

EU State Aid and Public Procurement Law: A Bitter Pill for Healthcare Systems?

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Outline


- Sources of PP rules and principles
- Parties to PP contracts
- Risk of double submission: PP and State aids
- Defining PSO in healthcare
- Conclusion


Sources	Parties	Double submission	Defining PSO	Conclusion
Sources of PP rules and Principles				
Directive 2004/18				
<ul style="list-style-type: none"> ➤ Health is covered – in principle <ul style="list-style-type: none"> ➤ All services are covered – but for express exceptions ➤ Health services are enumerated in Annex II B (n.35) ➤ Exclusion of the Dir rules <ul style="list-style-type: none"> ➤ Rec. 6: the Dir should in no way prejudice public... health ➤ Art. 17: service concessions ➤ Art. 18: service contracts awarded on the basis of exclusive right 				
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Sources	Parties	Double submission	Defining PSO	Conclusion
Sources of PP rules and Principles				
Directive 2004/18				
<ul style="list-style-type: none"> ➤ Distinction between Annex IIA and IIB services <ul style="list-style-type: none"> ➤ IIA: full applicability of Dir's rules ➤ IIB: applicable only <ul style="list-style-type: none"> ➤ Art. 23: technical specifications <ul style="list-style-type: none"> ➤ open, non discriminatory, using standards etc ➤ Art. 35(4): post award notice ➤ +++ <i>De minimis</i> communication ➤ If a service is both within Annex IIA and IIB: higher value ➤ What is a health service? 				
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★ Sources	Parties	Double submission	Defining PSO	Conclusion
Art. 49 Case Law – PPP Principles				
<ul style="list-style-type: none"> ➤ On award procedures [<i>Telaustria, Parking Brixen</i> etc] <ul style="list-style-type: none"> ➤ Transparency ➤ Equal treatment and non-discrimination ➤ Mutual recognition ➤ Proportionality ➤ <i>Contse'05</i>: also non discriminatory award criteria are controlled under <i>Gebhard</i> test ➤ Is it mandatory to follow an award procedure? <ul style="list-style-type: none"> ➤ For a contract: <i>Tögel'98</i> ➤ For an authorisation (when ltd n): <i>Placanica'05</i> + SD art 12 ➤ BUT: <i>Glöckner'01</i> : when exclusivity is justified by PSO??? 				
				<i>An Post'07</i> <i>If transborder interest</i>
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★ Sources	Parties	Double submission	Defining PSO	Conclusion
Soft Law				
<ul style="list-style-type: none"> ➤ “De minimis” Interpretative Communication 2006/C 179/02 <ul style="list-style-type: none"> ➤ Covers <ul style="list-style-type: none"> ➤ Contracts below the thresholds ➤ Services of Annex IIB – is it plausible? ➤ IPPPs <ul style="list-style-type: none"> ➤ Communication 2008/C 91/02 (+ concessions) <ul style="list-style-type: none"> ➤ pt. 2.3.1: services of Annex IIB subject to the PP principles. ➤ COM (2009) 615: point 3.1. 				
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 v2	Sources	Parties	Double submission	Defining PSO	Conclusion
		Parties in a contract subject to PP			
		Contracting Authorities			
		<ul style="list-style-type: none"> ➤ Annex III Dir 2004/18 (Dec 2008/963, 1/1/09), list per MS: ➤ Enumeration of bodies/ categories – not comparable (e.g. in healthcare) <ul style="list-style-type: none"> ➤ AT: All entities subject to the control of the Court of Auditors except those of industrial or commercial nature //FI ➤ BE: Some public hospitals and funds (but most H are private) ➤ BG: ??? (all in Bulgarian) ➤ CY: ??? (all in Greek): all funds – no hospitals ➤ CZ: all public funds – no hospitals ➤ DK: No body ➤ EL: All entities controlled by over 51% by the State ➤ ES: All bodies and entities subject to the Act on public contracts (//SW) + administrative and common entities for health & social services ➤ IR: Hospitals and similar institutions of a public character + agencies in various public sectors (e.g. healthcare materials management board) ➤ FR: all public hospitals + General interest groupings (only examples given) ➤ UK: Health & safety executive + Public health Laboratory service board 			
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 v3	Sources	Parties	Double submission	Defining PSO	Conclusion
		Parties in a contract subject to PP			
		Contracting Authorities			
		<ul style="list-style-type: none"> ➤ Criteria – In the directive <ul style="list-style-type: none"> ➤ Established for serving the general interest – not having an industrial or commercial character [<i>Agora</i>] ➤ Legal Personality [<i>Teckal</i>] ➤ Financed or controlled by the State or emanation thereof [Dir 80/723] ➤ Criteria cumulative [<i>Mannesmann</i>] 			
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- v2** Contracting authorities are bound by the dir not only when they award the contract directly, but also when they subsidise a C awarded by another body/entity by over 50%
- vasshatz, 02/04/2009

