

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

Framework for state aid in the form of public service compensation¹

1 PURPOSE AND SCOPE

1. For certain services of general economic interest (SGEIs) to operate on the basis of principles and under conditions that enable them to fulfil their missions, financial support from the public authorities may prove necessary where revenues accruing from the provision of the service do not allow the costs resulting from the public service obligation to be covered.
2. It follows from the case-law of the Court of Justice of the European Union² that public service compensation does not constitute state aid within the meaning of Article 61(1) of the EEA Agreement if it fulfils a certain number of conditions³. Where those conditions are met, Article 1 of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “Surveillance and Court Agreement”) does not apply.
3. Where public service compensation does not meet those conditions, and to the extent the general criteria for the applicability of Article 61(1) of the EEA Agreement are satisfied, such compensation constitutes state aid and is subject to Articles 59 and 61 of the EEA Agreement and Article 1 of Part I of Protocol 3 to the Surveillance and Court Agreement.
4. In its Chapter on the application of the state aid rules to compensation granted for the provision of services of general economic interest⁴, the EFTA Surveillance Authority (the “Authority”) has clarified the conditions under which public service

¹ This Chapter corresponds to the European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

² Judgments in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (‘Altmark’) [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243.

³ In its judgment in *Altmark*, the Court of Justice held that public service compensation does not constitute state aid if four cumulative criteria are met. 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. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, 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 the relevant means, would have incurred.

⁴ Adopted in parallel with this Framework.

compensation is to be regarded as state aid. Furthermore, the Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest⁵ which will be incorporated into the EEA Agreement, will set out the conditions under which small amounts of public service compensation should be deemed not to affect trade between EEA States and/or not to distort or threaten to distort competition. In those circumstances, compensation is not caught by Article 61(1) of the EEA Agreement and consequently does not fall under the notification procedure provided for in Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

- 5. Article 59(2) of the EEA Agreement provides the legal basis for assessing the compatibility of state aid for SGEIs. It states that undertakings entrusted with the operation of SGEIs or having the character of a revenue-producing monopoly are subject to the rules contained in the EEA Agreement, in particular to the rules on competition. However, Article 59(2) of the EEA Agreement provides for an exception from the rules contained in the EEA Agreement insofar as the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. This exception only applies where the development of trade is not affected to such an extent as would be contrary to the interests of the Contracting Parties.
- 6. When incorporated into the EEA Agreement, 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 interest (“Decision 2012/21/EU”)⁶ will lay down the conditions under which certain types of public service compensation are to be regarded as compatible with the internal market pursuant to Article 59(2) of the EEA Agreement and exempt from the requirement of prior notification under Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement⁷.
- 7. The principles set out in this Framework apply to public service compensation only in so far as it constitutes state aid not covered by Decision 2012/21/EU. Such compensation is subject to the prior notification requirement under Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement. This Framework spells out the conditions under which such state aid can be found compatible with the internal market pursuant to Article 59(2) of the EEA Agreement. It replaces the Chapter of the Authority’s Guidelines on state aid in the form of public service compensation⁸.

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

⁶ OJ L 7, 11.1.2012, p. 3.

⁷ Until the Decision 2012/21/EU has been incorporated into the EEA Agreement, such aid will, unless exempt from the notification obligation on the basis of Commission Decision 2005/842/EC of 28.11.2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest incorporated at point 1h of Annex XV of the EEA Agreement, be subject to the general notification requirements as stipulated in Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

⁸ OJ L 109, 26.4.2007, p. 44 and EEA Supplement No 20, 26.4.2007, p. 1.

8. The principles set out in this Framework apply to public service compensation in the field of air and maritime transport, without prejudice to stricter specific provisions contained in sectoral EEA legislation. They apply neither to the land transport sector, nor to the public service broadcasting sector, which is covered by the Chapter of the Authority's Guidelines on the application of state aid rules to public service broadcasting⁹.
9. Aid for providers of SGEIs in difficulty will be assessed under the Chapter of the Authority's Guidelines on state aid for rescuing and restructuring firms in difficulty¹⁰.
10. The principles set out in this Framework apply without prejudice to :
 - (a) requirements imposed by EEA law in the field of competition (in particular Articles 53 and 54 of the EEA Agreement);
 - (b) requirements imposed by EEA law in the field of public procurement;
 - (c) the provisions of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings¹¹;
 - (d) additional requirements flowing from the EEA Agreement or from sectoral EEA legislation.

2 CONDITIONS GOVERNING THE COMPATIBILITY OF PUBLIC SERVICE COMPENSATION THAT CONSTITUTES STATE AID

2.1 General provisions

11. At the current stage of development of the internal market, state aid falling outside the scope of Decision 2012/21/EU may be declared compatible with Article 59(2) of the EEA Agreement if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the EEA. The conditions set out in sections 2.2 to 2.10 must be met in order to achieve that balance.

2.2 Genuine service of general economic interest as referred to in Article 59 of the EEA Agreement

12. The aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 59(2) of the EEA Agreement.
13. In its Chapter on the application of the state aid rules to compensation granted for the provision of services of general economic interest, the Authority has provided guidance on the requirements concerning the definition of a service of general

⁹ Not yet published in the OJ or the EEA Supplement.

¹⁰ OJ L 97, 15.4.2005, p. 41 and EEA Supplement No 18, 15.4.2005, p. 1.

¹¹ OJ L 318, 17.11.2006, p. 17. Incorporated at point 1a of Annex XV to the EEA Agreement.

economic interest. In particular, EFTA States cannot attach specific public service obligations to services that are 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 conditions. 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's definition is vitiated by a manifest error, unless provisions of EEA law provide a stricter standard.

14. For the scope of application of the principles set out in this Framework, EFTA States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account. This does not apply where it is clear that a new consultation will not bring any significant added value to a recent consultation.

2.3 Need for an entrustment act specifying the public service obligations and the methods of calculating compensation

15. Responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each EFTA State. The term 'EFTA State' covers the central, regional and local authorities.
16. The act or acts must include, in particular:
- (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 granting authority;
 - (d) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and
 - (e) the arrangements for avoiding and recovering any overcompensation.

2.4 Duration of the period of entrustment

17. The duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.

2.5 Compliance with Directive 2006/111/EC

18. Aid will be considered compatible with the internal market on the basis of Article 59(2) of the EEA Agreement only where the undertaking complies, where

applicable, with Directive 2006/111/EC¹². Aid that does not comply with that Directive is considered to affect the development of trade to an extent that would be contrary to the interest of the EEA within the meaning of Article 59(2) of the EEA Agreement.

2.6 Compliance with EEA public procurement rules

- 19. Aid will be considered compatible with the internal market on the basis of Article 59(2) of the EEA Agreement only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable EEA rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the EEA Agreement and, where applicable, secondary EEA law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the EEA within the meaning of Article 59(2) of the EEA Agreement.

2.7 Absence of discrimination

- 20. Where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking.

2.8 Amount of compensation

- 21. The amount of compensation must not exceed what is necessary to cover the net cost¹³ of discharging the public service obligations, including a reasonable profit.
- 22. The amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the EFTA State wishes to provide from the outset, in accordance with paragraphs 40 and 41.
- 23. Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided. They must rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. EFTA States must indicate the sources on which these expectations are based¹⁴. The cost estimation must reflect the expectations of efficiency gains achieved by the SGEI provider over the lifetime of the entrustment.

Net cost necessary to discharge the public service obligations

¹² Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. Incorporated at point 1a of Annex XV to the EEA Agreement.

¹³ In this context, net cost means net cost as determined in paragraph 25 or costs minus revenues where the net avoided cost methodology cannot be applied.

¹⁴ Public sources of information, cost levels incurred by the SGEI provider in the past, cost levels of competitors, business plans, industry reports, etc.

24. The net cost necessary, or expected to be necessary, to discharge the public service obligations should be calculated using the net avoided cost methodology where this is required by EEA or national legislation and in other cases where this is possible.

Net avoided cost methodology

25. Under the net avoided cost methodology, the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation. Due attention must be given to correctly assessing the costs that the service provider is expected to avoid and the revenues it is expected not to receive, in the absence of the public service obligation. The net cost calculation should assess the benefits, including intangible benefits as far as possible, to the SGEI provider.
26. Annex IV to Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services¹⁵, and Annex I to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service¹⁶, contain more detailed guidance on how to apply the net avoided cost methodology.
27. Although the Authority regards the net avoided cost methodology as the most accurate method for determining the cost of a public service obligation, there may be cases where the use of that methodology is not feasible or appropriate. In such cases, where duly justified, the Authority can accept alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost allocation.

Methodology based on cost allocation

28. Under the cost allocation methodology, the net cost necessary to discharge the public service obligations can be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act.
29. The costs to be taken into consideration include all the costs necessary to operate the SGEI.
30. Where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration.
31. Where the undertaking also carries out activities falling outside the scope of the SGEI, the costs to be taken into consideration may cover all the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities. The costs linked to any activities outside the scope of the SGEI must include all the direct costs and an appropriate contribution to the common costs. To determine the appropriate

¹⁵ OJ L 108, 24.4.2002, p. 51. Incorporated at point 5cm of Annex XI to the EEA Agreement.

