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Competition and State aid implications of the *Spezzino* Judgment (C-113/13): the scope for inconsistency in assessing support for public services voluntary organisations

Dr Albert Sanchez Graells¹

1. Introduction

The rules applicable to the financing of public services (*lato sensu*) are a permanent source of legal challenge under EU law. Despite the clarification of the distribution of competences between the Member States and the European Union attempted by the TFEU and its Protocol (No 26) on services of general interest,² the boundaries of the constraints that EU law imposes on the organisation, commissioning and financing of the provision of public services remain relatively blurry;³ particularly where non-public providers are involved, and specially where voluntary (third sector, non-profit) organisations receive support (in the form of financing, contracts, etc) from the Member States.

The Judgment of the Court of Justice of the European Union (CJEU) in the recent *Spezzino* case⁴ has created additional uncertainty⁵ by determining that *as a matter of principle* EU law does not preclude “national legislation ... which provides that the provision of [certain social] services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by [sectoral] agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based”.⁶

The uncertainty deriving from the *Spezzino* Judgment is particularly acute regarding the rules applicable to the choice of provider and the remuneration payable for the provision of those services by voluntary (third sector, non-profit) entities, in particular where they develop their activities within a legal and contractual framework aimed to ensure that they “actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency”,⁷ as established by the domestic legislation of the Member States. Such entities seem to be exempted from the general requirements for the

¹ Senior Lecturer in Law, University of Bristol Law School. a.sanchez-graells@bristol.ac.uk. Comments welcome. I am thankful to Professor Roberto Caranta for his comments to an earlier version of this paper. The standard disclaimer applies.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/308.

³ For discussion and further references, see A Sanchez-Graells and E Szyszczak, “Modernising Social Services in the Single Market: Putting the Market into the Social” in JM Beneyto and J Maillo (eds) *Fostering Growth: Reinforcing the Internal Market* (Madrid, CEU Ediciones, 2014) 61-88, available at <http://www.idee.ceu.es/Portals/0/Libros/Fostering%20Growth.-Col.%20Gral.%2048.pdf> (accessed 30.06.15).

⁴ *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:2440.

⁵ For general discussion of the case, see D McGowan, “Does the Reservation of Ambulance Services to Voluntary Organisations on a Cost Reimbursement Basis Give Rise to a Public Service Contract? Case C-113/13, *Azienda Sanitaria Locale No. 5 ‘Spezzino’ v San Lorenzo Società Cooperativa Sociale*” (2015) 24(3) *Public Procurement Law Review* NA61-NA66.

⁶ *Spezzino*, general ruling.

⁷ *Spezzino*, 65.

selection and remuneration of public service providers and, in particular, the so-called *fourth Altmarm condition* that “where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed [for the provision of the service] has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with [material] means [...] 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”.⁸ Indeed, after *Spezzino*, where the voluntary entities are not chosen following a public procurement procedure (so as to ensure that they are the tenderer capable of providing those services at the least cost to the community), they seem to also not be subjected to the ‘*Altmarm benchmarking*’ against the economic standard of a “typically efficient undertaking”. Instead, they are subjected to the rather different and potentially much lower *Spezzino* standard of “contribution to budgetary efficiency”—which, in any case, is a new test riddled with interpretive difficulties.⁹

A permissive interpretation of the *Spezzino* Judgment and the criterion of “contribution to budgetary efficiency” could potentially deactivate a significant number of secondary State aid law requirements applicable to the remuneration for the provision of public services under the *Almunia Package*¹⁰—particularly the 2012 Decision on public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest¹¹—as well as create further uncertainty as to the relevance of the *Altmarm* doctrine when the commissioning of the provision of public services falls on voluntary, third sector (or) non-profit organisations. Hence, this aspect of the *Spezzino* case deserves some careful consideration.

