

PART VI: RULES ON PUBLIC SERVICE COMPENSATION, STATE OWNERSHIP OF ENTERPRISES AND AID TO PUBLIC ENTERPRISES

Application of the state aid rules to compensation granted for the provision of services of general economic interest¹

1. PURPOSE AND SCOPE

1. Services of general economic interest (SGEIs) play a central role in promoting social and territorial cohesion. The Contracting Parties to the EEA Agreement, each within their respective powers, must take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.
2. Certain SGEIs can be provided by public or private undertakings² without specific financial support from EFTA States' authorities. Other services can only be provided if the authority concerned offers financial compensation to the provider. In the absence of specific EEA rules, EFTA States are generally free to determine how their SGEIs should be organised and financed.
3. The purpose of this Chapter is to clarify the key concepts underlying the application of the state aid rules to public service compensation³. It will therefore focus on those State aid requirements that are most relevant for public service compensation.
4. On 20 December 2011, the European Commission (the Commission) issued a Commission Decision 2012/21/EU 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 interest⁴ (Decision 2012/21/EU), which declares certain types of SGEI compensation constituting state aid to be compatible with the Treaty on the Functioning of the European Union (the Treaty) pursuant to Article 106(2) of the Treaty and exempts them from the notification obligation under Article 108(3) of the Treaty. Decision 2012/21/EU is envisaged to be incorporated into the EEA Agreement within the shortest possible time-limits. In parallel with this

¹ This Chapter corresponds to the *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*, OJ C 8, 11.1.2012, p. 4.

² In accordance with Article 125 of the EEA Agreement, the Agreement in no way prejudices the rules of the Contracting Parties governing the system of property ownership. Consequently, the competition rules do not discriminate against companies based on whether they are in public or private ownership.

³ The European Commission has issued further guidance in the *Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, SEC(2010) 1545 final, 7.12.2010.

⁴ OJ L 7, 11.1.2012, p. 3.

Chapter, the EFTA Surveillance Authority (the Authority) has adopted a Framework for state aid in the form of public service compensation (the Framework), which sets out the conditions under which state aid for SGEIs not covered by Decision 2012/21/EU can be declared compatible under Article 59(2) of the EEA Agreement. The Commission also envisages adopting an SGEI-specific *de minimis* Regulation clarifying that certain compensation measures do not constitute state aid within the meaning of Article 107 of the Treaty (the Regulation).⁵ Once adopted, the Regulation will be incorporated into the EEA Agreement.

5. This Chapter is without prejudice to the application of other provisions of EEA law, in particular those relating to public procurement and requirements flowing from the EEA Agreement, including from sectoral legislation incorporated into the Agreement. Where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with EEA law governing public procurement, contained in Annex XVI to the EEA Agreement. Also in cases where the directives on public procurement are wholly or partially inapplicable (for example, for service concessions and service contracts listed in Annex IIB to Directive 2004/18/EC⁶, including different types of social services), the award may nevertheless have to meet requirements of the EEA Agreement on transparency, equality of treatment, proportionality and mutual recognition⁷.
6. In addition to the issues addressed in this Chapter, Decision 2012/21/EU and the Framework, the Authority will answer individual questions that arise in the context of the application of the state aid rules to SGEIs.⁸
7. This Chapter is without prejudice to the relevant case-law of the Court of Justice of the European Union (the Court of Justice) and the EFTA Court.

2. GENERAL PROVISIONS RELATING TO THE CONCEPT OF STATE AID

2.1. Concepts of undertaking and economic activity

8. Based on Article 61(1) of the EEA Agreement, the state aid rules generally only apply where the recipient is an ‘undertaking’. Whether or not the provider of a service of general interest is to be regarded as an undertaking is therefore fundamental for the application of the state aid rules.

⁵ A draft of which has been published in OJ C 8, 11.1.2012, p. 23.

⁶ Incorporated at point 2 of Annex XVI to the EEA Agreement.

⁷ Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745, paragraph 60 and Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2).

