

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 12/12/COL

of 25 January 2012

amending, for the eighty-fourth time, the procedural and substantive rules in the field of state aid by introducing new chapters on the application of state aid rules to compensation granted for the provision of services of general economic interest and on the framework for state aid in the form of public service compensation

THE EFTA SURVEILLANCE AUTHORITY (the Authority),

Whereas:

Under Article 5(2)(b) of the Agreement on the Establishment of a Surveillance Authority and a Court of Justice (the Surveillance and Court Agreement), the Authority shall issue notices or guidelines on matters dealt with in the Agreement on the European Economic Area (the EEA Agreement), if the EEA Agreement or the Surveillance and Court Agreement expressly so provide or if the Authority considers it necessary,

On 20 December 2011, the European Commission adopted a 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) and a Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011, OJ C 8, 11.1.2012, p. 15),

Both Communications are also of relevance for the European Economic Area,

Uniform application of the EEA state aid rules is to be ensured throughout the European Economic Area in line with the objective of homogeneity established in Article 1 of the EEA Agreement,

According to point II under the heading 'GENERAL' on page 11 of Annex XV to the EEA Agreement, the Authority, after consultation with the Commission, is to adopt acts corresponding to those adopted by the European Commission,

The Authority consulted the European Commission and the EFTA States by letters dated 10 January 2012 on the subject,

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing a new chapter on the application of state aid rules to compensation granted for the provision of services of general economic interest.

The new chapter is set out in Annex I to this Decision.

Article 2

The State Aid Guidelines shall be amended by introducing a new chapter on the framework for state aid in the form of public service compensation.

The new chapter is set out in Annex II to this Decision.

Article 3

Only the English language version of this Decision is authentic.

Done at Brussels, 25 January 2012.

For the EFTA Surveillance Authority

Oda Helen SLETNES
President

Sabine MONAUNI-TÖMÖRDY
College Member

ANNEX I

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 interest ⁽¹⁾****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 undertakings ⁽²⁾ 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 compensation ⁽³⁾. 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 interest ⁽⁴⁾ (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 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/EC ⁽⁶⁾, 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 recognition ⁽⁷⁾.

⁽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.

⁽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).

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 SGELs ⁽¹⁾.
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.

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 financed ⁽²⁾. 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 too ⁽³⁾. 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 links ⁽⁴⁾. 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 asset ⁽⁵⁾.
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 activity ⁽⁶⁾.

⁽¹⁾ 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⁾ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

⁽³⁾ 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.

⁽⁴⁾ Case C-480/09 P *AcquaElectrabel 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.

⁽⁵⁾ 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.

⁽⁶⁾ 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.

12. The question whether a market exists for certain services may depend on the way those services are organised in the EFTA State concerned ⁽¹⁾. 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-house ⁽²⁾ has no relevance for the economic nature of the activity ⁽³⁾.
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 law ⁽⁴⁾.

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' ⁽⁵⁾ or where authorities emanating from the State act 'in their capacity as public authorities' ⁽⁶⁾. 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 subject ⁽⁷⁾. 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 control ⁽⁸⁾;
- (c) maritime traffic control and safety ⁽⁹⁾;

⁽¹⁾ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

⁽²⁾ 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.

⁽³⁾ Neither has it any relevance for the question whether the service can be defined as SGEI; see section 3.2.

⁽⁴⁾ 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 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.

⁽⁵⁾ Case C-118/85 *Commission v Italy*, paragraphs 7 and 8.

⁽⁶⁾ Case C-30/87 *Bodson/Pompes funèbres des régions libérées* [1988] ECR I-2479, paragraph 18.

⁽⁷⁾ See, in particular, Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 30.

⁽⁸⁾ Case C-364/92 *SAT/Eurocontrol*, paragraph 27; Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

⁽⁹⁾ Commission Decision of 16 October 2002 in Case N 438/02 — Belgium — Aid to port authorities, OJ C 284, 21.11.2002.

- (d) anti-pollution surveillance ⁽¹⁾; and
- (e) the organisation, financing and enforcement of prison sentences ⁽²⁾.

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 compulsory ⁽³⁾;
- (b) whether the scheme pursues an exclusively social purpose ⁽⁴⁾;
- (c) whether the scheme is non-profit ⁽⁵⁾;
- (d) whether the benefits are independent of the contributions made ⁽⁶⁾;
- (e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured ⁽⁷⁾; and
- (f) whether the scheme is supervised by the State ⁽⁸⁾.

