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“Not so efficient?”  
Considering Efficiency of Public Broadcasters  
within Article 106(2) TFEU  
Compatibility Assessment in the light of the  
TV2/Danmark Judgment

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## **Abstract**

Member State financing of public broadcasters has long been a contentious issue within the European Union, which strives for an open marketplace where broadcasters of different origins move and compete freely. The public financing of certain broadcasters – reinforced by the Amsterdam Protocol and Member States' desire to maintain and enhance democracy as well as social and cultural values – poses challenges for private broadcasters intending to enter new markets and compete effectively. In many cases private broadcasters have alleged that their public counterparts are recipients of State aid that distorts terms of competition in the internal market and should be repaid to level the playing field. Such is the case with the competitors of Danish public broadcaster TV2/Danmark.

This thesis concerns State aid in relation to the provision of public broadcasting services. It examines the requirement that the operations of public broadcasters have to be of a certain efficiency level to escape classification as prohibited State aid under Article 107(1) TFEU and what role that requirement has in relation to assessment of whether State aid is compatible with the internal market under Article 106(2) TFEU. To that end the thesis focuses on the latest judicial development in the long-running dispute concerning the Danish State's financing of public broadcaster TV2/Danmark – the General Court's judgment on September 24 2015 in case T-125/12 – and the court's conclusion as to the requirement of economic efficiency.

## **Preface**

This thesis marks the end of my studies as LL.M. candidate in European Business Law at Lund University's Faculty of Law. It is safe to say that my two years in the LL.M. programme have been immensely rewarding. I have added greatly to and enhanced my knowledge of European Union law by enjoying lectures and seminars of the highest quality with excellent professors and guest lecturers as well as taking on challenging assignments.

I had the privilege of representing the Faculty of Law in the European Law Moot Court Competition from the autumn of 2014 until February 2015, when the Lund team participated in regional finals at Columbia University in New York. That experience was particularly enjoyable and valuable as I gained insight into the practical application of European Union law before the Union courts, which has served as a great complement to my own experiences as practising attorney. The moot court experience gave me access to the Faculty's enriching and supporting academic environment as I spent countless of hours discussing, deliberating and debating the moot case and different arguments with various professors and other staff members. I thank them all but in particular my supervisor, Professor Xavier Groussot, whose guidance, support and, most of all, untiring enthusiasm and companionship I will be forever grateful for.

Last but not least, my greatest thanks go to the two loves of my life – my fiancée, Margrét Elísa, and my daughter, Ragnhildur Jóhanna: Thank you for taking the big step with me to Sweden and for your unwavering support and love during our wonderful time together in Lund. You are the best ... “fjölskí!”

*Arnljótur Ástvaldsson*

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## Table of Abbreviations

|                                 |   |
|---------------------------------|---|
| 2001 Broadcasting Communication | Communication from the Commission on the application of State aid rules to public service broadcasting of 15 November 2001.   |
| 2005 SGEI Decision              | Commission Decision 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. |
| 2005 SGEI Framework             | Community framework for State aid in the form of public service compensation of 29 November 2005.   |
| AG                              | Advocate General.   |
| Amsterdam Protocol              | Protocol (No 29) to TFEU.   |
| Broadcasting Communication      | Communication from the Commission on the application of State aid rules to public service broadcasting of 27 October 2009.  |
| Charter                         | Charter of the Fundamental Rights of the European Union.  |
| EC Treaty                       | Treaty establishing the European Community  |
| ECJ or the Court                | European Court of Justice. <sup>1</sup>   |
| EEC Treaty                      | Treaty establishing the European Economic Community.  |
| EU                              | European Union.   |
| EU Courts or the Courts         | European Court of Justice and the General Court.  |
| Member States                   | States that are members of the EU at each relevant time.  |
| SGEI Communication              | Communication from the Commission on the application of the European Union State aid  |

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<sup>1</sup> Referred to as the “Court of Justice” in Article 19 TEU.

|                                   |  |
|-----------------------------------|--|
| SGEI Decision                     | <p>rules to compensation granted for the provision of services of general economic interest.</p> <p>Commission Decision 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.</p> |
| SGEI <i>de minimis</i> Regulation | <p>Commission Regulation on the application of Articles 107 and 108 TFEU to <i>de minimis</i> aid granted to undertakings providing SGEIs.</p>   |
| SGEI Framework                    | <p>Communication from the Commission – EU framework for State aid in the form of public service compensation.</p>  |
| SGEIs                             | <p>Services of General Economic Interest.</p>  |
| TEU                               | <p>Treaty on the European Union.</p>   |
| TFEU                              | <p>Treaty on the Functioning of the European Union.</p>  |
| Treaties                          | <p>TEU and TFEU.</p>   |

## 1. Introduction

### 1.1. Subject Matter and Background

The Author of this thesis had the honour of representing Lund University in the European Law Moot Court Competition, from late autumn 2014 to February 2015, as a part of his LL.M. studies in European Business Law. The legal issues in the moot court case concerned EU law on State aid and public procurement in relation to the provision of public services. During the research phase, in preparation for Lund's participation, the case *Viasat Broadcasting UK v Commission*<sup>2</sup> was uncovered by one of the Author's colleagues. The case immediately caught the Author's interest and the debate, on whether and to what extent Viasat's arguments could be used in the moot court case, was well and truly on. The case is also the latest step in a long-running dispute concerning the Danish State's financing of public broadcaster TV2/Danmark, with the Commission involved since the early 2000s, when the first complaint by TV/Danmark's competitors arrived at its doorsteps. The subject matter of this thesis is set against the backdrop of State aid within the field of public broadcasting services, with a particular focus on the General Court judgment in aforementioned *Viasat*, rendered on last September 24. By the time the Author defended this thesis the judgment has been appealed the EU's highest judicial function – European Court of Justice.<sup>3</sup>

At that time of the moot court preparations, the General Court's judgment in the case was pending and, accordingly, the only material information available on the court's website was an extract from Viasat's action, broadly setting out its pleas and main arguments for annulling the Commission's decision in the case. The arguments raised, once again, issues concerning the relationship between the Treaties' provision on prohibiting State aid – Article 107(1) TFEU<sup>4</sup> – and the Treaties' main provision on exempting the financing of public services from the Treaties' internal market rules, including on competition and State aid – Article 106(2) TFEU. Central to those issues is of course the European Court of Justice's landmark judgment in the *Altmark* case<sup>5</sup> and the criteria<sup>6</sup> it presented, for state financing to escape classification as prohibited State aid under Article 107(1).

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<sup>2</sup> Case T-125/12 *Viasat Broadcasting UK v Commission* (General Court, 24 September 2015) ("*Viasat*").

<sup>3</sup> Case C-660/15 P *Viasat Broadcasting UK v Commission* (pending).

<sup>4</sup> The consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ("*TFEU*").

<sup>5</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-07747.

<sup>6</sup> The *Altmark* criteria will also be referred to as the "*Altmark* conditions" or the "*Altmark* test".



In relation to the moot court case, the Author and his teammates considered Viasat's arguments in the context of national court competences: If national courts are competent to engage in in-depth examination of state financing of public services, including on the economic efficiency<sup>7</sup> of public services providers, in order to determine the existence of State aid under Article 107(1) and the fulfilment of the *Altmark* criteria, then surely they could engage in assessment of whether the exemption under Article 106(2) applied? For the assessment of public services financing under the two provisions is, after all, mostly the same, with many of the same conditions. Making such an argument is, however, an uphill, if not impossible, battle as the EU Courts have confirmed the distinction between Article 107(1) and Article 106(2):<sup>8</sup> While national courts have competence to determine whether a measure amounts to State aid under Article 107(1), the Commission has sole competence to assess the compatibility of such State aid measure with the internal market under Article 106(2).

Viasat's pleas and arguments do not revolve around national courts' competence. Instead, they concern the relationship between the two articles within the Commission's assessment of the TV2/Danmark case. Viasat argues<sup>9</sup> that the Commission, having found that the Danish state's financing of TV2/Danmark amounted to State aid, as the exempting conditions of the *Altmark* judgment were not fulfilled, should have taken that finding into account in its assessment of compatibility of the State aid under Article 106(2). In other words, according to Viasat, if it has not been proved that the public service provider is an efficient one under Article 107(1), then that factor cannot be wholly ignored when assessing whether the disputed measures are acceptable in the internal market.<sup>10</sup> At first sight, Viasat's arguments seems to go directly against settled case law on the relationship between Articles 107(1) and 106(2), even within the specific field of

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<sup>7</sup> The concept of "economic efficiency" or "efficiency" is a prominent feature in this thesis, whose meaning and scope will be discussed in detail in later chapters. For present purposes it is sufficient to describe the concept as referring to the level and management of costs in the operations of public (broadcasting) service providers, with the "efficiency requirement" originating in the *Altmark* (n 5) criteria's benchmark of comparing costs of providers to those of a hypothetical, "well-run" (efficient), company. See further Chapter 2.4.5.3.

<sup>8</sup> See case law cited and discussed in Chapter 3.4.

<sup>9</sup> Action brought on 14 March 2012 - *Viasat Broadcasting UK v Commission* in T-125/12 *Viasat* (n 2) [2012] OJ 138/37.

<sup>10</sup> Viasat's argumentation can be divided into two parts with respect to the *Altmark* judgment. The first part concerns the second *Altmark* condition on transparency, while the second concerns the part of the fourth condition that deals with economic efficiency. The second part forms subject matter of this thesis.

State aid in public broadcasting. However, a closer inspection of the arguments and the said case law reveals that there is perhaps “more than meets the eye” or, at the very least, a room for a legal discussion and debate on the arguments and how they should be dealt with.

## **1.2. Research Questions and Structure**

The General Court’s judgment on last September 24 did little to diminish the need for such discussion. On the contrary, it can be argued that it elevated the need, particularly in relation to what role efficiency considerations play in Article’s 106(2) compatibility assessment (if any) and what that assessment does in fact include, both in the light of the *Altmark* test and within the field of State aid in public broadcasting. This is the general question that the Author will attempt to examine in the following pages.

More specifically, the Author will examine the General Court’s assessment of Viasat’s arguments on the economic efficiency of a public broadcaster and what part efficiency can play in the Commission assessment of compatibility under Article 106(2), if any. Is the Commission prohibited from taking efficiency into account, as some case law would suggest, or should it be obliged to do so if lack of efficiency is one of the reasons for finding State aid under Article 107(1), as Viasat argues? Or, in the alternative, is the Commission simply at liberty to decide whether to include efficiency in its Article 106(2) assessment or not? What is the role of the specific EU primary law provision devoted to public broadcasting – the Amsterdam Protocol – in this respect? As the appeal in the case is pending before the ECJ, and a final judgment has thus not been rendered on the dispute, the analysis presented will focus on assessing the General Court’s judgment and subsequently outlining the main legal issues the ECJ is to address, rather than try and answer the aforementioned questions in a comprehensive manner.

Public broadcasting services fall within the field of services of general economic interest (SGEIs). In order for the reader to fully grasp the subject matter, and subsequent discussion, the frame of the thesis’ discussion will be set by outlining the concept of SGEIs and the legal status of such services in the European Union, as well the basic features of State aid and Article 107(1). This is done in Chapter 2, which also includes a historical overview of how the EU Courts have dealt with the issue of State aid in the context of Member States’ public services, concluding with the landmark *Altmark*

judgment and the mechanism it presented as a tool to evaluate whether state financing of public services constituted State aid or not. The setting of the legal framework continues in Chapter 3, which is devoted to the exemption provision in Article 106(2), its origins, conditions for application and relationship with Article 107(1). In Chapter 4 the discussion will turn to the specific sector of public broadcasting. Its special place in EU law will be described, including its legal basis EU in primary law. Sector-specific secondary legislation will be detailed, along with the general secondary legislation on State aid and public services, for clarity and comparison reasons. The focal point of the thesis – the *Viasat* case and the long-running dispute concerning the financing of TV2/Danmark – will be covered in Chapter 5. That chapter is be divided into two overall chapters, with the first one covering the TV2/Danmark saga in relative detail, concluding with the General Court’s judgment on last September 24. The second part is in Chapter 5.5 and contains case law analysis, where the *Viasat* judgment will be analysed in the light of three specific judgments within the field of public broadcasting, all of which are specifically cited by the General Court in its reasoning. Finally, conclusions and suggestions will be offered in Chapter 6.

### **1.3.Delimitations**

The thesis’ subject matter is confined to State aid within the field of public broadcasting. Given the limited scope and space of academic work at this level, the thesis does not contain a broad coverage of the field but is rather narrowed down to the General Court’s recent judgment in *Viasat* and analysis of selected case law cited therein. Commission decisions within the field are not covered specifically. The judgment, and *Viasat*’s arguments, will be used as a point of departure for discussion and analysis.

The focus will be on *Viasat*’s arguments that concern the fourth *Altmark* condition on economic efficiency. Accordingly, the thesis does not contain analysis of the other main part of *Viasat*’s argumentation – on the second *Altmark* condition and its transparency requirement. Emphasis will be on the relationship between Articles 107(1) and 106(2) within the field of public broadcasting, more precisely on what effects (if any) the part of the fourth *Altmark* condition that concerns economic efficiency has on the Commission’s compatibility assessment. Other parts of the Article 106(2) assessment are not considered specifically.

At last, it should be noted that the thesis does not contain economic analysis or scrutiny of financial statistics. Hence, the question of whether TV2/Danmark is actually a well operated and efficient public broadcaster is outside the scope of the thesis, just as it is generally outside the scope of the EU Courts' competences.

## **2. State aid and Public Services**

### **2.1.General**

When dealing with issues of potential State aid in the context of providing public services there is often no question of the state's actual intervention or whether the disputed aid measure is imputable to the state. The state has, in many instances, made an informed decision of funding a particular service that it deems necessary for the fulfilment of certain objective. The main issue is therefore not whether the state has funded a particular service – but whether such funding is excessive, resulting in the selected provider of public service being overcompensated. This chapter will introduce and discuss certain key concepts and provisions in relation to assessment on how state financing of public services can result in prohibit State aid, including the concept of Services of General Economic Interest and the main State aid provision in Article 107(1) TFEU.

### **2.2.Services of General Economic Interest**

#### **2.2.1. The Concept**

“Services of General Economic Interest” is legal term developed in European Union law without being strictly defined in the Treaties.<sup>11</sup> The term's scope and meaning has been the subject of many cases before the EU Courts<sup>12</sup> as well as the Commission's own legal instruments. SGEIs have been described as “services which belong to the market, but to which other, ‘non-market’, values are applied”<sup>13</sup> – services that are provided to the public but cannot, at the same time, be left to the private market to supply, as there is a probability that the market will simply not provide the services.<sup>14</sup> Or, in the alternative, as services that are of economic nature (market services) that are, at the same time, of non-market nature, as they are provided in the general interest.<sup>15</sup>

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<sup>11</sup> 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 of 11 January 2012 [2012] OJ C8/4 (the SGEI Communication), Para. 46.

<sup>12</sup> Alison Jones and Brenda Sufrin *EU competition law: text, cases and materials (5<sup>th</sup> Edition)* (Oxford University Press 2014), 632-633.

<sup>13</sup> *ibid*, 569.

<sup>14</sup> Leonor Moral Soriano, (2003) ‘How Proportionate should Anti-competition State Intervention be?’ *European Law Review* Volume 28 (Issue 1), 112-123, 114.

<sup>15</sup> Jakub Kociubiński, (2011) ‘Services of General Economic Interest – towards a European Concept of Public Services’ Volume 1 (Issue 2) *Wroclaw Review of Law, Administration & Economics* <<http://www.degruyter.com/view/j/wrlae.2011.1.issue-2/wrlae-2013-0027/wrlae-2013-0027.xml>> accessed 24 June 2015, 52, referring also to Moral Soriano (n 14), 114.

The Commission has referred to SGEIs as “... services of an economic nature which the Member States or the [EU] subject to specific public service obligations by virtue of a general interest criterion.”<sup>16</sup> Now, the Commission describes the SGEI concept as “... an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences ...” and, accordingly, affords Member States a wide margin of discretion in terms of defining certain service as SGEI.<sup>17</sup> The Commission’s competence is limited to make sure that Member States have not manifestly erred when defining a certain service as SGEI. To the same extent, the EU Courts have not provided a general definition of what constitutes a SGEI,<sup>18</sup> something that would arguably be irrational given differences between Member States and ever changing social and political landscapes. However, the EU Courts have in many cases recognised certain services as SGEIs, for example basic postal services,<sup>19</sup> management of particular waste<sup>20</sup> and, for the purposes of this thesis, public broadcasting.<sup>21</sup>

### 2.2.2. Legal Basis

Although the Treaties do not provide a specific definition of SGEIs the importance of the services in the EU is made perfectly clear in Article 14 TFEU, Article 36 of the Charter<sup>22</sup> and Protocol 26 to the TEU<sup>23</sup> and TFEU, which notably covers the wider concept of “Services of General Interest”.<sup>24</sup> Article 14 emphasises that SGEIs are “among the shared values of the [EU]”<sup>25</sup> and that they are particularly important in relation to “promoting social and territorial cohesion”. The EU and Member States should therefore secure the proper function of SGEI in order to achieve their aims. Article 36 of the Charter focuses on access to SGEIs, in line with its status within the EU’s primary legislation on fundamental rights, again in order to “promote the social and territorial cohesion”.

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<sup>16</sup> Commission Green Paper of 21 May 2003 on Services of General Interest COM(2003) 270 final, Para. 17. Textual amendments by Author.

<sup>17</sup> 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/C 8/02), Para. 45-46.

<sup>18</sup> Kociubiński (n 15), 53.

<sup>19</sup> Case C-320/91 *Criminal proceedings against Paul Corbeau* [1993] ECR I-02533, Para. 15.

<sup>20</sup> Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-03743, Para. 75.

<sup>21</sup> See e.g. Case C-155/73 *Giuseppe Sacchi* [1974] ECR 00409, Para. 14, and joined cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/S and Others v Commission* [2008] ECR II-02935, Para. 103-104.

<sup>22</sup> Charter of the Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>23</sup> Consolidated version of the Treaty on the European Union [2012] OJ C 326/13 (“TEU”).

<sup>24</sup> Jones and Sufrin (n 12), 632-633.

<sup>25</sup> Textual amendments by Author.

