

IV

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

No 90/04/COL

of 23 April 2004

amending for the forty-sixth time the procedural and substantive rules in the field of State aid by introducing a new Chapter 24C: The application of the State aid rules to public service broadcasting

THE EFTA SURVEILLANCE AUTHORITY,

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

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

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

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

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

WHEREAS, on 17 October 2001, the European Commission adopted a new Communication setting out the principles for the application of the State aid rules to public service broadcasting ⁽⁵⁾,

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

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

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

HAVING consulted the European Commission,

RECALLING that the EFTA Surveillance Authority has consulted the EFTA States in a multilateral meeting on the subject,

HAS ADOPTED THIS DECISION:

1. The State Aid Guidelines shall be amended by introducing a new Chapter 24C, Application of State aid rules to public service broadcasting. The new chapter is contained in Annex I to this Decision.

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

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

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

⁽⁴⁾ Initially published in OJ L 231, 3.9.1994, and in the EEA Supplement thereto No 32 on the same date, last amended by Decision No 62/04/COL of 31 March 2004 (not yet published).

⁽⁵⁾ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, p. 5.

2. The EFTA States shall be informed by means of a letter, including a copy of this Decision and including the Annex thereto.
3. The European Commission shall be informed, in accordance with point (d) of Protocol 27 of the EEA Agreement, by means of a copy of this Decision, including the Annex.
4. The Decision, including Annex I, shall be published in the EEA Section of and in the EEA Supplement to the *Official Journal of the European Union*.
5. The Decision shall be authentic in the English language.

Done at Brussels, 23 April 2004.

For the EFTA Surveillance Authority

Hannes HAFSTEIN

President

Einar M. BULL

College Member

ANNEX

24C. THE APPLICATION OF THE STATE AID RULES TO PUBLIC SERVICE BROADCASTING ⁽¹⁾**24C.1. Introduction**

- (1) Over the last two decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.
- (2) In the 1970s, however, economic and technological developments made it increasingly possible for the EFTA States to allow other operators to broadcast. EFTA States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services have become available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector. Whilst opening the market to competition, EFTA States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs that private operators would not necessarily fulfil to the optimal extent.
- (3) The increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Authority's attention by private operators. The complaints allege infringements of Article 61 of the EEA Agreement in relation to the public funding schemes established in favour of public service broadcasters.
- (4) These guidelines set out the principles to be followed by the Authority in the application of Articles 61 and 59(2) of the EEA Agreement to State funding of public service broadcasting. This will make the Authority's policy in this area as transparent as possible.

24C.2. The Role of Public Service Broadcasting

- (1) As stated by the Resolution of the EC Council and of Representatives of the Governments of the EC Member States of 1 January 1999 concerning public service broadcasting (hereinafter referred to as 'Resolution on public service broadcasting') ⁽²⁾, 'public service broadcasting in view of its cultural, social and democratic functions which it discharges for the common good has a vital significance for ensuring democracy, pluralism social cohesion, cultural and linguistic diversity'.
- (2) Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that *at the same time* has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.
- (3) Public service broadcasting has an important role to play in promoting cultural diversity in each country, in providing educational programming, in objectively informing the public, in guaranteeing pluralism and in supplying quality entertainment, democratically and free-of-charge ⁽³⁾.
- (4) Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately ensures that all citizens participate to a fair degree in public life.
- (5) The role of public service ⁽⁴⁾ in general is recognised by the EEA Agreement. The key provision in this respect is Article 59(2) of the EEA Agreement, which reads as follows: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties'.

⁽¹⁾ This chapter is to a large extent based on the Commission Communication on the application of the State aid rules to public service broadcasting, OJ C 320, 15.11.2001, p. 5.

⁽²⁾ OJ C 30, 5.2.1999, p. 1; incorporated into the EEA Agreement in Annex X, point 4, as an act which the Contracting Parties shall take note of, by Decision No 118/1999, OJ L 325, 21.12.2000, p. 33 and EEA Supplement No 60, 21.12.2000, p. 423 (Icelandic) and p. 424 (Norwegian), e.i.f. 1.10.1999.

⁽³⁾ 'The digital age of European audiovisual policy. Report from the EC high-level group on audiovisual policy', 1998.

⁽⁴⁾ For the purpose of the present guidelines, the term 'public service' corresponds with the term 'services of general economic interest' used in Article 59(2) of the EEA Agreement.

- (6) The Court of Justice of the European Communities has acknowledged in two cases that the broadcast of television services can be regarded as 'services of general economic interest' under Article 86(2) of the EC Treaty ⁽⁵⁾. The European Court of Justice has stressed that these services are subject to the competition provisions unless it is demonstrated that to apply those rules would be incompatible with the performance of their tasks ⁽⁶⁾.
- (7) The Resolution on public service broadcasting, taking the particular nature of the broadcasting sector into account, stated the principles and conditions according to which the provisions of the Treaty establishing the European Communities should be applied to this sector:

'The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfillment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

As the Resolution is incorporated into the EEA Agreement as an act which the Contracting Parties shall take note of ⁽⁷⁾, similar principles as those quoted would be applicable in the EEA.

- (8) The Resolution on public service broadcasting further reaffirmed the importance of public service broadcasting for social, democratic and cultural life. 'Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting'. Moreover, public service broadcasting needs to 'benefit from technological progress', bring 'the public the benefits of the new audiovisual and information services and the new technologies' and to undertake 'the development and diversification of activities in the digital age'. Finally, 'public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences'.
- (9) Given these characteristics, which are peculiar to the broadcasting sector, a public service mandate encompassing 'a wide range of programming in accordance with its remit', as stated by the Resolution on public service broadcasting, can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism.
- (10) It should be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a role in achieving the objectives of the Resolution on public service broadcasting to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes.

24C.3. The legal context

- (1) The application of the State aid rules to public service broadcasting has to take into account a wide number of different elements. The EEA Agreement includes Article 61 on State aid as well as Article 59(2) on the application of the rules of the EEA Agreement and the competition rules, in particular, to services of general economic interest. Protocol 3 to the Surveillance and Court Agreement establishes the rules of procedure in State aid cases.
- (2) For the European Communities, the Treaty of Amsterdam introduced a specific provision (Article 16 of the EC treaty) on services of general economic interest and an interpretative protocol on the system of public service broadcasting. The Treaty of Maastricht had already introduced an Article which defines the role of the Community in the field of culture (Article 151 of the EC Treaty) and a possible compatibility clause for State aid aimed at promoting culture (Article 87(3)(d) of the EC Treaty). The EEA Agreement does not contain a 'cultural exemption' similar to Article 87(3)(d) of the EC Treaty. However, this does not mean that an exemption for such measures is excluded. As accepted by the authority in previous cases, such support measures might be approved on cultural grounds on the basis of article 61(3)(c) of the EEA Agreement ⁽⁸⁾.

⁽⁵⁾ Article 86(2) of the EC Treaty corresponds to Article 59(2) of the EEA Agreement.

⁽⁶⁾ Case T-69/89 *Radio Telefís Éireann v Commission* [1991] ECR II 485, paragraph 82; Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, paragraph 15.

⁽⁷⁾ See footnote 2.

⁽⁸⁾ EFTA Surveillance Authority Decision 32/02/COL of 20.2.2002 concerning film production and film related activities in Norway. Further details can be seen in section 24.C.5(2) of these Guidelines.

- (3) Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ⁽⁹⁾ as amended by Directive 97/36/EC ⁽¹⁰⁾, has been incorporated into Annex X of the EEA Agreement ⁽¹¹⁾. Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ⁽¹²⁾, as amended by Directive 2000/52/EC ⁽¹³⁾ of 26 July 2000, was incorporated into the legal framework of the EEA Agreement by EEA Joint Committee Decision No 6/2001 ⁽¹⁴⁾. These rules are subject to interpretation by the EFTA Court within the 'EFTA pillar' and by the European Court of Justice and the European Court of First Instance within the 'Community pillar'. The Authority has also adopted several guidelines on the application of the State aid rules which correspond to similar communications issued by the EC Commission.

24C.4. Applicability of Article 61(1) of the EEA Agreement

24C.4.1. The State aid character of State financing of public service broadcasters

- (1) Article 61(1) of the EEA Agreement states: 'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between the Contracting Parties, be incompatible with the functioning of this Agreement'.
- (2) The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 61(1) of the EEA Agreement. State financing of public service broadcasters is normally to be regarded as State aid, inasmuch as it meets the above criteria. Public service broadcasters are normally financed out of the State budget or through a levy on TV-set holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources. Moreover, and to the extent that such measures fail to satisfy the market economy investor test, in accordance with Chapter 19 of the Authority's State Aid Guidelines on public authorities' holdings and Chapter 20 concerning the application of State aid provisions to public enterprises in the manufacturing sector ⁽¹⁵⁾, they favour in most cases only certain broadcasters and may thereby distort competition. Naturally, the existence of State aid will have to be assessed on a case-by-case basis, and depends also on the specific nature of the funding ⁽¹⁶⁾.
- (3) As the European Court of Justice has observed: 'When aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as unaffected by that aid' ⁽¹⁷⁾. Thus, State financing of public service broadcasters can generally be considered to affect trade between the Contracting Parties. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one EEA State.
- (4) According to the case-law of the European Court of Justice and the Court of First Instance ⁽¹⁸⁾, in general any transfer of State resources to a certain undertaking has to be regarded as State aid (provided that all the conditions for the application of Article 87(1) of the EC Treaty are fulfilled). However, as the European Court of Justice has decided in its judgment concerning *Altmark Trans GmbH* ⁽¹⁹⁾ (hereinafter referred to as the *Altmark* judgment) that '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 favorable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) [now Article 87(1) of the EC Treaty]'.

⁽⁹⁾ OJ L 298, 17.10.1989, p. 23.

⁽¹⁰⁾ OJ L 202, 30.7.1997, p. 60.

⁽¹¹⁾ Joint Committee Decision No 82/19999, OJ L 296, 23.11.2000, p. 39 and EEA Supplement No 54, 23.11.2000, p. 99 (Icelandic) and Del. 2, p. 69 (Norwegian) e.i.f. 1.7.2000.

⁽¹²⁾ OJ L 195, 29.7.1980, p. 35, incorporated into the EEA Agreement in Annex XV thereto.

⁽¹³⁾ OJ L 193, 29.7.2000, p. 75.

⁽¹⁴⁾ OJ L 66, 8.3.2001, p. 48 and EEA Supplement No 12, 8.3.2001, p. 6, e.i.f. 1.6.2002.

⁽¹⁵⁾ Chapter 19 of the Authority's State Aid Guidelines is based on Bulletin EC 9-1984 on the Application of [ex] Articles 92 and 93 of the EEC Treaty to public authorities' holdings. Chapter 20 corresponds to Commission Communication to the Member States on the application of [ex] Articles 92 and 93 of the EEC Treaty (now Articles 87 and 88 of the EC Treaty) and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307, 13.11.1993, p. 3.

⁽¹⁶⁾ See EC Commission Decisions NN 88/98 'Financing of a 24/hour advertising free news channel with licence fee by the BBC', OJ C 78, 18.3.2000, p. 6 and aid NN 70/98, 'State aid to public broadcasting channels Kinderkanal and Phoenix', OJ C 238, 21.8.1999, p. 3.

⁽¹⁷⁾ Cases 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671, paragraph 11; C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27; C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 33.

⁽¹⁸⁾ Cases T-106/95 *FFSA and Others v Commission* [1997] ECR II-229; T-46/97 *SIC v Commission* [2000] ECR II-2125 and C-332/98 *France v Commission* [2000] ECR I-4833.

⁽¹⁹⁾ Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, paragraph 89 et seq.

- (5) According to the *Altmark* judgment of the European Court of Justice, the four conditions below must however be satisfied for such a compensation to escape the classification as State aid:
- 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,
 - 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 for discharging those obligations,
 - 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⁽²⁰⁾.
- (6) The Authority will take this interpretation of the European Court of Justice into account, when it assesses public service compensation payments under Article 61(1) of the EEA Agreement. State support which fulfills the above mentioned criteria, does therefore not constitute State aid within the meaning of Article 61(1) of the EEA Agreement and does not need to be notified to the Authority.

24C.4.2. *Nature of the aid: existing aid as opposed to new aid*

- (1) The funding schemes currently in place in most of the EFTA States were introduced a long time ago. As a first step, therefore, the Authority must determine whether these schemes may be regarded as 'existing aid' within the meaning of Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement⁽²⁰⁾.
- (2) Existing aid is regulated by Article 1(1) in Part I of Protocol 3 to the Surveillance and Court Agreement which states that: 'The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement'.
- (3) Pursuant to Article 1(b)(i) in Part II of Protocol 3 to the Surveillance and Court Agreement, existing aid includes '*all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement*'.
- (4) Pursuant to Article 1(b)(v) in Part II of Protocol 3 to the Surveillance and Court Agreement, existing aid also includes 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State (...)'.
- (5) In accordance with Protocol 3 to the Surveillance and Court Agreement and the case-law of the European Court of Justice⁽²¹⁾, the Authority must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Authority must take into account all the legal and economic elements related to the broadcasting system of a given EFTA State. Although the legal and economic elements relevant for such an assessment present common features in all EEA States, the Authority believes that a case-by-case approach is the most appropriate.

24C.5. **Assessment of the compatibility of State aid under Articles 61(2) and 61(3) of the EEA Agreement**

- (1) State aid to public broadcasters must be examined by the Authority in order to determine whether or not it can be found compatible with the functioning of the EEA Agreement. The derogations listed in Article 61(2) and Article 61(3) of the EEA Agreement can be applied.

⁽²⁰⁾ Corresponds to Article 88(1) of the EC Treaty.

⁽²¹⁾ Case C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Dueroire and the Belgian State* [1994] ECR I-3829.

- (2) The EEA Agreement does not contain a provision corresponding to Article 151(4) of the EC Treaty which obliges the EC Commission to take cultural aspects into account in its actions under other provisions, nor does it contain a cultural exemption similar to Article 87(3)(d) of the EC Treaty. This does not, however, mean that the application of the State aid rules does not leave any room for the consideration of cultural aspects. In this respect, it should be recalled that the Authority established in a decision regarding State aid for film production and film-related activities in Norway, that film support measures might be approved on cultural grounds under the application of Article 61(3)(c) of the EEA Agreement, provided that this approach takes the criteria developed by the EC Commission sufficiently into account and that the approach does not deviate from the EC Commission's practice prior to the adoption of Article 87(3)(d) of the EC Treaty. Secondly, it should be noted that the EC Commission in its decision NN 49/97 and N 357/99 regarding a support package for Irish film and television production, explicitly stressed that the introduction of Articles 151(1) and 87(3)(d) of the EC Treaty did not necessarily reflect a change in the EC Commission's policy towards the cultural sector. Thirdly, with regard to broadcasting, the Resolution on public service broadcasting acknowledges that public service broadcasting fulfills a cultural function and that the application of the competition rules should take the realization of the remit of the public service into account.
- (3) It is for the Authority to decide on the actual application of any exemption provision in Article 61(3) of the EEA Agreement and how cultural aspects should be taken into account. It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Therefore, in the EC Commission's view also the notion of 'culture' for the purpose of exempting aid from the prohibition of State aid within the meaning of Article 87(3)(d) of the EC Treaty must be interpreted restrictively. The same applies when the Authority is examining whether a measure can be exempted on cultural grounds under Article 61(3)(c) of the EEA Agreement. As stated by the EC Commission in its *Kinderkanal* and *Phoenix* decision, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture ⁽²²⁾. In this respect, it should be noted that there is a distinction between the cultural, social and democratic needs of each society. Education may, of course, have a cultural aspect.
- (4) State aid to public service broadcasters often does not differentiate between those three needs. Consequently, unless an EFTA State provides for the separate definition and the separate funding of State aid to promote culture alone, such aid cannot generally be approved on that basis. It can normally be assessed, however, on the basis of Article 59(2) of the EEA Agreement concerning services of general economic interest. In any event, whatever the legal base for assessing compatibility, the substantive analysis would be conducted by the Authority on the basis of the same criteria, namely those set out in these Guidelines.

24C.6. Assessment of the compatibility of State aid under Article 59(2) of the EEA Agreement

- (1) The European Court of Justice has consistently held that Article 86 of the EC Treaty ⁽²³⁾ provides for a derogation and must therefore be interpreted restrictively. The European Court of Justice has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:
- (i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);
 - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
 - (iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test).
- (2) It is for the Authority to assess whether these criteria are satisfied when it applies the corresponding Article 59(2) of the EEA Agreement in relation to the EFTA States.
- (3) In the specific case of public service broadcasting, the above approach has to be adapted in light of the Resolution on public service broadcasting which refers to the 'public service remit as conferred, defined and organised by each Member State' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting 'in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit ... and ... does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account' (proportionality).

⁽²²⁾ See footnote 16.

⁽²³⁾ Article 86 of the EC Treaty corresponds to Article 59 of the EEA Agreement.

- (4) As the EC Commission's recent case practice demonstrates, a measure which does not fulfill all of the Altmark criteria, will still have to be analysed according to Article 86(2) of the EC Treaty, respectively Article 59(2) of the EEA Agreement ⁽²⁴⁾.

24C.6.1. Definition of public service remit

- (1) In order to meet the condition mentioned in 24C.6(1) for application of Article 59(2) of the EEA Agreement, it is necessary to establish an official definition of the public service mandate. Only then can the Authority assess with sufficient legal certainty whether the derogation under Article 59(2) of the EEA Agreement is applicable.
- (2) Definition of the public service mandate falls within the competence of the EFTA States, which can decide at national, regional or local level. Generally speaking, in exercising that competence, account must be taken of the concept of 'services of general economic interest'. However, given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered legitimate under Article 59(2) of the EEA Agreement. Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.
- (3) Similarly, the public service remit might include certain services that are not 'programmes' in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.
- (4) Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment act should be modified accordingly, within the limits of Article 59(2) of the EEA Agreement.
- (5) The Authority's task is to verify whether or not the EFTA States respect the provisions of the EEA Agreement. As regards the definition of public service in the broadcasting sector, the role of the Authority is limited to checking for manifest error. It is not for the Authority to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet the 'democratic, social and cultural needs of each society'. That would normally be the position in the case of e-commerce, for example. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit.
- (6) The definition of the public service mandate should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the EFTA State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement and, therefore, could not grant any exemption under that provision.
- (7) Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities.
- (8) Finally, the terms of the public service remit should be precise, so that EFTA States' authorities can effectively monitor compliance, as described in the following chapter.

24C.6.2. Entrustment and supervision

- (1) In order to benefit from the exemption under Article 59(2) of the EEA Agreement, the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference).
- (2) It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitor its application. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. It is not for the Authority to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the EFTA States.

⁽²⁴⁾ Commission Decision C62/1999, RAI, paragraph 99 and C85/2001, RTP, paragraph 158.

- (3) It is within the competence of the EEA State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.
- (4) In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement and, therefore, could not grant any exemption under that provision.

24C.6.3. Funding of public service broadcasting and the proportionality test

24C.6.3.1. The choice of funding

- (1) Public service duties may be either quantitative, qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.
- (2) Funding schemes can be divided into two broad categories: 'single-funding' and 'dual-funding'. The 'single-funding' category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. 'Dual-funding' systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial activities, such as the sale of advertising space or programmes.
- (3) As stated by the Resolution on public service broadcasting: 'The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting ...'. This will include the choice of the financing scheme. As long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the common interest, there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds).
- (4) While EFTA States are free to choose the means of financing public service broadcasting, the Authority has to verify, under Article 59(2) of the EEA Agreement, that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the EEA area in a disproportionate manner. The test is of a 'negative' nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the common interests.
- (5) The Resolution on public service broadcasting confirms this approach also for public service broadcasting, stating that funding should not 'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

24C.6.3.2. Transparency requirements for the State aid assessment

- (1) The above-described assessment by the Authority requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. Separation of accounts between these two spheres is normally already required at national level to ensure transparency and accountability when using public funds. A separation of accounts is necessary to allow the Authority to carry out its proportionality test. It will provide the Authority with a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 59(2) of the EEA Agreement.
- (2) The transparency requirements in the financial relations between public authorities and public undertakings and within undertakings granted special or exclusive rights or entrusted with the operation of a service of general economic interest are indicated in Directive 80/73/EEC ⁽²⁵⁾.
- (3) The EFTA States have been required by Directive 80/723/EEC to take the measures necessary to ensure — in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving State aid in any form whatsoever and which carries out other activities, that is to say, non-public service activities — that: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities, are separate; (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained are clearly established.

⁽²⁵⁾ See footnote 12.

- (4) The general transparency requirements apply also to broadcasters as indicated in the fifth recital of Directive 2000/52/EC ⁽²⁶⁾. The new requirements apply to public service broadcasters, in so far as they are beneficiaries of State aid and they are entrusted with the operation of a service of general economic interest, for which the State aid was not fixed for an appropriate period following an open, transparent and non-discriminatory procedure. The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services.
- (5) In the broadcasting sector, the separation of accounts does not pose a particular problem on the revenue side, but may not be straightforward or, indeed, feasible on the cost side. This is due to the fact that, in the broadcasting sector, EFTA States may consider the whole programming of the broadcasters as covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, different activities share the same input to a large extent.
- (6) For these reasons, the Authority considers that, on the revenue side, broadcasting operators should give a detailed account of the sources and amount of all income accruing from the performance of non-public service activities.
- (7) On the expenditure side, costs specific to the non-public service activity should be clearly identified. In addition, whenever the same resources — personnel, equipment, fixed installation, etc. — are used to perform both public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities ⁽²⁷⁾.
- (8) The above implies that, contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities, while benefiting also commercial activities, need not be apportioned between the two and can be entirely allocated to public service. This could be the case, for example, with the production costs of a programme which is shown as part of the public service remit but is also sold to other broadcasters. The main example, however, would be that of the number of viewers, which is generated both to fulfil the public service remit and to sell advertising space. It is considered that a full distribution of these costs between the two activities risks being arbitrary and not meaningful. However, cost allocation from the point of view of transparency of accounts should not be confused with cost recovery in the definition of pricing policies. The latter issue is addressed in section 24 C.6.3.3.(2).

24C.6.3.3. Proportionality

- (1) In carrying out the proportionality test, the Authority starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy this test, it is necessary that the State aid does not exceed the net costs of the public service mission, also taking into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.
- (2) On the other hand, there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster. Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations. This would in any event affect trading conditions and competition in the European Economic Area to an extent which would be contrary to the common interest.
- (3) Accordingly, in carrying out the proportionality test, the Authority will consider whether or not any distortion of competition arising from the aid can be justified in terms of the need to perform the public service as defined by the EFTA State and to provide for its funding. When necessary the Authority will also take action in light of other provisions of the EEA Agreement.

⁽²⁶⁾ See footnote 13 and 14.

⁽²⁷⁾ This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

- (4) The analysis of the effects of State aid on competition and development of trade will inevitably have to be based on the specific characteristics of each situation. The actual competitive structure and other characteristics of each of the markets cannot be described in the present communication, as they are generally quite different from each other. For the same reason, these Guidelines cannot *ex ante* define the conditions under which the prices of the public service broadcasters are in line with the principles explained in section 24.C.6.3.3. (2). Therefore the assessment under Article 59(2) of the EEA Agreement of the compatibility of State aid to public broadcasters can finally only be made on a case-by-case basis, according to the Authority's practice.
- (5) In its assessment, the Authority will take into account the fact that, to the extent that State aid is necessary to carry out the public service obligation, the system as a whole might also have the positive effect of maintaining an alternative source of supply in some relevant markets ⁽²⁸⁾. However, this effect has to be balanced against possible negative effects of the aid, such as preventing other operators from entering these markets, thereby allowing a more oligopolistic market structure, or leading to possible anti-competitive behaviour of public service operators in the relevant markets.
- (6) The Authority will also take into account the difficulty some EFTA States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher ⁽²⁹⁾.
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⁽²⁸⁾ This does not mean that State aid can be justified as a tool, which increases supply and competition in a market. State aid which allows an operator to stay in the market in spite of its recurrent losses causes a major distortion of competition, as it leads in the long run to higher inefficiency, smaller supply and higher prices for consumers. Lifting legal and economic barriers to entry, ensuring an effective anti-trust policy and promoting pluralism are more effective instruments in this respect. Natural monopolies are normally subject to regulation.

⁽²⁹⁾ Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.