

Public Procurement and State aid rules in Healthcare

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Notolin





Applicable rules

- ECJ case law on patients mobility: healthcare is a “service” subject to all the Treaty rules
- Art 87 EC on State aids
 - direct money transfers to undertakings only upon approval by the Commission/ system of prior notification
- PP rules (Dirs 2004/17 and 2004/18) and principles (*Telaustria* 2000 etc + Commission Communications):
 - contracts should be awarded to undertakings according to open, competitive tenders
 - Principles: transparency, non discrimination, equal treatment and mutual recognition





Rules alternative NOT cumulative

- 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 get into contractual relations with, but may not receive public funds



EU Grip: State aid and Public Procurement

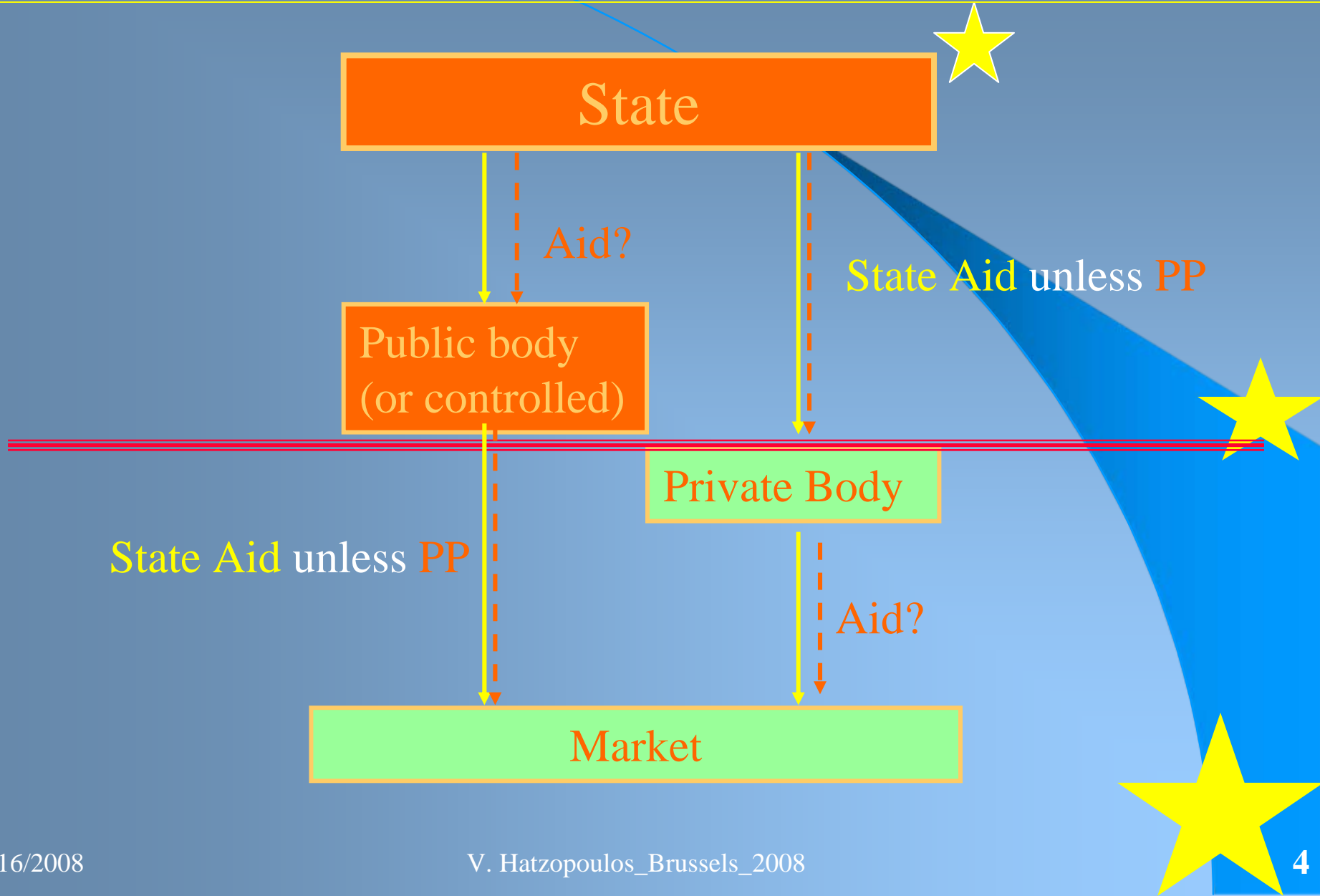
EU grip

Impact

Altmark

Procurement

Defining PSO



Impact of the rules on Healthcare



EU grip

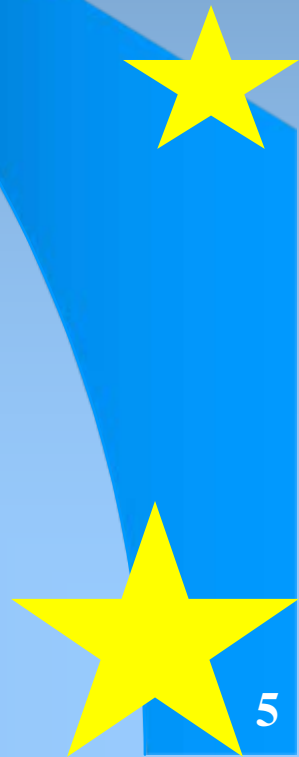
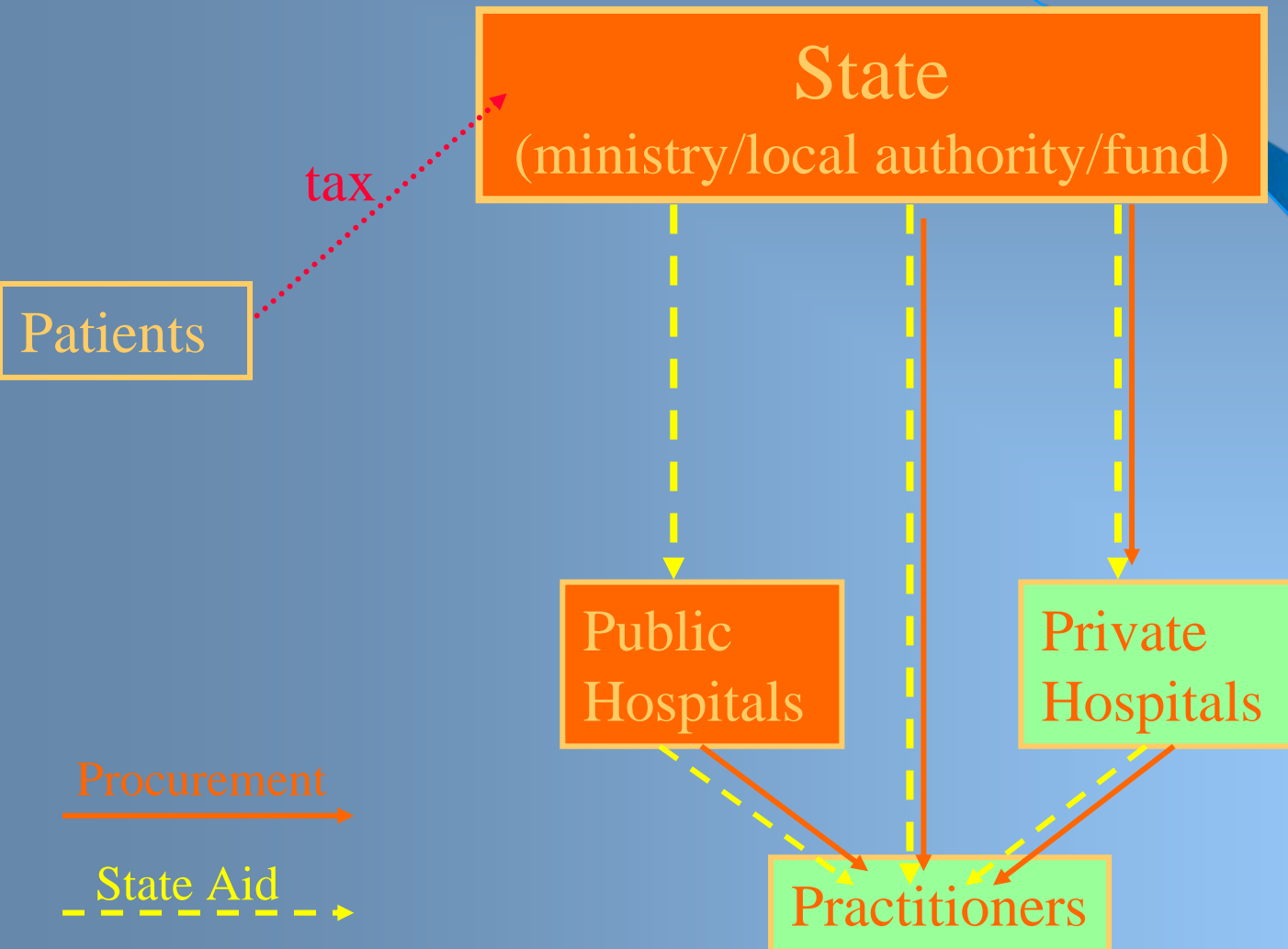
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National Health (Beveridge) System



Impact of the rules on Healthcare



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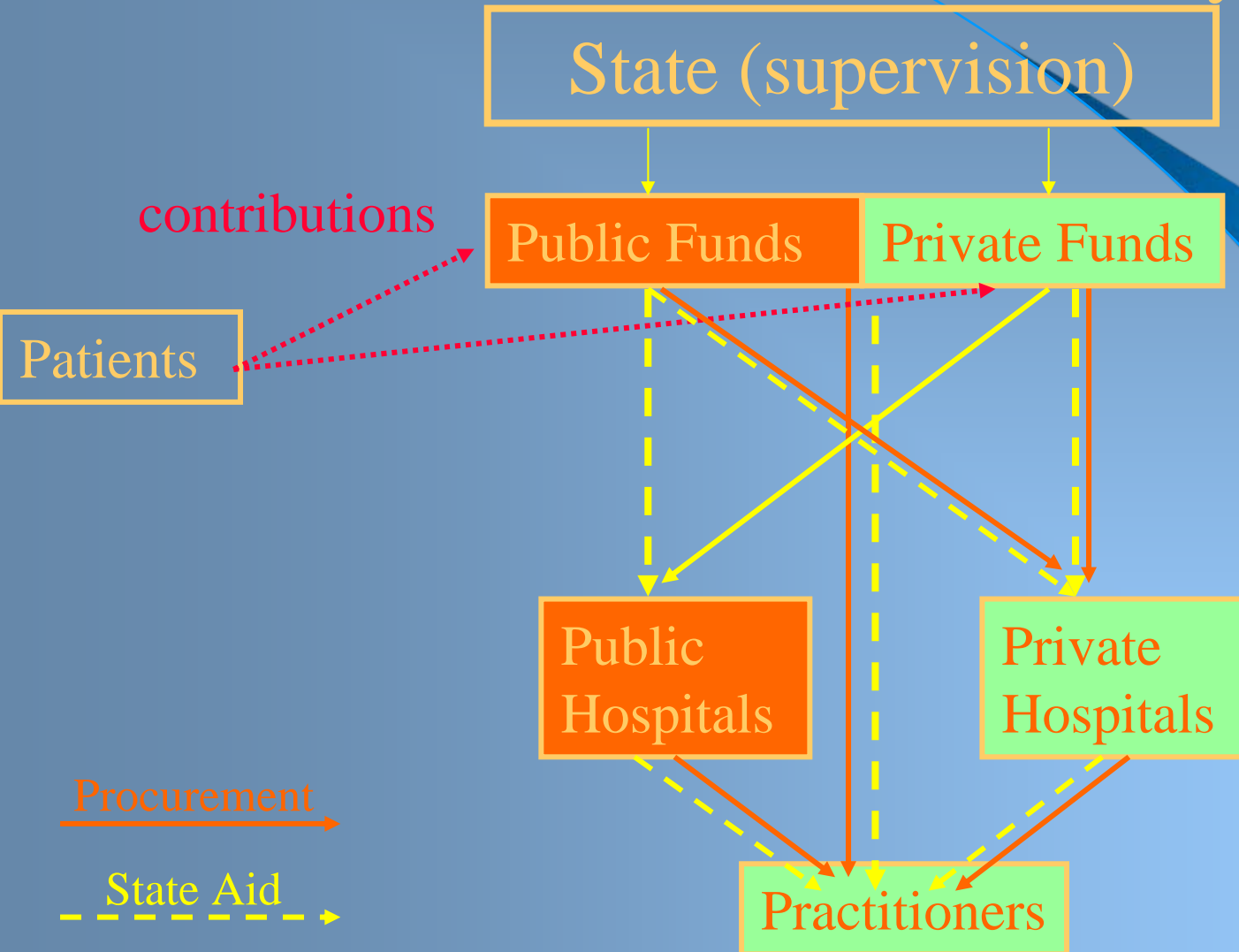
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Insurance Health (Bismark) System





State aid: The *Altmark* solution



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Defining PSO

Altmark judgment (C-280/00 [2003] ECR I-7747)

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





State aid: The *Altmark* Solution



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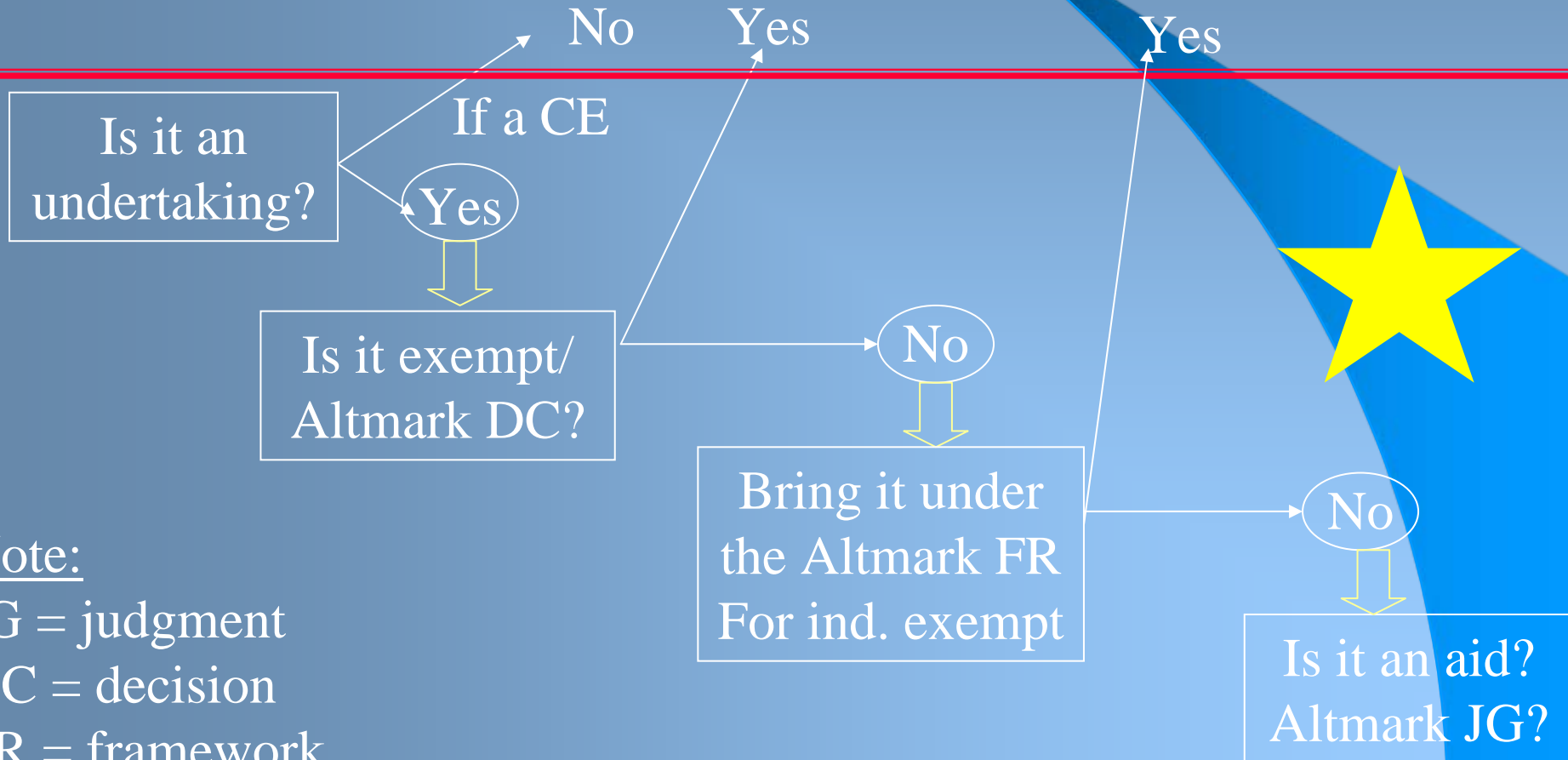
Altmark

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Defining PSO

Altmark package

Any entity receiving public money should ask:



Note:

JG = judgment

DC = decision

FR = framework

12/16/2008



What PP rules/principles for Healthcare?

- Contracting entities: Annex III of Dir 2004/18 contains a list per MS, BUT list not exhaustive; Criteria:
 - External: Financing - accomplishment of some PSO
 - Internal: board of directors, execution of the budget, contractual freedom, commercial side activities etc
 - Applicable rules
 - Health services under the Dir: pre/post contractual publicity + general procurement principles
 - Other services under the Dir: fully fledged application of rules
- What is a health service?





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





Calculate the cost of PSO in Healthcare

- Distinction between capital – exploitation costs
 - Different levels of public participation falsify downstream “markets”
 - Increasing private participation in infrastructure costs – choice should operate according to the PP principles
- Calculation of the cost of PSO in Healthcare
 - Diagnose Related Groups (DRGs) or equivalent should be used
 - Practitioners’ fees / their own consideration for using the facilities?
 - Number of intermediaries (funds, local authorities) involved?
- Monitoring
 - The fulfilment of public service obligations by hospitals
 - Overcompensation and refund





Conclusions

- Current situation is pregnant with legal uncertainties
 - Definition of undertaking/contracting entity
 - Scope of *Altmark* package
 - 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
- A common definition of SGO in healthcare at the EU level could act backwards and affect the definitions and content of national healthcare systems