Moreover, it is worth stressing that the *Spezzino* solution is functionally in contrast with the consolidated line of case law whereby the CJEU has stressed that the non-profit nature of the entity being awarded a public contract is incapable of altering the rules applicable to such an award where such entity engages in economic activity in competition with other (types of) providers. As recently stressed in the *Centro Hospitalar de Setubal* case,¹² there is no reason to exclude from the full application of EU public procurement rules the award of contracts for the provision of public services to entities that “*despite their status*

⁸ *Altmarm Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 95.

⁹ The difficulty with this *Spezzino* test and the potential relaxation if compared with *Altmarm* may be explained with a simple example. If a contracting authority has a budget of 100 for the contracting out of a given public service, a (voluntary sector) provider that can provide the service for a cost of 95 (arguably) contributes to budgetary efficiency. However, if an alternative (for-profit) supplier could have fulfilled the contract at a cost of 90, then there is a clear loss of economic efficiency because the contract is not awarded at the least cost to the community. Such loss of economic efficiency would be particularly relevant in times of austerity and diminishing budgets. In that regard, the interpretation of “budgetary efficiency” will be critical. See §3 below.

¹⁰ For discussion, see A Sanchez-Graells, “The Commission’s Modernization Agenda for Procurement and SGEI”, in E Szyszczak & J van de Gronden (eds), *Financing SGEIs: State Aid, Reform and Modernisation*, Legal Issues of Services of General Interest Series (The Hague, TMC Asser Press / Springer, 2012) 161-181.

¹¹ Decision 2012/21/EU of 20 December 2011 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 [2013] OJ L 7/3.

¹² *Centro Hospitalar de Setubal and SUCH*, C-574/12, EU:C:2014:2004.

as social solidarity institutions carrying out non-profit activities, are not barred from engaging in economic activity in competition with other economic operators”.¹³

Given that the voluntary associations preferred by the Italian scheme contested in *Spezzino* can engage in economic activity of a commercial and productive nature—which, albeit of a theoretical ‘incidental’ nature,¹⁴ actually represents more than 25% of their total average turnover (with some relevant variation, as the average is of around 17% for healthcare services and 30% for social services)¹⁵—this is a second area of potential clash between the approach in *Spezzino* and in the pre-existing case law of the CJEU on the award of public contracts to voluntary and non-profit organisations that also deserves criticism.

This paper focusses on these two sets of issues. It first provides some discussion on the uncertainty created by the *Spezzino* Judgment (§2). It then focusses on the issue of the economic efficiency / cost-effectiveness standard applicable to the commissioning and financing of public services to voluntary, third sector and non-profit entities and contrasts the *Spezzino* and the *Altmark* approaches in detail (§3). Afterwards, it tackles the competitive distortions that can derive from a blanket exemption from procurement rules for third sector, non-profit entities and its incompatibility with the rules of Directive 2014/24 on public procurement (§4). Some tentative conclusions follow (§5).

2. Limited clarity and new uncertainty as to the rules applicable to the procurement and financing of public services provided by voluntary (third sector, non-profit) entities

In view of the *Spezzino* Judgment, the rules applicable to the provision of emergency ambulance services are definitely clear as mud, and such uncertainty carries beyond this specific type of services. In the case at hand, the applicants challenged an Italian law whereby emergency ambulance services must be awarded on a preferential basis and by direct award, without any advertising, to certain voluntary bodies. This rule has, ultimately, constitutional protection in Italy, as “*the Italian Republic has incorporated into its constitution the principle of voluntary action by its citizens. Thus [it] provides that citizens, acting individually or in an association, may participate in activities of public interest with the support of the public authorities, on the basis of the principle of subsidiarity*”.¹⁶

The applicants’ argument was not necessarily of a constitutional nature, but rather that freedom of establishment is unduly restricted by a preferential scheme that completely excludes the tendering out of those ambulance services. They brought forward arguments based on general free movement provisions, public procurement rules and competition rules. The latter arguments based on competition law were not examined because the CJEU

¹³ Centro Hospitalar de Setubal, 40.