Slide 8

- v3** Contracting authorities are bound by the dir not only when they award the contract directly, but also when they subsidise a C awarded by another body/entity by over 50%
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Sources Parties Double submission Defining PSO Conclusion

Contracting Authorities

➤ Criteria – In practice

- External:
 - Degree of state control
 - State financing / absence of financial risk
 - Accomplishment of some PSO
 - Existence of competition for the same (?) activity
 - Pursuance of the activity in a way/logic different from market
- Internal
 - Nomination / control of board of directors
 - Control of execution of the budget
 - Degree of autonomy – State control over decision making
 - Commercial side-activities etc

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Sources Parties Double submission Defining PSO Conclusion

Contracting Authorities

➤ In the case law

- AT: the sickness insurance fund for lower Austria [Tögel]
- DE: the Land health authority [Glöckner]
- ES: the National Health Institute, INSALUD [Contse]
- EL: the public hospitals [Medipac, Com/Greece]
- IR: the Regional Health Authority [Com/Ireland]
- IT: the Region and the Regional Health Associations [Com/Italy]

➤ BUT many outstanding questions, e.g.

- BE: the private hospitals funded by public funds?
- UK (EN) / IT: private hospitals contracted by the SHAs/RHAs ?
- Nth: private funds (where affiliation compulsory according to terms fixed by law) and private hospitals receiving funds from central gvt?

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Sources Parties Double submission Defining PSO Conclusion

Parties in a contract subject to PP

Contractors in PP

- Voluntary/ not-for-profit organisations are undertakings [*Glöckner, Com/Italy*]
 - Focus on the specific activity (functional approach)
 - Remuneration
 - Is enough if it is paid by the State – not the patient
 - Exists whenever the amounts received are higher than the actual cost of the service (and any abstract form of calculation is liable to lead to remuneration)
- (semi) Public authorities entrusted by statute are NOT undertakings [*Com/Ireland*]

