGEI’s arranged by the Commission.²⁷⁴ The conclusion of the paper was that “[t]he division of tasks and powers between the Union and the Member States leads to a shared responsibility of the Union and the public authorities in the Member States but detailed definition of services to be provided and delivery of those services remain the responsibility of the Member States.”²⁷⁵ Bauby writes that the paper created a doctrine that was reinforced with Article 14 TFEU and Protocol on 26 on Service of General Interest of the TEU and the TFEU.

Jääskinen views Article 36 Charter in the light of the new constitutional setting on Lisbon, in which the “social market economy” is an objective. The Charter recognizes rights such as education which could motivate the introduction of SGEIs. Although Jääskinen agrees with the argument that the Charter did not bring about any new rights in the field of SGEIs, he still argues that the importance of a binding constitutional document should be underestimated. In Jääskinen’s opinion the role of fundamental rights does not boil down to a distinction between those that confer rights enforceable in court to individuals and others labelled as programmatic or declaratory.²⁷⁶ At the moment of writing Article 36 Charter has not been invoked by the European courts.

²⁷¹ Tony Prosser: Competition Law and Public Services: From Single Market to Citizenship Rights? *European Public Law*, vol. 11 no. 4, 2005, p. 554.

²⁷² Baquero Cruz 2005, p. 178.

²⁷³ White Paper on Services of General Interest, 2004, COM(2004)

374 final

²⁷⁴ Bauby 2011, p. 28.

²⁷⁵ White Paper on Services of General Interest, 2004, COM(2004)

374 final, p. 4.

²⁷⁶ Niilo Jääskinen: The New Rules on SGEI, *European State Aid Law Quarterly* 4:2011, p. 599.

5. SGEIs in the European Courts: 106(2) applied

5.1 Economic activity

In this chapter I will outline the case law on Article 106(2) relevant for SGEIs in the field of State aid. After *Altmark*²⁷⁷ it was unclear what the role of Article 106(2) was. However, in *BUPA* the GC ruled that the first *Altmark* requirement is brought in line with the case-law of Article 106(2). It is therefore relevant to review the case law in the context of State Aid. First, as the Court noted in *BUPA*, the degree of control of Member States SGEIs will vary depending on the division of competence between the Union and the Member State. Thus, in cases where the Member State has more competence, the review of the Commission will be restricted to a review of “manifest error” instead of a global review.²⁷⁸ In the context of the first *Altmark* criteria SGEIs are subject to certain requirements. The SGEI mission must be entrusted by a public authority; it must be universal and compulsory. Additionally a Member State must give reasons to why there is a need of an SGEI mission and why it must be distinguished from other interests.²⁷⁹

The most fundamental requirement for the application of Article 106(2) is the requirement that the service at issue constitutes an economic activity.²⁸⁰ As stated by Protocol 26 to the Lisbon Treaty, the Union does not have competence in services of a non-economic general interest. Furthermore the Treaties are not applicable to non-economic activities in the field of competition.²⁸¹

In *Höfner* the CJEU had to consider whether employment procurement services constituted economic activity. The question concerned the employment procurement state monopoly in Germany. The CJEU argued that the fact that a task was carried out by a public authority did not make it any less of an economic activity, and referred to the fact that this activity was on many occasions performed by private undertakings.²⁸² This could mean that the limits of markets set by Member States plays no role whatsoever.²⁸³ Nistor describes this as the CJEU testing whether an activity could be conducted by a market, a situation which

²⁷⁷ Case C – 280/00 *Altmark Trans und Regierungspräsidium Magdeburg* [2003] ECR I-774789.

²⁷⁸ Case T-298/03 *BUPA*, para. 167.

²⁷⁹ T-289/03 *BUPA*, para. 172.

²⁸⁰ Craig and de Burca 2011, p. 1080

²⁸¹ Baquero Cruz 2005, p. 179.

²⁸² Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para. 22.

²⁸³ Baquero Cruz 2005, p. 180.

was repeated in *Ambulanz Glöckner*²⁸⁴.²⁸⁵ However, the CJEU does not seem to have stopped applying that test. Baquero Cruz writes that based on *AOK Bundesverband*²⁸⁶ the general rule is that when Member States chose to exclude the markets from a certain sector the CJEU does not apply the potential–economic–activity test of *Höfner*.

In *Eurocontrol* the CJEU held that an international organization charged with the task of air navigation services for which it charged airlines fees did not conduct an economic activity.²⁸⁷ The CJEU held that the tasks were closely connected to that of a public authority. The decision set out the criteria of nature, aim and rules to which the activity is subject. The CJEU held that the task of the authority were dissociable, whereas in other case it has.²⁸⁸ In *Albany* the CJEU considered whether a pension fund was conducting economic activity.²⁸⁹ The CJEU found that the pension scheme did not contain sufficient amounts of elements of solidarity to be considered a non–economic activity. The benefits depended on the financial result of the investment instead of being fixed. Additionally, there were exceptions to the requirement of mandatory membership.²⁹⁰ It is hard to distinguish between social and economic activities and what is often decisive is the legal framework regulating the activity.²⁹¹

Nistor lists as important factors of the concept of economic activity the social function, the solidarity principle, the lack of intention to make profit, the level of state control, whether the activity takes place on an upstream or downstream market and the presence of economic elements.²⁹² Baquero Cruz in this regard writes that “[an activity] is economic because the rules to which it is subject do not completely shield it from competition on the part of private undertakings. It would not be economic, however, if those rules were framed in such a way that no private undertaking would pursue it under those conditions.”²⁹³

²⁸⁴ Case C–475/99 *Ambulanz Glöckner* [2001] ECR I–8089.

²⁸⁵ Laura Nistor: *Public Services in the European Union – Health Care, Health Insurance and Educational Services*, The Hague 2011, TCM Asser Press, p. 143.

²⁸⁶ Case C – 264/01 *AOK – Bundesverband and Others* [2004] ECR I– 02493.

²⁸⁷ Case C–364/92, *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I–43, para. 30.

²⁸⁸ Baquero Cruz 2005, p. 180.

²⁸⁹ Case C-67/96 *Albany* [1999] ECR I-05751.

²⁹⁰ C–67/96 *Albany*, paras. 82–84.

²⁹¹ Baquero Cruz 2005, p. 182.

²⁹² See chapter 4.2. in Nistor 2011.

²⁹³ Baquero Cruz 2005, p. 182.

5.2 The procedural and minimum requirements for SGEIs

In order for there to exist an SGEI mission there, that mission needs to be entrusted by an act of public authority and it needs to be clearly defined.²⁹⁴ The first requirement relates to the connection of the SGEI mission to the state, in separating it from a private interest while the second requirement, distinguishes an SGEI mission from general regulation. The provision of the service in question must, by definition, assume a general or public interest. Thus, SGEIs are distinguished in particular from services in the private interest, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial²⁹⁵ In that context the Court has held that the collective management of intellectual property rights by a private organisation were not in the general interest even though the interest was collective and these services were recognized.²⁹⁶

The mere fact that the national legislature, acting in the general interest in the broad sense, imposes certain rules of authorisation, of functioning or of control on all the operators in a particular sector does not in principle mean that there is an SGEI mission²⁹⁷ The general or public interest on which the Member State relies must not be reduced to the need to subject the market concerned to certain rules or the commercial activity of the operators concerned to authorisation by the State.²⁹⁸ In other words, there is difference between general regulation and specific task entrusted to undertakings.

In the concept of public authority is not only included regulation, but also public service concessions.²⁹⁹ It is irrelevant whether the SGEI is being provided by a public or private entity.³⁰⁰ The entrustment of an operator entrusted with a SGEI mission must not necessarily be connected to special or exclusive rights but all undertakings can be entrusted with a SGEI mission.³⁰¹ The reason is that there is a difference between the special or exclusive rights and the SGEI mission. The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform

²⁹⁴ Case 172/80 *Züchner* [1981] ECR 2021 para. 7, Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, para 55, Case C-242/95 *GT- Link* [1997] ECR I – 4449, para. 51, Case C-280/00 *Altmark Trans und Regierungspräsidium Magdeburg* [2003] ECR I-774789, para 89. and Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031, para. 186 and Case T – 289/03 *BUPA*, para 181.

²⁹⁵ T–289/03 *BUPA*, para 178, para. 7 and Case 7/82 *GVL v Commission* [1983] ECR 483, paras 31–32.

²⁹⁶ See also Case C – 49/07 *MOTOE v Greece* [2008] ECR I–4863, paras 31–32.

²⁹⁷ Case 7/82 *GVL v Commission*, para. 32, and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941.

²⁹⁸ Case 7/82 *GVL v Commission* *GVL v Commission* para. 32, and *GB- Inno-BM*, para. 22)

²⁹⁹ Case T-17/02 *Fred Olsen v Commission* [2005] ECR II-2031, para. 188.

³⁰⁰ Case 127/73 *BRT v SABAM* [1974] ECR 313, para. 20.

³⁰¹ Case T – 289/03 *BUPA*, para 179.

an SGEI mission.³⁰² Therefore SGEI missions can be granted to all undertakings in one market.³⁰³ This is a specification of the main rule which separates the SGEI missions from general regulation.

The service must be universal and compulsory. The universality requirement does however not mean that a SGEI must correspond to a need common to the whole population or that it must be provided throughout the entire territory of a Member State.³⁰⁴ SGEIs with a limited material scope, territorial scope or with a limited group of users, does not call its status as a SGEI into question.³⁰⁵ This rule may seem contradictory, but as the CJEU has pointed out it is essentially about limiting the freedom to compete of an undertaking.³⁰⁶ The compulsory nature of a SGEI means that operators are required to provide this service on the market to anyone who wishes to take advantage of it.³⁰⁷ In situation where undertakings are granted special or exclusive rights, this service obligation is seen as the counterpart to that. The exclusive or special rights are connected to the additional costs of providing a service in situations which might not be financially viable.³⁰⁸ In a situation where all undertakings are entrusted with such a right the counterpart may be the obligation to provide it to all those who request them. However, undertakings may still be awarded a minimum level of business freedom.³⁰⁹ These elements separate SGEIs from services which are provided under complete freedom, and are thus separate.³¹⁰

5.3 The measures tested by the courts

Out of the case law on Article 106(2) a proportionality test has been developed which scrutinizes measures which somehow infringe on Treaty articles. The proportionality test is used to assess whether the restriction is linked to the SGEI mission and whether it is necessary and proportionate to fulfil that mission. In a State aid context, the proportionality test will be “translated” to be applied to the compensation of the SGEI as to ensure that there is no overcompensation. In BUPA³¹¹ this third Altmark requirement was linked to the proportionality test. Sauter writes that as Article 106(2) is an exception it must be

³⁰² Case T- 289/03, para 179.

³⁰³ Case T- 289/03, para 179.

³⁰⁴ Case T – 17/02 Olsen v Commission, para 186.

³⁰⁵ Case T – 289/03 BUPA, para 188.

³⁰⁶ Case T – 289/03 BUPA, para 188.

³⁰⁷ Case T – 289/03 BUPA, para 188.

³⁰⁸ Case T – 289/03 BUPA, para 188.

³⁰⁹ Case T – 289/03 BUPA, para 189.

³¹⁰ Case T – 289/03 BUPA, para 190.

³¹¹ Case T – 289/03 BUPA.

interpreted strictly and that the burden of proof is with the party that invokes it, the Member State or undertaking.³¹² The principle of proportionality is a general principle of Union law and there are two variations of it.³¹³ There is the less restrictive test “manifestly disproportionate” and the strict test of “least restrictive means”.³¹⁴ The first test requires that the measures are prima facie suitable and the second test requires that it is the least restrictive of all measures. The distinguishing factor on when the tests are applied is the competence of the Union in a specific policy area.

Sauter argues that this distinction was shown by the CJEU in *Fedesa and Others*³¹⁵. In that case regarding a directive in the area of the Common Agricultural Policy the CJEU held regarding the principle of proportionality that in an area in which the Union legislature has discretionary power the control of proportionality is limited controlling if a measure is manifestly disproportionate.³¹⁶ Applied to Member States Sauter argues that this indicates that in areas in which the Member States have competence the proportionality test must be restricted to controlling whether a measure is manifestly disproportionate.³¹⁷

Sauter argues that this position was confirmed by the CJEU in *Corbeau*³¹⁸, *Almelo*³¹⁹ and *Ambulanz Glöckner*³²⁰. *Corbeau* and *Amelo* have been interpreted as strengthening the case for state intervention in the liberalized sectors.³²¹ In *Courbeu* the Belgian postal monopoly was challenged. According to the Belgian criminal code it was an offence to engage in the same type of economic activities to which the Belgian postal services had an exclusive right. The CJEU was asked whether such a restriction was compatible with Article 106(2). To begin with the CJEU held that the Postal service had been awarded exclusive rights under 106(1) and was responsible for carrying out an SGEI, which justified the restriction of competition due to the exclusive rights. The question the CJEU then turned to was the degree of restriction necessary for the Postal service to provide the

³¹² Sauter 2008, p. 26.

³¹³ Sauter 2008, p. 26. For the principle of proportionality see for instance CJEU, Case C – 390/12 *Pfleger and Others*, Judgement of the Court on 30 April 2014, not yet published.

³¹⁴ Sauter 2008, p. 26.

³¹⁵ CJEU Case C– 331/88 *The Queen V The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others* [1990] ECR I–4023.

³¹⁶ Case C – 311/88 *Fedesa*, para. 14.

³¹⁷ Sauter 2008, p. 27.

³¹⁸ Case C–320/91 *ECR Criminal proceedings against Paul Corbeau* [1993] I – 02533.

³¹⁹ Case C–393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* ECR [1994] I – 01477.

³²⁰ Case C–475/99 *Ambulanz Glöckner* [2001] ECR I– 8089.

³²¹ Sauter 2008, p. 171.

SGEI.³²² The CJEU's analysis of the implications of a service obligation was that in order for the undertaking to operate in economic equilibrium, the undertaking was required to offset losses in less profitable sectors, in which it was required to operate by law, with profits made in profitable sectors. Introducing competition would in the CJEU's view create the risk that undertakings not bound by such a service obligation would focus their operations on the more profitable sectors, leaving the Postal service unable to cross-subsidise its operations in less profitable sectors, due to competition in other sectors.³²³ However, the CJEU further stated that the restriction of competition must be necessary in order to maintain the economic equilibrium and that any additional restrictions not relating directly to the performance of the SGEI would not be justified.³²⁴

Sauter views the significance of *Corbeau* from the proponents' point of view to be that the CJEU was ready to accept the argument exclusive rights and cross-subsidisation could be acceptable in the context of an SGEI, in order to ensure the financial stability of the operations of a universal postal system.³²⁵ From this point of view the significance that of *Amelo* was that a regional electricity distributor was charged with a universal service obligation was accepted as providing services of general economic interest.³²⁶

Bauby's view on the significance of *Corbeau* and *Almelo*, is that the CJEU reaffirmed that the article 106(2) "provides that undertakings entrusted with services of the with the operation of services of general economic interest may be exempted from the application of the competition rules contained in the Treaty in so far as it is necessary to impose restrictions on competition, or even to exclude all competition, from other economic operators in order to ensure the performance of the particular tasks assigned to them." According to Bauby the CJEU recognized that services of general interest may fall under other objectives, missions, and forms of organization than the general law of competition.³²⁷ Baquero Cruz considers the test applied in *Corbeau* did not even constitute a proportionality test in the strict sense but rather a necessity test. He considers that

³²² *Corbieau*, paras. 8–16 .