Protocol 26 further emphasises the importance of SGEIs and expands upon Article 14 by affirming “the essential role and the wide discretion of national [...] authorities in providing [...] and organising [SGEIs] as closely as possible to the needs of the users” and “the diversity between various [SGEIs] and [...] in the needs and preferences of users that may result from different geographical, social or cultural situations.”<sup>26</sup> The importance of recognising the last mentioned differences is then expanded upon in Protocol 29, which specifically concerns public broadcasting, and will be discussed in more detail below.

The most important Treaty provision on SGEIs, with respect to State aid and the subject matter herein, is, however, the second Paragraph of Article 106(2) TFEU, which provides the legal basis for assessing the compatibility of a State aid measure for SGEIs.<sup>27</sup> If a measure is indeed State aid within the meaning of Article 107(1) it must be notified to the Commission in accordance to Article 108(3) TFEU<sup>28</sup> for its exclusive assessment of whether the conditions of Article 106(2) are fulfilled and whether the measure is compatible with the internal market, prior to its implementation.<sup>29</sup> In essence, the article provides exemption for state measures funding SGEIs that are found to be State aid within the meaning of Article 107(1), if the conditions of the article are fulfilled. Even though those measure constitute State aid – and normally entail some sort of competition distortion – they might be exempted from the prohibition in Article 107(1) on the basis of Article 106(2), as the Treaties’ competition rules might obstruct the performance of SGEI tasks.<sup>30</sup> The article thus attempts to reconcile EU goals, for example on fair competition, with effective SGEI provision and is, as such, a fundamental part of EU’s policy on SGEIs.<sup>31</sup>

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<sup>26</sup> Textual amendments by Author.

<sup>27</sup> Jones and Sufirin (n 12), 634.

<sup>28</sup> Vivien Rose and David Bailey (eds.) *Bellamy and Child: European Community Law of Competition (7<sup>th</sup> Edition)* (Oxford University Press 2013), 17.071.

<sup>29</sup> Kelyn Bacon (ed.) *European Union Law of State Aid (2nd Edition)* (Oxford Competition Law 2013), 3.63., as also confirmed by the EU Courts e.g. in case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-01627, Para. 51.

<sup>30</sup> Communication from the Commission European Union framework for State aid in the form of public service compensation (2011) of 11 January 2012 [2012] OJ C8/03 (the “SGEI Framework”), Para. 5.

<sup>31</sup> Bacon (n 29), 3.62.

## 2.3.State aid and Article 107(1) TFEU

### 2.3.1. General

Establishing a fully functioning internal market, where effective and fair competition thrives, naturally demands that authorities, whether national or local, refrain from granting certain undertakings<sup>32</sup> financial aid that might distort competition and cross-border trade.<sup>33</sup> This particular issue can be described as fundamental to the functioning of the internal market, and Member States are therefore, to take an example, prohibited from favouring “one of their own” undertakings, which compete with other undertakings located in various other Member States, in the internal market.<sup>34</sup> A classic example of such favouritism would be undue and excessive financing of a local SGEI provider, which would make it hard – even impossible – for undertakings in other Member States to compete with that provider, for example in selling advertisements in the field of television broadcasting.

The Treaties’ central provision prohibiting State is the first Paragraph of Article 107 TFEU, which prohibits the granting of State aid with the following words:

*“Save as otherwise provided in the Treaties, 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 EU Courts have repeatedly stated, that in assessment of whether a measure is State aid within the meaning of Article 107(1) the focus is on the measures *de facto* effects, rather than its causes or aims.<sup>35</sup> The objective pursued by a certain state measure and its

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<sup>32</sup> The term “undertaking” has a specific meaning in EU law, in particular in EU competition (and State aid) law where it has been defined as an entity engaged in “economic activity” – the activity of offering goods and services on a market in return for payment. See e.g. cases C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-01979, Para. 21, and C-118/85 *Commission v Italy* [1987] ECR 02599, Para. 7, and C-35/96 *Commission v Italy* [1998] ECR I-03851, Para. 36-38.

<sup>33</sup> Bellamy and Child (n 28), 17.001.

<sup>34</sup> Jörgen Hettne, (2011) ‘Public Services and State Aid – is a Decentralisation of State Aid Policy Necessary?’ 2011 (Issue 14) SIEPS European Policy Analysis <[http://www.sieps.se/sites/default/files/2011\\_14epa.pdf](http://www.sieps.se/sites/default/files/2011_14epa.pdf)> accessed December 17 2015.

<sup>35</sup> See e.g. cases 173/73 *Italian Republic v Commission* [1974] ECR 00709, Para. 13, C-172/03, *Heiser* (n 29), Para 46, and C-81/10 P *France Télécom v Commission* [2011] ECR I-12899, Para. 17.



proposed justifications are thus wholly irrelevant with respect to whether the measure constitutes State aid or not.<sup>36</sup> These statements are of particular importance for the subject matter of this thesis, as they confirm that no matter how good the intentions behind state financing might be, the funding authorities (and recipient undertaking) will, to escape infringement of the State aid prohibition, always need to “seek shelter” in some form of exemption, whether it is within Article 107(1) by fulfilling the conditions of the seminal *Altmark*<sup>37</sup> judgment, or outside the article in one of Treaties derogating provisions and secondary legislation derived therefrom. There, of course, Article 106(2) TFEU is most relevant.

### 2.3.2. Advantage or simply normal Market Practice?

Economic advantage is one of the four conditions that need to be fulfilled in order for there to be State aid within the meaning of Article 107(1) TFEU meaning, in essence, that a disputed measure has to confer some kind of advantage “favouring the recipient undertaking.”<sup>38</sup> The EU Courts have often been called upon to evaluate whether a measure, which *prima facie* seems to benefit a certain undertaking, is indeed an economic advantage under Article 107(1).<sup>39</sup> One of the issues that often arises – and needs to be determined – is whether the state grants an undertaking a benefit the latter would not have received under “normal market conditions” and which in some form reduces its financial burdens or otherwise improves its financial position.<sup>40</sup> Accordingly, if a measure is implemented to offset burdens that the receiving undertaking would not have to bear under “normal market conditions”, then it is possible that the measure does not constitute an economic advantage under Article 107(1).<sup>41</sup> This, in essence, is the fundamental question when assessing state measures that finance SGEIs: Is there a “real” advantage or is state financing simply to offset the burden of providing public services?

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<sup>36</sup> C-81/10 *France Télécom v Commission* (n 35), Para. 17.

<sup>37</sup> C-280/00 *Altmark* (n 5). See summary in Chapter 2.4.5.

<sup>38</sup> Joined cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243, Para. 29.

<sup>39</sup> *Bacon* (n 29), 2.08.

<sup>40</sup> *Bellamy and Child* (n 28), 17.010.

<sup>41</sup> *ibid.*

## 2.4. When does SGEI Financing become prohibited State aid?

### 2.4.1. General – Different Approaches

The issue of whether a state financing for providing public services can amount to State aid became prominent in the 1980's with the liberalisation of utilities sectors, such as postal services and public broadcasting. Private undertakings began entering the market for public services and were often not best pleased with the terms of their competition with state appointed SGEI providers. That resulted in a number of complaints alleging unlawful State aid, and subsequent debates and discussions, both before the EU Courts as well as in the Commission and among scholars, on how to best deal with the issue of State financed SGEIs.<sup>42</sup>

In general, the two different ways in dealing with the issue have been referred to as the *State aid approach* and the *Compensation approach*,<sup>43</sup> concisely described by Advocate Jacobs in *GEMO*<sup>44</sup> in the following manner:

*“[Under] ‘the compensation approach’ the term ‘compensation’ [...] covers appropriate remuneration for the services provided or the costs of providing those services. [...] State funding of [SGEIs] amounts to State aid within the meaning of Article [107(1) TFEU] only if and to the extent that the economic advantage which it provides exceeds such appropriate remuneration or such additional costs.”*<sup>45</sup>

*“[Under] ‘the State aid approach’ – [State funding of SGEIs] constitutes State aid within the meaning of Article [107(1)] which may however be justified under Article [106(2) TFEU] if the conditions of that derogation are fulfilled [...].”*<sup>46</sup>

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<sup>42</sup> Jose Luis Buendia Sierra ‘Finding the Right Balance: State Aid and Services of General Economic Interest’ in *EC State Aid Law/Le droit des aides d’Etat dans la CE. Liber Amicorum Francisco Santaolalla Gadea*, International Competition Law Series, Volume 36 (Kluwer Law International 2008), 191-222, 193.

<sup>43</sup> See e.g. Sierra (n 42), 193, case C-38/01 *Ministère de l’Économie, des Finances et de l’Industrie v GEMO SA* [2003] ECR I-13769, Opinion of AG Jacobs, Para. 93-96, and Kociubiński (n 15).

<sup>44</sup> C-38/01 *GEMO* (n 43), Opinion of AG Jacobs, Para. 93-96.

<sup>45</sup> *ibid*, Para. 95, referring to Article’s 107(1) TFEU’s predecessor, Article 87(1) of the EEC Treaty. Underlining and textual amendments by Author.

<sup>46</sup> C-38/01 *GEMO* (n 43), Opinion of Opinion of AG Jacobs, Para. 94, again referring to Article 87(1) of the EEC Treaty as well as Article’s 106(2) TFEU predecessor, Article 86(2) of the EEC Treaty. Textual amendments by Author.

Hence, by following the *Compensation approach*, state compensation for providing public services is not captured by Article 107(1) if it only covers appropriate remuneration (typically all costs along with the “reasonable profit”),<sup>47</sup> while under the *State aid approach* all compensation is considered as State aid under Article 107(1). The fundamental differences in consequences between the two approaches is of course directly related to the Commission’s monitoring and enforcement of Treaties’ State aid rules – following the *Compensation approach* means that “appropriate” compensation does not have to be notified to the Commission under Article 108(3) TFEU for assessment and approval, before its implemented, while the *State aid approach* demands that all compensation is notified to the Commission.

The EU Courts’ have defined the concept of State aid broadly with the focus being on a disputed measure’s effects, rather than its causes or aims.<sup>48</sup> Thus, unsurprisingly, the Courts’ jurisprudence on how to deal with the financing of SGEIs in the context of the State aid concept was, for many years, inconsistent.<sup>49</sup>

#### **2.4.2. Initial Compensation Approach**

In the *ADBHU (Waste Oils)*<sup>50</sup> the Court followed the *Compensation approach*. Indemnifying undertakings of costs incurred in relation to the collection and/or disposal of waste oils did not amount to State aid under EU law, “but rather consideration for the services performed by the collection or disposal undertakings.”<sup>51</sup> A directive, that specifically permitted such indemnification by Member States, was thus not contrary to the EEC Treaty’s prohibition on State aid.<sup>52</sup>

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<sup>47</sup> See the third *Altmark* (n 5) condition and the summary thereof in Chapter 2.4.5.3 below.

<sup>48</sup> See Chapter 2.3.1 and Kociubiński (n 15) 59.

<sup>49</sup> As pointed out by AG Jacobs in C-38/01 *GEMO* (n 43), Para. 96.

<sup>50</sup> Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 00531, Para. 16-20.

<sup>51</sup> *ibid*, Para. 18.

<sup>52</sup> It is, though, noteworthy to add that the directive itself contained a provision on the amount of the compensation, stating that the “amount of [...] indemnities must be such as not to cause any significant distortion of competition [...]” or unduly affect trade. *ibid*, Para. 19.

### 2.4.3. State aid Approach in the Nineties

In following cases dealing with issue the EU Courts turned to the *State aid approach*, either expressly or implicitly.<sup>53</sup> First, in *Banco Exterior de España*,<sup>54</sup> the Court held that a Spanish system, exempting public banks from paying taxes, did indeed constitute State aid,<sup>55</sup> irrespective of their public service obligations. Granting “certain undertakings a tax exemption which [...] places them in a more favourable position than other taxpayers [...]” simply constitutes State aid.<sup>56</sup> Since, however, the system in question – and the aid it apparently included – was in existence when Spain acceded to the EU, the Court held that it was for the Commission to examine its compatibility with the internal market – whether it could fall “outside the scope of the prohibition of [107(1) TFEU] by virtue of Article [106(2) TFEU].”<sup>57</sup> Until the Commission came to such conclusion the system could be implemented. *Banco Exterior de España* is perhaps not the most reliable indicator of the EU Court’s reversal to the *State aid approach* as the Court might have handled the matter differently had the disputed system (measure) not been one of existing aid, in particular given the Court’s judgment in *ADBHU (Waste Oils)*. However, had the Court applied the *Compensation approach* strictly then it would have had to assess whether public service obligations imposed on Spanish banks would have excluded the exemption from being classified as State aid.<sup>58</sup>

In *FFSA*<sup>59</sup> the Court of First Instance<sup>60</sup> followed *Banco Exterior de España*, with respect to tax concessions granted to the much maligned La Poste undertaking in the French postal services market. The court stated that the disputed tax concessions “in principle” constituted State aid as they placed La Poste in a more favourable “financial situation” than its competitors.<sup>61</sup> The court went on to reiterate, that even though the measure constituted State aid, its SGEI nature might very well result in it being found compatible with the internal market on the basis of the derogation in Article 106(2) TFEU,<sup>62</sup> leaving

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<sup>53</sup> C-38/01 *GEMO* (n 43), Opinion of AG Jacobs, Para. 98.

<sup>54</sup> Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-00877.

<sup>55</sup> Within the meaning of Article 92 of the EEC Treaty, the equivalent to today’s Article 107(1) TFEU.

<sup>56</sup> C-387/92 *Banco Exterior de España* (n 54), Para. 14.

<sup>57</sup> *ibid*, Para. 21.

<sup>58</sup> C-38/01 *GEMO* (n 43), Opinion of Opinion of AG Jacobs, Para. 99.

<sup>59</sup> Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-00229.

<sup>60</sup> Now the General Court.

<sup>61</sup> *ibid*, Para. 167. Underlining and textual amendments by Author.

<sup>62</sup> Referring to Article 90(2) of the EEC Treaty, the equivalent to today’s Article 106(2) TFEU.

it to no uncertain terms that it was following the *State aid approach*.<sup>63</sup> The Commission had in fact applied Article 106(2)<sup>64</sup> and found that, since the granted tax concession amounted to less than the additional costs incurred by the public service obligation, it did not constitute State aid. The court rejected this approach – there is either a State aid or not and if there is, such aid might be justified on the basis of Article 106(2).

The Court of First Instance also rejected the Commission’s approach in *SIC*,<sup>65</sup> which concerned Portuguese State funding of public television channels, albeit on different grounds. There, the Commission’s preliminary investigation led to finding no State aid, not by virtue of the derogation in Article 106(2) but rather simply by comparing compensation to costs under Article 107(1)<sup>66</sup> assessment. Thus, the Commission in fact applied the *Compensation approach* – inadvertently or not – and found no State aid as grants received were only to offset the additional costs of providing public broadcasting services.<sup>67</sup> The court held firm to the *State aid approach* and annulled the Commission’s decision.<sup>68</sup>

#### **2.4.4. Back to the Compensation Approach with Ferring**

The General Court’s judgment in *SIC* was not appealed to the ECJ. Had that been the case the ECJ might very well have sided with the Commission, taking into account its judgment in *Ferring*,<sup>69</sup> which is perhaps most famous for marking the EU Courts’ return to the *Compensation approach*. The case concerned a specific tax levied on pharmaceutical laboratories in France, which was intended to level the playing field between the laboratories and wholesale medicine distributors, since the latter were required – by a way of public service obligation – to have on offer, and deliver, a variety of medicinal products.<sup>70</sup> Relying on *ADBHU (Waste Oils)*, the Court found no State aid, as the wholesale medicine distributors did not benefit from any real advantage within the meaning of Article 107(1) TFEU.<sup>71</sup>

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<sup>63</sup> T-106/95 *FFSA and Others v Commission* (n 59), Para. 172.

<sup>64</sup> At the time Article 90(2) of the EEC Treaty.

<sup>65</sup> Case T-46/97 *SIC - Sociedade Independente de Comunicação SA v Commission* [2000] ECR II-02125.

<sup>66</sup> At the time Article 92 of the EEC Treaty.

<sup>67</sup> T-46/97 *SIC* (n 65), Para. 82.

<sup>68</sup> *ibid*, Para. 84, referring to what are now Articles 107(1) and 106(2) TFEU, respectively.

<sup>69</sup> Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-09067.

<sup>70</sup> Summary based on C-38/01 *GEMO* (n 43), Opinion of AG Jacobs, Para. 102.

<sup>71</sup> At the time Article 92 of the EEC Treaty.

“[Provided] that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article [107(1) ...].”<sup>72</sup>

If compensation is in line with the costs, there is no real advantage within the meaning of the State aid concept – it is simply a reasonable remuneration for fulfilling public service obligations and not prohibited State aid. The Court’s reversal to the *Compensation approach* in *Ferring* did not pass without its share of criticism and, in fact, became the subject of debates and discussions, both within the EU Courts and by scholars and commentators, which were generally surprised by the Court’s reasoning.<sup>73</sup> Different Advocates Generals had their say on the matter and were, in general, rather disapproving of the “solution” proposed by the Court,<sup>74</sup> irrespective of whether they endorsed the *Compensation approach* as such. Some scholars pointed out that the approach in *Ferring* would leave the door wide open for State aid to be granted without the Commission’s prior scrutiny and approval, as Member States would only need to define the service financed as a SGEI and make sure that the compensation did not exceed the cost of providing the service.<sup>75</sup> In other words, with *Ferring*, Member States would not be bound by any particular economic restraints in compensating public service providers and could therefore engage in overcompensation that would strengthen the providers’ competitive position and, thereby, distort competition in the internal market. It became apparent that the *Ferring* doctrine would not endure and thus the Court attempted to resolve the issue, of how handle the SGEIs in the context of State aid, in its now seminal judgment in *Altmark*.<sup>76</sup>

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<sup>72</sup> C-53/00 *Ferring* (n 69), Para. 27. Underlining by Author.

<sup>73</sup> Frands Mortensen, 'Altmark, Article 86(2) and Public Service Broadcasting' (2008) 2008 European State aid Law Quarterly 239, 242.

<sup>74</sup> Sierra (n 42), 195. With respect to AG Opinions, see e.g. deliberations in C-38/01 *GEMO* (n 43), Opinion of AG Jacobs, C-34/01 to C-38/01 *Enirisorse* (n 38), Opinion of AG Stix-Hackl, and the two opinions of AG Léger in C-280/00 *Altmark* (n 5), discussed below.

