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**Overview of whether procurement contracts procedures
and free competition in public service sectors are in
compliance with European and national regulations**

Why this question ?

- A first reason: national interest: France has always been committed to defending the concept of public service. In one way or another this concept should be included in European law.
- A more practical reason: how do local financial courts cope with these principles.

Two recent examples:

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- **A national example: October 4th 2013**

It involves the SNCM, the shipping company that links Corsica and Marseilles.

In mid-September, the European Commission applied to the French government for information about the refunding of allegedly illegal public aid.

This refunding amounts to some 220 million euros granted from 2007 to 2013 as “complementary service” with the aim of increasing the number of available crossings in Summer.

- **An example at local level:**

On Friday, October 4, Veolia, the world leader in water distribution and garbage treatment, was awarded a further 15 years' lease for the distribution of water for the Marseilles urban community. This contract concerns 1 million people and will generate a € 2.2 billion turnover.

The Marseilles case

- Through its subsidiary SEM (Société des eaux de Marseille) Veolia has obtained from the Marseilles urban community (MPM) the extension of its public service delegation for “the management of the drinkable water distribution network” which it has held for 60 years. This accounts for 17 districts, with about 1 million inhabitants. It is thus the second biggest water distribution contract in France, second only to the Sedif (149 districts around Paris, 14 million inhabitants, also held by Veolia).

What does SIG stand for ?

- It is a service which must comply with specific public service obligations (OSP), in order to successfully carry out a task serving the general interest.
- SIG may be involved in economic or non-economic activities (“regalian” activities for example)
- SIG can either be SIEG (general interest economic services) or SSIG (general interest social services)

A European Community definition (Services of General Interest)

The EU describes SGIs as "market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations" (communication 2007/725 November 2007 from the European Commission)

SERVICES D'INTERET GENERAL

Services soumis à des obligations spécifiques de service public (OSP) afin de garantir la réalisation d'un objectif d'intérêt général



How can French and European law match ?

- Notion of public service, a crucial issue in the French political and administrative system, should be granted formal recognition.
- With SGIs an increasingly important attention is given to notions that are close to the French public service.
- These public services rely on a high standard of quality and security, accessibility to the public, affordability and respect of users' rights.

- Economic SGIs have lately come to include activities such as professional training, culture, sports or assistance to private individuals, all of which are within the scope of local governments.
- For example, today most of the optional or mandatory responsibilities of a French “Département” may come within the scope of SIEGFs.
- Yet, neither SIEGs nor SSIGs are automatically exempted of competition regulations.

- Generally speaking, public subsidies, when considered as State aid, are suspected by European Treaties, when they fail to comply with European regulations concerning competition and freedom of movement and establishment.
- However, they are not illegal as long as they comply with these principles and with the existing legal framework, even though it changes all the time (see “Paquet Almunia” 2011)
- Local authorities are submitted to various obligations.

What are these obligations ?

- They result from various texts
- Thus, articles 106 and 107 impose a ban on State subsidies, but for some exceptions.
- Directive 2004/18/CE of 31 March 2004 concerning procurement contracts sets the rules for competition and advertising - it is now being revised.
- Services Directive 2006/123/CE of December 12 2006 excludes some activities such as social housing or child care. This does not mean that such activities whose management may be entrusted by local governments to a third party are exempted from competition.

- Until March 2011 “paquet Monti-Kroes” and the “ ALTMAZRK” case.
- Since December 2011, “paquet ALUMNIA” which includes:
- A decision concerning the criteria that allow to legalize public subsidies granted as public service compensation to companies in charge of managing a service of economic general interest.
- A framework reminding of the law concerning the aid to the SIEG
- Rules that set a benchmark for the above regulations: below this benchmark they are not applicable (today € 500 000 over 3 year): the “de minimis” rule.

- In case the aids should exceed the benchmark, they may not be considered as State aid, if the Altmark case is followed.
- The beneficiary is in charge of public service obligations that are clearly identified in the mandate of the community.
- The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- Compensation only applies to costs linked to public service obligations.
- The beneficiary is chosen following a procurement contract procedure (this criterion has disappeared from the “paquet ALUMNIA”)

Practical examples

- These examples are supplied by several Accounts Courts, to show that the topics treated are not limited to a single region.
- Most courts may be confronted to the same type of problems.

- A district with 22 000 inhabitants supervised by the CRC Auvergne-Rhône-Alpes: Sainte-Foy-lès-Lyon

In its tasks of auditing accounts, the court has checked the links between the association “Maison des Jeunes et de la Culture” and the district in the light of European community rules (see “paquet ALMUNIA” December 2011).

