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*Wolf Sauter**

Document summary

In its *BUPA* Case of February 2008 the Court of First Instance set a new standard for assessing whether public service compensation constitutes a state aid and/or is covered by the exception for services of general economic interest. At issue was risk equalisation between providers of private health insurance in Ireland. The alternative standard adopted in *BUPA* is less rigid than that in *Altmark* and therefore in principle to be welcomed also because it seems more suited to services provided in competition and therefore to new ways of providing public services. This means it contains elements of a new approach toward national attempts at reshaping the welfare state in EU law terms. However too much discretion was given to the national authorities and the Court of First Instance did not sufficiently address the conditions of competition in the relevant Irish markets in this case, making it on these counts a false start.

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* Dutch Healthcare Authority (NZa), TILEC member and professor of healthcare regulation, Tilburg University. All views expressed are purely personal. Please contact at: wsauter@nza.nl or +31.30.2968 933. Cf. <http://ssrn.com/author=857260>

1. Introduction

In the *BUPA* Case¹ the Court of First Instance handed down a detailed judgment of almost 350 paragraphs reviewing a Commission Decision which held that the statutory scheme designed to equalise risks between parties offering private health insurance in Ireland did not constitute a State aid. This judgment was based, first, upon an alternative version of the *Altmark*² criteria that are used to assess under Article 87(1) EC whether a State aid is involved in the context of public service compensation. Second, it was based on the test governing services of general economic interest of Article 86(2) EC. The *BUPA* ruling upheld the Commission's State aid Decision, and thereby found the risk equalization scheme in Ireland to be compatible with EU law. Several months later however, when ruling on a separate issue of national law, the Irish Supreme Court struck down the Statutory Instrument and the relevant Ministerial decision upon which risk equalisation in Ireland was based.³

Meanwhile, the *BUPA* judgment of the Court of First Instance raises more general questions about what test to apply under Article 87(1) EC to public services provided in competition.

For obvious reasons, questions concerning state aid and services of general economic interest often mix where the various forms of compensation for public services are involved. Broadly from the mid-1980s until the Court of Justice's 2003 *Altmark* judgment there were two fundamentally different ways of looking at this relationship if a legitimate service of general economic interest was involved (although the outcomes converge):⁴

- the State aid approach, which holds that aid exists but may be ruled compatible; and
- the compensation approach, which holds that there is no advantage involved because the compensation is provided in consideration for services rendered, and therefore there is no aid.⁵

A spirited debate on the *State aid* versus *compensation* approach (reminiscent of the rule of reason debate in the context of Article 81(1) EC on the issue whether a restriction of competition is involved) eventually arose between the different Advocates General, with the Community Courts taking different positions at different times.⁶ The Commission's practice, historically, was more in line with the compensation approach.

¹ Case T-289/03, *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v. Commission of the European Communities*, judgment of the Court of First Instance of 12 February 2008 (not yet reported). Third chamber, extended composition. Noted by Biondi, "BUPA v. Commission", (2008) *European State Aid Law Quarterly* (EstAL) 401-407; Fiebelkorn, "Das Risikoausgleichsystem im Gesundheitssektor: Eine unerlaubte staatliche Beihilfe?", (2008) *European Law Reporter* 126-137. Cf. Bartosch, "The ruling in BUPA – clarification or modification of Altmark?", (2008) *EstAL* 211.

² Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (Altmark)* [2003] ECR I-7747 (Opinions by Advocate General Léger of 19 March 2002 and 14 January 2003). Cf. Louis and Vallery, "Ferring revisited: the *Altmark* Case and State financing of public service obligations", (2004) 27(1) *World Comp.* 53-74; Sinnaeve, "State financing of public services: the Court's dilemma in the *Altmark* Case", (2003) 3 *EstAL* 351-364; Ronellenfisch, "Das Altmark-Urteil des Europäischen Gerichtshofs", (2004) 95(3) *Verwaltungsarchiv* 425-442; Bracq, "Droit communautaire matériel et qualification juridique: le financement des obligations de service public au coeur de la tourmente", (2004) 40(1) *RTDE* 33-70.

³ *BUPA Ireland Ltd & anor v. Health Insurance Authority & ors* [2008] IESC 42 (judgment of 16 July 2008). Supreme Court record number: 17/07. This decision overturned that of the High Court in *BUPA Ireland Ltd & anor v. Health Insurance Authority & ors* [2006] IEHC 431 (judgment of 23 November 2006).

⁴ These two approaches were so defined by Advocate General Jacobs in his Opinion of 30 April 2002 in Case C-126/01, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA (GEMO)* [2003] ECR I-13769. His proposal was to apply the compensation approach only if a clear *quid pro quo* for a well defined general interest obligation was involved, and the state aid approach for all other cases,

⁵ To establish the existence of a State aid in the sense of Article 87(1) EC requires: (1) an intervention by the State or through State resources; (2) this intervention must affect trade between the Member States; (3) it must confer an advantage on the recipient; (4) and it must distort or threaten competition. Case C-280/00 *Altmark*, *supra* note 2, para 75. Often a fifth condition that the intervention must be "selective" (i.e. not of general application) is listed – but this can also be seen as one aspect of conferring an advantage.