³²³ *Corbeau*, paras 17–18.

³²⁴ *Corbeau*, para 19.

³²⁵ Sauter 2008, p. 171 and *Corbeau*, paras 18 – 19.

³²⁶ Sauter 2008, p. 171, and *Almelo*, paras. 47 – 49.

³²⁷ Bauby 2011, p. 27.

Corbeau tipped the balance between market and non – market interest in the shape of SGEIs to the side of SGEIs.³²⁸

In *Commission v Netherlands*³²⁹ were the CJEU held that the test was not whether the application of treaty provisions threatened the survival of the undertaking, but rather whether the application obstructed the performance, in law or in fact of the special obligation entrusted to it.³³⁰ It sufficed to show that that, in the absence of the exclusive rights, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject.³³¹ The CJEU held that it follows from *Corbeau* that the conditions for the application of Article 90(2) are fulfilled in particular if maintenance of those rights is necessary to enable the holder of them to perform the tasks of general economic interest assigned to it under economically acceptable conditions.³³² The reference to *Corbeau* is the “economic equilibrium” test.³³³

In *Albany* the CJEU clarified the test as requiring that it is either not possible to perform the task defined by reference to the obligations and constraints to which it is subject, or, the task cannot be performed under economically viable conditions.³³⁴ It seems as if the CJEU accepts that showing the risk of loss in case the exclusive rights were withdrawn is sufficient to prove the necessity of the exclusive right in order to perform a task of general economic interest. Baquero Cruz states that this ruling confirmed the direction taken in *Corbeau*.³³⁵ The message on *Commission v Netherlands* was according to Baquero Cruz to be found in the concept of reconciling the aims of the Member States in using undertakings in the public sector to pursue policy aim with the interests of the Union.

In *Commission v Netherlands* the CJEU also held that, contrary to the opinion of the Commission, that the Member State is not under an obligation to show that no other conceivable measure could enable to be performed under the same conditions.³³⁶ In other

³²⁸ Baquero Cruz 2005, p. 192.

³²⁹ Case C – 157/94 *Commission v Netherlands* [1997] I – 5699. See also Case C – 438/02 *Hanner* [2005] ECR I – 4551, para 47.

³³⁰ *Commission v Netherlands*, para. 43.

³³¹ *Commission v Netherlands*, para. 52.

³³² *Commission v Netherlands*, para. 53.

³³³ *Corbeau*, paras 14–16.

³³⁴ *Albany*, para 107.

³³⁵ Baquero Cruz 2005, p. 193.

³³⁶ *Commission v Netherlands*, para 58. See also Case C – 340/99 *TNT Traco v Poste Italiane* [2001] I–04109, para 54 and Case C – 67/96 *Albany* [1999] I– 05751, para 107.

words, the Member State only has to show that in the absence of the measures, the provision of the SGEI would be possible or not possible under economically viable conditions, not that the measures are the least restrictive of competition. However, the measures should be limited to achieving the aims of the SGEI only. Baquero Cruz bases his argument on the necessity test on this reasoning by the CJEU.³³⁷

In evaluating the case law on SGEIs Baquero Cruz writes that the CJEU has chosen a less restrictive approach to the proportionality/necessity test in order to not eschew the democratic process and impose policy choices due to a strict interpretation of this test. As Baquero Cruz notes, a version of the test in which the CJEU would impose stricter requirements, i.e. the least restrictive measure test, would greatly minimize the margin of appreciation for Member States. The same reasoning can be seen in BUPA where the GC, referring to *Commission v Netherlands* held that cannot question the validity of the legal system of private health insurance. Baquero Cruz notes that the European courts' approaches to proportionality have created a very flexible concept.³³⁸

6. State aid

6.1 Regulation of State aid in EU law

In this chapter I will briefly review the rule on State aid law in the EU. The review will be brief as the focus of this thesis lies elsewhere. The rules on State aid in Articles 107–109 TFEU form part of the framework of EU competition law. These rules are applicable to private undertakings, public undertakings and Member States. Under these rules the EU institution and in particular the Commission are granted power to supervise subsidies, which in the legal context of the treaty may be qualified as State aid, given to industry by Member States. The general rule is that State aid which distorts competition and affects trade between Member States is prohibited. However, subsidies qualified as State aid may be accepted, or to use the language of Article 107, be found to be compatible with the internal market. In such a case the undertaking which has received the aid avoids the

³³⁷ Baquero Cruz 2005, p. 194.

³³⁸ Baquero Cruz 2005, 196.

obligation to repay the illegal aid. State aid may be found compatible on grounds relating to economic, regional, social and cultural concerns.³³⁹

The granting of subsidies relates to the role of the State in the economy. From an EU law point of view the basic starting point in the relationship between state and market in a State aid context is Article 345 TFEU which states that “the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”³⁴⁰ In addition Article 173 TFEU provides that the “EU and Member States shall ensure conditions necessary for the competitiveness of EU industry exist. While the Article is neutral towards public or private ownership it opposes dominance which can occur in a situation of public ownership. It also opposes the granting of a beneficial position to firms in the case where competition may be distorted.”³⁴¹ Specifically, the aim of Article 107 is to prevent trade between Member States from being affected by advantages granted by public authorities.³⁴² In providing a general definition of state aid Wyatt and Dashwood refer to the definition given by the CJEU in *Denkavit*³⁴³ as a general definition of State aid³⁴⁴:

The decisions of member states by which the latter, in pursuit of their own economic and social objectives, give, by unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought.

Article 107 contains rules on the conditions to identify State aid and the situations in which such State aid may be compatible with the internal market. It sets out rules on the basis of which compatibility is to be judged.³⁴⁵ In addition to the prohibition in Article 107(1) paragraph (2) contains mandatory and paragraph (3) discretionary exceptions. Paragraph (2) lays down the qualifications for situations in which an aid must be declared compatible with the internal market, whereas paragraph (3) lays down the qualifications for situations in which the situation requires assessment weighting the negative aspects with the positive aspects of the aid measure.³⁴⁶ The power to review aids is regulated under Article 108 which gives the Commission and the EU Courts the right to assess what constitutes aid and

³³⁹ Wyatt and Dashwood 2011, p. 705.

³⁴⁰ Paul Craig and Grainne de Burca: EU Law, 6th edition, Oxford 2011, Oxford University Press p. 1073.

³⁴¹ Craig and de Burca 2011, p. 1073.

³⁴² Case C – 39/94 *SFEI v La Poste* [1996] ECR I – 3547, para 58.

³⁴³ Case 61/79 *Amministrazione delle finanze dello stato v Denkavit* [1980] ECR 1205, para 31.

³⁴⁴ Wyatt and Dashwood 2011, p. 850.

³⁴⁵ Wyatt and Dashwood 2011, p. 849.

³⁴⁶ Wyatt and Dashwood 2011, p. 849.

what the conditions for compatibility with the internal market is. Paragraph (1) grants the Commission power of review; paragraph (2) regulates the Commission's power to declare aid illegal and the Council's power to declare aid compatible with the internal market. Paragraph (3) imposes on Member States an obligation to National courts lack the competence to declare aid compatible with the internal market.³⁴⁷ However, in certain situations

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

The central question in State aid law is what qualifies as aid. As can be seen from the article there is no definition what aid is, instead the article defines situations in which an aid is not compatible with the internal market. There concept of when an aid is incompatible has been developed by the CJEU together with the Commission. There are four prongs to the state aid test which are laid down in article 107(1). The prongs of the test are cumulative.³⁴⁸

The measure must confer an advantage on the recipient, the measure must originate in the member state or through state resource, the measure must threaten to distort or distort competition and it must have an effect on inter-state trade.³⁴⁹ Raitio writes that in case law these criteria are not always easily distinguishable from each other differentiated, which results in different criteria being applied in different circumstances.³⁵⁰ State aid cases might have market freedom connotations which will bring about public policy aims as justification for the national measures.³⁵¹

6.2 The State aid test under 107(1)

When assessing whether an aid confers a benefit on the recipient, it as this point not relevant to assess the rationale for the aid, that only becomes relevant once it has been

³⁴⁷ Case 78/76 Firma Steinike und Weinlig v Germany [1977] ECR 595, para 15.

³⁴⁸ Craig and de Burca 2011, p. 1087.

³⁴⁹ Craig de Burca 2011, p. 1087.

³⁵⁰ Juha Raitio: Eurooppaoikeus ja sisämarkkinat 3rd edition, Helsinki 2013, Talentum, p. 662.

³⁵¹ Ibid.

established that an aid exists.³⁵² The essential point is whether a measure confers an undue advantage on the recipient and whether it affects the markets.³⁵³ According to Siikavirta the central feature of state aid law is the benefit conferred.³⁵⁴ As an effect of such a benefit the recipient will have an advantage over its competitors on the market. The measure does not have to be a positive benefit, such as subsidies, but can also be a negative one which mitigates charges an undertaking would normally bear³⁵⁵, such as the supply of goods and services at a preferential rate³⁵⁶, a reduction in social security contribution³⁵⁷ or a tax exemption³⁵⁸.³⁵⁹ General measures of economic policy will not be classified as aid.³⁶⁰ This will however be discussed later in detail, as well as the definition of aid when the state is an owner of a company and which has posed some problems relation to the definition of an advantage.³⁶¹

Article 107(1) states that the must be “granted by a member state or through state resources. To be considered state aid, no direct “aid” must to be granted as long as the state uses regulatory power.³⁶² The advantage must directly or indirectly originate in state resources to be regarded as an aid.³⁶³ This rule has been difficult to apply in practise and has led to problematic situations.³⁶⁴ In early case law the CJEU was not coherent in its interpretation of the state resources criteria.³⁶⁵ The current interpretation of state resources is twofold.³⁶⁶ First the CJEU interprets whether there has been use of state resources and

³⁵² Craig and de Burca 2011, p. 1087.

³⁵³ Craig and de Burca 2011, p. 1087. See cases C – 487/06 P British Aggregates Association [2008] ECR I–5163, para. 61 and C–126/01 GEMO [2003] ECR I–13769, para. 34.

³⁵⁴ Kristian Siikavirta: Valtiontuki oikeuden ja politiikan yhtymäkohdassa – esimerkkinä ympäristönsuojelu, Helsinki 2007, Helsingin yliopisto, p. 99.

³⁵⁵ Case C–237/04 Enirisorse SpA v. Sotacarbo Spa [2006] ECR I–2843, para. 42.; Case C–222/04 Ministero dell’Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA [2006] ECR I–289, para. 131; Cases C–393/04 and C–41/05 Air Liquide SA and another v. Province de Liege [2006] ECR I–5293.

³⁵⁶ Case C–241/94 France v. Commission [1996] ECR I–4187, Case C–387/92 Banco de Credito International SA (Banco Exterior de Espana SA) v. Ayuntamiento de Valencia, Case C–39/94 Syndicat Francais de l’Express International (SFEI) v. La Poste [1996] ECR I–3547, Case C–143/99 Adria– Wien Pipeline GmbH and Wietersdörfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten [2001] ECR I– 8365.

³⁵⁷ Case C–75/97 Belgium v. Commission [1999] ECR I–3671.

³⁵⁸ Case C–6/97 Italy v. Commission [1999] ECR I–2981.

³⁵⁹ Craig and de Burca 2011, p. 1087.

³⁶⁰ Adria– Wien Pipeline GmbH and Wietersdörfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten [2001] ECR I– 8365, para. 35.

³⁶¹ Craig and de Burca 2011, p. 1088.

³⁶² Siikavirta 2006, p. 106.

³⁶³ Cases C–53/97–54/97 Viscido, Scandella and Terragnolo v. Ente Poste Italiane [1998] ECR I–2629, Case C –345/02 Pearle BV and others v. Hoofdbedrijfschap Ambachten [2004] ECR I–7139, Case T–351/02 Deutsche Bahn AG v. Commission [2006] ECR II–1047.

³⁶⁴ Raitio 2013, p. 663.

³⁶⁵ Ibid. Raitio refers to Case 290/83 Commission v France (Poor Farmers).

³⁶⁶ Ibid.

then whether these resources have been transferred.³⁶⁷ However, in some cases the transfer of resources did not need to be shown.³⁶⁸ As is typical in EU law the concept of state is understood in a broad sense.³⁶⁹ This means that the origin of the advantage may be a central, regional or local member state authority.³⁷⁰ For a measure to constitute aid it needs to be shown that the state exercised actual control over the undertaking and took part in adopting the measure.³⁷¹ A measure can therefore be considered aid if it originates from a body, regardless of its public or private nature, that has been set up or designated by the state.³⁷² In situations where the state bears no costs there is no aid.³⁷³

According to Raitio, the CJEU has taken a narrow view of what constitutes state resources.³⁷⁴ The narrow view was taken in *Ladbroke Racing*³⁷⁵ and *PreussenElektra*³⁷⁶ and confirmed in *UTECA* and *Aiscat*. The first case dealt with a French state owned gambling company arranging horse racing. The company had been using unclaimed winnings primarily to cover social costs and excess sums were transferred to the state. After a legislative amendment the unclaimed winnings were used as redundancy benefits to former employees. The CJEU held that the determining factor was that if the funds had been continuously within the control of the state the measure would be considered aid regardless of whether the funds are permanent assets of the state or not.³⁷⁷ *PreussenElektra* dealt with a regulatory benefit scheme for producers of certain types of renewable energy. Germany had imposed purchase obligation at a minimum fixed-price on distributors to act as an incentive for producers of renewables. The CJEU held that in this case the measure did not constitute aid as the resources were not state resources transferred to companies.

³⁶⁷ Raitio 2013, p. 663.

³⁶⁸ Case C-279/08 P, *Commission v. the Netherlands* [2011] ECR I-7671, para 104.

³⁶⁹ Juha Raitio 2013, p. 662. See also case C-188/89 *Foster* [1990] ECR I-3133 and subsequent case law.

³⁷⁰ 248/84 *Germany v Commission* [1987] ECR 4013, para. 17, Case C-323/82 *Intermills SA v Commission* [1984] ECR 3809, cases T-227, 229, 265, 266 and 270/01 *Territorio Histórico de Álava and others v Commission* [2009] ECR II-03029.

³⁷¹ Case C-482/09 *France v Commission* [2002] ECR I-4397, case T-442/03 *SIC – Sociedade Independente de Comunicação, SA v Commission* [2008] ECR II – 1161.