¹⁴ *Spezzino*, 14. See also the contribution by Annalisa Aschieri to this special issue for additional discussion.

¹⁵ C Todesco, *La misurazione dei risultati delle organizzazioni non-profit* (PhD thesis, University of Verona, 2011) 38-40, available at <http://hdl.handle.net/11562/350783> (accessed 30.06.15). The data used is relatively outdated, but the insight is striking when contrasted with the implicit assumptions of the CJEU in *Spezzino*.

¹⁶ *Spezzino*, 9.

considered that the public procurement analysis made it unnecessary.¹⁷ Hence, the *Spezzino* Judgment exclusively rested on internal market and public procurement legal grounds.

In my view, if read paragraph by paragraph, the reasoning of the CJEU is accurate and technically precise, but the overall *Spezzino* Judgment is too timid in spelling out the conditions for the application of the “public service exception” under art 106(2) TFEU (or otherwise) to the direct award of emergency ambulance services to voluntary action associations—and, more generally, to third sector, non-profit institutions. I will try to summarise my criticism and doubts as succinctly as possible, as well as to avoid issues generally concerned with fundamental freedoms and their restriction.

2.1. Limited clarity depending on level of application of procurement rules

On the bright side, some positions of the CJEU can be spelled out and actually create some clarity on the scope of rules applicable to decisions to reserve the award of public services contracts for ambulance services. The CJEU delineated three scenarios depending on the applicability of secondary EU public procurement law or not.

(A) When fully applicable, both Directive 2004/18¹⁸ and Directive 2014/24,¹⁹ preclude legislation which provides that the local authorities are to entrust the provision of urgent and emergency ambulance services on a preferential basis and by direct award, without any advertising, to the voluntary bodies mentioned in the agreement.²⁰ However, Directive 2004/18 did not automatically apply in full to ambulance services [see (B) below] and article 10(h) of Directive 2014/24 clearly excludes these contracts from its scope of application.²¹ Hence, this clear position is not that useful in practice because emergency ambulance services are not covered by secondary EU public procurement law provisions. When it comes to other social and special services, the light touch regime in articles 74 to 77 of Directive 2014/24 also imposes limited obligations and actually would cover a reservation system like the one challenged in *Spezzino*, provided certain conditions laid down in article 77 are fulfilled.²² Hence, going forward, it is hard to envisage a clear scenario where the procurement Directives would actually be fully applicable in a way as to *actually* prevent a system of reservation of contracts for this type of social and special services.

¹⁷ *Spezzino*, 64.

¹⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114.

¹⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

²⁰ *Spezzino*, 44.

²¹ *Spezzino*, 8. For an in-depth discussion of the complex maze of rules applicable to ambulance services, see R Caranta, “Mapping the margins of EU public contracts law: Covered, mixed, excluded and special contracts” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Copenhagen, DJØF, 2014) 67, 87 et seq; and *ibid*, “The changes to the public contract directives and the story they tell about how EU law works” (2015) 52(2) *Common Market Law Review* 391, 424 et seq.

²² For criticism, even if focussed on the UK implementation through the *Public Contracts Regulations 2015*, see A Sanchez-Graells, “Reserved contracts for certain services under Reg. 77 Public Contracts Regulations 2015”, *howtocrackanut*, 26.06.2015, available at <http://howtocrackanut.blogspot.co.uk/2015/06/reserved-contracts-for-certain-services.html> (accessed 30.06.15).