<sup>75</sup> Phedon Nicolaidis, (2003) 'Compensation for public service obligations: the floodgates of state aid?' Volume 24 (Issue 11) European Competition Law Review, 561, in particular 561.

<sup>76</sup> C-280/00 *Altmark* (n 5), Para. 23.

## 2.4.5. Altmark - the proposed Solution

### 2.4.5.1. General

*Altmark* concerned the granting of subsidies for providing public bus transport services by local authorities in Stendal, Germany, to an undertaking named Altmark. One of its competitors contested the decision, arguing that Altmark was neither able to continue its operations without public subsidies nor was it the undertaking that needed the least subsidies.<sup>77</sup> One of the primary issue was therefore whether the subsidies granted to Altmark were to be considered as State aid or simply a just compensation for providing bus services, with the referring court asking whether “[...] subsidies to compensate for deficits in local public transport [are at all subject] to the prohibition on aid contained in Article [92(1)].”<sup>78</sup>

### 2.4.5.2. The AG Opinions

Before the Court delivered its judgment it had the benefit of not one, but two, opinions from AG Léger on the subject matter. Those opinions were delivered after the Court’s judgment in *Ferring* and in the midst of the “internal” debating between the Court’s AGs. In short, AG Léger strongly opposed to the *Compensation approach* reversal in *Ferring*, believing, that it would severely undermine the “structure and logic” of Treaties’ State aid provisions, deprive the derogation in Article of 106(2) of its meaning and, finally, undermine the Commission’s monitoring and enforcement of State aid rules.<sup>79</sup>

On the structure and logic on the Treaty provisions on State aid and SGEIs, AG Léger followed the General Court in *SIC*<sup>80</sup> and pointed out that Article 107(1) TFEU sets out the principle of prohibiting State aid which could distort competition and affect trade, while Article 106(2) TFEU entails an exemption with respect to SGEI provision.<sup>81</sup> “[The] characterisation of a measure as aid depends solely on the question of whether or not it confers an advantage [...]. State intervention cannot be assessed in terms of the objective pursued by the public authorities [...]” which can only be taken into account when assessing whether aid is justified or not.<sup>82</sup> The AG also pointed out that following *Ferring* would inevitably lead to lesser control by the Commission, as measures that fulfil

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<sup>77</sup> C-280/00 *Altmark* (n 5), Para. 23.

<sup>78</sup> *ibid*, Para. 31, referring to Article 92(1) of the EEC Treaty, now Article 107(1) TFEU.

<sup>79</sup> C-280/00 *Altmark* (n 5), Opinion of AG Léger on March 19 2002, Para. 73-98.

<sup>80</sup> T-46/97 *SIC* (n 65), summarised in Chapter 2.4.3.

<sup>81</sup> *ibid*, Para. 74.

<sup>82</sup> *ibid*, Para. 77.

the *Ferring* compensation conditions do not need to be notified to the Commission under Article 108(3) TFEU, for assessment on compatibility with the internal market.<sup>83</sup>

On the significance of Article 106(2) in particular, the AG argued, that irrespective of whether compensation exceeds costs of SGEI provisions or not, the article will be deprived of its meaning by following the *Compensation approach* as set out in *Ferring*:

*“[If advantage does not exceed costs of SGEI provision] [...] the advantage does not constitute aid within the meaning of Article 92(1) [...] however, where the advantage [...] is greater than the [SGEI] costs [...], the portion which exceeds those costs cannot, in any event, be regarded as necessary to enable them to carry out the [SGEI] tasks [...].” That means that, in the first case, Article 90(2) [...] will not apply because the contested measure is not caught by the prohibition provided for in Article 92(1). However, nor will Article 90(2) apply in the second case because the part of the aid which exceeds the costs of the public service obligations does not come within the scope of application of that derogation.*<sup>84</sup>

Hence, the AG argues that, under *Ferring*, Article 106(2) will simply never be considered in the first case, as the measure would never be considered as State aid and therefore not subject to the restrictive Article 107(1) Treaty provision. In the second case, the argument is directly related Article 106(2)’s proportionality condition: If a measure entails compensation that exceeds costs it would in any event not be necessary and therefore not eligible for its exemption.

In his second opinion,<sup>85</sup> AG Léger supplemented his first opinion by upholding his previous, aforementioned, arguments, and rejecting certain arguments provided by the parties to the case as well as the so-called *quid pro quo* solution, proposed by AG Jacobs in the *GEMO*.<sup>86</sup> The AG expended upon the “real advantage” theory introduced by *Ferring*, expressly rejecting its focus on the “net benefits” derived from SGEI provision

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<sup>83</sup> *ibid*, Para. 91-97.

<sup>84</sup> *ibid*, Para. 81-82, referring to Articles 107(1) and 106(2) TFEU, respectively. Underlining and textual amendments by Authors.

<sup>85</sup> C-280/00 *Altmark* (n 5), Opinion of AG Léger on January 14 2003.

<sup>86</sup> C-38/01 *GEMO* (n 43), Opinion of Opinion of AG Jacobs, in particular Para. 117-120.



by insisting that the Treaty State aid provisions are based upon the “gross theory or the ‘apparent’ advantage theory.”<sup>87</sup>

#### 2.4.5.3. The Judgment – the Criteria

In its judgment the Court arguably tried to tread the “golden middle path”. It began by referring to the *Compensation approach* introduced by *Ferring*:

*“[Where] a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) [...]”*<sup>88</sup>

However, the Court went on to set four conditions for such SGEI compensation to escape classification as State aid under Article 107(1) TFEU.<sup>89</sup> First, a clearly defined public service obligation must have been imposed on the recipient of the compensation. Secondly, “the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner [...]”. Thirdly, “the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations taking into account the relevant receipts and a reasonable profit for discharging those obligations.” The fourth and final condition is as follows:

*“Fourth, where the [SGEI provider] is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the*

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<sup>87</sup> C-280/00 *Altmark* (n 5), Opinion of AG Léger on January 14 2003, Para. 31-33.

<sup>88</sup> C-280/00 *Altmark* (n 5), Para. 87.

<sup>89</sup> *ibid*, Para. 88-93.

*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.*”<sup>90</sup>

If a SGEI provider is not selected in a public tender the amount of compensation granted must be determined on basis of a benchmark involving a hypothetical “typical” undertaking in the way that the costs, that the compensation is to cover, should be in line with a well-run (efficient) undertaking. By adding this condition, along with the third condition on limiting compensation to what is “necessary”, the Court refined and curbed *Ferring’s* somewhat open-ended *Compensation approach*. In other words, it can be argued that the Court added the economic restraints that *Ferring* lacked: Compensation shall not exceed costs and a reasonable profit (the third condition) and, further, costs shall be as low as possible (the fourth condition).<sup>91</sup> The apparent reason for adding to the *Compensation approach* in such a way is that the court was trying to ensure that the approach could not be used by Member States to get all kinds of SGEI compensation outside the scope of the Treaties’ State aid system, by adding economic restraints related to necessity and efficiency. Only compensation of “appropriate” costs would escape the classification of State aid under Article 107(1).

If measure involving compensation for SGEI provision does not fulfil all of the four aforementioned *Altmark* conditions it is to be defined as State aid within the meaning Article 107(1) and has to be notified to the Commission in accordance with Article 108(3) TFEU.<sup>92</sup>

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<sup>90</sup> *ibid*, Para. 93.

<sup>91</sup> Mortensen (n 73), 242. It is noted that the cited authority was not directly used but served as inspiration and a basis for the Author to further his own understanding of the *Altmark* conditions and to form arguments in relation thereto.

<sup>92</sup> C-280/00 *Altmark* (n 5), Para. 94.

### 3. Article 106(2) TFEU

#### 3.1.General

Following the discussion above on Article 107(1) and when compensation for SGEIs does amount to State aid under that article, this chapter discusses the provision that comes into play when State aid has indeed been found – the derogation provision in Article 106(2) TFEU.

The origins of Article 106 can be traced back to a compromise between the ECC's founders. The “Benelux” countries, fearing that fair competition in the proposed internal market could be threatened by the presence of extensive public undertakings in France and Italy, requested that the first Paragraph of Article 106<sup>93</sup> be inserted into the EEC Treaty, which subjected those undertakings to the rules in the EEC Treaty, including rules on competition. At the same time, the latter founding nations feared that the effectiveness of certain public service activities might be affected by the inclusion of such provision and requested that the second Paragraph of Article 106 be inserted,<sup>94</sup> which is now as follows:

*“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 the Treaties, 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.”<sup>95</sup>*

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<sup>93</sup> Originally in the form of Article 90 of EEC Treaty, which read as follows: “Member States shall, in respect of public enterprises and enterprises to which they grant special or exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in this Treaty [...]” Textual amendments by Author.

<sup>94</sup> Natalia A. Fiedziuk *Services of General Economic Interest in EU Law: The role of the ‘public service’ exception in the light of recent developments in EU law* (Oisterwijk: Wolf Legal Publishers 2013), 4.

<sup>95</sup> Original version in Article 90(2) of EEC Treaty read as follows: “Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the de jure or de facto fulfilment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community.”

Article 106(2) TFEU is thus a derogation - an exemption provision that attempts to reconcile national objectives with the objectives of the European Union. It aims to achieve a balance between a fully functioning internal market, with fair competition as one of its cornerstones, and the provision of public services in individual Member States.<sup>96</sup> Competition rules should be respected and adhered to, but, at the same time, the rules should not unduly restrict the provision of SGEIs.

### **3.2. Conditions for Application**

As is generally the case with exemption rules, the EU Courts have repeatedly confirmed, that Article 106(2) should be interpreted strictly.<sup>97</sup> The application of the exemption is conditional upon the fulfilment of the five following conditions,<sup>98</sup> which have partly been developed through the EU Courts case law and which are now set out in greater detail in the Commission's SGEI Framework.<sup>99</sup>

First, the compensation at issue must be for the provision of a "genuine" SGEI, which has been defined in a correct manner.<sup>100</sup> The Commission's reassessment of whether the definition is correct is limited to ascertaining whether the relevant Member States has "manifestly erred" in defining certain service as SGEI. A key part of such definition is whether the service in question can be adequately provided by the market, without State intervention. If that is the case, then the service in question is liable to fall outside a proper definition of SGEI.<sup>101</sup> Secondly, the SGEI provider must be assigned to the public service by a clear and sufficiently detailed public authority act,<sup>102</sup> entrusting the undertaking at hand with providing a certain service.<sup>103</sup> The third condition concerns necessity:<sup>104</sup> State intervention can only be exempted from the Treaties' State aid prohibition as long as the prohibition truly restricts the provision of genuine SGEI. The fourth condition is on the

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<sup>96</sup> Bacon (n 29), 3.62.

<sup>97</sup> Bacon (n 29), 3.77. and cases C-127/73 *BRT v SABAM* [1974] ECR 00313, Para. 19, and C-340/99 *TNT Traco* [2001] ECR I-04109, Para. 56.

<sup>98</sup> Bacon (n 29), 3.77.

<sup>99</sup> Communication from the Commission European Union framework for State aid in the form of public service compensation (2011) of 11 January 2012 [2012] OJ C8/03 (the "SGEI Framework"). See in particular Para. 11-59.

<sup>100</sup> SGEI Framework, Articles 12-13.

<sup>101</sup> Bacon (n 29), 3.78.

<sup>102</sup> C-280/00 *Altmark* (n 59), Opinion of AG Léger on March 19 2002, Para. 87.

<sup>103</sup> SGEI Framework, Para. 15-16.

<sup>104</sup> Bacon (n 29), 3.84.

proportionality of the disputed measure and will be dealt with separately below. Finally, SGEI compensation should not affect development of trade to a significant extent.<sup>105</sup>

### 3.3. Proportionality

After determining that the disputed measure – and the entailing restriction of competition – is indeed necessary the Article 106(2) compatibility assessment turns to whether the measure is proportional. Could other, less restrictive, means have been implemented instead? In terms of State compensation for SGEI provision, the key issue is to assess whether the amount of compensation is proper, or whether it is excessive with respect to the services provided – whether there is overcompensation or not.<sup>106</sup> The SGEI Framework contains comprehensive guidelines on how the Commission assesses the proportionality of compensation,<sup>107</sup> beginning by essentially repeating the condition of harmony between compensation and costs, set by the Court in *Ferring* and *Altmark*:<sup>108</sup> The amount of compensation cannot exceed the net costs of providing the public service in question, “including a reasonable profit.”<sup>109</sup> Article’s 106(2) proportionality test thus revolves around comparing the costs of the public services provider’s operations to the compensation it receives for providing the services.

### 3.4. The Relationship with Article 107(1) TFEU

The interrelation between Article 107(1) TFEU and the exemption in Article 106(2) TFEU after the *Altmark* judgment has been the subject of many debates and scholar discussion.<sup>110</sup> That is not particularly surprising as the first and third *Altmark* conditions – mandating that public service obligation be clearly defined and imposed on the SGEI provider and that compensation cannot exceed the cost of SGEI provision – correspond to equivalent conditions for the application of Article 106(2).<sup>111</sup> The second and fourth

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<sup>105</sup> C-280/00 *Altmark* (n 59), Opinion of AG Léger on March 19 2002, Para. 87.

<sup>106</sup> Bacon (n 29), 3.85 – 3.86.

<sup>107</sup> SGEI Framework, Para. 21-59.

<sup>108</sup> C-53/00 *Ferring* (n 69) and C-280/00 *Altmark* (n 5).

<sup>109</sup> SGEI Framework, Para. 21.

<sup>110</sup> See for example Orla Lynskey, (2007) ‘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’ Volume 30 (Issue 1) World Competition and Economic Review, 153, and Max Klasse, ‘The Impact of Altmark: The European Commission Case Law Responses’ in Erika Szyszczak and Johan Willem van de Gronden (eds) *Financing Services of General Economic Interest* (TMC Asser Press 2013) <[http://link.springer.com/10.1007/978-90-6704-906-1\\_2](http://link.springer.com/10.1007/978-90-6704-906-1_2)> accessed 24 June 2015.

<sup>111</sup> See Chapter 2.4.5.3. and C-280/00 *Altmark* (n 5), Para. 88-93.

conditions, on the contrary, introduced “new” requirements: The parameters for calculating the compensation must be set in advance and the SGEI provider had to be of a certain efficiency level, which is either secured through public procurement procedure or with respect to the benchmark of a “typical” and “well run” undertaking.<sup>112</sup> Accordingly, as observers have noted, it would arguably be a rather futile exercise to try and apply the first and third conditions when assessing compatibility under Article 106(2) in the case that these conditions had not been fulfilled under the *Altmark* – Article 107(1) – assessment.<sup>113</sup> In other, more simple, terms: If compensation had exceeded costs and the third *Altmark* condition was not met, then surely such compensation wouldn’t pass the proportionality test under Article 106(2),<sup>114</sup> depriving the latter article of its effect,<sup>115</sup> at least to certain extent. Can such observation be upheld?

The introduction of the 2005 SGEI Decision and the 2005 SGEI Framework by the Commission resulted in the conditions of *Altmark* and Article 106(2) assessment becoming even more aligned. Now, the present SGEI legal package,<sup>116</sup> featuring the SGEI Decision<sup>117</sup> and the SGEI Framework, contains the first three *Altmark* conditions meaning, in essence, that those conditions are repeated when assessing the compatibility of compensation that has not fulfilled the *Altmark* test and is therefore classified as State aid.<sup>118</sup> What is left is the fourth *Altmark* condition, which is of course an integral part of the subject matter of this thesis and will be discussed in detail below. Regarding the public broadcasting sector in particular, which has its own separate legal framework as will be detailed later, the alignment is less intense: While the first and third *Altmark* conditions are, in essence, a part of the compatibility assessment under Article 106(2), the second

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<sup>112</sup> *ibid.*

<sup>113</sup> Lynskey (n 110), 158-159.

<sup>114</sup> The Court noted this in C-53/00 *Ferring* (n 69): “If [...] the [tax] advantage for wholesale distributors [...] exceeds the additional costs that they bear in discharging the public service obligations [...], that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them.” (Para. 32). Textual amendments by Author.

<sup>115</sup> As noted by AG Léger in C-280/00 *Altmark* (n 59), Opinion of AG Léger on January 14 2003 (n 73), Para. 82.

<sup>116</sup> The term “package” is used as a general reference to the Commission’s legal instruments for dealing with State aid in the context of SGEI. For summary of the Commission’s 2011 SGEI package see Chapter 4.2.2.

<sup>117</sup> Commission Decision 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 of 20 December 2011 [2011] OJ L7/3 (the “SGEI Decision”).

<sup>118</sup> Klasse (n 110), 38.

*Altmark* condition, and its transparency requirements, and the fourth condition, are not.<sup>119</sup> Notwithstanding the similarity of conditions, the EU Courts have indeed stated, both directly and indirectly, that the criteria of Article 107(1) and Article 106(2) are separate and should not be confused.<sup>120</sup> The *Altmark* test concerns whether the compensation amounts to State aid under Article 107(1) TFEU, while the Article 106(2) exemption is used to assess whether the compensation is compatible with the internal market. Such assessment falls within the Commission's exclusive competence.

Finding SGEI compensation, which amounts to State aid, compatible with the internal market on the basis of the exemption in Article 106(2) is therefore, and should be, a possibility, although the window for such a result is arguably small, given the close correspondence of conditions under the two tests. One such scenario could be that compensation, which did not fulfill the fourth *Altmark* condition as the necessary comparator of a "typical" and "well run" undertaking could not be found, is in any event deemed compatible on basis of Article 106(2).<sup>121</sup>

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<sup>119</sup> See summary and comparison of the two frameworks in Chapter 4.

<sup>120</sup> Case T-354/05 *TF1 v Commission* [2009] ECR II-00471, Para. 139–40, referring to case C-451/03 *Servizi Ausiliari Dottori Commercialisti v Giuseppe Calafiori* [2006] ECR I-02941, Para. 71. Textual amendments by Author.

<sup>121</sup> Bacon (n 29), 3.65.

## 4. The Public Broadcasting Sector

### 4.1. General

This chapter describes and discusses the public broadcasting sector in the context of EU rules on State aid and the exemption provision in Article 106(2). In line with the overall scope of this thesis, the focus will be on efficiency considerations and what requirements the EU imposes on service providers, both with respect to SGEIs in general and the public broadcasting sector in particular.