³⁷² Case 78/76 *Firma Steineke und Weinlig v Bundesamt für Ernährung und Forstwirtschaft* [1977] ECR 595, case 290/83 *Re Grants to Poor Farmers: Commission v France* [1985] ECR 439, Case 57/86 *Commission v Greece* [1988] ECR 2855, case T-358/94 *Compagnie Nationale Air France v Commission* [1996] ECR II-2109, Case 57/86 *Commission v Greece* [1988] ECR 2855.

³⁷³ Raitio 2013, p. 663.

³⁷⁴ Raitio 2013, p. 664.

³⁷⁵ Case C-83/98 P *Ladbroke Racing* [2000] ECR I-3271.

³⁷⁶ Case C-379/98 *Preussen Elektra* [2001] ECR I-2099.

³⁷⁷ Case C-83/98 *Ladbroke Racing*, para. 50.

Raitio is of the opinion that there is consistency in the CJEU's reasoning as the factor that separates these two cases is the state resource criteria.³⁷⁸

De Cecco writes that the question of the use of state resources had lacked a clear answer during decades and that the cases *Sloman Neptun*³⁷⁹, *Kirsammer–Hack*³⁸⁰ and *Viscido*³⁸¹. The cases all concerned derogations from generally applicable employment law.³⁸² The first case regarded a provision allowing ships registered in Germany to hire non-EU workers under less generous conditions, the second case regarded exemption from unfair dismissal laws regarding SMEs. The third case regarded fixed-term working contract legislation which favoured the Italian Post Office.³⁸³ In these cases the CJEU held that as no state resources were used there was no aid. De Cecco writes that *PreussenElektra* further consolidated and extended this line of case law.³⁸⁴ According to De Cecco the response to *PreussenElektra* is on one side that it was a welcome restriction to the expansion of the concept of aid, and on the other side that it was too formalistic an approach enabling member states to circumvent the state aid rules through regulatory design.³⁸⁵

State attribution was also considered in *Pearle*³⁸⁶, which Raitio views as a clarification of *PreussenElektra* and *Ladbroke*. *Pearle* concerned a Dutch, quasi-public, trade association board for skilled trades who had, by the request of its member trade organisation for opticians, required the members of that organisation to pay for an advertisement campaign to the benefit of all opticians. The CJEU held that such a measure does not fall under article 107(1) as the funds cannot be attributed to the state. The same line of reasoning was confirmed in *CIDEF*³⁸⁷ which concerned a French agricultural trade organisation which imposed a compulsory levy to be used for similar purposes as in *Pearle*.

³⁷⁸ Raitio 2013, p. 664.

³⁷⁹ Joined cases C–72/91 and C–73/91 *Sloman Neptune* [1993] ECR I – 887.

³⁸⁰ Case C – 189/91 *Kirsammer – Hack Petra v Nurhan Sidal* [1993] ECR I – 6185.

³⁸¹ Joined Cases C – 52/97, C – 53/97 and C – 54/97 *Epifanio Viscido, Mauro Scandella and Others and Massimiliano Terragnolo and Others v Ente Poste Italiane* [1998] I – 02629.

³⁸² Francesco de Cecco: *State Aid and the European Economic Constitution*, Oxford 2013, Hart Publishing, p. 110.

³⁸³ De Cecco 2013, p. 110.

³⁸⁴ *Ibid.*

³⁸⁵ De Cecco 2013, p. 111.

³⁸⁶ Case C–354/02 *Pearle* [2004] ECR I–7139.

³⁸⁷ Case C– 677/11 *Doux Élevage SNC and Coopérative agricole UKL– ARREE v Ministère de l’Agriculture, de l’Alimentation, de la Pêche, de la Ruralité et de l’Aménagement du territoire and Comité interprofessionnel de la dinde française (CIDEF)*, judgement on 30 May 2013.

The CJEU has followed the same approach as in *PreussenElektra* in subsequent case law.³⁸⁸ In *UTECA*³⁸⁹ the question asked to the CJEU regarded whether an obligation on television channels to use a certain percentage of their yearly profits to pre-finance European made films in any of the official languages of Spain. In practise this meant that most of the financing went to the Spanish film industry.³⁹⁰ Once again the CJEU held that the measure did not constitute state aid as the funds did not come from the state.³⁹¹ The reasoning of *Ladbroke* and *PreussenElektra* and was summarized in *Aiscat*.³⁹² In *Aiscat*³⁹³ the CJEU highlights the distinction between aid given by a member state and aid from state resources. The CJEU held that 107(1) does not imply that any aid or benefit constitutes state aid regardless of whether it is financed by the state or not, but that it should be interpreted as meaning aid given directly by the state and by a private or public body set up by the state.³⁹⁴

According to article 107(1) the aid must be directed towards “certain undertakings or certain goods”.³⁹⁵ This requirement demands that the measure be specific.³⁹⁶ Measures that are not specific do not constitute state aid which implies that general economic policy measures do not fall within the scope of article 107(1).³⁹⁷ Drawing the line between a general economic policy and a specific state aid can be difficult especially in circumstances where the measure is being disguised as a general support or restructuring programme.³⁹⁸ The intent of the measure is not relevant to the assessment of state aid.³⁹⁹ Measures such as the lowering of social and pension costs may constitute aid if the measure is not general enough but in favour of certain undertakings.⁴⁰⁰ The concept of aid

³⁸⁸ Raitio 2013, p. 666.

³⁸⁹ Case C – 222/07 *UTECA* [2009] ECR I–1407.

³⁹⁰ Raitio 2013, p. 666.

³⁹¹ *UTECA* paras. 41–47.

³⁹² Raitio 2013, p. 666.

³⁹³ Case T – 182/10 *Associazione italiana delle società concessionarie per la costruzione e l’esercizio di autostrade e trafori stradali (Aiscat) v European Commission*, judgement on 15 January 2013.

³⁹⁴ *Aiscat*, para. 103.

³⁹⁵ Case C – 143/99 *Adria– Wien Pipeline* [2001] ECR I – 8365, para 34, case C – 409/00 *Spain v Commission* [2003] ECR I – 1487, para. 47 and case C – 126/01 *GEMO* [2003] ECR I – 13769, para 35.

³⁹⁶ *Siikavirta* 2006, p. 111.

³⁹⁷ *Ibid.*

³⁹⁸ Raitio 2013, p. 667.

³⁹⁹ See Case C – 241/94 [1996] ECR I–4551 in general and para. 20 specifically.

⁴⁰⁰ Case 173/73 *Italy v Commission* [1974] ECR 709.

includes in addition to positive benefits also negative ones such as the lowering of fees otherwise demanded.⁴⁰¹

The definition of specificity is whether a one undertaking or a sector of the economy benefits more than other companies from a state measure than others does in a way that is discriminatory.⁴⁰² An example of a measure that does have a differentiated effect on recipients is tax measures which benefit all undertakings.⁴⁰³ Differentiated value added tax, different tax treatment based on the legal form of a company and differences based on the tax system do not constitute state aid as long as they are not selective and the authorities do not have discretion in these matters.⁴⁰⁴ In *Adria – Wien Pipeline* the CJEU had to answer the question whether a rebate on an energy tax paid to certain undertakings was considered aid under 107(1). The rebate was only paid to undertakings that produced goods, not for example to those who provided services. The CJEU held that for the measure not to be considered aid it would have to make no distinction between any undertakings within a national territory when conferring a benefit.⁴⁰⁵ The CJEU considered the measure to constitute aid under 107(1) as it selectively benefitted a certain group of undertakings.

In the *Azores*⁴⁰⁶ case the CJEU had to consider whether a tax measure benefited undertakings based on the Portuguese territory the Azores islands in the Atlantic. The question at hand was whether a tax reduction, specific to the Azores, in relation to the generally applicable corporation tax, constituted state aid under 107(1). The Portuguese legislation allowed for the local parliamentary body to adopt a tax reduction, which the local parliament had taken advantage of. The CJEU held that when dealing with taxation the reference framework is important, i.e. what tax rule to compare with in order to see whether the measure is selective.⁴⁰⁷

However, that framework need not be the entire geographical area of the member state so that a measure conferring an advantage in only one area of the member state would not automatically be considered selective.⁴⁰⁸ The test laid down by the CJEU was whether the

⁴⁰¹ Case C – GEMO [2003] ECR I-13769 para. 28 and case C-341/06 P and C – 342/06 P, *Chronopost v UFEX* [2008] ECR I – 4777, para. 123.

⁴⁰² *Siikavirta* 2006, p. 111.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Adria–Wien Pipeline*, para. 35.

⁴⁰⁶ Case C-88/03 *Portugal v Commission* [2006] ECR I – 7115.

⁴⁰⁷ Case C-88/03 *Portugal v Commission*, para. 56.

⁴⁰⁸ Case C-88/03 *Portugal v Commission*, para. 57.

regional body would be sufficiently autonomous in relation to the central government. The regional body must play a fundamental role in defining the political and economic environment in which the undertakings operate.⁴⁰⁹ In this case however it was found that the Azores were not autonomous enough and the measure was considered specific and not general.⁴¹⁰

According to Raitio criteria of selectivity was specified in *British Aggregates*.⁴¹¹ The case dealt with a levy on new aggregates as opposed to recycled ones. The aim of the measure was to create incentives for the use of more environmentally friendly products. The British Aggregates Association had appealed the decision made by the GC.⁴¹² The CJEU held that it is at first necessary to establish whether a measure confers a benefit on one or more undertakings within the context of a legal system, in relation to other undertakings which are in a legally or factually comparable situation.⁴¹³ Second the CJEU held that measures that are selective due to the nature and structure of the overall system of which they form a part are not considered state aid.⁴¹⁴

6.3 The effect on competition and trade

As a third condition there is the distortion of competition or the threat of the distortion of competition by aid favouring certain undertakings or products.⁴¹⁵ This condition rarely requires a much evidence to be proven in state aid cases.⁴¹⁶ As Craig and De Burca write a subsidy will undoubtedly place an undertaking at an advantage in relation to other undertakings and this condition is often an unproblematic issue in state aid law.⁴¹⁷ However, as Siikavirta writes, the idea behind state aid law is not that all forms of aid will distort competition, and thus should be banned, but that prohibited aid must be separated from aid that is compatible with the market.⁴¹⁸

⁴⁰⁹ Case C-88/03 *Portugal v Commission*, paras. 53 – 58.

⁴¹⁰ *Portugal v Commission*, para 79.

⁴¹¹ Case C – 487/06 P *British Aggregates Association* [2008] ECR I – 10515.

⁴¹² Case T – 210/02 *British Aggregates Association* [2006] II– 02789.

⁴¹³ Case C – 487/06 P *British Aggregates Association* *British Aggregates*, para. 82

⁴¹⁴ Case C – 487/06 P *British Aggregates Association*, para 83.

⁴¹⁵ Craig and de Burca 2011, p. 1092.

⁴¹⁶ Alkio 2010, p. 39.

⁴¹⁷ Craig and de Burca 2011, p. 1092.

⁴¹⁸ Siikavirta 2006, p. 112.

According to the CJEU state aid law pursues, together with antitrust law, the aim of undistorted competition in the internal market.⁴¹⁹ State aid can be used as a way of correcting market failure⁴²⁰ reviewing the Commissions position on state aid in the State Aid Action Plan⁴²¹ De Cecco writes that avoiding obstacles to productive, allocative and dynamic efficiency seems to be the Commission's central concern.⁴²² De Cecco writes that a similar inquiry into the competitive effects of state aid as in antitrust law⁴²³ is not required by the CJEU, even though there has been a gradual increase in the intensity of such reviews.⁴²⁴ In Philip Morris⁴²⁵ the CJEU dismissed an initial attempt to introduce a scrutiny of the competition effects of an aid measure.⁴²⁶ The CJEU held that it was unnecessary to define relevant product and geographical markets and the relationship between the beneficiary and its competitors. Instead it was sufficient to show that the aid facilitated the increase of the production capacity, and that the measure relieved the undertaking of parts of the costs arising from an increase in production capacity which its competitors would normally have to bear.⁴²⁷ The CJEU stated that “[w]hen state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid”⁴²⁸ The same reasoning has been frequently used since.⁴²⁹ According to Raitio the relevance of this case was however that the Commission need only show a potential threat to the distortion of competition.⁴³⁰ Referring to Italy v Commission⁴³¹ Craig and de Burca write that the CJEU will compare the situation of an undertaking before it received the aid with the post-aid situation.⁴³²

⁴¹⁹ Case C – 225/91 Malta v Commission [1993] ECR I–3203, para 42, Case T–49/93 Société Internationale de Diffusion et d’Edition (SIDE) v Commission of the European Communities [1995] ECR II – 2501, para. 72, Case T–156/98 RJB Mining v Commission [2001] ECR II–337, para. 13.

⁴²⁰ Ibid.

⁴²¹ Commission: State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009, COM (2005) 107 final, 7 June 2005.

⁴²² De Cecco 2013, p. 32.

⁴²³ TFEU 101 and 102.

⁴²⁴ De Cecco 2013, p. 33.

⁴²⁵ Case 730/79 Philip Morris, [1980] ECR 2671, 2688.

⁴²⁶ De Cecco 2013, p. 33.

⁴²⁷ Case 730/79 Philip Morris, paras. 11–12.

⁴²⁸ Case 730/79 Philip Morris, para. 11.

⁴²⁹ De Cecco 2013, p. 34. See for example Joined Cases C–78/08 to C – 80/08 Paint Graphos [2011] ECR I–07611

⁴³⁰ Raitio 2011, p. 670. See also: 488C– 142/87 Tubemeuse, [1990] ECR I– 959, paras. 3540 ja T–447/93 and T–449/93 [1995] ECR II–1971, paras. 139 and 141.

⁴³¹ Case 173/73 Italy v Commission [1974] ECR 709.

⁴³² Craig and de Burca 2011, p. 1092.

According to article 107(1) an aid is incompatible with the internal market in so far as it affects trade between member states. In practise this condition will be fulfilled when an undertaking engages in trade in other member states or the sector in which the undertaking operates in stretches to another member state.⁴³³ It is often sufficient for an undertaking to be active in a sector in which there inter-state trade occurs, even though the undertaking itself does not engage in inter-state trade.⁴³⁴ The Commission only needs to show that inter-state trade will potentially be affected.⁴³⁵ Even a relatively small amount of aid or the small amount of recipients may affect inter-state trade.⁴³⁶ This is likely to be the case in a sector where there is strong competition in the sector in which the undertaking operates.⁴³⁷

7. Financing public services – Altmark and its aftermath

7.1 Legal approaches to financing Public Services: A background to Altmark

SGEIs find its link to state aid law, and more precisely to Article 107 TFEU through how the way they are financed. From a state aid law point of view, because states usually fund services of general economic interest, the central issue in SGEIs is the price paid for the service.⁴³⁸ The case law on the issue of financing SGEIs was for long dominated by two sharply contrasting views. These sides were dubbed “the compensation approach and the State Aid approach”.⁴³⁹ The CJEU originally took the compensation approach only to

⁴³³ Siikavirta 2006, p. 113.

⁴³⁴ Ibid.

⁴³⁵ Case C- 298/00 P Italy v Commission [2004] ECR I- 04087, para. 49. The CJEU confirmed the GCs interpretation of the inter- state trade element in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 Alzetta and Others v Commission [2000] ECR II-2319, paras. 77 – 79.

⁴³⁶ Italy v Commission, para. 54 Case C- 142/87 Belgium v Commission [1990] ECR I- 959, para 43, Joined Cases C-278/92 to C-280/92 Spain v Commission [1994] ECR I-4103, para. 42, and Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR I-7747, para. 81

⁴³⁷ Italy v Commission, para. 54, Case 259/85 France v Commission [1987] ECR 4393, para. 24, and Case C-351/98 Spain v Commission [2002] ECR I-8031, para. 63.

⁴³⁸ Alkio 2010, p. 92.

⁴³⁹ Opinion of AG Jacobs in Case C- 126/01 GEMO [2003] ECR I- 13769, para 94.

reverse it later and to specify it in Altmark. Before Altmark the State aid approach was generally favoured by the Commission and the GC.⁴⁴⁰

The compensation approach was taken in ADBHU⁴⁴¹. The case concerned the collection of waste oil for which the certain undertakings were responsible and received an indemnity. Regarding the question of whether the indemnity was considered an aid measure the CJEU held that compensation did not constitute aid under 107(1) but rather a consideration for a service.⁴⁴² Advocate General Lenz held that “the indemnities must not exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit.”⁴⁴³ In opposition to this view the State aid approach holds that the funding of SGEIs should fall within the definition of State aid, but also that it should be able to benefit from the exemption in Article 106(2).⁴⁴⁴ The benefit of this approach is that Member States would be required to notify aid to the Commission and national CJEU would be bound by the standstill obligation.⁴⁴⁵ In other words, SGEI financing would be subject to the control of the CJEU and the Commission.

The position was outlined by the CJEU in Banco Exterior de España⁴⁴⁶ in which the CJEU held that a tax measure which exempted a public undertaking from a certain tax, when the undertaking was operating in the public interest, would be caught by Article 107(1), however, it could possibly be exempted by Article 106(2). AG Lenz wrote on the relationship between Articles 106(2) and 107 that Article 106(2) cannot be relied on from the outset.⁴⁴⁷ AG Lenz concluded that Article 106(2) should be viewed similarly as to the types of aid which are compatible in with the internal market according to Article 107(2) and (3).⁴⁴⁸ AG Lenz goes on to cite the CJEU in Italy v Commission⁴⁴⁹ where it was concluded that “it must further be observed that the application of article [106(2)] of the treaty is not left to the discretion of the member state, which has entrusted an undertaking

⁴⁴⁰ Leigh Hancer and Pierre Larouche: EU Regulation of Network Industries and Services in Paul Craig and Grainne de Burca (eds.): *The Evolution of EU Law*, 2nd edition, Oxford 2011, Oxford University Press, p. 761.

⁴⁴¹ Case 240/83 ADBHU [1985] ECR 531.

⁴⁴² Case 240/83 ADBHU, para. 18.

⁴⁴³ Opinion of Mr Advocate General Lenz delivered on 22 November 1984 in Case 240/83, p. 536.

⁴⁴⁴ De Cecco 2013, p. 140.

⁴⁴⁵ De Cecco 2013, p. 140.

⁴⁴⁶ Case C – 387/92 Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia [1994] I– 00877, paras 14 – 22.

⁴⁴⁷ Opinion of Mr Advocate General Lenz delivered on 11 January 1994 in C – 387/92, para 71.

⁴⁴⁸ Ibid, para 66.

⁴⁴⁹ Case 41/81 Italy v Commission [1985] ECR 873.

with the operation of a service of general economic interest. Article [106(3)] assigns to the commission the task of monitoring such matters, under the supervision of the CJEU.”⁴⁵⁰

This State aid approach was subsequently applied by the GC, which further explored the interaction between Article 106(2) and Article 107(1) TFEU in *FFSA*⁴⁵¹ and *SIC*⁴⁵². *FFSA* concerned a tax concession, which benefited the state-owned post monopoly, *La Poste* in comparison to its competitors. The tax concession was a compensation for providing certain universal services such as the presence of post offices throughout the entire territory of France. The GC held that the tax measure constituted aid as it conferred an advantage.⁴⁵³ The GC held that aid which normally would be considered incompatible with the internal market may be compatible under Article 106(2). As derogation 106(2) had to be interpreted strictly, it was not enough that an undertaking has been entrusted with a SG EI; it must also be shown that the application of the treaty provisions would obstruct its performance.⁴⁵⁴

This approach was later overturned by the CJEU.⁴⁵⁵ In *Ferring*⁴⁵⁶ the CJEU introduced the so called compensation approach. *Ferring* dealt with wholesale medical distribution in France. Distributors of medicines were required by French law to maintain in stock a certain amount of pharmaceutical products and to be ready to supply and deliver them within a certain amount of time, a so called public service obligation. Partly in order to compensate for the PSO the French government implemented a tax which exempted wholesale distributors of pharmaceutical products. This tax was challenged by a French pharmaceutical company as conferring an advantage upon wholesale distributors and thus constitutes aid under Article 107(1). In this case the CJEU concluded that compensation for a public service obligation is not State aid within the meaning of Article 107(1) TFEU, unlike it had done in *FFSA*.

The CJEU based its reasoning on *ADBHU*⁴⁵⁷. Certain undertakings were required to dispose of waste oil. For this service they received a compensation which was equal to the costs. In *ADBHU* the CJEU had considered such a compensation not to constitute aid, but

⁴⁵⁰ C 41/81, para 30.

⁴⁵¹ Case T- 106/95 *FFSA, FCA and BIPAR v Commission* [1997] ECR II- 229.

⁴⁵² Case T- 46/97 *SIC – Sociedade Independente de Comunicação SA v Commission*

⁴⁵³ T – 106/95 *FFSA*, para. 167.

⁴⁵⁴ T – 106/95 *FFSA*, para. 167

⁴⁵⁵ De Cecco 2013, p. 141.

⁴⁵⁶ Case C – 53/00 *Ferring v ACOSS* [2001] ECR I – 9067.

⁴⁵⁷ Case 240/83 *ADBHU* [1985] ECR 531.

rather a compensation for a SGEI.⁴⁵⁸ In *Ferring* the same conclusion was made. The CJEU held that as long as the amount of compensation paid to the wholesale distributors did not exceed the yearly costs of meeting the PSOs, i.e. that there was a connection between the compensated sum and the costs of providing the service, it was not a question of State aid according to Article 107(1).⁴⁵⁹ Subsequently the CJEU applied Article 106(2) alone and held that additional costs to the cost of meeting the public service obligation will not be considered as necessary to meet the obligation as there is no advantage conferred.⁴⁶⁰

De Cecco writes that the significance of this decision was that it moved back the compensation issue from the compatibility stage to the threshold stage.⁴⁶¹ In other words, the CJEU assessed whether Article 107(1) applied, not whether the measure was aid compatible with the internal market. Such an assessment will go back to analysing the reasons for state aid instead of the effect on competition and possible compatibility with the internal market. Instead of, as in the State aid approach, assessing whether a measure confers an advantage, the compensation approach directly concludes that in cases where undertakings are entrusted with SGEIs there cannot be an advantage since the measure compensates for an SGEI. Only if the compensation exceeds the additional costs incurred from the performance of the SGEI there is an advantage conferred upon the undertaking.

Rizza criticises *Ferring* and the compensation approach negate the function and relevance of Article 106(2).⁴⁶² AG Léger who criticized the compensation approach in his opinion in *Altmark*⁴⁶³ was of the opinion that *Ferring* blurred the line between whether a measure is categorized as aid and whether the aid is justified.⁴⁶⁴ In his criticism he contends that Article 106(2) loses its applicability with the *Ferring* argumentation. Léger reasons that if Article 107(1) does not apply as the measure only compensates a PSO, then Article 106(2) has no effect. If there is “overcompensation” the Article 107(1) will be applied to the additional costs which exceed the costs arising from the PSO. According to this reasoning, Article 106(2) is therefore deprived its effect.⁴⁶⁵ Additionally Léger found it problematic

⁴⁵⁸ Case 240/83 *ADBHU*, para.18.

⁴⁵⁹ Case C-53/00 *Ferring*, para 29.

⁴⁶⁰ Case C-53/00 *Ferring*, para 27.

⁴⁶¹ De Cecco 2013, p. 142.

⁴⁶² Rizza 2003, p. 435.

⁴⁶³ Opinion of AG Léger delivered on 19 March 2002 C- 280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and Oberbundesanwalt beim Bundesverwaltungsgericht [2003] I-7747.

⁴⁶⁴ *Altmark I* opinion, para. 75–83.

⁴⁶⁵ Opinion of AG Léger, para. 82.

that the role of the Commission as a monitor of was diminished by Ferring. Léger argued that since member states according to previous case-law were required to notify planned aid measures involving a PSO, the duty to notify would not apply as a measure to compensate a PSO would not be considered aid and that it therefore would be no duty to notify.⁴⁶⁶

AG Jacobs echoed this criticism in stating that although both approaches are concerned with additional sums of money paid to undertakings with PSOs with the State aid approach there is a duty to notify.⁴⁶⁷ According to Rizza the Ferring judgement increased the risk of Member States using PSO's as a means to disguise distortive measures.⁴⁶⁸ Additionally, the Ferring case did not contain any indications on how to assess the equivalence between the costs of the PSO and the compensation.⁴⁶⁹

7.2 A compromise of approaches: The Altmark ruling and Chronopost

7.2.1 Altmark: The compensation approach with strict requirements

After Ferring, many national courts sought clarifications on the concept of the “equivalence test”, i.e. in the situations in which a state measure would be deemed to merely compensate and not confer an advantage on the recipient.⁴⁷⁰ Altmark⁴⁷¹ provided an answer to that question and clarified the relationship between SGEIs and their financing. The CJEU appears to have been partially influenced by the Opinion of AG Jacobs in GEMO.⁴⁷² In his Opinion AG Jacobs criticized the CJEU for what he viewed as an inconsistency in the application of the compensation and the State Aid approach.⁴⁷³ After having applied the compensation approach in ADBHU⁴⁷⁴ the CJEU had subsequently applied the State aid approach until Ferring⁴⁷⁵ in which it switched back to the compensation approach.⁴⁷⁶ AG Jacobs, stating that both approaches had merits to them as

⁴⁶⁶ Opinion of AG Léger, para. 93.

⁴⁶⁷ Opinion of Mr Advocate General Jacobs delivered on 30 April 2002 in C – 126/01 Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] I– 13769, para. 112.

⁴⁶⁸ Rizza 2003, p. 436.

⁴⁶⁹ De Cecco 2013, p. 142.

⁴⁷⁰ De Cecco, p. 143.

⁴⁷¹ C–280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht [2003] I– 7747.

⁴⁷² Opinion of Mr Advocate General Jacobs delivered on 30 April 2002 in C–126/01 Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] I– 13769.

⁴⁷³ Opinion of AG Jacobs in C – 126/01 GEMO, para. 96.

⁴⁷⁴ Case 240/83 ABDHU

⁴⁷⁵ Case C–53/00 Ferring.

⁴⁷⁶ Opinion of AG Jacobs in C – 126/01 GEMO, para. 102.

well as problems, proposed a compromise between the two approaches, applying the one in certain situations and the other in other situations.⁴⁷⁷

In situations where there was a clear link between the compensation of a PSO, and where the contents of the PSO were clearly defined, such as in a situation where public procurement has preceded the entrustment of the task, the compensation approach would continue to apply. In situations where there was not a sufficiently clear link between the state measure and the PSO the State aid approach would continue to apply. AG Jacobs used the example of Banco de Exterior de España⁴⁷⁸ in which the measure related to a law granting a tax exemption to all public banks. The law did not indicate that the funds raised by the tax measure were intended for compensation of a PSO.⁴⁷⁹ The CJEU seemed influenced by the approach suggested by AG Jacobs in GEMO but went even further in its own reasoning.⁴⁸⁰

Altmark, a German case, dealt with the public subsidies to transport company, awarded with a near exclusive geographical licence, operating local bus lines. The bus lines were not profitable and the regional authority granted the bus line operator with a subsidy. The legal issues regarded the financing of the PSO. First, the CJEU held that where a state measure compensates for services provided by the recipient undertakings, in order to discharge public service measures, the measure will not be caught by Article 107(1) and be regarded as State aid. The conditions are that the measure does not grant the undertakings a financial advantage and that the measure does not put the recipient undertakings in a more favourable position than its competitors.⁴⁸¹ So far the CJEU followed the compensation approach. However, the CJEU continued by stating that for a measure not to be caught under Article 107(1) four conditions must be met. This approach can be dubbed the refined compensation approach⁴⁸²

- 1) The recipient undertaking must have PSOs to discharge and the PSOs must be clearly defined.

⁴⁷⁷ Opinion of AG Jacobs in C- 126/01 GEMO, paras 119 – 120.

⁴⁷⁸ Case C-387/92 Banco Exterior de España SA, see [n] 631.

⁴⁷⁹ Opinion of AG Jacobs in C – 120/01 GEMO, para 120.

⁴⁸⁰ De Cecco 2013, p. 143.

⁴⁸¹ C – 280/00 Altmark, para 87.

⁴⁸² Hans Vedder and Marijn Holwerda: The European CJEU's Jurisprudence after Altmark; Evolution or Devolution? in Erika Szyszczak and Johan Willem van de Gronden (eds.): Financing Services of General Economic Interest, The Hague 2013, TMC Asser Press, p. 57.

- 2) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- 3) The compensation cannot exceed what is necessary to cover the additional costs for discharging the PSO. This ought to be done by taking into account the relative receipts and allowing for a reasonable profit.
- 4) The recipient undertakings discharging the PSO must either be selected through a public procurement process, or, if that is not possible, the level of compensation needed to fund the discharge of the PSO must be determined by an analysis of the costs a well-run undertaking provided with the means to discharge the PSO would have incurred.⁴⁸³

Altmark can be dubbed a compromise between the compensation and the State aid approaches.⁴⁸⁴ The test created by the CJEU seems to have originated from the test under 106(2).⁴⁸⁵ The actions of the CJEU in Altmark can be characterized as trying to push away the treatment of public service obligations from a formalistic paradigm in 106(2) to a more integrative paradigm.⁴⁸⁶ What the CJEU did was that it shifted the focus of the discussion regarding SGEIs from the issue of whether a PSO would be qualified as a SGEI and allow for derogation from treaty rules.⁴⁸⁷ Instead the CJEU shifted focus to the financing aspect of SGEIs through Article 107(1) which implies that the financing of PSOs can be accommodated from within state aid law without the formality of a rule/exception relationship.⁴⁸⁸ In Müller's view Altmark should be viewed against the backdrop of the relationship between competition and the creation of an internal market and the concept of market correction, social welfare and redistribution especially by granting aids.⁴⁸⁹ Müller writes that these two concepts are not wholly compatible, but that they are linked through the "spill-over effect" of competition law into other fields of Member State policies,

⁴⁸³ C – 280/00 Altmark, paras 89 – 93.