19. Such solidarity-based schemes must be distinguished from economic schemes ⁽⁹⁾. In contrast with solidarity-based schemes, economic schemes are regularly characterised by:

- (a) optional membership ⁽¹⁰⁾;
- (b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme) ⁽¹¹⁾;
- (c) their profit-making nature ⁽¹²⁾; and

⁽¹⁾ Case C-343/95 *Cali & Figli* [1997] ECR I-1547, paragraph 22.

⁽²⁾ 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.

⁽³⁾ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 13.

⁽⁴⁾ Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraph 45.

⁽⁵⁾ 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.

⁽⁶⁾ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraphs 15 to 18.

⁽⁷⁾ Case C-218/00 *Cisal and INAIL*, paragraph 40.

⁽⁸⁾ 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.

⁽⁹⁾ See, in particular, Case C-244/94 *FFSA and Others*, paragraph 19.

⁽¹⁰⁾ Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 80-87.

⁽¹¹⁾ 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.

⁽¹²⁾ Joined Cases C-115/97 to C-117/97 *Brentjens*.

(d) the provision of entitlements which are supplementary to those under a basic scheme ⁽¹⁾.

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 importance ⁽²⁾.

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 solidarity ⁽³⁾. 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 coverage ⁽⁴⁾. The Court of Justice and the General Court have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings ⁽⁵⁾.

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 market ⁽⁶⁾.

24. In other national systems, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance ⁽⁷⁾. 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 activity ⁽⁸⁾. 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,

'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' ⁽⁹⁾.

⁽¹⁾ Joined Cases C-180/98 to C-184/98 *Pavlov and Others*.

⁽²⁾ Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

⁽³⁾ 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).

⁽⁴⁾ 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.

⁽⁵⁾ Case T-319/99 *FENIN* [2003] ECR II-357, paragraph 39.

⁽⁶⁾ Case T-319/99 *FENIN*, paragraph 40.

⁽⁷⁾ 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*.

⁽⁸⁾ See Joined Cases C-180 to C-184/98 *Pavlov and Others*, paragraphs 75 and 77.

⁽⁹⁾ 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 læringsarena*, 12.10.2011, p. 9.

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 purse ⁽¹⁾. These principles can cover public educational services such as vocational training ⁽²⁾, private and public primary schools ⁽³⁾ and kindergartens ⁽⁴⁾, secondary teaching activities in universities ⁽⁵⁾ and the provision of education in universities ⁽⁶⁾.
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 innovation ⁽⁷⁾, 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;
 - (c) and
- the dissemination of research results.
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 nature ⁽⁸⁾ and all income is reinvested in the primary activities of the research organisations concerned ⁽⁹⁾.

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 Agreement ⁽¹⁰⁾. 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.

⁽¹⁾ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁽²⁾ Case 263/86 *Humbel* [1988] ECR-5365.

⁽³⁾ Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-76/05 *Schwartz* [2007] ECR-6849.

⁽⁴⁾ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.

⁽⁵⁾ Case C-281/06 *Jundt* [2007] ECR I-12231.

⁽⁶⁾ Case 109/92 *Wirth* [1993] ECR I-6447.

⁽⁷⁾ OJ L 305, 19.11.2009, p. 1 and EEA Supplement No 60, 19.11.2009, p. 1.

⁽⁸⁾ 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.

⁽⁹⁾ See paragraphs 3.1.1 and 3.1.2 of the Chapter on aid for research and development and innovation.

⁽¹⁰⁾ 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.

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* ⁽¹⁾, 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 beneficiaries ⁽²⁾.
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 arrangement has been examined by the Court of Justice, in particular in its judgment in Case 173/73 *Italy v Commission* ⁽³⁾, 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* ⁽⁴⁾, 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

⁽¹⁾ Case C-482/99 *France v Commission* [2002] ECR I-4397.

⁽²⁾ 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.

⁽³⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16. See also Case 78/79 *Steinike* [1977] ECR 595, paragraph 21, Case C-206/06, *Essent Netwerk* [2008] 5497, paragraphs 47, 57 and 96.

⁽⁴⁾ *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.

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 markets ⁽¹⁾.

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 reduced ⁽²⁾.
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 affected ⁽³⁾. 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 population ⁽⁴⁾;
 - (b) local hospitals aimed exclusively at the local population ⁽⁵⁾;
 - (c) local museums unlikely to attract cross-border visitors ⁽⁶⁾; and
 - (d) local cultural events, whose potential audience is restricted locally ⁽⁷⁾.
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 aid ⁽⁸⁾, 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 sector ⁽⁹⁾ 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.

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* judgment ⁽¹⁰⁾, 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.

⁽¹⁾ 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.

⁽²⁾ See, in particular, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

⁽³⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, paragraph 81.

⁽⁴⁾ Commission Decision in Case N 258/2000 — Germany — Leisure Pool Dorsten, OJ C 172, 16.6.2001, p. 16.

⁽⁵⁾ Commission Decision in Case N 543/2001 — Ireland — Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4.

⁽⁶⁾ Commission Decision in Case N 630/2003 — Italy — Local museums — Sardinia, OJ C 275, 8.12.2005, p. 3.

⁽⁷⁾ Commission Decision in Case N 257/2007 — Spain — Grants for theatrical productions in the Basque Country, OJ C 173, 26.7.2007, p. 2.

⁽⁸⁾ OJ L 379, 28.12.2006, p. 5, incorporated at point 1ea of Annex XV to the EEA Agreement.

⁽⁹⁾ See Article 2(2) of Regulation (EC) No 1998/2006 for transport.

⁽¹⁰⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

... 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 obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations' ⁽¹⁾.

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 Agreement ⁽²⁾, the need for an entrustment act ⁽³⁾, the obligation to define the parameters of compensation ⁽⁴⁾, the principles concerning the avoidance of overcompensation ⁽⁵⁾ and the principles concerning the selection of the provider ⁽⁶⁾.

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 SGELs are services that exhibit special characteristics as compared with those of other economic activities ⁽⁷⁾.

46. In the absence of specific EEA rules defining the scope for the existence of an SGEL, EFTA States have a wide margin of discretion in defining a given service as an SGEL 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 SGEL ⁽⁸⁾ 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 SGEL has been correctly defined for the purpose of state aid control.

⁽¹⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, paragraphs 87 to 93.

⁽²⁾ See section 3.2.

⁽³⁾ See section 3.3.

⁽⁴⁾ See section 3.4.

⁽⁵⁾ See section 3.5.

⁽⁶⁾ See section 3.6.

⁽⁷⁾ 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.

⁽⁸⁾ 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.

47. The first Altmark criterion requires the definition of an SGEI task. This requirement coincides with that of Article 59(2) of the EEA Agreement ⁽¹⁾. 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' ⁽²⁾. Generally speaking, 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 conditions ⁽³⁾. 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 conditions ⁽⁴⁾. 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 conditions ⁽⁵⁾.
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 State ⁽⁶⁾. 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.
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.

⁽¹⁾ Case T-289/03 *British United Provident Association Ltd (BUPA) v Commission* [2008], ECR II-81, paragraphs 171 and 224.

⁽²⁾ See, in particular, Case C-127/73 *BRT v SABAM* [1974] ECR-313.

⁽³⁾ 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).

⁽⁴⁾ Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 71.

⁽⁵⁾ 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.

⁽⁶⁾ See, in particular, Case C-127/73 *BRT v SABAM* [1974] ECR-313.

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 provider ⁽¹⁾. 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 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 capital ⁽²⁾ 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.

⁽¹⁾ Case T-17/02 *Fred Olsen*, paragraph 188.

⁽²⁾ 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 sectors⁽¹⁾ 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 contracts⁽²⁾, 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 open⁽³⁾ procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted⁽⁴⁾ procedure can satisfy the fourth *Altmark* criterion, unless interested operators are prevented to tender without valid reasons. On the other hand, a competitive dialogue⁽⁵⁾ or a negotiated procedure with prior publication⁽⁶⁾ 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 publication of a contract notice⁽⁷⁾ 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'⁽⁸⁾ obviously satisfies the fourth *Altmark* criterion. Also the 'most economically advantageous tender'⁽⁹⁾ is deemed sufficient, provided that the award criteria, including environmental⁽¹⁰⁾ 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 market⁽¹¹⁾. 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.