⁸ Questions can also be addressed to the Commission through its Interactive Information Service on Services of General Interest, which is accessible on the Commission’s website http://ec.europa.eu/services_general_interest/registration/form_en.html.

2.1.1. *General principles*

9. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed⁹. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 61(1) of the EEA Agreement. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the state aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too¹⁰. Where this is not the case, non-profit providers remain of course entirely outside of state aid control.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

10. Two separate legal entities may be considered to form one economic unit for the purposes of the application of state aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice looks at the existence of a controlling share or functional, economic and organic links¹¹. On the other hand, an entity that in itself does not provide goods or services on a market is not an undertaking for the simple fact of holding shares, even a majority shareholding, when the shareholding gives rise only to the exercise of the rights attached to the status of shareholder or member as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset¹².

⁹ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

¹⁰ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125, paragraph 21; Case C-244/94 *FFSA and Others* [1995] ECR I-4013; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28.

¹¹ Case C-480/09 P *AceaElectrabel Produzione SpA v Commission* [2010] ECR paragraphs 47 to 55; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SPA and Others* [2006] ECR I-289, paragraph 112.

¹² Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SPA and Others* [2006] ECR I-289, paragraphs 107-118 and 125.

11. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity¹³.
12. The question whether a market exists for certain services may depend on the way those services are organised in the EFTA State concerned¹⁴. The state aid rules only apply where a certain activity is provided in a market environment. The economic nature of certain services can therefore differ from one EFTA State to another. Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa.
13. The decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house¹⁵ has no relevance for the economic nature of the activity.¹⁶
14. Since the distinction between economic and non-economic services depends on political and economic specificities in a given EFTA State, it is not possible to draw up an exhaustive list of activities that *a priori* would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. The following paragraphs instead seek to clarify the distinction with respect to a number of important areas.
15. In the absence of a definition of economic activity in the EEA Agreement, the case-law appears to offer different criteria for the application of internal market rules and for the application of competition law¹⁷.

¹³ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, paragraph 75.

¹⁴ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

¹⁵ See Opinion of Advocate General Geelhoed in Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-2999, paragraphs 110 to 116; Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1, Articles 5(2) and 6(1); Commission Decision 2011/501/EU of 23 February 2011 on State aid C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr, OJ L 210, 17.8.2011, p. 1, paragraphs 208-209.

¹⁶ Neither has it any relevance for the question whether the service can be defined as SGEI; see section 3.2.

¹⁷ Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, paragraphs 30 to 33; Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 66, 72, 74 and 75; Opinion

2.1.2. *Exercise of public powers*

16. It follows from the Court of Justice case-law that Article 107 of the Treaty, which corresponds to Article 61 of the EEA Agreement, does not apply where the State acts ‘*by exercising public power*’¹⁸ or where authorities emanating from the State act ‘*in their capacity as public authorities*’¹⁹. An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject²⁰. Generally speaking, unless the EFTA State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to:
- (a) the army or the police;
 - (b) air navigation safety and control²¹;
 - (c) maritime traffic control and safety²²;
 - (d) anti-pollution surveillance²³; and
 - (e) the organisation, financing and enforcement of prison sentences²⁴.

2.1.3. *Social security*

17. Whether schemes in the area of social security are to be classified as involving an economic activity depends on the way they are set up and structured. In essence, the Court of Justice and the General Court distinguish between schemes based on the principle of solidarity and economic schemes.
18. The Court of Justice and the General Court have used a range of criteria to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity. A bundle of factors can be relevant in this respect:
- (a) whether affiliation with the scheme is compulsory²⁵;

of Advocate General Poiares Maduro delivered on 10 November 2005 in Case C-205/03 P *FENIN* [2006] ECR I-6295, paragraphs 50 and 51.

¹⁸ Case C-118/85 *Commission v Italy*, paragraphs 7 and 8.

¹⁹ Case C-30/87 *Bodson/Pompes funèbres des régions libérées* [1988] ECR I-2479, paragraph 18.

²⁰ See, in particular, Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 30.

²¹ Case C-364/92 *SAT/Eurocontrol*, paragraph 27; Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

²² Commission Decision of 16 October 2002 in Case N 438/02 — Belgium — Aid to port authorities, OJ C 284, 21.11.2002.