⁴⁸⁴ Leigh Hancer and Pierre Larouche: EU Regulation of Network Industries and Services in Paul Craig and Grainne de Burca (eds.): *The Evolution of EU Law*, 2nd edition, Oxford 2011, Oxford University Press, p. 760.

⁴⁸⁵ Hancer and Larouche 2011, p. 760.

⁴⁸⁶ Hancer and Larouche 2011, p. 760.

⁴⁸⁷ Hancer and Larouche 2011, p. 760.

⁴⁸⁸ Hancer and Larouche 2011, p. 760.

⁴⁸⁹ Thomas Müller: Efficiency control in State aid and the Power of Member States to define SGEIs, *European State Aid Law Quarterly* 1:2009, p. 39.

thereby restricting their autonomy. This takes place especially in fields which departs from the “principle of open markets and free competition”.⁴⁹⁰

In relation to the previous 106(2) test the Altmark test is more complex in that it requires an economics and accounting analysis, and more rigorous in that there is no need to define what the contents of an SGEI is.⁴⁹¹ The direct connection to Article 106(2) seems to be removed, which does not exactly solve the problem of the applicability of the Article which AG Jacob had called for. Instead the CJEU uses the concept of a “public service obligation. The Altmark criteria can also be characterized as more severe than the test under Article 106(2). It requires transparency of the Member states regarding the public service obligation, the need to fix the rules on funding in advance, and the assessment of the amount of funding needed using the two types of mechanisms in the fourth criteria.⁴⁹²

The four criteria in Altmark were not problem-free. Although the first three requirements can be seen as quite straightforward, albeit with some interpretational difficulties the fourth criteria left questions unanswered.⁴⁹³ The first requirement can be seen as being of a formal character and preventing member states from ex-post allegedly imposed SGEIs. The second requirement seeks to make sure that no advantage is conferred. This is accomplished through the requirement that the parameters for calculating the compensation is established in advance and that they are transparent and objective. The problematic issue here was that of the implementation and the problems with ensuring that a pre-defined methodology of calculating compensation will not necessarily guarantee that no advantage is conferred in the future. The third requirement clarified that the compensation provided to the undertaking discharging the PSO may not only cover the costs but also a reasonable profit. The problematic issue here is obviously the difference between “normal” and “excessive” profit.⁴⁹⁴

With the fourth requirement the CJEU dictates how the compensation is to be determined concretely and provides to options. The public procurement option is in line with the policy of the Commission which has considered that a public procurement procedure will avoid overcompensation and a distortion of competition. Before Altmark it had not been

⁴⁹⁰ Müller 2009, p. 39.

⁴⁹¹ Hancer and Larouche 2011, p. 761.

⁴⁹² Hancer and Larouche 2011, p. 761.

⁴⁹³ Adinda Sinnaeve: State Financing of Public Services: The CJEU's Dilemma in the Altmark Case, *European State Aid Law Quarterly*, vol. 3 (2003), p. 357.

⁴⁹⁴ Sinnaeve 2003, p. 357.

clear whether a public procurement procedure would automatically eliminate state aid or whether it merely made the aid compatible with the internal market under Article 106(2). With the second option the CJEU introduces an approach in which it compares the costs of a well-run undertaking with that of the undertaking imposed with the PSO. This can be seen as an introduction of the private investor principle which amounts to an efficiency criteria. Together with the third criteria this implies that the costs required to discharge the PSO will not only have to match the costs, but it will have to be run efficiently, with the benchmark being “a well-run undertaking”. Some of the problems with this approach is finding a suitable comparator, as was the problem in the *Chronopost*⁴⁹⁵, might occur. Additionally, the costs to be compensated are traditionally based on actual costs of a specific undertaking and not on a hypothetical market actor.

7.2.2 The Almunia Package

In response to *Altmark* the Commission published in 2005 a set of measures intended to clarify the conditions of the *Altmark* test, which was named the *Altmark* or the Monti-Kroes package.⁴⁹⁶ The package contained an amendment of the Transparency directive, a *de minimis* Decision on aid to SGEIs, and a Framework on the application of Article 106(2) to the funding of SGEIs.⁴⁹⁷ The Decision was created to alleviate worries regarding the retroactive application of the *Altmark* criteria by exempting from notifications measures that met the first three criteria of the *Altmark* conditions.⁴⁹⁸ The framework was intended for situations in which neither the *Altmark* nor the Decision requirements were applicable and it provided guidance on the applicability of Article 106(2) TFEU.⁴⁹⁹ The amended Transparency Directive required all undertakings that received compensations for the discharge of PSOs and also carried out other non-PSO related tasks to keep separate

⁴⁹⁵ Joined cases C-83/01P, C-93/01P and C-94/01P *Chronopost and Others v Ufex and Others* [2003] I-04777.

⁴⁹⁶ De Cecco 2013, p. 149.

⁴⁹⁷ Commission Decision 2005/842/EC on the application of the Article 86(2) of the EC Treaty to State Aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] OJ L312/67; Community Framework for State aid in the form of public service compensation [2005] OJ C297/04; Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2005] OJ L312/47, later consolidated version Directive 2006/111/EC on the transparency of financial relations between member states and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17.

⁴⁹⁸ De Cecco 2013, p. 149. See Article 3 of Commission Decision 2005/842/EC.

⁴⁹⁹ De Cecco 2013, p. 149. See Article 1.2. of the Community Framework for State aid in the form of public service compensation.

accounts.⁵⁰⁰ This package was part of the more comprehensive Action Plan for State Aids.⁵⁰¹ The reform was a part of the Lisbon strategy⁵⁰² and its aim was to aid towards improving the competitiveness of European industry and creating sustainable jobs, and to contribute better to social and regional cohesion and environmental protection.⁵⁰³ The Commission intended to set up a more “economic approach” towards State aids.⁵⁰⁴

In 2011 the Commission created a new package as a result of some of the grey areas in the Monti-Kroes package.⁵⁰⁵ The new package which was dubbed the Almunia package contained a Communication, a Decision, a Framework and a proposal for a de minimis Regulation in the field of SGEIS.⁵⁰⁶

In the Communication the Commission explains how it interprets the Altmark criteria when assessing whether a State measure is to be considered to fall outside the scope of Article 107(1) as laid down in Altmark.⁵⁰⁷ In its De minimis Regulation the Commission lays down rules for de minimis aid granted to undertakings providing a service of general economic interest providing a service within the meaning of Article 106(2).⁵⁰⁸ State measures meeting the de minimis criteria will be considered by the

⁵⁰⁰ De Cecco 2013, p 150. See Article 1 of the Commission Directive 2006/111/EC.

⁵⁰¹ State Aid Action Plan – Less and better targeted state aid: A roadmap for state aid reform 2005 – 2009, COM(2005) 107 final.

⁵⁰² Communication to the Spring European Council – Working together for growth and jobs – A new start for the Lisbon Strategy – Communication from President Barroso in agreement with Vice– President Verheugen COM/2005/24 final.

⁵⁰³ Stephane Rodrigues: The European Commission’s Reform Strategy in in Erika Szyszczak and Johan Willem van de Gronden (eds.) in *Financing Services of General Economic Interest*, The Hague 2013, T.M.C. Asser Press, p. 91.

⁵⁰⁴ In the Action Plan, paras. 22 and 23, the Commission writes that the plan is “22. [...] a means to ensure a proper and more transparent evaluation of the distortions to competition and trade associated with state aid measures. This approach can also help investigate the reasons why the market by itself does not deliver the desired objectives of common interest and in consequence evaluate the benefits of state aid measures in reaching these objectives.

23. One key element in that respect is the analysis of market failures, such as externalities, imperfect information or coordination problems, which may be reasons why the markets do not achieve desired objectives of common interest, in particular if they are of an economic nature [...]”

⁵⁰⁵ De Cecco 2013, p. 150.

⁵⁰⁶ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4; 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 [2012] OJ L7/3; Communication – European Union Framework for State aid in the form of public service compensation [2011] OJ C8/15; Communication – Approval of the content of a draft for a Commission Regulation on de minimis aid for the provision of services of general economic interest [2012] OJ C8/23.

⁵⁰⁷ Article 1.3. of the Communication.

⁵⁰⁸ Article 1.1. of the Regulation.

Commission to comply with the Altmark criteria and therefore not constitute Aid within the meaning of Article 1017(1) and be exempt from notification under Article 108(3).⁵⁰⁹

The Decision lays down rules for when a State measure that does not meet the Altmark criteria, and therefore is caught by Article 107(1) but can be declared aid compatible with the internal market through the application of Article 106(2).⁵¹⁰ These criteria apply to aid of a maximum of € 15 million granted during a certain period of time.⁵¹¹ The consequence of meeting the criteria laid down in the Decision is that the aid does not have to be notified to the Commission.⁵¹² The requirements regarding compensation of social services of general economic interest as defined by the Decision are less strict.⁵¹³ The Framework sets out the “principles” that apply to public service compensation which constitutes aid in situation where the aid is not covered by the Decision 2012/21/EU, i.e. where the measure neither constitutes aid under the de minimis rules nor under does it exceed € 15 million.⁵¹⁴ Such aid is subject to notification under Article 108(3). The principles of the Framework are applied by the Commission when assessing whether the aid is applicable with the internal market under Article 106(2).⁵¹⁵

Consequently, the relationship between the measures of the Almunia package is that the Commission first will assess whether a measure of compensation for a public service obligation constitutes State aid according to its Altmark based requirements in the Communication. If those requirements are not met the measure may constitute State aid, which may or may not be compatible with the internal market. If the measure meets the de minimis requirements of the Regulation it will not be considered State aid. If the sum of the measure is up to € 15 million it might be considered State aid compatible with the internal market. If, however, the aid measure does not meet the requirements of the Decision it will be assessed under Article 106(2) regarding its compatibility with the internal market by using the principles laid down in the Framework. Depending on the outcome of that analysis the aid may or may not be declared compatible with the internal market.⁵¹⁶

⁵⁰⁹ Article 2.1. of the Regulation.

⁵¹⁰ Recital 7 of the Preamble of the Decision.

⁵¹¹ Article 2 of the Decision.

⁵¹² Article 1 of the Decision.

⁵¹³ Recital 11 of the Preamble of the Decision.

⁵¹⁴ Article 1.7 of the Framework.

⁵¹⁵ Article 1.7 of the Framework.

⁵¹⁶ Buendia Sierra and Panero Rivas suggest in their analytical approach that it should be determined first whether the measure in question is caught by the de minimis regulation. This approach seems logical since de

7.2.3 The Commission's guidance of the Altmark criteria

The Commission points out that in the absence of EU rules on SGEIs Member States have a wide discretion in defining SGEIs. The task of the Commission is to assess whether there has been a manifest error in the definition of the SGEIs.⁵¹⁷ The Commission considers that in situations where there an activity is already is provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions, it is not appropriate to entrust an undertaking with a PSO.⁵¹⁸ This approach seems to give a Member State considerable discretion as it is up to defining the public interest and when it is met. As an example of a manifest error given by the Commission is a situation in the broadband sector in which private investors have already set invested in broadband infrastructure network which provides “adequate” access, setting up a parallel broadband network infrastructure should not be a SGEIs.⁵¹⁹ The Commission uses the market as benchmark and state intervention becomes the exception. The question that requires interpretation is of course when a broadband network can be considered to provide adequate access? Do the requirements relate to speed and geographical coverage? Additionally the Commission points out those SGEIs should be addressed to citizens and society as a whole.⁵²⁰

Regarding the entrustment of the PSO the Commission is of the opinion there may be variations in the manner in which an undertaking is entrusted with a PSO. The Commission is more interested in what the act of entrustment contains. According to the Communication the act must contain (a) the content and duration of the public service obligations; (b) the undertaking and, where applicable, the territory concerned;(c) the nature of any exclusive or special rights assigned to the undertaking by the authority in

minimis aid will not be deemed aid within the meaning of Article 107(1). Such an approach would be less strenuous as no effort is made to analyse the whether the Altmark criteria are met. It might however from a pedagogical view be more understandable to assess the Altmark criteria first, and then apply the de minimis regulation as an exception. It must however again be emphasized that from a legal point of view de minimis aid is not 107(1) aid, whereas aid falling under the Decision is. The result of the application is however the same as neither require notification. José Luíís Buendía Sierra and José Manuel Panero Rivas in *The Almunia Package: State Aid and Services of General Economic Interest* in Erika Szyszczak and Johan Willem van de Gronden (eds.) in *Financing Services of General Economic Interest*, The Hague 2013, T.M.C. Asser Press, p.132.

⁵¹⁷ Para 46 of the Communication.

⁵¹⁸ Para 48 of the Communication.

⁵¹⁹ Para 49 of the Communication.

⁵²⁰ Para 50 of the Communication.

question; (d) the parameters for calculating, controlling and reviewing the compensation; and (e) the arrangements for avoiding and recovering any overcompensation.⁵²¹

Concerning the parameters of calculating the compensation the Commission emphasizes that there does not have to be a specific formula used as long as it is clear what how the compensation is being determined.⁵²² Where the undertaking is offered a reasonable profit the calculation of that profit must be specified in the entrustment act. The Commission specifies that because overcompensation is prohibited any selection mechanism of undertakings to be entrusted with a PSO be ensure that no overcompensation takes place.⁵²³ Reasonable profit means a return on capital that would be required by a “typical” company considering whether or not to provide the SGEI taking into account the level of risk. The risk may depend on the specific sector. Reference can be made to public service contracts granted under competitive conditions such as public tender. When there is no undertaking to compare with a comparison can be made with undertakings providing SGEIs in other Member States or undertakings in other sectors, taking into account the specific characteristics of each sector. The Member States may use incentive criteria relating to quality of service and increase of productivity. However, efficiency gains may not be achieved to the detriment of the quality of services.⁵²⁴

Regarding the fourth Altmarm criteria the Commission specifies the award criteria regarding the “lowest price”. The requirement is the lowest economically advantageous offer, including social and environmental objectives as long as they are closely related to the subject matter of the service offered.⁵²⁵ Regarding environmental requirements the Commission refers to its guidance on “green” public procurement. Qualitative criteria are allowed to be a part of the assessment. In situations where a public tender would not lead to the most economically advantageous outcome, in situations where there is no true competition on the market, when certain undertaking possess vital infrastructure or intellectual property, a public tender will not automatically ensure that the fourth criteria is fulfilled.⁵²⁶

⁵²¹ Para 52 of the Communication.