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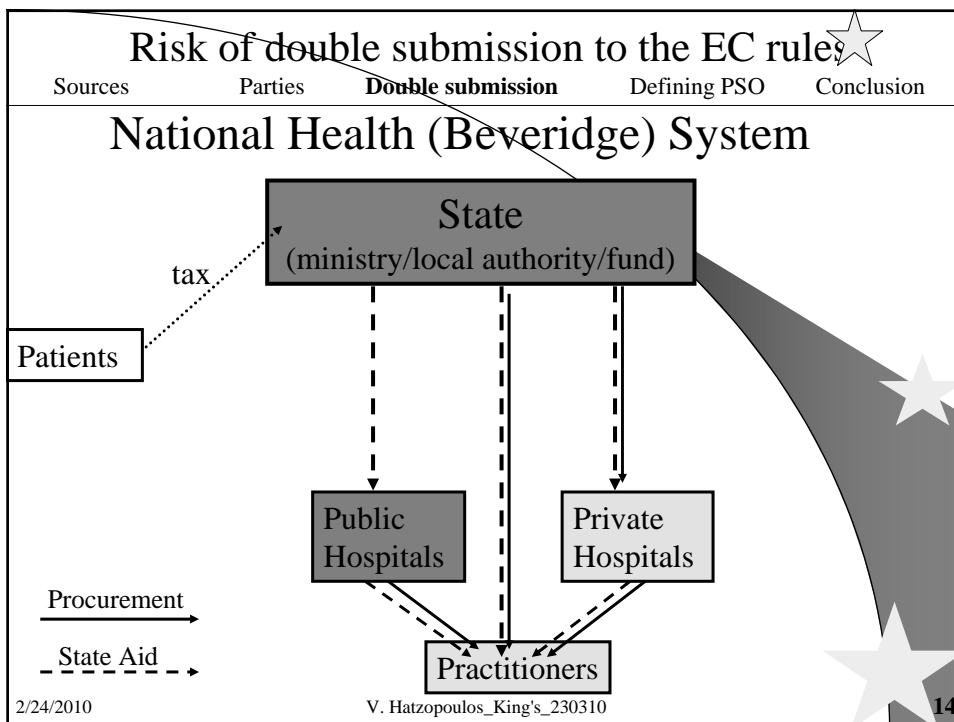
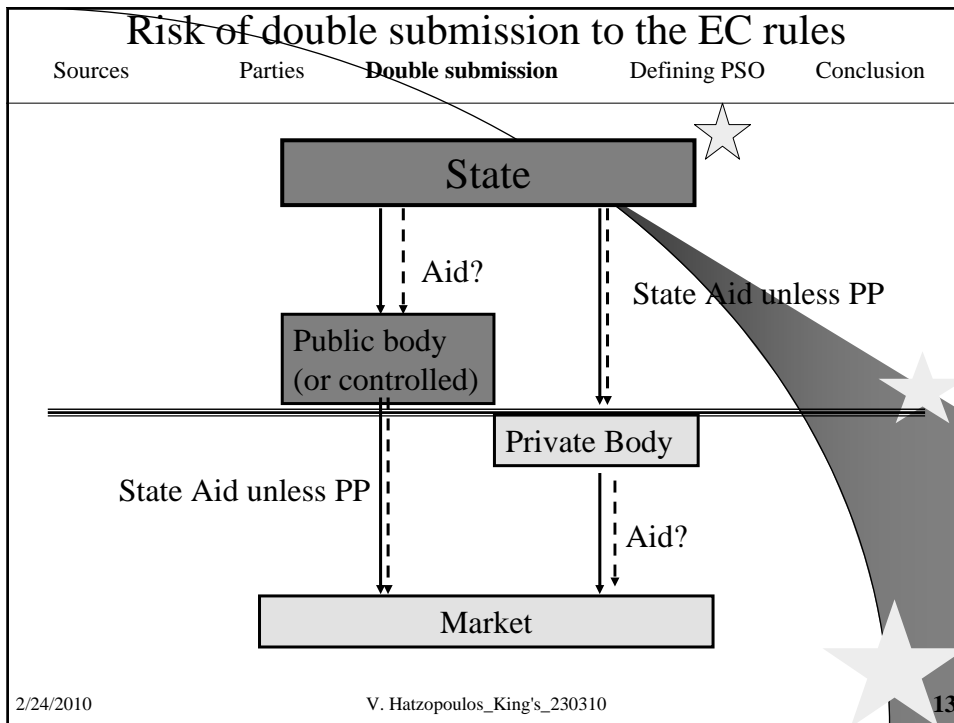
Sources Parties Double submission Defining PSO Conclusion

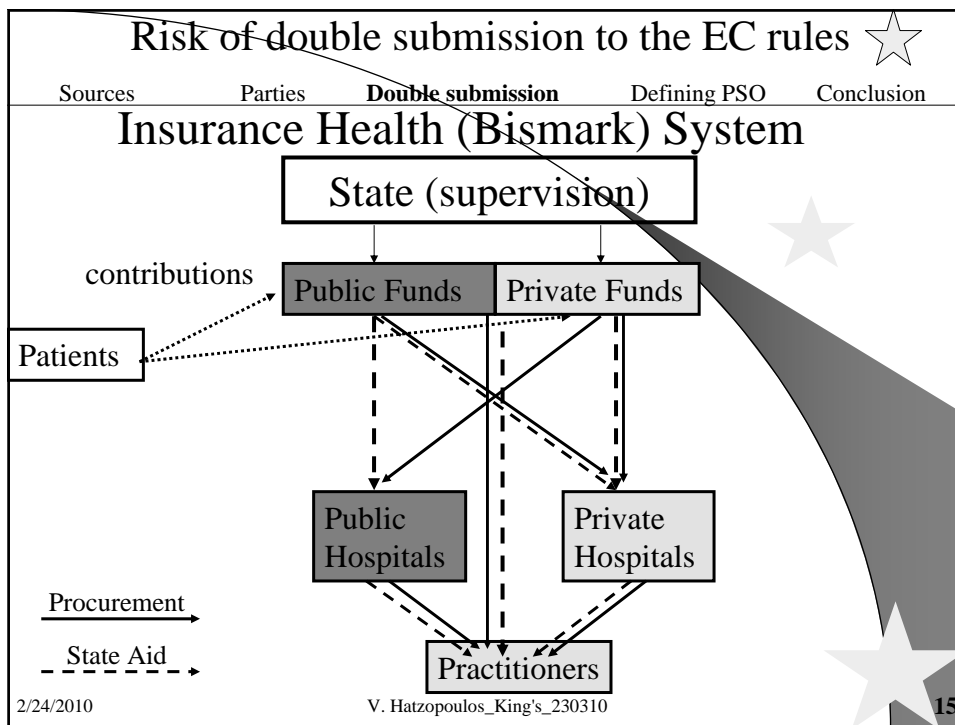
Risk of double submission to the EC rules