²³ Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

²⁴ Commission Decision in Case N 140/2006 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006.

- (b) whether the scheme pursues an exclusively social purpose²⁶;
 - (c) whether the scheme is non-profit²⁷;
 - (d) whether the benefits are independent of the contributions made²⁸;
 - (e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured²⁹; and
 - (f) whether the scheme is supervised by the State³⁰.
19. Such solidarity-based schemes must be distinguished from economic schemes³¹. In contrast with solidarity-based schemes, economic schemes are regularly characterised by:
- (a) optional membership³²;
 - (b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme)³³;
 - (c) their profit-making nature³⁴; and
 - (d) the provision of entitlements which are supplementary to those under a basic scheme³⁵.
20. Some schemes combine features of both categories. In such cases, the classification of the scheme depends on an analysis of different elements and their respective importance³⁶.

²⁵ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 13.

²⁶ Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraph 45.

²⁷ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraphs 47 to 55.

²⁸ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraphs 15 to 18.

²⁹ Case C-218/00 *Cisal and INAIL*, paragraph 40.

³⁰ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraph 14; Case C-218/00 *Cisal and INAIL*, paragraphs 43 to 48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband*, paragraphs 51 to 55.

³¹ See, in particular, Case C-244/94 *FFSA and Others*, paragraph 19.

³² Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 80-87.

³³ Case C-244/94 *FFSA and Others*, paragraphs 9 and 17 to 20; Case C-67/96 *Albany*, paragraphs 81 to 85; see also Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025, paragraphs 81 to 85, Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, paragraphs 71 to 75, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, paragraphs 114 and 115.

³⁴ Joined Cases C-115/97 to C-117/97 *Brentjens*.

³⁵ Joined Cases C-180/98 to C-184/98 *Pavlov and Others*.

³⁶ Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

2.1.4. *Health care*

21. In the EEA, the health care systems differ significantly between the States. The degree to which different health care providers compete with each other in a market environment largely depends on these national specificities.
22. In some national systems, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity³⁷. Such hospitals are directly funded from social security contributions and other state resources and provide their services free of charge to affiliated persons on the basis of universal coverage³⁸. The Court of Justice and the General Court have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings³⁹.
23. Where that structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another non-economic service, are not of an economic nature. An organisation that purchases goods — even in large quantities — for the purpose of offering a non-economic service does not act as an undertaking simply because it is a purchaser in a given market⁴⁰.
24. In other national systems, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance⁴¹. In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic.
25. The Court of Justice and the General Court have also clarified that health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity⁴². The same principles would apply as regards independent pharmacies.

2.1.5. *Education*

26. Case-law has established that public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. In this regard, the Court of Justice has indicated that the State,

³⁷ Based on the case-law of the European Courts, a prominent example is the Spanish National Health System (see Case T-319/99 *FENIN* [2003] ECR II-357).

³⁸ Depending on the overall characteristics of the system, charges which only cover a small fraction of the true cost of the service may not affect its classification as non-economic.

³⁹ Case T-319/99 *FENIN* [2003] ECR II-357, paragraph 39.

⁴⁰ Case T-319/99 *FENIN*, paragraph 40.

⁴¹ See, for example, Case C-244/94 *FFSA*, Case C-67/96 *Albany*, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens*, and Case C-219/97 *Drijvende Bokken*.

⁴² See Joined Cases C-180 to C-184/98 *Pavlov and Others*, paragraphs 75 and 77.

“by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents ... does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas”⁴³.

27. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse⁴⁴. These principles can cover public educational services such as vocational training⁴⁵, private and public primary schools⁴⁶ and kindergartens⁴⁷, secondary teaching activities in universities⁴⁸ and the provision of education in universities⁴⁹.
28. Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain systems, public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.
29. In the State Aid Guidelines on aid for research and development and innovation⁵⁰, the Authority has clarified that certain activities of universities and research organisations fall outside the ambit of the state aid rules. This concerns the primary activities of research organisations, namely:
- (a) education for more and better skilled human resources;
 - (b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; and
 - (c) the dissemination of research results.

⁴³ See, among others, Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 68. See also Decision of the Commission of 25.4.2001, N118/00 Subvention publiques aux clubs sportifs professionnels and decision of the EFTA Surveillance Authority in Case 68123 Norway Nasjonal digital laeringsarena, 12.10.2011, p. 9.

⁴⁴ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁴⁵ Case 263/86 *Humbel* [1988] ECR-5365.

⁴⁶ Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-76/05 *Schwartz* [2007] ECR-6849.

⁴⁷ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁴⁸ Case C-281/06 *Jundt* [2007] ECR I-12231.

⁴⁹ Case 109/92 *Wirth* [1993] ECR I-6447.

⁵⁰ OJ L 305, 19.11.2009, p. 1 and EEA Supplement No 60.

30. The Authority has also clarified that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organisation) are non-economic where those activities are of an internal nature⁵¹ and all income is reinvested in the primary activities of the research organisations concerned⁵².

2.2. State resources

31. Only advantages granted directly or indirectly through state resources can constitute state aid within the meaning of Article 61 of the EEA Agreement⁵³. Advantages financed from private resources may have the effect of strengthening the position of certain undertakings but do not fall within the scope of Article 61 of the EEA Agreement.
32. This transfer of state resources may take many forms such as direct grants, tax credits and benefits in kind. In particular, the fact that the State does not charge market prices for certain services constitutes a waiver of state resources. In its judgment in Case C-482/99 *France v Commission*⁵⁴, the Court of Justice also confirmed that the resources of a public undertaking constitute state resources within the meaning of Article 107 of the Treaty, corresponding to Article 61 of the EEA Agreement, because the public authorities are capable of controlling these resources. In cases where an undertaking entrusted with the operation of an SGEI is financed by resources provided by a public undertaking and this financing is imputable to the State, such financing is thus capable of constituting state aid.
33. The granting, without tendering, of licences to occupy or use public domain, or of other special or exclusive rights having an economic value, may imply a waiver of state resources and create an advantage for the beneficiaries⁵⁵.
34. EFTA States may, in some instances, finance an SGEI from charges or contributions paid by certain undertakings or users, the revenue from which is transferred to the undertakings entrusted with the operation of that SGEI. This type of financing

⁵¹ According to footnote 26 of the Chapter on aid for research and development and innovation of the State Aid Guidelines, 'internal nature' means a situation where the management of the knowledge of the research organisation is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.

⁵² See paragraphs 3.1.1 and 3.1.2 of the Chapter on aid for research and development and innovation.

⁵³ Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 16. See also Case C-379/98, *PreussenElektra v Schleswig* [2001] ECR I-2099.

⁵⁴ Case C-482/99 *France v Commission* [2002] ECR I-4397.

⁵⁵ Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG* [2003] ECR I-05197, paragraphs 92 and 93; Case T-475/04 *Bouygues and Bouygues Télécom SA v Commission* [2007] ECR II-02097, paragraphs 101, 104, 105 and 111.

arrangement has been examined by the Court of Justice, in particular in its judgment in Case 173/73 *Italy v Commission*⁵⁶, in which it held that:

"As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article [107 of the Treaty], even if they are administered by institutions distinct from the public authorities."

35. Similarly, in its judgment in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest*⁵⁷, the Court of Justice confirmed that measures financed through parafiscal charges constitute measures financed through state resources.
36. Accordingly, compensatory payments for the operation of SGEIs which are financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation are compensatory payments made through state resources.

2.3. Effect on trade

37. In order to be caught by Article 61 of the EEA Agreement, public service compensation must affect or threaten to affect trade between Contracting Parties. Such an effect generally presupposes the existence of a market open to competition. Therefore, where markets have been opened up to competition either by the EEA Agreement or by national legislation or *de facto* by economic development, state aid rules apply. In such situations EFTA States retain their discretion as to how to define, organise and finance SGEIs, subject to state aid control where compensation is granted to the SGEI provider, be it private or public (including in-house). Where the market has been reserved for a single undertaking (including an in-house provider), the compensation granted to that undertaking is equally subject to state aid control. In fact, where economic activity has been opened up to competition, the decision to provide the SGEI by methods other than through a public procurement procedure that ensures the least cost to the community may lead to distortions in the form of preventing entry by competitors or making easier the expansion of the beneficiary in other markets. Distortions may also occur in the input markets. Aid granted to an undertaking operating on a non-liberalised market may affect trade if the recipient undertaking is also active on liberalised markets⁵⁸.