⁵²² Para 55 of the Communication.

⁵²³ Para 60 of the Communication.

⁵²⁴ Para 61 of the Communication.

⁵²⁵ Paras 66 – 67 of the Communication.

⁵²⁶ Para 68 of the Communication.

The Commission specifies the criteria of “well-run undertaking”. The aim is to make sure that the high costs of an undertaking are not taken as a benchmark. Member States should apply “economically recognized criteria representative of satisfactory management”.⁵²⁷ Showing profitable result will not be enough as the Commission holds that it must be taken into account that in sectors with undertakings entrusted with SGEIs their financial result may be influenced by market power or sectorial rules.⁵²⁸ When assessing the undertakings the Member States must use national and international accounting standards. Member States may also use qualitative criteria to assess the undertaking. Undertakings must always comply with these criteria. When analysing cost structures the size and sector of the undertaking must be taken into account.⁵²⁹

7.2.4 The Commission’s case law after Altmark: A strict application of Altmark

In his analysis of the post-Altmark Commission case law Max Klasse concludes that the Commission has interpreted the Altmark criteria strictly and as a consequence it has regularly been held that the criteria have not been met.⁵³⁰ As Klasse writes of the Commission’s approach: “[W]hile Altmark allows for a self-assessment by Member States of public service compensation, the assessment of whether compensation that qualifies as State aid meets the requirements for compatibility under Article 106(2) TFEU or other Treaty provision is a matter for exclusive competence of the Commission.”⁵³¹ By the Commission’s strict interpretation the Member States in practise often fail to meet the Altmark requirements, bringing the public service compensation within the reach of Article 107(1). Subsequently the Commission declares the compensation compatible with the internal market through Article 106(2) or 107(3). The conclusion drawn by Klasse is that “the Commission has seized control the Commission has seized control over Member States’ spending in the context of what they consider to be a public service remit.”⁵³² The fourth Altmark criterion has proven to be difficult. The Commission has interpreted it in such a way that it seems like the criteria can only be met if the provider is selected based on a competitive tender. Even in such cases it seems like the Commission may not accept a

⁵²⁷ Para 71 of the Communication.

⁵²⁸ Para 72 of the Communication.

⁵²⁹ Para 73 of the Communication.

⁵³⁰ Max Klasse: *The Impact of Altmark: The European Commission Case Law Responses* in Erika Szyszczak and Johan Willem van de Gronden (eds.) in *Financing Services of General Economic Interest*, The Hague 2013, T.M.C. Asser Press, p. 50.

⁵³¹ Klasse 2013, p. 50.

⁵³² Klasse 2013, p. 50.

correctly conducted public procurement procedure as the compensation may fail the necessity test, the least cost criteria. This has led to situations where arrangements such as incentives for the operator to increase efforts, seek improvements to quality, attract more customers and attain additional revenues, require notification.⁵³³

Klasse writes that the Commission has compelled parties to agree to a more or less fixed margin of profit. The second alternative of the fourth Altmark criteria has been unclear (a typical, well-run undertaking). With the absence of additional guidance there have been problems as to the foreseeability of the results of the test, which has created legal uncertainty. Member States have had difficulties conducting self-assessments. Problems with finding a suitable benchmark undertaking can arise because the undertaking providing a SGEI operates in a sector without private undertakings and the differences in public service tasks may not make a cross-border comparison possible. Therefore the comparison may have to be done with a fictional undertaking.⁵³⁴

7.3 Altmark amended?

7.3.1 Chronopost: Lex Specialis?

Chronopost was a case in which a verdict was given a few weeks before Altmark. The two cases shared some similarities but Altmark provided no guidance as to how to apply the fourth Altmark criteria. The French postal service, La Poste, had a legal monopoly on certain postal services and La Poste had an exclusive right to providing the services in question. La Poste was also charged with public service obligations such as provision of services in the entire French territory. Unlike the main postal network, the express service sector was open to competition. La Poste owned a subsidiary, Chronopost, operating in this competitive market. A competitor argued that the fees paid by Chronopost for use of the postal network in its business constituted State aid as the fees did not correspond to the amount a private undertaking having set a similar postal network would charge another undertaking for using its services.

The CJEU of Justice, however, held that such a benchmark was incorrect. . In the words of the CJEU: “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, normal market

⁵³³ Klasse 2013, p. 50.

⁵³⁴ Klasse 2013, p. 51.

conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available[...]"⁵³⁵ The CJEU concluded that La Poste was an undertaking entrusted with SGEIs to the benefit of all users in the French territory to be provided at certain fixed prices. As such La Poste would have had to create a postal network for this purpose which was not in line with a purely commercial purpose. Such a network would never have been created by a private undertaking. The CJEU therefore held that if the costs payable by Chronopost to La Post were equivalent of the costs of providing the service then there was no State aid.⁵³⁶ More specifically, there was no State aid if “first, it is established that the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.”⁵³⁷

Von Danwitz puts Chronopost in perspective and views it as a matter of cross-subsidisation with its origin in the Corbeau⁵³⁸ case.⁵³⁹ As explained the CJEU held in Corbeau that 106(2) TFEU allowed for an undertaking with a legal monopoly, entrusted with an SGEI to cross-subsidies its business operations to ensure economic equilibrium. In Corbeau Article 106(2) TFEU was applied in relation to Article 102 TFEU as the legal monopoly itself was questioned. Von Danwitz writes the perception of cross-subsidisation as a subject to state aid law is a relatively new one and it is closely linked to the process of liberalisation of certain sectors. There is a risk of state resources originally intended to fund SGEIs used in order to cross-subsidies business operations in a competitive environment.⁵⁴⁰

The question has been raised of whether Chronopost and the fourth Altmark criteria can be reconciled.⁵⁴¹ In other words, why wasn't the well run undertaking test applied to La Poste? However, the CJEU held that exclusion of competition was not allowed for other

⁵³⁵ Joined cases C– 83/01P C – 93/01P and C – 94/01P Chronopost and Others v Ufex and Others [2003] I–04777, para 38.

⁵³⁶ C – 83/01P Chronopost, paras. 31– 40.

⁵³⁷ Joined Cases C– 83/01 P, C– 93/01 P and C– 94/01 P Chronopost, para. 40.

⁵³⁸ Case C–320/91Corbeau.

⁵³⁹ Thomas von Danwitz: The Concept of State Aid in Liberalised Sectors. EUI working paper no. 2008/28, p. 10.

⁵⁴⁰ Von Danwitz 2008, p. 8.

⁵⁴¹ Andreas Bartosh: Clarification or Confusion – How to reconcile the ECJ's rulings in Altmark and Chronopost, European State Aid Law Quarterly 3:2003.

than services associated with the provision of the SGEI.⁵⁴² Such a test would have enabled a closer scrutiny of the cost structure of La Poste. Bartosch argues that there is no real conflict between Altmark and Chronopost as there in Altmark were comparators (other bus line operators) whereas in Chronopost there were none.⁵⁴³ Bartosch considers Chronopost to be the exception to the rule provided in Altmark for situations as the one mentioned. Von Danwitz sees the Chronopost ruling as a way to balance the interests of the general ban of State aid in Article 107 and the necessity of ensuring workable conditions for public services under Article 106(2) and that there should be no hierarchical relationship between them.⁵⁴⁴ Agreeing with Bartosch Müller writes that Altmark is *Lex generalis* and Chronopost is *Lex specialis* distinguished on the basis of the difference underlying facts, especially the market structure.⁵⁴⁵ Bartosch writes that from that perspective “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.”⁵⁴⁶ It seems clear in the light of the foregoing arguments that Chronopost must be seen as an exception to Altmark.

7.3.2 BUPA

BUPA⁵⁴⁷ is a landmark case that applied the Altmark criteria in a more lax way than in Altmark. The BUPA ruling also shed light on the relationship between Article 106(2) and the first Altmark requirement by combining bringing them in line. The case dealt with private health insurance in Ireland and is together with Chronopost one of the most significant developments since Altmark.

BUPA was a British health insurance company which sought annulment of a Commission decision regarding the Irish risk equalisation scheme (RES) created by in order to equalize losses by of health insurance providers due to a high risk profile. The Commission held that the RES did not constitute State aid as it was compensation for a SGEI mission. At the time of the decision Altmark had not been given yet due to which the Commission applied Ferring.

⁵⁴² C – 320/91 Corbeau, para 19..

⁵⁴³ Bartosch, 2003 p. 384.

⁵⁴⁴ von Danwitz 2008, p. 10.

⁵⁴⁵ Müller 2009, p. 41.

⁵⁴⁶ Bartosch 2003, p. 385.

⁵⁴⁷ T – 289/03 BUPA and Others v Commission [2008] ECR II –81.

The Irish market for health insurance was deregulated in 1994. Prior to that, there had been one provider of private medical insurance (PMI), with exclusive rights, the VHI. The PMI was an additional insurance which offered coverage on top of the general social security scheme which had limited coverage for person for other than persons in poor social situations. This meant in practise that the majority of the Irish population was not wholly covered by the statutory social security scheme and purchased additional PMI.

One of the aims of the Irish health care system was to ensure solidarity between generations. With the aim of achieving this certain obligations were imposed on all the insurers such as open enrolment, community rating and lifetime coverage. Generational solidarity was to be realized by preventing, to a certain extent, insurers from differentiated pricing for the same product based on age or sex, resulting in higher prices for young customers and lower for older, thereby subsidizing the older clients. In order to keep the market stable and prevent what in practise was new entrants into the market from targeting young and healthy clients with low risk profiles, thereby leaving all the high risk customers with the former monopolist, the RES was set up to compensate insurers with a high risk profile. Insurers with low risk profiles would compensate insurers with high risk profiles through monetary transfers through the RES. BUPA, an entrant on the market following the deregulation of the market that had paid to the RES, argued that the RES served as a mechanism for providing State aid to VHI, the incumbent.

The obligations which were imposed on all insurers consisted in open enrolment prohibited insurers from declining consumers that fulfilled the requirements from being granted insurance, community rating banning direct discrimination based on age and sex in pricing, and lifetime coverage meaning that once insurance was granted it expired upon death.

As an introductory remark it should be stated that the GC held that, unlike in *Altmark*⁵⁴⁸, the subject matter of the case dealt with an area where the Union almost has no competence, namely the organisation of health care.⁵⁴⁹ Adding to this the Court emphasised the significance of Article 14 TFEU in that it a reflection of the division of power between the Union and the Member States. On the definition of SGEIs the Court held that “there is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be

⁵⁴⁸ C- 280/00 *Altmark* Trans, paras 45 – 47. See Article 90 TFEU on Common transport policy.

⁵⁴⁹ T – 289/03 *BUPA*, para 167.

satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, either within the meaning of the first Altmark condition or within the meaning of Article [106(2) TFEU].”⁵⁵⁰ Referring to case law the Court subsequently held that in scrutinizing the nature and scope of a SGEI mission defined by a member state, the role of the Commission’s, review, and the review by the Court itself is restricted to manifest errors.⁵⁵¹ In doing this the Court tied together the case law of Article 106(2) with the Altmark criteria.⁵⁵²

The Courts treatment of the requirements of clearly defined SGEIs, universality and the compulsory nature of SGEIs are interesting. Due to the fact that there was no single undertaking responsible for providing SGEIs, but that the provision of SGEIs was imposed on all actors on the market, the Court had to deal with the question of separating general regulation of market activity from the defining what was to be a SGEI. The Court first held that a SGEI mission could be entrusted to all actors on a market, basing this on the fact that an SGEI mission is conceptually separate from an exclusive or special right.⁵⁵³ Without further analysis the Court also asserted that the SGEI mission entrusted to all actors was separate from general regulation, against a claim raised by the application. This distinction between regulation and a SGEI mission, which is important because without a SGEI mission restrictions of treaty provisions cannot be accepted, seems hard to pinpoint considering the degree of freedom the market actors had. As the applicant pointed out, the insurers were allowed to exclude persons over 65. Additionally, the insurance was not compulsory but voluntary. However, the Court still held that that the requirements for a SGEI mission were fulfilled and that a limited material or geographical or personal scope of a SGEI mission did not call into question its qualification as a SGEI mission.⁵⁵⁴ Commenting on the compulsory nature of an SGEI mission the Court engages in a circular argument. It held that the compulsory nature means that the service providers are bound to provide the services according to the rules governing those services.⁵⁵⁵

The SGEIs obligations largely consisted of a ban to discriminate based on age or sex. However, there was no maximum level for the premiums and differentiated cover at

⁵⁵⁰ T – 289/03 BUPA, para 165.

⁵⁵¹ T – 289/03 BUPA, para 166.

⁵⁵² The GC referred to Case T-17/02 Fred Olsen v Commission [2005] ECR II-2031, para. 216.

⁵⁵³ T – 289/03 BUPA, para 179.

⁵⁵⁴ T – 289/03 BUPA, para 179.

⁵⁵⁵ T – 289/03 BUPA, para 188.

differentiated prices was allowed for different products. The Court did not elaborate on the distinction between regulatory activity and imposing a SGEI mission, it merely referred to case law stating that a SGEI mission does not have to be connected to a special or exclusive right but can also be assigned to all undertakings.⁵⁵⁶ In reality, there seems to be little difference between general regulation and imposing a SGEI mission. The

As regards the universal and compulsory nature of the SGEI, the GC held that even though insurers were not required to grant insurance to persons over the age of 65, this exception was not sufficient to deprive the SGEI of its universal and compulsory nature. Instead the Court based its reasoning on the fact that the exception only concerns persons who have never had coverage and that the number is likely to decrease as more people apply for insurance at an earlier age. In other words the Court conducted a material analysis of the situation but accepted that an SGEI does not have to be provided to all applicants.⁵⁵⁷

Analysing the third criteria of overcompensation, the Court held that in light of member state discretion in defining SGEIs, and the role of the Commission as reviewing whether there was a manifest error the scope of the judicial review would be to check whether the Commission had erred in concluding that there was no manifest error.⁵⁵⁸ The Court further held that the third Altmark criteria coincide with the Article 106(2) case law on necessity and proportionality of SGEI compensation.⁵⁵⁹ The proportionality test is limited to whether the discharge can function in economically acceptable conditions.

In applying the third Altmark criteria the Court first came to the conclusion that the RES does not compensate for costs arising from the SGEI obligations. Instead the role of the RES is to equalize the burden between. Within the limited review the Court held that the legality and of the rules could not be called into question. Comparing the system to that in *Ferring* and *Altmark* the GC held that the mechanism for compensation was “radically different”. For this reason the GC held that the third Altmark in a strict sense was not fulfilled. Instead the GC assessed that the RES was consistent with the “spirit and purpose” of the Altmark criteria.⁵⁶⁰ The Court considered that the comparing of average risk profile to the risk profile of an individual market actor when determining costs to be paid to the

⁵⁵⁶ T – 289/03 BUPA, para. 179

⁵⁵⁷ T – 298/03 BUPA, para 198.