Relationship between PP and State aids rules

- **Art 87 EC on State aids:** direct money transfers to undertakings only upon approval by the Commission/ system of prior notification
- Moneys given out according to PP rules /principles cannot qualify as State aid, as they
 - Are the consideration for a specific good/service
 - Are set according to market forces (competition)
- Any given entity should be subject to only one set of rules
 - EITHER it is managing public money and has to give it out according to the PP principles
 - OR it is a private undertaking and is free to chose whom it will contract with, but may not freely receive public funds

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Risk of double submission to the EC rules

Sources	Parties	Double submission	Defining PSO	Conclusion
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The *Altmark* package as a limited solution

State aid rules do not apply (even if no PP award) if PSO

- a) undertaking formally **entrusted** with **PSO** (through contract, concession, exclusive rights etc)
- b) **subsidy determined** in advance according to objective and transparent criteria (not end of the year top-ups)
- c) **no overcompensation** (reasonable profit is OK)
- d) **no compensation for inefficiencies**

→ Dec 2005/842: block exemption for hospitals

→ 2005 Framework PSO: all other undertakings

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★ Risk of double submission to the EC rules ★

Sources	Parties	Double submission	Defining PSO	Conclusion
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Altmark package

Any entity receiving public money should ask:

No Yes Yes

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graph TD
    Q1[Is it an undertaking?] -- Yes --> Q2[If a CE]
    Q2 -- Yes --> Q3[Is it exempt/Altmark DC?]
    Q3 -- No --> Q4[Bring it under the Altmark FR For ind. exempt]
    Q4 -- No --> Q5[Is it an aid? Altmark JG?]
    Q1 -- No --> N1((No))
    Q2 -- No --> N2((No))
    Q3 -- Yes --> Y1((Yes))
    Q4 -- Yes --> Y2((Yes))
    
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Note:
 JG = judgment
 DC = decision
 FR = framework

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★ Risk of double submission to the EC rules ★

Sources	Parties	Double submission	Defining PSO	Conclusion
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Art 106(2) TFEU

- “Undertakings entrusted with the operation of services of general interest” are exempt from ALL the Treaty rules
 - State aid: *Chronopost’08*
 - Competition rules: *Corbeau’93* etc
 - Internal market rules: *Wouters’02*

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Defining PSO in Healthcare

Sources Parties Double submission Defining PSO Conclusion

Concept of SGEI/PSO/US

Qualification	Rules applicable	Exception
Undertaking or Contracting Authority	State aid? 107 Altmark n. 1	106 (2)? Entrusted with PSO?

PSOs

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Defining PSO in Healthcare

Sources Parties Double submission Defining PSO Conclusion

Define the scope of **PSO in Healthcare**

- **Variables**
 - Population covered
 - Treatments covered
 - Quality of medical services (qualifications, waiting lists etc)
 - Quality of non-medical services (accommodation, catering)
- **Are MS free to tailor the scope of SGI in healthcare? YES BUT**
 - Direct ECJ control for “manifest error”: if too much SGI
 - Indirect control: *Smits & Peerbooms, Watts* etc: if too little SGI
- **What degree of detail is needed/how do you do it?**
 - general definition, indicators, benchmarks
 - Legislative act, flexible norms, self-regulation

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Defining PSO in Healthcare

Sources	Parties	Double submission	Defining PSO	Conclusion
Calculate the cost of PSO in Healthcare				
<ul style="list-style-type: none"> ● Distinction between capital – exploitation costs <ul style="list-style-type: none"> – Different levels of public participation falsify downstream “markets”: need to identify public funding – Increasing private participation in infrastructure costs – choice should operate according to the PP principles ● Calculation of the cost of PSO in Healthcare <ul style="list-style-type: none"> – Diagnose Related Groups (DRGs) or equivalent should be used – Number of intermediaries (funds, local authorities) involved? ● Monitoring <ul style="list-style-type: none"> – The fulfilment of public service obligations by hospitals – Overcompensation and refund ● What role for the EU??? 				
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Conclusions

