

The Ruling in BUPA – Clarification or Modification of Altmark?

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It is hardly imaginable to find a ruling handed down by the Luxembourg Community Courts that allowed journals dealing with European Competition and in particular European State aid control law to fill so many of their pages as the one in Altmark handed down by the Grand Chamber of the European Court of Justice on 24 July 2003. Prior to 12 February this year the debate around the famous four Altmark criteria has however almost ceased down completely. Coincidentally born on the very same day as the ruling in CELF, another product of the Grand Chamber of the ECJ, BUPA led its twin-sibling, the Court of First Instance, to pronounce itself for the very first time in quite some detail on how to interpret the four Altmark criteria.

The opportunity to do so arose from an action lodged by a UK health insurance company and its Irish subsidiary against a Commission decision that had declared a risk equalisation scheme in the Irish private health insurance market to contain no elements of State aid. Leaving aside the myriad technical details of this scheme, the latter boiled down to obliging the applicant in Case T-289/03 to make payments to his competitor on the Irish market for private health insurance, at the same time the incumbent provider of such services before liberalisation effected in the mid-90ies, compensating for the better risk profile of his clients. The aim of the equalisation scheme was therefore to effectively prevent the new entrant in this market from cherry-picking his clients amongst the young and healthy whilst leaving less attractive customers to the incumbent.

The impressive, almost 350 paragraphs long ruling the CFI went into all the details of the scheme under attack and, in doing so, based its material assessment on the four criteria as developed in Altmark. The judgment is outstanding for two reasons: first, it came to the conclusion that the equalisation scheme satisfied the entirety of the Altmark requirements even though the Commission decision had based its assessment - prior to the ruling in Altmark - on the early Ferring judgment that had

been subject to a major overhaul by Altmark. Second, the ruling in BUPA essentially says that Altmark provides very useful guidance on how to assess national schemes designed to compensate costs linked to the fulfilment of SGEI, but does not fit in each and every case and therefore has to be modified accordingly. Apart from the wide discretion granted to the Member States both with regard to the definition of the SGEI and to setting the parameters for compensation the judges most remarkably held that the so-called efficiency requirement as laid down by the fourth Altmark condition would not apply if there was no danger that costs resulting from inefficiency would have to be paid for by those liable to finance the scheme in question.

Although the Commission won the case in BUPA, its findings may still be bad news for it. Since its services have started to review schemes on the basis of Altmark, its practice can hardly be classified as very imaginative. The cases decided hereafter have merely applied the wording of the 2003 judgment word by word and never found any scheme designed before the pronouncement of the Altmark criteria to fall outside the scope of Article 87 (1) EC. This ought to change now. The wide discretion granted by the CFI in BUPA is hardly compatible with the Commission's recent practice of second-guessing both contents and costs of public service missions designed by the Member States. One may only look at the Commission's most recent decisions in the area of public service broadcasting. The finding of the CFI that the efficiency test introduced by Altmark does not always apply might however produce few practical consequences as most schemes still demand that inefficiencies have to be borne by those liable to finance them.

When this journal went to press it was still unclear whether there would be an appeal in the BUPA case. Regardless of whether or not this is to be the case, there are lots of issues for debate now – both inside and outside the chambers of the Community judiciary.