Public service broadcasting holds a special place within EU's legal system. The service is considered to be of particular importance for "[...] social, democratic and cultural life [...]" in the European Union and should function to secure "democracy, pluralism, social cohesion, cultural and linguistic diversity" through "broad public access, without discrimination [...], to various channels and services".<sup>122</sup> The role of broadcasting is thus broader than most other SGEIs,<sup>123</sup> which are not tasked with being the main source of information to the general public, contributing to public discussion and ensuring, to the extent possible, that individuals are informed and able to participate in such discussion.<sup>124</sup> Due to the social and cultural element of public broadcasting, and its inherent link to domestic policy and funding in individual Member States, the issue of potential State aid, contrary to the aims of the EU and the internal market, has become particularly contentious in the Commission's State aid enforcement practices.<sup>125</sup>

Provision of public broadcasting services is imperative for a society to function in a transparent, democratic and non-discriminatory way, for example to ensure the independency and objectiveness of broadcasting and that it attends – in equal manner – to the multi-faceted needs to modern day society. Thus, although markets for broadcasting where opened for competition in the last quarter of the 20<sup>th</sup> century – not least because of technological advancements – Member States have placed strong emphasis on providing public service broadcasting precisely for these reasons, which generally entails the use of

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<sup>122</sup> Communication from the Commission on the application of State aid rules to public service broadcasting of 27 October 2009 [2009] OJ C257/1 (the "Broadcasting Communication"), Para. 12, and Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council concerning public service broadcasting of 27 January 1999 [1999] OJ C30/01, Preamble, Recital (B) and Para. (4).

<sup>123</sup> Bacon (n 29), 15.04.

<sup>124</sup> Broadcasting Communication, Para. 9-10.

<sup>125</sup> Leigh Hancher, Tom Ottervanger and Piet Jan Slot *EU state aids (4<sup>th</sup> Edition)* (Sweet & Maxwell 2012), 18-001, 18-002.



state resources in some form. This emphasis, and the need to reconcile it with EU's emphasis on fair competition (including a general prohibition of State aid), led to the adoption of a specific interpretive protocol on the system of public broadcasting as a part of the Amsterdam Treaty.<sup>126</sup> The protocol has been referred to as the Amsterdam Protocol and its substance now forms Protocol 29 TFEU, which begins by reaffirming the ties that public broadcasting systems have to "the democratic, social and cultural needs of each society and to the need to preserve media pluralism", before stating the following:

*"The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."*<sup>127</sup>

The Amsterdam Protocol can thus be described as a special version of the general SGEI exemption in Article 106(2) TFEU,<sup>128</sup> which provides a specific proportionality test and "opens the door" for a certain kind of SGEIs – public broadcasting services – in the context of achieving a balance between an effective and competitive internal market and the provision of these services.

## **4.2.Public Broadcasting Legislation**

### **4.2.1. General**

The issue of whether state funding of public broadcasting services amounts to incompatible State aid has been the subject of many Commission examinations and assessments. Since 2001 the framework for such assessment has been in the form of communications specific to the public service broadcasting sector, which have set out and

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<sup>126</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

<sup>127</sup> TFEU, Protocol (no 29). Textual Amendments by Author.

<sup>128</sup> Bacon (n 29), 15.06.

clarified the principles the Commission adheres to when evaluating whether public broadcasting funding amounts to State aid under Article 107(1) TFEU and, if so, whether such aid funding is compatible with the internal market under Article 106(2) TFEU.<sup>129</sup> This framework is separate from the general legal framework for assessing whether compensation for other SGEIs amounts to State aid, which is in the form of the 2011 SGEI package. That general framework will now be briefly covered, to clarify and fully understand how the Commission deals with efficiency considerations in general and the latest developments in relation thereto.

#### 4.2.2. The general SGEI Package

The Commission's current, general, legislative package, on whether the financing of SGEIs amounts to State aid, was adopted in late December 2011.<sup>130</sup> The package entered into force in 2012 and consisted of the SGEI Communication<sup>131</sup> and the SGEI *de minimis* Regulation<sup>132</sup> along with the previously mentioned SGEI Decision and the SGEI Framework. A detailed breakdown on the interrelation between these legislative instruments is not within the scope of this thesis.<sup>133</sup> For present purposes it is sufficient to say that the SGEI *de minimis* Regulation and the SGEI Communication concern whether a specific measure is defined as State aid, within the meaning of Article 107(1) TFEU, while the SGEI Decision and the SGEI Framework concern whether a State aid measure is compatible with the internal market.

Despite this difference, both sets of legislative instruments contain fairly detailed provisions on amount of SGEI compensation and assessment of costs in relation thereto. While the third *Altmark* condition requires certain harmony between SGEI costs and the compensation provided in return, the fourth conditions sets out the principles on how this

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<sup>129</sup> 2001 Broadcasting Communication, Para. 4, and Broadcasting Communication, Para. 8.

<sup>130</sup> Erika Szyszczak (2012) 'Modernising State Aid and the Financing of SGEI' Volume 3 (Issue 4) Journal of European Competition Law & Practice <<http://jeclap.oxfordjournals.org/content/early/2012/06/07/jeclap.lps035.full.pdf>> accessed 24 June 2015, 332, 332.

<sup>131</sup> 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 of 11 January 2012 [2012] OJ C8/2 (the "SGEI Communication").

<sup>132</sup> Commission Regulation (EU) on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest of 25 April 2012 [2012] OJ L114/8 (the "SGEI *de Minimis* Regulation").

<sup>133</sup> For a simple breakdown and description see, for example, the SGEI Framework, Para. 1-7.

harmony can be achieved when selecting the SGEI provider.<sup>134</sup> To briefly recap, the fourth *Altmark* condition requires that if the SGEI provider is not selected on the basis of a public procurement procedure, “[...] the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport 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.”<sup>135</sup> Thus, the second part of the fourth *Altmark* condition demands some kind of cost-analysis in order to determine the efficiency of the SGEI provider, with the objective of refraining from using a badly run and inefficient undertaking, which presumably incurs high costs in its operations, as a standard.<sup>136</sup> The last section of the SGEI Communication attempts to clarify this efficiency condition.<sup>137</sup> It begins by stating that where a market provides a “generally accepted remuneration” then that is the best benchmark in order to evaluate the amount of compensation considered appropriate.<sup>138</sup> In the absence of such benchmark, the evaluation becomes vaguer and the focus shifts over to evaluation of operational practices and costs in relation thereto. The fact that the SGEI provider runs a profitable operation is not enough on its own, without evaluating its operation and cost structure in the context of its size, market power (even monopolistic position) and the rules in the sector it operates.<sup>139</sup> The communication notes that the reference to a “typical undertaking” necessarily entails comparison with other undertakings and implicitly acknowledges the apparent problem with that condition – the lack of necessary comparators.<sup>140</sup> The Commission, however, explicitly states that an undertaking enjoying monopoly position is not an adequate comparator as its operating costs are likely to be “higher than normal”. The burden of proofing that the SGEI task – and compensation – has been granted to an efficient undertaking lies with the relevant public authority. Hence, in terms of determining what amounts appropriate compensation

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<sup>134</sup> SGEI Communication, Para. 44.

<sup>135</sup> C-280/00 *Altmark* (n 59), Para. 94. Underlining by Author.

<sup>136</sup> SGEI Communication, Para. 70.

<sup>137</sup> *ibid*, Section 3.6.2., Para. 69-77.

<sup>138</sup> *ibid*, Para. 69.

<sup>139</sup> *ibid*, Para. 71 and 73.

<sup>140</sup> *ibid*, Para. 74. A problem that has not escaped the attention of commentators, which have also highlighted the fact that the second part of the fourth *Altmark* condition does not provide a guideline on how to proceed in the absence of comparators. See for example Annalisa Renzulli, (2008) ‘Services of General Economic Interest: The Post-Altmark Scenario’ Volume 14 (Issue 3) *European Public Law*, 399, 412-413, and discussion on the Danish State’s argumentation in Chapter 5.3.

within the *Altmark* criteria the Commission has, in essence, provided a twofold guideline: The compensation is either appropriate as it corresponds to a “generally accepted market remuneration” or because it covers costs that correspond to the costs of an “efficient undertaking”.

The SGEI Framework concerns the compatibility of SGEI compensation and, essentially, repeats the first three *Altmark* conditions, as previously described.<sup>141</sup> In terms of compensation and costs, the SGEI Framework restates the third *Altmark* condition: Amount of compensation cannot exceed the “net costs” of SGEI provision, which can either be based upon actual or expected revenues and costs, with the so-called “net avoided cost methodology” being the Commission’s ideal method for calculating net costs.<sup>142</sup> The main difference – and arguably the most important factor to note – when comparing the assessment of SGEI compensation as State aid under Article 107(1) TFEU and the SGEI Communication, on one hand, and the compatibility of the compensation under Article 106(2) TFEU and the SGEI Framework, on the other hand, is that the latter only deals with actual costs, whether they have already been incurred or are expected. In other words, the focus is on SGEI provider’s costs only, rather than comparing those costs, and the provider’s operations, with the cost structures and operations of other, “efficient”, undertakings. In return, the SGEI Framework demands that Member States insert certain “efficiency incentives” into their SGEI systems, which are to ensure that the public service in question is provided at as least cost as possible, without jeopardising its quality.<sup>143</sup> The structure of such incentives can vary, with the framework specifically mentioning the method of fixing a compensation level beforehand<sup>144</sup> and setting efficiency targets.<sup>145</sup> It is worth noting that the 2005 SGEI Framework did not include efficient incentives and their introduction in the SGEI Framework was the result of the Commission’s focus on providing a framework that encouraged a better – more efficient – managing of public resources.<sup>146</sup>

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<sup>141</sup> See Chapter 3.4.

<sup>142</sup> SGEI Framework, Para. 21-27, although the Commission opens the door for other, alternative, calculating methods, which can be justified in certain situations.

<sup>143</sup> *ibid*, Para. 39-43.

<sup>144</sup> *ibid*, Para. 40.

<sup>145</sup> *ibid*, Para. 41.

<sup>146</sup> Damien Geradin, (2012) ‘Public Compensation for Services of General Economic Interest: An Analysis of the 2011 European Commission Framework’ TILEC Discussion Paper No. 2012-023 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564)> accessed 14 April 2015.

### 4.2.3. The Broadcasting Communication

In the current Broadcasting Communication from 2009 the Commission attempts to combine its case practice “in a future-oriented manner”<sup>147</sup> and resets the guiding principles with reference to technical and legal developments that had occurred since its 2001 Broadcasting Communication.<sup>148</sup> With respect to legal developments, the Commission naturally notes the most important factor: The *Altmark* judgment, which set the conditions under which compensation for SGEI provision could escape classification as State aid, within the meaning of Article 107(1),<sup>149</sup> and the Commission’s 2005 SGEI State aid reforms (package). If the four conditions of the *Altmark* judgment are met, compensation for providing public service broadcasting does not constitute State aid as Article’s 107(1) condition of economic advantage is not fulfilled.<sup>150</sup> If the conditions are not fulfilled then “the funding [...] would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.”<sup>151</sup> The Broadcasting Communication covers both assessment of whether a measure falls within the scope of Article 107(1) (including assessment of the *Altmark* conditions) and assessment of compatibility under Article 106(2), unlike the general SGEI package, where the SGEI Communication is devoted to the former assessment while the SGEI Framework covers the latter.

### 4.2.4. Efficiency Considerations

The Broadcasting Communication repeats the *Altmark* conditions including, of course, that the amount of compensation must be based on the costs of a “typical and well run” undertaking,<sup>152</sup> without going into further detail on how these conditions are to be construed and applied in the specific case of public broadcasting. Thus, the communication does not, unlike the SGEI Communication, seek to clarify *Altmark*’s efficiency condition. It should be noted that this is merely *prima facie* summary of the communication’s content compared to the later adopted SGEI Communication, which excludes discussion on the actual success of the SGEI Communication’s attempted clarifications,<sup>153</sup> or how they suit the assessment of the efficiency condition in the public

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<sup>147</sup> Broadcasting Communication, Para. 8.

<sup>148</sup> *ibid*, Para. 4-7, and Bacon (n 29), 15.07.

<sup>149</sup> See summary of *Altmark* in Chapter 2.4.5.

<sup>150</sup> Broadcasting Communication, Para. 23.

<sup>151</sup> *ibid*, Para. 24.

<sup>152</sup> *ibid*.

<sup>153</sup> See summary and discussion in Chapter 4.2.2.

broadcasting sector. The Commission has obviously decided to leave the assessment open and flexible without any predetermined parameters, whilst, of course, not excluding the use of the guidelines in the SGEI Communication.

Instead, the main focus in the Broadcasting Communication is on the compatibility of public broadcasting systems under Article 106(2) TFEU<sup>154</sup> and whether the conditions for applying the exemption in that article are fulfilled.<sup>155</sup> The Commission makes the important note that, in the case of public broadcasting, the conditions must be applied “in the light of the interpretive provisions of the Amsterdam Protocol” and the specific proportionality test therein.<sup>156</sup> The communication includes requirements that the public service remit of the public broadcaster is defined as precisely as possible<sup>157</sup> and that the remit is entrusted to one or more undertakings by a specific public act.<sup>158</sup> The effects of the special nature of public broadcasting and the Amsterdam Protocol are, however, clearly visible, for example in Paragraph 47, which allows for a “qualitative definition” of the public service remit in order to secure editorial independence and balanced broadcasting covering a wide spectrum.<sup>159</sup>

On assessing costs, in relation to determining whether compensation for providing public broadcasting services is appropriate, the Broadcasting Communication states, that to fulfil the proportionality test, the amount of compensation cannot exceed the net cost of public broadcasting, taking into account direct and indirect revenues associated with the public service obligation.<sup>160</sup> All costs incurred may be considered,<sup>161</sup> with, however, the Commission specifically acknowledging that separation of accounts might be particularly arduous when assessing costs “in the public broadcasting sector [as] Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public

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<sup>154</sup> At the time Article 86(2) of the EEC Treaty.

<sup>155</sup> Broadcasting Communication, Para. 36-79. See also summary of Article’s 106(2) conditions in Chapter 3.2.

<sup>156</sup> Broadcasting Communication, Para. 38.

<sup>157</sup> *ibid*, Para. 43-49.

<sup>158</sup> *ibid*, Para. 50-55.

<sup>159</sup> *ibid*, Para. 47.

<sup>160</sup> *ibid*, Para. 71.

<sup>161</sup> *ibid*, Para. 65.

service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.”<sup>162</sup>

The special nature of the public broadcasting sector, reinforced by the Amsterdam Protocol, thus leads to a situation where Commission’s compatibility assessment is narrowed down to assessment of all actual costs, which are furthermore hard to separate from costs unrelated to the public service obligation, due to the sharing of input. Thus, like the more general SGEI Framework,<sup>163</sup> the focus is on costs actually incurred rather than on the assessment or analysis of those costs in the context of how efficient the public broadcaster is – no such mechanism or guidelines are provided in the communication. In other words: The communication does not demand assessment of the public service broadcaster efficiency. However, unlike the SGEI Framework,<sup>164</sup> the communication does not provide any “efficiency incentives” as guarantees to make up for the lack of cost analysis. On the other hand, Member States have to prove that their funding of public broadcasters is proportional and, on the basis of evidence provided, the Commission examines whether their systems include adequate safeguards to combat overcompensation and cross-subsidisation,<sup>165</sup> which should include external (and independent) reviewers that carry out, *inter alia*, in-depth, *ex post*, examination of the public broadcasters’ financial situation at the end of financing periods.<sup>166</sup>

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<sup>162</sup> *ibid*, Para. 65.

<sup>163</sup> Which covers the assessment of compatibility of State aid measures outside sectors subject to specific rules such as public broadcasting. See summary in Chapter 4.2.2.

<sup>164</sup> See summary in Chapter 4.2.2 and SGEI Framework, Para. 40 and 41.

<sup>165</sup> Broadcasting Communication, Para. 40.

<sup>166</sup> *ibid*, Para. 77-79.

## 5. The TV2/Danmark Case

### 5.1. Background

The aim of the discussion hitherto was to set the legal background for case analysis of the long-running TV2/Danmark case in this chapter. Thus, the reader should by this point be familiar with the main concepts and legal rules that govern the issue of potential State aid in relation to SGEI provision, including the Commission's legal instruments in the form of communications and frameworks, covered in Chapter 4, and the efficiency considerations therein. This chapter includes a detailed discussion and analysis of the TV2/Danmark case, including analysis of selected case law cited by the General Court in its *Viasat* judgment in Chapter 5.5.

On last September 24 the General Court rendered two judgments in the so-called *TV2/Danmark* cases,<sup>167</sup> one of which – *Viasat*<sup>168</sup> – is a focal point of this thesis. The judgments are the latest episode in the long-running saga of TV/Danmark – a Danish public broadcaster entrusted with providing audience in Denmark with national and regional television programmes.<sup>169</sup> TV2/Danmark started broadcasting in 1989,<sup>170</sup> having been established in 1986 as autonomous state undertaking. In 2003 its operations were transferred into a state owned stock company and its legal name became TV2/Danmark A/S.<sup>171</sup>

Since 2000<sup>172</sup> the Danish State's funding of TV2/Danmark has been the subject of continuous complaints by TV2/Danmark's competitors in the broadcasting sector and ensuing examinations and decisions by the European Commission and the European Courts.<sup>173</sup> In essence, the competitors believe that the terms of competition in the Danish broadcasting market are unfair as TV2/Danmark has benefitted from excessive and wide-ranging state funding. Thus, the initial complaint lodged in 2000 led to a decision wherein

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<sup>167</sup> T-125/12 *Viasat* (n 2) and T-674/11 *TV2/Danmark v Commission* (General Court, 24 September 2015).

<sup>168</sup> T-125/12 *Viasat* (n 2).

<sup>169</sup> *ibid*, Para. 3.

<sup>170</sup> *TV/Danmark* (C(2004) 1814) 2005/217/EC [2004] OJ L85/1, Para. 78.

<sup>171</sup> With the abbreviation "A/B" meaning "aktieselskab" in Danish. This change in legal form does not have a particular significance with respect to the subject matter and focus of this thesis. Accordingly, TV2/Danmark and TV2/Danmark A/S are jointly referred to as "TV2/Danmark".

<sup>172</sup> Beginning with a complaint from a competitor, SBS Broadcasting AS/TvDanmark, T-125/12 *Viasat* (n 2), Para. 6.

<sup>173</sup> For a more detailed version of complaints, examinations and decisions see T-125/12 *Viasat* (n 2), Para. 1-19, which is the basis of the summary in this chapter.



the Commission examined, *inter alia*, whether measures such as receiving license fees, *ad hoc* payments, tax exemptions and a state guarantee constituted State aid within the meaning of Article 107(1) TFEU and, if so, whether the aid was compatible with the internal market under Article 106(2) TFEU.<sup>174</sup>

In May 2004 the Commission came to the conclusion that the Danish State's system, compensating TV2/Danmark for the costs of providing public broadcasting service, did indeed constitute State aid under Article 107(1), as it did not fulfil the second and fourth *Altmark* conditions.<sup>175</sup> The issue thus came down to compatibility assessment under Article 106(2), where the Commission concluded that TV2/Danmark had, essentially, been vastly overcompensated and that an amount of roughly 630 million Danish kroner was to be repaid to the Danish State, with accrued interests.<sup>176</sup> As the obligation to repay such an amount would inevitably lead to TV2/Danmark's insolvency the Danish State decided to recapitalise the undertaking, by way of capital injections and conversion of state loans into capital, and notified the Commission of such intentions in June 2004.<sup>177</sup> In 2008 the Court of First Instance<sup>178</sup> annulled the decision, holding that the Commission had failed to adequately state reasons, *inter alia* for finding that the two *Altmark* conditions had not been fulfilled.<sup>179</sup> The Commission subsequently reopened examination of the Danish state funding of TV2/Danmark and in 2011 it adopted a new decision.<sup>180</sup> The Commission still held that the second and fourth *Altmark* conditions were not fulfilled.<sup>181</sup> However, this time around the Commission actually held that the State aid measures were compatible with the internal market under Article 106(2). It took the 2004 recapitalisation into account and concluded that the 630 million Danish kroner overcompensation – accumulated by TV2/Danmark up to 2002 – was in fact necessary for the undertaking to fulfil its public service obligation and proportional.<sup>182</sup>

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<sup>174</sup> T-125/12 *Viasat* (n 2), Para. 6.

<sup>175</sup> Decision 2005/217/EC *TV/Danmark* (n 170), Para. 71. For summary of the *Altmark* conditions, see Chapter 2.4.5.3.

<sup>176</sup> *ibid*, Para. 104-127.

<sup>177</sup> T-125/12 *Viasat* (n 2), Para. 9.

<sup>178</sup> Now the General Court.

<sup>179</sup> T-309/04 et al. *TV2/Danmark A/S and Others v Commission* (n 21), Para. 224-232.

<sup>180</sup> *TV/Danmark* (C(2011) 2612) 2011/839/EU [2011] OJ L340/1, Para. 104-136.

<sup>181</sup> Decision 2011/839/EU *TV/Danmark* (n 180), Para. 104-136.

<sup>182</sup> *ibid*, Para. 233, and T-125/12 *Viasat* (n 2), Para. 16-17.

The 2011 decision was subject to two separate actions for annulment before the General Court. One by TV2/Danmark, which challenged the Commission's conclusions that the disputed measures were State aid within the meaning of Article 107(1) in aforementioned case T-674/11.<sup>183</sup> The other by one of TV2/Danmark's competitors – Viasat Broadcasting UK Ltd. – which challenged the Commission's finding that State aid was compatible under Article 106(2) in the aforementioned *Viasat* case. The two cases are of course closely linked and were decided on the same day – the last September 24. In the former case the Court partially annulled the Commission's decision, finding that payment of advertising revenue to TV2/Danmark during a certain period could not be classified as State aid within the meaning of Article 107(1).<sup>184</sup> This led to the action in *Viasat* being partially devoid of purpose as the issue of compatibility only arises if there has been a prior finding of State aid.<sup>185</sup> In the parts of *Viasat* that were not devoid of purpose, the General Court upheld the Commission's finding of compatibility and dismissed the action.

*Viasat* will, of course, be assessed in detail below. The following coverage in this chapter will, however, not include all aspects of the different decisions and judgment in the long-running TV2/Danmark dispute. It will instead focus on matters concerning the efficiency of TV2/Danmark and what effects, if any, efficiency considerations have in the context of Article's 107(1) and 106(2), and relevant parts of decisions and judgments, beginning with the initial Commission decision in 2004 and its judicial review in 2008.

## **5.2. The first Part – 2004 Decision and 2008 Judgment**

In its decision in May 2004<sup>186</sup> the Commission examined the funding of TV2/Danmark during the period of 1995 to 2002.<sup>187</sup> The Commission concluded that TV2/Danmark had indeed enjoyed an advantage,<sup>188</sup> within the meaning of Article 107(1) TFEU, and that advantage could not be exempted from Article 107(1) on the basis of the *Altmark* conditions, as neither the second nor the fourth condition were fulfilled.

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<sup>183</sup> T-674/11 *TV2/Danmark v Commission* (n 2).

<sup>184</sup> *ibid*, Para. 262.

<sup>185</sup> T-125/12 *Viasat* (n 2), Para. 45.

<sup>186</sup> Decision 2005/217/EC *TV/Danmark* (n 170).

<sup>187</sup> *ibid*, Para. 9.

<sup>188</sup> In the form of license fees, ad hoc payments, tax exemptions, state guarantee and more, cf. Decision 2005/217/EC *TV/Danmark* (n 170), Para. 69.

The reasoning for that finding is remarkably short – in fact it is confined to one single Paragraph<sup>189</sup> – and, with respect to the fourth *Altmark* condition, it is based upon the Commission’s assertion that no analysis had been carried out (by the Danish state) “to ensure that the level of compensation is determined on an analysis of the costs which a typical undertaking [...] would have incurred in discharging [public service] obligations [...].”<sup>190</sup> In other words, since the Commission had not been provided with anything meaningful (by the Danish State or TV2/Danmark) in order to assess whether the fourth *Altmark* condition had been fulfilled – in the absence of a public tender – there was no need for it did not engage in any assessment of TV2/Danmark’s efficiency as public broadcaster. The burden of proof lies with the Member State in question.

Having classified the disputed measures as State aid, the Commission assessed whether the aid was compatible under Article 106(2). The key part of such assessment is of course to determine whether the measures were proportional – whether the public broadcaster had been overcompensated as the compensation had exceeded the net cost of providing the public broadcasting service.<sup>191</sup> The Commission applied twofold proportionality assessment.<sup>192</sup> The first part was simply to calculate the net cost of the providing the public broadcasting service, by deducting from all costs the revenue from commercial exploitation of the public service activity,<sup>193</sup> and then comparing those costs to the amount of public financing received, directly or indirectly. The result of this calculation was that the Danish State’s financing exceeded the net costs of providing the service by roughly 630 million Danish kroner.<sup>194</sup> Thus, the Commission did not consider the efficiency of TV2/Danmark as public service provider, neither under assessment of the fourth *Altmark* condition (because of the alleged lack of providing analysis or other relevant evidence by the Danish state) nor while examining net costs under Article 106(2).

In the second part of the proportionality assessment, which involved examining the pricing of advertising, the Commission did, however, open the door to efficiency assessment. If a public broadcaster’s pricing of advertisement was at a level below “[...]”

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<sup>189</sup> *ibid*, Para. 71.

<sup>190</sup> *ibid*. Underlining by Author.

<sup>191</sup> *ibid*, Para. 82.

<sup>192</sup> *ibid*, Para. 103.

<sup>193</sup> *ibid*, Para. 105.

<sup>194</sup> *ibid*, Para. 108. For details of the calculation, see Para. 104-108, including table of calculations.

what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations.”<sup>195</sup> This part of the Commission’s proportionality assessment under Article 106(2) therefore includes evaluation of efficiency, albeit not the efficiency of the public broadcaster but the rather its competitors in the advertising market. The competitor in question – TvDanmark – believed that TV2/Danmark’s prices were so low that it could not cover the stand-alone costs of its TV operations, where it to charge the same prices.<sup>196</sup> The Commission examined both whether TvDanmark was comparable to TV2/Danmark and also whether it could be defined as efficient operator. In short, it found that neither was the case.<sup>197</sup> TvDanmark was not in a similar situation as TV2/Danmark could therefore not be “directly compared”. With respect to efficiency, the Commission simply could not determine whether TvDanmark was efficient or not. First, because of lack of comparators on the Danish market. Secondly, the Commission engaged in financial analysis of TvDanmark and another competitor, SBS Broadcasting, and simply could not “[...] establish with certainty whether the losses incurred stem from high initial start-up costs that TvDanmark has not yet been able to recover or whether the operator is simply not performing efficiently [and could therefore not] conclude with certainty whether TvDanmark's losses are caused by TV2's pricing behaviour or by other factors for which TvDanmark itself is responsible.”<sup>198</sup> The Commission thus turned its attention to TV2/Danmark’s pricing policies and eventually concluded that they did not involve depression of prices and where, therefore, not indicators of overcompensation.<sup>199</sup>

The 2004 decision was subject to several different actions for annulment before the Court of First Instance, perhaps most notably from the Danish state and TV2/Danmark, faced with the impending insolvency of the latter. In October 2008 the court annulled the Commission’s decision, as previously mentioned. The court’s judgment is not based upon the substance of Article 107(1) and 106(2) *per se*, but rather on the finding that the Commission failed to fulfil its Treaty obligation to adequately state the reasons behind its

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<sup>195</sup> *ibid*, Para. 131.

<sup>196</sup> *ibid*, Para. 132.

<sup>197</sup> *ibid*, Para. 133-136.

<sup>198</sup> *ibid*. Para. 136. Textual amendments by Author.

<sup>199</sup> *ibid*, Para. 137-162.

decision,<sup>200</sup> including in relation to its conclusion that the second and fourth *Altmark* conditions were not fulfilled, and that the disputed measures entailed overcompensation not compatible with the internal market under Article 106(2).<sup>201</sup> The Court held that the Commission had failed to conduct a “diligent” and “serious” examination, on how TV2/Danmark was financed during the relevant period and on the proportionality of that financing in relation to the needs of TV2/Danmark, including by not examining information provided by the Danish state.<sup>202</sup> Failure to examine this information, along with the general failure to assess the legal and economic conditions of the Danish financing scheme (including an economic analysis of TV2/Danmark’s “funding needs”<sup>203</sup>), explained the insufficient statement of reasons – an infringement of essential procedural requirements that led to the annulment of the decision.<sup>204</sup>

On the fourth *Altmark* condition, the court dismissed the Commission’s short reasoning as inadequate, holding that diligent examination of the Danish state’s procedure for determining amounts of license fees – which included “[...] economic analyses drawn up with the help of [TV2/Danmark’s] competitors [...]” could very well have led to the conclusion that the fourth conditions had been fulfilled.<sup>205</sup> In other words, the information available could have led to the finding that the amount of compensation to TV2/Danmark was in accordance with the financing needs of a typical and well-run undertaking. Of the inadequate Article 106(2) assessment, the court held the Commission had the information to examine “seriously” whether the capital reserves built up for TV2/Danmark were necessary to provide the public service, given relevant legal and economic conditions.<sup>206</sup>

### 5.3. The 2011 Decision

Following the Court of First Instance’s 2008 judgment the Commission re-examined the Danish state’s financing of TV2/Danmark. The examination included both the period of

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<sup>200</sup> And thereby failed its Treaty obligation under Article 253 of the EEC Treaty (now Article 296(2) TFEU). The obligation to state reasons is now also protected by the right to good administration in Article 41(2) (c) of the Charter.

<sup>201</sup> T-309/04 et al. *TV2/Danmark A/S and Others v Commission* (n 21), Para. 178-234.

<sup>202</sup> *ibid*, Para. 208.

<sup>203</sup> *ibid*, Para. 206.

<sup>204</sup> *ibid*, Para. 202.

<sup>205</sup> *ibid*, Para. 232. Textual amendments by Author.

<sup>206</sup> *ibid*, Para. 220. Instead assessing whether the build-up of capital reserve was necessary (and proportional) the Commission based its conclusion of non-compatibility on the allegation that the Danish system was neither transparent nor “regularised” resulting in the accumulation of unspecified amounts of capital, which could be used for “[...] any purpose and need not be applied to performing a special task” (Para. 192-193).

1995 to 2002 as well as the recapitalisation measures taken by the Danish state in 2004, in reaction to the Commission's initial decision on the matter. The Commission eventually came to the conclusion, that while the measures still constituted State aid under Article 107(1) TFEU and that the second and fourth *Altmark* conditions were not fulfilled, the (same) overcompensation of roughly 630 million Danish kroner was "[...] was necessary for [TV2/Danmark] to fulfil its public service mission [and] therefore satisfied the criteria of proportionality and necessity under Article 106(2) TFEU."<sup>207</sup> However, and in line with the court's reprimands in 2008, the Commission apparently engaged in more detailed examination and assessment before coming to those conclusions.

In finding that the fourth *Altmark* condition had not been fulfilled, the Commission assessed various information and reports as well as legal and factual arguments, put forward by the Danish state and TV2/Danmark,<sup>208</sup> and deemed them inconclusive as a proof of the compensation being in line with the costs of typical, well-run, undertaking. External audit report was deemed inconclusive as it did not cover TV2/Danmark's costs or the costs of its competitors but was instead limited to the Danish advertising market.<sup>209</sup> Regular public audits were also dismissed, both because *ex posts* verifications could not suffice to fulfil the fourth *Altmark* condition, in the absence of *ex ante* analysis of the compensation needed,<sup>210</sup> and because comparison of broadcasters' productivity could not be equalled to comparisons of costs and efficiencies.<sup>211</sup> In other words, the reports put forward did not include assessments or comparison of costs and efficiencies - an integral part of the fourth *Altmark* condition.

The Danish state and TV2/Danmark also put forward legal arguments based upon the Courts' judgments in *BUPA*<sup>212</sup> and *Chronopost*.<sup>213</sup> First, in relation to *BUPA* – a General Court judgment on the Irish health insurance system where the court, arguably, does not apply the *Altmark* conditions strictly in the light of the particular characteristics of the

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<sup>207</sup> Decision 2011/839/EU *TV/Danmark* (n 180), Para. 233.

<sup>208</sup> *ibid*, Para. 118-136.

<sup>209</sup> *ibid*, Para. 120-125. Report by auditor firm KPMG.

<sup>210</sup> *ibid*, Para. 128. The verifications in question were made by the Danish National Audit Office.

<sup>211</sup> *ibid*, Para. 129-135. The Danish state put forward one particular report from the National Audit Office in this respect, which included comparison of TV2/Danmark to public broadcasters' in a couple of other Member States, but did not include assessment or comparison of costs and efficiency as such.

<sup>212</sup> Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-00081.

<sup>213</sup> Joined cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost v Ufex and Others* [2003] ECR I-06993.

case<sup>214</sup> – the Danish state and TV2/Danmark argued that the Commission should follow suit and find the fourth *Altmark* condition not applicable to the case, or at least that it was only necessary to fulfil it in essence. The Commission did not agree: The situation was not comparable to the unorthodox situation in *BUPA* as compensation could very well be calculated in the case of public broadcasters, based on costs and revenues.<sup>215</sup> Secondly, building on *Chronopost* – where the ECJ ruled on alleged State aid by the French Post Office (La Poste) to its affiliate operating in the express delivery service – the Danish state and TV2/Danmark argued that a public broadcaster like the latter mentioned could not be compared to a (typical and well-run) private operator, with the consequence that the fourth *Altmark* condition could simply not be applied. The Commission dismissed that argument by simply stating that such comparison was the essence of the fourth *Altmark* condition<sup>216</sup> and could therefore not be overlooked.<sup>217</sup>

The legal framework for the Commission’s assessment of the compatibility of TV2/Danmark’s financing with the internal market – having found that they constituted State aid – was Article 106(2) and the 2001 Broadcasting Communication.<sup>218</sup> In its assessment the Commission essentially repeated the formula and conclusions from its 2004 decision. The twofold proportionality assessment was applied, with the Commission first calculating the net cost of service provision and comparing it to compensation received, and then examining TV2/Danmark’s advertising pricing, to find out whether it might be depressed and therefore an indicator of overcompensation.<sup>219</sup> The result of the first part was the same as before – an overcompensation of roughly 630 million Danish kroner,<sup>220</sup> based on calculation of all actual costs without any cost analysis or efficiency assessment. This time, however, the Commission, mindful of the reprimands given by the court in its 2008 judgment, considered a number of justifications for the

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<sup>214</sup> Wolf Sauter, (2012) ‘The Altmark package mark II: new rules for state aid and the compensation of services of general economic interest’ Volume 33 (Issue 7) European Competition Law Review, 307, 309 and 315.

<sup>215</sup> Decision 2011/839/EU *TV/Danmark* (n 180), Para. 126.

<sup>216</sup> *ibid*, Para. 127.

<sup>217</sup> For an overview of *BUPA* (n 212) and *Chronopost* (n 213), and the unorthodoxy of situation in those cases *vis-à-vis* the *Altmark* criteria, see Leigh Hancker and Pierre Larouche, (2010) ‘The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest’ TILEC Law and Economics Discussion Paper No. 2010-024 and Tilburg Law School Legal Studies Research Paper No. 014/2010 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1628573](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628573)> accessed 11 September 2015, 21-22.

<sup>218</sup> *ibid*, Para. 155-159, and T-125/12 *Viasat* (n 2), Para. 38.

<sup>219</sup> *ibid*, 180-182. See also summary of the 2004 decision in Chapter 5.2 above.

<sup>220</sup> *ibid*, Para. 196.

overcompensation, put forward by the Danish state and TV2/Danmark.<sup>221</sup> Interestingly, the Commission seemed to be of the opinion that, because of the said judgment, it needed to assess whether the overcompensation was necessary for fulfilling the public broadcasting services, rather than having to carry out such assessment from the beginning. Irrespective of such speculations, the question posed the Commission is simple: Is overcompensation in the amount of 630 million Danish kroner necessary for TV2/Danmark to fulfil its service obligation as a public broadcaster in Denmark and therefore justified as an exemption to the prohibition of State aid in the internal market?