⁵⁵⁸ T – 298/03 BUPA, para 220.

⁵⁵⁹ T – 298/03 BUPA, para 224.

⁵⁶⁰ T – 298/03 BUPA, para. 237.

RES was sufficient to fulfil the criteria. Because of the characteristics of the system there was no need to take into account the receipts from the cost of the operation.⁵⁶¹ In applying the fourth Altmark criteria the Court initially pointed out the close link between the third and fourth criteria as the both relate to the costs incurred by the undertaking entrusted a SGEI-mission. As with the third criteria the Court held that it was not possible, in the strict sense, to apply the fourth criteria, as the compensation was not directly linked to the SGEI-obligations. The Commission would in applying the fourth Altmark criteria have looked at whether the VHI as the recipient. The Court also held that there were sufficient guarantees to ensure the system would not be taken advantage of by deliberately increasing costs in order to manipulate the risk profile with the aim of being granted RES payments.⁵⁶²

The conclusion of the Court was that all of the requirements of the Altmark criteria had been met and that the Commission had not erred in its finding of no manifest errors. The Court held that the Member State's discretion in this area is confirmed by the by the lack of competence by the Commission and the absence of a definition in Union law.⁵⁶³ The GC argued that the fact that Union lacks competence in the area of health care was allows for a more room to manoeuvre in the definition of SGEIs. In areas which no or shared competence this freedom to define is at its greatest, according to the GC, referring to the principles of conferral and subsidiarity in Article 5 TEU. In this context the GC emphasizes the role of Article 14 TFEU on SGEIs as reflecting the division of power between the Union and the Member States. In interpreting the first Altmark criteria the GC seems to bring into the interpretation Article 106(2) as to bring the case law in line.⁵⁶⁴

7.3.3 Further case law

The EU courts have interpreted the Altmark criteria around 25 times where a handful of these decisions have not yet been published.⁵⁶⁵ In most cases the EU courts simply apply the criteria without any closer scrutiny. However, there are cases that are interesting for this analysis.

⁵⁶¹ T – 298/03 BUPA, para. 241.

⁵⁶² T – 298/03 BUPA, para 254.

⁵⁶³ T – 289/03 BUPA, para. 166.

⁵⁶⁴ T – 289/03 BUPA, para. 171.

⁵⁶⁵ As of 28 May 2014.

In Valmont⁵⁶⁶, a case in which the recipient of what the Commission had held was State aid had contested the decision. The applicant Valmont had received subsidies from a Dutch municipality which was partly used to build a parking lot. Through what was in the case referred to as a “gentlemen’s agreement” the municipality and Valmont agreed on open up part of the car park to the public. Because of this, “semi-public” car park the Commission had in its decision held that only 50% of the aid would be classified as aid and the other half would be classified as compensation. The GC however concluded that the Commission had made a manifest error in not applying the Altmark test to review the amount that was to be considered compensation and what the costs were for the discharging of the obligation.⁵⁶⁷

The GC had initially held that the Valmont “bore a burden in the public interest”, and with this initial conclusion held that the Altmark test should have applied.⁵⁶⁸ Without applying Altmark the Commission could not be able to assess whether a benefit was conferred was the message of the GC, and consequently the decision was annulled. The GC did not conduct a review as thorough as it did in BUPA as Altmark was not applied. An interesting point to this case is that the GC did identify what it called a public service burden without applying Altmark. This interesting thing about this public service burden is that it had been given through a gentlemen’s agreement. It seems that the formal requirements for the entrustment of an SGEI can be very low. It should however be pointed out that the GC did not conclude that there was an SGEI mission but merely that based on the public service burden the Altmark test should have been applied, and that the Commission therefore made a manifest error.

According to Hedder and Holwerda this shows that undertakings may rely on “ill-defined” services of general economic interest in order to shield themselves for State aid law and the obligation to repay aid.⁵⁶⁹ However, it must be remembered that in this case the GC did not conduct an Altmark analysis and there was thus no analysis of the SGEI. It merely held that the Commission had made a manifest error. It can be argued that the use of this case is limited to situations where the Commission has failed to apply and Altmark and not as a definition of a SGEI mission, as that analysis was never made. It was simply held for the sake of analysing the case the public service burden was sufficient to trigger Altmark. In

⁵⁶⁶ GC, Case T– 274/01 Valmont [2004] ECR II– 3150.

⁵⁶⁷ T–274/01 Valmont, para. 133.

⁵⁶⁸ T–274/01 Valmont, para. 132.

⁵⁶⁹ Hedder and Holwerda 2013, p. 59 .

that sense it may be more appropriate to conclude that this case was about showing the Commission the significance of Altmark.

Another interesting case is *TV2/Denmark v Commission*⁵⁷⁰, a joined case, which regarded the definition of SGEIs. An applicant in this State aid case which dealt with aid to a public broadcaster had question SGEI mission of TV2. TV2, a Danish public broadcaster, received its funding partly from licence fees and partly from selling air time for commercials. The applicant in this case argued that since TV2 also broadcasted programming which was broadcasted by purely commercial networks that programming should be excluded for the public service mission and as such could not receive compensation.⁵⁷¹ The Commission should have assessed which programming was public service and then compared with the programming of private actors. The Commission on the other refuted that submission by stating that its task was limited to finding manifest errors. The GC agreed with the Commission in this case and referred to the discretion of Member State in defining the contents of the SGEI mission, which in this context further was based on the SGEI Communication⁵⁷² and the Amsterdam protocol on public broadcasting⁵⁷³.⁵⁷⁴ The GC held that the applicant confused the financing with the definition of SGEIs. An SGEI could consist in both the broadcasting of commercial and non-commercial content. The Commission had not erred in finding that there was no manifest error.

7.3.4 Defining SGEIs

It seems that EU law does not provide a definition of the content of a SGEI.⁵⁷⁵ The treaty is silent on the content of an SGEI. On the older case law defining SGEIs, such as *Commission v Netherlands*⁵⁷⁶, Ross writes that the CJEU focused more on the conditions for applying a introducing a SGEI than the definition itself. However, that changed with the introduction of Article 14 TEU and the Commission's papers on the subject.⁵⁷⁷ The GC made it clear that there is no definition of an SGEI either within the meaning of the

⁵⁷⁰ Joined cases T- 309/04, T- 317/04, T- 329/04 and T- 336/04 *TV2/Denmark v Commission* [2008] ECR II- 02935.

⁵⁷¹ *TV2/Danmark*, para 90.

⁵⁷² Communication of 20 September 2000 on services of general interest in Europe (COM(2000) 580 final)

⁵⁷³ Resolution of 25 January 1999 concerning public service broadcasting (OJ 1999 C 30, p. 1)

⁵⁷⁴ *Tv2/Danmark v Commission*, para 107.

⁵⁷⁵ Sauter expressly states that there is no definition of a SGEI. Sauter 2008, p. 10.

⁵⁷⁶ Case C – 157/94 *Commission v Netherlands* [1997] ECR I-5699, para 40.

⁵⁷⁷ Malcom Ross: A healthy approach to Services of General Economic Interest? The BUPA Judgement in the CJEU of First instance, *European Law Review*, vol. 34 no.1 (2009), p. 131.

first Altmark criteria or Article 106(2).⁵⁷⁸ The GC therefor dismissed the idea that a SGEI should be a Union concept.⁵⁷⁹ In this regard Member States have a wide discretion and role of the Commission is limited to finding manifest errors.⁵⁸⁰ Instead the GC reviewed the criteria for creating SGEIs.⁵⁸¹ In Ross's opinion this creates a tension between the previous assertions by the GC that an SGEI is not a Union concept. As previously stated, within the definition of universal service, the GC found room for limitations to the scope of its application.⁵⁸² Additionally the services could even be offered for profit and that the services concerned could be considered as luxury. The GC also clearly rejected the Commission's definition of a SGEI.⁵⁸³ The applicant in BUPA argued that a SGEI must fulfil certain requirements laid down by the Commission its Green paper on Services of General Economic Interest.⁵⁸⁴ The requirements were universal service, continuity, quality of service, affordability, as well as user and consumer protection. However, these elements were rejected by the GC.⁵⁸⁵

In FFSA the GC expressed it clearly that it is not the role of the Commission is not to question the political choices made by national authorities in imposing public service obligations.⁵⁸⁶ An example of this discretion was is the case of TV2/Danmark v Commission.⁵⁸⁷ The Danish legislator had defined the SGEI of a public broadcaster in qualitative terms, indicating that the public broadcaster itself could define what kind of programming was aired, including programming that "competed" with private networks. A qualitative definition of an SGEI, which in allows for the public broadcaster to freely decide the content is a good example of how broad the concept is. The airing of any programming that was deemed to meet certain qualitative criteria as defined by the broadcaster itself was held to be an SGEI. Compared to for instance Altmark, where the

⁵⁷⁸ Case T-289/03 BUPA, para 165.

⁵⁷⁹ As concluded by De Cecco 2013, p. 152.

⁵⁸⁰ Case T-289/03 BUPA, para 166.

⁵⁸¹ Case T-289/03 BUPA, paras 174 – 208.

⁵⁸² See chapter 6.2.3. on BUPA. The private health care scheme imposed waiting periods, it was not mandatory for the entire population, certain age groups were excluded from the obligation to provide services, the SGEI covered not only basic but also additional cover sold at higher prices.

⁵⁸³ Case T-289/03 BUPA, para. 187. The applicant referred to Commission Green Paper on services of general interest, 21 May 2003, COM(2003) 270 final, paragraph 49).

⁵⁸⁴ Case T-289/03 BUPA, para. 96.

⁵⁸⁵ Case T-289/03 BUPA, para. 187.

⁵⁸⁶ Case T- 106/95 FFSA, para 108.

⁵⁸⁷ Joined cases T- 309/04, T- 317/04, T- 329/04 and T- 336/04 TV2/Denmark v Commission [2008] ECR II- 02935.

SGEI consisted of well-defined transport services, bus lines at certain routes we can see that SGEI can be used by Member States in a variety of ways.

The difference between *Altmark* and for instance *TV2/Danmark* seems to have created two different categories of SGEIs. The background to these two distinct categories of SGEIs seems to have been clarified in *BUPA*. In *BUPA* the GC held that it was not appropriate to apply the *Altmark* test, but instead to apply the test in the “spirit of *Altmark*”, in a case regarding private health insurance. Referring to *BUPA* the GC in *CBI v Commission*⁵⁸⁸ held that in certain areas *Altmark* cannot be applied strictly.⁵⁸⁹ Taking into account the specifics of the hospital sector, the General CJEU stated that when assessing whether to apply *Altmark* strictly or not, it should be taken into account whether a SGEI is provided without a commercial interest because it is classified as a SGEI for the reason that its existence affects the commercial sector.⁵⁹⁰ In *CBI v Commission* the GC referred to a similar reasoning in *SIC v Commission*⁵⁹¹. The case dealt as in *TV2/Danmark* with the financing of public service broadcasting. In that context the CJEU held that “[a]lthough the public service of broadcasting is considered to be an SGEI and not a service of general non-economic interest, it must none the less be pointed out that that classification as an SGEI is explained more by the de facto impact of public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting. As is clear from the Amsterdam Protocol, public service broadcasting ‘is directly related to the democratic, social and cultural needs of each society’.”⁵⁹²

In other words, when competition is at risk of being distorted because of a not-for-profit activity affecting competition, and not because there is risk of overcompensation of an otherwise commercial activity (the situation in *Altmark*) there is reason to apply *Altmark* less strictly. If we are to define SGEIs in relation to the way in which *Altmark* is applied it can be argued that there are different kinds of SGEI and that the definition has been affected by EU law since different standards are applied to different types of SGEIs. However, this binary division cannot wholly be applied to *BUPA* as the undertakings

⁵⁸⁸ Case T-137/10 *CBI v Commission*, Judgement of 7 November 2012, not yet published.

⁵⁸⁹ Case T-137/10 *CBI v Commission*, para. 86.

⁵⁹⁰ Case T-137/10 *CBI v Commission*, para. 88.

⁵⁹¹ Case T-442/03 *SIC v Commission* 2008 ECR II-01161.

⁵⁹² Case T-442/03 *SIC v Commission*, para 153.

discharging SGEIs in that case did have a profit motive and there was a risk of overcompensation distorting competition.

GEMO⁵⁹³ provides an interesting example of the definition of SGEIs. Gemo concerned a tax payable by certain purchasers of meat such as supermarkets which was used to fund carcass disposal services. This disposal services were provided free of charge to French farmers. The background to this measure was the outbreak of foot and mouth disease.⁵⁹⁴ The question at issue was not the compensation for providing the service of carcass disposal but rather that farmers benefited from the service being free of charge to them. De Cecco points out that Gemo does not relate to the definition of SGEIs but rather this “side effect”.⁵⁹⁵ However, this case can also be seen as the CJEU taking a strict approach on how strictly Member States should define the parameters of an SGEI. Had the definition of the public service included the provision of the services for free the result might have been different. It can also be argued that the GEMO judgement questions the logic of the system. If the carcass disposal service, a private undertaking, is to charge farmers for its services, what exactly is it the being compensated for? Does this not trigger an Altmark investigation regarding possible overcompensation? In that sense can be argued that by attacking that services were being provided for free, and thereby distorting the logic of the system, the GC did impact on how SGEIs are defined. It seems that the conclusion drawn by many others that the definition of SGEIs is truly open. However, as shown above it can be somewhat altered by the context, and not all situations provide equal freedom.

8. Analysing SGEIs and the Altmark criteria: An impact of NPM

In this chapter I will analyse the relationship between NPM and SGEIs in a State aid context. At the onset the differences between NPM and SGEIs in a State aid context must be emphasized, what they consists of and how it is relevant to this analysis. The difference that must be highlighted is the difference in their relation to the public sector. NPM is a movement which seeks to make the public sector more efficient, it is a set of ideas based on certain assumptions of reality, and on the basis of those ideas policy suggestions are made. In other words, liberalization or privatisations are not ends in themselves, but rather

⁵⁹³ Case C-126/01 GEMO.

⁵⁹⁴ For an extensive background see Opinion of Advocate General Jacobs delivered on 30 April 2002 (1) Case C- 126/01 *Ministre de l'économie, des finances et de l'industrie V GEMO SA*

⁵⁹⁵ De Cecco 2013, p. 153.

means to achieve an efficient public sector. Rules on SGEIs on the other hand function as a limit for the rules on, in this specific context, of the Union's competition policy. Initially it can be stated that where NPM sets out to change the public sector, it cannot be known *prima facie* whether rules on SGEIs does the same. For example, in the field of liberalization NPM advocates it, whereas SGEI rules have to adapt to it.

Liberalization and privatisation are phenomena which both NPM and SGEI rules have a relationship to. Privatisation and liberalization have been undertaken first at a national level, and second at a Union level through harmonized programmes. Furthermore, public procurement law a regime within the Union which can be argued to shape the role of state in what the State produces itself and what is left to the market.