¹⁶ OJ L 15, 21.1.1998, p. 14. Incorporated at point 5d of Annex XI to the EEA Agreement.

contribution to the common costs, market prices for the use of the resources, where available, can be taken as a benchmark¹⁷. In the absence of such market prices, the appropriate contribution to the common costs can be determined by reference to the level of reasonable profit¹⁸ the undertaking is expected to make on the activities falling outside the scope of the SGEI or by other methodologies where more appropriate.

Revenue

- 32. The revenue to be taken into account must include at least the entire revenue earned from the SGEI, as specified in the entrustment act, and the excessive profits generated from special or exclusive rights even if linked to other activities as provided in paragraph 45, regardless of whether those excessive profits are classified as state aid within the meaning of Article 61(1) of the EEA Agreement.

Reasonable profit

- 33. Reasonable profit should be taken to mean the rate of return on capital¹⁹ 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 entrustment act, 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.
- 34. Where duly justified, profit level indicators other than the rate of return on capital can be used to determine what the reasonable profit should be, such as the average return on equity²⁰ over the entrustment period, the return on capital employed, the return on assets or the return on sales.
- 35. Whatever indicator is chosen, the EFTA State must provide the Authority with evidence that the projected profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

¹⁷ In *Chronopost* (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA* [2003] ECR I-6993), the European Court of Justice referred to "normal market conditions": "*In the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, "normal market conditions", which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available*".

¹⁸ The reasonable profit will be assessed from an *ex ante* perspective (based on expected profits rather than on realised profits) in order not to remove the incentives for the undertaking to make efficiency gains when operating activities outside the SGEI.

¹⁹ The rate of return on capital is defined here as the Internal Rate of Return (IRR) that the company makes on its invested capital over the lifetime of the project, that is to say the IRR on the cash flows of the contract.

²⁰ In any given year the accounting measure return on equity (ROE) is defined as the ratio between earnings before interests and taxes (EBIT) and equity capital in that year. The average annual return should be computed over the lifetime of the entrustment by applying as discount factor either the company's cost of capital or the rate set by the Authority in line with the Chapter of the Authority's Guidelines on reference and discount rates (OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1) and published at the Authority's website at the following url: <http://www.eftasurv.int/state-aid/rates/>, whichever more appropriate.

36. A rate of return on capital that does not exceed the relevant swap rate²¹ plus a premium of 100 basis points²² is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act.
37. Where the provision of the SGEI is connected with a substantial commercial or contractual risk, for instance because the compensation takes the form of a fixed lump sum payment covering expected net costs and a reasonable profit and the undertaking operates in a competitive environment, the reasonable profit may not exceed the level that corresponds to a rate of return on capital that is commensurate with the level of risk. That 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 awarded under competitive conditions (for example, contracts awarded under a tender). Where it is not possible to apply that method, other methods for establishing a return on capital may also be used, upon justification²³.
38. Where the provision of the SGEI is not connected with a substantial commercial or contractual risk, for instance because the net cost incurred in providing the service of general economic interest is essentially compensated *ex post* in full, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36. Such a compensation mechanism provides no efficiency incentives for the public service provider. Hence its use is strictly limited to cases where the EFTA State is able to justify that it is not feasible or appropriate to take into account productive efficiency and to have a contract design which gives incentives to achieve efficiency gains.

Efficiency incentives

39. In devising the method of compensation, EFTA States must introduce incentives for the efficient provision of SGEIs of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.
40. Efficiency incentives can be designed in different ways to best suit the specificity of each case or sector. For instance, EFTA States can define upfront a fixed compensation level which anticipates and incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act.
41. Alternatively, EFTA States can define productive efficiency targets in the entrustment act whereby the level of compensation is made dependent upon the extent to which the targets have been met. If the undertaking does not meet the objectives, the compensation should be reduced following a calculation method specified in the entrustment act. In contrast, if the undertaking exceeds the

²¹ The swap rate is the longer maturity equivalent to the Inter-Bank Offered Rate (IBOR rate). It is used in the financial markets as a benchmark rate for establishing the funding rate.

²² The premium of 100 basis points serves, *inter alia*, to compensate for liquidity risk related to the fact that an SGEI provider that invests capital in an SGEI contract commits that capital for the duration of the entrustment act and will be unable to sell its stake as rapidly and at as low a cost as is the case with a widely held and liquid risk-free asset.

²³ For instance, by comparing the return with the weighted average cost of capital (WACC) of the company in relation to the activity in question, or with the average return on capital for the sector in recent years, taking into account whether historical data can be appropriate for forward-looking purposes.

objectives, the compensation should be increased following a method specified in the entrustment act. Rewards linked to productive efficiency gains are to be set at a level such as to allow balanced sharing of those gains between the undertaking and the EFTA State and/or the users.

42. Any such mechanism for incentivising efficiency improvements must be based on objective and measurable criteria set out in the entrustment act and subject to transparent *ex post* assessment carried out by an entity independent from the SGEI provider.
43. Efficiency gains should be achieved without prejudice to the quality of the service provided and should meet the standards laid down in EEA legislation.

Provisions applicable to undertakings also carrying out activities outside the scope of the SGEI or providing several SGEIs

44. Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31. Where an undertaking is entrusted with the operation of several SGEIs because the granting authority or the nature of the SGEI is different, the undertaking's internal accounts must make it possible to verify whether there has been any overcompensation at the level of each SGEI.
45. If the undertaking in question holds special or exclusive rights linked to activities, other than the SGEI for which aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 61(1) of the EEA Agreement, and added to the undertaking's revenue. The reasonable profit on the activities for which the undertaking holds special or exclusive rights has to be assessed from an *ex ante* perspective, in the light of the risk, or the absence of risk, incurred by the undertaking in question. That assessment also has to take into account the efficiency incentives that the EFTA State has introduced in relation to the provision of the services in question.
46. The EFTA State may decide that the profits accruing from other activities outside the scope of the SGEI, in particular those activities which rely on the infrastructure necessary to provide the SGEI, must be allocated in whole or in part to the financing of the SGEI.

Overcompensation

47. Overcompensation should be understood as compensation that the undertaking receives in excess of the amount of aid as defined in paragraph 21 for the whole duration of the contract. As stated in paragraphs 39 to 42, a surplus that results from higher than expected efficiency gains may be retained by the undertaking as additional reasonable profit as specified in the entrustment act²⁴.

²⁴ Similarly, a deficit which results from efficiency gains lower than expected should be partially borne by the undertaking when stipulated in the entrustment act.

48. Since overcompensation is not necessary for the operation of the SGEI, it constitutes incompatible state aid.
49. EFTA States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Framework and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Authority. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication²⁵, checks should normally be made at least every two years.
50. Where the EFTA State has defined upfront a fixed compensation level which adequately anticipates and incorporates the efficiency gains that the public service provider can be expected to make over the period of entrustment, on the basis of a correct allocation of costs and revenues and of reasonable expectations as described in this section, the overcompensation check is in principle confined to verifying that the level of profit to which the provider is entitled in accordance with the entrustment act is indeed reasonable from an *ex ante* perspective.
- 2.9 Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the EEA**
51. The requirements set out in sections 2.1 to 2.8 are usually sufficient to ensure that aid does not distort competition in a way that is contrary to the interests of the EEA.
52. It is conceivable, however, that in some exceptional circumstances, serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interests of the EEA.
53. In such a case, the Authority will examine whether such distortions can be mitigated by requiring conditions or requesting commitments from the EFTA State.
54. Serious competition distortions such as to be contrary to the interests of the EEA Agreement are only expected to occur in exceptional circumstances. The Authority will restrict its attention to those distortions where the aid has significant adverse effects on other EEA States and the functioning of the EEA, for example, because they deny undertakings in important sectors of the economy the possibility to achieve the scale of operations necessary to operate efficiently.
55. Such distortions may arise, for instance, where the entrustment either has a duration which cannot be justified by reference to objective criteria (such as the need to amortise non-transferable fixed assets) or bundles a series of tasks (typically subject to separate entrustments with no loss of social benefit and no additional costs in terms of efficiency and effectiveness in the provision of the services). In such a case, the Authority would examine whether the same public service could equally well be

²⁵ Such as aid granted in relation to in-house contracts, concessions with no competitive allocation, public procurement procedures with no prior publication.

provided in a less distortive manner, for instance by way of a more limited entrustment in terms of duration or scope or through separate entrustments.

56. Another situation in which a more detailed assessment may be necessary is where the EFTA State entrusts a public service provider, without a competitive selection procedure, with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI. Those adverse effects on the development of trade may be more pronounced where the SGEI is to be offered at a tariff below the costs of any actual or potential provider, so as to cause market foreclosure. The Authority, while fully respecting the EFTA State's wide margin of discretion to define the SGEI, may therefore require amendments, for instance in the allocation of the aid, where it can reasonably show that it would be possible to provide the same SGEI at equivalent conditions for the users, in a less distortive manner and at lower cost for the State.
57. Closer scrutiny is also warranted where the entrustment of the service obligation is connected with special or exclusive rights that seriously restrict competition in the internal market to an extent contrary to the interests of the EEA Agreement. While the primary route for apprehending such a case remains Article 59(1) of the EEA Agreement, the state aid may not be deemed compatible where the exclusive right provides for advantages that could not be properly assessed, quantified or apprehended according to the methodologies to calculate the net costs of the SGEI described in section 2.8.
58. The Authority will also pay attention to situations where the aid allows the undertaking to finance the creation or use of an infrastructure that is not replicable and enables it to foreclose the market where the SGEI is provided or related relevant markets. Where this is the case, it may be appropriate to require that competitors are given fair and non-discriminatory access to the infrastructure under appropriate conditions.
59. If distortions of competition are a consequence of the entrustment hindering effective implementation or enforcement of EEA legislation aimed at safeguarding the proper functioning of the internal market, the Authority will examine whether the public service could equally well be provided in a less distortive manner, for instance by fully implementing the sectoral EEA legislation.

2.10 Transparency

60. For each SGEI compensation falling within the scope of this Framework, the EFTA State concerned must publish the following information on the internet or by other appropriate means:
 - (a) the results of the public consultation or other appropriate instruments referred to in paragraph 14;
 - (b) the content and duration of the public service obligations;
 - (c) the undertaking and, where applicable, the territory concerned;

- (d) the amounts of aid granted to the undertaking on a yearly basis.

2.11 Aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU

- 61. The principles set out in paragraphs 14, 19, 20, 24, 39, 51 to 59 and 60(a) do not apply to aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU.

3 REPORTING AND EVALUATION

- 62. EFTA States shall report to the Authority on the compliance with this Framework every two years. The reports must provide an overview of the application of this Framework to the different sectors of service providers, including:
 - (a) a description of the application of the principles set out in this Framework to the services falling within its scope, including in-house activities;
 - (b) the total amount of aid granted to undertakings falling within the scope of this Framework with a breakdown by the economic sector of the beneficiaries;
 - (c) an indication of whether, for a particular type of service, the application of the principles set out in this Framework has given rise to difficulties or complaints by third parties; and
 - (d) any other information concerning the application of the principles set out in this Framework required by the Authority and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.

- 63. In addition, in accordance with the requirements of Part II of Protocol 3 to the Surveillance and Court Agreement and the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Surveillance and Court Agreement²⁶, EFTA States must submit annual reports to the Authority on the aid granted following a decision of the Authority based on this Framework.
- 64. The reports will be published on the internet site of the Authority.
- 65. The Authority intends to carry out a review of this Framework by 31 January 2017.

4 CONDITIONS AND OBLIGATIONS ATTACHED TO DECISIONS OF THE AUTHORITY

- 66. Pursuant to Article 7(4) of Part II of Protocol 3 to the Surveillance and Court Agreement, the Authority may attach to a positive decision conditions subject to which aid may be considered compatible with the internal market, and lay down obligations to enable compliance with the decision to be monitored. In the field of

²⁶ As amended, consolidated version available on the Authority's website at the following url: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>.

SGEI, conditions and obligations may be necessary in particular to ensure that aid granted to the undertakings concerned does not lead to undue distortions of competition and trade in the internal market. In this context, periodic reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

5 APPLICATION

67. The Authority will apply the provisions of this Framework from 31 January 2012.
68. The Authority will apply the principles set out in this Framework to all aid projects notified to it and will take a decision on those projects in accordance with those principles, even if the projects were notified prior to 31 January 2012.
69. The Authority will apply the principles set out in this Framework to unlawful aid on which it takes a decision after 31 January 2012 even if the aid was granted before this date. However, where the aid was granted before 31 January 2012, the principles set out in paragraphs 14, 19, 20, 24, 39 and 60 do not apply.

6 APPROPRIATE MEASURES

70. The Authority proposes as appropriate measures for the purposes of Article 1(1) of Part I of Protocol 3 to the Surveillance and Court Agreement that EFTA States publish the list of existing aid schemes regarding public service compensation which have to be brought into line with this Framework by 31 January 2013, and that they bring those aid schemes into line with this Framework by 31 January 2014.
71. EFTA States should confirm to the Authority by 29 February 2012 that they agree to the appropriate measures proposed. In the absence of any reply, the Authority will take it that the EFTA State concerned does not agree.