The Commission's eventual answer was affirmative. In coming to that conclusion the Commission relied heavily on the Amsterdam Protocol<sup>222</sup> and the judgment from 2008 as a basis for accepting several justification arguments or "factors". The Commission noted that it had in prior cases approved financing of public broadcasters by way of building up capital reserves in advance,<sup>223</sup> before turning to the arguments. The first part of the arguments can be described as historical, as the Commission noted that TV2/Danmark's initial financing in 1988, in the form of start-up loan rather than equity capital, quickly led to financial troubles and continuous need for equity capital injections. This eventually led to the decision to privatise TV2/Danmark into a public limited liability undertaking, which needed a capital base, estimated to be in around 640 million Danish kroner.<sup>224</sup> The Commission duly noted that it was in favour of such privatisation decisions in general as they entail positive effects on competition. The second part of the arguments concern fluctuations in revenue and the need to have a strong capital in relation thereto, in particular as advertising revenues could be unstable.<sup>225</sup> The third part of argumentation was that TV2/Danmark's loan financing opportunities were limited by law<sup>226</sup> and the fourth, and last, part concerned the fact that TV2/Danmark was indeed subject to public audit and "checks" were carried out.<sup>227</sup> This meant, that although the auditing body could not prevent overcompensation, rectifications could be made the next time compensation was set, based upon the auditing body's findings. Together, all the aforementioned arguments or "factors", in the light of the Amsterdam Protocol and the court's 2008

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<sup>221</sup> *ibid*, Para. 199-233.

<sup>222</sup> *ibid*, Para. 200.

<sup>223</sup> *ibid*, Para. 201.

<sup>224</sup> *ibid*, Para. 206-226.

<sup>225</sup> *ibid*, Para. 227-230.

<sup>226</sup> *ibid*, Para. 231.

<sup>227</sup> *ibid*, Para. 232.



judgment, resulted in the overcompensation being necessary for TV2/Danmark to fulfil its public broadcasting obligation and, therefore, fulfilled the first part of the proportionality assessment.<sup>228</sup>

The second part of the proportional assessment was essential the same as in the 2004 decision, with same outcome:<sup>229</sup> The Commission again attempted to assess whether TV2/Danmark's pricing of advertisement was lower than the stand-alone costs that an efficient, comparable, competitor needed to recover. Again it found that the competitor TvDanmark was not in a comparable situation and that it could not conclude whether the competitors were efficient or not. It therefore undertook the same analysis of TV2/Danmark's pricing policies and found no behaviour that would indicate overcompensation.

## **5.4. The *Viasat* Judgment**

### **5.4.1. General**

Neither TV2/Danmark nor its competitor Viasat Broadcasting UK Ltd. were content with the Commission conclusions in its 2011 decision and brought separate actions for annulment before the General Court. TV/Danmark's action was partial successful, leading to annulments of limited parts of the decision in case T-674/11<sup>230</sup> as the Commission had wrongly classified advertising revenue in 1995 and 1996 as State aid under Article 107(1) TFEU. As Viasat's arguments revolved around errors in the Commission's compatibility assessment under Article 106(2) TFEU, of measures already classified as State aid, the General Court deemed the action in *Viasat*<sup>231</sup> devoid of purpose as far as it concerned the compatibility of the aforementioned advertising revenue measures. Other than that, the General Court considered Viasat's arguments in relation to the Commission's compatibility assessment, to which we now turn.

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<sup>228</sup> *ibid*, Para. 233.

<sup>229</sup> *ibid*, Para. 238-270.

<sup>230</sup> T-674/11 *TV2/Danmark v Commission* (n 2).

<sup>231</sup> T-125/12 *Viasat* (n 2), Para. 45.

#### 5.4.2. Viasat's Arguments

Viasat has been a part of complaints and actions against the Danish state's financing of TV2/Danmark from the early 2000s.<sup>232</sup> In 2011 it was faced with a Commission decision that found TV2/Danmark's excess financing of nearly 630 million Danish kroner compatible with the internal market. Viasat argued, first, that the Commission erred in law in finding the compensation compatible and, secondly, that it failed to sufficiently state the reasons for such finding, as demanded by Article 296(2) TFEU. As previously stated, the focus will be on the part of Viasat's arguments that concerns the fourth *Altmark* condition on economic efficiency and not on its arguments in relation to the second *Altmark* condition and the transparency requirements therein.

The essence of Viasat's argument is that an Article 106(2) compatibility assessment should, to some extent, include examination of the public broadcaster's efficiency. If the Commission has found that the fourth *Altmark* condition has not been fulfilled under Article 107(1) State aid assessment, then it has to take that into account as well when assessing compatibility under Article 106(2). The Commission thus, according to Viasat, erred in law in its compatibility assessment, "[...] since it since it failed to draw the necessary consequences from the finding that the public service compensation [...] had been granted in violation of the second and of the fourth *Altmark* conditions [...]".<sup>233</sup> Not considering efficiency – including the examination of costs – would have “detrimental consequences to competition”, particularly within the field of public broadcasting, as “[...] all costs incurred by a public service operator may be characterised as additional public service costs that may be compensated by the Member State [...]” and the compensation might thus “be used as de facto rescue aid or operating aid, allowing a failing firm to continue its operations instead of being restructured or eliminated [...]”.<sup>234</sup> Carrying out such efficiency examination under Article 106(2) in addition to the fourth *Altmark* condition assessment under Article 107(1) would, in Viasat's opinion, not render the former provision irrelevant, as the Commission could still find compensation

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<sup>232</sup> At least since 2004, when the company brought an action for annulling the Commission's 2004 decision before the Court of First Instance. T-125/12 *Viasat* (n 2), Para. 10.

<sup>233</sup> Application for Annulment brought on 14 March 2012 *Viasat Broadcasting UK v Commission* (Case T-125/12) [2012] OJ C138/37. Underlining by Author.

<sup>234</sup> *ibid.*

compatible, even though it was above the costs of a typical, well-run, undertaking, on the basis of particular features of the relevant case.<sup>235</sup>

Thus, Viasat did not raise particular objections towards the Commission's assessment of facts, its calculation of overcompensation or its assessment of the justifications for the overcompensation. Instead, the Court noted, Viasat's arguments are based on the alleged incorrect methodology the Commission applied, whereby the Commission failed take the non-fulfilment of the *Altmark* conditions into account in its compatibility assessment.<sup>236</sup> The court took the view that the main issue raised in the case was the relationship between the *Altmark* conditions within Article 107(1) assessment and compatibility assessment under Article 106(2) and proceeded to review the case on that basis<sup>237</sup> – an issue that had already been subject to the Courts' jurisprudence on several occasions.

#### **5.4.3. The Court's Conclusion – the Judgment**

The General Court rejected Viasat's arguments and upheld the Commission's decision. The core of the court's reasoning is in the form of comprehensive explanation – and analysis – of the fundamental difference between assessment under Article 107(1) TFEU and the *Altmark* test, on one hand, and the compatibility assessment under Article 106(2) TFEU, on the other hand. The court attempts to explain why the *Altmark* conditions can neither be applied in compatibility assessment under Article 106(2), nor “necessarily influence” such assessment.

The court notes that there are similarities between the *Altmark* conditions and the conditions for applying the Article 106(2), as evidenced by arguments made in different cases before the Courts. However, those two conditions – and the tests they are a part of – seek to answer distinctive and separate questions.<sup>238</sup> The *Altmark* test attempts to clarify whether public financing of SGEIs amounts to State aid by ascertaining whether the service provider has received a compensation which it would not have received under normal market conditions. If the compensation is in accordance with what the market would have demanded, then there is no advantage and therefore no State aid within the

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<sup>235</sup> *ibid.*

<sup>236</sup> T-125/12 *Viasat* (n 2), Para. 42-43 and 48.

<sup>237</sup> *ibid.*, Para. 52.

<sup>238</sup> *ibid.*, Para. 62-63.

meaning of Article 107(1).<sup>239</sup> Assessment of compatibility – and, as the case may be, a decision that a measure is compatible, is, on the contrary, “[...] based on the premise that the measure in question [already] constitutes [State] aid.”

*“In other words, in the case of an undertaking which provides a service of general economic interest, such a classification [of State aid] necessarily presupposes that the undertaking in question obtains, in return for providing that service, an advantage which it would not have obtained under normal market conditions.”*<sup>240</sup>

The court cites what is arguably its key judgment on the difference between the *Altmark* 107(1) test and the Article 106(2) compatibility assessment – *TFI v Commission*<sup>241</sup> – before noting that Viasat did not demand a departure from that line of case-law but rather that the *Altmark* conditions should “necessarily affect” assessment under Article 106(2).<sup>242</sup> In response, the court again emphasises the fundamental difference between the two sets of conditions, which, albeit being very similar, are applied in different context and for a different purpose:

*“In the case of the application of Article 106(2) TFEU, it is no longer a question of determining whether [SGEI] is provided under normal market conditions. The application of that provision presupposes the existence of State aid, which means, by definition [...] that the service in question is not provided under such conditions.”*<sup>243</sup>

The court reaffirms its earlier position that cost evaluation is simply irrelevant to Article 106(2) assessment by citing its judgment in *M6 v Commission*,<sup>244</sup> arguably the most significant jurisprudence on the essence of Article’s 106(2) proportionality condition, in particular in comparison to the efficiency requirements in the fourth *Altmark* condition. All actual costs of providing the public service should be taken into consideration when

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<sup>239</sup> *ibid*, Para. 56-57 and 59.

<sup>240</sup> *ibid*, Para. 60. Textual amendments by Author.

<sup>241</sup> T-354/05 *TFI v Commission* (n 120).

<sup>242</sup> *ibid*, Para. 77-79.

<sup>243</sup> *ibid*, Para. 85-86. Textual amendments by Author.

<sup>244</sup> Joined cases T-568/08 and T-573/08 *M6 and TFI v Commission* [2010] ECR II-03397.

assessing proportionality under Article 106(2), without any assessment by comparison to a typical, and well-run, undertaking.<sup>245</sup> In other words, Article 106(2) proportionality assessment does neither include nor demand analysis of costs or efficiency of the public broadcaster – it simply demands examination of actual costs, and comparison to compensation received. Accepting Viasat’s argument of including examination of efficiency in Article’s 106(2) compatibility assessment would, according to the court, in the end lead to condition that all SGEI compensation would have to be under normal market conditions. Again citing its judgments in *TFI v Commission* and *M6 v Commission* the court could not accept such conclusion, with the following arguments:

*“If such a requirement were accepted, however, the application of competition rules might obstruct the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of [SGEIs], which Article 106(2) TFEU seeks precisely to prevent [...]”.*<sup>246</sup>

*Moreover, such an argument leads to a logical impasse, in so far as it means that, for aid to be declared compatible with the internal market under Article 106(2) TFEU, all the Altmark conditions must be respected, in which case the measure in question will not even constitute aid [...]”.*<sup>247</sup>

The court thus concluded, that the fact that the Commission found Danish state’s financing of TV2/Danmark compatible under Article 106(2) event though the fourth *Altmark* condition had to been fulfilled, did not entail an error in law.<sup>248</sup> Further, the court rejected Viasat’s second plea, which was based on failure to state reasons as the Commission did not detail how it came to its conclusions on compatibility despite having found two *Altmark* conditions unfulfilled. The court held that this was not down to failure to reason, but simply because the Commission “[...] applie[d] a different analytical framework from that which favours [Viasat]”.<sup>249</sup> The court concluded by stating that the Commission’s decision included a “[...] detailed reasoning to justify the compatibility of

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<sup>245</sup> T-125/12 *Viasat* (n 2), Para. 87-88.

<sup>246</sup> *ibid*, Para. 90. Textual amendments by Author.

<sup>247</sup> *ibid*, Para. 91. Textual amendments by Author.

<sup>248</sup> *ibid*, Para. 100.

<sup>249</sup> *ibid*, Para. 103.

the measures concerned with the internal market [...]” and that Viasat did object to that reasoning, as such.<sup>250</sup>

## 5.5. Case Law Analysis

### 5.5.1. General

From ECJ’s judgment in *Altmark* and subsequent case law, as well as ensuing Commission legal instruments such as the 2011 SGEI package and the Broadcasting Communication, it is evident that the comparison of compensation and costs is an indispensable part of assessing whether SGEI compensation can constitute a compatible State aid. Not only does that hold true with respect to assessment of whether a certain compensation amounts to State aid, under Article 107(1) TFEU, but also with respect to whether such compensation can be found compatible, under Article 106(2) TFEU. The rule is, in principle, that if compensation exceeds the net costs (and a reasonable profit) of providing the public service in question, then it amounts to State aid that is incompatible with the internal market. In other words, such compensation satisfies neither the State aid test under Article 107(1) TFEU, nor the compatibility assessment under Article 106(2) TFEU. But of course the matter is not always that simple, with the General Court judgment in *Viasat* providing a good example of that.

On the other hand, the question of efficiency and related analysis of costs has been held to be indispensable only in relation to assessment of State aid under Article 107(1) TFEU, more precisely within the fourth *Altmark* condition when no public tender has been held. While the efficiency condition is not an indispensable part of compatibility assessment under Article 106(2), the Commission has made an effort to include efficiency considerations in its legal instruments. Thus, the SGEI Framework requires certain efficiency incentives and the Broadcasting Communication, while not including the incentives requirements, indirectly includes efficiency considerations by demanding a safeguard in the form of *ex post* external review of public broadcasters’ finances.

Thus, the line between the *Altmark* conditions – which are already repeated to a large extent under Article 106(2) compatibility assessment – and the conditions for applying the exemption in Article 106(2) have become even blurrier in later years. It is in this light

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<sup>250</sup> *ibid*, Para. 104.

that the applicant's argument in *Viasat* that the *Altmark* conditions should "necessarily affect" assessment under Article 106(2) is, if not acceptable to the Court, at least understandable. What is arguably less understandable is the General Court's application of Article 106(2) in the light of the importance given to the condition of compensation not exceeding costs, both under Article 107(1) *Altmark* assessment and Article 106(2) compatibility assessment. For after all, the court in *Viasat* in effect found compensation that vastly exceeded costs justifiable and thus the exemption in Article 106(2) applicable. Such conclusion begs the question of what Article 106(2)'s does in fact demand to find State aid, within the field of public broadcasting, compatible with the internal market, in particular in relation to the proportionality of such aid. In attempt to delve further into these questions several key judgments, some of which were expressly relied upon by the General Court in *Viasat*, will be examined below. The point of departure for the examination will be the court's listing of several judgments where "the parties have noted a certain similarities between the conditions for the application of Article 106(2) TFEU and some of the conditions set out by the [ECJ] in [*Altmark*] [...]"<sup>251</sup>

### 5.5.2. *SIC and the conditions of Article 106(2) TFEU*

In *SIC*<sup>252</sup> the Commission had found certain *ad hoc* measures for the benefit of public broadcaster RTP either not to constitute State aid under Article 107(1) or, in the case of those that were determined as State aid, compatible with the internal market under Article 106(2). SIC, one of the biggest private television undertakings in Portugal, challenged the Commission's decision before the General Court and pleaded, *inter alia*, that the Commission erred in law by neither classifying the measures as State aid nor applying the conditions of Article 106(2) correctly.<sup>253</sup>

The first part of SIC's plea on Article 106(2) consisted of arguing that the article's exemption could not be applied without prior competitive tender of the public broadcasting service. Thus, SIC seemed to try and include its related argument on non-fulfilment of the fourth *Altmark* condition into its argument on the misapplication of

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<sup>251</sup> T-125/12 *Viasat* (n 2), Para. 62.

<sup>252</sup> Case T-442/03 *SIC v Commission* [2008] ECR II-01161.

<sup>253</sup> *ibid*, Para. 31.

Article 106(2) at the reply stage in the proceedings.<sup>254</sup> The court held the argument to be a new argument, within the meaning of its Rules of Procedure,<sup>255</sup> and thus inadmissible under Article 48(2) of the rules.<sup>256</sup> However, before finding the first part of the applicant's inadmissible, the court rejected SIC's argument on substance: Article 106(2) contains three conditions and none of them contains the requirement of holding a public tender.<sup>257</sup> The General Court in *Viasat* cites its judgment in *SIC* in order to reaffirm the conditions of Article 106(2). In doing so, the court states that the Article's third condition is "is based on the concept of proportionality".<sup>258</sup> In *SIC* the court framed that third condition in the following manner:

*"[...] thirdly, the application of the competition rules of the Treaty – in this case, the ban on State aid – must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community."*<sup>259</sup>

The second part of SIC's plea on Article 106(2) was in two parts. In the first part the court rejected SIC's argument that the article's conditions of clearly defined SGEI had not been fulfilled, as Member States should not be able to define public services in a wide manner when the broadcaster in question is engaged in commercial activities, in addition to its public broadcasting.<sup>260</sup> In rejecting the argument the court relied heavily on the importance given to SGEIs in the European Union, including the Member States' wide discretion in relation thereto, and, in particular, the specific nature of SGEIs in public broadcasting.<sup>261</sup> Member States are at liberty to define SGEIs in public broadcasting widely "to include the broadcasting of full-spectrum programming", irrespective of whether the public broadcaster carries out other, commercial, activities.<sup>262</sup>

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<sup>254</sup> *ibid*, Para. 159.

<sup>255</sup> See consolidated version of the Rules of Procedure of the General Court of 2 May 1991 [1991] OJ L136/1 and OJ L317/34 (corrigenda) as later amended up to and including Amendments to the Rules of Procedure of the General Court of 19 June 2013 [2013] OJ L173/66.

<sup>256</sup> *ibid*, Para. 157-160.

<sup>257</sup> *ibid*, Para. 145-146.

<sup>258</sup> T-125/12 *Viasat* (n 2), Para. 61.

<sup>259</sup> T-442/03 *SIC* (n 252), Para. 144.

<sup>260</sup> *ibid*, 194.

<sup>261</sup> *ibid*, Para. 195-205.

<sup>262</sup> *ibid*, Para. 201-202.



*“Calling such activities into question would be tantamount to making the very definition of the broadcasting SGEI dependent on its method of financing. ... As the Commission points out in [...] the [Broadcasting Communication], ‘the question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services’.”*<sup>263</sup>

In coming to this conclusion the court relied on the ECJ’s judgment in *Sacchi*<sup>264</sup> and, perhaps more importantly, the specific importance given to public broadcasting services in the Amsterdam Protocol and specific resolutions of the Council (of the European Union) and Member States.<sup>265</sup> Accordingly, in the light of the importance of national broadcasting services in the EU, the financing of such services should be separated from their definition.<sup>266</sup> The second part of SIC’s second plea on Article 106(2) alleged, in essence, that the Commission’s examination of the Portuguese state’s system of monitoring the public broadcasters operations was inadequate.<sup>267</sup> The court agreed, holding that the Commission’s examination was neither diligent nor impartial, which, crucially, led to the situation where the Commission simply did not have the necessary information to ascertain whether the compensation provided was in accordance with the cost of providing the service.<sup>268</sup> In other words, the Commission could not properly assess whether Article’s 106(2) proportionality condition had been fulfilled:

*“In the absence of such information, the Commission was unable to proceed subsequently to a meaningful verification of whether the funding was proportionate to the public service costs and was unable to make a valid finding that there had been no overcompensation of the public service costs.”*<sup>269</sup>

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<sup>263</sup> *ibid*, Para. 203.