(B) Where the Directives are not fully applicable (*ie* where contracts can be tendered under part B services rules under dir 2004/18, or under the special regime for social services under arts 74-76 dir 2014/24), if the contract is of cross-border interest,²³ the general principles of transparency and equal treatment flowing from articles 49 TFEU and 56 TFEU would be applicable²⁴ (as well as their specification in art 18 dir 2014/24, as per art 76 dir 2014/24). In that case, it is also clear that such a preferential scheme would run contrary to the Directives, which are: “*intended to ensure the free movement of services and the opening-up to competition in the Member States which is undistorted and as wide as possible*”.²⁵ However, the CJEU only considers that the scheme would result in indirect discrimination susceptible of objective justification. Indeed, the CJEU considers that

such legislation excludes for-profit entities from an essential part of the market concerned [...] the award, in the absence of any transparency, of a contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but are situated in another Member State. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 TFEU and 56 TFEU (see, to that effect, judgments in *Commission v Ireland*, EU:2007:676, paragraphs 30 and 31; *Commission v Italy*, EU:C:2007:729, paragraph 64; and *Commission v Italy*, EU:C:2008:102, paragraph 66).²⁶

In my view, this analysis based on nationality is too lenient and the CJEU should have focussed on the *direct discrimination* between for-profit and non-profit organisations (regardless of nationality). In the end, an Austrian or French non-profit organisation that had been interested in the contracts for emergency ambulance services in Italy would also *most likely* have been excluded by the Italian scheme challenged in the *Spezzino* case and, consequently, a stronger clash between these measures and the general requirements derived from free movement rules should have been acknowledged.²⁷ Hence, the additional clarity of this analytical framework also seems limited.

(C) Implicitly, then, where the Directives do not apply *at all* but the contract is still of cross-border interest (*ie* the new likely situation under art 10(h) dir 2014/24), the award of the contract is ‘merely’ subjected to the (residual/general) requirements of articles 49 TFEU and 56 TFEU. In that case (not expressly assessed in the *Spezzino* Judgment), the contracting

²³ *Spezzino*, 46-50.

²⁴ *Spezzino*, 45.

²⁵ *Spezzino*, 51.

²⁶ *Spezzino*, 52.

²⁷ *Cfr.* Opinion of Advocate General Wahl of 30 April 2014 in *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:291, paragraph 51. AG Wahl considers that “[t]he wording of [the relevant provision] does not explicitly limit that priority rule to voluntary organisations constituted under Italian law. Nevertheless, such a measure is at least capable of excluding from the tendering procedure entities which are based in other Member States and have not been established as non-profit-making entities.” In my view, however, given the closeness of the Italian local authorities with the entities of the voluntary sector on which they rely, an argument for *de facto* direct discrimination could be easily built.

authority would still need to go through the assessment under the market access test generally applicable to restrictions of freedom of establishment.²⁸

Hence, if the contract is of cross-border interest, there are always concerns and constraints derived from EU law (either general, or the specific rules of public procurement). Nonetheless, they are of varying degrees of intensity and it looks as if under Directive 2014/24, the award of service contracts for emergency ambulance services (exclusively, or for most of their value if the contracts include other sorts of ambulance services) will exclusively be governed by the general rules on freedom of establishment. This is not to say that the rules applicable to their award are clear, but the general framework is set.

2.2. Increased uncertainty as to the rules applicable to the procurement and financing of public services provided by voluntary (third sector, non-profit) entities

On the shady side, once the potential incompatibility with EU public procurement or general free movement law is established (and, really, there seems to be no escape to scenarios A to C discussed above, except if the contract has no cross-border interest whatsoever—and, on that, see the *Ancona* Judgment),²⁹ the CJEU will apply a *Sodemare*-like test because the provision of ambulance services falls within the (very broad) remit of the organisation of healthcare and social security systems.³⁰ In that case, then, it will be particularly important to bear in mind that, as the CJEU has repeatedly stressed, “EU law does not detract from the power of the Member States to organise their public health and social security systems”,³¹ and that “it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved”.³² So far, so good.