⁶ E.g. a compensation approach in Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531; Case C-53/00, *Ferring SA v. Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067; and a state aid approach in Case T-106/95, *Fédération française des sociétés d'assurances (FFSA) et al. v. Commission of the European Communities* [1997] ECR II-229; Case T-46/97, *SIC - Sociedade Independente de Comunicação SA v. Commission of the European Communities* [2000] ECR II-2125; Case C-332/98, *French Republic v. Commission of the European Communities. Aid for the Coopérative d'Exportation du Livre Français (CELF)* [2000] ECR I-4833.

In the *Altmark* Case the Court of Justice finally settled this debate by embracing the compensation approach and by formulating an elaborate four-part test for its application. Ruling against the Opinion (in fact two of them) of its Advocate General Léger, the Court held that public subsidies for (in this case regional) transport services did not constitute State aid if they formed compensation for performing public service obligations. To determine whether this was the case, the following conditions had to be satisfied:

“first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided (...) so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”⁷

This formula was generally recognised as introducing a new standard – including by academic economists welcoming the efficiency requirement in the fourth *Altmark* criterion.⁸ It also inspired the Commission to adopt in November 2005 a package of measures concerning public service compensation that it presented as the first installment implementing its June 2005 State Aid Action Plan.⁹ These measures consisted in the first place of an Article 86(3) EC Decision setting out threshold criteria below which public service compensation that failed the *Altmark* criteria would be considered compatible aid.¹⁰ In this manner it waived liability for a large number of aid cases that would otherwise have clogged the system. In the second place a framework was introduced for assessing whether aid above the thresholds was compatible based on an Article 86(2) EC analysis. In fact both measures replicated in the context of Article 86(2) EC the first three criteria of the *Altmark* test that is carried out in application of Article 87(1) EC). In those cases where the *Altmark* test is not found to be satisfied based on Article 87(1) EC this has the unfortunate effect of substantive duplication of that test when, next, Article 86(2) EC is applied. The only element dropped is the fourth criterion: the public procurement requirement or its alternative, comparison to an efficient undertaking.

⁷ Case C-280/00, *Altmark*, *supra* note 2, para 95. Cf. the more elaborate formulation in paras 89-93, where it is also specified that the ex post compensation of losses without the parameters of such compensation having been established beforehand does constitute a State aid. The case law cited in support is Case 240/83, *ADBHU*, *supra* note 6, and Case C-53/00 *Ferring*, *supra* note 6.

⁸ Cf. Services of general economic interest: Opinion prepared by the state aid group of EAGCP (economic advisory group for competition policy), June 29 2006. This opinion was positive in particular on the introduction of the notion of efficiency – and critical of the Commission measures that left out precisely this aspect (*infra*, note 9). More sceptical: Nicolaidis, “Compensation for public service obligations: the floodgates of State aid”, (2003) 24(11) ECLR 561-573.

⁹ Commission Decision of 28 November 2005 on the application of 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, OJ 2005, L312/67; Community framework for State aid in the form of public service compensation, OJ 2005, C297/04; Commission Directive 2005/81/EC, 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, OJ 2005 L312/47. European Commission consultation document of 7 June 2005, State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (SEC(2005) 795), COM/2005/0107 final .

¹⁰ Required are: a clearly defined public service mandate; no over-compensation; compensation of less than €30 million per year per undertaking; an annual turnover of less than €100 million per undertaking. There are no limits for the amount of compensation for hospitals and social housing, air and maritime transport to islands not exceeding 300.000 passenger movements, as well as airports and ports for passenger movements below 1.000.000 for airports and 300.000 for ports. In effect the Decision replicates first three *Altmark* criteria (but not the fourth criterion) in greater detail: hence the need to apply either public procurement procedures or the comparator of an efficient undertaking are dropped, and if the other requirements are met no individual Commission scrutiny is required.

The *Altmark* heritage so far has been a mixed one. The Commission in its State aid decision practice appears to have been fairly strict in applying the four-part test under Article 87(1) EC, respectively its own reformulation thereof under Article 86(2) EC.¹¹ The same does not hold to the same degree for the Courts. The European Court of Justice got off to a slow start by not applying the *Altmark* test in the *GEMO* case,¹² and applied only the first two of its criteria in *Enirisorse*.¹³ Since then the test has been applied both the Court of Justice and the Court of First Instance, albeit not frequently.¹⁴ Meanwhile (as presaged in the Commission's State aid package), the convergence between Articles 87(1) EC and Article 86(2) EC seems to have halted where arguably it would have mattered most: on the efficiency test of the fourth *Altmark* condition.¹⁵ It is against this background that the *BUPA* judgment is set.

2. Factual background

The *BUPA* Case revolves around the Decision by the European Commission of May 2003¹⁶ concerning the risk equalisation scheme in the Irish health insurance market. The Decision ruled that the notified measure did not constitute aid, and (by implication) rejected the complaint that had been lodged against this scheme with the Commission by BUPA (British United Provident Association) Ireland in March 1999. To facilitate discussion of the judgment the facts concerning risk equalisation in Ireland are set out first.

