

Community framework for State aid in the form of public service compensation

(2005/C 297/04)

1. PURPOSE AND SCOPE

1. It is apparent from the case-law of the Court of Justice of the European Communities ⁽¹⁾, that public service compensation does not constitute State aid within the meaning of Article 87(1) of the EC Treaty if it fulfils certain conditions. However, if public service compensation does not meet these conditions and if the general criteria for the applicability of Article 87(1) are satisfied, such compensation constitutes State aid.
2. Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ⁽²⁾ lays down the conditions under which certain types of public service compensation constitute State aid compatible with Article 86(2) of the EC Treaty and exempts compensation satisfying those conditions from the prior notification requirement. Public service compensation which constitutes State aid and does not fall within the scope of Decision 2005/842/EC *on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest* will still be subject to the prior notification requirement. The purpose of this framework is to spell out the conditions under which such State aid can be found compatible with the common market pursuant to Article 86(2).
3. This framework is applicable to public service compensation granted to undertakings in connexion with activities subject to the rules of the EC Treaty, with the exception of the transport sector, and the public service broadcasting sector covered by the Communication from the Commission on the application of State aid rules to public service broadcasting ⁽³⁾.
4. The provisions of this framework apply without prejudice to the stricter specific provisions relating to public service obligations contained in sectoral Community legislation and measures.
5. This framework applies without prejudice to the Community provisions in force in the field of public procurement and competition (in particular Articles 81 and 82 of the EC Treaty).

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

2.1. General provisions

6. In its judgment in *Altmark*, the Court laid down the conditions under which public service compensation does not constitute State aid as follows:

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

[...] Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. [...] Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.

[...] Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit [...].

[...] Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

⁽¹⁾ Judgments in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark') [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243.

⁽²⁾ OJ L 312, 29.11.2005, p. 67.

⁽³⁾ OJ C 320, 15.11.2001, p. 5.

7. Where these four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the EC Treaty do not apply. If the Member States do not respect these criteria and if the general criteria for the applicability of Article 87(1) of the EC Treaty are met, public service compensation constitutes State aid.
8. The Commission considers that at the current stage of development of the common market, such State aid may be declared compatible with the Treaty under Article 86(2) of the EC Treaty if it is necessary to the operation of the services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Community. The following conditions should be met in order to achieve such balance.

2.2. Genuine service of general economic interest within the meaning of Article 86 of the EC Treaty

9. It is apparent from the case-law of the Court of Justice that with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. Thus, the Commission's task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest.
10. It transpires from Article 86(2) that undertakings⁽¹⁾ entrusted with the operation of services of general economic interest are undertakings entrusted with 'a particular task'. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are encouraged to consult widely, with a particular emphasis on users.

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

11. The concept of service of general economic interest within the meaning of Article 86 of the EC Treaty means that the undertakings in question have been entrusted with a special task by the State⁽²⁾. Public authorities remain responsible — with the exception of the sectors in which there are Community rules governing the matter — for setting the framework of criteria and conditions for the provision of services, regardless of the legal status of the provider and of whether the service is provided on the

basis of free competition. Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and of the State. The term 'State' covers the central, regional and local authorities.

12. Responsibility for operation of the service of general economic interest must be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. The act or acts must specify, in particular:
- (a) the precise nature and the duration of the public service obligations;
 - (b) the undertakings and territory concerned;
 - (c) the nature of any exclusive or special rights assigned to the undertaking;
 - (d) the parameters for calculating, controlling and reviewing the compensation;
 - (e) the arrangements for avoiding and repaying any over-compensation.
13. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, Member States are invited to consult widely, with particular emphasis on users.

2.4. Amount of compensation

14. The **amount of compensation** may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.
15. In any event, compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation granted for the operation of a service of general economic interest, but actually used to operate on other markets is not justified, and consequently constitutes incompatible State aid. The undertaking receiving public service compensation may, however, enjoy a reasonable profit.

⁽¹⁾ 'Undertaking' is to be understood as any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. 'Public undertaking' is to be understood as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, as defined in Article 2(1)(b) of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2000/52/EC, OJ L 193, 29.7.2000, p. 75).

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

16. The **costs to be taken into consideration** include all the costs incurred in the operation of the service of general economic interest. Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, an appropriate contribution to fixed costs common to both the service of general economic interest and other activities and an adequate return on the own capital assigned to the service of general economic interest⁽¹⁾. The costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the functioning of the service of general economic interest. The costs linked to any activities outside the scope of the service of general economic interest must cover all the variable costs, an appropriate contribution to fixed common costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the service of general economic interest. The calculation of costs must follow criteria which have previously been defined and be based on generally accepted cost accounting principles which must be brought to the knowledge of the Commission in the context of the notification pursuant to Article 88(3) of the EC Treaty.

17. The **revenue to be taken into account** must include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to a service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 87 of the EC Treaty, and are added to its revenue. The Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest.

18. '**Reasonable profit**' should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector

are taken into account. In determining what amounts to a reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency.

19. When a company carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues. Where an undertaking is entrusted with the operation of several services of general economic interest either because the authority assigning the service of general economic interest is different or because the nature of the service of general economic interest is different, the undertaking's internal accounts must make it possible to ensure that there is no over-compensation at the level of each service of general economic interest. These principles are without prejudice to the provisions of Directive 80/723/EEC in cases where that Directive applies.

3. OVER-COMPENSATION

20. Member States must check regularly, or arrange for checks to be made, to ensure that there has been no over-compensation. Since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State, and for the future, the parameters for the calculation of the compensation must be updated.

21. Where the amount of over-compensation does not exceed 10 % of the amount of annual compensation, such over-compensation may be carried forward to the next year. Some services of general economic interest may have costs that vary significantly each year, notably as regards specific investments. In such cases, exceptionally, over-compensation in excess of 10 % in certain years may prove necessary for the operation of the service of general economic interest. The specific situation which may justify over-compensation in excess of 10 % should be explained in the notification to the Commission. However, the situation should be reviewed at intervals determined on the basis of the situation in each sector which, in any event, should not exceed four years. All over-compensation discovered at the end of that period should be repaid.

22. Any over-compensation may be used to finance another service of general economic interest operated by the same undertaking, but such a transfer must be shown in the undertaking's accounts and be carried out in accordance with the rules and principles set out in this framework, notably as regards prior notification. The Member States must ensure that such transfers are subjected to proper control. The transparency rules laid down in Directive 80/723/EEC apply.

⁽¹⁾ See Joined Cases C-83/01P, C-93/01P and C-94/01P *Chronopost SA* [2003] ECR I - 6993.

23. The amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the Treaty (for example, environmental aid, employment aid and aid for small and medium-sized enterprises). If a Member State wishes to grant such aid, the prior notification procedure laid down in Article 88(3) of the EC Treaty should be complied with. Aid may be disbursed only if it has been authorised by the Commission. If such aid is compatible with a block exemption Regulation, the conditions of the relevant block exemption Regulation must be fulfilled.

4. CONDITIONS AND OBLIGATIONS ATTACHED TO COMMISSION DECISIONS

24. According to Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market, and lay down obligations to enable compliance with the decision to be monitored. In the field of services of general economic interest, conditions and obligations may be necessary notably to ensure that aid granted to the undertakings concerned does not actually lead to over-compensations. In this context, periodical reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

5. APPLICATION OF THE FRAMEWORK

25. This framework will apply for a period of six years from the date of its publication in the *Official Journal of the European Union*. The Commission may, after consulting the Member States, amend the framework before it expires, for important reasons linked to the development of the

common market. Four years after the date of publication of this framework, the Commission will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided by the Member States. The results of the impact assessment will be made available to the European Parliament, the Committee of Regions and the Economic and Social Committee and to the Member States.

26. The Commission will apply the provisions of this framework to all aid projects notified to it and will take a decision on those projects after the framework is published in the Official Journal, even if the projects were notified prior to such publication. In the case of non-notified aid, the Commission will apply:

- (a) the provisions of this framework, if the aid was granted after publication of the framework in the Official Journal;
- (b) the provisions in force at the time the aid was granted, in all other cases.

6. APPROPRIATE MEASURES

27. The Commission proposes as appropriate measures for the purposes of Article 88(1) of the EC Treaty that Member States bring their existing schemes regarding public service compensation into line with this framework, within 18 months following its publication in the Official Journal. Member States should confirm to the Commission within one month of publication of the framework in the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.