⁵⁶ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16. See also Case 78/79 *Steinike* [1977] ECR 595, paragraph 21, Case C206/06, *Essent Netwerk* [2008] 5497, paragraphs 47, 57 and 96.

⁵⁷ *Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice Port* [1992] ECR I-1847, paragraph 35. See also Joined Cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243, paragraph 26.

⁵⁸ Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Mauro Alzetta and others v Commission* [2000] ECR II-2319, paragraphs 143-147.

38. Aid measures can also have an effect on trade where the recipient undertaking does not itself participate in cross-border activities. In such cases, domestic supply may be maintained or increased, with the consequence that the opportunities for undertakings established in other Contracting Parties to offer their services in that EFTA State are reduced⁵⁹.
39. According to the case-law of the Court of Justice, there is no threshold or percentage below which trade between Contracting Parties can be regarded as not having been affected⁶⁰. The relatively small amount of aid or the relatively small size of the recipient undertaking does not *a priori* mean that trade between Contracting Parties may not be affected.
40. On the other hand, the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Contracting Parties. Examples are:
- (a) swimming pools to be used predominantly by the local population⁶¹;
 - (b) local hospitals aimed exclusively at the local population⁶²;
 - (c) local museums unlikely to attract cross-border visitors⁶³; and
 - (d) local cultural events, whose potential audience is restricted locally⁶⁴.
41. Finally, the Authority does not have to examine all financial support granted by EFTA States. Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid⁶⁵, stipulates that aid amounting to less than EUR 200 000 per undertaking over any period of three years is not caught by Article 61(1) of the EEA Agreement. Specific *de minimis* thresholds apply in the transport sector⁶⁶ and the Commission envisages adopting a Regulation with a specific *de minimis* threshold for local services of general economic interest, which will be incorporated into the EEA Agreement.

⁵⁹ See, in particular, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

⁶⁰ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, paragraph 81.

⁶¹ Commission Decision in Case N 258/2000 — Germany — Leisure Pool Dorsten, OJ C 172, 16.6.2001, p. 16.

⁶² Commission Decision in Case N 543/2001 — Ireland — Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4.

⁶³ Commission Decision in Case N 630/2003 — Italy — Local museums — Sardinia, OJ C 275, 8.12.2005, p. 3.

⁶⁴ Commission Decision in Case N 257/2007 — Spain — Grants for theatrical productions in the Basque Country, OJ C 173, 26.7.2007, p. 2.

⁶⁵ OJ L 379, 28.12.2006, p. 5, incorporated at point 1ea of Annex XV to the EEA Agreement.

⁶⁶ See Article 2(2) of Regulation (EC) No 1998/2006 for transport.

3. CONDITIONS UNDER WHICH PUBLIC SERVICE COMPENSATION DOES NOT CONSTITUTE STATE AID

3.1. The criteria established by the Court of Justice

42. The Court of Justice, in its *Altmark* judgment⁶⁷, provided further clarification regarding the conditions under which public service compensation does not constitute state aid owing to the absence of any advantage.

43. According to the Court of Justice,

“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 [107(1) of the Treaty]. However, for such compensation to escape qualification as State aid in a particular case, a number of conditions must be satisfied.

... First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. ...

... Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. ... Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article [107(1) of the Treaty].

... Third, 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 ...

... Fourth, where the undertaking which is to discharge public service obligations, in a specific case, 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 necessary public service requirements, would have incurred in discharging those

⁶⁷ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”⁶⁸.

44. Sections 3.2 to 3.6 below will address the different requirements established in the *Altmark* case-law, namely the concept of a service of general economic interest for the purposes of Article 61 of the EEA Agreement⁶⁹, the need for an entrustment act⁷⁰, the obligation to define the parameters of compensation⁷¹, the principles concerning the avoidance of overcompensation⁷² and the principles concerning the selection of the provider⁷³.

3.2. Existence of a service of general economic interest

45. The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the EFTA State concerned. The Court of Justice has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities⁷⁴.
46. In the absence of specific EEA rules defining the scope for the existence of an SGEI, EFTA States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Authority’s competence in this respect is limited to checking whether the EFTA State has made a manifest error when defining the service as an SGEI⁷⁵ and to assessing any state aid involved in the compensation. Where specific EEA rules exist, the EFTA States’ discretion is further bound by those rules, without prejudice to the Authority’s duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of state aid control.
47. The first *Altmark* criterion requires the definition of an SGEI task. This requirement coincides with that of Article 59(2) of the EEA Agreement⁷⁶. It transpires from Article 59(2) of the EEA Agreement that undertakings entrusted with the operation of SGEIs are undertakings entrusted with ‘a particular task’⁷⁷. Generally speaking,

⁶⁸ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, paragraphs 87 to 93.

⁶⁹ See section 3.2.

⁷⁰ See section 3.3.

⁷¹ See section 3.4.

⁷² See section 3.5.

⁷³ See section 3.6.

⁷⁴ Cases C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; Case C-242/95 *GT-Link A/S* [1997] ECR I-4449, paragraph 53; and Case C-266/96, *Corsica Ferries France SA* [1998] ECR I-3949, paragraph 45.

⁷⁵ Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraphs 166-169 and 172; Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216.

⁷⁶ Case T-289/03 *British United Provident Association Ltd (BUPA) v Commission* [2008], ECR II-81, paragraphs 171 and 224.

⁷⁷ See, in particular, Case C-127/73 *BRT v SABAM* [1974] ECR-313.

the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions⁷⁸. Applying a general interest criterion, EFTA States or the EEA Agreement may attach specific obligations to such services.

48. The Authority thus considers that it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions⁷⁹. As for the question of whether a service can be provided by the market, the Authority's assessment is limited to checking whether the EFTA State has made a manifest error.
49. An important example of this principle is the broadband sector, for which the Authority has already given clear indications as to the types of activities that can be regarded as SGEIs. Most importantly, the Authority considers that in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as an SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions⁸⁰.
50. The Authority also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole.

3.3. Entrustment act

51. For Article 59(2) of the EEA Agreement to apply, the operation of an SGEI must be entrusted to one or more undertakings. The undertakings in question must therefore have been entrusted with a special task by the State⁸¹. Also the first *Altmark* criterion requires that the undertaking has a public service obligation to discharge. Accordingly, in order to comply with the *Altmark* case-law, a public service assignment is necessary that defines the obligations of the undertakings in question and of the authority.

⁷⁸ See, in particular, Article 2 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

⁷⁹ Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 71.

⁸⁰ For more detailed provisions see paragraphs 24 to 30 of the Chapter on the application of state aid rules in relation to rapid deployment of broadband networks in the State Aid Guidelines, not yet published in the OJ.

⁸¹ See, in particular, Case C-127/73 *BRT v SABAM* [1974] ECR-313.

52. The public service task must be assigned by way of an act that, depending on the legislation in EFTA States, may take the form of a legislative or regulatory instrument or a contract. It may also be laid down in several acts. Based on the approach taken by the Commission and the Authority in such cases, the act or series of acts must at least specify:
- (a) the content and duration of the public service obligations;
 - (b) the undertaking and, where applicable, the territory concerned;
 - (c) the nature of any exclusive or special rights assigned to the undertaking by the authority in question;
 - (d) the parameters for calculating, controlling and reviewing the compensation; and
 - (e) the arrangements for avoiding and recovering any overcompensation.
53. The involvement of the service provider in the process by which it is entrusted with a public service task does not mean that that task does not derive from an act of public authority, even if the entrustment is issued at the request of the service provider⁸². In some national systems, it is not uncommon for authorities to finance services which were developed and proposed by the provider itself. However, the national authority has to decide whether it approves the provider's proposal before it may grant any compensation. It is irrelevant whether the necessary elements of the entrustment act are inserted directly into the decision to accept the provider's proposal or whether a separate legal act, for example, a contract with the provider, is put in place.
- 3.4. Parameters of compensation**
54. The parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings.
55. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula (for example, a certain price per day, per meal, per passenger or per number of users). What matters is only that it is clear from the outset how the compensation is to be determined.
56. Where the national authority decides to compensate all cost items of the provider, it must determine at the outset how those costs will be determined and calculated. Only the costs directly associated with the provision of the SGEI can be taken into

⁸² Case T-17/02 *Fred Olsen*, paragraph 188.

account in that context. All the revenue accruing to the undertaking from the provision of the SGEI must be deducted.

57. Where the undertaking is offered a reasonable profit as part of its compensation, the entrustment act must also establish the criteria for calculating that profit.
58. Where a review of the amount of compensation during the entrustment period is provided for, the entrustment act must specify the arrangements for the review and any impact it may have on the total amount of compensation.
59. If the SGEI is assigned under a tendering procedure, the method for calculating the compensation must be included in the information provided to all the undertakings wishing to take part in the procedure.

3.5. Avoidance of overcompensation

60. According to the third *Altmark* criterion, the compensation must not 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. Therefore any mechanism concerning the selection of the service provider must be decided in such a way that the level of compensation is determined on the basis of these elements.
61. Reasonable profit should be taken to mean the rate of return on capital⁸³ that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts under competitive conditions (for example, contracts awarded under a tender). In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, reference can be made to comparable undertakings situated in other Contracting Parties, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the EFTA States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains cannot be achieved at the expense of the quality of the service provided.

⁸³ The rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract.

3.6. Selection of provider

62. In accordance with the fourth *Altmark* criterion, the compensation offered must either be the result of a public procurement procedure which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means.

3.6.1. Amount of compensation where the SGEI is assigned under an appropriate tendering procedure

63. The simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁸⁴ and 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 contracts⁸⁵, as specified below. As indicated in paragraph 5, the conduct of such a public procurement procedure is often a mandatory requirement under existing EEA rules.

64. Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid.

65. Based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of state aid where it allows for the selection of the tenderer capable of providing the service at "the least cost to the community".

66. Concerning the characteristics of the tender, an open⁸⁶ procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted⁸⁷ procedure can satisfy the fourth *Altmark* criterion, unless interested operators are prevented to tender without valid reasons. On the other hand, a competitive dialogue⁸⁸ or a negotiated procedure with prior publication⁸⁹ confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth *Altmark* criterion in exceptional cases. The negotiated procedure without

⁸⁴ OJ L 134, 30.4.2004, p. 114, incorporated at point 4 of Annex XVI to the EEA Agreement.

⁸⁵ OJ L 134, 30.4.2004, p. 1, incorporated at point 2 of Annex XVI to the EEA Agreement.

⁸⁶ Article 1(11)(a) of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

⁸⁷ Article 1(11)(b) of Directive 2004/18/EC, Article 1(9)(b) of Directive 2004/17/EC.

⁸⁸ Article 29 of Directive 2004/18/EC.

⁸⁹ Article 30 of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

publication of a contract notice⁹⁰ cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the least cost to the community.

67. As to the award criteria, the "lowest price"⁹¹ obviously satisfies the fourth *Altmark* criterion. Also the "most economically advantageous tender"⁹² is deemed sufficient, Provided that the award criteria, including environmental⁹³ or social ones, are closely related to the subject-matter of the service provided and allow for the most economically advantageous offer to match the value of the market⁹⁴. Where such circumstances occur, a claw-back mechanism may be appropriate to minimise the risk of overcompensation ex ante. The awarding authority is not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in its award decision.
68. Finally, there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition. This could be the case, for example, due to the particularities of the service in question, existing intellectual property rights or necessary infrastructure owned by a particular service provider. Similarly, in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community.

3.6.2. *Amount of compensation where the SGEI is not assigned under a tendering procedure*

69. Where a generally accepted market remuneration exists for a given service, that market remuneration provides the best benchmark for the compensation in the absence of a tender⁹⁵.
70. Where no such market remuneration exists, the amount of compensation must be determined on the basis of an analysis of the costs that 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

⁹⁰ Article 31 of Directive 2004/18/EC. See also Article 40(3) of Directive 2004/17/EC.

⁹¹ Article 53(1)(b) of Directive 2004/18/EC, Article 55 (1)(b) of Directive 2004/17/EC.

⁹² Article 53(1)(a) of Directive 2004/18/EC, Article 55(1)(a) of Directive 2004/17/EC; Case 31/87 *Beentjes* [1988] ECR 4635 and Case C-225/98 *Commission v France* [2000] ECR I-7445; Case C-19/00 *SIAC Construction* [2001] ECR I-7725.

⁹³ See for example a new edition of "Buying Green! A Handbook on Green public procurement", available at: http://ec.europa.eu/environment/gpp/buying_handbook_en.htm.

⁹⁴ In other words, the criteria should be defined in such a way as to allow for an effective competition that minimises the advantage for the successful bidder.

⁹⁵ See for example Commission Decision in Case C 49/2006 — Italy — State aid scheme implemented by Italy to remunerate Poste Italiane for distributing postal savings certificates, OJ L 189, 21.7.2009, p. 3.

discharging those obligations. The aim is to ensure that the high costs of an inefficient undertaking are not taken as the benchmark.

71. As regards the concept of 'well run undertaking' and in the absence of any official definition, the EFTA States should apply objective criteria that are economically recognised as being representative of satisfactory management. The Authority considers that simply generating a profit is not a sufficient criterion for deeming an undertaking to be 'well run'. Account should also be taken of the fact that the financial results of undertakings, particularly in the sectors most often concerned by SGEIs, may be strongly influenced by their market power or by sectoral rules.
72. The Authority takes the view that the concept of 'well run undertaking' entails compliance with the national or international accounting standards in force. The EFTA States may base their analysis, among other things, on analytical ratios representative of productivity (such as turnover to capital employed, total cost to turnover, turnover per employee, value added per employee or staff costs to value added). EFTA States can also use analytical ratios relating to the quality of supply as compared with user expectations. An undertaking entrusted with the operation of an SGEI that does not meet the qualitative criteria laid down by the EFTA State concerned does not constitute a well run undertaking even if its costs are low.
73. Undertakings with such analytical ratios representative of efficient management may be regarded as representative typical undertakings. However, the analysis and comparison of the cost structures must take into account the size of the undertaking in question and the fact that in certain sectors undertakings with very different cost structures may exist side by side.
74. The reference to the costs of a 'typical' undertaking in the sector under consideration implies that there are a sufficient number of undertakings whose costs may be taken into account. Those undertakings may be located in the same EFTA State or in another Contracting Party. However, the Authority takes the view that reference cannot be made to the costs of an undertaking that enjoys a monopoly position or receives public service compensation granted on conditions that do not comply with EEA law, as in both cases the cost level may be higher than normal. The costs to be taken into consideration are all the costs relating to the SGEI, that is to say, the direct costs necessary to discharge the SGEI and an appropriate contribution to the indirect costs common to both the SGEI and other activities.
75. If the EFTA State can show that the cost structure of the undertaking entrusted with the operation of the SGEI corresponds to the average cost structure of efficient and comparable undertakings in the sector under consideration, the amount of compensation that will allow the undertaking to cover its costs, including a reasonable profit, is deemed to comply with the fourth *Altmark* criterion.
76. The expression 'undertaking adequately provided with material means' should be taken to mean an undertaking which has the resources necessary for it to discharge

immediately the public service obligations incumbent on the undertaking to be entrusted with the operation of the SGEI.

77. 'Reasonable profit' should be taken to mean the rate of return on capital⁹⁶ that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk, as provided in section 3.5.

⁹⁶ The rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract.