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Contents

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

[1] Text with EEA relevance.

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2017/2404

of 20 December 2017

conferring protection under Article 99 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council on the name 'Maasvallei Limburg' (PDO)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ([1]), and in particular Article 99 thereof,

Whereas:

(1) In accordance with Article 97(2) and (3) of Regulation (EU) No 1308/2013, the Commission has examined the application to register the name 'Maasvallei Limburg' sent by Belgium and the Netherlands and has published it in the *Official Journal of the European Union* ([2]).

(2) No statement of objection has been received by the Commission under Article 98 of Regulation (EU) No 1308/2013.

(3) In accordance with Article 99 of Regulation (EU) No 1308/2013, the name 'Maasvallei Limburg' should be protected and entered in the register referred to in Article 104 of that Regulation.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Committee for the Common Organisation of the Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

The name 'Maasvallei Limburg' (PDO) is hereby protected.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) OJ C 278, 22.8.2017, p. 4.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 December 2017.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION IMPLEMENTING REGULATION (EU) 2017/2405

of 20 December 2017

conferring protection under Article 99 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council on the name 'Picpoul de Pinet' (PDO)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ([1]), and in particular Article 99 thereof,

Whereas:

(1) In accordance with Article 97(2) and (3) of Regulation (EU) No 1308/2013, the Commission examined France's application to register the name 'Picpoul de Pinet'. The Commission found that the conditions laid down in Articles 93 to 96, 97(1), 100, 101 and 102 of Regulation (EU) No 1308/2013 had been met. It thus found, subject to possible opposition, that protection could be granted to the composite name 'Picpoul de Pinet' as a whole, on the basis of its traditional usage. The Commission also considered that this registration would not prevent the use — provided the principles and rules applicable in the Union's legal order are respected — of the name of the 'piquepoul' grape variety or its synonyms, since this name neither contains nor consists of the name 'Picpoul de Pinet', nor, essentially, does it refer to the geographical element of that name, and therefore the conditions laid down in the first subparagraph of Article 100(3) of Regulation (EU) No 1308/2013 are not met. The application to register the name was subsequently published in the *Official Journal of the European Union* ([2]).

(2) No statement of opposition has been received by the Commission under Article 98 of Regulation (EU) No 1308/2013.

(3) In accordance with Article 99 of Regulation (EU) No 1308/2013, the name 'Picpoul de Pinet' should be protected and entered in the register referred to in Article 104 of that Regulation.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

The name 'Picpoul de Pinet' (PDO) is hereby protected.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 December 2017.

For the Commission

The President

Jean-Claude JUNCKER

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) OJ C 253, 4.8.2017, p. 4.

COMMISSION IMPLEMENTING REGULATION (EU) 2017/2406

of 20 December 2017

determining the quantities to be added to the quantity fixed for the subperiod 1 April to 30 June 2018 under the tariff quotas opened by Regulation (EC) No 442/2009 in the pigmeat sector

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [1], and in particular Article 188(2) and (3) thereof,

Whereas:

(1) Commission Regulation (EC) No 442/2009 [2] opened annual tariff quotas for imports of pigmeat products. The quotas listed in Part B of Annex I to that Regulation are managed using the simultaneous examination method.

(2) The quantities covered by import licence applications lodged from 1 to 7 December 2017 for the subperiod 1 January to 31 March 2018 are smaller than those available. The quantities for which applications have not been lodged should therefore be determined and these should be added to the quantity fixed for the following quota subperiod.

(3) In order to ensure the efficient management of the measure, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The quantities for which import licence applications have not been lodged under Regulation (EC) No 442/2009, to be added to the subperiod 1 April to 30 June 2018, are set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 December 2017.

For the Commission,
On behalf of the President,
Jerzy PLEWA
Director-General
Directorate-General for Agriculture and Rural Development

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[1] OJ L 347, 20.12.2013, p. 671.
[2] Commission Regulation (EC) No 442/2009 of 27 May 2009 opening and providing for the administration of Community tariff quotas in the pigmeat sector (OJ L 129, 28.5.2009, p. 13).

ANNEX

Order No	Quantities not applied for, to be added to the quantities available for the subperiod 1 April to 30 June 2018 (kg)
09.4038	25 693 750
09.4170	3 691 500

COMMISSION IMPLEMENTING REGULATION (EU) 2017/2407

of 20 December 2017

establishing the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 1 to 7 December 2017 and determining the quantities to be added to the quantity fixed for the subperiod from 1 April to 30 June 2018 under the tariff quotas opened by Regulation (EC) No 539/2007 in the egg sector and for egg albumin

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ([1]), and in particular Article 188 thereof,

Whereas:

(1) Commission Regulation (EC) No 539/2007 ([2]) opened annual tariff quotas for imports of egg products and egg albumin.

(2) For some quotas, the quantities covered by the applications for import licences lodged from 1 to 7 December 2017 for the subperiod from 1 January to 31 March 2018 exceed those available. The extent to which import licences may be issued should therefore be determined by fixing the allocation coefficient to be applied to the quantities requested, calculated in accordance with Article 7(2) of Commission Regulation (EC) No 1301/2006 ([3]).

(3) For some quotas, the quantities covered by the applications for import licences lodged from 1 to 7 December 2017 for the subperiod from 1 January to 31 March 2018 are less than those available. The quantities for which applications have not been lodged should therefore be determined, and these should be added to the quantity fixed for the following quota subperiod.

(4) In order to ensure the efficiency of the measure, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union,*

HAS ADOPTED THIS REGULATION:

Article 1

1. The quantities for which import licence applications have been lodged under Regulation (EC) No 539/2007 for the subperiod from 1 January to 31 March 2018 shall be multiplied by the allocation coefficient set out in the Annex hereto.

2. The quantities for which import licence applications have not been lodged pursuant to Regulation (EC) No 539/2007, to be added to the subperiod from 1 April to 30 June 2018, are set out in the Annex hereto.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) Commission Regulation (EC) No 539/2007 of 15 May 2007 opening and providing for the administration of tariff quotas in the egg sector and for egg albumin (OJ L 128, 16.5.2007, p. 19).
([3]) Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences (OJ L 238, 1.9.2006, p. 13).

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 December 2017.

For the Commission,
On behalf of the President,
Jerzy PLEWA
Director-General
Director-General for Agriculture and Rural Development

ANNEX

Order No	Allocation coefficient – applications lodged for the sub-period from 1 January to 31 March 2018 (as a %)	Quantities not applied for, to be added to the quantities available for the subperiod from 1 April to 30 June 2018 (shell egg equivalent weight in kg)
09.4015	—	105 912 000
09.4401	99,823823	0
09.4402	—	10 545 000

DECISIONS

COUNCIL IMPLEMENTING DECISION (EU) 2017/2408

of 18 December 2017

authorising the Republic of Latvia to apply a special measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ([1]), and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Under point 10 of Article 287 of Directive 2006/112/EC, Latvia may exempt from value added tax (VAT) taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 17 200 at the conversion rate on the day of its accession.

(2) By virtue of Council Implementing Decision 2010/584/EU ([2]), Latvia was authorised, as a derogating measure, to exempt taxable persons whose annual turnover was no higher than EUR 50 000 from VAT, until 31 December 2013. That measure was extended by Council Implementing Decision 2014/796/EU ([3]) and expires on 31 December 2017.

(3) By letter registered with the Commission of 3 July 2017, Latvia requested authorisation for a special measure in order to continue derogating from Article 287 of Directive 2006/112/EC and to decrease the exemption threshold to EUR 40 000 (the 'special measure').

(4) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 13 September 2017 of the request made by Latvia. The Commission notified Latvia by letter dated 14 September 2017 that it had all the information necessary to consider the request.

(5) Given that the special measure will result in reduced VAT obligations for small enterprises, Latvia should be authorised to apply it for a limited period of time, until 31 December 2020. Taxable persons should still be able to opt for the normal VAT arrangements.

(6) Based on information provided by Latvia, the special measure will have a negligible impact on the overall amount of tax revenue collected at the final stage of consumption.

(7) As Articles 281 to 294 of Directive 2006/112/EC governing the special scheme for small enterprises are subject to review, it is possible that a directive amending those provisions will enter into force by 31 December 2020.

(8) The special measure has no impact on the Union's own resources accruing from value added tax because Latvia will carry out a compensation calculation in accordance with Article 6 of Council Regulation (EEC, Euratom) No 1553/89 ([4]),

([1]) OJ L 347, 11.12.2006, p. 1.
([2]) Council Implementing Decision 2010/584/EU of 27 September 2010 authorising the Republic of Latvia to apply a measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax (OJ L 256, 30.9.2010, p. 29).
([3]) Council Implementing Decision 2014/796/EU of 7 November 2014 authorising the Republic of Latvia to apply a measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax (OJ L 330, 15.11.2014, p. 46).
([4]) Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ L 155, 7.6.1989, p. 9).

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from point 10 of Article 287 of Directive 2006/112/EC, the Republic of Latvia is authorised to exempt from VAT taxable persons whose annual turnover is no higher than EUR 40 000.

Article 2

This Decision shall take effect on the day of its notification.

This Decision shall apply from 1 January 2018 until 31 December 2020 or until the entry into force of a directive amending Articles 281 to 294 of Directive 2006/112/EC, whichever date is earlier.

Article 3

This Decision is addressed to the Republic of Latvia.

Done at Brussels, 18 December 2017.

For the Council
The President
K. SIMSON

COUNCIL IMPLEMENTING DECISION (EU) 2017/2409

of 18 December 2017

authorising Sweden to apply a reduced rate of excise duty on electricity consumed by households and service sector companies situated in certain areas in the North of Sweden in accordance with Article 19 of Directive 2003/96/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([1]), and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Council Implementing Decision 2012/47/EU ([2]) authorises Sweden to apply, until 31 December 2017, a reduced rate of excise duty to electricity consumed by households and service sector companies in certain areas in the north of Sweden ('the beneficiaries') pursuant to Article 19 of Directive 2003/96/EC.

(2) By letter of 10 May 2017, Sweden requested authorisation to continue to apply a reduced rate of excise duty to electricity consumed by the beneficiaries for a further period of 6 years, until 31 December 2023. The reduction is to be limited to SEK 96 per MWh. By letter of 1 September 2017, Sweden sent additional information and clarifications.

(3) In the geographical areas concerned, the costs of heating are on average 30 % higher than in the rest of the country, due to the longer heating period. Reducing the costs of electricity for the beneficiaries narrows the gap between overall costs of heating for consumers in the north of Sweden and those borne by consumers in the rest of the country. The measure therefore contributes to achieving regional and cohesion policy objectives. The tax reduction should not exceed what is necessary to compensate for the additional per-unit costs of heating borne by the consumers in the geographical areas concerned.

(4) The reduced excise duty rates should be above the minimum rates laid down in Article 10 of Directive 2003/96/EC.

(5) The measure is not expected to lead to significant distortions of competition or changes in trade between Member States in view of: the remote nature of the areas to which it applies; the fact that the reduction should not exceed the additional costs of heating in the North of Sweden; and the limitation of the measure to households and service sector companies.

(6) Consequently, the measure is acceptable from the point of view of the proper functioning of the internal market and of the need to ensure fair competition. It is also compatible with the Union's health, environment, energy and transport policies.

(7) In light of Article 19(2) of Directive 2003/96/EC, each authorisation granted under this Article is to be strictly limited in time. In order to provide the beneficiaries with a sufficient degree of certainty, the authorisation should be granted for a period of 6 years. This Decision is without prejudice to the application of the Union rules regarding State aid.

(8) The authorisation granted under Decision 2012/47/EU should continue to apply so as to avoid creating a gap between the expiry of that Decision and the taking effect of this Decision,

([1]) OJ L 283, 31.10.2003, p. 51.
([2]) Council Implementing Decision 2012/47/EU of 24 January 2012 authorising Sweden to apply a reduced rate of taxation to electricity consumed by households and service sector companies situated in certain areas in the north of Sweden in accordance with Article 19 of Directive 2003/96/EC (OJ L 26, 28.1.2012, p. 33).

HAS ADOPTED THIS DECISION:

Article 1

1. Sweden is hereby authorised to apply a reduced rate of excise duty to electricity consumed by households and service sector companies situated in the municipalities listed in the Annex.

Such reduction from the standard national excise duty rate for electricity shall not exceed what is necessary to compensate for the extra heating costs due to the northern location, in comparison with the rest of Sweden, and shall not exceed SEK 96 per MWh.

2. The reduced rate shall comply with the requirements of Directive 2003/96/EC, and in particular with the minimum rates laid down in Article 10 thereof.

Article 2

This Decision shall take effect on the day of its notification.

It shall apply from 1 January 2018 until 31 December 2023.

Article 3

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 18 December 2017.

For the Council
The President
K. SIMSON

ANNEX

Regions	Municipalities
Norrbottens län	All municipalities
Västerbottens län	All municipalities
Jämtlands län	All municipalities
Västernorrlands län	Sollefteå, Ånge, Örnsköldsvik
Gävleborgs län	Ljusdal
Dalarnas län	Malung-Sälen, Mora, Orsa, Älvdalen
Värmlands län	Torsby

COMMISSION IMPLEMENTING DECISION (EU) 2017/2410

of 20 December 2017

amending Decisions 2006/415/EC and 2007/25/EC and Implementing Decision 2013/657/EU concerning certain protection measures in relation to highly pathogenic avian influenza

(notified under document C(2017) 8969)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market ([1]), and in particular Article 9(4) thereof,

Having regard to Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market ([2]), and in particular Article 10(4) thereof,

Having regard to Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC ([3]), and in particular Article 18(1) and (7) thereof,

Having regard to Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries ([4]), and in particular Article 22(1) and (6) thereof,

Having regard to Council Directive 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC ([5]), and in particular Article 63(3) thereof,

Having regard to Regulation (EU) No 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals and repealing Regulation (EC) No 998/2003 ([6]), in particular Article 36(1),

Whereas:

(1) Commission Decisions 2006/415/EC ([7]) and 2007/25/EC ([8]) and Commission Implementing Decision 2013/657/EU ([9]) were adopted following outbreaks of highly pathogenic avian influenza of the subtype H5N1 with a view to protecting animal and human health in the Union.

(2) Decision 2006/415/EC lays down certain protection measures to be applied in the event of an outbreak of highly pathogenic avian influenza of the subtype H5N1 in poultry in a Member State, including the establishment of areas A and B following a suspected or confirmed outbreak of that disease.

(3) Decision 2007/25/EC lays down certain protection measures in relation to highly pathogenic avian influenza and movements of pet birds accompanying their owners into the Union.

([1]) OJ L 395, 30.12.1989, p. 13.
([2]) OJ L 224, 18.8.1990, p. 29.
([3]) OJ L 268, 24.9.1991, p. 56.
([4]) OJ L 24, 30.1.1998, p. 9.
([5]) OJ L 10, 14.1.2006, p. 16.
([6]) OJ L 178, 28.6.2013, p. 1.
([7]) Commission Decision 2006/415/EC of 14 June 2006 concerning certain protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 in poultry in the Community and repealing Decision 2006/135/EC (OJ L 164, 16.6.2006, p. 51).
([8]) Commission Decision 2007/25/EC of 22 December 2006 as regards certain protection measures in relation to highly pathogenic avian influenza and movements of pet birds accompanying their owners into the Community (OJ L 8, 13.1.2007, p. 29).
([9]) Commission Implementing Decision 2013/657/EU of 12 November 2013 concerning certain protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 to be applied in the event of an outbreak of that disease in Switzerland and repealing Decision 2009/494/EC (OJ L 305, 15.11.2013, p. 19).

(4) Implementing Decision 2013/657/EU provides that Union protection measures in the event of a positive finding of avian influenza of subtype H5N1 in a wild bird or an outbreak of that disease in poultry in Switzerland are only to be applied to those parts of that third country for which the competent authority of that third country applies equivalent protection measures to those laid down in Decision 2006/415/EC and Commission Decision 2006/563/EC ([1]).

(5) The measures laid down in Decisions 2006/415/EC and 2007/25/EC and Implementing Decision 2013/657/EU apply until 31 December 2017.

(6) During recent years most outbreaks of highly pathogenic avian influenza in poultry and other captive birds, as well as cases in wild birds, within the Union have been caused by H5 subtypes other than H5N1 of Asian origin. However, that virus strain continues to circulate widely in poultry and other captive birds and in wild birds in several Asian and African countries and the risks for animal and human health in the Union persist.

(7) It is therefore appropriate to continue mitigating the risks posed by that virus by certain protection measures in relation to outbreaks of highly pathogenic avian influenza in poultry and other captive birds in the Union and to maintain the measures directed at preventing the possible entry of highly pathogenic avian influenza viruses into the Union via imports of poultry commodities, including the introduction of pet birds.

(8) The introduction of pet birds accompanying their owner poses a low risk for the introduction of the avian influenza virus into the Union, provided that the requirements of Decision 2007/25/EC are complied with, and the birds are destined for a household or another residence of the owner or responsible person. However, the requirements regarding the destination of pet birds following their entry in the Union are not sufficiently laid down in Decision 2007/25/EC which could result in such birds being entered into shows, fairs, exhibitions or other gatherings of birds with a higher risk for the possible spread of infection. Therefore, Decision 2007/25/EC should be amended in order to clearly lay down a requirement that such birds must not be entered into such events before the expiry of a period of 30 days following their entry into the Union.

(9) In addition, the European Food Safety Authority adopted on 14 September 2017 a Scientific Opinion on avian influenza ([2]) (the EFSA Opinion). The measures laid down in Decisions 2006/415/EC and 2007/25/EC and Implementing Decision 2013/657/EU, should be reviewed in the light of the findings of the EFSA Opinion.

(10) In order to maintain the current protection measures and to allow for a thorough evaluation of the policy options for the envisaged review of Union rules based on the findings of the EFSA opinion, the period of application of Decisions 2006/415/EC and 2007/25/EC and Implementing Decision 2013/657/EU should be extended until 31 December 2018.

(11) With regard to Decision 2007/25/EC, it is also appropriate to update the conditions for the introduction of pet birds into the Union by including the avian influenza H7 antigen for the use of diagnostic tests and vaccines.

(12) In addition, in order to facilitate the application of Union rules including certification for the introduction of pet birds into the Union, certain cross-references in Decision 2007/25/EC should be updated to take account of changes in Union legislation.

(13) Decisions 2006/415/EC and 2007/25/EC and Implementing Decision 2013/657/EU should therefore be amended accordingly.

(14) In order to avoid any disturbance with regard to the introduction of pet birds into the Union, the use of the veterinary certificate issued in accordance with Decision 2007/25/EC, prior to the amendments made by this Decision, should be authorised during a transitional period subject to certain conditions.

(15) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS DECISION:

Article 1

In Article 12 of Decision 2006/415/EC, the date '31 December 2017' is replaced by '31 December 2018'.

([1]) Commission Decision 2006/563/EC of 11 August 2006 concerning certain protection measures in relation to highly pathogenic avian influenza of subtype H5N1 in wild birds in the Community and repealing Decision 2006/115/EC (OJ L 222, 15.8.2006, p. 11).
([2]) *EFSA Journal* 2017;15(10):4991.

Article 2

Decision 2007/25/EC is amended as follows:

(1) in Article 1(1)(b):

(a) the points (ii), (iii) and (iv) are replaced by the following:

'(ii) undergo quarantine for 30 days after import into the Member State of destination on premises approved in accordance with the first paragraph of Article 6 of Commission Implementing Regulation (EU) No 139/2013 (*), or

(iii) have, within the last six months and not later than 60 days prior to dispatch from the third country, been vaccinated, and on at least one occasion they have been revaccinated, against avian influenza of the H5 and H7 subtypes; the vaccine(s) used must have been approved for the species concerned in accordance with the manufacturer's instructions, or

(iv) have been in isolation for at least 10 days prior to export and have undergone a test to detect the avian influenza H5 and H7 antigen or genome as laid down in the Chapter on avian influenza of the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals, as regularly updated by the OIE, carried out on a sample taken not earlier than the third day of isolation, and

(*) Commission Implementing Regulation (EU) No 139/2013 of 7 January 2013 laying down animal health conditions for imports of certain birds into the Union and the quarantine conditions thereof (OJ L 47, 20.2.2013, p. 1).'

(b) a new point (v) is added:

'(v) are moved to a household or another residence within the Union and they must not be permitted to enter shows, fairs, exhibitions or other gatherings of birds during the period of 30 days following their entry into the Union, with the exception of movements to an approved facility for quarantine following their importation into the Union as referred to in (ii).'

(2) in Article 2, paragraph (4) is replaced by the following:

'4. Where such checks reveal that the animals do not meet the requirements laid down in this Decision, Article 35 of Regulation (EU) No 576/2013 of the European Parliament and of the Council (*) shall apply.

(*) Regulation (EU) No 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals and repealing Regulation (EC) No 998/2003 (OJ L 178, 28.6.2013, p. 1).'

(3) In Article 6, the date '31 December 2017' is replaced by '31 December 2018'.

(4) In Annex II, Part II of the model veterinary certificate is amended as follows:

(a) Point 3 is replaced by the following:

'[3. The bird(s) complies/comply with at least one of the following conditions:

([1]) *either* [it/they comes/come from a third country listed in Part 1 of Annex I or Part 1 of Annex II to Regulation (EU) No 206/2010 and has/have been confined on the premises specified in point I.11 under official supervision for at least 30 days prior to the date of dispatch and effectively protected from contact with any other bird(s);]

([1]) *or* [it/they has/have been vaccinated on .....[dd/mm/yyyy] and re-vaccinated on .....[dd/mm/yyyy] against avian influenza of H5 and H7 subtypes within the last 6 months and not later than 60 days prior to the date of dispatch, in accordance with the manufacturer's instructions. The vaccine(s) used is/are not (a) live vaccine(s) and is/are approved for the species concerned in the third country of dispatch or in at least one Member State of the European Union;]

([1]) *or* [it/they has/have been isolated for at least 10 days prior to the date of dispatch and have been subjected to a test for the detection of avian influenza H5 and H7 antigen or genome, as prescribed in the Chapter 2.3.4 on avian influenza in the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals of the OIE, as regularly updated, carried out on a sample taken on ..... [dd/mm/yyyy], which must not be earlier than on the third day of isolation;]

and is/are moved to a household or another residence within the European Union and must not be entered in shows, fairs, exhibitions or other gatherings of birds during the period of 30 days following entry into the Union.]

([1]) *or* [3. The owner/person responsible for the bird(s) has declared that he/she has made arrangements for the 30 day post-introduction quarantine after entry into the European Union, in an approved quarantine facility or centre in accordance with the first paragraph of Article 6 of Commission Implementing Regulation (EU) No 139/2013'.

(b) Point 4.1 is replaced by the following:

'4.1. The birds(s) is/are 'pet animals' as defined in Article 3(b) of Regulation (EU) No 576/2013 intended for non-commercial movement.'

(5) In Annex III, the following point 5 is added:

'5. The bird(s) must be moved to a household or another residence within the Union and must not be entered in shows, fairs, exhibitions or other gatherings of birds during the period of 30 days following entry into the Union, with the exception of movements to an approved quarantine facility following entry into the Union.'

Article 3

In Article 4 of Decision 2013/657/EU, the date '31 December 2017' is replaced by '31 December 2018'.

Article 4

For a transitional period until 1 March 2018, pet birds accompanied by a veterinary certificate issued before that date and within the period of its validity in accordance with the model veterinary certificate set out in Annex II and the Declaration set out in Annex III of Decision 2007/25/EC in their versions before the amendments made to Decision 2007/25/EC by Article 2 of this Decision, may continue to be introduced into the Union.

Article 5

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2017.

For the Commission
Vytenis ANDRIUKAITIS
Member of the Commission

COMMISSION IMPLEMENTING DECISION (EU) 2017/2411

of 20 December 2017

amending the Annex to Implementing Decision 2014/709/EU concerning animal health control measures relating to African swine fever in certain Member States

(notified under document C(2017) 8988)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market ([1]), and in particular Article 9(4) thereof,

Having regard to Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market ([2]), and in particular Article 10(4) thereof,

Having regard to Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption ([3]), and in particular Article 4(3) thereof,

Whereas:

(1) Commission Implementing Decision 2014/709/EU ([4]) lays down animal health control measures in relation to African swine fever in certain Member States. The Annex to that Implementing Decision demarcates and lists certain areas of those Member States in Parts I to IV thereof, differentiated by the level of risk based on the epidemiological situation as regards that disease.

(2) In December 2017, a few cases of African swine fever in wild boar were observed in Poland, in powiecie parczewski and warszawski currently listed in Part I of the Annex to Implementing Decision 2014/709/EU. These cases constitute an increased level of risk that should be reflected in the Annex to that Implementing Decision. Accordingly, the powiat miejski Warszawa and gmina Siemień affected by these cases of African swine fever in wild boar in Poland should now be listed in Part II of the Annex to Implementing Decision 2014/709/EU, instead of in Part I, and in addition gmina Wiązowna in Poland should now be listed in Part I of that Annex.

(3) The evolution of the current epidemiological situation of African swine fever in the feral pig population in the Union should be taken into account in the assessment of the risk to animal health posed by the new disease situation in certain Member States and neighbouring third countries. In order to focus the animal health control measures provided for in Implementing Decision 2014/709/EU, and to prevent the further spread of African swine fever, while at the same time preventing any unnecessary disturbance to trade within the Union, and also avoiding unjustified barriers to trade by third countries, the Union list of areas subject to the animal health control measures set out in the Annex to that Implementing Decision should be updated to take account of the changes in the epidemiological situation as regards that disease in Poland.

(4) The Annex to Implementing Decision 2014/709/EU should therefore be amended accordingly.

(5) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

([1]) OJ L 395, 30.12.1989, p. 13.
([2]) OJ L 224, 18.8.1990, p. 29.
([3]) OJ L 18, 23.1.2003, p. 11.
([4]) Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to African swine fever in certain Member States and repealing Implementing Decision 2014/178/EU (OJ L 295, 11.10.2014, p. 63).

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Implementing Decision 2014/709/EU is replaced by the text set out in the Annex to this Decision.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2017.

For the Commission
Vytenis ANDRIUKAITIS
Member of the Commission

ANNEX

The Annex to Implementing Decision 2014/709/EU is replaced by the following:

'*ANNEX*

PART I

1. **The Czech Republic**

The following areas in the Czech Republic:

— okres Uherské Hradiště,

— okres Kroměříž,

— okres Vsetín.

2. **Estonia**

The following areas in Estonia:

— Hiiu maakond.

3. **Latvia**

The following areas in Latvia:

— Aizputes novads,

— Alsungas novads,

— Auces novada Vecauces un Ukru pagasts, Auces pilsēta,

— Jelgavas novada Platones, Vircavas, Jaunsvirlaukas, Vilces, Lielplatones, Elejas un Sesavas pagasts,

— Kuldīgas novada Ēdoles, Īvandes, Gudenieku, Turlavas, Kurmāles, Snēpeles, Laidu pagasts, Kuldīgas pilsēta,

— Pāvilostas novada Sakas pagasts un Pāvilostas pilsēta,

— republikas pilsēta Jelgava,

— Saldus novada Ezeres, Kursīšu, Novadnieku, Pampāļu, Saldus, Zaņas un Zirņu pagasts, Saldus pilsēta,

— Skrundas novads,

— Stopiņu novada daļa, kas atrodas uz rietumiem no autoceļa V36, P4 un P5, Acones ielas, Dauguļupes ielas un Dauguļupītes,

— Tērvetes novads,

— Ventspils novada Jūrkalnes pagasts.

4. **Lithuania**

The following areas in Lithuania:

— Akmenės rajono savivaldybė: Akmenės, Kruopių, Naujosios Akmenės kaimiškoji, Naujosios Akmenės miesto ir Ventos seniūnijos,

— Joniškio rajono savivaldybė,

— Jurbarko rajono savivaldybė: Eržvilko, Girdžių, Jurbarko miesto, Jurbarkų ir Viešvilės seniūnijos, Skirsnemunės ir Šimkaičių seniūnijos dalis į vakarus nuo kelio Nr. 146,

— Kalvarijos savivaldybė,

— Kazlų Rūdos savivaldybė,

— Kelmės rajono savivaldybė,

— Marijampolės savivaldybė,

— Mažeikių rajono savivaldybė,

— Radviliškio rajono savivaldybė: Aukštelkų, Radviliškio, Radviliškio miesto, Šaukoto, Šaulėnų ir Tyrulių,

— Raseinių rajono savivaldybė: Ariogalos seniūnija į šiaurę nuo kelio Nr A1, Ariogalos miesto, Betygalos seniūnijos, Girkalnio ir Kalnūjų seniūnijos į šiaurę nuo kelio Nr A1, Nemakščių, Pagojukų, Paliepių, Raseinių, Raseinių miesto, Šiluvos ir Viduklės seniūnijos,

— Šakių rajono savivaldybė,

— Šiaulių miesto savivaldybė,

— Šiaulių rajono savivaldybė.

5. **Poland**

The following areas in Poland:

w województwie warmińsko-mazurskim:

— gminy Stare Juchy i gmina wiejska Ełk w powiecie ełckim,

— gminy Biała Piska, Orzysz i Pisz w powiecie piskim,

— gminy Miłki i Wydminy w powiecie giżyckim,

— gminy Olecko, Świętajno i Wieliczki w powiecie oleckim,

— gminy Górowo Iławeckie z miastem Górowo Iławeckie i Bartoszyce z miastem Bartoszyce w powiecie bartoszyckim.

w województwie podlaskim:

— gmina Brańsk z miastem Brańsk, gminy Boćki, Rudka, Wyszki, część gminy Bielsk Podlaski położona na zachód od linii wyznaczonej przez drogę nr 19 (w kierunku północnym od miasta Bielsk Podlaski) i przedłużonej przez wschodnią granicę miasta Bielsk Podlaski i drogę nr 66 (w kierunku południowym od miasta Bielsk Podlaski), miasto Bielsk Podlaski, część gminy Orla położona na zachód od drogi nr 66 w powiecie bielskim,

— gminy Augustów z miastem Augustów i Nowinka w powiecie augustowskim,

— gminy Dziadkowice, Grodzisk i Perlejewo w powiecie siemiatyckim,

— gminy Kolno z miastem Kolno, Mały Płock i Turośl w powiecie kolneńskim,

— gminy Juchnowiec Kościelny, Suraż, Turośń Kościelna, Łapy i Poświętne w powiecie białostockim,

— powiat zambrowski,

— gminy Bakałarzewo, Raczki, Rutka-Tartak, Suwałki i Szypliszki w powiecie suwalskim,

— gminy Sokoły, Kulesze Kościelne, Nowe Piekuty, Szepietowo, Klukowo, Ciechanowiec, Wysokie Mazowieckie z miastem Wysokie Mazowieckie, Czyżew w powiecie wysokomazowieckim,

— gminy Łomża, Miastkowo, Nowogród, Piątnica, Śniadowo i Zbójna w powiecie łomżyńskim,

— powiat miejski Białystok,

— powiat miejski Łomża,

— powiat miejski Suwałki.

w województwie mazowieckim:

— gminy Bielany, Ceranów, Jabłonna Lacka, Sabnie, Sterdyń i gmina wiejska Sokołów Podlaski w powiecie sokołowskim,

— gminy Domanice, Kotuń, Mokobody, Skórzec, Suchożebry, Mordy, Siedlce, Wiśniew i Zbuczyn w powiecie siedleckim,

— powiat miejski Siedlce,

— gminy Rzekuń, Troszyn, Czerwin i Goworowo w powiecie ostrołęckim,

— gminy Olszanka i Łosice w powiecie łosickim,

— powiat ostrowski,

— gmina Wyszogród w powiecie płockim,

— gminy Czerwińsk nad Wisłą i Załuski w powiecie płońskim,

— gminy Pomiechówek, Zakroczym i część miasta Nowy Dwór Mazowiecki położona na północ od rzeki Wisły w powiecie nowodworskim,

— gmina Pokrzywnica i Zatory w powiecie pułtuskim,

— gmina Serock w powiecie legionowskim,

— gmina Somianka w powiecie wyszkowskim,

— gminy Dąbrówka, Klembów, Marki, Poświętne, Radzymin, Wołomin, Zielonka i Ząbki w powiecie wołomińskim,

— gminy Halinów i Sulejówek w powiecie mińskim,

— gmina Józefów, Karczew, Otwock i Wiązowna w powiecie otwockim,

— gminy Lesznowola, Tarczyn i część gminy Góra Kalwaria położona na południe od linii wyznaczonej przez drogę nr 79 i północną granicę miasta Góra Kalwaria w powiecie piaseczyńskim,

— gminy Chynów i Grójec w powiecie grójeckim,

— gminy Brwinów, Michałowice, Nadarzyn, Piastów, Pruszków i Raszyn w powiecie pruszkowskim,

— gminy Baranów, Grodzisk Mazowiecki, Milanówek i Podkowa Leśna w powiecie grodziskim,

— gminy Iłów, Młodzieszyn, Sochaczew z miastem Sochaczew i Teresin w powiecie sochaczewskim.

w województwie lubelskim:

— gminy Cyców, Ludwin, Puchaczów i Spiczyn w powiecie łęczyńskim,

— gminy Borki, Czemierniki, miasto Radzyń Podlaski i Ulan-Majorat w powiecie radzyńskim,

— gmina Adamów, Krzywda, Serokomla, Stanin, Trzebieszów, Wojcieszków i gmina wiejska Łuków w powiecie łukowskim,

— gminy Dębowa Kłoda i Sosnowica w powiecie parczewskim,

— gminy Dorohusk, Kamień, Chełm, Ruda – Huta, część gminy Sawin położona na południe od linii wyznaczonej przez drogę łącząca miejscowość Chutcze z miejscowością Sawin, wzdłuż ulic Brzeska, Wygon i Podgrabowa w miejscowości Sawin, a dalej wzdłuż drogi stanowiącej przedłużenie ulicy Podgrabowa w kierunku wschodnim do granicy gminy, Siedliszcze, Rejowiec, Rejowiec Fabryczny z miastem Rejowiec Fabryczny i Wierzbica w powiecie chełmskim,

— powiat miejski Chełm,

— gminy Firlej, Kock, Lubartów z miastem Lubartów, Serniki, Niedźwiada, Ostrówek, Ostrów Lubelski i Uścimów w powiecie lubartowskim.

PART II

1. **The Czech Republic**

The following areas in the Czech Republic:

— okres Zlín.

2. **Estonia**

The following areas in Estonia:

— Haapsalu linn,

— Hanila vald,

— Harju maakond,

— Ida-Viru maakond,

— Jõgeva maakond,

— Järva maakond,

— Kihelkonna vald,

— Kullamaa vald,

— Kuressaare linn,

— Lääne-Viru maakond,

— Lääne-Saare vald,

— osa Leisi vallast, mis asub lääne pool Kuressaare-Leisi maanteest (maanatee nr 79),

— Lihula vald,

— Martna vald,

— Muhu vald,

— Mustjala vald,

— Osa Noarootsi vallast, mis asub põhja pool maanteest nr 230,

— Nõva vald,

— Pihtla vald,

— Pärnu maakond (välja arvatud Audru ja Tõstamaa vald),

— Põlva maakond,

— Rapla maakond,

— Osa Ridala vallast, mis asub edela pool maanteest nr 31,

— Ruhnu vald,

— Salme vald,

— Tartu maakond,

— Torgu vald,

— Valga maakond,

— Viljandi maakond,

— Vormsi vald,

— Võru maakond.

3. **Latvia**

The following areas in Latvia:

— Ādažu novads,

— Aglonas novada Kastuļinas, Grāveru un Šķeltovas pagasts,

— Aizkraukles novads,

— Aknīstes novads,

— Alojas novads,

— Alūksnes novads,

— Amatas novads,

— Apes novads,

— Auces novada Bēnes, Lielauces un Īles pagasts,

— Babītes novads,

— Baldones novads,

— Baltinavas novads,

— Balvu novads,

— Bauskas novads,

— Beverīnas novads,

— Brocēnu novads,

— Burtnieku novads,

— Carnikavas novads,

— Cēsu novads,

— Cesvaines novads,

— Ciblas novads,

— Dagdas novads,

— Daugavpils novada Vaboles, Līksnas, Sventes, Medumu, Demenas, Kalkūnes, Laucesas, Tabores, Maļinovas, Ambeļu, Biķernieku, Naujenes, Vecsalienas, Salienas un Skrudalienas pagasts,

— Dobeles novads,

— Dundagas novads,

— Engures novads,

— Ērgļu novads,

— Garkalnes novada daļa, kas atrodas uz ziemeļrietumiem no autoceļa A2,

— Gulbenes novads,

— Iecavas novads,

— Ikšķiles novada Tīnūžu pagasta daļa, kas atrodas uz dienvidaustrumiem no autoceļa P10, Ikšķiles pilsēta,

— Ilūkstes novads,

— Jaunjelgavas novads,

— Jaunpiebalgas novads,

— Jaunpils novads,

— Jēkabpils novads,

— Jelgavas novada Glūdas, Zaļenieku, Svētes, Kalnciema, Līvbērzes un Valgundes pagasts,

— Kandavas novads,

— Kārsavas novads,

— Ķeguma novads,

— Ķekavas novads,

— Kocēnu novads,

— Kokneses novads,

— Krāslavas novads,

— Krimuldas novada Krimuldas pagasta daļa, kas atrodas uz ziemeļaustrumiem no autoceļa V89 un V81, un Lēdurgas pagasta daļa, kas atrodas uz ziemeļaustrumiem no autoceļa V81 un V128,

— Krustpils novads,

— Kuldīgas novada Padures, Pelču, Rumbas, Rendas, Kalibes un Vārmes pagasti,

— Lielvārdes novads,

— Līgatnes novads,

— Limbažu novada Skultes, Limbažu, Umurgas, Katvaru, Pāles un Viļķenes pagasts, Limbažu pilsēta,

— Līvānu novads,

— Lubānas novads,

— Ludzas novads,

— Madonas novads,

— Mālpils novads,

— Mārupes novads,

— Mazsalacas novads,

— Mērsraga novads,

— Naukšēnu novads,

— Neretas novada Mazzalves pagasta daļa, kas atrodas uz ziemeļaustrumiem no autoceļa P73 un uz rietumiem no autoceļa 932,

— Ogres novads,

— Olaines novads,

— Ozolnieku novads,

— Pārgaujas novads,

— Pļaviņu novads,

— Preiļu novada Saunas pagasts,

— Priekuļu novada Veselavas pagasts un Priekuļu pagasta daļa, kas atrodas uz dienvidiem no autoceļa P28 un rietumiem no autoceļa P20,

— Raunas novada Drustu pagasts un Raunas pagasta daļa, kas atrodas uz dienvidiem no autoceļa A2,

— republikas pilsēta Daugavpils,

— republikas pilsēta Jēkabpils,

— republikas pilsēta Jūrmala,

— republikas pilsēta Rēzekne,

— republikas pilsēta Valmiera,

— Rēzeknes novada Audriņu, Bērzgales, Čornajas, Dricānu, Gaigalavas, Griškānu, Ilzeskalna, Kantinieku, Kaunatas, Lendžu, Lūznavas, Maltas, Mākoņkalna, Nagļu, Ozolaines, Ozolmuižas, Rikavas, Nautrēnu, Sakstagala, Silmalas, Stoļerovas, Stružānu un Vērēmu pagasts un Feimaņu pagasta daļa, kas atrodas uz ziemeļiem no autoceļa V577 un Pušas pagasta daļa, kas atrodas uz ziemeļaustrumiem no autoceļa V577 un V597,

— Riebiņu novada Sīļukalna, Stabulnieku, Galēnu un Silajāņu pagasts,

— Rojas novads,

— Ropažu novada daļa, kas atrodas uz austrumiem no autoceļa P10,

— Rugāju novads,

— Rundāles novads,

— Rūjienas novads,

— Salacgrīvas novads,

— Salas novads,

— Saldus novada Jaunlutriņu, Lutriņu un Šķēdes pagasts,

— Saulkrastu novads,

— Siguldas novada Mores pagasts un Allažu pagasta daļa, kas atrodas uz dienvidiem no autoceļa P3,

— Skrīveru novads,

— Smiltenes novads,

— Strenču novads,

— Talsu novads,

— Tukuma novads,

— Valkas novads,

— Varakļānu novads,

— Vecpiebalgas novads,

— Vecumnieku novads,

— Ventspils novada Ances, Tārgales, Popes, Vārves, Užavas, Piltenes, Puzes, Ziru, Ugāles, Usmas un Zlēku pagasts, Piltenes pilsēta,

— Viesītes novada Elkšņu un Viesītes pagasts, Viesītes pilsēta,

— Viļakas novads,

— Viļānu novads,

— Zilupes novads.

4. **Lithuania**

The following areas in Lithuania:

— Alytaus miesto savivaldybė,

— Alytaus rajono savivaldybė,

— Anykščių rajono savivaldybė: Andrioniškio, Anykščių, Debeikių, Kavarsko seniūnijos dalis į šiaurės rytus nuo kelio Nr. 1205 ir į šiaurę rytus nuo kelio Nr. 1218, Kurklių, Skiemonių, Svėdasų, Troškūnų ir Viešintų seniūnijos,

— Birštono savivaldybė,

— Biržų miesto savivaldybė,

— Biržų rajono savivaldybė: Nemunėlio Radviliškio, Pabiržės, Pačeriaukštės ir Parovėjos seniūnijos,

— Elektrėnų savivaldybė,

— Ignalinos rajono savivaldybė,

— Jonavos rajono savivaldybė,

— Jurbarko rajono savivaldybė: Juodaičių, Raudonės, Seredžiaus, Veliuonos seniūnijos ir Skirsnemunės ir Šimkaičių seniūnijos dalis į rytus nuo kelio Nr. 146,

— Kaišiadorių miesto savivaldybė,

— Kaišiadorių rajono savivaldybė,

— Kauno miesto savivaldybė,

— Kauno rajono savivaldybės: Akademijos, Alšėnų, Batniavos, Domeikavos, Ežerėlio, Garliavos apylinkių, Garliavos, Karmėlavos, Kačerginės, Kulautuvos, Lapių, Linksmakalnio, Neveronių, Raudondvario, Ringaudų, Rokų, Samylų, Taurakiemio, Užliedžių, Vilkijos apylinkių, Vilkijos, Zapyškio seniūnijos,

— Kėdainių rajono savivaldybė savivaldybės: Dotnuvos, Gudžiūnų, Josvainių seniūnijos dalis į šiaurę nuo kelio Nr 3514 ir Nr 229, Krakių, Kėdainių miesto, Surviliškio, Truskavos, Vilainių ir Šėtos seniūnijos,

— Kupiškio rajono savivaldybė: Noriūnų, Skapiškio, Subačiaus ir Šimonių seniūnijos,

— Molėtų rajono savivaldybė,

— Pakruojo rajono savivaldybė: Klovainių, Rozalimo, Lygumų, Pakruojo, Žeimelio, Linkuvos ir Pašvitinio seniūnijos,

— Panevėžio rajono savivaldybė: Krekenavos seninūnijos dalis į vakarus nuo Nevėžio upės ir į pietus nuo kelio Nr. 3004,

— Pasvalio rajono savivaldybė: Joniškėlio apylinkių, Joniškėlio miesto, Saločių ir Pušaloto seniūnijos,

— Radviliškio rajono savivaldybė: Baisogalos, Grinkiškio, Skėmių, Šeduvos miesto, Pakalniškių ir Sidabravo seniūnijos,

— Raseinių rajono savivaldybė: Kalnūjų, Girkalnio, Ariogalios seniūnijos į pietus nuo kelio Nr. A1,

— Prienų miesto savivaldybė,

— Prienų rajono savivaldybė,

— Rokiškio rajono savivaldybė,

— Širvintų rajono savivaldybė,

— Švenčionių rajono savivaldybė,

— Trakų rajono savivaldybė,

— Utenos rajono savivaldybė,

— Vilniaus miesto savivaldybė,

— Vilniaus rajono savivaldybė,

— Vilkaviškio rajono savivaldybė,

— Visagino savivaldybė,

— Zarasų rajono savivaldybė.

5. **Poland**

The following areas in Poland:

w województwie warmińsko-mazurskim:

— gmina Kalinowo i Prostki w powiecie ełckim,

w województwie podlaskim:

— część gminy Wizna położona na zachód od linii wyznaczonej przez drogę łączącą miejscowości Jedwabne i Wizna oraz na południe od linii wyznaczoną przez drogę nr 64 (od skrzyżowania w miejscowości Wizna w kierunku wschodnim do granicy gminy) w powiecie łomżyńskim,

— gmina Dubicze Cerkiewne, Czyże, Białowieża, Hajnówka z miastem Hajnówka, Narew, Narewka i części gmin Kleszczele i Czeremcha położone na wschód od drogi nr 66 w powiecie hajnowskim,

— gmina Kobylin-Borzymy w powiecie wysokomazowieckim,

— gminy Grabowo i Stawiski w powiecie kolneńskim,

— gminy Czarna Białostocka, Dobrzyniewo Duże, Gródek, Michałowo, Supraśl, Tykocin, Wasilków, Zabłudów, Zawady i Choroszcz w powiecie białostockim,

— część gminy Bielsk Podlaski położona na wschód od linii wyznaczonej przez drogę nr 19 (w kierunku północnym od miasta Bielsk Podlaski) i przedłużonej przez wschodnią granicę miasta Bielsk Podlaski i drogę nr 66 (w kierunku południowym od miasta Bielsk Podlaski), część gminy Orla położona na wschód od drogi nr 66 w powiecie bielskim,

— powiat sejneński,

— gminy Bargłów Kościelny, Płaska i Sztabin w powiecie augustowskim,

— powiat sokólski,

w województwie mazowieckim:

— gmina Przesmyki w powiecie siedleckim,

— gmina Repki w powiecie sokołowskim,

— gmina Brochów w powiecie sochaczewskim,

— gminy Czosnów, Leoncin i część miasta Nowy Dwór Mazowiecki ograniczona od północy rzeką Narew i od południa rzeką Wisła w powiecie nowodworskim,

— powiat warszawski zachodni,

— gminy Jabłonna, Nieporęt, Wieliszew i Legionowo w powiecie legionowskim,

— gminy Konstancin – Jeziorna, Piaseczno, Prażmów i część gminy Góra Kalwaria, położona na północ od linii wyznaczonej przez drogę nr 79 i północną granicę miasta Góra Kalwaria w powiecie piaseczyńskim,

— powiat miejski Warszawa.

w województwie lubelskim:

— gminy Komarówka Podlaska i Wohyń w powiecie radzyńskim,

— gminy Stary Brus i Urszulin w powiecie włodawskim,

— gminy Rossosz, Wisznice, Sławatycze, Sosnówka, Tuczna i Łomazy w powiecie bialskim,

— gminy Jabłoń, Milanów, Parczew i Siemień w powiecie parczewskim,

— część gminy Sawin położona na północ od linii wyznaczonej przez drogę łącząca miejscowość Chutcze z miejscowością Sawin, wzdłuż ulic Brzeska, Wygon i Podgrabowa w miejscowości Sawin, a dalej wzdłuż drogi stanowiącej przedłużenie ulicy Podgrabowa w kierunku wschodnim do granicy gminy w powiecie chełmskim.

PART III

1. **Estonia**

The following areas in Estonia:

— Audru vald,

— Lääne-Nigula vald,

— Laimjala vald,

— osa Leisi vallast, mis asub ida pool Kuressaare-Leisi maanteest (maantee nr 79),

— Osa Noarootsi vallast, mis asub lõuna pool maanteest nr 230,

— Orissaare vald,

— Pöide vald,

— Osa Ridala vallast, mis asub kirde pool maanteest nr 31,

— Tõstamaa vald,

— Valjala vald.

2. **Latvia**

The following areas in Latvia:

— Aglonas novada Aglonas pagasts,

— Auces novada Vītiņu pagasts,

— Daugavpils novada Nīcgales, Kalupes, Dubnas un Višķu pagasts,

— Garkalnes novada daļa, kas atrodas uz dienvidaustrumiem no autoceļa A2,

— Ikšķiles novada Tīnūžu pagasta daļa, kas atrodas uz ziemeļrietumiem no autoceļa P10,

— Inčukalna novads,

— Krimuldas novada Krimuldas pagasta daļa, kas atrodas uz dienvidrietumiem no autoceļa V89 un V81, un Lēdurgas pagasta daļa, kas atrodas uz dienvidrietumiem no autoceļa V81 un V128,

— Limbažu novada Vidrižu pagasts,

— Neretas novada Neretas, Pilskalnes, Zalves pagasts un Mazzalves pagasta daļa, kas atrodas uz dienvidrietumiem no autoceļa P73 un uz austrumiem no autoceļa 932,

— Priekuļu novada Liepas un Mārsēnu pagasts un Priekuļu pagasta daļa, kas atrodas uz ziemeļiem no autoceļa P28 un austrumiem no autoceļa P20,

— Preiļu novada Preiļu, Aizkalnes un Pelēču pagasts un Preiļu pilsēta,

— Raunas novada Raunas pagasta daļa, kas atrodas uz ziemeļiem no autoceļa A2,

— Rēzeknes novada Feimaņu pagasta daļa, kas atrodas uz dienvidiem no autoceļa V577 un Pušas pagasta daļa, kas atrodas uz dienvidrietumiem no autoceļa V577 un V597,

— Riebiņu novada Riebiņu un Rušonas pagasts,

— Ropažu novada daļa, kas atrodas uz rietumiem no autoceļa P10,

— Salaspils novads,

— Saldus novada Jaunauces, Rubas, Vadakstes un Zvārdes pagasts,

— Sējas novads,

— Siguldas novada Siguldas pagasts un Allažu pagasta daļa, kas atrodas uz ziemeļiem no autoceļa P3, un Siguldas pilsēta,

— Stopiņu novada daļa, kas atrodas uz austrumiem no autoceļa V36, P4 un P5, Acones ielas, Dauguļupes ielas un Dauguļupītes,

— Vārkavas novads,

— Viesītes novada Rites un Saukas pagasts.

3. **Lithuania**

The following areas in Lithuania:

— Anykščių rajono savivaldybė: Kavarsko seniūnijos dalis į vakarus nuo kelio Nr. 1205 ir į pietus nuo kelio Nr. 1218 ir Traupio seniūnija,

— Biržų rajono savivaldybė: Vabalninko, Papilio ir Širvenos seniūnijos,

— Druskininkų savivaldybė,

— Kauno rajono savivaldybė: Babtų, Čekiškės ir Vandžiogalos seniūnijos,

— Kėdainių rajono savivaldybė: Pelėdnagių, Pernaravos seniūnijos ir Josvainių seniūnijos dalis į pietus nuo kelio Nr 3514 ir Nr 229,

— Kupiškio rajono savivaldybė: Alizavos ir Kupiškio seniūnijos,

— Lazdijų rajono savivaldybė,

— Pakruojo rajono savivaldybė: Guostagalio seniūnija,

— Panevėžio miesto savivaldybė,

— Panevėžio rajono savivaldybė: Karsakiškio, Miežiškių, Naujamiesčio, Pajstrio, Raguvos, Ramygalos, Smilgių, Upytės, Vadoklių, Velžio seniūnijos ir Krekenavos seniūnijos dalis į rytus nuo Nevėžio upės ir į šiaurę nuo kelio Nr. 3004,

— Pasvalio rajono savivaldybė: Daujėnų, Krinčino, Namišių, Pasvalio apylinkių, Pasvalio miesto, Pumpėnų ir Vaškų seniūnijos,

— Šalčininkų rajono savivaldybė,

— Ukmergės rajono savivaldybė,

— Varėnos rajono savivaldybė.

4. **Poland**

The following areas in Poland:

w województwie podlaskim:

— powiat grajewski,

— powiat moniecki,

— gminy Jedwabne i Przytuły oraz część gminy Wizna, położona na wschód od linii wyznaczonej przez drogę łączącą miejscowości Jedwabne i Wizna oraz na północ od linii wyznaczonej przez drogę 64 (od skrzyżowania w miejscowości Wizna w kierunku wschodnim do granicy gminy) w powiecie łomżyńskim,

— gmina Lipsk w powiecie augustowskim,

— części gminy Czeremcha i Kleszczele położone na zachód od drogi nr 66 w powiecie hajnowskim,

— gminy Drohiczyn, Mielnik, Milejczyce, Nurzec-Stacja, Siemiatycze z miastem Siemiatycze w powiecie siemiatyckim.

w województwie mazowieckim:

— gminy Platerów, Sarnaki, Stara Kornica i Huszlew w powiecie łosickim,

— gminy Korczew i Paprotnia w powiecie siedleckim.

w województwie lubelskim:

— gminy Kodeń, Konstantynów, Janów Podlaski, Leśna Podlaska, Piszczac, Rokitno, Biała Podlaska, Zalesie i Terespol z miastem Terespol, Drelów, Międzyrzec Podlaski z miastem Międzyrzec Podlaski w powiecie bialskim,

— powiat miejski Biała Podlaska,

— gminy Radzyń Podlaski i Kąkolewnica w powiecie radzyńskim,

— gminy Hanna, Hańsk, Wola Uhruska, Wyryki i gmina wiejska Włodawa w powiecie włodawskim,

— gmina Podedwórze w powiecie parczewskim.

PART IV

Italy

The following areas in Italy:

— tutto il territorio della Sardegna.'

COMMISSION IMPLEMENTING DECISION (EU) 2017/2412

of 20 December 2017

amending the Annex to Implementing Decision (EU) 2017/247 on protective measures in relation to outbreaks of the highly pathogenic avian influenza in certain Member States

(notified under document C(2017) 9014)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market ([1]), and in particular Article 9(3) and (4) thereof,

Having regard to Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market ([2]), and in particular Article 10(3) and (4) thereof,

Whereas:

(1) Commission Implementing Decision (EU) 2017/247 ([3]) was adopted following outbreaks of highly pathogenic avian influenza of subtype H5 in a number of Member States ('the concerned Member States'), and the establishment of protection and surveillance zones by the competent authority of the concerned Member States in accordance with Article 16(1) of Council Directive 2005/94/EC ([4]).

(2) Implementing Decision (EU) 2017/247 provides that the protection and surveillance zones established by the competent authorities of the concerned Member States in accordance with Directive 2005/94/EC are to comprise at least the areas listed as protection and surveillance zones in the Annex to that Implementing Decision. Implementing Decision (EU) 2017/247 also lays down that the measures to be applied in the protection and surveillance zones, as provided for in Article 29(1) and Article 31 of Directive 2005/94/EC, are to be maintained until at least the dates for those zones set out in the Annex to that Implementing Decision.

(3) Since the date of its adoption, Implementing Decision (EU) 2017/247 has been amended several times to take account of developments in the epidemiological situation in the Union as regards avian influenza. In particular, Implementing Decision (EU) 2017/247 was amended by Commission Implementing Decision (EU) 2017/696 ([5]) in order to lay down rules regarding the dispatch of consignments of day-old chicks from the areas listed in the Annex to Implementing Decision (EU) 2017/247. That amendment took into account the fact that day-old chicks pose a very low risk for the spread of highly pathogenic avian influenza compared to other poultry commodities.

(4) Implementing Decision (EU) 2017/247 was also subsequently amended by Commission Implementing Decision (EU) 2017/1841 ([6]) in order to strengthen the disease control measures applicable where there is an increased risk for the spread of highly pathogenic avian influenza. Consequently, Implementing Decision (EU) 2017/247 now provides for the establishment at Union level of further restricted zones in the concerned Member States, as referred to in Article 16(4) of Directive 2005/94/EC, following an outbreak or outbreaks of highly pathogenic avian influenza, and the duration of the measures to be applied therein. Implementing Decision (EU) 2017/247 now also lays down rules for the dispatch of live poultry, day-old chicks and hatching eggs from the further restricted zones to other Member States, subject to certain conditions.

([1]) OJ L 395, 30.12.1989, p. 13.
([2]) OJ L 224, 18.8.1990, p. 29.
([3]) Commission Implementing Decision (EU) 2017/247 of 9 February 2017 on protective measures in relation to outbreaks of the highly pathogenic avian influenza in certain Member States (OJ L 36, 11.2.2017, p. 62).
([4]) Council Directive 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC (OJ L 10, 14.1.2006, p. 16).
([5]) Commission Implementing Decision (EU) 2017/696 of 11 April 2017 amending Implementing Decision (EU) 2017/247 on protective measures in relation to outbreaks of the highly pathogenic avian influenza in certain Member States (OJ L 101, 13.4.2017, p. 80).
([6]) Commission Implementing Decision (EU) 2017/1841 of 10 October 2017 amending Implementing Decision (EU) 2017/247 on protective measures in relation to outbreaks of the highly pathogenic avian influenza in certain Member States (OJ L 261, 11.10.2017, p. 26).

(5) In addition, the Annex to Implementing Decision (EU) 2017/247 has been amended numerous times, mainly to take account of changes in the boundaries of the protection and surveillance zones established by the concerned Member States in accordance with Directive 2005/94/EC.

(6) The Annex to Implementing Decision (EU) 2017/247 was last amended by Commission Implementing Decision (EU) 2017/2289 ([1]), following the notification by Bulgaria and Italy of further outbreaks of highly pathogenic avian influenza in those Member States. Bulgaria notified the Commission of one outbreak of highly pathogenic avian influenza of subtype H5N8 in a poultry holding in the region of Stara Zagora of that Member State. Italy notified the Commission of outbreaks of highly pathogenic avian influenza of subtype H5N8 in poultry holdings in the regions of Lombardia and Veneto of that Member State. Those Member States also notified the Commission that they had duly taken the necessary measures required in accordance with Directive 2005/94/EC following those outbreaks, including the establishment of protection and surveillance zones around the infected poultry holdings.

(7) Since the date of the last amendment made to Implementing Decision (EU) 2017/247 by Implementing Decision (EU) 2017/2289, the Netherlands has notified the Commission of a recent outbreak of highly pathogenic avian influenza of subtype H5N6 in a poultry holding in the province of Flevoland of that Member State. The Netherlands has also notified the Commission that it has taken the necessary measures required in accordance with Directive 2005/94/EC following that recent outbreak, including the establishment of protection and surveillance zones around the infected poultry holding.

(8) The Commission examined those measures in collaboration with the Netherlands, and was satisfied that the borders of the protection and surveillance zones, established by the competent authority in that Member State, were at a sufficient distance to the actual poultry holding where the outbreak was confirmed.

(9) In order to prevent any unnecessary disturbance to trade within the Union, and to avoid unjustified barriers to trade being imposed by third countries, it was necessary to rapidly describe at Union level, in collaboration with the Netherlands the protection and surveillance zones established in that Member State, in accordance with Directive 2005/94/EC, following the recent outbreak of highly pathogenic avian influenza in that Member State.

(10) Pending the opinion of the Standing Committee on Plants, Animals, Food and Feed the Commission adopted interim protective measures taking into account the epidemiological situation in the Netherlands, in particular considering the risks associated with avian influenza being confirmed again in that Member State following several months without its detection, and the generally high density of poultry holdings in the Netherlands, which constitutes an increased risk for the spread of the virus. Those interim protective measures were aimed at preventing its spread without any delay.

(11) Those interim protective measures in relation to highly pathogenic avian influenza in the Netherlands were adopted by Commission Implementing Decision (EU) 2017/2304 ([2]) which lists in the Annex thereto, the areas that the competent authority of the Netherlands has established as protection and surveillance zones. That Implementing Decision applies until 10 January 2018.

(12) It is necessary to review the interim protective measures laid down in Implementing Decision (EU) 2017/2304. The Netherlands has also provided regular updates on the epidiomiological situation and no further outbreaks of highly pathogenic avian influenza have occurred on its territory.

(13) Taking into account the favourable outcome of the epidemiological inquiries and the results of the laboratory investigations carried out in the protection and surveillance zones established by the competent authority of the Netherlands in accordance with Directive 2005/94/EC, it is appropriate to adapt the boundaries of the surveillance zone established in that Member State in accordance with that Directive at Union level. The new boundaries should be listed in the Annex to Implementing Decision (EU) 2017/247.

(14) In addition, Italy has now notified the Commission of a new outbreak of highly pathogenic avian influenza on its territory in the region of Emilia Romagna. It has also notified the Commission that it has duly taken the necessary measures required in accordance with Directive 2005/94/EC following that outbreak, including the establishment of protection and surveillance zones around the infected poultry holding.

([1]) Commission Implementing Decision (EU) 2017/2289 of 11 December 2017 amending the Annex to Implementing Decision (EU) 2017/247 on protective measures in relation to outbreaks of the highly pathogenic avian influenza in certain Member States (OJ L 328, 12.12.2017, p. 126).

([2]) Commission Implementing Decision (EU) 2017/2304 of 12 December 2017 concerning certain interim protective measures in relation to highly pathogenic avian influenza of subtype H5 in the Netherlands (OJ L 329, 13.12.2017, p. 61).

(15) The Commission has examined the measures taken by the Netherlands and Italy in accordance with Directive 2005/94/EC, following the recent outbreaks of highly pathogenic avian influenza in those Member States, and it is satisfied that the boundaries of the protection and surveillance zones established by the competent authorities of those two Member States are at a sufficient distance to any poultry holding where an outbreak of highly pathogenic avian influenza has been confirmed.

(16) In order to prevent any unnecessary disturbance to trade within the Union, and to avoid unjustified barriers to trade being imposed by third countries, it is necessary to rapidly describe at Union level, in collaboration with Italy and the Netherlands, the protection and surveillance zones established in those two Member States, in accordance with Directive 2005/94/EC, following the recent outbreaks of highly pathogenic avian influenza in those Member States.

(17) Implementing Decision (EU) 2017/247 should therefore be updated to take account of the up-to-date epidemiological situation in Italy and the Netherlands as regards highly pathogenic avian influenza. In particular, the protection and surveillance zones in Italy and the Netherlands, now subject to restrictions in accordance with Directive 2005/94/EC, should be listed in the Annex to Implementing Decision (EU) 2017/247.

(18) The Annex to Implementing Decision (EU) 2017/247 should therefore be amended to update regionalization at Union level in order to include the protection and surveillance zones established in Italy and in the Netherlands in accordance with Directive 2005/94/EC, following the recent outbreaks of highly pathogenic avian influenza in those Member State, and the duration of the restrictions applicable therein.

(19) Implementing Decision (EU) 2017/247 should therefore be amended accordingly.

(20) Furthermore, as the Annex to Implementing Decision (EU) 2017/247, as amended by this Decision will list the protection and surveillance zones established by the competent authority of the Netherlands, in accordance with Directive 2005/94/EC, Implementing Decision (EU) 2017/2304 should be repealed.

(21) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Implementing Decision (EU) 2017/247 is amended in accordance with the Annex to this Decision.

Article 2

Implementing Decision (EU) 2017/2304 is repealed.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2017.

For the Commission
Vytenis ANDRIUKAITIS
Member of the Commission

ANNEX

The Annex to Implementing Decision (EU) 2017/247 is amended as follows:

(1) Part A is amended as follows:

(a) the entry for Italy is replaced by the following:

'**Member State: Italy**

Area comprising:	Date until applicable in accordance with Article 29(1) of Directive 2005/94/EC
— The area of the parts of Lombardia Region (ADNS 17/0080) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N45.259133 E10.317484	16.12.2017
— The area of the parts of Veneto Region (ADNS 17/0082) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N45.707605 E11.947517	29.12.2017
— The area of the parts of Emilia Romagna Region (ADNS 17/0083) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N44.495737 E11.777354	4.1.2018'

(b) the following entry for the Netherlands is inserted between the entries for Hungary and Poland:

'**Member State: The Netherlands**

Area comprising:	Date until applicable in accordance with Article 29(1) of Directive 2005/94/EC
Province of Flevoland	
Biddinghuizen — Vanaf kruising Swifterweg (N710) met Hoge Vaart (water), Hoge Vaart volgen in noordoostelijke richting tot aan Oosterwoldertocht (water). — Oosterwoldertocht volgen in zuidoostelijke richting tot aan Elburgerweg (N309). — Elburgerweg (N309) volgen tot aan de brug in Flevoweg over het Veluwemeer. — Veluwemeer volgen in zuidwestelijke richting tot aan Bijsselseweg. — Bijsselseweg volgen in noordelijke richting tot aan de Spijkweg (N306). — Spijkweg (N306) volgen in noordelijke richting tot aan Strandgaperweg. — Strandgaperweg volgen in westelijke richting tot aan Bremerbergweg (N708). — Bremerbergweg volgen in noordelijke richting tot aan Oldebroekerweg Oldebroekerweg volgen in noordwestelijke richting tot aan Baan. — Baan volgen in westelijke richting overgaand in Swifterweg (N710). — Swifterweg (N710) volgen in noordelijke richting tot aan Hoge Vaart (Water).	29.12.2017'

(2) Part B, is amended as follows:

(a) the entry for Italy is replaced by the following:

'**Member State: Italy**

Area comprising:	Date until applicable in accordance with Article 31 of Directive 2005/94/EC
— The area of the parts of Lombardia Region (ADNS 17/0075) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N45,297588 E10,221751	From 8.12.2017 to 16.12.2017
— The area of the parts of Lombardia Region (ADNS 17/0075) extending beyond the area described in the protection zone and within the circle of a radius of ten kilometres, centred on WGS84 dec. coordinates N45,297588 E10,221751	16.12.2017
— The area of the parts of Lombardia Region (ADNS 17/0080) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N45.259133 E10.317484	From 17.12.2017 to 25.12.2017
— The area of the parts of Lombardia Region (ADNS 17/0080) extending beyond the area described in the protection zone and within the circle of a radius of ten kilometres, centred on WGS84 dec. coordinates N45.259133 E10.317484	25.12.2017
— The area of the parts of Veneto Region (ADNS 17/0082) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N45.707605 E11.947517	From 30.12.2017 to 7.1.2018
— The area of the parts of Veneto Region (ADNS 17/0082) extending beyond the area described in the protection zone and within the circle of a radius of ten kilometres, centred on WGS84 dec. coordinates N45.707605 E11.947517	7.1.2018
— The area of the parts of Emilia Romagna Region (ADNS 17/0083) contained within a circle of radius of three kilometres, centred on WGS84 dec. coordinates N44.495737 E11.777354	From 5.1.2018 to 13.1.2018
— The area of the parts of Emilia Romagna Region (ADNS 17/0083) extending beyond the area described in the protection zone and within the circle of a radius of ten kilometres, centred on WGS84 dec. coordinates N44.495737 E11.777354	13.1.2018'

(b) the following entry for the Netherlands is inserted between the entries for Hungary and Austria:

'**Member State: The Netherlands**

Area comprising:	Date until applicable in accordance with Article 31 of Directive 2005/94/EC
Province of Flevoland	
Biddinghuizen — Vanaf kruising Swifterweg (N710) met Hoge Vaart (water), Hoge Vaart volgen in noordoostelijke richting tot aan Oosterwoldertocht (water). — Oosterwoldertocht volgen in zuidoostelijke richting tot aan Elburgerweg (N309). — Elburgerweg (N309) volgen tot aan de brug in Flevoweg over het Veluwemeer. — Veluwemeer volgen in zuidwestelijke richting tot aan Bijsselseweg.	From 30.12.2017 to 8.1.2018

Area comprising:	Date until applicable in accordance with Article 31 of Directive 2005/94/EC
— Bijsselseweg volgen in noordelijke richting tot aan de Spijkweg (N306). — Spijkweg (N306) volgen in noordelijke richting tot aan Strandgaperweg. — Strandgaperweg volgen in westelijke richting tot aan Bremerbergweg (N708). — Bremerbergweg volgen in noordelijke richting tot aan Oldebroekerweg Oldebroekerweg volgen in noordwestelijke richting tot aan Baan. — Baan volgen in westelijke richting overgaand in Swifterweg (N710). — Swifterweg (N710) volgen in noordelijke richting tot aan Hoge Vaart (Water).	
Biddinghuizen — Vanaf brug Biddingweg(N710) Lage vaart, Biddingweg volgen in noordelijke richting tot aan Elandweg. — Elandweg volgen in oostelijke richting tot aan Dronterringweg (N307). — Dronterringweg (N307) volgen in zuidoostelijke richting tot aan Rendieerweg. — Rendierweg volgen in noordoostelijke richting tot aan Swiftervaart(water). — Swiftervaart volgen in oostelijke richting tot aan Lage vaart. — Lage vaart volgen in noordelijke richting tot aan Ketelmeer(water). — Ketelmeer volgen in zuidoostelijke overgaand in Vossemeer overgaand in Drontermeer volgen ter hoogte van Geldersesluis. — Geldersesluis volgen in oostelijke richting tot aan Buitendijks. — Buitendijks volgen in zuidoostelijke richting overgaand in Groote Woldweg tot aan Naalderweg. — Naalderweg volgen in oostelijke richting tot aan Kleine Woldweg. — Kleine Woldweg volgen in zuidelijke richting tot aan Zwarteweg. — Zwarteweg volgen in oostelijke richting overgaand in Wittensteinse Allee tot aan Oosterweg. — Oosterweg volgen in zuidelijke richting tot aan Zuiderzeestraatweg (N308). — Zuiderzeestraatweg volgen in westelijke richting tot aan Mheneweg Zuid. — Mheneweg Zuid in zuidelijke richting overgaand in Bongersweg overgaand in Ottenweg tot aan A28. — A28 volgen in zuidwestelijke richting tot aan Klarenweg. — Klarenweg volgen in Noordelijke richting tot aan Harderwijkerweg. — Harderwijkerweg volgen in zuidwestelijke richting overgaand in Zuiderzeestraatweg tot aan Newtonweg. — Newtonweg volgen in noordelijke en vervolgens westelijke richting tot aan Knardijk (N302). — Knardijk (N302) volgen in noordelijke richting overgaand in Ganzenweg tot aan Futenweg. — Futenweg volgen in oostelijke richting tot aan Larserweg (N302). — Larserweg (N302) volgen in noordelijke richting Zeebiesweg. — Zeebiesweg volgen in oostelijke richting tot aan Larserringweg. — Larserringweg volgen in noordelijke richting tot aan Lisdoddeweg. — Lisdoddeweg volgen in oostelijke richting tot aan Wiertocht. — Wiertocht volgen in noordelijke richting tot aan Dronterweg. — Dronterweg volgen in oostelijke richting tot aan Biddingweg (N710).	8.1.2018’

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 3/17/COL

of 18 January 2017

amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413]

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

HAVING regard to:

the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24 and Article 5(2)(b),

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'),

Whereas:

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

Under Article 5(2)(b) of the Surveillance and Court Agreement, the 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 Authority considers it necessary,

On 19 May 2016, the European Commission adopted a Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [1],

This notice is 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,

HAVING consulted the European Commission,

HAVING consulted the EFTA States,

[1] OJ C 262, 19.7.2016, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The substantive rules in the field of State aid shall be amended by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the EEA Agreement. The new Guidelines are annexed to this Decision and form an integral part of it.

Article 2

Only the English language version of this decision is authentic.

Decision made in Brussels, on 18 January 2017.

For the EFTA Surveillance Authority

Sven Erik SVEDMAN	Frank J. BÜCHEL
President	*College Member*

ANNEX

GUIDELINES ON THE NOTION OF STATE AID AS REFERRED TO IN ARTICLE 61(1) OF THE EEA AGREEMENT (*)

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(*) These Guidelines correspond to the European Commission ('the Commission') Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ C 262, 19.7.2016, p. 1). The numbering of the footnotes in the text corresponds to the Commission Notice. Some footnotes have been deleted as they are not EEA relevant.

1. **INTRODUCTION**

1. In the context of the State aid modernisation, the Authority wishes to provide further clarification on the key concepts relating to the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area ('the EEA Agreement'), with a view to contributing to an easier, more transparent and more consistent application of this notion across the European Economic Area ('the EEA').

2. These Guidelines only concern the notion of State aid as referred to in Article 61(1) of the EEA Agreement, which both the Authority and national authorities (including national courts) have to apply in conjunction with the notification and standstill obligations provided for in Article 1(3) in 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'). It does not concern the compatibility of State aid with the functioning of the EEA Agreement pursuant to Article 61(2) and (3) and Article 59(2) of the EEA Agreement, which is for the Authority to assess.

3. Given that the notion of State aid is an objective and legal concept defined directly by the EEA Agreement ([2]), these Guidelines clarify the Authority's understanding of Article 61(1) of the EEA Agreement, as interpreted by the Court of Justice, the General Court and the EFTA Court ('the EEA Courts'). On issues that have not yet been considered by the EEA Courts, the Authority will set out how it considers that the notion of State aid should be construed. The views set out in these Guidelines are without prejudice to the interpretation of the notion of State aid by the EEA Courts ([3]); the primary reference for interpreting the EEA Agreement is always the case-law of the EEA Courts.

([2]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 111.

([3]) See Judgment of the Court of Justice of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, ECLI:EU:C:2011:497, paragraph 125.

4. It should be stressed that the Authority is bound by this objective notion and enjoys only a limited margin of discretion in applying it, namely where the appraisals by the Authority are technical or complex in nature, in particular in situations involving complex economic assessments ([4]).

5. Article 61(1) of the EEA Agreement defines State aid as '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 […], in so far as it affects trade between Contracting Parties'. These Guidelines will clarify the different constituent elements of the notion of State aid: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition and trade between EEA States. In addition, given the need for specific guidance expressed by EEA States, these Guidelines provide specific clarification with respect to public funding of infrastructure.

2. NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

6. The State aid rules only apply where the beneficiary of a measure is an 'undertaking'.

2.1. **General principles**

7. The EEA Courts have consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([5]) 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.

8. 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 same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity.

9. Second, the application of the State aid rules does not depend on whether the entity is set up to generate profits. Non-profit entities can also offer goods and services on a market ([6]). Where this is not the case, non-profit entities remain outside the scope of State aid control.

10. 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 ([7]).

11. Several 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 considers the existence of a controlling share and other functional, economic and organic links to be relevant ([8]).

12. To clarify the distinction between economic and non-economic activities, the EEA Courts have consistently held that any activity consisting in offering goods and services on a market is an economic activity ([9]).

([4]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 114, and Judgment of the Court of Justice of 2 September 2010, *Commission* v *Scott*, C-290/07 P, ECLI:EU:C:2010:480, paragraph 66.

([5]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

([6]) Judgment of the Court of Justice of 29 October 1980, *Van Landewyck*, Joined Cases 209/78 to 215/78 and 218/78, ECLI:EU:C:1980:248, paragraph 88; Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraph 21; Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraphs 27 and 28.

([7]) Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 108.

([8]) Judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione SpA* v *Commission*, C-480/09 P, ECLI:EU:C:2010:787, paragraphs 47 to 55; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 112.

([9]) See Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission* v *Italy*, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75; Judgment of the EFTA Court of 10 May 2011 in Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein and others* v *EFTA Surveillance Authority* EFTA Ct. Rep [2011] p. 16, paragraph 54.

13. The question whether a market exists for certain services may depend on the way those services are organised in the EEA State concerned ([10]) and may thus vary from one EEA State to another. Moreover, due to political choice or economic developments, the classification of a given activity can change over time. What is not an economic activity today may become one in the future, and *vice versa*.

14. The decision of a public 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 has no relevance for the economic nature of the activity ([11]).

15. Since the distinction between economic and non-economic activities depends to some extent on political choices and economic developments in a given EEA 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. Paragraphs 17 to 37 instead seek to clarify the distinction with respect to a number of important areas.

16. The simple fact that an entity holds shares, even a majority shareholding, in an undertaking providing goods or services on a market does not mean that that entity should automatically be considered an undertaking for the purposes of Article 61(1) of the EEA Agreement. Where that shareholding only gives rise to the exercise of rights attached to the status of shareholder as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset, that entity will not be considered an undertaking if it does not itself provide goods or services on a market ([12]).

2.2. **Exercise of public powers**

17. Article 61(1) of the EEA Agreement does not apply where the State acts 'by exercising public power' ([13]) or where public entities act 'in their capacity as public authorities' ([14]). An entity may be deemed to act by exercising public power where the activity in question 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 ([15]). Generally speaking, unless the EEA 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 of such activities are the following:

(a) the army or the police ([16]);

(b) air navigation safety and control ([17]);

(c) maritime traffic control and safety ([18]);

(d) anti-pollution surveillance ([19]);

([10]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraphs 16 to 20.

([11]) See Opinion of Advocate General Geelhoed of 28 September 2006, *Asociación Nacional de Empresas Forestales (Asemfo)*, C-295/05, ECLI:EU:C:2006:619, 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), referred to at point 4a of Annex XIII to the EEA Agreement, see Decision of the EEA Joint Committee No 85/2008 of 4 July 2008 amending Annex XIII (Transport) to the EEA Agreement (OJ L 280, 23.10.2008, p. 20 and EEA Supplement No 64, 23.10.2008, p. 13) 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), recitals 208 and 209.

([12]) Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraphs 107 to 118 and 125.

([13]) Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, ECLI:EU:C:1987:283, paragraphs 7 and 8.

([14]) Judgment of the Court of Justice of 4 May 1988, *Bodson*, 30/87, ECLI:EU:C:1988:225, paragraph 18.

([15]) See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30 and Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 to 23.

([16]) Commission Decision of 7 December 2011 on State aid SA.32820 (2011/NN) – United Kingdom –Aid to Forensic Science Services, (OJ C 29, 2.2.2012, p. 4), paragraph 8.

([17]) Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 27; Judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraph 71.

([18]) Commission Decision of 16 October 2002 on State aid N 438/02 – Belgium – Aid to port authorities (OJ C 284, 21.11.2002, p. 2).

([19]) Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraph 22.

(e) the organisation, financing and enforcement of prison sentences ([20]);

(f) the development and revitalization of public land by public authorities ([21]); and

(g) the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data ([22]).

18. In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers that entity acts as an undertaking in relation to that activity. In contrast, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking ([23]).

2.3. **Social security**

19. 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 case-law distinguishes between schemes based on the principle of solidarity and economic schemes.

20. Solidarity-based social security schemes that do not involve an economic activity typically have the following characteristics:

(a) affiliation with the scheme is compulsory ([24]);

(b) the scheme pursues an exclusively social purpose ([25]);

(c) the scheme is non-profit ([26]);

(d) the benefits are independent of the contributions made ([27]);

(e) the benefits paid are not necessarily proportionate to the earnings of the person insured ([28]); and

(f) the scheme is supervised by the State ([29]).

21. Such solidarity-based schemes must be distinguished from schemes that involve an economic activity ([30]). The latter are regularly characterised by:

(a) optional membership ([31]);

([20]) Commission Decision of 19 July 2006 on State aid N 140/06 – Lithuania – Allotment of subsidies to the State Enterprises at the Correction Houses (OJ C 244, 11.10.2006, p. 12).

([21]) Commission decision of 27 March 2014 on State aid SA.36346 – Germany – GRW land development scheme for industrial and commercial use (OJ C 141, 9.5.2014, p. 1). In the context of a measure that supported the revitalisation (including decontamination) of public land by local authorities, the Commission found that making public terrain ready to build upon and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and roads) did not constitute an economic activity, but was part of the public tasks of the State, namely the provision and supervision of land in line with local urban and spatial development plans.

([22]) Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH*, C-138/11, ECLI:EU:C:2012:449, paragraph 40.

([23]) Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH*, C-138/11, ECLI:EU:C:2012:449, paragraph 38, and Judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraphs 72 et seq.

([24]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 13.

([25]) Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 45.

([26]) Judgment of the Court of Justice of 16 March 2004, *AOK Bundesverband*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 47 to 55.

([27]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraphs 15 to 18.

([28]) Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 40.

([29]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 14; Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraphs 43 to 48; Judgment of the Court of Justice of 16 March 2004, *AOK Bundesverband*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 51 to 55.

([30]) See, in particular, Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraph 19.

([31]) Judgment of the Court of Justice of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 80 to 87.

(b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme) ([32]);

(c) their profit-making nature ([33]); and

(d) the provision of entitlements which are supplementary to those under a basic scheme ([34]).

22. 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 ([35]).

2.4. **Health care**

23. In the EEA, health care systems differ significantly between EEA States. Whether and to what degree different health care providers compete with each other depends on these national specificities.

24. In some EEA States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity ([36]). Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge on the basis of universal coverage ([37]). The EEA Courts have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings ([38]).

25. 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 ([39]).

26. In many other EEA States, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance ([40]). 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.

27. The EEA Courts 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 ([41]). The same principles apply to pharmacies.

([32]) Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraphs 9 and 17 to 20; Judgment of the Court of Justice of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 81 to 85; see also Judgment of the Court of Justice of 21 September 1999, *Brentjens*, Joined Cases C-115/97 to C-117/97, ECLI:EU:C:1999:434 paragraphs 81 to 85; Judgment of the Court of Justice of 21 September 1999, *Drijvende Bokken*, C-219/97, ECLI:EU:C:1999:437, paragraphs 71 to 75, and Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 114 and 115.

([33]) Judgment of the Court of Justice of 21 September 1999, *Brentjens*, Joined Cases C-115/97 to C-117/97, ECLI:EU:C:1999:434, paragraphs 74 to 85.

([34]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 67 to 70.

([35]) Judgment of the Court of Justice of 5 March 2009, *Kattner Stahlbau*, C-350/07, ECLI:EU:C:2009:127, paragraphs 33 et seq.

([36]) A prominent example is the Spanish National Health System (see Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50 and Judgment of the Court of Justice of 11 July 2006, *FENIN*, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28).

([37]) 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.

([38]) Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50, paragraph 39; and Judgment of the Court of Justice of 11 July 2006, *FENIN*, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28.

([39]) Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50, paragraph 40.

([40]) See, for instance, Judgment of the Court of Justice of 12 July 2001, *Geraets-Smits and Others*, C-157/99, ECLI:EU:C:2001:404, paragraphs 53 to 58.

([41]) See Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 75 and 77.

2.5. **Education and research activities**

28. Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. The Court of Justice held 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' ([42]).

29. 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 ([43]). These principles can cover public educational services such as vocational training ([44]), private and public primary schools ([45]) and kindergartens ([46]), secondary teaching activities in universities ([47]) and the provision of education in universities ([48]).

30. Such public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly fall within the latter category. In certain EEA States public entities 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.

31. In the light of the principles set out in paragraphs 28, 29 and 30, the Authority considers that certain activities of universities and research organisations fall outside the scope of the State aid rules. This concerns their primary activities, 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) the dissemination of research results.

32. The Authority considers that knowledge transfer activities (licensing, creation of spin-off, or other forms of management of knowledge created by the research organisation or infrastructure) are non-economic where they are conducted either by the research organisation or research infrastructure (including their departments or subsidiaries) or jointly with, or on behalf of other such entities, and all income from those activities is reinvested in the primary activities of the research organisations or infrastructures concerned ([49]).

2.6. **Culture and heritage conservation, including nature conservation**

33. Culture is a vehicle of identities, values and meanings that mirror and shape the EEA's societies. The area of culture and heritage conservation covers a vast array of purposes and activities, inter alia, museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, archaeological sites,

([42]) Judgment of the Court of Justice of 11 September 2007, *Commission* v *Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68. See also Commission Decision of 25 April 2001 on State aid N 118/00 Subvention publiques aux clubs sportifs professionnels (OJ C 333 28.11.2001, p. 6).
([43]) Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* EFTA Ct. Rep [2008] p. 62, paragraph 83.
([44]) Judgment of the Court of Justice of 27 September 1988, *Humbel*, 263/86, ECLI:EU:C:1988:451, paragraph 18.
([45]) Judgment of the Court of Justice of 11 September 2007, *Commission* v *Germany*, C-318/05, ECLI:EU:C:2007:495, paragraphs 65 to 71; Judgment of the Court of Justice of 11 September 2007, *Schwarz*, C-76/05, ECLI:EU:C:2007:492, paragraphs 37 to 47.
([46]) Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* EFTA Ct. Rep [2008] p. 62.
([47]) Judgment of the Court of Justice of 18 December 2007, *Jundt*, C-281/06, ECLI:EU:C:2007:816, paragraph 28 to 39.
([48]) Judgment of the Court of Justice of 7 December 1993, *Wirth*, C-109/92, ECLI:EU:C:1993:916, paragraphs 14 to 22.
([49]) See point 19 of the Guidelines on State aid for research and development and innovation, adopted by EFTA Surveillance Authority Decision No 271/14/COL of 9 July 2014 amending for the 97th time the procedural and substantive rules in the field of State aid by adopting new Guidelines for research and development and innovation [2015/1359] (OJ L 209, 6.8.2015, p. 17 and EEA Supplement No 44, 6.8.2015, p. 1).

monuments, historical sites and buildings, traditional customs and crafts, festivals and exhibitions, as well as cultural and artistic education activities. Europe's rich natural heritage, including conservation of biodiversity, habitats and species further provides valuable benefits for societies in the EEA.

34. Taking into account their particular nature, certain activities related to culture, heritage and nature conservation may be organised in a non-commercial way and thus be non-economic in nature. Public funding thereof may therefore not constitute State aid. The Authority considers that public funding of a cultural or heritage conservation activity accessible to the general public free of charge fulfils a purely social and cultural purpose which is non-economic in nature. In the same vein, the fact that visitors of a cultural institution or participants in a cultural or heritage conservation activity, including nature conservation, open to the general public are required to pay a monetary contribution that only covers a fraction of the true costs does not alter the non-economic nature of that activity, as it cannot be considered genuine remuneration for the service provided.

35. In contrast, cultural or heritage conservation activities (including nature conservation) predominantly financed by visitor or user fees or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals and arts schools predominantly financed from tuition fees) should be qualified as economic in nature. Similarly, heritage conservation or cultural activities benefitting exclusively certain undertakings rather than the general public (for example, the restoration of a historical building used by a private company) should normally be qualified as economic in nature.

36. Moreover, many cultural or heritage conservation activities are objectively non-substitutable (for example, keeping public archives holding unique documents) and thus exclude the existence of a genuine market. In the Authority's view, such activities would also qualify as non-economic in nature.

37. In cases where an entity carries out cultural or heritage conservation activities, some of which are non-economic activities as set out in paragraphs 34 and 36 and some of which are economic activities, public funding it receives will fall under the State aid rules only insofar as it covers the costs linked to the economic activities ([50]).

3. **STATE ORIGIN**

38. The granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State are two separate and cumulative conditions for State aid to exist ([51]). However, they are often considered together when assessing a measure under Article 61(1) of the EEA Agreement, as they both relate to the public origin of the measure in question.

3.1. **Imputability**

39. In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities. The same applies if a public authority designates a private or public body to administer a measure conferring an advantage. Indeed, EEA law cannot permit the rules on State aid to be circumvented through the creation of autonomous institutions charged with allocating aid ([52]).

([50]) As explained in paragraph 207, the Authority considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between EEA States. Similarly, the Authority considers that public financing to customary amenities that are provided in the context of non-economic culture and heritage conservation activities (for instance, a shop, bar, or paid cloakroom in a museum) normally has no effect on trade between EEA States.

([51]) See, for instance, Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 24; Judgment of the General Court of 5 April 2006, *Deutsche Bahn AG* v *Commission*, T-351/02, ECLI:EU:T:2006:104, paragraph 103.

([52]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 62.

40. Imputability is less evident, however, if the advantage is granted through public undertakings ([53]). In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure ([54]).

41. The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State ([55]). However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question ([56]). In fact, since relations between the State and public undertakings are necessarily close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent manner and in breach of the rules on State aid laid down by the EEA Agreement ([57]). Moreover, precisely because of the privileged relations that exist between the State and public undertakings, it will, as a general rule, be very difficult for a third party to demonstrate that measures taken by such an undertaking were in fact adopted on the instructions of the public authorities in a particular case ([58]).

42. For these reasons, the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken ([59]).

3.1.1. *Indicators for imputability*

43. Possible indicators to establish whether a measure is imputable include the following ([60]):

a) the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;

b) the presence of factors of an organic nature which link the public undertaking to the State;

c) the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies ([61]);

d) the integration of the public undertaking into the structures of the public administration;

e) the nature of the public undertaking's activities ([62]) and their exercise on the market in normal conditions of competition with private operators;

f) the legal status of the undertaking (whether it is subject to public law or ordinary company law), although the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot be regarded as sufficient reason to exclude imputability ([63]), having regard to the autonomy which that legal form confers on it;

([53]) The concept of public undertakings can be defined by reference to 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 (OJ L 318, 17.11.2006, p. 17), referred to at point 1a of Annex XV to the EEA Agreement, see Decision of the EEA Joint Committee Decision No 55/2007 of 8 June 2007 amending Annex XV (State aid) to the EEA Agreement (OJ L 266, 11.10.2007, p. 15, and EEA Supplement No 48, 11.10.2007, p. 12). Article 2(b) of this Directive states that 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

([54]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 52.

([55]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294. See also Judgment of the General Court of 26 June 2008, *SIC* v *Commission*, T-442/03, ECLI:EU:T:2008:228, paragraphs 93 to 100.

([56]) It is, furthermore, not necessary to demonstrate that, in a particular case, the public undertaking's conduct would have been different if it had acted autonomously, see Judgment of the General Court of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, ECLI:EU:T:2015:435, paragraph 48.

([57]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 53.

([58]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 54.

([59]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 55.

([60]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs of 13 December 2001, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2001:685, paragraphs 65 to 68.

([61]) Judgment of the Court of Justice of 23 October 2014, *Commerz Nederland*, C-242/13, ECLI:EU:C:2014:2224, paragraph 35.

([62]) For instance, when measures are taken by public development banks pursuing public policy objectives (Judgment of the General Court of 27 February 2013, *Nitrogenmuvek Vegyipari, Zrt.* v *Commission*, T-387/11, ECLI:EU:T:2013:98, paragraph 63) or when measures are taken by privatisation agencies or public pension funds (Judgment of the General Court of 28 January 2016, *Slovenia* v *Commission* ('ELAN'), T-507/12, ECLI:EU:T:2016:35, paragraph 86).

([63]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 57.

g) the degree of supervision that the public authorities exercise over the management of the undertaking;

h) any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

3.1.2. *Imputability and obligations under EEA law*

44. A measure is not imputable to an EEA State if the EEA State is under an obligation to implement it under EEA law without any discretion. In that case, the measure stems from an obligation under EEA law and is not imputable to the EEA State ([64]).

45. However, this is not the case in situations where EEA law simply allows for certain national measures and the EEA State enjoys discretion (i) as to whether to adopt the measures in question or (ii) in establishing the characteristics of the concrete measure which are relevant from a State aid perspective ([65]).

46. Measures that are adopted jointly by several EEA States are imputable to all the EEA States concerned pursuant to Article 61(1) of the EEA Agreement ([66]).

3.2. **State resources**

3.2.1. *General principles*

47. Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 61(1) of the EEA Agreement ([67]).

48. State resources include all resources of the public sector ([68]), including resources of intra-State entities (decentralised, federated, regional or other) ([69]) and, under certain circumstances, resources of private bodies (see paragraphs 57 and 58). It is irrelevant whether or not an institution within the public sector is autonomous ([70]). Funds provided by the central bank of an EEA State to specific credit institutions generally imply the transfer of State resources ([71]).

([64]) See Judgment of the Court of Justice of 23 April 2009, *Puffer*, C-460/07, ECLI:EU:C:2009:254, paragraph 70, on the right to tax deductions under the VAT system set up by the Union, and Judgment of the General Court of 5 April 2006, *Deutsche Bahn AG* v *Commission*, T-351/02, ECLI:EU:T:2006:104, paragraph 102, on tax exemptions required by Union law.

([65]) See Judgment of the Court of Justice of 10 December 2013, *Commission* v *Ireland and Others*, C-272/12 P, ECLI:EU:C:2013:812, paragraphs 45 to 53, on an authorisation granted to a Member State by a Council decision to introduce certain tax exemptions. The judgment also clarifies that the fact that a Council decision in the area of harmonisation of legislation was adopted on a proposal by the Commission is irrelevant because the notion of State aid is an objective notion.

([66]) Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/2009 (ex NN 45/08, NN 49/08 and NN50/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA (OJ L 274, 19.10.2010, p. 54).

([67]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26; Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 63.

([68]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 56.

([69]) Judgment of the Court of Justice of 14 October 1987, *Germany* v *Commission*, 248/84, ECLI:EU:C:1987:437, paragraph 17; Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava and Others* v *Commission*, Joined Cases T-92/00 and 103/00, ECLI:EU:T:2002:61, paragraph 57.

([70]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraphs 58 to 62.

([71]) Guidelines on the application, from 1 December 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis ('2013 Banking Guidelines'.), adopted by EFTA Surveillance Authority Decision No 464/13/COL of 27 November 2013 amending, for the 91st time, the procedural and substantive rules in the field of State aid by introducing a new chapter on the application, from 1 December 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Guidelines 2013') (OJ L 264, 4.9.2014, p. 6, and EEA Supplement No 50, 4.9.2014, p. 1), in particular point 62). However, the Authority clarified that where a central bank reacts to a banking crisis with general measures open to all comparable market players in the market (for example lending to the whole market on equal terms) rather than with selective measures in favour of individual banks, such general measures often fall outside the scope of State aid control.

49. Resources of public undertakings also constitute State resources within the meaning of Article 61(1) of the EEA Agreement because the State is capable of directing the use of these resources ([72]). For the purposes of State aid law, transfers within a public group may also constitute State aid if, for example, resources are transferred from the parent company to its subsidiary (even if they constitute a single undertaking from an economic point of view) ([73]). The question of whether the transfer of such resources is imputable to the State is addressed in section 3.1. The fact that a public undertaking is a beneficiary of an aid measure does not mean it may not grant aid to another beneficiary by way of a different aid measure ([74]).

50. The fact that a measure granting an advantage is not financed directly by the State, but by a public or private body established or appointed by the State to administer the aid, does not necessarily mean that the measure is not financed through State resources ([75]). A measure adopted by a public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by virtue of the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned ([76]).

51. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. A positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources ([77]). For example, a 'shortfall' in tax and social security revenue due to exemptions or reductions in taxes or social security contributions granted by the EEA State, or exemptions from the obligation to pay fines or other pecuniary penalties, fulfils the State resources requirement of Article 61(1) of the EEA Agreement ([78]). The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 61(1) ([79]).

52. If public authorities or public undertakings provide goods or services at a price below market rates, or invest in an undertaking in a manner that is inconsistent with the market economy operator test, as described from paragraph 73 onwards, this implies foregoing State resources (as well as the granting of an advantage).

53. Granting access to a public domain or natural resources, or granting special or exclusive rights ([80]) without adequate remuneration in line with market rates, can constitute foregoing State revenues (as well as the granting of an advantage) ([81]).

([72]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 38. See also Judgment of the Court of Justice of 29 April 2004, *Greece* v *Commission*, C-278/00, ECLI:EU:C:2004:239, paragraphs 53 and 54, and Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia SpA* v *Commission*, Joined Cases C-328/99 and C-399/00, ECLI:EU:C:2003:252, paragraphs 33 and 34.

([73]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 62.

([74]) Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 143.

([75]) Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, 78/76, ECLI:EU:C:1977:52, paragraph 21.

([76]) Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, 78/76, ECLI:EU:C:1977:52, paragraph 22.

([77]) Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraphs 48 to 51.

([78]) Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 14 on tax exemptions. Furthermore, derogations from the normal insolvency rules, which allow undertakings to continue trading in circumstances under which they would not be allowed if the ordinary insolvency rules were applied, may involve an additional burden for the State if public bodies are among the principal creditors of those undertaking or where such action amounts to a de facto waiver of public debts. See Judgment of the Court of Justice of 17 June 1999, *Piaggio*, C-295/97, ECLI:EU:C:1999:313, paragraphs 40 to 43 and Judgment of the Court of Justice of 1 December 1998, *Ecotrade*, C-200/97, ECLI:EU:C:1998:579, paragraph 45.

([79]) Judgment of the Court of Justice of 1 December 1998, *Ecotrade*, C-200/97, ECLI:EU:C:1998:579, paragraph 41 and Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraphs 137, 138 and 139.

([80]) As defined in Article 2(f) and (g) of Directive 2006/111/EC referred to at point 1a of Annex XV to the EEA Agreement, see Decision No 55/2007.

([81]) See also Guidelines on the application of the state aid rules to compensation granted for the provision of services of general economic interest, adopted by 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 (OJ L 161, 13.6.2013, p. 12 and EEA Supplement No 34, 13.6.2013, p. 1), paragraph 33.

54. In these cases it needs to be established whether the State, in addition to its role of manager of the public assets in question, acts as a regulator that pursues policy objectives by making the selection process of the undertakings concerned subject to qualitative criteria (established *ex ante* in a transparent and non-discriminatory manner) ([82]). When the State acts as a regulator, it can decide legitimately not to maximise the revenues which could otherwise have been achieved without falling under the scope of State aid rules, provided that all the operators concerned are treated in line with the principle of non-discrimination, and that there is an inherent link between achieving the regulatory purpose and the foregoing of revenue ([83]).

55. In any event, a transfer of State resources is present if, in a given case, the public authorities do not charge the normal amount under their general system for access to the public domain or natural resources, or for granting certain special or exclusive rights.

56. A negative indirect effect on State revenues stemming from regulatory measures does not constitute a transfer of State resources where it is an inherent feature of the measure ([84]). For example, a derogation from employment law provisions altering the framework for contractual relations between undertakings and employees does not constitute a transfer of State resources, despite the fact that it may reduce social security contributions or taxes payable to the State ([85]). Similarly, national regulation which sets a minimum price for certain goods does not entail the transfer of State resources ([86]).

3.2.2. *Controlling influence over the resources*

57. The origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they come under public control and are therefore available to the national authorities ([87]), even if the resources do not become the property of the public authority ([88]).

58. Thus, subsidies financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of public rules imply a transfer of State resources,

([82]) See Judgment of the General Court of 4 July 2007, *Bouygues SA* v *Commission*, T-475/04, ECLI:EU:T:2007:196, where the General Court noted that, in granting access to a scarce public resource such as the radio spectrum, national authorities simultaneously performed the roles of telecommunications regulator and manager of such public resources, paragraph 104.

([83]) See to that effect Commission Decision of 20 July 2004 on State aid NN 42/2004 – France – Modification of payments due from Orange and SFR for UMTS licences (OJ C 275, 8.11.2005, p. 3), recitals 28, 29 and 30, upheld by the EEA courts (Judgment of the General Court of 4 July 2007, *Bouygues SA* v *Commission*, T-475/04, ECLI:EU:T:2007:196, paragraphs 108 to 111 and 123, and Judgment of the Court of Justice of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, ECLI:EU:C:2009:223, paragraphs 94 to 98 and 125). In this case, as regards the granting of UMTS radio spectrum licences, the State simultaneously performed the roles of telecommunications regulator and manager of these public resources and pursued the regulatory objectives set out in Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunication services (OJ L 117, 7.5.1997, p. 15), referred to at point 5cc of Annex XI to the EEA Agreement, see Decision of the EEA Joint Committee Decision No 37/1999 of 30 March 1999 amending Annex XI (telecommunication services) to the EEA Agreement (OJ L 266, 19.10.2000, p. 25 and EEA Supplement No 46, 19.10.2000, p. 147). In such a situation, the EEA courts confirmed that the award of licences without maximising the revenues which could have been achieved did not involve the granting of State aid, given that the measures in question were justified by the regulatory objectives set out in Directive 97/13/EC and complied with the principle of non-discrimination. In contrast, in the Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraphs 88 et seq. the Court did not identify regulatory reasons that would have justified the award without consideration of freely tradable emission rights. See also Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraphs 46 et seq.

([84]) Judgment of the Court of Justice of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160, paragraph 62.

([85]) Judgment of the Court of Justice of 17 March 1993, *Sloman Neptun Schiffahrts*, Joined Cases C-72/91 and C-73/91, ECLI:EU:C:1993:97, paragraph 20 and 21. See also Judgment of the Court of Justice of 7 May 1998, *Viscido et al.*, Joined Cases C-52/97, C-53/97 and C-54/97, ECLI:EU:C:1998:209, paragraphs 13 and 14 and Judgment of the Court of Justice of 30 November 1993, *Kirsammer-Hack*, C-189/91, ECLI:EU:C:1993:907, paragraphs 17 and 18, on the fact that the non-application of certain provisions of employment law does not constitute a transfer of State resources.

([86]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26.

([87]) See, for instance Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraph 70; Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraph 50.

([88]) See Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraphs 65, 66 and 67, concerning an aid granted by the Caisse des Dépôts et Consignations which was financed with the voluntary deposits of private citizens which could be withdrawn at any time. That did not affect the conclusion that those funds were State resources because the Caisse was able to use them from the balance produced by deposits and withdrawals as if they were permanently at its disposal. See also Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraph 50.

even if not administered by the public authorities ([89]). Moreover, the mere fact that the subsidies are financed in part by voluntary private contributions is not sufficient to rule out the presence of State resources, since the relevant factor is not the origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing ([90]). The transfer of State resources can only be ruled out in very specific circumstances, notably if resources from the members of a trade association are earmarked for funding a specific purpose in the interest of the members, are decided on by a private organisation and have a purely commercial purpose, and if the EEA State is simply acting as a vehicle in order to make the contribution introduced by the trade organisation compulsory ([91]).

59. A transfer of State resources is also present if the resources are at the joint disposal of several EEA States who decide jointly on the use of those resources ([92]). This would be the case, for example, for funds from the European Stability Mechanism (ESM).

60. Resources coming from the EEA (for example from structural funds or EEA/Norway grants), from the European Investment Bank or the European Investment Fund, or from international financial institutions, such as the International Monetary Fund or the European Bank for Reconstruction and Development, are considered as State resources if national authorities have discretion as to the use of these resources (in particular the selection of beneficiaries) ([93]). By contrast, if such resources are awarded directly by the European Union, by the European Investment Bank or by the European Investment Fund, with no discretion on the part of the national authorities, they do not constitute State resources (for example funding awarded in direct management under the Horizon 2020 framework programme, the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME) or the Trans-European Transport Network (TEN-T) funds).

3.2.3. *State involvement in redistribution between private entities*

61. Regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not, in principle, entail a transfer of State resources if the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer ([94]).

62. For example, an obligation imposed by an EEA State on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not entail the direct or indirect transfer of State resources to undertakings which produce that type of electricity ([95]). In this case, the undertakings concerned (that is to say the private electricity suppliers) are not appointed by the State to manage an aid scheme, but are only bound by an obligation to purchase a specific type of electricity with their own financial resources.

63. However, a transfer of State resources is present where the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries.

([89]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 16; Judgment of the Court of Justice of 11 March 1992, *Compagnie Commerciale de l'Ouest*, Joined Cases C-78/90 to C-83/90, ECLI:EU:C:1992:118, paragraph 35; Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraphs 58 to 74.

([90]) Judgment of the General Court of 27 September 2012, *France et al.* v *Commission*, Joined Cases T-139/09, T-243/09 and T-328/09, ECLI:EU:T:2012:496, paragraphs 63 and 64.

([91]) See Judgment of the Court of Justice of 15 July 2004, *Pearle*, C-345/02, ECLI:EU:C:2004:448, paragraph 41 and Judgment of the Court of Justice of 30 May 2013, *Doux élevages SNC et al*, C-677/11, ECLI:EU:C:2013:348.

([92]) Decision 2010/606/EU.

([93]) See, for instance, concerning structural funds, Commission Decision of 22 November 2006 on State aid N 157/06, United Kingdom South Yorkshire Digital Region Broadband Project, recitals 21 and 29 on a measure partly financed by the European Regional Development Fund (ERDF) (OJ C 80, 13.4.2007, p. 2). As regards financing for the production of and trade in agricultural products, the scope of application of the State aid rules is limited by Article 42 of the Treaty.

([94]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26.

([95]) Judgment of the Court of Justice of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160, paragraphs 59 to 62. The Court held that the imposition of a purchase obligation on private undertakings does not constitute a direct or indirect transfer of State resources, and that this qualification does not change because of the lower revenues of the undertakings subject to that obligation which is likely to cause a diminution of tax revenues, because this constitutes an inherent feature of the measure. See also Judgment of the Court of Justice of 5 March 2009, *UTECA*, C-222/07, ECLI:EU:C:2009:124, paragraphs 43 to 47, on compulsory contributions imposed on broadcasters in favour of film production not involving a transfer of State resources.

64. For example, this is the case even where a private entity is appointed by law to collect such charges on behalf of the State and to channel them to the beneficiaries, but is not allowed to use the proceeds from the charges for purposes other than those provided for by the law. In this case, the sums in question remain under public control and are therefore available to the national authorities, which is sufficient reason for them to be considered State resources ([96]). Since this principle applies both to public bodies and private entities appointed to collect the charges and process the payments, changing the status of the intermediary from a public to a private entity has no relevance for the State resources criterion if the State continues to strictly monitor that entity ([97]).

65. Moreover, a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase a product from certain providers at a price higher than the market price that is financed by all final consumers of the said product also constitutes an intervention through State resources, even when this mechanism is partly based on a direct transfer of resources between private entities ([98]).

4. ADVANTAGE

4.1. The notion of advantage in general

66. An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention ([99]). Section 4.2 of these Guidelines provides detailed guidance on the question whether a benefit can be considered to be obtained under normal market conditions.

67. Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention ([100]). Whenever the financial situation of an undertaking is improved as a result of State intervention ([101]) on terms differing from normal market conditions, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken ([102]). Since only the effect of the measure on the undertaking matters, it is irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it ([103]).

68. The precise form of the measure is also irrelevant in establishing whether it confers an economic advantage on the undertaking ([104]). Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens ([105]) can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking ([106]). This covers all situations in which economic operators are relieved of the inherent costs of their economic activities ([107]). For instance, if an EEA State pays part of the costs of the employees of a specific undertaking, it relieves that

([96]) Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraphs 69 to 75.
([97]) Commission Decision 2011/528/EU of 8 March 2011 on State aid C-24/09 (ex NN 446/08) – State aid for energy-intensive businesses under the Green Electricity Act in Austria (notified under document C(2011) 1363) Text with EEA relevance (OJ L 235, 10.9.2011, p. 42), recital 76.
([98]) Judgment of the Court of Justice of 19 December 2013, *Vent de Colère and Others*, C-262/12, ECLI:EU:C:2013:851, paragraphs 25 and 26.
([99]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.
([100]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.
([101]) The term 'State interventions' does not only refer to positive actions by the State but also covers the fact that the authorities do not take measures in certain circumstances, for example to enforce debts. See for example Judgment of the Court of Justice of 12 October 2000, *Magefesa*, C-480/98, ECLI:EU:C:2000:559, paragraphs 19 and 20.
([102]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71 paragraph 13.
([103]) Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1), recital 69; Opinion of Advocate General Fennelly of 26 November 1998, *France* v *Commission*, C-251/97, ECLI:EU:C:1998:572, paragraph 26.
([104]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 84.
([105]) Such as, for example, tax advantages or reductions of social security contributions.
([106]) Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 13; Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy* v *Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 36.
([107]) Judgment of the Court of Justice of 20 November 2003, *GEMO SA*, C-126/01, ECLI:EU:C:2003:622, paragraphs 28 to 31 on the free collection and disposal of waste.

undertaking from costs that are inherent in its economic activities. An advantage also exists where public authorities pay a salary supplement to the workers of a specific undertaking, even if the undertaking was under no legal obligation to pay such a supplement ([108]). It also covers situations where some operators do not have to bear costs that other comparable operators normally do under a given legal order, regardless of the non-economic nature of the activity to which the costs relate ([109]).

69. Costs arising from regulatory obligations imposed by the State can in principle be considered to relate to the inherent costs of the economic activity, so that any compensation for these costs confers an advantage on the undertaking ([111]). This means that the existence of an advantage is in principle not excluded by the fact that the benefit does not go beyond compensation for a cost stemming from the imposition of a regulatory obligation. The same applies to relief for costs that the undertaking would not have incurred had there been no incentive stemming from the State measure because without this incentive it would have structured its activities differently ([112]). The existence of an advantage is also not excluded if a measure compensates charges of a different nature that are unconnected with that measure ([113]).

70. As regards compensation for costs incurred to provide a service of general economic interest, the Court of Justice made clear in the *Altmark* judgment that the granting of an advantage can be excluded if four cumulative conditions are met ([114]). 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 public service obligations, taking into account the relevant receipts and a reasonable profit. Fourth, where the undertaking that is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing these 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 to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Authority has further elaborated its understanding of these conditions in its Guidelines on the application of State aid rules to compensation granted for the provision of services of general economic interest ([115]).

71. The existence of an advantage is excluded in the case of a reimbursement of illegally levied taxes ([116]), an obligation for the national authorities to compensate for damage they have caused to certain undertakings ([117]) or the payment of compensation for an expropriation ([118]).

([108]) Judgment of the Court of Justice of 26 September 1996, *France* v *Commission*, C-241/94, ECLI:EU:C:1996:353, paragraph 40; Judgment of the Court of Justice of 12 December 2002, *Belgium* v *Commission*, C-5/01, ECLI:EU:C:2002:754, paragraphs 38 and 39; Judgment of the General Court of 11 September 2012, *Corsica Ferries France SAS* v *Commission*, T-565/08, ECLI:EU:T:2012:415, paragraphs 137 and 138, upheld on appeal, see Judgment of the Court of Justice of 4 September 2014, *SNCM and France* v *Commission*, Joined Cases C-533/12 P and C-536/12 P, ECLI:EU:C:2014:2142.

([109]) See Guidelines on State aid to airports and airlines, adopted by EFTA Surveillance Authority Decision No 216/14/COL of 28 May 2014 amending for the 96th time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid to airports and airlines [2016/2051] (OJ L 318, 24.11.2016, p. 17 and EEA Supplement No 66, 24.11.2016, p. 1) recital 37.

([111]) Judgment of the General Court of 25 March 2015, *Belgium* v *Commission*, T-538/11, ECLI:EU:T:2015:188, paragraphs 74 to 78.

([112]) For instance, if a company receives a subsidy to carry out an investment in an assisted region, it cannot be argued that this does not mitigate costs normally included in the budget of the undertaking given that, in the absence of the subsidy, the company would not have carried out the investment.

([113]) Judgment of the Court of Justice of 8 December 2011, *France Télécom SA* v *Commission*, C-81/10 P, ECLI:EU:C:2011:811, paragraphs 43 to 50. This logically applies to the relief of costs incurred by an undertaking to replace the status of officials with the status of employees comparable to that of its competitors, which confers an advantage on the undertaking concerned (on which there was some previous uncertainty following the judgment of the General Court of 16 March 2004, *Danske Busvognmænd* v *Commission*, T-157/01, ECLI:EU:T:2004:76, paragraph 57). On compensation for stranded costs, see also Judgment of the General Court of 11 February 2009, *Iride SpA and Iride Energia SpA* v *Commission*, T-25/07, ECLI:EU:T:2009:33, paragraphs 46 to 56.

([114]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraphs 87 to 95.

([115]) Decision No 12/12/COL and EEA Supplement No 34, 13.6.2013, p. 1.

([116]) Judgment of the Court of Justice of 27 March 1980, *Amministrazione delle finanze dello Stato*, 61/79, ECLI:EU:C:1980:100, paragraphs 29 to 32.

([117]) Judgment of the Court of Justice of 27 September 1988, *Asteris AE and Others* v *Greece*, Joined Cases 106 to 120/87, ECLI:EU:C:1988:457, paragraphs 23 and 24.

([118]) Judgment of the General Court of 1 July 2010, *Nuova Terni Industrie Chimiche SpA* v *Commission*, T-64/08, ECLI:EU:T:2010:270, paragraphs 59 to 63 and 140 to 141, clarifying that while the payment of compensation for an expropriation does not grant an advantage, an extension *ex post* of such compensation can constitute State aid.

72. The existence of an advantage is not ruled out by the mere fact that competing undertakings in other EEA States are in a more favourable position ([119]), because the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure.

4.2. **The market economy operator (MEO) test**

4.2.1. *Introduction*

73. The EEA legal order is neutral with regard to the system of property ownership ([120]) and does not in any way prejudice the right of EEA States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form ([121]), they are subject to EEA State aid rules.

74. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ([122]). This principle has been developed with regard to different economic transactions. The EEA courts have developed the 'market economy investor principle' to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question ([123]). Similarly, the EEA courts have developed the 'private creditor test' to examine whether debt renegotiations by public creditors involve State aid, comparing the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation ([124]). Finally, the EEA courts have developed the '*private vendor test*' to assess whether a sale carried out by a public body involves State aid, considering whether a private vendor, under normal market conditions, could have obtained the same or a better price ([125]).

75. Those tests are variations of the same basic concept that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such bodies grant an advantage to their counterparts. In these Guidelines, the Authority will therefore refer, in general terms, to the 'market economy operator' (MEO) test as the relevant method to assess whether a range of economic transactions carried out by public bodies take place under normal market conditions and, therefore, whether they involve the granting of an advantage (which would not have occurred in normal market conditions) to their counterparts. The general principles and the relevant criteria for applying the MEO test are set out in sections 4.2.2. and 4.2.3.

4.2.2. *General principles*

76. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant

([119]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 17. See also Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 85.

([120]) Article 125 of the EEA Agreement provides that 'This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership'.

([121]) See, for instance, Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 12.

([122]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

([123]) See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium* v *Commission* (*'Tubemeuse'*), C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy* v *Commission* ('ALFA *Romeo*'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of the General Court of 30 April 1998, *Cityflyer Express* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

([124]) Judgment of the Court of Justice of 22 November 2007, *Spain* v *Commission*, C-525/04 P, ECLI:EU:C:2007:698; Judgment of the Court of Justice of 24 January 2013, *Frucona* v *Commission*, C-73/11 P, ECLI:EU:C:2013:32; Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332.

([125]) Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria* v *Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90.

whether the intervention constitutes a rational means for the public bodies to pursue public policy (for example employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions ([126]), placing it in a more favourable position compared to that of its competitors ([127]).

77. For the purpose of the MEO test, only the benefits and obligations linked to the role of the State as an economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account ([128]). Indeed, the MEO test is normally not applicable if the State acts as a public authority rather than as an economic operator. For example, if a State intervention is driven by public policy reasons (for instance, for reasons of social or regional development), the State's behaviour, while being rational from a public policy perspective, may at the same time include considerations which a market economy operator would normally not consider. Accordingly, the MEO test should be applied leaving aside all considerations which exclusively relate to an EEA State's role as a public authority (for example social, regional or sectoral policy considerations) ([129]).

78. Whether a State intervention is in line with market conditions must be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon ([130]). In fact, any prudent market economy operator would normally carry out its own *ex-ante* assessment of the strategy and financial prospects of a project ([131]), for instance, by means of a business plan. It is not enough to rely on *ex-post* economic evaluations entailing a retrospective finding that the investment made by the EEA State concerned was actually profitable ([132]).

79. If an EEA State argues that it acted as a market economy operator it must, where there is doubt, provide evidence showing that the decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the profitability or economic advantages of the transaction ([133]).

([126]) Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 208.

([127]) See, to that effect, Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 90; Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 14; Judgment of the Court of Justice of 19 May 1999, *Italy* v *Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 16.

([128]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 81; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain* v *Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134.

([129]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79, 80 and 81; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain* v *Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57; Judgment of the General Court of 24 September 2008, *Kahla Thüringen Porzellan* v *Commission*, T-20/03, ECLI:EU:T:2008:395; Judgment of the General Court of 17 October 2002, *Linde* v *Commission*, T-98/00, ECLI:EU:T:2002:248.

([130]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.

([131]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85 and 105.

([132]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 85.

([133]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85. See also Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 61. The level of sophistication of such an *ex ante* assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved. Normally, such *ex ante* evaluations should be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by policy considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.

80. Whether a transaction is in line with market conditions must be established through a global assessment of the effects of the transaction on the undertaking concerned without considering whether the specific means used to carry out that transaction would be available to market economy operators. For instance, the applicability of the MEO test cannot be ruled out simply because the means employed by the State are fiscal in nature ([134]).

81. In certain cases, several consecutive measures of State intervention may, for the purposes of Article 61(1) of the EEA Agreement, be regarded as a single intervention. This could be the case, in particular, where consecutive interventions are so closely linked to each other, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, that they are inseparable ([135]). For instance, a series of State interventions which take place in relation to the same undertaking in a relatively short period of time, are linked to each other, or were all planned or foreseeable at the time of the first intervention, may be assessed as one intervention. On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention ([136]) the two measures should normally be assessed separately.

82. To assess whether certain transactions are in line with market conditions all the relevant circumstances of the particular case should be considered. For instance, there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions ([137]).

4.2.3. *Establishing compliance with market conditions*

83. When applying the MEO test, it is useful to distinguish between situations in which the transaction's compliance with market conditions can be directly established through transaction-specific market data and situations in which, due to the absence of such data, the transaction's compliance with market conditions has to be assessed on the basis of other available methods.

4.2.3.1. Cases where compliance with market conditions can be directly established

84. A transaction's compliance with market conditions can be directly established through transaction-specific market information in the following situations

(i) where the transaction is carried out '*pari passu*' by public entities and private operators; or

(ii) where it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through a competitive, transparent non-discriminatory and unconditional tender procedure.

85. In such cases, if the specific market information concerning the transaction shows that it does not comply with market conditions, it would not normally be appropriate to use other assessment methodologies to reach a different conclusion ([138]).

([134]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 88.

([135]) Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 104; Judgment of the General Court of 13 September 2010, *Greece and Others* v *Commission*, Joined Cases T-415/05, T-416/05 and T-423/05, ECLI:EU:T:2010:386, paragraph 177; Judgment of the General Court of 15 September 1998, *BP Chemicals* v *Commission*, T-11/95, ECLI:EU:T:1998:199, paragraphs 170 and 171.

([136]) Commission Decision of 19 December 2012 in Case SA.35378 Financing of Berlin Brandenburg Airport, Germany (OJ C 36, 8.2.2013, p. 10), recitals 14 to 33.

([137]) In Judgment of the General Court of 28 January 1999, *BAI* v *Commission*, T-14/96, ECLI:EU:T:1999:12, paragraphs 74 to 79, the General Court held that, in the light of specific circumstances of the case, it could be concluded that the purchase of travel vouchers by national authorities from P&O Ferries did not meet an actual need, and thus the national authorities did not act in a manner similar to that of a private operator acting under normal market economy conditions. Accordingly, that purchase conferred an advantage on P&O Ferries which it would not have obtained under normal market conditions and all the sums paid in the fulfilment of the purchase agreement constituted State aid.

([138]) See to that effect, Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95. In that case, the Court held in particular that, where a public authority proceeds to sell an undertaking through a proper tender, it can be presumed that the market price corresponds to the highest (binding and credible) offer, without the necessity to resort to other valuation methods, such as independent studies.

(i) *Pari passu* transactions

86. When a transaction is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation (a '*pari passu*' transaction) ([139]), as may occur in public private partnerships, it can normally be inferred that such a transaction is in line with market conditions ([140]). In contrast, if a public body and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms or conditions, this normally indicates that the intervention of the public body is not in line with market conditions ([141]).

87. In particular, to consider a transaction '*pari passu*', the following criteria should be assessed:

a) whether the intervention of the public bodies and private operators is decided and carried out at the same time or whether there has been a time lapse and a change of economic circumstances between those interventions;

b) whether the terms and conditions of the transaction are the same for the public bodies and all private operators involved, also taking into account the possibility of increasing or decreasing the level of risk over time;

c) whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal ([142]); and

d) whether the starting position of the public bodies and the private operators involved is comparable with regard to the transaction, taking into account, for instance, their prior economic exposure *vis-à-vis* the undertakings concerned (see section 4.2.3.3) ([142a]), the possible synergies which can be achieved ([143]), the extent to which the different investors bear similar transaction costs ([144]), or any other circumstance specific to the public body or private operator which could distort the comparison.

88. The '*pari passu*' condition may not be applicable in some cases where the public involvement (in view of its unique nature or magnitude) is such that it could in practice not be replicated by a market economy operator.

([139]) The terms and conditions cannot be considered to be the same if public bodies and private operators intervene on the same terms but at different moments, following a change in the economic situation that is relevant to the transaction.

([140]) See, in that regard, Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, paragraph 81.

([141]) However, if the transactions are different and are not carried out at the same time, the mere fact that the terms and conditions are different does not provide any decisive indication (positive or negative) as to whether the transaction carried out by the public body is in line with market conditions.

([142]) For instance, in the Citynet Amsterdam case, the Commission considered that two private operators taking up one-third of the total equity investments in a company (considering also the overall shareholding structure and that their shares are sufficient to form a blocking minority regarding any strategic decision of the company) could be considered economically significant (see Commission Decision 2008/729/EC of 11 December 2007 on the State aid C-53/2006 (ex N 262/05, ex CP 127/04), investment by the city of Amsterdam in a fibre-to-the-home (FttH) network (OJ L 247, 16.9.2008, p. 27), recitals 96 to 100). By contrast, in case N 429/2010 Agricultural Bank of Greece (ATE) (OJ C 317, 29.10.2011, p. 5), the private participation reached only 10 % of the investment, as opposed to 90 % by the State, so that the Commission concluded that '*pari passu*' conditions were not met since the capital injected by the State was neither accompanied by a comparable participation of a private shareholder nor proportionate to the number of shares held by the State. See also Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, paragraph 81.

([142a]) EFTA Surveillance Authority Decision No 273/14/COL of 9 July 2014, on the financing of Scandinavian Airlines through the new Revolving Credit facility (Norway) [2015/2023] (OJ L 295, 12.11.2015, p. 47 and EEA Supplement No 68, 12.11.2015, p. 3).

([143]) They must also have the same industrial rationale; see Commission Decision 2005/137/EC of 15 October 2003 on the Walloon region's financial stake in Carsid SA (OJ L 47, 18.2.2005, p. 28), recitals 67 to 70.

([144]) Transaction costs may relate to the costs that the respective investors incur for the purpose of screening and selecting the investment project, arranging the terms of the contract or monitoring the performance over the lifetime of the contract. For instance, where publicly owned banks consistently bear the costs of screening investment projects for loan financing, the mere fact that private investors co-invest at the same interest rate is not sufficient to exclude aid.

(ii) The sale and purchase of assets, goods and services (or other comparable transactions) through competitive, transparent, non-discriminatory and unconditional tenders

89. If the sale and purchase of assets, goods and services (or other comparable transactions ([145])) are carried out following a competitive ([146]), transparent, non-discriminatory and unconditional tender procedure in line with the principles of the EEA Agreement on public procurement ([147]) (see paragraphs 90 to 94), it can be presumed that those transactions are in line with market conditions, provided that the appropriate criteria for selecting the buyer or seller as set out in paragraphs 95 and 96 have been used. In contrast, if an EEA State decides to provide support, for public policy reasons, to a certain activity and tenders out, for example, the amount of funding provided, such as in the case of support to the production of renewable energy or to the mere availability of electricity generation capacity, this would not fall in the scope of this sub-section (ii). In such a situation a tender can only minimize the amount granted but cannot exclude an advantage.

90. A tender procedure has to be competitive to allow all interested and qualified bidders to participate in the process.

91. The procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. Accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure. A tender has to be sufficiently well-publicised, so that all potential bidders can take note of it. The degree of publicity needed to ensure sufficient publication in a given case depends on the characteristics of the assets, goods and services. Assets, goods and services which may attract bidders operating on a Europe-wide or international scale in view of their high value or other features should be publicised in such a manner as to attract potential bidders operating on a Europe-wide or international scale ([147a]).

92. Non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. To guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.

93. Using and complying with the procedures provided for in the Public Procurement Directives ([148]) can be considered sufficient to meet the requirements above provided that all the conditions for the use of the respective procedure are fulfilled. This does not apply in specific circumstances that make it impossible to establish a market price, such as the use of the negotiated procedure without publication of a contract notice. If only one bid is submitted, the procedure would not normally be sufficient to ensure a market price, unless either (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically able to submit a credible bid or (ii) the public authorities verify through additional means that the outcome corresponds to the market price.

([145]) For instance, the lease of certain goods or the grant of concessions for the commercial exploitation of natural resources.

([146]) The EEA Courts often refer, in the context of State aid, to an 'open' tender procedure (see for example Judgment of the General Court of 5 August 2003, *P & O European Ferries (Vizcaya)* v *Commission*, Joined Cases T-116/01 and T-118/01, ECLI:EU:T:2003:217, paragraphs 117 and 118; Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 94). The use of the word 'open', however, does not refer to a specific procedure under Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243), referred to at points 2 and 4 of Annex XVI to the EEA Agreement, see Joint Committee Decision No 97/2016 (not yet published). Therefore, the word 'competitive' appears more appropriate. It is not intended to deviate from the substantive conditions set out in the case law.

([147]) Judgment of the Court of Justice of 7 December 2000, *Telaustria*, C-324/98, ECLI:EU:C:2000:669, paragraph 62; Judgment of the Court of Justice of 3 December 2001, *Bent Mousten Vestergaard*, C-59/00, ECLI:EU:C:2001:654, paragraph 20. See also 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).

([147a]) Judgment of the EFTA Court of 22 July 2013 in Case E-9/12 *Iceland* v *EFTA Surveillance Authority* EFTA Ct. Rep [2013] p. 454, paragraphs 66-70.

([148]) Directive 2014/24/EU referred to at points 2 and 4 of Annex XVI to the EEA Agreement, see Joint Committee Decision No 97/2016 (not yet published).

94. A tender for the sale of assets, goods or services is unconditional when a potential buyer is generally free to acquire the assets, goods or services to be sold and to use them for its own purposes irrespective of whether or not it runs certain businesses. If there is a condition that the buyer is to assume special obligations for the benefit of the public authorities or in the general public interest, which a private seller would not have demanded – other than those arising from general domestic law or a decision of the planning authorities —, the tender cannot be considered unconditional.

95. When public bodies sell assets, goods and services, the only relevant criterion for selecting the buyer should be the highest price ([149]), also taking into account the requested contractual arrangements (for example the vendor's sales guarantee or other post-sale commitments). Only credible ([150]) and binding offers should be considered ([151]).

96. When public bodies buy assets, goods and services, any specific conditions attached to the tender should be non-discriminatory and closely and objectively related to the subject matter and to the specific economic objective of the contract. They should allow for the most economically advantageous offer to match the value of the market. The criteria therefore should be defined in such a way as to allow for an effectively competitive tendering procedure which leaves the successful bidder with a normal return, not more. In practice, this implies the use of tenders which put significant weight on the 'price' component of the bid or which are otherwise likely to achieve a competitive outcome (e.g. certain reverse tenders with sufficiently clear-cut award criteria).

4.2.3.2. Establishing whether a transaction is in line with market conditions on the basis of benchmarking or other assessment methods

97. If a transaction has been realised through a tender or on '*pari passu*' terms, this provides direct and specific evidence of compliance with market conditions. However, if a transaction has not been realised through a tender, or if the intervention of the public bodies is not '*pari passu*' with that of private operators, this does not automatically mean that the transaction does not comply with market conditions ([152]). In such cases compliance with market conditions can still be assessed through (i) benchmarking or (ii) other assessment methods ([153]).

(i) Benchmarking

98. To establish whether a transaction is in compliance with market conditions, that transaction can be assessed in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking).

99. To identify an appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned (for example a group holding, a speculative fund, or a long-term investor seeking to secure profits in the longer run), the type of transaction at stake (for example equity participation or debt transaction) and the market or markets concerned (for example financial markets, fast-growing technology markets, utility or infrastructure markets). The timing of the transactions is also particularly relevant when significant economic developments have taken place. Where appropriate, the available market benchmarks may need to be adjusted according to the specific features of the State transaction (for instance, the situation of the beneficiary

([149]) Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria* v *Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87. The EFTA Court took a similar approach in a case relating to the lease of an asset in its Judgment of 27 January 2014 in Case E-1/13 *Míla* v *EFTA Surveillance Authority* EFTA Ct. Rep [2014] p. 4, paragraph 81.

([150]) An unsolicited bid can also be credible, depending on the circumstances of the case, and in particular if the bid is binding (see Judgment of the General Court of 13 December 2011, *Konsum Nord* v *Commission*, T-244/08, ECLI:EU:T:2011:732, paragraphs 73, 74 and 75).

([151]) For instance, mere announcements without legally binding requirements would not be given consideration in the tender procedure; see Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria* v *Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87 and Judgment of the General Court of 13 December 2011, *Konsum Nord* v *Commission*, T-244/08, ECLI:EU:T:2011:732, paragraphs 67 and 75.

([152]) See Judgment of the General Court of 12 June 2014, *Sarc* v *Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98.

([153]) When the market price is set through '*pari passu*' or tender transactions, these results cannot be disputed by other assessment methodologies, such as by independent studies (see Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95).

undertaking and of the relevant market) ([154]). Benchmarking may not be an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions.

100. Benchmarking often does not establish one precise reference value but rather establishes a range of possible values by assessing a set of comparable transactions. Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency such as the average or the median of the set of comparable transactions.

(ii) Other assessment methods

101. Whether a transaction is in line with market conditions can also be established on the basis of a generally-accepted, standard assessment methodology ([155]). Such a methodology must be based on the available objective, verifiable and reliable data ([156]), which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations ([157]). Depending on the value of the transaction, the robustness of the evaluation should normally be corroborated by performing a sensitivity analysis, assessing different business scenarios, preparing contingency plans and comparing the results with alternative evaluation methodologies. A new (*ex-ante*) valuation may need to be carried out if the transaction is delayed and it is necessary to take into account recent changes in market conditions.

102. A widely accepted standard methodology to determine the (annual) return on investments is to calculate the internal rate of return (IRR) ([158]). One can also evaluate the investment decision in terms of its net present value (NPV) ([159]), which produces results equivalent to the IRR in most cases ([160]). To assess whether the investment is carried out on market terms, the return on the investment must be compared to the normal expected market return. A normal expected return (or cost of capital of the investment) can be defined as the average expected return that the market requires from the investment on the basis of generally accepted criteria, in particular the risk of the investment, taking into account the financial position of the company and the specific features of the sector, region or country. If this normal return cannot be reasonably expected, then the investment would most likely not be pursued on market terms. In general, the riskier the project, the higher the rate of return that fund providers will demand, that is to say the higher the cost of capital.

103. The appropriate assessment methodology may depend on the market situation ([161]), data availability or the type of transaction. For instance, whereas an investor seeks to generate a profit by investing in undertakings (in which

([154]) See Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 251.

([155]) See Judgment of the General Court of 29 March 2007, *Scott* v *Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 134, and Judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 39.

([156]) See Judgment of the General Court of 16 September 2004, *Valmont Nederland BV* v *Commission*, T-274/01, ECLI:EU:T:2004:266, paragraph 71.

([157]) See Judgment of the General Court of 29 March 2007, *Scott* v *Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 158.

([158]) The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

([159]) The NPV is the difference between the positive and negative cash flows over the lifetime of the investment, discounted at the appropriate return (the cost of capital).

([160]) There is a perfect correlation between NPV and IRR in cases where the IRR is equal to the opportunity cost to the investor. Where the NPV of an investment is positive, this implies that the project has an IRR that exceeds the required rate of return (opportunity cost to the investor). In this case, the investment is worth carrying out. If the project has an NPV that is equal to zero, the IRR of the project equals the required rate of return. In this case, it is immaterial whether the investor makes the investment or invests elsewhere. Where the NPV is negative, the IRR is below the cost of capital. The investment is not profitable enough as better opportunities exist elsewhere. Where the IRR and the NPV lead to different investment decisions (such a difference in result could arise, in particular, in mutually exclusive projects), in principle the NPV method should be preferred in line with market practice, unless there is significant uncertainty as to the appropriate discount rate.

([161]) For instance, in the case of liquidation of a company, a valuation based on liquidation value or on asset value could be the most appropriate assessment methods.

case IRR or NPV are likely to be the most appropriate method), a creditor seeks to obtain payment of sums owed to it (the principal sum and any interest) by a debtor within the contractually and legally determined period ([162]) (in which case the evaluation of collateral, for example the asset value, could be more relevant). In the case of sales of land, an independent expert evaluation prior to the sale negotiations to establish the market value on the basis of generally accepted market indicators and valuation standards is in principle satisfactory ([163]).

104. Methods to establish the IRR or NPV of an investment do not typically result in one precise value that could be accepted, but rather in a range of possible values (depending on the economic, legal and other specific circumstances of the transaction inherent in the assessment method). Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency, such as the average or the median of the set of comparable transactions.

105. Prudent market economy operators typically assess their interventions by using several different methodologies to corroborate the estimates (for instance, NPV calculations are validated by benchmarking methods). The different methodologies converging at the same value will provide a further indication for establishing a genuine market price. Thus, the presence of complementary valuation methodologies corroborating each other's findings will be considered a positive indication when assessing whether a transaction is in line with market conditions.

4.2.3.3. Counterfactual analysis in the case of prior economic exposure to the undertaking concerned

106. The fact that the public body concerned has prior economic exposure to an undertaking should be taken into consideration when examining whether a transaction is in line with market conditions, provided that a comparable private operator could have such prior exposure (for example in its capacity of shareholder of an undertaking) ([164]).

107. Prior exposure must be considered in the framework of counterfactual scenarios for the purpose of the MEO test. For instance, in the case of an equity or debt intervention in a public undertaking in difficulty, the expected return on such an investment should be compared with the expected return in the counterfactual scenario of the liquidation of the company. In the event that liquidation provides higher gains or lower losses, a prudent market economy operator would choose that option ([165]). For this purpose, the liquidation costs to be considered should not include costs linked to the responsibilities of the public authorities, but only costs that a rational market economy operator would incur ([166]), also taking into account the evolution of the social, economic and environmental context in which it operates ([167]).

([162]) See, for instance, Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 46, and Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 24.

([163]) If the comparative method (benchmarking) is not appropriate and other generally accepted methods appear to fail to accurately establish the land value, an alternative method could be employed, such as the *Vergleichspreissystem* valuation method proposed by Germany (endorsed for agricultural and forestry land in Commission Decision on State aid SA.33167 Proposed alternative method to evaluate agriculture and forestry land in Germany when sold by public authorities (OJ C 43, 15.2.2013, p. 7). On the limitations of other methods see Judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 52.

([164]) See Judgment of the Court of Justice of 3 April 2014, *ING Groep NV*, C-224/12 P, ECLI:EU:C:2014:213, paragraphs 29 to 37. However the prior exposure should not be taken into account if it results from a measure which, on a global assessment of all aspects of that measure, could not have been undertaken by a private investor seeking a profit (Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 52 to 61.

([165]) See, to that effect, Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, or Judgment of the Court of Justice of 24 January 2013, *Frucona* v *Commission*, C-73/11 P, ECLI:EU:C:2013:32, paragraphs 79 and 80.

([166]) Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 140.

([167]) Judgment of the General Court of 11 September 2012, *Corsica Ferries France SAS* v *Commission*, T-565/08, ECLI:EU:T:2012:415, paragraphs 79 to 84, upheld on appeal, see Judgment of the Court of Justice of 4 September 2014, *SNCM and France* v *Commission*, Joined Cases C-533/12 P and C-536/12 P, ECLI:EU:C:2014:2142, paragraphs 40 and 41. The Courts confirmed in this case that, in principle, it might be economically rational in the long term for private investors, in particular larger groups of companies, to pay complementary indemnities (for instance, to protect the brand image of a group). However, the necessity of paying such complementary indemnities should be demonstrated thoroughly in the concrete case in which the protection of the image is needed and it should also be demonstrated that such payments are an established practice amongst private companies in similar circumstances (mere examples are not sufficient).

4.2.3.4. Specific considerations to establish whether the terms for loans and guarantees are in line with market terms

108. In the same way as any other transaction, loans and guarantees granted by public bodies (including public undertakings) may entail State aid if they are not in line with market terms.

109. For guarantees, a triangular situation involving a public entity as a guarantor, a borrower and a lender normally has to be analysed ([168]). In most cases, aid can only be present at the level of the borrower, as the public guarantee may grant it an advantage, by enabling it to borrow at a rate that would not have been obtainable on the market without the guarantee ([169]) (or to borrow in a situation where, exceptionally, no loan could have been obtained on the market at any rate). However, under certain specific circumstances, the granting of a public guarantee might also entail aid to the lender, in particular where the guarantee is given *ex post* on an existing obligation between lender and borrower, where a complete passing on of the advantage to the borrower is not ensured ([170]) or where a guaranteed loan is used to pay back a non-guaranteed one ([171]).

110. Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the borrower, confers an advantage on the latter (who pays a fee that does not appropriately reflect the risk that the guarantor assumes) ([172]). In general, unlimited guarantees are not in line with normal market conditions. This also applies to implicit guarantees stemming from State liability for the debts of insolvent undertakings sheltered from ordinary bankruptcy rules ([173]).

111. In the absence of specific market information on a given debt transaction, the debt instrument's compliance with market conditions may be established on the basis of a comparison with comparable market transactions (that is to say through benchmarking). In the case of loans and guarantees, information on the financing costs of the undertaking may, for example, be obtained from other (recent) loans taken by the undertaking in question, from yields on bonds issued by the undertaking or from credit default swap spreads on that undertaking. Comparable market transactions may also be similar loan or guarantee transactions undertaken by a sample of comparator companies, bonds issued by a sample of comparator companies or credit default swap spreads on a sample of comparator companies. In the case of guarantees, if no corresponding price benchmark can be found on the financial markets, the total financing cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, should be compared to the market price of a similar non-guaranteed loan. Benchmarking methods may be complemented with assessment methods based on the return on capital ([174]).

112. To facilitate assessment of whether a measure complies with the MEO test, the Authority has developed proxies to determine the aid character of loans and guarantees.

([168]) For information on the assessment to be carried out concerning the possible grant of State aid in the form of a guarantee, see also Guidelines on State Guarantees, adopted by EFTA Surveillance Authority Decision No 788/08/COL of 17 December 2008 amending, for the sixty-seventh time, the procedural and substantive rules in the field of State aid by amending the existing chapters on reference and discount rates and on State aid granted in the form of guarantees and by introducing a new chapter on recovery of unlawful and incompatible State aid, on State aid to cinematographic and other audiovisual works and State aid for railway undertakings (OJ L 105, 21.4.2011, p. 32 and EEA Supplement No 23, 21.4.2011, p. 1). Those Guidelines are not replaced by the present Guidelines.

([169]) See Judgment of the Court of Justice of 8 December 2011, *Residex Capital* v *Gemeente Rotterdam*, C-275/10, ECLI:EU:C:2011:814, paragraph 39.

([170]) See Judgment of the Court of Justice of 19 March 2015, *OTP Bank Nyrt* v *Magyar Állam and Others*, C-672/13, ECLI:EU:C:2015:185.

([171]) See Judgment of the Court of Justice of 8 December 2011, *Residex Capital* v *Gemeente Rotterdam*, C-275/10, ECLI:EU:C:2011:814, paragraph 42.

([172]) See Judgment of the Court of Justice of 3 April 2014, *France* v *Commission*, C-559/12 P, ECLI:EU:C:2014:217, paragraph 96.

([173]) See Judgment of the Court of Justice of 3 April 2014, *France* v *Commission*, C-559/12 P, ECLI:EU:C:2014:217, paragraph 98.

([174]) For instance, through RAROC (Risk Adjusted Return on Capital), which is what lenders and investors require for providing finance of similar benchmark risk and maturity to an undertaking active in the same sector.

113. For loans, the methodology to calculate a reference rate, to act as a proxy for the market price in situations where comparable market transactions are not easy to identify (something that is more likely to apply to transactions involving limited amounts and/or transactions involving small and medium sized undertakings (SMEs)) is set out in the Reference and Discount Rates Guidelines ([175]). It should be recalled that this reference rate is only a proxy ([176]). If comparable transactions have typically taken place at a lower price than that indicated as a proxy by the reference rate, the EEA State can consider this lower price to be the market price. If, on the other hand, the same company has carried out recent similar transactions at a higher price than the reference rate, and its financial situation and the market environment have remained substantially unchanged, the reference rate may not constitute a valid proxy of market rates for that specific case.

114. The Authority has developed detailed guidance on proxies (and irrebuttable presumptions ('safe harbours') for SMEs) relating to guarantees in the Guidelines on Guarantees ([177]). According to these Guidelines, in order to rule out the presence of aid, it is normally sufficient that the borrower is not in financial difficulty, that the guarantee is linked to a specific transaction, that the lender bears part of the risk and that the borrower pays a market-oriented price for the guarantee.

4.3. **Indirect advantage**

115. An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage) ([178]). A measure can also constitute both a direct advantage to the recipient undertaking and an indirect advantage to other undertakings, for instance, undertakings operating at subsequent levels of activity ([179]). The direct recipient of the advantage can be either an undertaking or an entity (natural or legal person) not engaged in any economic activity ([180]).

116. Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (for example through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an *ex ante* point of view. An indirect advantage is present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, *de facto* or *de jure*, made conditional on the purchase of goods or services produced by certain undertakings only (for example only undertakings established in certain areas) ([181]).

5. **SELECTIVITY**

5.1. **General principles**

117. To fall within the scope of Article 61(1) of the EEA Agreement, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

([175]) See Guidelines on Reference and Discount Rates, adopted by Decision No 788/08/COL. For subordinated loans, which are not covered in the Reference Rate Communication, the methodology set out in Commission Decision of 11 December 2008 on State aid N 55/2008, GA/EFRE Nachrangdarlehen (OJ C 9, 14.1.2009), can be used.

([176]) However, where Commission regulations or Authority decisions on aid schemes refer to the reference rate for the identification of the aid amount, the Authority will consider it as a fixed no-aid benchmark (safe-harbour).

([177]) Guidelines on State Guarantees, adopted by Decision No 788/08/COL.

([178]) Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraphs 26 and 27; Judgment of the Court of Justice of 28 July 2011, *Mediaset SpA* v *Commission*, C-403/10 P, ECLI:EU:C:2011:533, paragraphs 73 to 77; Judgment of the Court of Justice of 13 June 2002, *Netherlands* v *Commission*, C-382/99, ECLI:EU:C:2002:363, paragraphs 60 to 66; Judgment of the General Court of 4 March 2009, *Italy* v *Commission*, T-424/05, ECLI:EU:T:2009:49, paragraphs 136 to 147. See also Article 61(2)(a) of the EEA Agreement.

([179]) In case an intermediary undertaking is a mere vehicle for transferring the advantage to the beneficiary and it does not retain any advantage, it should not normally be considered as a recipient of State aid.

([180]) Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraphs 26 and 27; Judgment of the Court of Justice of 28 July 2011, *Mediaset SpA* v *Commission*, C-403/10 P, ECLI:EU:C:2011:533, paragraph 81.

([181]) By contrast, a mere secondary economic effect in the form of increased output (which does not amount to indirect aid) can be found where the aid is simply channelled through an undertaking (for example a financial intermediary) which passes it on in full to the aid beneficiary.

118. Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 61(1) of the EEA Agreement. However, the case-law has made it clear that even interventions which, at first appearance, apply to undertakings in general may be selective to a certain extent and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods ([182]). Neither a large number of eligible undertakings (which can even include all undertakings of a given sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State measure constitutes a general measure of economic policy, if not all economic sectors can benefit from it ([183]). The fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria according to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, is insufficient to call into question the selective nature of the measure ([184]).

119. To clarify the notion of selectivity under State aid law, it is useful to distinguish between material and regional selectivity. Moreover, it is useful to provide further guidance on certain issues specific to tax (or similar) measures.

5.2. **Material selectivity**

120. The material selectivity of a measure implies that the measure applies only to certain (groups of) undertakings or certain sectors of the economy in a given EEA State. Material selectivity can be established *de jure* or *de facto*.

5.2.1. *De jure and de facto selectivity*

121. *De jure* selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance: those having a certain size, active in certain sectors ([184a]) or having a certain legal form ([185]); companies incorporated or newly listed on a regulated market during a particular period ([186]); companies belonging to a group having certain characteristics or entrusted with certain functions within a group ([187]); ailing companies ([188]); or export undertakings or undertakings performing export-related activities ([189])). *De facto* selectivity can be established in cases where, although the formal criteria for the

([182]) Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 27; Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava – Diputación Foral de Álava et al.* v *Commission*, Joined Cases T-127/99, T-129/99 and T-148/99, ECLI:EU:T:2002:59, paragraph 149. See also Judgment of the EFTA Court of 10 May 2011 in Joined Case E-04/10, E-06/10 and E-07/10 *The Principality of Liechtenstein and others* v *EFTA Surveillance Authority* EFTA Ct. Rep [2011] p. 16, paragraph 78.

([183]) See, for instance, Judgment of the Court of Justice of 17 June 1999, *Belgium* v *Commission*, C-75/97, ECLI:EU:C:1999:311, paragraph 32; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598, paragraph 48.

([184]) Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 40. See also Judgment of the General Court of 13 September 2012, *Italy* v *Commission*, T-379/09, ECLI:EU:T:2012:422, paragraph 47. The measure in question in that case was a partial exemption from excise duty on the diesel used for the heating of greenhouses. The General Court indicated that the fact that the exemption could benefit all undertakings choosing greenhouse production was not sufficient to establish the general character of the measure.

([184a]) See also Judgment of the EFTA Court of 21 July 2005 in Joined Cases E-05/04 to E-07/04 *Fesil and others* v *EFTA Surveillance Authority* EFTA Ct. Rep [2005] p. 117, paragraphs 78-79.

([185]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 52.

([186]) Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraph 120, and Judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraphs 59 and 60.

([187]) Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 122.

([188]) Judgment of the General Court of 4 February 2016, *Heitkamp Bauholding* v *Commission*, T-287/11, ECLI:EU:T:2016:60, paragraph 129 et seq.

([189]) Judgment of the Court of Justice of 10 December 1969, *Commission* v *France*, Joined Cases 6 and 11/69, ECLI:EU:C:1969:68, paragraph 3; Judgment of the Court of Justice of 7 June 1988, *Greece* v *Commission*, 57/86, ECLI:EU:C:1988:284, paragraph 8; Judgment of the Court of Justice of 15 July 2004, *Spain* v *Commission*, C-501/00, ECLI:EU:C:2004:438, paragraph 92.

application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (as in the examples in the preceding sentence) ([190]).

122. *De facto* selectivity may be the result of conditions or barriers imposed by EEA States preventing certain undertakings from benefiting from the measure. For example, applying a tax measure (for example a tax credit) only to investments exceeding a certain threshold (other than a minor threshold for reasons of administrative expediency) may mean that the measure is *de facto* reserved for undertakings with significant financial resources ([191]). A measure granting certain advantages for a brief period only may also be *de facto* selective ([192]).

5.2.2. *Selectivity stemming from discretionary administrative practices*

123. General measures which *prima facie* apply to all undertakings but are limited by the discretionary power of the public administration are selective ([193]). This is the case where meeting the given criteria does not automatically result in an entitlement to the measure.

124. Public administrations have discretionary power in applying a measure, in particular, where the criteria for granting the aid are formulated in a very general or vague manner that necessarily involves a margin of discretion in the assessment. One example would be that the tax administration can vary the conditions for granting a tax concession according to the characteristics of the investment project submitted to it for assessment. Similarly, if the tax administration has broad discretion to determine the beneficiaries or the conditions under which a tax advantage is granted on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' ([194]).

125. The fact that a tax relief requires prior administrative authorisation does not automatically mean that it constitutes a selective measure. This is not the case where a prior administrative authorisation is based on objective, non-discriminatory criteria which are known in advance, thus circumscribing the exercise of the public administrations' discretion. Such a prior administrative authorisation scheme must also be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings ([195]).

5.2.3. *The assessment of material selectivity for measures mitigating the normal charges of undertakings*

126. When EEA States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings ([196]).

([190]) This was the case in the Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, concerning the Gibraltar tax reform, which de facto favoured offshore companies. See paragraphs 101 et seq. of that judgment. The reform introduced a system consisting of three taxes applicable to all Gibraltar companies, namely a payroll tax, a business property occupation tax (BPOT) and a registration fee. Liability for payroll tax and BPOT would have been capped at 15 % of profits. The Court found that such a combination of taxes excluded from the outset any taxation of offshore companies as they had no taxable basis due to the lack of employees and lack of business property in Gibraltar.

([191]) See, for instance, Judgment of the General Court of 6 March 2002, *Ramondin SA and Ramondín Cápsulas SA* v *Commission*, Joined Cases T-92/00 and T-103/00, ECLI:EU:T:2002:61, paragraph 39.

([192]) Judgment of the General Court of 12 September 2007, *Italy and Brandt Italia* v *Commission*, Joined Cases T-239/04 and T-323/04, ECLI:EU:T:2007:260, paragraph 66; Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraph 120; Judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraphs 59 and 60.

([193]) See Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 27.

([194]) See Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraph 27.

([195]) See Judgment of the Court of Justice of 12 July 2001, *Smits and Peerbooms*, C-157/99, ECLI:EU:C:2001:404, paragraph 90; Judgment of the Court of Justice of 3 June 2010, *Sporting Exchange Ltd, trading 'Betfair'* v *Minister van Justitie*, C-203/08, ECLI:EU:C:2010:307, paragraph 50.

([196]) See Judgment of the Court of Justice of 4 June 2015, *Commission* v *MOL*, C-15/14 P, ECLI:EU:C:2015:362, paragraphs 60 et seq.; Opinion of Advocate General Mengozzi of 27 June 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:442, paragraph 52.

127. The situation is usually less clear when EEA States adopt broader measures applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear (for instance, tax or social security exemptions for undertakings fulfilling certain criteria).

128. In such cases, the selectivity of the measures should normally be assessed by means of a three-step analysis. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is *prima facie* selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system ([197]). If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 61(1) of the EEA Agreement ([198]).

129. However, the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned. It must be emphasised that Article 61(1) of the EEA Agreement does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used ([199]). This means that in certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system as defined by the EEA State concerned. It is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.

130. Thus, in Joined Cases C-106/09 P and C-107/09 P ([200]) concerning the Gibraltar tax reform, the Court of Justice found that the reference system as defined by the EEA State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies ([201]). In this respect, the Court found that the fact that offshore companies were not taxed was not a random consequence of the regime, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies had no tax base ([202]).

131. Similar verification may also be necessary in certain cases concerning special-purpose levies, where there are elements indicating that the boundaries of the levy have been designed in a clearly arbitrary or biased way, so as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levies in question. For instance, in *Ferring* ([203]), the Court of Justice considered that a levy imposed on the direct sale of medicinal products by pharmaceutical laboratories but not on the sale by wholesalers was selective. In the light of the particular factual circumstances – such as the clear objective of the measure and its effects – the Court did not simply examine whether the measure in question would lead to a derogation from the reference system constituted by the levy. It also compared the situations of the pharmaceutical laboratories (subject to the levy) and of the wholesalers (excluded), concluding that the non-imposition of the tax on the direct sales by the wholesalers equated to granting them a *prima facie* selective tax exemption ([204]).

([197]) See, for instance, Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 62; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598.

([198]) See, for instance, Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 49 et seq.; Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252.

([199]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraphs 85 and 89 and the case-law cited; Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 51; Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 87.

([200]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732.

([201]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 et seq.

([202]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 106.

([203]) Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 20.

([204]) Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraphs 19 and 20.

5.2.3.1. Identification of the reference system

132. The reference system constitutes the benchmark against which the selectivity of a measure is assessed.

133. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.

134. In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system ([205]), the VAT system ([206]), or the general system of taxation of insurance ([207]). The same applies to special-purpose (stand-alone) levies, such as levies on certain products or activities having a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and subject to special cases illustrated in paragraphs 129 to 131 above, the reference system is, in principle, the levy itself ([208]).

5.2.3.2. Derogation from the system of reference

135. Once the reference system has been established, the next step of the analysis consists in examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in the light of the intrinsic objective of the system of reference ([209]). External policy objectives – such as regional, environmental or industrial policy objectives – cannot be relied upon by the EEA State to justify the differentiated treatment of undertakings ([210]).

136. The structure of certain special-purpose levies (and in particular their tax bases), such as environmental and health taxes imposed to discourage certain activities or products that have an adverse effect on the environment or human health, will normally integrate the policy objectives pursued. In such cases, a differentiated treatment for activities or products whose situation is different from the situation of those activities or products which are subject to the tax as regards the intrinsic objective pursued, does not constitute a derogation ([211]).

137. If a measure favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation, the measure is *prima facie* selective.

([205]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 50. The Court sometimes applies in this context the term of 'the ordinary tax system' (see Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 95) or 'the general tax scheme' (see Judgment of the Court of Justice of 15 December 2005, *Italy* v *Commission*, C-66/02, ECLI:EU:C:2005:768, paragraph 100).

([206]) See the Court's reasoning concerning selectivity in Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraphs 40 et seq.

([207]) See Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252, paragraphs 75 and 78.

([208]) See Judgment of the General Court of 7 March 2012, *British Aggregates Association* v *Commission*, T-210/02 RENV, ECLI:EU:T:2012:110, paragraphs 49 and 50. Even if a levy is introduced in the national legal system to transpose a Union directive, incorporated into the EEA Agreement, that levy remains the system of reference.

([209]) In its *Paint Graphos* judgment, the Court has indicated however that, in light of the peculiarities of cooperative societies which have to conform to particular operating principles, those undertakings cannot be regarded as being in a comparable factual and legal situation to that of commercial companies, provided that they act in the economic interest of their members and their relations with their members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance (See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 61).

([210]) Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12 *P*, ECLI:EU:C:2013:525, paragraph 27 et seq.

([211]) A levy introduced in the national legal system transposing an EU directive incorporated into the EEA Agreement, which provides within its scope for differentiated treatment for certain activities/products can indicate that such activities/products are in a different situation as regards the intrinsic objective pursued.

5.2.3.3. Justification by the nature or general scheme of the system of reference

138. A measure which derogates from the reference system (*prima facie* selectivity) is non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([212]). In contrast, it is not possible to rely on external policy objectives which are not inherent to the system ([213]).

139. The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability ([213a]), the principle of tax neutrality ([214]), the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation ([215]), or the objective of optimising the recovery of fiscal debts.

140. EEA States should, however, introduce and apply appropriate control and monitoring procedures to ensure that derogations are consistent with the logic and general scheme of the tax system ([216]). For derogations to be justified by the nature or general scheme of the system, it is also necessary to ensure that those measures are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures ([217]).

141. An EEA State which introduces a differentiation between undertakings needs to be able to show that this differentiation is actually justified by the nature and general scheme of the system in question ([218]).

5.3. **Regional selectivity**

142. In principle, only measures that apply within the entire territory of the EEA State escape the regional selectivity criterion laid down in Article 61(1) of the EEA Agreement. However, as outlined below, the reference system does not necessarily have to be defined as the entire EEA State ([219]). It follows that not all measures that apply only to certain parts of the territory of an EEA State are automatically selective.

143. As established by the case-law ([220]), measures with a regional or local scope of application may not be selective if certain requirements are fulfilled. This case-law has so far only dealt with tax measures. However, as regional selectivity is a general concept, the principles set out by the EEA Courts as regards tax measures apply to other types of measures as well.

([212]) See for example Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 69.

([213]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 69 and 70; Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 81; Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551; Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757; Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraphs 27 et seq.

([213a]) See EFTA Surveillance Authority Decision No 155/16/COL on alleged state aid arising from the Norwegian import duty exemption for low-value goods imported by final consumers, (not yet published, paragraph 98).

([214]) For undertakings for collective investment; see section 5.4.2.

([215]) In Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members (paragraph 71).

([216]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 74.

([217]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 75.

([218]) See Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 146; Judgment of the Court of Justice of 29 April 2004, *Netherlands* v *Commission*, C-159/01, ECLI:EU:C:2004:246, paragraph 43; Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511.

([219]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 57; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraph 47.

([220]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraphs 57 et seq.; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 47 et seq.

144. In order to assess regional selectivity, three scenarios must be distinguished ([221]):

(1) In the first scenario, which results in the regional selectivity of a measure, the central government of an EEA State unilaterally decides to apply a lower level of taxation within a defined geographical area ([221a]).

(2) The second scenario corresponds to symmetrical devolution of tax powers ([222]) – a model of distribution of tax competences in which all infra-State authorities at a particular level (regions, districts or others) of an EEA State have the same autonomous power in law to decide the applicable tax rate within their territory of competence, independently of the central government. In this case, the measures decided by the infra-State authorities are not selective as it is impossible to determine a normal tax rate capable of constituting the reference framework.

(3) In the third scenario – the asymmetrical devolution of tax powers ([223]) – only certain regional or local authorities can adopt tax measures applicable within their territory. In this case, the assessment of the selective nature of the measure at stake depends on whether the authority concerned is sufficiently autonomous from the central government of the EEA State ([224]). This is the case when three cumulative criteria of autonomy are fulfilled: institutional, procedural and economic and financial autonomy ([225]). If all of these criteria of autonomy are present when a regional or local authority decides to adopt a tax measure applicable only within its territory, then the region in question, not the EEA State, constitutes the geographical reference framework.

5.3.1. *Institutional autonomy*

145. The existence of institutional autonomy can be established where the tax measure decision has been taken by a regional or local authority with its own constitutional, political and administrative status that is separate from that of the central government. In the *Azores* case, the Court of Justice observed that the Portuguese Constitution recognised the Azores as an autonomous region with its own political and administrative status and self-governing institutions, which also have their own fiscal competence, and the power to adapt national fiscal provisions to particular regional features ([226]).

146. The assessment of whether this criterion has been fulfilled in each individual case should include, in particular, examination of the constitution and other relevant laws of a given EEA State so as to verify whether a given region indeed has its own separate political and administrative status and whether it has its own self-governing institutions which have the power to exercise their own fiscal competence.

5.3.2. *Procedural autonomy*

147. The existence of procedural autonomy can be established where a tax measure decision has been adopted without the central government being able to directly intervene in determining its content.

148. The essential criterion for determining whether procedural autonomy exists is not the extent of the competence that the infra-State body is recognised as having, but the capability of that body, in view of its competence, to adopt a decision on a tax measure independently, that is to say without the central government being able to intervene directly as regards its content.

([221]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraphs 63 to 66.

([221a]) Judgement of the EFTA Court of 20 May 1999 in Case E-6/98 *The Kingdom of Norway* v *EFTA Surveillance Authority EFTA* Ct. Rep [1999] p. 74, paragraph 38.

([222]) See Opinion of Advocate General Geelhoed of 20 October 2005, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2005:618, paragraph 60.

([223]) Opinion of Advocate General Geelhoed of 20 October 2005, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2005:618, paragraph 60.

([224]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 58: *'It is possible that an infra-state body enjoys legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate.'*

([225]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 67.

([226]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 70.

149. The fact that a consultation or conciliation procedure exists between the central and regional (or local) authorities to avoid conflicts does not automatically mean that an infra-State body does not have procedural autonomy, provided that that body, and not the central government, has the final word on the adoption of the measure at stake ([227]).

150. The mere fact that the acts which an infra-State body adopts are subject to judicial review does not in itself mean that that body lacks procedural autonomy, since the existence of such review is an inherent feature of the rule of law ([228]).

151. A regional (or local) tax measure does not have to be completely separate from a more general tax system for it not to constitute State aid. In particular, it is not necessary that the tax system in question (bases of assessment, tax rates, tax recovery rules and exemptions) is fully devolved to the infra-State body ([229]). For example, corporate tax devolution limited to the power to vary rates within a limited range, without devolving the power to change the bases of assessment (tax allowances and exemptions, etc.), could be considered as fulfilling the procedural autonomy condition if the pre-defined rate bracket allows the region concerned to exercise meaningful autonomous powers of taxation, without the central government being able to directly intervene as regards content.

5.3.3. *Economic and financial autonomy*

152. The existence of economic and financial autonomy can be established where an infra-State body assumes responsibility for the political and financial consequences of a tax reduction measure. This cannot be the case if the infra-State body is not responsible for managing a budget, that is to say when it does not have control of both revenue and expenditure.

153. Therefore, in establishing the existence of economic and financial autonomy, the financial consequences of the tax measure in the region must not be offset by aid or subsidies from other regions or the central government. Hence, the existence of a direct causal link between the tax measure adopted by the infra-State body and the financial support from other regions or the central government of the EEA State concerned rules out the existence of such autonomy ([230]).

154. The existence of economic and financial autonomy is not undermined by the fact that a shortfall in tax revenues as a result of the implementation of devolved tax powers (for example a lower tax rate) is offset by a parallel increase in the same revenues due to the arrival of new businesses attracted by the lower rates.

155. The autonomy criteria do not require the rules governing tax collection to be devolved to the regional or local authorities, nor do they require the tax revenues to actually be collected by those authorities. The central government may continue to be responsible for collecting devolved taxes if the collection costs are borne by the infra-State authority.

5.4. **Specific issues concerning tax measures**

156. EEA States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production. Nonetheless, EEA States must exercise this competence in accordance with EEA law ([231]).

([227]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 96 to 100.
([228]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 80 to 83.
([229]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511.
([230]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 129 et seq.
([231]) In particular, EEA States must not introduce or maintain legislation which entails incompatible State aid or discrimination that is contrary to the fundamental freedoms. See, for instance, Judgment of the Court of Justice of 17 September 2009, *Glaxo Wellcome*, C-182/08, ECLI:EU:C:2009:559, paragraph 34 and the case-law cited.

5.4.1. *Cooperative societies*

157. In principle, genuine cooperative societies conform to operating principles which distinguish them from other economic operators ([232]). In particular, they are subject to specific membership requirements and their activities are conducted for the mutual benefit of their members ([233]), not in the interest of outside investors. In addition, reserves and assets are non-distributable and must be dedicated to the common interest of the members. Finally, cooperatives generally have limited access to equity markets and generate low profit margins.

158. In the light of these particular features, cooperatives can be regarded as not being in a comparable factual and legal situation to that of commercial companies, so that preferential tax treatment for cooperatives may fall outside the scope of the State aid rules provided that ([234]):

— they act in the economic interest of their members;

— their relations with members are not purely commercial, but personal and individual;

— the members are actively involved in the running of the business;

— they are entitled to equitable distribution of the results of economic performance.

159. If, however, the cooperative society under examination is found to be comparable to commercial companies, it should be included in the same reference framework as commercial companies and undergo the three-step analysis as set out in paragraphs 128 to 141. The third step of that analysis requires an analysis of whether the tax regime in question is justified by the logic of the tax system ([235]).

160. For this purpose, it should be noted that the measure needs to be in line with the basic or guiding principles of the EEA State's tax system (by reference to the mechanisms inherent to that system). A derogation for cooperative societies in the sense that they are not taxed themselves as cooperatives can, for example, be justified by the fact that they distribute all their profits to their members and that tax is then levied on those individual members. In any event, the reduced taxation must be proportionate and not go beyond what is necessary. Moreover, appropriate control and monitoring procedures must be applied by the EEA State concerned ([236]).

5.4.2. *Undertakings for collective investment* ([237])

161. It is generally accepted that investment vehicles, such as undertakings for collective investment ([238]), should be subject to an appropriate level of taxation since they basically operate as intermediary bodies between (third party) investors and the target companies that are the subject of investment. The absence of special tax rules

([232]) See preamble to Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1), referred to at point 10c of Annex XXII to the EEA Agreement, see Decision of the EEA Joint Committee No 15/2004 of 6 February 2004 amending Annex XXII (Company Law) to the EEA Agreement (OJ L 116, 22.4.2004, p. 68 and EEA Supplement No 20, 22.4.2004, p. 21).

([233]) Control of cooperatives is vested equally in its members, as reflected in the 'one person, one vote' rule.

([234]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 55 and 61.

([235]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 69 to 75.

([236]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 74 and 75.

([237]) This section is not limited to undertakings for collective investment subject to Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), referred to at point 30 of Annex IX to the EEA Agreement, see Decision of the EEA Joint Committee No 120/2010 of 10 November 2010 amending Annex IX (Financial services) to the EEA Agreement (OJ L 58, 3.3.2011, p. 77 and EEA Supplement No 12, 3.3.2011, p. 20). It also covers other types of collective investment undertakings not covered by that Directive, such as – among others – Alternative Investment Funds as defined by Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1), referred to at point 31bb of Annex IX to the EEA Agreement, see Joint Committee Decision No 202/2016 (not yet published).

([238]) Such undertakings may be constituted under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies). See Article 1(3) of the UCITS Directive.

governing investment funds or companies could result in an investment fund being treated as a separate taxpayer – with an additional layer of tax being imposed on any income or gains by the intermediary vehicle. In this context, EEA States generally seek to reduce adverse taxation effects on investments through investment funds or companies compared to direct investments by individual investors and, as far as possible, to ensure that the overall final tax burden on the basket of various types of investments is about the same, irrespective of the vehicle used for the investment.

162. Tax measures aimed at ensuring tax neutrality for investments in collective investment funds or companies should not be viewed as selective where those measures do not have the effect of favouring certain undertakings for collective investment or certain types of investments ([239]), but rather of reducing or eliminating double economic taxation in accordance with the overall principles inherent to the tax system in question. For the purpose of this section, tax neutrality means that taxpayers are treated the same whether they invest in assets, such as government securities and the shares of joint-stock companies, directly or indirectly through investment funds. Accordingly, a tax regime for undertakings for collective investment respecting the purpose of fiscal transparency at the level of the intermediary vehicle may be justified by the logic of the tax system in question, provided that the prevention of double economic taxation constitutes a principle inherent to the tax system in question. By contrast, preferential tax treatment limited to well-defined investment vehicles which fulfil specific conditions ([240]) to the detriment of other investment vehicles that are in a comparable legal and factual situation should be viewed as selective ([241]), for instance, where tax rules would provide for a favourable treatment of national venture, social impact or long-term investment funds and omit EU-harmonised EuVECA ([242]), EuSEF ([243]) or ELTIF ([244]) funds.

163. However, tax neutrality does not mean that such investment vehicles should be entirely exempt from any tax or that the fund managers should be exempt from tax on the fees charged by them for managing the underlying assets being invested into by the funds ([245]). Nor does it justify a more beneficial tax treatment of a collective investment than of an individual investment for the tax regimes in question ([246]). In such cases, the tax regime would be disproportionate and would go beyond what is necessary to achieve the objective of preventing double taxation and would therefore constitute a selective measure.

5.4.3. *Tax amnesties*

164. Tax amnesties commonly involve immunity from criminal penalties, fines and (some or all) interest payments. While certain amnesties require payment in full of tax amounts due ([247]), others entail a partial waiver of the amount of tax due ([248]).

([239]) See Judgment of the General Court of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, ECLI:EU:T:2009:50, paragraph 78 et seq. where the General Court upheld Commission Decision 2006/638/EC of 6 September 2005 on the aid scheme implemented by Italy for certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets (OJ L 268, 27.9.2006, p. 1), declaring as incompatible with the common market an aid scheme that provides certain undertakings with tax incentives for collective investment in transferable securities specialising in shares of small or medium-sized capitalisation companies which may be traded on the regulated European market.

([240]) For example, preferential tax treatment at the investment vehicle level being conditional upon the investment of three-quarters of the fund's assets in SMEs.

([241]) See Judgment of the General Court of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, ECLI:EU:T:2009:50, paragraph 150.

([242]) Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1). At the time of the adoption of these Guidelines, Regulation (EC) No 345/2013 was under scrutiny by EEA EFTA.

([243]) Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18). At the time of the adoption of these Guidelines, Regulation (EC) No 346/2013 was under scrutiny by EEA EFTA.

([244]) Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98). At the time of the adoption of these Guidelines, Regulation (EC) No 2015/760 was under scrutiny by EEA EFTA.

([245]) The logic of neutrality behind the special taxation of investment undertakings applies to the fund capital, but not to the management companies' own revenues and capital. See State aid Decision of the EFTA Surveillance Authority of 18 March 2009 with regard to the taxation of investment undertakings in Lichtenstein.

([246]) See Commission Decision of 12 May 2010, N 131/2009, Finland, Residential Real Estate Investment Trust (REIT) scheme (OJ C 178, 3.7.2010, p. 1), recital 33.

([247]) Tax amnesties may also provide the possibility to report undeclared assets or incomes.

([248]) See Judgment of the Court of Justice of 29 March 2012, *Ministero dell'Economia e delle Finanze*, C-417/10, ECLI:EU:C:2012:184, paragraph 12.

165. In general, a tax amnesty measure that applies to undertakings can be considered a general measure if the conditions below are met ([249]).

166. First, the measure is effectively open to any undertaking of any sector or size that has outstanding tax liabilities due at the date set by the measure, without favouring any pre-defined group of undertakings. Second, it does not entail any *de facto* selectivity in favour of certain undertakings or sectors. Third, the tax administration's action is limited to administering the implementation of the tax amnesty without any discretionary power to intervene in the granting or intensity of the measure. Finally, the measure does not entail a waiver from verification.

167. The limited temporal application of tax amnesties, which apply only for a short period ([250]) to tax liabilities which were due before a pre-defined date and which are still due at the time of the introduction of the tax amnesty, is inherent to the concept of a tax amnesty that aims to improve both the collection of taxes and taxpayers' compliance.

168. Tax amnesty measures may also be considered as general measures if they follow the national legislature's objective of ensuring compliance with a general principle of law, such as the principle that a judgment must be given within a reasonable period of time ([251]).

5.4.4. *Tax rulings and settlements*

5.4.4.1. Administrative tax rulings

169. The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally ([252]). This may be done to establish in advance how the provisions of a bilateral tax treaty or national fiscal provisions will be applied to a particular case or how 'arm's-length profits' will be set for related party transactions where uncertainty justifies an advance ruling to ascertain whether certain intra-group transactions are priced at arm's length ([253]). EEA States can provide their taxpayers with legal certainty and predictability on the application of general tax rules, which is best ensured if its administrative ruling practice is transparent and the rulings are published.

170. The grant of a tax ruling must, however, respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability in the EEA State as compared to companies in a similar factual and legal situation.

171. The Court of Justice has held that a reduction in the taxable base of an undertaking that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer, by virtue of the fact that its tax liability under the ordinary tax system is reduced as compared to independent companies which rely on

([249]) See Commission Decision of 11 July 2012 on the tax amnesty measure notified by Latvia, SA.33183 (OJ C 1, 4.1.2013, p. 6).
([250]) The period of application should be sufficient to allow all taxpayers to whom the measure applies to seek to benefit from it.
([251]) See Judgment of the Court of Justice of 29 March 2012, *Ministero dell'Economia e delle Finanze*, C-417/10, ECLI:EU:C:2012:184, paragraphs 40, 41 and 42.
([252]) Some EEA States have adopted circulars regulating the scope and extent of their ruling practices. Some of them also publish their rulings.
([253]) See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, not yet published, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, not yet published, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, not yet published, all cases are under appeal.

their actually recorded profit to determine their taxable base ([254]). Accordingly, a tax ruling which endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm's length principle confers a selective advantage upon its recipient. The search for a 'reliable approximation of a market-based outcome' means that any deviation from the best estimate of a market-based outcome must be limited and proportionate to the uncertainty inherent in the transfer pricing method chosen or the statistical tools employed for that approximation exercise.

172. This arm's length principle necessarily forms part of the Authority's assessment of tax measures granted to group companies under Article 61(1) of the EEA Agreement, independently of whether an EEA State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the EEA State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. The arm's length principle the Authority applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 61(1) of the EEA Agreement, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the EEA States and the national tax rules are not excluded from its scope ([255]).

173. When examining whether a transfer pricing ruling complies with the arm's length principle inherent in Article 61(1) of the EEA Agreement, the Authority may have regard to the guidance provided by the Organisation for Economic Cooperation and Development ('OECD'), in particular the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. Those guidelines do not deal with matters of State aid *per se*, but they capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions. Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.

174. In sum, tax rulings confer a selective advantage on their addressees in particular where:

a) the ruling misapplies national tax law and this results in a lower amount of tax ([256]);

b) the ruling is not available to undertakings in a similar legal and factual situation ([257]); or

([254]) See Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416. In this judgment on the Belgian tax regime for coordination centres, the Court of Justice assessed a challenge to a Commission decision (Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25)) which concluded, inter alia, that the method for determining taxable income under that regime conferred a selective advantage on those centres. Under that regime, taxable profit was established at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, 'in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, […], to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition.' The Court then held that 'the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition', which the Court found to '[confer] an advantage on the coordination centres' (paragraphs 96 and 97).

([255]) See Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 81. See also Judgment of the General Court of 25 March 2015, *Belgium* v *Commission*, T-538/11, ECLI:EU:T:2015:188, paragraphs 65 and 66 and the case-law cited.

([256]) See Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C54/2001 (ex NN55/2000) Ireland — Foreign Income (OJ L 204, 13.8.2003, p. 51), recitals 33 to 35.

([257]) For example, this would be the case if some undertakings involved in transactions with controlled entities are not allowed to request such rulings, contrary to a pre-defined category of undertakings. See in this respect Commission Decision 2004/77/EC of 24 June 2003 on the aid scheme implemented by Belgium — Tax ruling system for United States foreign sales corporations (OJ L 23, 28.1.2004, p. 14), recitals 56 to 62.

c) the administration applies a more 'favourable' tax treatment compared with other taxpayers in a similar factual and legal situation. This could, for instance, be the case where the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome ([258]). The same applies if the ruling allows its addressee to use alternative, more indirect methods for calculating taxable profits, for example the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, while more direct ones are available ([259]).

5.4.4.2. Tax settlements

175. Tax settlements generally occur in the context of disputes between a taxpayer and the tax authorities concerning the amount of tax owed. They constitute a common practice in a number of EEA States. The conclusion of such tax settlements allows tax authorities to avoid long-standing legal disputes before national jurisdictions and to ensure quick recovery of the tax due. While the competence of EEA States in this field is not in dispute, State aid may be involved in the conclusion of a tax settlement, in particular where it appears that the amount of tax due has been reduced without clear justification (such as optimising the recovery of debt) or in a disproportionate manner to the benefit of the taxpayer ([260]).

176. In this context, a transaction between the tax administration and a taxpayer may in particular entail a selective advantage where ([261]):

a) in making disproportionate concessions to a taxpayer, the administration applies a more 'favourable' discretionary tax treatment compared to other taxpayers in a similar factual and legal situation;

b) the settlement is contrary to the applicable tax provisions and has resulted in a lower amount of tax, outside a reasonable range. This might be the case, for example, where established facts should have led to a different assessment of the tax on the basis of the applicable provisions (but the amount of tax due has been unlawfully reduced).

5.4.5. *Depreciation/amortisation rules*

177. In general, tax measures of a purely technical nature such as depreciation/amortisation rules do not constitute State aid. The method of calculating asset depreciation varies from one EEA State to another, but such methods may be inherent to the tax systems to which they belong.

178. The difficulty in assessing possible selectivity with regard to the depreciation rate of certain assets lies in the requirement to establish a benchmark (from which a specific rate or depreciation method would possibly derogate). While in accounting terms, the purpose of this exercise is generally to reflect the economic depreciation of the assets with the aim of presenting a fair view of the financial situation of the company, the fiscal process follows different purposes such as allowing companies to spread deductible expenses over time.

([258]) See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, not yet published, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, not yet published, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, not yet published, all cases are under appeal.

([259]) See Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 (ex NN 47/2000) — Finance companies — implemented by Luxembourg (OJ L 153, 20.6.2003, p. 40), recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) — Coordination Centres — implemented by Luxembourg (OJ L 170, 9.7.2003, p. 20), recitals 46, 47 and 50; Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25), recitals 89 to 95 and the related Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraphs 96 and 97; Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres (OJ L 23, 28.1.2004, p. 1), recitals 50 and 53; Commission Decision of 21 October 2015 in Case SA.38374, *Starbucks*, not yet published, under appeal, recitals 282 to 285; Commission Decision of 21 October 2015 in Case SA.38375, *Fiat*, not yet published, under appeal, recital 245.

([260]) See Commission Decision 2011/276/EU of 26 May 2010 concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03)) (OJ L 122, 11.5.2011, p. 76).

([261]) See Commission Decision 2011/276/EU, recital 155.

179. Depreciation incentives (such as a shorter term of depreciation, a more favourable depreciation method ([262]), early depreciation, etc.) for certain types of assets or undertakings, which are not based on the guiding principles of the depreciation rules in question, may give rise to the existence of State aid. In contrast, accelerated and early depreciation rules for leased assets may be seen as general measures if the lease contracts in question are really accessible to companies of all sectors and sizes ([263]).

180. If the tax authority has discretionary power to set different depreciation periods or different valuation methods, firm by firm or sector by sector, there is obviously a presumption of selectivity. Likewise, prior authorisation from a tax administration as a condition for applying a depreciation scheme involves selectivity if the authorisation is not limited to the prior verification of the legal requirements ([264]).

5.4.6. *Fixed basis tax regime for specific activities*

181. Specific provisions that do not contain discretionary elements, allowing, for example, income tax to be determined on a fixed basis, may be justified by the nature and general scheme of the system where, for instance, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors.

182. Such provisions are therefore not selective, if the following conditions are fulfilled:

a) the fixed basis regime is justified by the concern to avoid disproportionate administrative burden on certain types of undertakings because of their small size or sector of activity;

b) on average, the fixed basis regime does not have the effect of implying a lower tax burden for those undertakings as compared to other undertakings excluded from its scope and does not entail advantages for a sub-category of beneficiaries of the regime.

5.4.7. *Anti-abuse rules*

183. The provision of anti-abuse rules may be justified as measures to prevent tax avoidance by taxpayers ([265]). However, such rules might be selective if they provide for a derogation (non-application of the anti-abuse rules) to specific undertakings or transactions, which would not be consistent with the logic underlying the anti-abuse rules in question ([266]).

5.4.8. *Excise duties*

184. A reduced excise duty can grant a selective advantage to the undertakings which use the product in question as an input or sell it on the market ([268]).

6. **EFFECT ON TRADE AND COMPETITION**

6.1. **General principles**

185. Public support to undertakings only constitutes State aid under Article 61(1) of the EEA Agreement if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only insofar as it 'affects trade' between EEA States.

([262]) Declining-balance method or the sum-of-the-years' digits method as opposed to the most common straight-line method.
([263]) See Commission Decision of 20 November 2012 on SA.34736 on the early depreciation of certain assets acquired through a financial leasing (OJ C 384, 13.12.2012, p. 1).
([264]) See Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code — State aid C 46/2004 (ex NN 65/2004) (OJ L 112, 30.4.2007, p. 41), recital 122.
([265]) Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252, paragraphs 65 et seq.
([266]) See Decision 2007/256/EC, recital 81 et seq.
([268]) See, for instance, Commission Decision 1999/779/EC of 3 February 1999 on an Austrian aid granted in the form of an exemption from beverage tax of wine and other fermented beverages sold directly on the place of production to the consumer (OJ L 305, 30.11.1999, p. 27).

186. These are two distinct and necessary elements of the notion of aid. In practice, however, these criteria are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked ([269]).

6.2. **Distortion of competition**

187. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ([270]). For all practical purposes, a distortion of competition within the meaning of Article 61(1) of the EEA Agreement is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([271]).

188. The fact that the authorities assign a public service to an in-house provider (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if the following cumulative conditions are met:

a) a service is subject to a legal monopoly (established in compliance with EEA law) ([272]);

b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question ([273]);

c) the service is not in competition with other services; and

d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires that separate accounts are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

189. Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations ([274]). The definition of State aid does not require that the distortion of competition or effect on trade is significant or material. The fact that the amount of aid is low or the recipient undertaking is small will not in itself rule out a distortion of competition or the threat thereof ([275]), provided however that the likelihood of such a distortion is not merely hypothetical ([276]).

([269]) Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 81.
([270]) Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 80.
([271]) Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraphs 141 to 147; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415.
([272]) A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.
([273]) Judgment of the General Court of 16 July 2014, *Germany* v *Commission*, T-295/12, ECLI:EU:T:2014:675, paragraph 158; Commission Decision of 7 July 2002 on State aid No N 356/2002 – United Kingdom – Network Rail (OJ C 232, 28.9.2002, p. 2), recitals 75, 76 and 77. For example, if a concession is awarded through a competitive procedure there is competition for the market.
([274]) Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.
([275]) Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 89; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 81.
([276]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 79.

6.3. **Effect on trade**

190. Public support to undertakings only constitutes State aid under Article 61(1) of the EEA Agreement insofar as it 'affects trade' between EEA States. In that respect, it is not necessary to establish that the aid has an actual effect on trade between EEA States but only whether the aid is liable to affect such trade ([277]). In particular, the EEA Courts have ruled that 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[EEA] trade, the latter must be regarded as affected by the aid.' ([278])

191. Public support can be considered capable of having an effect on trade between EEA States even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other EEA States to enter the market by maintaining or increasing local supply ([279]).

192. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between EEA States might be affected ([280]). A public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between EEA States where undertakings from other EEA States could provide such services (also through the right of establishment) and that possibility is not merely hypothetical. For example, where an EEA State grants a public subsidy to an undertaking for supplying transport services, the supply of those services may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other EEA States have less of a chance of providing their transport services in the market in that EEA State ([281]). Such an effect may, however, be less likely where the scope of the economic activity is very small, as may for instance be evidenced by a very low turnover.

193. In principle, an effect on trade can also occur even if the recipient exports all or most of its production outside the EEA, but in such situations the effect is less immediate and cannot be assumed from the mere fact that the market is open to competition ([282]).

194. In establishing an effect on trade, it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors ([283]).

195. However, an effect on trade between EEA States cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between EEA States, based on the foreseeable effects of the measure ([284]).

196. The Authority and the Commission have in a number of decisions considered, in view of the specific circumstances of the cases, that the measure had a purely local impact and consequently had no effect on trade between EEA States. In those cases the Authority and the Commission ascertained in particular that the beneficiary supplied goods or services to a limited area within an EEA State and was unlikely to attract customers from other EEA States, and that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.

([277]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

([278]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

([279]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 78; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 78.

([280]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 68.

([281]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraphs 77 and 78.

([282]) Judgment of the Court of Justice of 21 March 1990, *Belgium* v *Commission ('Tubemeuse')*, C-142/87, ECLI:EU:C:1990:125, paragraph 35; Judgment of the Court of Justice of 30 April 2009, *Commission* v *Italian Republic and Wam SpA*, C-494/06 P, ECLI:EU:C:2009:272, paragraph 62.

([283]) Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209; Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraphs 157 to 160; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 95.

([284]) Judgment of the General Court of 6 July 1995, *AITEC and others* v *Commission*, Joined Cases T-447/93, T-448/93 and T-449/93, ECLI:EU:T:1995:130, paragraph 141.

197. While it is not possible to define general categories of measures that typically meet these criteria, past decisions provide examples of situations where the Authority and the Commission found, in the light of the specific circumstances of the case, that public support was not liable to affect trade between EEA States. Some examples of such cases are:

a) sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other EEA States ([285]);

b) cultural events and entities performing economic activities ([286]) which however are unlikely to attract users or visitors away from similar offers in other EEA States ([287]); the Authority considers that only funding granted to large and renowned cultural institutions and events in an EEA State which are widely promoted outside their home region has the potential to affect trade between EEA States;

c) hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other EEA States ([288]);

d) news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience ([289]);

e) a conference centre, where its location and the potential effect of the aid on prices is genuinely unlikely to divert users from other centres in other EEA States ([290]);

f) an information and networking platform to directly address problems of unemployment and social conflicts in a predefined and very small local area ([291]);

g) small airports ([292]) or ports ([293]) that predominately serve local users, thereby limiting competition for the services offered to a local level, and for which the impact on cross-border investment is genuinely no more than marginal;

h) the financing of certain cable ways (and in particular ski lifts) in areas with few facilities and limited tourism capability. The Commission has clarified that the following factors are typically taken into account to draw

([285]) See, for instance, Commission Decisions on State aid cases in N 258/2000 Leisure Pool Dorsten (OJ C 172, 16.6.2001, p. 16); Commission Decision 2004/114/EC of 29 October 2003 on measures in favour of non-profit harbours for recreational crafts, the Netherlands (OJ L 34, 6.2.2004, p. 63); SA.37963 – United Kingdom – Alleged State aid to Glenmore Lodge (OJ C 277, 21.8.2015, p. 3; SA.38208 – United Kingdom – Alleged State aid to UK member-owned golf clubs (OJ C 277, 21.8.2015, p. 4); EFTA Surveillance Authority Decision No 459/12/COL of 5 December 2012 on aid to Bømlabadet Bygg AS for the construction of the Bømlabadet aqua park in the Municipality of Bømlo (OJ C 193, 4.7.2013, p. 9, and the EEA Supplement No 39, 4.7.2013, p. 1).

([286]) See section 2.6 for the conditions under which cultural or heritage conservation activities are economic in nature in the meaning of Article 61(1) of the EEA Agreement. For cultural or heritage conservation activities which are not economic in nature an assessment whether possible public funding may have an effect on trade is not necessary.

([287]) See, for instance, the Commission decisions in State aid cases N 630/2003 Local Museums Sardinia (OJ C 275, 8.11.2005, p. 3); SA.34466 Cyprus – Center for Visual Arts and Research (OJ C 1, 4.1.2013, p. 10); SA.36581 Greece – Construction of Archaeological Museum, Messara, Crete; (OJ C 353, 3.12.2013, p. 4); SA.35909 (2012/N) – Czech Republic — Infrastructure for tourism (NUTS II region Southeast) (OJ C 306, 22.10.2013, p. 4); SA.34891 (2012/N) - Poland — State support to Związek Gmin Fortecznych Twierdzy Przemyśl (OJ C 293, 9.10.2013, p. 1).

([288]) See, for instance, Commission Decisions in State aid cases N 543/2001 Ireland – Capital allowances for hospitals (OJ C 154, 28.6.2002, p. 4); SA.34576 Portugal – Jean Piaget North-east Continuing Care Unit (OJ C 73, 13.3.2013, p. 1); SA.37432 – Czech Republic – Funding to public hospitals in the Hradec Králové Region (OJ C 203, 19.6.2015, p. 2); SA.37904 – Germany – Alleged State aid to medical center in Durmersheim (OJ C 188, 5.6.2015, p. 2); SA.38035 – Germany – Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery (OJ C 188, 5.6.2015, p. 3).

([289]) See, for instance, Commission Decisions in State aid cases N 257/2007 Subsidies for theatre productions in the Basque country (OJ C 173, 26.7.2007, p. 1); N 458/2004 Editorial Andaluza Holding (OJ C 131, 28.5.2005, p. 1); SA.33243 Jornal da Madeira (OJ C 16, 19.1.2013, p. 1).

([290]) See, for instance, the Commission Decision in State aid case N 486/2002 Sweden – Congress hall in Visby (OJ C 75, 27.3.2003, p. 2).

([291]) See Commission Decision on State aid in SA.33149 – Germany – Alleged unlawful State aid for the Städtische Projekt 'Wirtschaftsbüro Gaarden' – Kiel (OJ C 188, 5.6.2015, p. 1).

([292]) See, for instance, Commission Decision in State aid in case SA.38441 – United Kingdom – Isles of Scilly Air links (OJ C 5, 9.1.2015, p. 4).

([293]) See, for instance, Commission Decisions in State aid cases SA.39403 – Netherlands – Investment in the port of Lauwersoog (OJ C 259, 7.8.2015, p. 4); SA.42219 – Germany – Refurbishment of the Schuhmacher-quay in the port of Maasholm (OJ C 426, 18.12.2015, p. 5).

a distinction between installations supporting an activity capable of attracting non-local users, which are generally considered to have an effect on trade, and sport-related installations in areas with few facilities and limited tourism capability, where public support may not have an effect on trade between EEA States ([294]): a) the location of the installation (for example within cities or linking villages); b) operating time; c) predominantly local users (proportion of daily as opposed to weekly passes); d) the total number and capacity of installations relative to the number of resident users; e) other tourism-related facilities in the area. Similar factors could, with the necessary adjustments, also be relevant for other types of facilities.

198. Even if the circumstances in which the aid is granted are in most cases sufficient to show that the aid is capable of affecting trade between EEA States and of distorting or threatening to distort competition, those circumstances should be appropriately set out. In the case of aid schemes, it is normally sufficient to examine the characteristics of the particular scheme ([295]).

7. INFRASTRUCTURE: SOME SPECIFIC CLARIFICATIONS

7.1. Introduction

199. The guidance regarding the notion of State aid as set out in these Guidelines applies to the public funding of infrastructure having an economic use, as it applies to any other public funding that favours an economic activity ([296]). However, given the strategic importance of public funding of infrastructure, not least for the promotion of growth, and the questions which it often raises, it is appropriate to provide specific guidance on when public funding of infrastructure favours an undertaking, grants an advantage and has an effect on competition and on trade between EEA States.

200. Infrastructure projects often involve several categories of actors and any State aid involved may potentially benefit the construction (including extensions or improvements), the operation or the use of the infrastructure ([297]). For the purposes of this section, it is, therefore, useful to distinguish between the developer and/or first owner ('**developer/owner**' ([298])) of an infrastructure, the **operators** (that is to say undertakings who make direct use of the infrastructure to provide services to end-users, including undertakings which acquire the infrastructure from the developer/owner to exploit it economically or which obtain a concession or lease for the use and operation of the infrastructure), and the **end-users** of an infrastructure, although these functions may in some cases overlap.

7.2. Aid to the developer/owner

7.2.1. *Economic activity versus non-economic activity*

201. The public funding of much infrastructure was traditionally considered to fall outside the State aid rules since their construction and operation were considered to constitute general measures of public policy and not an economic activity ([299]). More recently, several factors, such as liberalisation, privatisation, market integration and technological progress have, however, increased the scope for commercial exploitation of infrastructures.

([294]) Commission communication to the Member States and other interested parties concerning State aid N 376/01 — Aid scheme for cableways (OJ C 172, 18.7.2002, p. 2).
([295]) See, for instance, Judgment of the Court of Justice of 14 October 1987, *Germany* v *Commission*, 248/84, ECLI:EU:C:1987:437, paragraph 18.
([296]) 'Public funding to infrastructure' is meant to include all forms of provision of State resources for the construction, acquisition or operation of infrastructure.
([297]) This section does not concern potential aid to contractors involved in the construction of infrastructure.
([298]) 'Owner' includes any entity exercising the effective ownership rights over the infrastructure and enjoying the economic benefits thereof. For example, in case the owner delegates its ownership rights to a separate entity (for example to a port authority) who manages the infrastructure on behalf of the owner, this can be seen as replacing the owner for the purposes of State aid control.
([299]) Twenty-Fifth Report on Competition Policy, 1995, pt. 175.

202. In the *Aéroports de Paris* judgment ([300]) the General Court acknowledged this evolution, clarifying that the operation of an airport had to be seen as an economic activity. More recently, the *Leipzig/Halle* judgment ([301]) confirmed that the construction of a commercial airport runway is an economic activity in itself. While these cases relate specifically to airports, the principles developed by the EEA Courts appear to be of broader interpretation and thus applicable to the construction of other infrastructures that are indissociably linked to an economic activity ([302]).

203. On the other hand, the funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules. This concerns, for instance, infrastructure that is used for activities that the State normally performs in the exercise of its public powers (for instance, military facilities, air traffic control in airports, lighthouses and other equipment for the needs of general navigation including on inland waterways, flood protection and low water management in the public interest, police and customs) or that is not used for offering goods or services on a market (for instance roads made available for free public use). Such activities are not of an economic nature and consequently fall outside the scope of the State aid rules, as does, accordingly, the public funding of the related infrastructure ([303]).

204. Where an infrastructure originally used for non-economic activities is later re-assigned to economic use (for example where a military airport is converted to civilian use), only the costs incurred for the conversion of the infrastructure to economic use will be taken into account for the assessment under the State aid rules ([304]).

205. If an infrastructure is used for both economic and non-economic activities, public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities.

206. If an entity is engaged in economic and non-economic activities, EEA States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a clear separation of accounts.

207. If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, the Authority considers that its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked to its main non-economic use. This should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure ([305]). Examples of such ancillary economic activities may include a research organisation occasionally renting out its equipment and laboratories to industrial partners ([306]). The Authority also considers that public financing provided to customary amenities (such as restaurants, shops or

([300]) Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 125, confirmed on appeal in Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, ECLI:EU:C:2002:617. See also Judgment of the General Court of 17 December 2008, *Ryanair* v *Commission*, T-196/04, ECLI:EU:T:2008:585, paragraph 88.

([301]) Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, in particular paragraphs 93 and 94, upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, in particular paragraphs 40 to 43, 47.

([302]) Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraphs 43 and 44. Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 40.

([303]) Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, C-118/85, ECLI:EU:C:1987:283, paragraphs 7 and 8. Judgment of the Court of Justice of 4 May 1988, *Bodson/Pompes funèbres des regions libérées*, C-30/87, ECLI:EU:C:1988:225, paragraph 18; Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 98.

([304]) See Commission Decision 2013/664/EU of 25 July 2012 on measure SA.23324 — C 25/07 (ex NN 26/07) — Finland Finavia, Airpro and Ryanair at Tampere-Pirkkala airport (OJ L 309, 19.11.2013, p. 27), and on State aid SA.35388 – Poland – Setting up the Gdynia-Kosakowo Airport.

([305]) In this respect, the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 20 per cent of the infrastructure's overall annual capacity.

([306]) If the activities do not remain ancillary, also secondary economic activities can be subject to the State aid rules (see Judgment of the General Court of 12 September 2013, *Germany* v *Commission*, T-347/09, ECLI:EU:T:2013:418 on the selling of wood and tourism activities of nature conservation organizations).

paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between EEA States since those customary amenities are unlikely to attract customers from other EEA States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment.

208. As the Court of Justice acknowledged in its *Leipzig/Halle* judgment, the construction of an infrastructure, or part of it, can fall within the State's exercise of public powers ([307]). In such a case the public funding of the infrastructure (or the relevant part of the infrastructure) is not subject to State aid rules.

209. Due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Authority. It follows that the Authority cannot put such funding measures definitively adopted before the *Aéroports de Paris* judgment into question on the basis of State aid rules ([308]). This does not imply any presumption as regards the presence or absence of State aid or legitimate expectations as regards funding measures not definitively adopted before the *Aéroports de Paris* judgment, which will have to be verified on a case by case basis ([309]).

7.2.2. *Distortion of competition and effect on trade*

210. The rationale underlying the cases in which the Authority and the Commission considered that certain measures were not capable of affecting trade between EEA States as set out in paragraphs 196 and 197 can also be relevant for certain public funding of infrastructure, particularly local or municipal infrastructure, even if it is commercially exploited. One pertinent characteristic of such cases would be a predominately local catchment area as well as evidence that cross-border investment is unlikely to be affected more than marginally. For example, the construction of local leisure installations, health care facilities, small airports or ports that predominately serve local users and for which the impact on cross-border investment is marginal are unlikely to affect trade. Evidence to demonstrate that there is no effect on trade could include data showing that there is only limited use of the infrastructure from outside the EEA State and that cross-border investments in the market under consideration are minimal or unlikely to be adversely affected.

211. There are circumstances in which certain infrastructures do not face direct competition from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly ([310]). The absence of direct competition between infrastructures is likely the case for comprehensive network infrastructures ([311]) that are natural monopolies, that is to say for which a replication would be uneconomical. Similarly, there may be sectors where private financing for the construction of infrastructures is insignificant ([312]). The Authority considers that an effect on trade between EEA States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and EEA State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.

([307]) Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraph 47.

([308]) Commission Decision 2013/693/EU of 3 October 2012 on the measure SA.23600 — C 38/08 (ex NN 53/07) — Germany — Financing Arrangements for Munich Airport Terminal 2 (OJ L 319, 29.11.2013, p. 8), recitals 74 to 81. The Commission's 1994 Aviation guidelines stated that '*[t]he construction [or] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids*' (OJ C 350, 10.12.1994, p. 5), paragraph 12. The Chapter of the Authority State aid Guidelines on aid to the aviation sector (OJ L 124, 23.5.1996, p. 41 and EEA Supplement No 23, 23.5.1996, p. 83) referred to the Commission's 1994 Aviation guidelines and stated that the Authority would apply criteria corresponding to those found in the Commission's Guidelines.

([309]) These clarifications are without prejudice to the application of Cohesion Policy rules in these circumstances, on which guidance has been provided in other instances. See for example the Commission's guidance note to the COCOF: Verification of compliance with State Aids in infrastructure cases, available under http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2012/cocof_12_0059_01_en.pdf.

([310]) For example services offered by commercial ferry operators can be in competition with a toll bridge or tunnel.

([311]) In a network infrastructure different elements of the network complement each other, instead of competing with one another.

([312]) The question whether there is only insignificant market financing in a given sector has to be assessed at the level of the EEA State concerned rather than a regional or local level, similarly to the assessment of the existence of a market in an EEA State (see, for example, Judgment of the General Court of 26 November 2015, *Spain* v *Commission*, T-461/13, ECLI:EU:T:2015:891, paragraph 44).

212. In order for the entire public funding of a given project to fall outside State aid rules, EEA States have to ensure that the funding provided for the construction of the infrastructures in the situations mentioned in paragraph 211 cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner does not engage in any other economic activity or – if the infrastructure owner is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities. The absence of indirect aid, in particular to the operator of the infrastructure, can be ensured, for example, by tendering out the operation.

7.2.3. *Aid to the developer/owner of an infrastructure – an overview sector-by-sector*

213. This section provides an overview of how the Authority intends to assess the State aid nature of the funding of infrastructure in different sectors, having regard to the main features that public infrastructure financing typically and currently shows in the different sectors with respect to the conditions identified above. It is without prejudice to the outcome of the concrete case by case assessment of projects in the light of their specific characteristics, the way a given EEA State has organised the provision of services linked to the use of the infrastructure and the development of the commercial services and of the functioning of the EEA Agreement. It is not intended to replace an individual assessment of whether all the elements of the notion of State aid are fulfilled in respect of the concrete financing measure of a specific infrastructure. The Authority has also provided more detailed guidance on specific sectors in some of its Guidelines and Frameworks.

214. **Airport infrastructure** consists of different types of infrastructure. Based on the case law of the EEA Courts, it is well established that most airport infrastructure ([313]) is intended for the provision of airport services to airlines against payment ([314]), which qualify as economic activities, and that therefore their funding is subject to the State aid rules. Similarly, if an infrastructure is intended for non-aeronautical commercial services to other users, its public funding is subject to the State aid rules ([315]). Since airports often compete with one another, the financing of airport infrastructure is also likely to affect trade between EEA States. In contrast, public funding of infrastructures intended for activities that fall under the responsibility of the State in the exercise of its public powers does not fall under the State aid rules. Air traffic control, aircraft rescue and firefighting, police, customs and activities necessary to safeguard civil aviation at an airport against acts of unlawful interference are in general considered to be of such a non-economic nature.

215. Similarly, as follows from the Authority's and the Commission's decision-making practice ([316]), public funding of **port infrastructure** favours an economic activity and is hence in principle subject to State aid rules. As is the case with airports, ports may compete with one another and the financing of port infrastructure is therefore also likely to affect trade between EEA States. However, investment for infrastructure that is necessary for activities that fall under the responsibility of the State in the exercise of its public powers are not subject to State aid control. Maritime traffic control, firefighting, police and customs are in general of such non-economic nature.

216. **Broadband infrastructure** is used to enable the provision of telecommunication connectivity to end-users. Providing connectivity to end-users against payment is an economic activity. Broadband infrastructure is in many instances built by operators without any State funding, which is evidence of significant market financing, and in

([313]) Such as runways and their lighting systems, terminals, aprons, taxiways or centralised ground handling infrastructure such as baggage belts.
([314]) Guidelines on State aid to airports and airlines, adopted by Decision No 216/14/COL, recital 31.
([315]) Guidelines on State aid to airports and airlines, adopted by Decision No 216/14/COL, recital 33.
([316]) Commission Decision of 27 March 2014 on State aid SA.38302 – Italy – Port of Salerno; Commission Decision of 22 February 2012 on State aid SA.30742 (N/2010) – Lithuania – Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda (OJ C 121, 26.4.2012, p. 1); Commission Decision of 2 July 2013 on State Aid SA.35418 (2012/N) – Greece – Extension of Piraeus Port (OJ C 256, 5.9.2013, p. 2); EFTA Surveillance Authority Decision No 90/14/COL of 26 February 2014 on the public financing of harbour infrastructure at Húsavík (OJ C 196, 26.6.2014, p. 4 and the EEA Supplement No 38, 26.6.2014, p. 1).

many geographical zones several networks of different operators compete ([317]). Broadband infrastructures are part of large, interconnected and commercially exploited networks. For these reasons, public funding of broadband infrastructure for the provision of connectivity to end-users is subject to State aid rules, as set out in the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks ([318]). In contrast, connecting only public authorities is a non-economic activity and the public funding of so called 'closed networks' therefore does not constitute State aid ([319]).

217. **Energy infrastructure** ([320]) is used for the provision of energy services against payment, which amounts to an economic activity. Energy infrastructure is, to a large extent, built by market actors, which is evidence of significant market financing, and financed through user tariffs. Public funding of energy infrastructure therefore favours an economic activity and is likely to have an effect on trade between EEA States and is hence in principle subject to State aid rules ([321]).

218. Public funding of **research infrastructures** can favour an economic activity and is hence subject to State aid rules insofar as the infrastructure is in fact intended for the performance of economic activities (such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research). Public funding of research infrastructures used for non-economic activities, such as independent research for increased knowledge and better understanding, in contrast, does not fall under the State aid rules. For more detailed guidance on the distinction between economic and non-economic activities in the area of research, see the explanations provided in the Guidelines on State aid for research and development and innovation ([322]).

219. While the operation of **railway infrastructure** ([323]) may constitute an economic activity ([324]), the construction of railway infrastructure which is made available to potential users on equal and non-discriminatory terms – as opposed to the operation of the infrastructure – typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not affect trade between EEA States or distort competition. To ensure that the entire funding of a given project is not subject to State aid rules, EEA States also have to ensure that the conditions set out in paragraph 212 are fulfilled. The same reasoning applies to investments in **railway bridges**, **railway tunnels** and **urban transport infrastructure** ([325]).

([317]) As stated in paragraph 211 and footnote 312, the question whether there is only insignificant market financing in a given sector has to be assessed at the level of the EEA State concerned rather than at regional or local level.

([318]) Adopted by EFTA Surveillance Authority Decision No 73/13/COL of 20 February 2013 amending for the eighty-ninth time the procedural and substantive rules in the field of state aid by introducing a new chapter on the application of state aid rules in relation to the rapid deployment of broadband networks, (OJ L 135, 8.5.2014, p. 49 and EEA Supplement No 27, 8.5.2014, p. 1). The guidelines explain that the broadband sector is characterised by specific features, in particular by the fact that a broadband network can host several operators of telecommunication services and can therefore provide an opportunity for the presence of competing operators.

([319]) Guidelines on the application of state aid rules in relation to rapid deployment of broadband networks, recital 7 and footnote 9.

([320]) Energy infrastructure includes, in particular, transmission, distribution and storage infrastructures for electricity, gas and oil. For more details, see the definition in Guidelines on State aid for environmental protection and energy 2014-2020, adopted by EFTA Surveillance Authority Decision No 301/14/COL of 16 July 2014 amending for the ninety-eighth time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid for environmental protection and energy 2014-2020 [2015/790] (OJ L 131, 28.5.2015, p. 1 and EEA Supplement No 30, 28.5.2015, p. 1), recital 31.

([321]) Guidelines on State aid for environmental protection and energy 2014-2020, section 3.8; Commission Decision of 10.7.2014 on State aid no SA.36290 – United Kingdom – Northern Ireland Gas Pipeline; extension to the West and the North West.

([322]) Adopted by Decision No 271/14/COL, p. 1, recitals 17 et seq.

([323]) Such as rail tracks and train stations.

([324]) This observation is without any prejudice to the question of whether any advantage granted to the infrastructure operator by the State amounts to State aid. For instance, if the operation of the infrastructure is subject to a legal monopoly and if competition for the market to operate the infrastructure is excluded, an advantage granted to the infrastructure operator by the State cannot distort competition and therefore does not constitute State aid. See paragraph 188 of these Guidelines and Commission Decision of 17 July 2002 on State aid N 356/2002 – United Kingdom Network Rail and Commission Decision of 2 May 2013 on SA.35948 – Czech Republic – Prolongation of interoperability scheme in railway transport. As explained in paragraph 188, if the owner or operator is active in another liberalised market, it should, in order to prevent cross-subsidisation, maintain separate accounts, allocate costs and revenues in an appropriate way and ensure that any public funding does not benefit other activities.

([325]) Such as tracks for trams or underground public transport.

220. While **roads** made available for free public use are general infrastructures and their public funding does not fall under State aid rules, the operation of a toll-road constitutes in many instances an economic activity. However, the construction as such of road infrastructure ([326]), including toll-roads – as opposed to the operation of a toll-road and provided that it does not constitute dedicated infrastructure – typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not affect trade between EEA States or distort competition ([327]). To ensure that the entire public funding of a given project is not subject to State aid rules EEA States also have to ensure that the conditions set out in paragraph 212 are fulfilled. The same reasoning applies to investments in **bridges**, **tunnels** and **inland waterways (for example rivers and canals)**.

221. While the operation of **water supply and waste water networks** ([328]) constitutes an economic activity, the construction of a comprehensive water supply and waste water network as such typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not distort competition or affect trade between EEA States. To ensure that the entire funding of a given project is not subject to State aid rules EEA States also have to ensure that the conditions set out in paragraph 212 are fulfilled.

7.3. **Aid to operators**

222. Where all the elements of Article 61(1) of the EEA Agreement are fulfilled as regards the developer/owner of an infrastructure, State aid to the developer/owner is present, irrespective of whether they make direct use of the infrastructure to provide goods or services themselves or make the infrastructure available to a third party operator who in turn provides services to end-users of the infrastructure (for example, where the owner of an airport grants a concession for the provision of services in the airport).

223. **Operators** who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions. Guidance on how to establish whether the terms of operation comply with market conditions is provided in section 4.2. In line with that section, the Authority considers that an economic advantage to the operator can in particular be excluded if the concession to operate the infrastructure (or parts of it) is assigned for a positive price through a tender that meets all the relevant conditions set out in paragraphs 90 to 96 ([329]).

224. However, the Authority recalls that if an EEA State does not comply with its notification obligation and there are doubts as to the compatibility of the aid to the developer/owner with the functioning of the EEA Agreement, the Authority may issue an injunction requiring the EEA State to suspend the implementation of the measure and to provisionally recover any money paid until it has taken a decision on its compatibility. In addition, national judges are under an obligation to do so as well at the request of competitors. Furthermore, if, following its assessment of the measure, the Authority adopts a decision declaring the aid to be incompatible with the functioning of the EEA Agreement and orders its recovery, an impact on the operator of the infrastructure cannot be excluded.

7.4. **Aid to end-users**

225. If the operator of an infrastructure has received State aid or if its resources constitute State resources, it is in a position to grant an advantage to the users of the infrastructure (if they are undertakings) unless the terms of use comply with the MEO test, that is to say the infrastructure is made available to the users on market terms.

([326]) Including roads for the connection of commercially exploitable land, see Commission Decision of 1 October 2014 on SA.36147 — Alleged infrastructure aid for Propapier and Commission Decision of 8 January 2016 on SA.36019 — Road infrastructure measures in the vicinity of a real estate project – Uplace.

([327]) An atypical situation in which State aid cannot be excluded would, for example, be a bridge or tunnel between two EEA States, offering a largely substitutable service to the service offered by commercial ferry operators or the construction of a toll-road in direct competition with another toll-road (for example two toll-roads running in parallel to each other, thereby offering largely substitutable services).

([328]) Water supply and waste water networks include the infrastructure for the distribution of water and the transportation of waste water, such as the respective pipes.

([329]) See Commission Decision of 1 October 2014 on SA.38478 – Hungary – Development of the Győr-Gönyű National Public Port. In contrast, an advantage for the developer/owner of an infrastructure cannot be excluded by a tender and the tender only minimizes the aid granted.

226. In accordance with the general principles explained in section 4.2, an advantage to users in such cases can be excluded where the fees for use of the infrastructure have been set through a tender that meets all the relevant conditions set out in paragraphs 90 to 96.

227. As explained in section 4.2, where such specific evidence is not available, the question of whether a transaction is in line with market conditions can be assessed in the light of the terms and conditions under which the use of comparable infrastructure is granted by comparable private operators in comparable situations (benchmarking), provided such a comparison is possible.

228. If none of the above assessment criteria can be applied, the fact that a transaction is in line with market conditions can be established on the basis of a generally accepted, standard assessment methodology. The Authority considers that the MEO test can be satisfied for public funding of open infrastructures not dedicated to any specific user(s) where their users incrementally contribute, from an *ex ante* viewpoint, to the profitability of the project/operator. This is the case where the operator of the infrastructure establishes commercial arrangements with individual users that allow covering all costs stemming from such arrangements, including a reasonable profit margin on the basis of sound medium-term prospect. This assessment should take into account all incremental revenues and expected incremental costs incurred by the operator in relation to the activity of the specific user ([330]).

8. **FINAL PROVISIONS**

229. These Guidelines replace the following Guidelines of the Authority:

— Guidelines on the application of State aid provisions to public enterprises in the manufacturing sector ([331]);

— Guidelines on State aid elements in sales of land and buildings by public authorities ([332]);

— Guidelines on the application of State aid rules to measures relating to direct business taxation ([333]).

230. The present Guidelines replace any opposing statements relating to the notion of State aid included in any existing Authority Guidelines, save for statements pertaining to specific sectors and justified by their particular features.

([330]) See for example Commission Decision of 1 October 2014 on SA.36147, Alleged infrastructure aid for Propapier. See also the Guidelines on State aid to airports and airlines, adopted by Decision No 216/14/COL, recitals 61 to 64.

([331]) Adopted by Decision of the EFTA Surveillance Authority No 4/94/COL of 19 January 1994 on the adoption and issuing of the Procedural and Substantive Rules in the Field of State Aid (Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement) (OJ L 231, 3.9.1994, p. 1 and EEA Supplement No 32, 3.9.1994), p. 1.

([332]) Adopted by EFTA Surveillance Authority Decision No 275/99/COL of 17 November 1999 introducing guidelines on State aid elements in sales of land and buildings by public authorities and amending for the 20th time the Procedural and Substantive Rules in the field of State aid (OJ L 137, 8.6.2000, p. 28 and EEA Supplement No 26, 8.6.2000, p. 19).

([333]) Adopted by EFTA Surveillance Authority Decision No 149/99/COL of 30 June 1999 introducing guidelines on the application of State aid rules to measures relating to direct business taxation and amending for the 19th time the Procedural and Substantive Rules in the field of State aid, (OJ L 137, 8.6.2000, p. 20 and EEA Supplement No 26, 8.6.2000, p. 10).

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