Private health insurance was first introduced in Ireland in 1957 with the establishment of the Voluntary Health Insurance Board (VHI) which remained a de facto monopolist until BUPA Ireland entered the market in January 1997 after various legislative changes, notably the 1994 Health Insurance Act.¹⁷ Such private insurance was originally regarded as necessary for consumers who were not eligible for public sickness insurance. Eventually however – after the tax-financed public health insurance system was extended to provide universal coverage in 1991 – it became an alternative system of coverage for private medical treatment. By October 2005 around 50% of the Irish population had taken out private insurance either with VHI, BUPA or a third provider, VIVAS Healthcare (which entered the market in October 2004). At the time of the contested Commission Decision in 2003 VHI accounted for 85% of the market and BUPA for 15%.¹⁸ BUPA however withdrew from the market in April 2007 after its appeal against the introduction of the risk equalisation scheme (see below) was rejected by the Irish High Court,¹⁹ and its activities were taken over by the Quinn Group.

¹¹ Cf. Renzulli, "Services of general economic interest: the post-*Altmark* scenario", (2008) 14(3) EPL 399-432; Lynskey, "The application of Article 86(2) EC to measures which do not fulfil; the *Altmark* criteria: institutionalising incoherence in the legal framework governing state compensation of public service obligations", (2007) 30(1) World Comp. 153-168. E.g., Commission Decision C(2004) 4343 final, of 16 November 2004 relating to State aid N 381/2004 Pyrénées-Atlantiques; Commission Decision C(2005) 1170 final of 3 May 2005 relating to State aid N282/2004.

¹² Case C-126/01, *GEMO*, supra note 4.

¹³ Joined Cases C-34/01 to C-38/01, *Enirisorse SpA v. Ministero delle Finanze (Enirisorse)* [2003] ECR I-14243.

¹⁴ Case T-157/01, *Danske Busvognmaend v. Commission* [2004] ECR II-917; Case T-274/01, *Valmont Nederland BV v. Commission* [2004] ECR II-3145; Case C-451/03, *Servizi ausiliari dottori commercialisti v. Giuseppe Calafiori* [2006] ECR I-2941; Case C-206/06, *Essent Netwerk Noord BV*, judgment of 17 July 2008 (not yet reported).

¹⁵ In Case T-442/03, *SIC - Sociedade Independente de Comunicação, SA v. Commission of the European Communities*, judgment of 26 June 2008 (not yet reported), para 145 and Case T-17/02, *Fred Olsen SA v. Commission (Olsen)* [2005] ECR II-2031, paragraph 239, the Court of First Instance stated that neither the wording of Article 86(2) EC nor the case-law on that provision require tendering procedures for services of general economic interest.

¹⁶ Commission Decision C(2003) 1322 final of 13 May 2003, State aid N 46/2003 – Ireland – Risk equalisation scheme in the Irish health insurance market. (Decision that the notified measure does not constitute aid and/or not to raise objections pursuant to Articles 4(2) and 4(3) of Council Regulation 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 88 [93] EC, OJ 1999 L83/1.)

¹⁷ The 1994 Health Insurance Act (amended in 2001 and 2003) was intended inter alia to bring the private health insurance regime in line with the Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) OJ 1992 L228/1.

¹⁸ According to the Commission Decision, supra note 16, para 39. When the application in the *BUPA* Case was lodged BUPA had 15% of members and 11% by receipts, VHI 80% of members and 85% of receipts. Case C-289/03, *BUPA*, supra note 1, para 17. Such figures – especially the lower per capita receipts of BUPA – hardly suggest a compelling case for transfer payments towards VHI. On the other hand, BUPA's daily treatment cost was estimated to be 17% lower – which could be the result of greater efficiency, a lower risk profile, or both. *Ibid.*, para 251.

¹⁹ Supra note 3.

Under the terms of the 1994 Health Insurance Act the provision of private health insurance in Ireland must meet the following four public interest requirements:

- *Open enrolment*: i.e. anyone under 65 years of age must be accepted regardless of age sex or health status (although waiting periods may apply)
- *Lifetime cover*: contracts cannot be terminated by the insurer
- *Community rating*: the same rate applies for a given level of service regardless of age, sex or health status
- *Minimum benefits policies*: benefits provided must be above a certain prescribed level.

In order to back up these obligations the Irish Government aimed to set up a risk equalisation scheme, initially in 1996 (never implemented and revoked in 1999) and eventually in January 2003 as notified to the Commission. BUPA's complaint originated in the run-up to the notified risk equalisation scheme that, following the Commission's Decision, entered into force in July 2003.²⁰

The general notion behind risk equalisation in health insurance is that payments take place between the insurers to compensate for the competitive disadvantage of those insurance providers whose customers are on average older or otherwise more susceptible to ailments and medical expenses. Hence insurers with a healthier consumer profile make compensation payments to those with a less healthy consumer profile. From an economic or a health policy point of view this is typically done in order to encourage insurers to compete on the merits – e.g. based on efficient contracting with providers of care and investments in quality and prevention – rather than on risk selection of their customers – i.e. insuring only healthy consumers. Moreover, without risk equalisation the other public interest policies such as open enrolment and community rating are unlikely to work, given the possibilities of de facto risk selection (e.g. based on selective marketing and neglecting the needs of undesirable consumers).²¹

The Irish risk equalisation scheme was triggered based on calculations taking into account the age and sex of the insured population as well as (potentially) a "health status weight" based on hospital utilisation. Depending on the level of the risk differentials involved the Health Minister could either act at the request of the Health Insurance Authority, or after consulting it. The actual equalisation payments were based on divergence from the average risk profile in the market and on the net claims costs – i.e. the medical costs incurred, not the overhead costs of running the health insurance business. However as a form of ex post compensation based on actual costs they would tend to remove incentives to compete on efficient purchasing, prevention and quality (as the resultant costs are thereafter in any event shared between competitors) which means that as a rule ex ante compensation is preferable. In April 2005 the Health Insurance Authority recommended activating the risk equalisation scheme. Given in particular the age distribution of their consumers this would have meant potentially significant payments from BUPA to VHI.²² However, due to legal proceedings that BUPA initiated to challenge the scheme in the Irish Courts its activation was suspended.

The Commission in its abovementioned Decision had meanwhile come to the conclusion that the risk equalisation scheme as notified in principle fulfilled the conditions set out in Article 87(1) EC and hence would constitute a state aid. However, based on the approach to Article 86(2) EC applied in *Ferring*,²³ the Commission held it should be regarded as compensation for services provided to undertakings charged with public service obligations (the open enrolment, lifetime cover, community rating and minimum benefits) that sought to install solidarity between policy holders. It held the policy to be necessary to maintain stability on the Irish market and limited to the minimum required to equalise risk profiles. Hence it decided there was no state aid, or in the alternative that any aid involved was compatible with the common market pursuant to Article 86(2) EC.

²⁰ Statutory Instruments, S.I. no. 261 of 2003, Risk equalization scheme, 2003.

²¹ Cf. the analysis of different regulatory solutions to guaranteeing solidarity in Paolucci, Den Exter and Van de Ven, "Solidarity in competitive health insurance markets: analysing the relevant EC legal framework", (2006) *Health Economics, Policy and Law* 107-126; Van de Ven and Ellis, "Risk adjustment in competitive health plan markets", in Culyer and Newhouse (eds), *Handbook of Health Economics, vol. 1* (North-Holland, Amsterdam 2000), 755-845.

²² As a new entrant VIVAS was entitled to a three year holiday from the risk equalisation scheme. BUPA estimated the payments it would have to make under the scheme (over a three-year period) at €160 million, against projected profits of €60 million. Alternative calculations carried out in the course of the legal proceedings in Ireland came to BUPA payments into the scheme of €90 million and profits of 43€ million or, in any event, a significant loss as the result of the risk equalisation scheme.

²³ Case C-53/00, *Ferring*, *supra* note 6, para 27.

3. Judgment

3.1. Preliminary remarks

Because the applicants (British United Provident Association Ltd, BUPA Insurance Ltd and BUPA Ireland Ltd, collectively: BUPA) claimed the Commission's Decision should be annulled for failing to meet the four-part *Altmark* test (that had not existed yet at the time of the contested Decision), the first issue that the Court of First Instance (the Court) had to settle in the *BUPA* Case was the applicable framework. It ruled that because the Court of Justice had not limited the scope of its *Altmark* findings in time, the criteria formulated there were applicable to the case at hand, albeit "in a manner adapted to the particular facts of the present case".²⁴ At the same time however the defendants (the Commission) limited their arguments to the applicability of Article 86(2) EC. The bizarre effect was that it was now left primarily to the Court and the intervening parties (Ireland, The Netherlands and VHI) to identify how the various elements of the Commission's Decision could be read in the light of the *Altmark* criteria that they were never drafted to address. The body of the *BUPA* judgment comes in two parts: the discussion of the *Altmark* criteria and the discussion of Article 86(2) EC.

3.2. The four *Altmark* criteria

The first Altmark criterion: a public service obligation

The first requirement (as is the first condition for the application of Article 86(2) EC) is that a clearly defined public service obligation must actually exist. Here the Court confirmed that because healthcare is almost exclusively a Member State competence the Commission could only intervene in the case of a manifest error,²⁵ meaning that checking for manifest error would also be the standard for judicial review. Moreover it found that an act of entrustment was required – not an exclusive or special right: the attribution of a service of general economic interest could consist in an obligation imposed on a number of operators or even on all operators active in a market.²⁶ This requirement was found to be met in the Irish market for private medical services by the statutory obligations of open enrolment, lifetime cover, community rating and minimum benefits.