On the dark side, however, and significantly departing from the more developed approach in *Altmark* for services of general economic interest, the CJEU has created an economically oriented safeguard that leaves too much room for manoeuvre—particularly due to the substitution of arguments of economic efficiency or cost-effectiveness (*Altmark*) with arguments of budgetary efficiency (*Spezzino*), as discussed below (§3). Implicitly accepting that emergency ambulance services are not of economic interest, but simply social services, the CJEU has created a new test for the assessment of their entrustment and financing by ruling that

²⁸ For two thought provoking attempts to rationalise this test, see E Christodoulidis, “The European Court of Justice and Total Market Thinking” (2013) 14 *German Law Journal* 2005; and MS Jansson & H Kalimo, “De minimis meets ‘market access’: Transformations in the substance – and the syntax – of EU free movement law?” (2014) 51(2) *Common Market Law Review* 523.

²⁹ *Comune di Ancona*, C-388/12, EU:C:2013:734. For discussion, see A Sanchez-Graells, “The Continuing Relevance of the General Principles of EU Public Procurement Law after the Adoption of the 2014 Concessions Directive” (2015) *European Procurement & Public Private Partnership Law Review*, forthcoming. <http://ssrn.com/abstract=2581683>.

³⁰ *Spezzino*, 55-59.

³¹ *Spezzino*, 55.

³² *Spezzino*, 56.

Having regard to the general principle of EU law on the prohibition of abuse of rights (see, by analogy, judgment in *3M Italia*, C-417/10, EU:C:2012:184, paragraph 33), the application of that legislation cannot be extended to cover the wrongful practices of voluntary associations or their members. Thus, the activities of voluntary associations may be carried out by the workforce only within the limits necessary for their proper functioning. As regards the reimbursement of costs, it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity and that volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the associations themselves.³³

In my view, this is way too timid. Indeed, the CJEU constructs a rather weak safeguard by not focussing at all in the economic efficiency or cost-effectiveness of the voluntary activities (which, even on a non-profit, reimbursement basis can be extremely inefficient) and imposes a sort of “anti-fraud” test that misses the point. In order to ensure compatibility with State aid provisions (which should not have been set aside so quickly),³⁴ an efficiency-based test like the one existing in the fourth condition of *Altmark* should have been imposed (see below §3). Moreover, the CJEU shows excessive deference towards the voluntary sector by *de facto* allowing for a special treatment that it had been opposing in previous case law (below §4).

3. How to coordinate *Altmark* and *Spezzino*, if at all possible?

As mentioned above (§1 and §2.2), the *Spezzino* Judgment allows for unlimited financial support to the voluntary sector organisations providing a public service on the basis of compliance with two conditions. First, their activities need to be constrained by a legal and contractual framework that ensures that they “*actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency*”.³⁵ And, second, “*it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity*”.³⁶ The first condition is relevant for its departure from the *Altmark* test for the assessment of the existence of State aid to providers of public services. The second one is relevant as a safeguard for the special treatment afforded under *Spezzino* and will be assessed later (§4).

The creation of a special test of “contribution to budgetary efficiency” in (apparent) derogation of the standard *Altmark* test of comparing the cost structure of the public service provider with that of a “typically efficient undertaking” is inapt (or at least misleading) for the purposes of the application of the public mission exemption under Article 106(2) TFEU and, failing that, also for State aid analysis under Article 107(1) TFEU.³⁷ It is very hard to make sense of what the CJEU actually means by “contribution to budgetary efficiency”. In the *Spezzino* Judgment itself, the assessment of the compatibility of the regime with Articles 49 and 56 TFEU under an objective justification argument based on an indirect discrimination of the undertakings not covered by the preferential regime (above §2.1), is premised on the following concatenation of reasoning and arguments:

³³ *Spezzino*, 62; emphasis added.

³⁴ *Spezzino*, 64.

³⁵ *Spezzino*, 65; emphasis added.

³⁶ *Spezzino*, 62; emphasis added.