<sup>264</sup> C-155/73 *Sacchi* (n 21).

<sup>265</sup> T-442/03 *SIC* (n 252), Para. 198-200.

<sup>266</sup> In this respect, one could be forgiving for wondering whether the definition of such services does not “necessarily affect” the structure of their financing, and determinations in relation thereto.

<sup>267</sup> T-442/03 *SIC* (n 252), Para. 205-256.

<sup>268</sup> *ibid*, Para. 254-256.

<sup>269</sup> *ibid*, Para. 255. Underlining by Author.

### 5.5.3. TF1 and the Difference between Articles 107(1) and 106(2)

In *Viasat*, the applicant argued that the fourth *Altmark* condition, and the efficiency assessment it entails, should necessarily play some part in the Commission's assessment of compatibility under Article 106(2) TFEU. In other words, the Commission's assessment of the fourth condition in determining the existence of State aid under Article 107(1), and subsequent findings, should "necessarily affect" its compatibility assessment under Article 106(2). Since it did not, the Commission, according to *Viasat*, failed, in its compatibility assessment, to draw the right conclusions from its finding that the fourth *Altmark* condition had not been fulfilled and, therefore, erred in law in its decision.<sup>270</sup> The General Court seems from the onset rather unimpressed by this argument, taking a thinly veiled shot at *Viasat* by noting that it was "careful not to specify the nature and extent of the alleged influence."<sup>271</sup> The court proceeds to, essentially, reformulate *Viasat*'s argument in the following way:

*"[T]he applicant claims, in essence, that the contested decision is vitiated by an error of law, in that the Commission considered the measures in question to be compatible with the internal market under Article 106(2) TFEU, even though those measures do not satisfy the second and fourth Altmark conditions."*<sup>272</sup>

The reformulation set the court up nicely to use its previously cited judgment in *TF1 v Commission*,<sup>273</sup> and the reasoning therein on the fundamental difference between State aid assessment under Article 107(1) and compatibility assessment under Article 106(2) TFEU. In *TF1 v Commission* the subject matter was the French state's system of financing of public broadcasters France 2 and France 3, which had been challenged by private television operator Télévision française 1 SA (TF1). The Commission had found the system compatible with the internal market on the basis of Article 106(2),<sup>274</sup> in particular after receiving certain commitments from the French state. TF1 sought to have the decision annulled and pleaded, *inter alia*, that the Commission erred in law when it applied the Article 106(2) exemption even though it found overcompensation in its

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<sup>270</sup> T-125/12 *Viasat* (n 2), Para. 71-72.

<sup>271</sup> *ibid*, Para. 73. Underlining by Author.

<sup>272</sup> *ibid*, Para. 74.

<sup>273</sup> T-354/05 *TF1 v Commission* (n 120).

<sup>274</sup> At the time Article 86(2) of the EEC Treaty.

Article 107(1) State aid assessment. Assessment of proportionality, TF1 said, is already carried out when assessing the fulfilment of the *Altmark* conditions under Article 107(1) assessment.<sup>275</sup> The General Court agreed with the Commission and the French state in that TF1 was confusing two different issues:

*“[The ECJ in Altmark] draws a distinction between the question of classifying a measure as State aid [...] and that of its compatibility with the common market.” ... [National courts have] no jurisdiction to determine the compatibility of State aid measures or of a State aid scheme with the common market, that assessment falling within the exclusive competence of the Commission [...]. That [...] clearly shows that in the present plea the applicant is confusing the Altmark test, which seeks to determine the existence of State aid within the meaning of Article [107(1)], with the Article [106(2)] test, which is used to determine whether a measure constituting State aid may be regarded as compatible with the common market.”<sup>276</sup>*

Article 106(2) continues to apply even though one or more of the *Altmark* conditions have not been fulfilled. That much is clear, and in *Viasat* the applicant did not argue against that conclusion. The company, however, held that the court in *TF1 v Commission* did not address the issue of whether the *Altmark* conditions – and the assessment of their fulfilment – should in any way affect the assessment of compatibility under Article 106(2).<sup>277</sup> While keeping in mind the importance of not giving an argument other purpose or meaning than what was intended by the arguing party, the roots of *Viasat*’s argument seem to lie in the similarity between the *Altmark* conditions, on one hand, and the conditions for applying Article 106(2), on the other hand. Thus, like TF1 in *TF1 v Commission*, *Viasat* basis its argument on the fact that many of the issues that were analysed by the Commission under its Article 106(2) assessment had already been analysed in considering the fulfilment of the *Altmark* under Article 107(1) assessment. However, unlike the French company, *Viasat* does not claim that this should result in the

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<sup>275</sup> T-354/05 *TFI v Commission* (n 120), Para. 111-122, in particular Para. 116-119.

<sup>276</sup> *ibid*, Para. 134 and 139-140, referring to Articles 86(1) and 86(2) of the EEC Treaty, respectively. Textual amendments by Author.

<sup>277</sup> T-125/12 *Viasat* (n 2), Para. 79.

general inapplicability of Article 106(2) but rather that it should have some effect on the Commission's Article 106(2) assessment.

In that light it is debatable whether the General Court could simply rely on its judgment in *TFI v Commission*, although its reformulation of Viasat's argument indeed indicates otherwise. The court acknowledges the similarities between the *Altmark* conditions and the Article 106(2) conditions, *inter alia* by referring to its remark in *BUPA* on the third *Altmark* condition "broadly coincid[ing]" with Article's 106(2) proportionality condition, as developed by case law.<sup>278</sup> The court then makes the following statement:

*"It must, however, be stated that although, in both [the Altmark assessment and the Article 106(2) assessment], it is essentially the same criterion which is being applied, the context and the purpose of its application are, in each case, different."*<sup>279</sup>

When applying Article 106(2) it has already been determined – by way of assessment on the fulfilment of the *Altmark* conditions – that the SGEI in question was not provided under normal market conditions: The compensation in question is State aid within the meaning of Article 107(1).<sup>280</sup> Assessing whether compensation for providing SGEIs is in line with what would occur in the marketplace is not the point of Article 106(2). Conclusion of the opposite would, held the court, lead to an untenable situation for SGEIs:

*"In fact, the [Viasat's] line of argument leads, ultimately, to requiring that [SGEIs] must always be provided under normal market conditions. If such a requirement were accepted, however, the application of competition rules might obstruct the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of [SGEIs], which Article 106(2) TFEU seeks precisely to prevent [...]. Moreover, such an argument leads to a logical impasse, in so far as it means that, for aid to be declared compatible with the internal market under Article*

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<sup>278</sup> *ibid*, Para. 84, referring to T-289/03 *BUPA and Others v Commission* (n 212), Para. 244.

<sup>279</sup> T-125/12 *Viasat* (n 2), Para. 85. Underlining and textual amendments by Author.

<sup>280</sup> *ibid*, Para. 86.

*106(2) TFEU, all the Altmark conditions must be respected, in which case the measure in question will not even constitute aid [...].”<sup>281</sup>*

Again, it could be argued that the court is over-simplifying or thinning-out Viasat’s argument, which revolves around the outcome of the *Altmark* condition assessment having a necessary effect on the Article 106(2) compatibility assessment, rather than demanding that the *Altmark* test is redone (and fulfilled) under Article 106(2). While Viasat’s argument is possibly not as unambiguous or clear as one might have wished, it is certainly debatable whether it can be rejected with, essentially, the same reasoning used to reject TF1 argument in *TF1 v Commission*. What is also notable is that the court states that the *Altmark* criterion and the Article 106(2) criterion is “essentially the same”, with the fundamental difference lying in the context and purpose of the two test. In other words, while essentially assessing the same matters and issues again under Article 106(2), the examiner – the Commission – needs to adopt a different mind-set and, presumably, take other matters into account. The basis for assessment should be different, which is arguably most important in relation to assessment of proportionality under the two test, to which we now turn.

#### **5.5.4. M6 and the Proportionality Assessment**

In *M6 v Commission*<sup>282</sup> the issue was once again the French public broadcaster system, with private television company M6 joining TF1 in challenging the French state’s financing of France Télévisions SA in the amount of 150 million Euros. The Commission had found the financing to constitute State aid within the meaning of Article 107(1) TFEU but that the aid was compatible with the internal market under Article 106(2) TFEU, after conducting a preliminary examination under Article 108(3) TFEU.<sup>283</sup> The applicants requested annulment of decision on the grounds that the Commission had failed to consider the compatibility of the State aid under a formal investigation procedure under Article 108(2) TFEU.<sup>284</sup>

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<sup>281</sup> *ibid*, Para. 85. Underlining and textual amendments by Author.

<sup>282</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244).

<sup>283</sup> At the time Article 88(3) of the EEC Treaty.

<sup>284</sup> At the time Article 88(2) of the EEC Treaty.

The proportionality test was the focal point of the Commission's compatibility assessment, with the institute taking into account the state's intention to exclude France Télévisions SA from advertising activities, which would result in increased net cost of operating the public broadcaster (because of lost advertising revenue), as well as certain commitments made by the French state.<sup>285</sup> The Commission came to the conclusion, having considered "fluctuations in advertising revenue for 2008 and to the need for additional programmes", that the amount of 150 million Euros was "unlikely to exceed the variations in the net cost of the public service and [should therefore] not lead to an overcompensation of the costs of fulfilling the public service tasks [...]"<sup>286</sup> The applicants, M6 and TF1, believed that the disputed decision contained errors and argued, *inter alia*, that the Commission could not conclude that less advertising revenue automatically resulted in higher net costs without carrying out detailed analysis of the public broadcaster's income and costs.<sup>287</sup>

The General Court rejected the applicants' arguments, holding that the Commission was justified in not initiating formal investigation procedure. As a point of departure, the court noted that the amount of 150 million Euros was actually much lower than the estimated additional net costs of providing the public broadcasting services for the period in question, which was more than 300 million Euros.<sup>288</sup> The applicants had not challenged this estimation<sup>289</sup> and the Commission was right in concluding, on the basis of the information in its decision, that "it was impossible to impose any significant saving of commercial costs which would prevent the conclusion that there was a relationship of proportionality between the fall in commercial income and the fall in net profit."<sup>290</sup> Thus, if the estimation of additional net costs, which the state financing is intended to cover, is higher than the actual financing and goes unchallenged, and there is furthermore an impossibility in terms of reducing the additional costs by way of "significant" savings, then Article 106(2)'s proportionality test is fulfilled.<sup>291</sup>

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<sup>285</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244), Para. 16 and 18.

<sup>286</sup> *ibid*, Para. 17, referring to Para. 47 of the relevant Commission decision. Textual amendments by Author.

<sup>287</sup> *ibid*, Para. 36.

<sup>288</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244), Para. 66 and 69.

<sup>289</sup> *ibid*, Para. 67-68, 80 and 87.

<sup>290</sup> *ibid*, Para. 95. Underlining by Author.

<sup>291</sup> *ibid*, Para. 95-99.

The issue of whether a public broadcaster was able to “impose savings” arguably comes down to the efficiency of the broadcaster’s operations. In that light it is therefore a bit surprising that the court proceeded to unequivocally rule out the possibility of examining economic efficiency when assessing compatibility under Article 106(2). In arriving at that conclusion, the court relied on the Amsterdam Protocol. The court reasoned that the Amsterdam Protocol empowered Member States to “define and finance public service broadcasting” and consequently held the following:

*“[The] applicants’ position, which consists in claiming that an alleged low level of economic efficiency of the public service broadcaster in the exercise of a commercial activity of selling advertising space should be penalised by inadequate cover [...] of the net service costs, is directly contrary to the provisions of the Treaty and, more particularly, of the Amsterdam Protocol [and its emphasis on ‘the fulfilment of the public service remit as conferred, defined and organised by each Member State’].”<sup>292</sup>*

Thus, including examination of economic efficiency, when assessing the compatibility of aid to public broadcasters, does not fall within Article 106(2)’s proportionality test, as that would be contrary to the Amsterdam Protocol. The court proceeded to add further reasoning on the exclusion of economic efficiency.<sup>293</sup> There the court did not specifically mention the Amsterdam Protocol, opting instead to recount Article’s 106(2) balancing act. The underlying effects of the Amsterdam Protocol are, however, quite evident, with the court holding that the Commission did not have the authority assess and decide upon the basis of public broadcasting services and the “political choices” in relation thereto and, consequently, it was not in a position to assess and decide upon the costs of the broadcasting services and the efficiency of the broadcaster. The court held that, when no specific EU law governs the matter at hand, the Commission simply does not have the competence to assess and decide upon public broadcasters’ economic efficiency.<sup>294</sup>

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<sup>292</sup> *ibid*, Para. 108-109. Textual amendments by Author.

<sup>293</sup> *ibid*, Para. 136-141.

<sup>294</sup> *ibid*, Para. 139.

*“[The] question of [whether] an undertaking responsible for a broadcasting SGEI may [fulfil] its public service obligations at lower cost [...] is irrelevant for assessing the compatibility of the State funding of that service in the light of the Community State aid rules. What Article [Article 106(2)] EC seeks to prevent, though the assessment of the proportionality of the aid, is that the operator responsible for the SGEI benefits from funding which exceeds the net costs of the public service.”<sup>295</sup>*

Thus, as confirmed by the Court of First Instance in the aforementioned *SIC* and previously discussed,<sup>296</sup> Article 106(2) is, according to the court, mainly about comparing compensation to actual costs of providing the public service and, if the former exceeds the latter, then the aid is not proportional and therefore contrary to what the article’s objective. Assessing the costs specifically – the economic efficiency – is not a part of such comparison. In coming to that conclusion the court relies on its judgment in *FFSA* from 1997, which concerned complaints by companies in the French insurance sector of an alleged State aid (in the form of tax concessions) to the frequently mentioned public undertaking *La Poste*.<sup>297</sup> The court in *FFSA* based its own finding on the exclusion of efficiency consideration on the opinion of Advocate General Tesouro in *Corbeau*,<sup>298</sup> to which the court in *M6* also refers in its reasoning. Interestingly enough, *Corbeau*, does not concern a compensation or other aid measures to an undertaking operating in a market that is open to competition. On the contrary, *Corbeau* revolves around criminal proceedings against an individual that decided to start a certain type of mail delivery services in Belgium even though Belgian mail delivery was, in general, reserved to a State monopoly. The case therefore concerned the legality of an exclusivity granted to a State monopoly and the applicant’s arguments regarding the quality and efficiency of the State monopoly’s service where, accordingly, addressed in that context:

*“[Statutory] monopolies justified by objective requirements of public interest, [...] must be regarded as compatible with Articles [106 and 102].  
On the other hand, Articles [106 and 102] cannot constitute a means of*

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<sup>295</sup> *ibid*, Para. 140, referring to Article 86(2) of the EEC Treaty. Underlining and textual amendments by Author.

<sup>296</sup> See Chapter 5.5.2.

<sup>297</sup> T-106/95 *FFSA and Others v Commission* (n 59). See, in particular Para. 108.

<sup>298</sup> C-320/91 *Corbeau* (n 19), Opinion of AG Tesouro.



*evaluating the economic efficiency of this or that national monopoly. If a monopoly is objectively justified — as in the case of the basic postal monopoly — it is of little importance whether it is more or less effectively managed; in any event it will have to be regarded as consistent with the Treaty, whilst it will be for the national authorities to apply themselves to improving the quality of the services provided.”<sup>299</sup>*

It is debatable whether an opinion on the content of the exemption in Article 106(2) in the context of assessing a State monopoly’s alleged breaches of Article’s 102 TFEU (prohibiting abuse of dominant position), in conjunction with 106(1) (which specifically concerns exclusive rights granted by States), can be used as a precedent when determining the content and scope of Article 106(2) in the context of aid granted absent State monopolies and closed marketplaces, as the situation was in *FFSA, M6* and, at last, *Viasat*. Restricting markets and competition by granting exclusivity to State monopolies demands, as the AG duly notes, objective justifications in the general interest. If the general interest truly justifies such monopoly, then lack of efficiency cannot, as a logical consequence, prohibit the monopoly from providing its services.

The situation is hardly the same with respect to state funded television stations, which are in competition with private stations. Notwithstanding, the court in *Viasat* relies on *M6*, and thus the aforementioned case law, in concluding that economic efficiency cannot form a part of the Commission’s assessment under Article 106(2). Consequently, the court rejects *Viasat*’s argument that the Commission’s conclusion on (lack of) efficiency in its *Altmark* assessment should affect its assessment of compatibility under Article 106(2). The court reliance on the case law originating from *Corbeau* is also interesting in the light of *Viasat*’s action for annulment, where the company states that “an efficiency test does not make Article 106(2) TFEU a “dead letter” since the Commission may, depending on the characteristics of the case, approve compensation which exceeds the costs of an average, well-run undertaking [...]”. *Viasat*, therefore, seems to argue that there is more in Article’s 106(2) exemption provision than simply comparing compensation to costs – that overcompensation can be justified by other reasons. The

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<sup>299</sup> *ibid*, Para. 16, referring to Articles 90 and 86 of the EEC Treaty, respectively. Underlining and textual amendments by Author.

court's overall reasoning, however, in essence, rejects this approach by relying on *M6* and fundamental difference between the assessment of economic efficiency under Article 107(1) and the *Altmark* test, on one hand, and the assessment of proportionality under Article 106(2) compatibility assessment, on the other hand.<sup>300</sup>

The consequence of the court's aforementioned approach and reasoning, based on *M6* and the case law derived from *Corbeau*, is, in the case of *TV2/Danmark*, that the court essentially accepts, as compatible, compensation that exceeded costs in amount of more than 600 million Danish kroner without engaging in any specific analyses of the Commission's justifications.<sup>301</sup> In other words, Article's 106(2) proportionality test, as set out and applied by the court and also in the previous cases of *SIC*, *M6* and *FFSA*, was, unlike in *M6*, not met but still the compensation was found compatible under Article 106(2). It should be noted that the Commission did indeed rely on several other justifications for finding compatibility, even though it had found overcompensation to exist.<sup>302</sup> It should, of course, also be noted that the court is bound the parties pleas and arguments and cannot raise and argument of its own motion.<sup>303</sup> However, given *Viasat*'s aforementioned "dead letter" argument and the main issue of the case, which was the compatibility of Danish public broadcasting system with the internal market, it is certainly worth discussing whether the court could come to its conclusion without in-depth analysis of the Commission's reasoning for accepting, as compatible, compensation that vastly exceeded costs, let alone analysing the legitimacy of such compensation.

At last, it should be mentioned that in *Viasat* the court comes to its conclusion – that Article 106(2) compatibility does not contain the requirement of assessing economic efficiency – without relying on the Amsterdam Protocol and the specific nature of public broadcasting services. Thus, the court, unlike in *M6* and, to a lesser extent, *SIC*, did not deem it necessary to build its conclusion on the basis of Member States' special competences in the matters of public broadcasting, as reinforced by the Amsterdam

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<sup>300</sup> T-125/12 *Viasat* (n 2), in particular Para. 86-91.

<sup>301</sup> With respect to the justifications, the court simply stated that the Commission had "set out detailed reasoning to justify the compatibility of the measures [...] and that the applicant [did] not raise any head of complaint with regard to that reasoning." *ibid*, Para. 104. Textual amendments by Author.

<sup>302</sup> See summary in Chapter 5.3.

<sup>303</sup> See e.g. case C-272/09 *KME Germany and Others v Commission* [2011] ECR I-12789, Para. 104, and the court's statement in *Viasat* that *Viasat* did "not raise any head of complaint with regard to [the Commission's justification] reasoning", T-125/12 *Viasat* (n 2), Para. 104.

Protocol. The court simply held, based on Article 106(2) alone, that the article's proportionality test did not entail any such requirement.<sup>304</sup> Such conclusion is particularly interesting in the light of the Court's reliance on the Amsterdam Protocol in *M6*, as basis for its statement that the Commission was not entitled to decide on economic efficiency. Thus, in *Viasat* the court leaves open the issue of what role economic efficiency can potentially play within the realms of Article 106(2) by treating efficiency as a pure condition, which, furthermore, does not need to be fulfilled under Article 106(2). Taking into account the fact that the Commission did engage in efficiency assessment, in evaluating the behaviour of TV2/Danmark in the advertising market, it is tempting to conclude that the Court is of the opinion that considering efficiency is simply an option for the Commission, which it can use, if and when it deems appropriate in a certain case, or parts of a certain case. Such conclusion, though, is arguably contrary to the conclusion in the aforementioned *M6* (and related case law), on the Commission not having competence to assess economic efficiency under Article 106(2) in public broadcasting cases.

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<sup>304</sup> T-125/12 *Viasat* (n 2), in particular Para. 87-88.

## 6. Conclusions

### 6.1. General

In the European Union legal order Member States have the competence to define and organise public services they provide to their citizens. This holds particularly true in the field of public service broadcasting, where the “social, democratic and cultural” nature of services have led to the codification of their importance in EU primary law with the Amsterdam Protocol.<sup>305</sup> This competence and Member States’ financing of public service broadcasting inevitably has some detrimental effects on the functioning of the internal market and the effectiveness of competition therein. Such effects are inherent in Member States’ financing of one domestic market operator, as broadcasters in other Member States are by default less likely to enter markets where publicly financed broadcasters are present, and those who do enter face challenges in competing for the same reasons. To combat this, and reduce detrimental effects to the internal market and competition, the EU demands that public financing is kept at minimum, albeit not in a manner that compromises the provision of the services. The aim is to provide quality services at the least cost to society. This is, in essence, what the *Altmark* test within Article 107(1) TFEU and the exemption in Article 106(2) TFEU aim for, although the context of their respective legal assessments differs, as the General Court quite rightly pointed out in *Viasat*.<sup>306</sup>

In this thesis an attempt has been made to examine the requirement that public broadcasters have to be efficient, if not selected by way of public tender, as set forth in the latter part of the fourth *Altmark* condition, and what role efficiency considerations play in the assessment of compatibility under Article 106(2), if any at all. For these purposes the thesis substantive part begins by summarising the legal status of SGEIs in the EU, as well as the rules on State aid in general, in Chapter 2. The chapter concludes with an overview of the EU Courts’ different approaches to SGEIs in the context of State aid, which culminated in the seminal *Altmark* judgment and the introduction of the efficiency requirement. The discussion in Chapter 2 fell within the scope of Article 107(1) and the issue of whether there is State aid or not, as a precursor for description of the exemption provision in Article 106(2) in Chapter 3. In Chapter 4 the discussion moves

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<sup>305</sup> See Chapter 4.1.

<sup>306</sup> See Chapter 5.4.

on to the sector of public broadcasting, describing its specific nature and applicable legislation. The chapter also covers legal instruments applicable to SGEIs in general, mainly to show what efficiency requirements are made in SGEIs outside the field of public broadcasting. In Chapter 5 the long-running dispute over the Danish State's financing of TV2/Danmark is covered, including analysis of the disputes' latest part and the thesis' specific subject matter – the *Viasat* judgment. Specific case law is selected and analysed, using the *Viasat* judgment as a point of departure.

The aim with this final chapter is to draw some conclusions from the preceding discussion and offer some further considerations, with the focus being on the *Viasat* judgment and case law analysis in Chapter 5.

## **6.2. The Role of Efficiency within Article 106(2) TFEU**

### **6.2.1. The Importance of Efficiency Considerations**

In its judgment in *Ferring* the ECJ set out conditions that had to be fulfilled for public service compensation to escape classification as State aid under Article 107(1) TFEU.<sup>307</sup> The Court's approach was widely criticised. While the ideology behind the approach in *Ferring* – that if compensation was in line with costs then there would be no “real” advantage within the meaning of Article 107(1) – was solid the execution was arguably less so. The main reason being, of course, that only requiring compensation to be in accordance with costs would give far too much leeway for Member States' financing of public service providers, with the possibility of compensating all costs, irrespective of how costs were incurred and how they were managed. Thus, the ECJ in *Altmark* refined and enhanced the execution of the core thinking behind the *Ferring* judgment, by setting out four comprehensive conditions for Member States' financing to escape State aid classification and Commission scrutiny.<sup>308</sup> One of those was to require a certain efficiency level of the service providers to preclude Member States from compensating, and keeping in business, inefficient and thus expensive providers, with additional costs for society and detrimental effects to competition and internal market freedoms, which the State aid prohibition in Article 107(1) seeks to protect.

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<sup>307</sup> C-53/00 *Ferring* (n 69). See summary in Chapter 2.4.4.

<sup>308</sup> C-280/00 *Altmark* (n 5). See summary in Chapter 2.4.5.

The *Altmark* judgment does not cover Article 106(2) TFEU specifically. Notwithstanding, the Commission has, since the judgment, taken various steps to include efficiency in its assessment of Member States' measures in the field of SGEIs. Such assessment is, of course, mandatory when evaluating whether there is State aid or not within Article 107(1) in cases where there has been no public tender, in accordance with the fourth *Altmark* condition. With respect to Article 106(2), the Commission has included certain efficiency requirements in its guidelines on compatibility assessment under the article,<sup>309</sup> and has also taken efficiency into consideration in assessing the same in its decisions.<sup>310</sup> The goal is surely to try and minimise the inherent restrictions to competition in the internal market that follow publicly financed service providers. While all costs can be compensated under Article 106(2), the Commission seeks to induce Member States in a way to keep those costs at minimum, either by including efficiency incentives as requirements in its assessment<sup>311</sup> or by requiring *ex post* safeguards in the form of financial analysis.<sup>312</sup>

It is tempting to make the assumption that the Commission's aforementioned manoeuvres are made to keep *Altmark's* refinement of *Ferring* from losing all meaning, for what would it be worth to require costs being kept at a proper (efficient) level in State aid assessment if all costs are then subsequently accepted under compatibility assessment, irrespective of whether they are the result of inefficient operation or not? It is here that the applicant's argument in *Viasat* gains strength: If the Commission has found lack of efficiency in its State aid assessment (while other *Altmark* conditions might be fulfilled), then should that not also be taken into account, to some extent, in assessment of proportionality under Article 106(2)?

### **6.2.2. Efficiency as a Condition or is Commission Competence the Issue?**

In in any event, *Viasat's* arguments along with the aforementioned Commission's activities and several General Court judgments, in particular *M6*<sup>313</sup> and the *Viasat* judgment itself, make it far from clear what the role of efficiency in the assessment of

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<sup>309</sup> See summary in Chapter 4.2.4.

<sup>310</sup> See for example Decision 2011/839/EU *TV/Danmark* (n 180) and summary in Chapter 5.3.

<sup>311</sup> In the SGEI Framework, cf. summary in Chapter 4.2.2.

<sup>312</sup> In the Broadcasting Communication, cf. summary in Chapter 4.2.4.

<sup>313</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244) and analysis in Chapter 5.5.4.

compatibility under Article 106(2) actually is. What is, however, arguably clear is that efficiency is not an indispensable condition under Article 106(2) – aid can be declared compatible even though the efficiency requirement has not been fulfilled. The General Court has made that distinction, between Article 107(1) and Article 106(2), clear in *TFI v Commission*.<sup>314</sup> However, such considerations seem to fall outside of Viasat’s argument. The argument, at least when taken at face value, is about requiring the Commission to look into efficiency, in case that condition has not been fulfilled under the *Altmark* test. It is not about efficiency being an indispensable condition that has to be fulfilled in order to apply Article 106(2). It is, seemingly, rather about figuring efficiency in as one of the potentially many factors that need to be weighed when assessing whether SGEI compensation, even though conferring an advantage that distorts competition (State aid), is still compatible with the internal market. By treating the argument as being about efficiency as a condition, the General Court is able to rely on its judgment in *TFI v Commission* and its “logical impasse” reasoning: If efficiency is a condition under Article 106(2) as well then the *Altmark* test is in effect redone in whole and, if fulfilled, the disputed measures will not even be considered as State aid in the first place.<sup>315</sup> Further, by construing the argument in this manner, the General Court also manages to divert the attention from what is arguably the bigger issue with respect efficiency and Article 106(2): What are the Commission’s competences – what is it entitled, under EU law, to assess and decide upon?

It is in that light that the court’s reliance on its judgment in *M6* becomes all the more interesting. The court cites *M6* in order to conclude that assessment of costs and efficiency is “irrelevant” to the assessment of compatibility under Article 106(2) and the assessment should include (all) actual costs.<sup>316</sup> However, the court does not take a stance on another, crucial, part of the *M6* judgment, which is whether the Commission is at all competent to take efficiency into account in its Article 106(2) assessment. As previously summarised,<sup>317</sup> the court in *M6* expressly stated that the Commission is not “entitled”, “in the absence of [EU law] governing the matter” to “rule” on the economic efficiency of a public service provider.<sup>318</sup> That statement was made based upon case law originating in

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<sup>314</sup> T-354/05 *TFI v Commission* (n 120) and analysis in Chapter 5.5.3.

<sup>315</sup> T-125/12 *Viasat* (n 2), Para. 91.

<sup>316</sup> *ibid*, Para. 87.

<sup>317</sup> See Chapter 5.5.4.

<sup>318</sup> T-568/08 and T-573/08 *M6 and TFI v Commission* (n 244), Para. 139.

disputes on State monopolies and whether such monopolies, and their inherent competition and internal market restrictions, could be accepted on the basis of derogation mechanism developed within rules on the four freedoms of the internal market: Objective justifications in the general interest. It is, as previously submitted,<sup>319</sup> debatable whether that line of case law can be relied upon to determine whether, within the content and scope of Article 106(2), efficiency considerations are relevant or not – or to decide upon the Commission’s powers in applying that provision. In *M6*, the General Court finds the issue of costs analysis and efficiency irrelevant because of the Commission’s lack of competences.<sup>320</sup> Thus, there is a logical context in its reasoning – lack of powers leads to irrelevancy of efficiency considerations. The court in *Viasat* does not specifically cover this but decides instead to rely solely on the part concerning relevancy. The result of this is that the issue of whether the Commission is competent to assess efficiency under Article 106(2) is left open, with the court even indicating that this might be an option for the Commission, given the circumstances of a case and the factual information before it.<sup>321</sup> What effect such conclusion might have on the principles of legal certainty and legitimate expectations, both for Member States who finance, or intend to finance, a selected public broadcaster and competing private broadcasters, is open to debate.

### 6.2.3. The Significance of the Amsterdam Protocol

The special nature of public broadcasting services and their importance to Member States’ societies led to the adoption of a specific interpretive protocol to the Treaties, the previously discussed Amsterdam Protocol. It is a special version of the more general exemption provision in Article 106(2). While its legal significance has been debated, with some commentators describing the provision as being symbolic and containing no valuable additions to the Article 106(2) assessment,<sup>322</sup> literal interpretation of the provision and the very fact that it was introduced would suggest otherwise. Such assumption is reinforced by the Commission’s practices and the General Court’s judgments in *SIC* and, in particular, *M6*. In the Broadcasting Communication the Commission notes that the compatibility assessment under Article 106(2) needs to be

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<sup>319</sup> See Chapter 5.5.4.

<sup>320</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244), Para. 139-140.

<sup>321</sup> See T-125/12 *Viasat* (n 2), Para. 89: “In that context, the criterion of proportionality is taken into account to estimate the actual costs of the service of general economic interest if, in the absence of evidence available to the Commission which would allow a precise calculation of those costs, the Commission is obliged to make an estimate.” Underlining by Author.

<sup>322</sup> *Sierra* (n 42), 221.



adapted in the light of the protocol.<sup>323</sup> Thus, the Commission uses the protocol as a legal basis to under-build its guidelines and, furthermore, relies on the protocol in justifying the compatibility of the compensation in the very decision contested in *Viasat*.<sup>324</sup> In that case it is hard to argue that the protocol did not function as an additional leeway for the Danish State and the, arguably, not so strong justifications reasons it put forward. Further, it could be argued that the General Court, in its judgment in *M6*, relies heavily on the Amsterdam Protocol in order to conclude that considering efficiency under Article 106(2) would be contrary to the protocol.<sup>325</sup> In *Viasat*, the General Court does not rely on the Amsterdam Protocol at all, in fact the protocol is barely mentioned in the judgment. The reasons for the protocol's omission are of course not clear – perhaps the General Court was of the opinion that the legal framework of the case, as formed by the parties' pleas and arguments, did not call for an assessment of, or reliance on, the Amsterdam Protocol. Notwithstanding such speculations, it is debatable whether finding the Danish state's compensation – which vastly exceeded costs – proportional and compatible under Article 106(2) without relying on the Amsterdam Protocol, and the Member States' additional leeway therein, falls within the scope of Article's 106(2) exemption. Such submission gains strength from the way the article's proportionality test has been developed, both by the Commission and in case law, which is mainly about comparing compensation to costs, and also from the basic premise that the article contains an exemption, a derogation, which should be narrowly construed.

### 6.3.Final Remarks

As the *Viasat* judgment has now been appealed to the ECJ a clarification of the Commission's powers, in assessing and deciding upon efficiency of public broadcasters under Article 106(2), would be most welcome. Should the Commission take efficiency into account in cases where it has not been fulfilled under the *Altmark* test, without requiring efficiency as an indispensable condition, as *Viasat*'s argues? The rationale being, *inter alia*, that otherwise there would be a risk of keeping inefficient public broadcasters in business by compensating all costs of their failing operations, thus rendering *Altmark*'s refinement of *Ferring's Compensation approach* ineffective. Or is the Commission simply not entitled to take efficiency into account, following the General

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<sup>323</sup> Broadcasting Communication, Para. 38. See summary in Chapter 4.2.4.

<sup>324</sup> See summary in Chapter 5.3.

<sup>325</sup> T-568/08 and T-573/08 *M6 and TF1 v Commission* (n 244) and analysis in Chapter 5.5.4.

Court's *M6* judgment and, perhaps, on the basis of Member States' competences under the Amsterdam Protocol? Addressing that question would also give the ECJ an opportunity to assess the applicability of the case law relied upon by the General Court in coming to its conclusion in *M6*, which has, as it happens, its origins in an Advocate General opinion on a Belgian State monopoly. Or, in the alternative, is the Commission simply at liberty to decide whether to include efficiency considerations or not, as the General Court's judgment in *Viasat* could be interpreted as suggesting and as the Commission's own practice certainly suggest, including its guidelines and parts of the decision disputed in *Viasat*. What would such conclusion mean for the general principles of transparency, legal certainty and legitimate expectations, both for Member States and their public broadcasters as well as for individual competitors?

Whether the EU's highest judicial function decides to address the aforementioned issues remains to be seen. It is, however, submitted that a correct interpretation of *Viasat*'s arguments should not lead to the ECJ accepting the General Court's reasoning and reliance on its judgment in *TF1 v Commission*. That reasoning in effect treats *Viasat*'s arguments as demanding efficiency as a condition within Article 106(2) and thereby avoids addressing the broader issue of the scope of the Commission's competence in applying the article – it is an inefficient way of dealing with an important question on the role of efficiency considerations within the Commission's Article 106(2) assessment. Furthermore, it is submitted that the ECJ should take the opportunity to clarify the Commission's competences and its discretionary powers when assessing the compatibility of public broadcasting compensation under Article 106(2). In that respect, it is suggested that the Court should not exclude, or limit, efficiency consideration within Article 106(2) with the same reasoning as the General Court applied in *Viasat*, which is based upon its reasoning in *M6* and the questionable reference to earlier case law therein. The Court could use the opportunity to address that reference specifically. Instead, if the Court decides to curtail efficiency considerations, it is submitted that the stronger legal basis for such conclusion, both in general and within the realms of the case at hand, would be in the specific nature of public broadcasting services, as codified in the Amsterdam Protocol.

A public broadcaster that provides quality services and is managed efficiently is a benefit to all. Private broadcasters are likely to be willing to enter different EU markets and, once

there, are able to compete more effectively. At the same time, society in whole benefits, as citizens are able to choose from a diverse range of quality broadcasting while the drains of public funds are less. Ensuring efficiency is thus important, irrespective of whether that is done on national or EU level. On the latter level, the first step would be to clarify the scope and content of the Commission's power in assessing efficiency under Article 106(2). Hopefully, the ECJ's judgment in the Viasat case will achieve that.

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