Although it has been argued that *Altmark* increased the scrutiny of the Member State definition of SGEIs⁵⁹⁶, De Ceccos assertion that *BUPA* proves this argument incorrect seems to be true.⁵⁹⁷ However, this requires in my mind some further assessment. It seems as if though the difference between *Altmark* and *BUPA* are, looked at from an NPM perspective, is are inherently similar to one of the main points of criticism towards NPM namely its relationship to approach to so called public service values. As we can see in *BUPA*, the GC was given the task of reviewing a national private health care scheme. Interestingly, the background of the case can be found in a marketization reform of the health care market in Ireland. That reform had not did not entail the full application of market forces the health insurance market but instead it the Irish legislator had chosen to include the protection of certain non-market values, namely generational solidarity. The special features of the Irish national regulation of using market solution while at the same time protecting other values can also be found in the theme of NPM and its relationship with values. The task of the GC in *BUPA* was therefore to review an NPM reform.

However, it must be remembered that at the time of the *BUPA* ruling NPM reforms were receiving heavy criticism already and in many countries there were movements against the application of NPM to public sector reform. It can be argued that NPM management reforms are connected to what Freedland dubbed the concept of public service law.⁵⁹⁸ What we see here is one of the two elements of the birth of this concept. As was written

⁵⁹⁶ Ewa Gromnicka: Services of General Economic Interest in the State Aid Regime: Proceduralisation of Political Choices? *European Public Law*, vol. 11, no. 3 (2005), p. 429.

⁵⁹⁷ De Cecco 2013, p. 154.

⁵⁹⁸ Freedland 1998, p.12. See chapter 5.1.

earlier, Freedland contributed this development to the liberalization and privatization in the Member States. Whereas Freedland stated that the one of the reasons to the birth of public service law would be to prevent regulatory competition, it seems that in the case of BUPA there was actually the opposite occurring, namely a foreign entrant on the market claiming to be losing profit because of structure of the national system.

Another conclusion to be drawn regards the relationship between NPM and State aid law is the opening of markets and the increase of the use of State aid law as the tool to by undertakings to remedy perceived benefits conferred. As De Cecco writes the connection between State aid law and SGEIs is relatively new.⁵⁹⁹ The shift of SGEIs towards the area of State aid law can be explained by the opening of markets to competition, which arguably can be seen as an NPM reform. The legal instrument to use for an undertaking wishing to challenge an incumbent will be different when exclusive rights have been dismantled due to marketization and privatization reforms. As seen in chapter 6, the early case law relating to SGEI was often in connection directly to Article 102. With the increasing use of public procurement to choose which market operator would perform an SGEI this also meant that the “old” legal instruments partly lost their relevance?

Therefore we can see that NPM, and in particular marketization reforms played a part in shifting the focus of SGEI from the areas of antitrust. That is not to say that these areas completely have lost their relevance, but it can at least be argued that their significance as legal instruments have decreased.⁶⁰⁰ In this context it is important to note that it is not sufficient in reviewing this development to look at differences in the “culture” of the public sector in the Member States.⁶⁰¹ But wider developments such as EU wide NPM reforms of the public sectors must be viewed. There seems to be a tendency⁶⁰² to try to focus on the differences of the public service sector in the Member States as a basis for analysis of the development of SGEI and State aid law.

While such differences must not be underestimated it should at the same time not be forgotten that there are developments within different Member States as well and these developments might also be connected to policy initiatives at an EU level. As Bauby wrote the liberalisation schemes on a Union level were preceded by liberalisation schemes on a

⁵⁹⁹ De Cecco, p 135.

⁶⁰⁰ See Bekkedal 2011.

⁶⁰¹ See for instance Bauby 2009.

⁶⁰² See Prosser 2005, Developments in Services of General Economic Interests.

national level.⁶⁰³ With this in mind the development of SGEIs cannot be merely looked at through the Member State - Union dichotomy, but broader developments must be taken into account.⁶⁰⁴

As Ross writes, the BUPA case can also be seen in the light of the wider discussion regarding the relationship between competition law, in the broad sense⁶⁰⁵, and other non-competition values.⁶⁰⁶ This debate relates to the issue of whether competition law with its primary objective of efficiency can embrace values relating to equal treatment and the distribution of resources.⁶⁰⁷ As Prosser writes since the gradual expansion of competition law into other fields there has been debate as to what the role of non-market values should be. Seen in this light BUPA highlights the importance of non-market values in Union law. Ross sees BUPA as the development of social values in Union law. Instead of claiming that BUPA was about State sovereignty BUPA can be interpreted in light of the increasing significance of solidarity in the Union. Referring to the objective of generational solidarity of the RES in BUPA he connects it to the term of intergenerational solidarity introduced by the Lisbon treaty.⁶⁰⁸ On the role of solidarity in EU law Boeger writes “[EU] competition law steps back where Member States impose solidarity obligations on their citizens, not simply out of respect for the role allocation between the [Union] and the Member State, but because in a very real sense this role allocation is founded on the idea that those obligations are not imposed at all but have been freely assumed by citizens through their participation in their national political processes.”⁶⁰⁹ In the operational concept of solidarity De Cecco sees it as a bond between citizens of Member States, not between Member States or Union citizens.⁶¹⁰

The BUPA case can be seen as strengthening the view that non-market values are strengthened in relation to market values.⁶¹¹ Ross argues that viewed from the solidarity perspective there is no need for a Union definition of SGEIs “[i]nstead, a re-conceptualisation of the European Union’s competition rules can produce a subsidiarity-led

⁶⁰³ Bauby 2011, p. 24

⁶⁰⁴ For a similar argumentation see De Cecco and Syzyak.

⁶⁰⁵ In TFEU the provisions on State aid law and SGEIs are part of Title VII – Chapter 1 – Rules on Competition.

⁶⁰⁶ Ross 2009, p. 139.

⁶⁰⁷ Tony Prosser 2005, p. 38.

⁶⁰⁸ Ross 2009, p. 140.

⁶⁰⁹ Nina Boeger: Solidarity and EC competition law, *European Law Review*, Vol. 32 3:2007, p. 325.

⁶¹⁰ De Cecco 2013, p. 156.

⁶¹¹ De Cecco 2013, p. 156.

case for the effectiveness of SGEIs delivered nationally and locally. The concept of solidarity can be found in Article 3 TEU, and a chapter on “Solidarity” in the Charter of Fundamental Rights on workers’ rights, environmental protection and consumer protection. De Cecco finds the operational approach to solidarity in the SGEI.⁶¹² With the solidarity approach in mind De Cecco suggests the following conclusion to be drawn from BUPA: “For the purpose of State aid law, SGEIs are, at the current state of development, requirements to which Member States ascribe special significance, a significance which the EU recognizes and promotes as being a manifestation of its own values clustered under the label of solidarity, values to which the EU law attaches no specific prescriptions.”⁶¹³ The exception in this case is the areas in which the Union has legislated.⁶¹⁴ De Cecco’s and Ross’s arguments are in my view supported by *TV2/Danmark v Commission* where the concepts of solidarity and non-market values seem to be further strengthened in relation to market values. The GC held regarding public broadcasting highlighted the significance of the public service mission’s “cultural, social and democratic functions which it discharges for the common good [and has] a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity.”⁶¹⁵ Similarly the GC followed the BUPA approach in the post-BUPA case *CIB v Commission* when *Altmark* was applied less strictly.

If this is the conclusion to be drawn is as described what is then the relation between solidarity in a State aid context and NPM? I can be arguing that it relates to the concept of solidarity as a relationship between citizens of Member States, to be more precise it deals with the concept of citizenship. As previously written, NPM has been criticized for reconceptualising the concept of citizenship. When the citizen is viewed more as a consumer receiving a service, moreover, a service than can be provided through the market, the then there is a risk of the solidarity aspect of citizenship to disappear as solidarity is the product of citizens coming together to create common policy. In this sense it has been argue that the Union engages in activities which are market-making and therefor as a disturbance and erosion for national solidarity. From this point of view it seems like the NPM consumer–citizen does not seem to be able to find a home in BUPA. Where the NPM consumer–citizen interacts with others on the market, with the market

⁶¹² De Cecco 2013, p. 156.

⁶¹³ De Cecco 2013, p. 157.

⁶¹⁴ *Ibid.*

⁶¹⁵ Joined cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark v Commission*, para. 106.

being the bond that brings people together, the “traditional citizen” is linked to other citizens through solidarity.

What about the situations in which Altmark is applied strictly? How is one to interpret those situations in the light of the solidarity argument? De Cecco argues that BUPA proves that Altmark did not bring about a more intensified review of SGEIs and that it was in line with previous case law, instead it highlights the importance of solidarity for the Union.⁶¹⁶ How is then the rest of the case law in which Altmark is applied strictly to be interpreted? According to De Cecco’s definition of an SGEI there seems to be more freedom in the area of “solidarity” and more scrutiny in areas in which the Union has more competence. The problem with this approach is of course that the area of solidarity is poorly defined. When may solidarity be invoked? Naturally, as was pointed out by the GC itself, the fact that the Union has little competence in the area of health plays a role.

In BUPA it was not only the definition of an SGEI that was at stake but the way they were connected to the other Altmark criteria. One must remember in BUPA that the legal issue did not merely regard the first Altmark requirements, but also the three others. In theory it could have been possible for the GC to accept the existence of an SGEI mission but considered that there others were not fulfilled as the RES did not directly compensate for an SGEI but rather a structural element of the health insurance system itself, which was to share risks equally in for the purpose of generational solidarity. The conclusion to be drawn here is that the definition of SGEIs is related to how they are financed, at least in the strict Altmark model. The reason for this is that the Altmark test is constructed upon a certain concept of how an SGEI is structured. In the Altmark world there are clearly definable SGEIs discharged by undertakings, and these can SGEIs can be quantifiable in a way that enables compensation to be paid for their discharge. This concept is limited to situations where the services that are performed are quantifiable, which, as previously mentioned is largely due to the way 106(2) case law developed.

In the Altmark context, the services at issue were transport services, which are easy to quantify. The result of a “failed” Altmark test in a situation where the service is easily quantifiable and it is provided by one undertaking is that there eventually may be a situation where unlawful State aid must be repaid. However, when markets are opened to competition and EU law is “invited” in the situation changes. In a context such as in

⁶¹⁶ De Cecco 2013, p. 152.

BUPA where all market actors were imposed with a SGEI and it was difficult to quantify cost, a State aid decision would have most likely lead to the entire restructuring of the private healthcare system. A strict Altmark application would have had systemic applications. Not just is the Altmark decision based on certain parameters regarding the nature and financing of a SGEI, but also, due to the logic of State aid, the consequences of an Altmark application differs depending on how the SGEI system is constructed. In the first situation the consequence is repayment of aid, in the second there are systemic implications.

Essentially, Altmark did define the concept of an SGEI, as it is not only the first criteria that establish the existence of an SGEI mission, but the other three that implicitly create the framework of how an SGEI should be delivered. This delivery takes place on a market, the service can be clearly defined and the provision of the service can be subject to an efficiency standard. It is through this analysis that the relationship with NPM materializes. The concept of the delivery of a service public service in Altmark is highly shaped by the ideas and values of NPM. In Altmark we find the marketization aspect, the quantification aspect and the managerialist element in the sense that any organisation can deliver a public service as long as they are subject to a strict efficiency scrutiny which is best realized through competition. In that sense Altmark also exhibits the limitations of an NPM approach as demonstrated by BUPA. Where the lack of the ability to clearly define a public service mission, in the context of State aid law, an NPM approach is applied, it will push towards market solutions as NPM does not recognize solidarity based values.

Has the influence of NPM been decreased with the BUPA? Not necessarily. In my view BUPA is the exception and Altmark is the main rule. In this regard one must not overlook the argument of the significance of Article 14 TEU, Article 36 of the Charter and the SGEI protocol to the Lisbon Treaty. However, by looking at the post–Altmark case law we can see that Altmark is regularly being applied. That is not to say that there would not be cases in the future in which the BUPA approach is being applied, but rather that the Altmark test seems to be adequate in most situations. To clarify, I bring this argument fourth in response to the argument that BUPA shows that there is less scrutiny if the definition of Member State financing and entrusting of SGEI missions. Although the scope of application of Altmark is limited by BUPA, is still applies in many situations.

However, if one is of the opinion that the Altmark test is appropriate, which it undoubtedly from an NPM perspective is, then there is really no change. Due to its relationship with state aid law in the SGEI context, NPM should be viewed as a factor in creating the framework for public services in the context of what Prosser views as an emerging area of public service law⁶¹⁷, as a separate area of law. It could even be stated that in a legal context NPM materializes as public service law, through its views on the public sector. Prosser wrote that this sector of law is created when partly when movements for privatization and public service values meet, which leads to the accentuation of non-market value concepts within competition law which previously have in a separate sphere of public law. It is against the background of the rising legal significance of the concept of solidarity in EU law the suggestions of characterising SGEIS as necessary only when there is market failure. Due to the rise of non-market values, these suggestions made by the Commission and others could be viewed as a way of giving a NPM, or perhaps more specifically, law and economics definition to them. BUPA and Altmark are very good indicators of the process of the birth of the area of public sector law. They contain the conflict between market and non-market values.

As a final remark it can be stated that the argument of NPM leading to overregulation instead over deregulation seems valid when looking at the SGEI rules. In a legal context this could be translated to legal uncertainty. The field of SGEI law is very complex and is connected to many different areas of law and requires extensive knowledge to get a broad view of. The clash between deregulated markets and non-market values has created a field of complex rules which lack clear parameters for application. Although it can be stated that such values as solidarity has been acknowledged by the EU courts, it is still unclear in which situations such exceptions might apply.

9. Conclusion: NPM and the birth of public service law

The relationship between NPM and SGEIs seems to be that NPM reforms were part of opening open markets which provided for the applicability of Union law. In the field of competition law, the liberalisations of markets led to a shift in the caseload from a focus on monopolies to a focus on state aid though the financing of SGEIs. It can be concluded that NPM has had an effect on a national level, to which EU law has had to react with new

⁶¹⁷ See Prosser 1998.

tools. The effect of NPM in an area such as healthcare, in the form of liberalization and marketization, has led to Union law to deal with such concepts as solidarity. In this indirect way, by forcing Union law, in the application of competition law, to assess situations in which non-market values have been present, NPM has been a part of reshaping an area of law, or even perhaps created a new area of law, public service law. This has had a negative effect on legal certainty and has increased the complexity of regulation. N

PM reforms have in this sense brought the public sectors of the Member States closer to the integration process of the Union. Although NPM has progressed at different speeds in different Member States and different policy alternatives have been implemented, through its contact with EU law it has in a way affected all Member States. As there at the moment still is uncertainty as to how Union law interacts with especially with non-harmonized areas of law in which the Member States have competence, there is still an ongoing development and this impact of NPM will have to be further studied to see its long term effects.