Sources	Parties	Double submission	Defining PSO	Conclusion
<ul style="list-style-type: none"> ● Current situation is pregnant with legal uncertainties <ul style="list-style-type: none"> – Definition of undertaking/contracting entity – Scope of <i>Altmark</i> package - <i>BUPA</i> – Definition of the scope of PSO in healthcare ● Source of differentiation between MS, at least at the short term but could lead to de facto streamlining in the long term ● BUT conceptual shift: from healthcare SYSTEMS (at the MS level) towards healthcare SERVICES (at the EU level) ● → Deconstruction??? 				
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<h2>Cited Case law</h2>	
➤	Case C-44/96 <i>Mannesmann Anlagenbau Austria</i> [1998] ECR I-73
➤	Case C-76/97 <i>Tögel</i> [1998] ECR I-5357
➤	Case C-107/98 <i>Teckal</i> [1999] ECR I-8121
➤	Case C-324/98 <i>Telaustria</i> [2000] ECR I-745
➤	Case C-380/98 <i>ex parte University of Cambridge</i> [2000] ECR I-8035
➤	Case C-223&260/99 <i>Agora & Excelsior</i> [2001] ECR I-3605
➤	Case C-475/99 <i>Glöckner</i> [2001] ECR I-8089
➤	Case C-280/00 <i>Altmark</i> [2003] ECR I-7747
➤	Case C-373/00 <i>Truley</i> [2003] ECR I-1931
➤	Case C-458/03, <i>Parking Brixen</i> , [2005] ECR I-8612
➤	Case C-234/04, <i>Contse</i> [2005] ECR I-9315
➤	Case C-6/05, <i>Medipac</i> [2007] ECR I-4557
➤	Case C-119/06 <i>Commission v Italy, ambulance services</i> [2007] ECR I-168
➤	Case C-507/03 <i>Commission v Ireland, An Post</i> [2007] ECR I-9777
➤	Case C-532/03 <i>Commission v Ireland, ambulance services</i> [2007] ECR I-11353
➤	Case C-147&148/06 <i>SECAP v Comune di Torino</i> [2008] ECR I-3565
➤	Case T-289/03 <i>BUPA v Commission</i> [2008] ECR II-81
➤	Case C-489/06 <i>Commission v Greece, EC markings</i> [2009] nyr
➤	Case C-160/08 <i>Commission v Germany, ambulance services</i> (pending)

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<h2>Related readings</h2>	
By the speaker	
●	- <i>Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms</i> ; <u>Common Market Law Review</u> , n. 4/2002, p. 683-729
●	- <i>Do the Rules on Internal Market Affect National Health Care Systems? In McKee, M., Mossialos, E., Baeten, R. (eds.), <u>The Impact of EU Law on Health Care Systems</u>, Peter Lang, Bruxelles, 2002, p. 123-160.</i>
●	- <i>Health Law and Policy: the Impact of the EU</i> , in De Burca (ed) <u>EU Law and the Welfare State: In Search of Solidarity</u> , EU/OUP (2005) p. 123-160.
●	- <i>Services of General interest in Healthcare: An exercise in deconstruction?</i> , in U. Neergaard, L. Roseberry & R. Nielsen (eds), <u>Integrating welfare functions into EU law – From Rome to Lisbon</u> (2009) Copenhagen, DJOF Publishing, 225-252.
●	- <i>Financing national health care in a trans-national environment: the impact of the EC internal market</i> , <u>Wisconsin International Law Journal</u> 26:3 (2009) 761-804; presentation available on videostream at http://videos.med.wisc.edu/event.php?eventid=46 .
●	- <i>Public procurement and state aid in national healthcare systems</i> , in Mossialos, E., Permanand, G., Baeten, R. and Hervey, T. (eds.), <u>Health Systems Governance in Europe: the role of EU law and policy</u> , Cambridge, CUP (forthcoming); already available at http://www.coleurop.be/template.asp?pagename=lawpapers .
●	- <i>'Public procurement law and health care: From theory to practice'</i> (co-authored with H. Stergiou) in Van de Gronden, J., Krajewski, M., Neergaard, U. & Szyszczak, E., <u>Health Care and EU Law</u> (The Hague: Asser Press, forthcoming)

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