

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 328/05/COL

of 20 December 2005

amending for the 53rd time the Procedural and Substantive Rules in the Field of State Aid by introducing a new Chapter 18C: State aid in the form of public service compensation

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area ⁽¹⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾, in particular to Article 24, Article 5(2)(b) and Article 1 in Part I of Protocol 3 and Articles 18 and 19 in Part II of Protocol 3 thereof,

WHEREAS under Article 24 of the Surveillance and Court Agreement, the EFTA Surveillance Authority shall give effect to the provisions of the EEA Agreement concerning State aid;

WHEREAS under Article 5(2)(b) of the Surveillance and Court Agreement the EFTA Surveillance Authority shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;

RECALLING the Procedural and Substantive Rules in the Field of State Aid ⁽³⁾ adopted on 19 January 1994 by the EFTA Surveillance Authority ⁽⁴⁾;

WHEREAS, on 13 July 2005, the European Commission adopted a Communication framework setting out the rules for State aid in the form of public service compensation ⁽⁵⁾;

WHEREAS this Communication is also of relevance for the European Economic Area;

WHEREAS a uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area;

WHEREAS, according to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the EFTA Surveillance Authority is to adopt, after consultation with the Commission, acts corresponding to those adopted by the European Commission;

HAVING consulted the European Commission;

RECALLING that the EFTA Surveillance Authority has consulted the EFTA States by letter dated 19 October 2005 on the subject,

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new Chapter 18C, State aid in the form of public service compensation. The new chapter is contained in Annex I to this Decision. Appropriate measures, contained in Annex I to this Decision, are proposed.

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽³⁾ Hereinafter referred to as the State Aid Guidelines.

⁽⁴⁾ Initially published in OJ L 231, 3.9.1994, and in the EEA Supplement thereto No 32 on the same date, last amended by Decision No 313/05/COL of 7.12.2005 (not yet published).

⁽⁵⁾ Community framework for State aid in the form of public service compensation (OJ C 297 of 29.11.2005, p. 4).

2. The EFTA States shall be informed by means of a letter, including a copy of this Decision and including the Annex thereto. The EFTA States are requested to signify their agreement to the proposal for appropriate measures within one month from receipt of this proposal.
3. The European Commission shall be informed, in accordance with point (d) of Protocol 27 of the EEA Agreement, by means of a copy of this Decision, including Annex I.
4. The Decision, including Annex I, shall be published in the EEA Section of and in the *EEA Supplement to the Official Journal of the European Union*.
5. In case the EFTA States accept the proposal for appropriate measures, a summary notice shall be published in the EEA Section of and in the *EEA Supplement to the Official Journal of the European Union* (attached in Annex II to this Decision).
6. The Decision is authentic in the English language.

Done at Brussels, 20 December 2005.

For the EFTA Surveillance Authority

Einar M. BULL
President

Kurt JÄGER
College Member

ANNEX

18C. STATE AID IN THE FORM OF PUBLIC SERVICE COMPENSATION ⁽¹⁾**18C.1. Purpose and scope**

- (1) It is apparent from the caselaw of the Court of Justice of the European Communities ⁽²⁾, that public service compensation does not constitute State aid within the meaning of Article 87(1) of the EC Treaty if it fulfils certain conditions. However, if public service compensation does not meet these conditions and if the general criteria for the applicability of Article 87(1) of the EC Treaty are satisfied, such compensation constitutes State aid. In the Authority's view, this case law applies equally in the context of Article 61(1) of the EEA Agreement.
- (2) The European Commission Decision 2005/842/EC of 28 November 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 ⁽³⁾ lays down the conditions under which certain types of public service compensation constitute State aid compatible with Article 86(2) of the EC Treaty and exempts compensation satisfying those conditions from the prior notification requirement. The Decision has not yet been incorporated into the EEA Agreement ⁽⁴⁾. Public service compensation which constitutes State aid and does not fall within the scope of Decision 2005/842/EC will still be subject to the prior notification requirement, also after that Decision has been adopted. The purpose of these guidelines is to spell out the conditions under which such State aid can be found compatible with the functioning of the EEA Agreement pursuant to Article 59(2) of the EEA Agreement.
- (3) These guidelines are applicable to public service compensation granted to undertakings in connexion with activities subject to the rules of the EEA Agreement, with the exception of the transport sector, and the public service broadcasting sector covered by the EFTA Surveillance Authority's guidelines on the application of State aid rules to public service broadcasting ⁽⁵⁾.
- (4) The provisions of these guidelines apply without prejudice to the stricter specific provisions relating to public service obligations contained in sectoral EEA rules and measures.
- (5) These guidelines apply without prejudice to the provisions in force in the field of public procurement and competition (in particular Articles 53 and 54 of the EEA Agreement).