³⁷ Similarly, see McGowan (n 5) NA66.

not only the risk of seriously undermining the financial balance of a social security system may constitute per se an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services, but also the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may also fall within one of the derogations, on grounds of public health in so far as it contributes to the attainment of a high level of health protection (see to that effect, judgment in *Stamatelaki*, C-444/05, EU:C:2007:231, paragraphs 30 and 31 and the case-law cited). Thus, measures which aim, first, to meet the objective of guaranteeing in the territory of the Member State concerned sufficient and permanent access to a balanced range of high-quality medical treatment and, secondly, [to] assist in ensuring the desired control of costs and prevention, as far as possible, of any wastage of financial, technical and human resources are also covered (see to that effect judgment in *Commission v Germany*, EU:C:2008:492, paragraph 61).³⁸

a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the [...] services and may help to control costs relating to those services.³⁹

I submit that the exact same arguments would have been made regarding the assessment under Article 106(2) TFEU as to the justification of the exclusion of competition law rules for the purposes of enabling the undertaking to provide the public service it had been entrusted with. In that regard, it seems rather obvious to me that the CJEU seems to assume that simply because they are non-profit and, consequently, they do not (should not) impose mark-ups in the prices (rectius, reimbursement claims) that form the basis of the financial support they receive, voluntary (third sector, non-profit) entities are ideally placed to prevent wastage of financial resources and to help control costs relating to those services. This is hardly acceptable at face value and, as Advocate General Wahl explicitly addressed in his Opinion in *Spezzino*, the legal reservation of the contract and the suppression of *any competition, even only between non-profit organisations*, makes it very plausible that the scheme of direct award of contracts challenged in the *Spezzino* case “would seem usually to work to the detriment of public finances”.⁴⁰ Hence, a substantive test is clearly needed.

At this point, there are two options to give meaning to the test of test of “contribution to budgetary efficiency” derived from *Spezzino*. The first one would be to take the pain of going beyond the literal tenor of the Judgment and the general flair of the case and reconcile the *Spezzino* test with *Altmark* on the simple (economic) basis that a voluntary sector entity can only make a contribution to *actual* budgetary efficiency if it does not require more support than a for-profit organisation. Or, in other words, a voluntary sector is only making a positive “contribution to budgetary efficiency” if the compensation it receives in reimbursement for its direct costs and the corresponding proportion of the indirect costs derived from providing the public service is comparable (*ie* equal or lower) to that “*determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with [material] means [...] 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*”, as per

³⁸ *Spezzino*, 57; emphasis added.

³⁹ *Spezzino*, 59; emphasis added.

⁴⁰ Opinion of AG Wahl in *Spezzino*, paragraph 56. See generally remarks in paragraphs 55 to 59.

Altmark. Or, even more simply, if it is recognised that the only way in which a voluntary (third sector, non-profit) organisation can contribute to budgetary efficiency is by ensuring that *overall* it is equally costly (or cheaper) than an alternative (for-profit) provider. If this was the accepted interpretation of the *Spezzino* test and its coordination with the *Altmark* test, the only criticism for the CJEU would be its almost inscrutable lack of clarity. Moreover, as AG Wahl also stressed, this would seem not to be against the opportunities for voluntary, non-profit organisations to overcome the test⁴¹ due to “*the fact that, in all likelihood, voluntary organisations which merely ask for reimbursement of the expenses incurred, and which are run in a reasonably effective manner, should, in principle, often be able to prevail [...] simply by virtue of their cost-effectiveness*”.⁴²

However, that interpretation seems very unlikely, to say the least. It seems much more feasible that there will be no connection whatsoever between the *Spezzino* and the *Altmark* tests and, consequently, there will be no effective economic assessment of the “contribution to budgetary efficiency” that voluntary sector organisations actually make in the provision of public services. It would not be surprising if such contribution would simply be based on the assumption that, by employing an unknown proportion of unpaid volunteers and not being profit oriented, they allow the State to save financial resources or, if we are to play with words, to prevent, as far as possible, any wastage. If this is the result of the *Spezzino* Judgment, then, Member States will have a strong incentive to restrict or limit their public services markets to local third sector, non-profit providers, with the ensuing negative effects for the internal market derived from the closure of such public service markets to all other potential providers. However, assessing those effects exceeds the scope of this comment. This approach could find political support on the basis of the social market economy approach resulting from the Treaty of Lisbon. However, it will also create significant legal uncertainty in view of the need to overturn significant volumes of case law of the CJEU that have been denying any preferential treatment for non-profit organisation, particularly in the public procurement field. This leads to the analysis of the “anti-fraud” clause created by the CJEU in its *Spezzino* Judgment.