Moreover, in response to the applicants claim that no service of general economic interest existed as the obligations concerned created no universal service, and concerned "luxury" services, the Court held that the service need not respond to a need common to the whole population or be supplied throughout a territory,²⁷ and that the compulsory nature of the service (i.e. the unilateral obligation to deal under the open enrolment obligation) was a sufficient condition as regards universality (reinforced by the other obligations such as community rating).²⁸ At the same time it found the existence of product differentiation in different packages (including basic, average and luxury coverage) and price competition between providers to be consistent with universality and objectives of risk sharing and solidarity between generations that could not be called into question by Community institutions. The Court also held that "the universality criterion does not require that the service in question be free of charge or that it be offered without consideration of economic profitability", and not even that all potential users should be able to afford all services concerned (e.g. the luxury coverage).²⁹ Hence it ruled the first criterion was met, or more accurately, that the Commission had not erred in concluding a service of general economic interest was involved.

The second Altmark criterion: parameters for compensation

²⁴ Case T-289/03, *BUPA*, supra note 1, para 160.

²⁵ Case T-289/03, *BUPA*, supra note 1, para 166, citing Case T-17/02, *Olsen*, supra note 15, para 216.

²⁶ Case T-289/03, *BUPA*, supra note 1, para 179, with reference to *Services of general interest in Europe*, OJ 2001 C17/4, paras 14 and 15.

²⁷ Case T-289/03, *BUPA*, supra note 1, para 186, with reference to Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V* [1989] ECR 803, para 55; Case C-266/96, *Corsica Ferries France v. Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, et al.* [1998] ECR I-3949, para 45; and Case T-17/02, *Olsen*, supra note 15, para 186ff. All these cases concern transport and/or port services.

²⁸ Case T-289/03, *BUPA*, supra note 1, paras 192ff. This obligation to deal need not be reciprocal: hence the voluntary nature of the private insurance scheme in Ireland did not exclude the existence of a service of general economic interest in the present case.

²⁹ Provided the service in question was offered at uniform and non-discriminatory rates and at similar quality conditions for all customers (which does not square well with differentiated and/or luxury coverage). *Ibid.*, para 203, with reference to Case C-320/91, *Criminal proceedings against Paul Corbeau* [1993] ECR I-2533, para 15; Case C-393/92, *Municipality of Almelo et al. v. NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, para 48; and Case C-475/99, *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001] ECR I-8089, para 55.

The second condition requires the pre-existence of clearly defined parameters for compensation. Here the Court emphasized that the Member States have wide discretion when determining the compensation for costs related to a service of general economic interest which calls for an assessment of complex economic facts. It accused the applicants of confusing the criteria used to activate risk equalisation with the calculation of the compensation paid, whereas only the latter should be subject to *Altmark* scrutiny. As the criteria for the calculation of payments under the risk equalisation scheme were complicated but not intransparent or unclear, and Commission had detailed the relevant aspects of the scheme in its Decision, the Court was satisfied the second condition had been met.

The third Altmark criterion: necessity and proportionality

Much as in the context of Article 86(2) EC, the third *Altmark* condition requires compensation to be necessary and proportional, i.e. covering all or part of the costs incurred in discharging the public service obligations and taking into account receipts and a reasonable profit. Here again the Court pointed out that in the context of a legitimate service of general economic interest (as had been established existed under the first condition) the standard of review was manifest error and held that the applicable proportionality test was whether the compensation involved was necessary for the service of general economic interest to be performed under economically acceptable conditions.³⁰ According to the applicants the risk equalisation scheme was not in reality aimed at compensating for the cost of supplying the private health insurance services which in any event were not as such services of general economic interest. They pointed out the risk insurance scheme did not take into account the receipts of the insurers or whether they ran a loss on "bad risks". Also, they claimed the possibility of market segmentation by means of product differentiation allowed insurers to avoid "bad risks", rendering compensation superfluous.

The Court however found that even in the absence of a direct relationship between the amounts actually paid by an insurer following a particular claim and compensation under the risk equalisation scheme there was still a link between the overall cost associated with providing private health insurance services and the compensation provided. It accepted that the operation of the risk equalisation scheme was radically different from the compensation systems found in cases like *Ferring* and *Altmark*, and it could therefore not strictly fulfil the third *Altmark* condition. The Court then stated that the quantification of the additional costs based on a comparison between risk profiles was "consistent with the purpose and the spirit of the third *Altmark* condition in so far as the compensation is calculated on the basis of elements which are *specific, clearly identifiable and capable of being controlled*".³¹ It held that a requirement to look at receipts for private health insurance services in order to determine the additional costs of supplying them did not make sense in the light of community rating which means premiums are set in such a manner as to cover the costs of the insured population as a whole. The Court considered "that neither the purpose nor the spirit of the third *Altmark* condition requires that receipts be taken into account in a system of compensation which operates independent of receipts".³² As the Commission had duly observed the existence of a link between additional costs and a negative risk profile the Court found it had not misapplied the third *Altmark* condition.

The fourth Altmark criterion: efficiency

The fourth condition concerns the selection according to public procurement rules, or, in the alternative, the comparison of costs for purposes of compensation with those of an efficient operator. The Court found that this *Altmark* condition could not be applied either because the compensation system was neutral with respects to costs and receipts but instead based on the additional costs associated with negative risk profiles. In such a system it held that it was not possible to identify in advance which operator would be the beneficiary of risk equalization payments and compare their costs with that of an efficient operator (an issue of fact because at the time of the Commission Decision the risk equalisation scheme had not been activated yet). Any remaining inefficiencies, the Court held, were offset by the fact that the average claim costs of all insurers were computed, allowing them to benefit from their own efficiencies if they did better than the national average. In sum, the Court concluded that the Commission took into account to the requisite standard that the compensation provided under the risk equalisation system was neutral with regard to inefficiencies, and hence did not fail to have regard to the fourth *Altmark* condition.

³⁰ Case T-289/03, *BUPA*, *supra* note 1, para 222.

³¹ *Ibid.*, para 237 (emphasis added). Lowering the bar even further the Court also held there that the applicants had failed to establish, inter alia, the absence of "a link" between the obligations and the risk equalisation payments.

³² *Ibid.*, para 242.

With this the Court concluded that Commission's Decision had been correct in finding that the Irish risk equalisation system did not involve State aid in the sense of Article 87(1) EC on all four of the *Altmark* criteria, and that the complaint must be rejected in its entirety. Nevertheless it went on to consider the alleged infringement of Article 86(2) EC.

3.3. Article 86(2) EC: necessity and proportionality

Due to the significant overlap between the arguments raised in relation to the *Altmark* criteria and Article 86(2) EC only the issues not addressed earlier were discussed under this head.

Necessity

Regarding the necessity of the risk equalisation system in order to address the market failure identified by the State authorities the Court held the standard for Commission's assessment under Article 86(2) EC was limited to checking for manifest errors and it could not ask Ireland to demonstrate its solution was indispensable (linking the wide discretion accorded to authorities to the need for the scheme to adjust to market developments³³). Next it examined whether the Commission could reasonably have concluded that a private health insurance market with public interest obligations of open enrolment, community rating, lifetime cover and minimum benefits was in danger of risk selection and resulting market instability.

The Court held that the danger of risk selection occurring due to e.g. selective marketing, benefit design or selective quality of service was plausible. This danger would be all the graver if insurers were to adopt either a strategy of "predation" or a "price follower" strategy,³⁴ both of which could lead to "a downward spiral and thus destabilise the equilibrium and the functioning of the community rating PMI (private medical insurance) market".³⁵ Moreover, the Commission had relied on evidence showing that BUPA had in fact adopted a strategy of active risk selection combined with a "price follower" strategy. In the light of this perceived threat the Court found that the Commission did not err in concluding that the risk equalisation system was necessary to restore and maintain the stability of a community rated market and in order for the public interest obligations to be carried out under economically acceptable conditions.

Proportionality

Under proportionality the most significant observation by the Court was that even if the risk equalisation system did have a deterrent effect on entrants, this was offset by the three-year exemption during an insurer's initial activity in the Irish market for private health insurance, and in itself did not mean it was a manifestly inappropriate instrument. It then rejected the complaint as regards Article 86(2) EC.

3.4. State aid and other provisions

Finally the Court dismissed the applicants' claim that Article 88 EC precludes a result that declares State aid compatible with the common market if certain aspects of that State aid contravene other aspects of the Treaty (Articles 82 EC, 43 EC, 49 EC and the third non-life insurance directive³⁶). As these provisions had not been mentioned in the operative part of the Decision the Court found that they were not capable of adversely affecting the applicants and of conferring an interest in bringing an action.

The BUPA judgment has not been appealed.

4. Comments

4.1. Altmark overruled or Altmark expanded?

The *BUPA* judgment has several aspects that are particularly striking on a general reading:

³³ Case T-289/03, *BUPA*, *supra* note 1, para 265 – somewhat implausibly, as regards "rapid" market developments, given that the point of health risk differentials is that they are largely predictable.

³⁴ Predation is normally understood as a strategy by a party enjoying a dominant position in a particular market to drive out competitors and/or deter their entry by systematically pricing below cost. It is however easily confused with efficient pricing. Cf. *Motta, Competition policy: theory and practice* (Cambridge, Cambridge University Press 2004), Chapter 7: Predation, monopolisation and other abusive practices. Price following (except in the context of collusion) is not normally regarded as an anticompetitive practice.

³⁵ Case T-289/03, *BUPA*, *supra* note 1, para 278.

³⁶ *Supra* note 17. Cf. Palm, "Voluntary health insurance and EU Insurance Directives: between solidarity and the market", in McKee, Mossalios and Baeten (eds), *The impact of EU law on healthcare systems* (P.I.E-Peter Lang, Brussels 2002), 195-233.

- First of all this concerns the degree of deference shown to the powers of the Member States in the context of services of general economic interest that is pervasive throughout the judgment.
- Second, as a corollary to the first point, the Court's thoroughness in categorically rejecting each and every argument that cast doubts on the Commission's position is remarkable. Especially in the light of the implausible assumption that the Commission performed in accordance with the *Altmark* standard prior to the existence of the latter. The applicants were simply steamrolled.
- Third, and more significantly in terms of substance, it was remarkable how the Court accepted and elaborated that services of general economic interest can also cover only part of the population, can be for profit, can involve selective (even "luxury") schemes and price-discrimination, and can take place on top of (or in order to top up) truly universal public provision.

It seems likely that especially the elements listed under the third point can be recombined in future cases to offer the outline of a new perspective on services of general economic interest that may be more relevant to social services in general and therefore to the future of the welfare state. More immediately pertinent to the case at hand however are two other subjects: one relating to the Court's decision in *BUPA* to provide alternative versions to the third and fourth *Altmark* conditions; the other relating to the substance of the case – risk equalisation.

4.2. *The reformulation of the Altmark conditions*

The obvious question regarding the third and fourth *Altmark* conditions is this: why did the Court not simply find that the Commission's Decision had not met them, and then deal with the case at hand based on an assessment under Article 86(2) EC – which the Commission in its Decision claimed had been satisfied too (and to which in fact its defence was limited)? Why did the Court first move the goalposts to meet the requirements of this specific case, and then state the test had been met? In effect there is now an alternative *Altmark* test:

- the third condition (instead of necessary expenses for discharging public service obligations) that of compensation according to criteria that are "specific, clearly identifiable and capable of being controlled", and
- the fourth condition (instead of the costs of an efficient undertaking for those cases where public procurement had not been used) that of "neutrality with regards to inefficiencies".

These tests apply where compensation is not directly based on the costs, receipts, and profits of the services of general economic interest that are being compensated. Of course *BUPA* does not involve a relatively straightforward scenario of licensing or one-off reimbursement of a loss-making public transport route: what is at issue is risk unevenly distributed across a population, and shifting freely between competing insurers. Moreover, neither public procurement procedures nor theoretically efficient firms are relevant: why should they be where market entry is open? In fact it might well be argued that the fourth condition should apply as soon as a plausible form of competitive provision takes place, which in itself should carry a presumption of efficiency – i.e. provided it is not neutered by the compensation mechanism involved. Following *BUPA*, we therefore see two parallel worlds emerging within the framework of Article 87(1) EC: *Altmark*, and *Altmark* Mark II (or perhaps: "*de luxe*").

4.3 *The application of the new conditions to the Irish scheme*

There is in fact a lot to be said for a less doctrinaire approach to Article 87(1) EC that might enable the competitive provision of social services such as health insurance (and potentially pensions as well as eventually social security services) consistent with Community law. We do require an approach that is forward looking instead of focused on more traditional services of general interest such as the loss-making regional transport system in *Altmark* (however much valued its contributions to social cohesion). And it is perhaps also logical that in this context the Court should not immediately have raised the bar too high. However because the Irish scheme was based on ex post risk equalisation of the actual costs incurred (although based on the claims settled during a particular period and not on overhead such as administrative and marketing costs as well) this by definition means it also compensated for inefficiency. The fact that under this scheme it compensated only up to the level of the average inefficiency in the market is only a partial excuse.

- *Efficiency*: the Court appears to have believed that all costs apart from overhead were somehow outside the control of the insurers and that these costs were therefore “not linked with the efficiency of the operators in question”.³⁷ However it would be a sad day if efficiency really meant no more than cutting down administrative staff, removing excessive layers of management and trimming down marketing departments (however useful such steps evidently might be). Instead, efficiency should be brought to bear on all aspects of an insurer’s operations, especially the key parts thereof, and therefore not excluding but including in particular the costs of the care contracted for.
- *Compensation ex post*: compensating such costs after they have been incurred means that all the incentives for efficient contracting and purchasing, investing in quality, in multi-agency and multi-professional care and prevention (all of which are known to drive down costs), are blunted – because the resultant costs are in any event socialised, or better yet: borne by competitors! What is more: in the process, competitors’ profits derived from more efficient practices are skimmed off, dampening incentives to compete and hence competitive pressures in the market (ultimately facilitating a collusive equilibrium).
- *Compensation ex ante*: compensating up front (i.e. when risks are known but no costs have been incurred yet) makes more sense on both counts: better to be forced to make ends meet with the means available – an incentive to contract shrewdly – rather than an open-ended commitment that costs once incurred will be duly compensated. In particular in a market entry setting featuring a former forty-year monopolist incumbent operator, as appears to have been the case in Ireland, the ex post approach is highly undesirable.

All this hardly suggests that the new take on the *Altmark* criteria introduced in *BUPA* or indeed the necessity and proportionality standards under Article 86(2) EC have in fact been met in this Case. Moreover the “predatory” behaviour (in the absence of dominance) and “price following” (in the absence of collusion) that were cited by the Court as negative factors are generally considered standard business practice rather than dangerous behaviours which warrant regulatory intervention. Intervention against such practices may or may not have merit in proportional pursuit of a legitimate public interest objective. However this requires at a minimum that a proper analysis (e.g. in the light of Regulation 1/2003³⁸ and/or the third non-life insurance Directive³⁹) is carried out first. Finally, issues of market structure and market entry should have featured prominently in any Article 86(2) EC assessment involving a market recently opened up to competition (or indeed in the context of an Article 87(1) EC assessment), as here they did not.

4.4. Subsequent developments in Ireland

On 16 July 2008, the Irish Supreme Court struck down the risk equalisation scheme as unconstitutional for having exceeded the powers of the Health Minister under the 1994 Health Insurance Act. This ruling revolved around the meaning of community rating, which the Supreme Court found must be understood as “within the plan across the market” and not “across the full market for all insured”. Because this meant solidarity within the pool of insured for each insurance plan, and not across insurers, the Supreme Court ruled it could not form the basis of a risk equalisation scheme. Creating a sound legal basis for risk equalisation in Ireland is therefore now likely to require a return to the legislature of that Member State.

4.5. The *Azivo* Decision

Until it was removed from the register at the request of the applicant in October 2008 the Court had been poised to rule upon another risk equalisation case, this time involving The Netherlands.⁴⁰ Here the Commission Decision (that was appealed by *Azivo*)⁴¹ did rely on the four *Altmark* criteria, found the fourth criterion had not been met, but exempted the State aid concerned on the basis of Article 86(2) EC. The *Azivo* Case raised some very different issues from *BUPA*, as “risk equalisation” in this case covered not merely solidarity concerning different health risks (a

³⁷ Case C-289/03, *BUPA*, *supra* note 1, especially paras 250, 234-235 and 33.

³⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ 2003 L1/1.

³⁹ *Supra* note 17.

⁴⁰ Order of the President of the Third Chamber of the Court of First Instance of 13 October 2008 in Case T-84/06 *Onderlinge Waarborgmaatschappij Azivo Algemeen Ziekenfonds De Volharding v. Commission of the European Communities (Azivo)*, nyr.

⁴¹ Case T-84/06, *Azivo* (Action brought on 13 March 2006), OJ 2006 C108/27. Appeal for annulment of Commission Decision of 3 May 2005 relating to State aid N 541/2004 and N 542/2004 – The Netherlands – Risk equalisation scheme and retention of reserves, OJ 2005 C324/28.

comparatively minor element of the scheme) but also income redistribution (by weight a far more important element of the scheme, which accounts for 50% of compulsory private health insurance funding) and by implication the very financing scheme underpinning the Dutch healthcare system as a whole.⁴² Moreover the Commission in its Decision had at least considered that the risk equalisation scheme concerned combines elements of ex ante and ex post compensation.⁴³

The request to drop this case had been expected since December 2007 when a merger/takeover was announced between Azivo, a smaller and struggling regional player in the health insurance market, and the much larger insurer Menzis that is of national scope and has a commensurately larger stake in not upsetting the present system.⁴⁴ Nonetheless it appears clear that in particular the ex post elements of risk equalisation in The Netherlands will have to be reviewed soon, if competition between private health insurers (originally intended to be one of the main drivers of competition in a new demand driven system), is not to be dampened definitively. If liberalisation is so far not delivering the expected benefits, as seems to be the case, this may well be one of the main reasons.

5. Conclusion

The *BUPA* case provides a fundamentally different alternative formulation of the *Altmark* conditions – or at least two of them – for the compensation of public services that are provided in competition. An EU legal framework for the provision of social services such as health insurance to public standards under conditions of competition is of course to be welcomed.⁴⁵ Yet it is doubtful whether the *BUPA* Case provides it. The problem is not that *Altmark* was applied flexibly (although arguably it should not have been), or what the new standard so far actually says: it is that in *BUPA*, right off the bat, it was applied in a manner that all but ignored competition. This inauspicious start matters because, especially when the distinction between the public and private spheres blurs (as it inevitably will with welfare states seeking alternative forms of funding and providing entitlements, or even alternative forms of entitlements), the process of competition should be protected. Without it, there will be few gains from private provision of social services to look forward to other than moving liabilities off public balance sheets.

⁴² As a result the sums involved were very much larger than in the *BUPA* case – approximately €12 billion or half the total expenses for curative care (in 2007) – and financed from income dependent social security contributions withheld at source (the other half derives from insurance premiums that consumers pay directly to insurers).

⁴³ Only three types of ex post compensation were considered in the Commission Decision, but at least six currently appear to exist in practice (some of which are acknowledged to have undesirable effects on competition). Ministry of Health, Welfare and Sport, Risk Insurance under the Health Insurance Act in The Netherlands, Summary of 7 July 2008 (original report August 2007). Apparently initiatives to reduce ex post compensation for liberalised care are under consideration.

⁴⁴ Azivo has some 120.000 health insurance customers whereas Menzis has some 2 million. Their merger was cleared by the Dutch competition authority in April 2008.

⁴⁵ Cf. generally: Biondi and Rubini, "EC State aid law and its impact on national social policies", in Dougan and Spaventa (eds), *Social welfare and EU law. Essays in European law* (Hart, Oxford 2005), 79-103.

NZa

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