In this case, the court stated the subsidy is a legal source of funding insofar as the community has clearly defined the task entrusted to the association as being a Service of economic general interest. It also reminded that the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (Altmark case. July 24, 2003)

- This association with more than 2000 members is an economic actor, as regards a big slice of its activity in terms of culture, sport and education (more than 50% of its total resources- 30% of these resources coming from public contributions, with the district as the major public contributor)
- The court considered that the participation of the district to the funding of the association largely exceeded the “**de minimis**” benchmark, while the obligations imposed by the European community legal texts had not been implemented.
- Indeed, over the last three years, the sums paid by the district amounted to more than € 530 000, which represents a €500 000 excess over the “de minimis” benchmark (this benchmark was set for the community in April 2012 for bodies that operate in the field of Services of social public interest).

- In conclusion, the court considered that the district, as being the major public contributor, should have initiated the implementation of the entrustment procedure defined by European community law, the definition of the expected requirements, and the calculation of the fair compensation, so as to provide legal safeguards to the aid granted.
- Let it be noted that the State circulates standard agreement forms to avoid this kind of risk: if the January 18,2010 memorandum and the attached agreement form had been used, it would have allowed the local community to take these stakes into account when submitting the agreement renewal application for 2011.

- A similar type of dysfunction has been spotted as regards the town of Saumur (CRC Pays de la Loire)
- The court considered that the amount of subsidies (roughly comparable to public aid to a company, according to the European Court of Justice – former CJCE) required an agreement that clearly defines the public service obligations in their reality, duration and scope.

Audit of the Economic development agency of Corsica (ADEC) - CRC of Corsica

- The control of the “de minimis” rule (at the time of the control: €200 000, benchmark beyond which the situation of the company must be declared and controlled by the European Union) by the Economic Development agency, which depends on the regional community, is not satisfactory.
- This agency, which monitors the public aid, must equip itself with a central information system, for every firm it has to control, where applications and replies for financial aids should be listed, together with the total amount of funding. This would ensure an accurate assessment of all the aids granted, and compliance with European law.

Report from CRC Alsace: the Altkirch case

- Following the audit of the accounts of the district, one observation concerns the renovation of a building to accommodate a 10-people company.
- The court issued a warning to the community because the total amount of public aid largely exceeded the “de minimis” limit (at the time the control operations were carried out). The court also pointed out that no analysis had been conducted to determine whether this European community rule had been complied with.

Example of a low-cost airline company:

Ryanair

- In 2009, around 14 million Euros were granted by the Chambers of Commerce and Industry and territorial bodies in charge of managing airports through advertising on the company's site. To which must be added rebates on the services provided by airports.
- The CRC Aquitaine- Poitou-Charentes considered that the marketing aid which the company applied for with the La Rochelle airport from 2004 onwards is actually an operating subsidy, which is prohibited by European law as distorting competition.

- Likewise, in Bergerac (Dordogne), the local Chamber of Commerce and Industry is urged by the court to declare to the European commission that “marketing” subsidies were granted using public money. Indeed, to gain validation from Brussels, those subsidies must be degressive and limited to a three years' duration.. This rule was not followed by the CCI of Bergerac.
- Why should it do so, since the French administrative control authorities (apart from the CRCs) i.e. the préfectures and the Direction générale de l'Aviation civile prove reluctant to intervene ?

- About economic aid for the territorial communities, the Cour des Comptes issued a report in 2007, on the basis of remarks from the regional courts, entitled: *Aid to the territorial communities in favour of economic development*, in which it pointed out practices that largely ignore European rules.
- It stated that apart from specific regulations, only State aid (broadly speaking) amounting to less than 100 000 Euros(this amount having been raised since) over a 3 years' period were euro-compatible, because without any real impact on competition.

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- It found that offences were many, for lack of control, as a local community grants aid to a company in various forms.
- The “de minimis” rule is often forgotten by local communities eager to attract companies.
- Among the most conspicuous examples quoted in the report: a “departement”, for a public service shipping company, granted to a private carrier a subsidy amounting to 23% of its turnover. Yet the distinction between the market-oriented activity and the public service missions was rather blurred.
- Undertakings entrusted with the operation of services of general economic interest are not completely exempted from the European rules on competition when they are granted aid from territorial communities as compensation for the public service charges they incur. (see Altmark case CJCE 24 July 2003)

Altmark case

- The court of justice has defined the conditions in which the compensation paid to an organization providing a public service is not treated as State aid.
- It judged that there is no aid if the compensation is calculated in an objective and transparent manner, if it does not exceed the costs incurred, taking into account a reasonable profit, and if it is determined within the procurement contract framework or on the basis of an analysis of the costs which a typical undertaking, if well run and adequately equipped, would have incurred.

Sanctions

- European law requires that any aid that distorts competition and that is granted contrary to the rules imposed by the treaties should be refunded.
- Should this rule not be respected, the community that granted the aid at issue is likely to be prosecuted and condemned.
- Any community that granted aid to a company is bound to retrieve it as soon as possible, if it is charged to do so by a European commission's decision or by a ruling of the CJUE, whether provisional or final.