4. Is the voluntary sector, or non-profit economic activity, special all of a sudden?

As a safeguard against the abuse of the favourable treatment that *Spezzino* allows for non-profit organisations in the award of public services contracts (primarily for emergency ambulance services, but not only), the CJEU included an “anti-fraud” requirement whereby other than ensuring a contribution to budgetary efficiency, “*it must be ensured that profit making, even indirect, cannot be pursued under the cover of a voluntary activity*”.⁴³ In my view, this is a reasonable safeguard but it is too vague and, even if interpreted in strict terms, it fails to tackle other risks derived from the favourable treatment to non-profit organisations.

⁴¹ Or, in the context of the AG Opinion, win a tender for public contracts.

⁴² Opinion of AG Wahl in *Spezzino*, paragraph 70. Similarly, see McGowan (n 5) NA65.

⁴³ *Spezzino*, 62; emphasis added.

Firstly, it is hard to understand what the CJEU means by ensuring that even indirect profits are not pursued under the cover of a voluntary activity. If the CJEU is concerned with overall, end of year (distributable) profits, then the threshold is set too low and it is very unlikely that any voluntary, non-profit organisation will ever report having an unspent surplus. However, if the CJEU aimed to impose very strict assessment of whether the voluntary organisation has any operating margin at all, then the threshold is probably too high and disregards the unavoidable fact that cost accounting (by means of which indirect costs are allocated between activities) is not an exact science and, consequently, there is always room for (marginal) indirect profit or margin to be obtained year on year. Moreover, it is also unclear whether a reinvestment of any profits in the provision of the public service would fall foul of the *Spezzino* “anti-fraud” requirement or not. Hence, even in its strict terms, this caveat is problematic and difficult to apply.

Secondly, and more importantly, the CJEU seems to forget its previous case law excluding the possibility of providing favourable treatment to non-profit organisations in the award of public contracts. As already mentioned, its traditional position has been that “*despite their status as social solidarity institutions carrying out non-profit activities [if public sector providers] are not barred from engaging in economic activity in competition with other economic operators*”, they shall not be afforded any special treatment when it comes to the award of public contracts or public (financial) support.⁴⁴ The ultimate argument has always been that the for-profit or non-profit nature of undertakings is irrelevant for the purposes of the application of EU public procurement⁴⁵ and competition law. However, the *Spezzino* Judgment overlooks this issue completely and opens new roads for the creation of a special public procurement regime for the non-profit sector that may be magnified if Member States make an intense use of the light touch regime in Articles 74 to 77 of Directive 2014/24—and, in particular, of the possibility to reserve contracts under Article 77 thereof.

5. Tentative conclusion

As a brief conclusion, it seems clear to me that the *Spezzino* Judgment has created a significant area of uncertainty for the application of EU public procurement and competition law. Its impact on the effectiveness of the State aid rules for public services can be very significant and not necessarily positive, and it can also contribute to the creation of a public procurement black hole when it comes to the award of public services contracts. Consequently, in my view, it is an unwelcome development of EU economic law and it should be reversed soon. In any case, there are possibilities for the creative realignment of *Spezzino* and previous case law, particularly *Altmark*, along the lines discussed above. National courts would be well advised to explore those avenues in order to maintain a much needed economic rationale in the development of the law applicable to this important part of public sector provision and, ultimately, towards contributing to the financial viability of the welfare State.

⁴⁴ Centro Hospitalar de Setubal, 40.

⁴⁵ In that regard, see Opinion of AG Wahl in *Spezzino*, paragraph 24.