⁽¹⁾ OJ L 134, 30.4.2004, p. 114, incorporated at point 4 of Annex XVI to the EEA Agreement.

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

⁽³⁾ Article 1(11)(a) of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

⁽⁴⁾ Article 1(11)(b) of Directive 2004/18/EC, Article 1(9)(b) of Directive 2004/17/EC.

⁽⁵⁾ Article 29 of Directive 2004/18/EC.

⁽⁶⁾ Article 30 of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

⁽⁷⁾ Article 31 of Directive 2004/18/EC. See also Article 40(3) of Directive 2004/17/EC.

⁽⁸⁾ Article 53(1)(b) of Directive 2004/18/EC, Article 55(1)(b) of Directive 2004/17/EC.

⁽⁹⁾ 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.

⁽¹⁰⁾ 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

⁽¹¹⁾ 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.

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 tender⁽¹⁾.

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 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.

⁽¹⁾ 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.

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 capital ⁽¹⁾ 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.
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⁽¹⁾ 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.

ANNEX II

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 compensation ⁽¹⁾****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 Union ⁽²⁾ 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 conditions ⁽³⁾. 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 interest ⁽⁴⁾, the EFTA Surveillance Authority (the 'Authority') has clarified the conditions under which public service 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 interest ⁽⁵⁾ 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.

⁽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.

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

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')⁽¹⁾ 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 Agreement⁽²⁾.
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 compensation⁽³⁾.
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 broadcasting⁽⁴⁾.
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 difficulty⁽⁵⁾.
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 undertakings⁽⁶⁾;
 - (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.

⁽¹⁾ OJ L 7, 11.1.2012, p. 3.

⁽²⁾ 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.

⁽³⁾ OJ L 109, 26.4.2007, p. 44 and EEA Supplement No 20, 26.4.2007, p. 1.

⁽⁴⁾ Not yet published in the OJ or the EEA Supplement.

⁽⁵⁾ OJ L 97, 15.4.2005, p. 41 and EEA Supplement No 18, 15.4.2005, p. 1.

⁽⁶⁾ OJ L 318, 17.11.2006, p. 17. Incorporated at point 1a of Annex XV to the EEA Agreement.

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 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/EC⁽¹⁾. 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 cost⁽²⁾ 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 based⁽³⁾. 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

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.

⁽¹⁾ 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.

⁽²⁾ 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.

⁽³⁾ Public sources of information, cost levels incurred by the SGEI provider in the past, cost levels of competitors, business plans, industry reports, etc.

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 services ⁽¹⁾, 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 service ⁽²⁾, 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 contribution to the common costs, market prices for the use of the resources, where available, can be taken as a benchmark ⁽³⁾. In the absence of such market prices, the appropriate contribution to the common costs can be determined by reference to the level of reasonable profit ⁽⁴⁾ 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.

⁽¹⁾ OJ L 108, 24.4.2002, p. 51. Incorporated at point 5 cm of Annex XI to the EEA Agreement.

⁽²⁾ OJ L 15, 21.1.1998, p. 14. Incorporated at point 5d of Annex XI to the EEA Agreement.

⁽³⁾ 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'.

⁽⁴⁾ 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.

Reasonable profit

33. Reasonable profit should be taken to mean the rate of return on capital ⁽¹⁾ 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 equity ⁽²⁾ 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.
36. A rate of return on capital that does not exceed the relevant swap rate ⁽³⁾ plus a premium of 100 basis points ⁽⁴⁾ 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 justification ⁽⁵⁾.
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.

⁽¹⁾ 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.

⁽²⁾ 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.

⁽³⁾ 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.

⁽⁴⁾ 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.

⁽⁵⁾ 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.

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 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 act ⁽¹⁾.
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 publication ⁽²⁾, checks should normally be made at least every two years.

⁽¹⁾ Similarly, a deficit which results from efficiency gains lower than expected should be partially borne by the undertaking when stipulated in the entrustment act.

⁽²⁾ Such as aid granted in relation to in-house contracts, concessions with no competitive allocation, public procurement procedures with no prior publication.

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 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 SGIE 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 SGIE 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 Agreement ⁽¹⁾, 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 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.

⁽¹⁾ As amended, consolidated version available on the Authority's website at the following url: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>