18C.2. Conditions governing the compatibility of public service compensation that constitutes State aid**18C.2.1. General provisions**

- (6) In its judgment in *Altmark* ⁽⁶⁾, the Court of Justice of the European Communities laid down the conditions under which public service compensation does not constitute State aid as follows:

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

⁽¹⁾ This chapter corresponds to the Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4.

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

⁽³⁾ Commission Decision of 28 November 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, OJ L 312, 29.11.2005, p. 67.

⁽⁴⁾ Hence, until the decision has been incorporated into the EEA legal framework, these types of public service compensations are subject to the general notification requirements as stipulated in Article 1(3) in Part I and Article 2 in Part II of Protocol 3 to the Surveillance and Court Agreement.

⁽⁵⁾ Chapter 24C of the State Aid Guidelines.

⁽⁶⁾ See footnote 2.

[...] 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 87(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 obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

(7) Where these four criteria are met, public service compensation does not constitute State aid, and Articles 61 of the EEA Agreement and Article 1 in Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court (hereinafter: the “Surveillance and Court Agreement”) do not apply. If the EFTA States do not respect these criteria and if the general criteria for the applicability of Article 61(1) of the EEA Agreement are met, public service compensation constitutes State aid.

(8) The Authority considers that at the current stage of development of the EEA Agreement, such State aid may be declared compatible with the EEA Agreement under Article 59(2) of the EEA Agreement if it is necessary to the operation of the services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Contracting Parties. The following conditions should be met in order to achieve such balance.

18C.2.2. *Genuine service of general economic interest within the meaning of Article 59 of the EEA Agreement*

(9) It is apparent from the caselaw of the Court of Justice of the European Communities that with the exception of the sectors in which there are rules of the EEA Agreement governing the matter, the EFTA States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. Thus, the Authority’s task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest.

(10) It transpires from Article 59(2) of the EEA Agreement that undertakings ⁽⁷⁾ entrusted with the operation of services of general economic interest are undertakings entrusted with “a particular task”. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the EFTA States are encouraged to consult widely, with a particular emphasis on users.

⁽⁷⁾ “Undertaking” is to be understood as any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. “Public undertaking” is to be understood as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, as defined in Article 2(1)(b) of the Act referred to under point 1 of Annex XV to the EEA Agreement, Commission Directive 80/723/EEC on the transparency of financial relations between Member States and undertakings (OJ L 195, 29.7.1980, p. 35, as last amended by Directive 2000/52/EC, OJ L 193, 29.7.2000, p. 75, incorporated into Annex XV to the EEA Agreement by Joint Committee Decision 6/2001, OJ L 66, 8.3.2001, p. 48, and EEA Supplement No 12, 8.3.2001, p. 6, e.i.f. 1.6.2002).

18C.2.3. *Need for an instrument specifying the public service obligations and the methods of calculating compensation*

- (11) The concept of service of general economic interest within the meaning of Article 59 of the EEA Agreement means that the undertakings in question have been entrusted with a special task by the State ⁽⁸⁾. Public authorities remain responsible — with the exception of the sectors in which there are EEA rules governing the matter — for setting the framework of criteria and conditions for the provision of services, regardless of the legal status of the provider and of whether the service is provided on the basis of free competition. Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and of the State. The term “State” covers the central, regional and local authorities.
- (12) Responsibility for operation of the service of general economic interest must be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each EFTA State. The act or acts must specify, in particular:
- (a) the precise nature and the duration of the public service obligations;
 - (b) the undertakings and territory concerned;
 - (c) the nature of any exclusive or special rights assigned to the undertaking;
 - (d) the parameters for calculating, controlling and reviewing the compensation;
 - (e) the arrangements for avoiding and repaying any overcompensation.
- (13) When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the EFTA States are invited to consult widely, with particular emphasis on users.

18C.2.4. *Amount of compensation*

- (14) The **amount of compensation** may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.
- (15) In any event, compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation granted for the operation of a service of general economic interest, but actually used to operate on other markets is not justified, and consequently constitutes incompatible State aid. The undertaking receiving public service compensation may, however, enjoy a reasonable profit.
- (16) The **costs to be taken into consideration** include all the costs incurred in the operation of the service of general economic interest. Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, an appropriate contribution to fixed costs common to both the service of general economic interest and other activities and an adequate return on the own capital assigned to the service of general economic interest ⁽⁹⁾. The costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the functioning of the service of general economic interest. The costs linked to any activities outside the scope of the service of general economic interest must cover all the variable costs, an appropriate contribution to fixed common costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the service of general economic interest. The calculation of costs must follow the criteria which have previously been defined and be based on generally accepted cost accounting principles which must be brought to the knowledge of the Authority in the context of the notification in accordance with provisions of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

⁽⁸⁾ See, in particular, the judgment in Case C-127/73 *BRT v SABAM* [1974] ECR-313.

⁽⁹⁾ See Joined Cases C-83/01P, C-93/01P and C-94/01P *Chronopost SA* [2003] ECR I-6993.

- (17) The **revenue to be taken into account** must include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to a service of general economic interest that generates profit 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 of the EEA Agreement, and are added to its revenue. The EFTA State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest.
- (18) "Reasonable profit" should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the EFTA State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other EEA States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what amounts to a reasonable profit, the EFTA State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency.
- (19) When a company carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues. Where an undertaking is entrusted with the operation of several services of general economic interest either because the authority assigning the service of general economic interest is different or because the nature of the service of general economic interest is different, the undertaking's internal accounts must make it possible to ensure that there is no overcompensation at the level of each service of general economic interest. These principles are without prejudice to the provisions of the Act mentioned under point 1 of Annex XV to the EEA Agreement (Commission Directive 80/723/EEC on the transparency of financial relations between Member States and certain undertakings, as amended) in cases where that Act applies.

18C.3. Overcompensation

- (20) The EFTA States must check regularly, or arrange for checks to be made, to ensure that there has been no overcompensation. Since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State, and for the future, the parameters for the calculation of the compensation must be updated.
- (21) Where the amount of overcompensation does not exceed 10 % of the amount of annual compensation, such overcompensation may be carried forward to the next year. Some services of general economic interest may have costs that vary significantly each year, notably as regards specific investments. In such cases, exceptionally, overcompensation in excess of 10 % in certain years may prove necessary for the operation of the service of general economic interest. The specific situation which may justify overcompensation in excess of 10 % should be explained in the notification to the Authority. However, the situation should be reviewed at intervals determined on the basis of the situation in each sector which, in any event, should not exceed four years. All overcompensation discovered at the end of that period should be repaid.
- (22) Any overcompensation may be used to finance another service of general economic interest operated by the same undertaking, but such a transfer must be shown in the undertaking's accounts and be carried out in accordance with the rules and principles set out in these guidelines, notably as regards prior notification. The EFTA States must ensure that such transfers are subjected to proper control. The transparency rules laid down in the Act referred to under point 1 of Annex XV to the EEA Agreement (Commission Directive 80/723/EEC, as amended) apply.
- (23) The amount of overcompensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the EEA Agreement (for example environmental aid, employment aid and aid for small and medium-sized enterprises). If an EFTA State wishes to grant such aid, the prior notification procedure laid down in Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement should be complied with. Aid may be disbursed only if it has been authorised by the Authority. If such aid is compatible with a block exemption regulation, the conditions of the relevant block exemption regulation must be fulfilled.

18C.4. Conditions and obligations attached to Decisions of the Authority

- (24) According to Article 7(4) in Part II of Protocol 3 to the Surveillance and Court Agreement ⁽¹⁰⁾, the Authority may attach to a positive decision conditions subject to which an aid may be considered compatible with the functioning of the EEA Agreement, and lay down obligations to enable compliance with the decision to be monitored. In the field of services of general economic interest, conditions and obligations may be necessary notably to ensure that aid granted to the undertakings concerned does not actually lead to overcompensations. In this context, periodical reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

18C.5. Application of the Guidelines

- (25) These guidelines will apply as of their adoption by the Authority. Their validity will end six years after its entry into force. The Authority may, after consulting the EFTA States, amend these guidelines before their date of expiry for important reasons linked to the development of the functioning of the EEA Agreement. Four years after the date of adoption of these guidelines, the Authority will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Authority on the basis, notably, of data provided by the EFTA States. The results of the impact assessment will be made available to the EFTA States.

- (26) The Authority will apply the provisions of these guidelines to all aid projects notified to it and will take a decision on those projects after adoption of the guidelines, even if the projects were notified prior to adoption. In the case of non-notified aid, the Authority will apply:

— the provisions of these guidelines if the aid was granted after the adoption of these guidelines;

— the provisions in force at the time the aid was granted, in all other cases.

18C.6. Appropriate measures

- (27) The Authority proposes as appropriate measures for the purposes of Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement that the EFTA States bring their existing schemes regarding public service compensation into line with these guidelines, within 18 months following the notification of the decision to the EFTA State. The EFTA States should confirm to the Authority within one month of the notification of the decision to them 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.

⁽¹⁰⁾ Corresponding to Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty.