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NON-PAPER

Services of general economic interest and state aid

This discussion paper is intended to permit an exchange of views with Member States' experts on the conditions governing the operation of services of general economic interest (SGEIs) in the light of the Community rules on state aid and exclusive or special rights. The legal classification of public service compensation and its state aid implications will have to be examined at a later date, once the Court of Justice has delivered its rulings in GEMO[1] *and ALTMARK.*[2]
This document, which has been prepared by its departments, does not necessarily represent the views of the Commission itself.

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Article 16 of the Treaty reads as follows: "Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions."

SGEIs perform a fundamental function in all Member States, which, in the absence of specific Community rules, have wide discretionary powers when it comes to defining the nature and extent of the "public services" they wish to introduce in the light of their political choices. For a large number of SGEIs, it is established that the local authorities are best placed to define the general public's needs in this respect.

The Commission has a duty to provide positive support for the introduction and development of SGEIs, in accordance with Article 16 of the Treaty, and it is in everyone's interests that they should dovetail harmoniously with the economic fabric in each Member State, with steps being taken to ensure that their beneficial effects are not diluted by indirect adverse effects on markets open to competition and not subject to public service obligations.

The Commission has three main objectives here:

- *to ensure efficient functioning of SGEIs;*

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1 Case C-126/01.

2 Case C-280/00.

- *to see to it that services provided in the competitive sphere outside the scope of SGEIs and not pursuing a general-interest objective are not classified as SGEIs;*
- *to see to it that there should be no adverse repercussions on markets open to competition outside the public service.*

Difficulties may thus arise if the classification as SGEIs and the associated advantages are conferred on activities not caught by this concept either because they are already being satisfactorily carried out by firms operating within a competitive framework or because they do not promote the general interest. Such practices, particularly in the sectors of the economy that have been recently liberalised, may engender adverse effects at the level of firms operating on competitive markets not subject to public service obligations.

The same difficulties may arise if the advantages conferred on firms performing SGEIs (exclusive rights or financial compensation) go beyond what is necessary for the public service to function. In such cases there is also a risk that the advantages or some of them will be misused to benefit activities outside the public service.

The success of liberalisation means that the rules of the game need to be clearly laid down and observed by all operators. Firms that rightly enjoy advantages when providing public services must not exploit these advantages so as to compete unfairly in the most profitable liberalised sectors. To be sure, they may operate on these most profitable markets or market segments but they must do so "on equal terms" with all firms.

Such practices, which are not necessary for the operation of public services, are harmful to the effective functioning of the economy and run counter to the general interest.

The Commission considers that many of the difficulties could be avoided if there were greater transparency in assigning SGEIs and in the relationship between the firms providing public services and the public authorities.

A. INTRODUCTION

1. The Commission has on several occasions, and in particular in its 1996 communication on services of general interest in Europe,[3] as supplemented by its 2000 communication on the same subject,[4] emphasised the importance it attaches to services of general interest in Europe. As the 2001 communication indicates, "services of general interest are a key element in the European model of society".

   Generally speaking, the availability of SGEIs is in the interests of consumers and contributes in particular to attainment of the objectives referred to in Article 153 of the Treaty.

2. Article 16 of the Treaty reads as follows: "Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in

3 OJ C 281, 26.9.1996.

4 OJ C 17, 19.1.2001.

the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions."

3. The Commission is careful to act in accordance with the principles laid down in Article 16. It is important to remember here that, while Community law may entail compliance with certain procedures and principles, notably the principles of transparency, non-discrimination and proportionality, it does not prevent the introduction and smooth operation of SGEIs. In the absence of specific rules in the matter adopted by the Council, Member States have wide discretionary powers when it comes to drawing up the list of their SGEIs and their operating procedures, including any public support that may be needed. For its part, the Commission has to ensure that the relevant provisions of the Treaty are met, and in particular Articles 43, 49, 73, 86, 87 and 88, as well as the provisions governing the selection procedures for operators of SGEIs. Under the state aid rules, intervention by the Commission is not aimed at introducing controls or rules on public service activities[5] but is intended solely to avoid unnecessary distortions of purely commercial activities. Such distortions may stem, for example, from the classification as SGEIs of activities that do not fall into this category or from the granting of public support in excess of what is necessary to perform a given public service task. These practices would constitute abuses that might impair the normal functioning of markets and, in particular, would handicap undertakings that were active on the same markets and did not enjoy the same advantages.

4. From this viewpoint, and in response to the request made by the Nice European Council meeting on 7, 8 and 9 December 2000, the Commission presented to the **Laeken European Council** on 14 and 15 December 2001 a **report on services of general interest** (COM (2001) 598 final) in which it states among other things that, in order to enhance legal certainty in the field of public service compensation, it *"intends to establish during 2002, in close consultation with the Member States, a Community framework for state aid granted to undertakings entrusted with the provision of services of general economic interest. Such a framework will inform Member States and undertakings of the conditions under which state aid granted as compensation for the imposition of public service obligations can be authorised by the Commission. It could in particular specify the conditions for the authorisation of state aid schemes by the Commission, thus alleviating the notification obligation for individual aid."*

5. In its work, however, the Commission must take account of the evolving nature of the case law of the Court of First Instance (CFI) and the Court of Justice. In this regard, it has traditionally taken the view that compensation paid by a Member State to undertakings providing SGEIs did not constitute aid if it were limited to offsetting the actual cost of performing the public service obligations. In its rulings of 27 February 1997 in *FFSA*[6] and 10 May 2000 in *Portuguese*

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5 This is, of course, without prejudice to the existence of specific Community rules governing public service obligations, e.g. in the field of air transport.

6 Case T-106/95, upheld by order of the Court of 25 March 1998 in Case C-174/97 P.

Television,[7] the CFI held that such compensation constitutes state aid within the meaning of Article 87(1) of the Treaty even if the amount of such compensation does not exceed what is necessary to perform the public service task (provided that the other conditions of Article 87(1) are met). However, in its judgment of 22 November 2001 in *Ferring*,[8] the Court of Justice ruled that, where the amount of compensation granted by a Member State does not exceed what is necessary to discharge the public service task, such compensation does not confer an advantage on recipients and does not, therefore, constitute state aid within the meaning of Article 87(1). It also stressed that the amount of compensation exceeding what is necessary to discharge the public service task could constitute state aid that could not be authorised under Article 86 of the Treaty.

6. Two cases are pending in which the Court of Justice will have to rule on the legal classification of public service compensation in the light of the state aid rules.[9] Once the case law has been clearly established, the Commission will draw the necessary conclusions for the nature of the texts to be drawn up in order to guarantee proper legal certainty.

7. It transpires, however, that, even if public service compensation does not constitute state aid, a text will still be useful as a means of stipulating in particular the conditions under which SGEIs might be caught by the Community competition and public procurement rules and the conditions under which Member States may grant compensation to undertakings entrusted with the provision of SGEIs.

B. DEFINITIONS

8. **Services of general interest** are market and non-market services that the public authorities classify as being of general interest and may therefore be subject to specific public service obligations.

9. **Services of general economic interest** are market services that discharge general interest tasks and are therefore subject to specific public service obligations imposed by the Member States. The term **"universal service" is an evolving concept** developed by the Community institutions and designating a set of general interest requirements which should be met by undertakings operating in certain sectors such as the postal service and telecommunications. The resulting obligations are intended to ensure that everyone everywhere has access to certain essential services of specified quality at an affordable price. They may be imposed on one undertaking or on all the undertakings in a given sector of activity.

10. The term **"public service"** is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of

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7 Case T-46/97.

8 Case C-53/00.

9 Cases C-126/01 *GEMO* and C-280/00 *Altmark Trans GmbH*.

the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term public service and the term public sector, which relates to the legal status of those providing the service in terms of who owns the services. Given its lack of precision, this term will generally not be used in this document and the term "general-interest services" or "services of general economic interest" will be used instead.

The Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, recalls that "public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".

11. The term **"assignment of a public service"** means any legally binding act by which a competent authority entrusts one or more operators with a particular public service task.

C. DEFINITION OF SGEIs

12. It emerges from the case law that "in the absence of Community rules governing the matter, the Commission has no power to take a position on the organisation and scale of the public service tasks [...] or on the expediency of political choices made in this regard by the competent national authorities, provided that the aid in question does not benefit the activities pursued in competitive sectors or exceed what is necessary to enable the undertaking concerned to perform the particular task assigned to it".[10] By contrast, where the conditions governing the imposition of public service obligations are laid down in a Community instrument, the Member States may not derogate from them.[11] The Commission's task is to ensure that these provisions are applied with no manifest error.

13. Generally speaking, "public service obligations" means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions".[12] In this connection, Article 86(2) of the EC Treaty stipulates that "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the

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10 See, in particular, Case T-106/95 *FFSA* [1997] ECR II-229, paragraph 192.

11 See, in particular, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969).

12 See Article 2 of Council Regulation (EEC) No 1191/69.

Community." These provisions, and in particular the limits on the concept of service in the general economic interest, have been clarified by the case law of the Court of Justice.

14. In its judgment of 21 March 1974 in *BRT* v *SABAM,*[13] the Court emphasised that the concept of service in the general economic interest within the meaning of Article 86 of the Treaty means, among other things, that Member States assign "particular tasks" to undertakings. According to the Court, "that is not the position in the case of an undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law" (paragraph 23 of the aforementioned judgment).

15. The Court took the same approach in its judgment of 2 March 1983 in *GVL*[14] concerning a law on the management of copyright and related rights which stipulates *inter alia* that a management company must be authorised by the public authorities, that it is subject to monitoring by the patents office and that it is obliged to conclude certain management contracts.

The Court took the view that the legislation in question "does not confer the management of copyright and related rights on specific undertakings but defines in a general manner the rules applying to the activities of companies which intend to undertake the collective exploitation of such rights. Even if it is true that the monitoring of the activities of such companies as provided for by that law goes further than the public supervision of many other undertakings, that is, however, not sufficient for those companies to be included in the category of undertakings referred to in Article 86(2) of the Treaty." (paragraphs 31 and 32).

16. Similarly, the Court considered that the loading, unloading, transshipment, storage and general movement of goods or material of any kind within a port are not necessarily of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities.[15]

17. It took the view though that "Mooring operations are of general economic interest, such interest having special characteristics, in relation to those of other economic activities, which is capable of bringing them within the scope of Article 86(2) of the Treaty. Mooring groups are obliged to provide at any time and to any user a universal mooring service, for reasons of safety in port waters."[16]

18. The Court applied the same reasoning in the area of postal services, finding that "it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the

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13 Case 127/73 [1974] ECR 313.

14 Case 7/82 [1983] ECR 483.

15 Cases C-179/90 *Porto di Genova* [1991] ECR I-5889 and C-242/95 *GT-Link* [1997] ECR I-4449.

16 Case C-266/96 *Corsica Ferries* [1998] ECR I-3949.

specific situations or the degree of economic profitability of each individual operation".[17]

However, it should be pointed out that, in the same judgment, the Court took the view that specific services which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service are dissociable from the service of general interest.

19. In the electricity sector, the Court considers that the concept of service in the general economic interest covers the activity of an undertaking which "must ensure that throughout the territory in respect of which the concession is granted, all consumers, whether local distributors or end-users, receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers".[18]

20. The Court has also ruled that the concept of service in the general economic interest may cover maintenance of the navigability of an important river,[19] the distribution of water,[20] the supply of services in the telecommunications field[21] or television broadcasting.[22]

21. This cursory review of the case law suggests that the classification as SGEIs normally applies to services:[23]

- the provision of which is generally entrusted to private operators rather than being entrusted by statute to all the undertakings in a given sector of the economy;

- which are intended to meet individuals' general needs, notably in the case of a universal service or in the case of certain network services, and do not benefit a specific category of user.

However, classification as SGEIs cannot apply, for example, where exclusive rights are granted solely in order to allow an undertaking to finance an investment project (particularly one involving infrastructure).

22. In its decision-making practice, the Commission is determined to follow the Court's case law scrupulously and only in a very few cases does it contest the classification as SGEIs. Such action does not constitute interference by the

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17 Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15.

18 Case C-393/92 *Municipality of Almelo* [1994] ECR I-1477, paragraph 48.

19 Case 10/71 *Muller* [1971] ECR 723.

20 Case 96/82 *IAZ* [1996] ECR 3369.

21 Case 41/83 *Italy* v *Commission* [1985] ECR 873.

22 Case 155/73 *Sacchi* [1974] ECR 409.

23 Without prejudice to specific rules that may exist in certain sectors, e.g. transport (Regulation (EC) No 1191/69).

Commission in the powers of the Member States but is designed solely to avoid abuse. This is the case in particular where a given activity does not exhibit any specific characteristics relative to other economic activities or where that activity is already carried out satisfactorily by undertakings operating in accordance with the rules of the market.[24]

D. CONCEPT OF STATE AID

23. The purpose of this paper is not to describe in detail the concept of state aid. However, as indicated by the Commission in its report to the Seville European Council on the status of work on the guidelines for state aid and services of general economic interest,[25] the text will "take stock of the relevant case law, in particular as regards the concepts of economic activity and effects on trade, and clarify the methods for calculating compensation, notably in connection with public contracts, in order to avoid excess compensation". The matters relating to the concept of state aid are still relevant, irrespective of developments in the case law of the Court on public service compensation. It is, in fact, laid down that excess compensation remains, in any event, state aid subject to Article 87 of the Treaty.

D.1 Concept of economic activity

24. The Commission 1996[26] and 2000[27] communications on services of general interest in Europe as well as the Commission report to the Laeken European Council[28] contain information on the concept of economic activity which is still valid and to which reference can usefully be made.

25. As a general rule, Community law classifies as an undertaking any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[29] The fact that an entity is non-profit-making is not relevant.

26. Recent judgments by the Court and the decision-making practice of the Commission have shed further light on this concept, mainly in two sectors where undertakings may be entrusted with the performance of tasks comprising services in the general economic interest.

D.1.(a) Social security and social protection

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24 See, in particular, the Commission decision of 20 June 2001 in *Tirrenia di navigazione* (Case C-64/99).

25 COM (2002) 280 final.

26 OJ C 281, 26.9.1996.

27 OJ C 17, 19.1.2001.

28 COM(2001) 598 final.

29 See, in particular, the judgment in Case C-41/90 *Höfner*.

27. In its judgment of 22 January 2002 in *Cisal di Battistello Venanzio & C. Sas* v *INAIL*,[30] the Court examined the activities of the Italian Institute for Insurance against Accidents at Work, which is required by the public authorities to guarantee compulsory insurance against accidents at work and occupational diseases. This body is financed by contributions the level of which is not systematically proportional to the risk insured, and the level of benefits paid is not necessarily proportional to the policyholder's income. The benefits are paid in the event of an accident even if the contributions have not been paid on time. The Court concludes from this that the system entails solidarity between workers and that the Institute performs an exclusively social function and its activity is not, therefore, economic in nature within the meaning of the competition rules of the EC Treaty.

28. The Court has confirmed its established precedent whereby basic compulsory social security schemes resting on the principle of national solidarity do not constitute economic activities.[31]. By contrast, optional supplementary schemes based on the principle of capitalisation and providing benefits the level of which depends on the amount of contributions paid and the financial results of the organisations involved constitute economic activities.[32]

D.1.(b) Health sector

29. In its judgment of 25 October 2001 in *Ambulanz Glöckner*,[33] the Court indicated that the transport of patients is an economic activity proposed against remuneration by various operators on the market for emergency transport services and patient transport services. Now, it is established that any activity involving the supply of goods or services on a given market is an economic activity.

    In the case in point, these services are provided by non-profit-making bodies. However, the Court recalled that these particular characteristics are not such as to rule out classification as an undertaking within the meaning of Article 87 of the EC Treaty in cases where those bodies carry out an economic activity.

30. In its judgment of 10 May 2001 *Henning Veedfald*,[34] the Court ruled that the manufacture within a hospital of a substance used in the course of a medical service at the hospital constitutes an economic activity. The fact that the service is not paid for directly by the patient but is financed from public funds does not affect this classification as an economic activity.

31. This approach has been confirmed in two Court judgments (*B.S.M Smits/Stichting Ziekenfonds*[35] and *Abdon Vanbraekel*[36] dated 12 July 2001) in which certain

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30 Case C-218/00.

31 See, in particular, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

32 See, in particular, Case C-67/96 *Albany* [1999] ECR I-5751.

33 Case C-475/99.

34 Case C-203/99 [2001] ECR I-3569.

35 Case C-157/99 [2001] ECR I-5473.

Member States argued that medical services do not constitute economic activities on the ground that the patient receiving treatment in a hospital need not necessarily pay for the services provided. The Court ruled that medical activities are economic activities, irrespective of whether the services need not be paid for directly by the patients but by the public authorities or sickness funds.

D.1.(c) Conclusion regarding the concept of economic activity

32. Generally speaking, recent case law confirms that the concept of economic activity encompasses "an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits".[37] This may be the case notably where the benefit of the supply of certain services can be appropriated by the private sector as customers can be required to pay the cost of the service.

33. The presence of an element of solidarity does not necessarily rule out the possibility of carrying out an activity in a profit-making capacity. Some operators may agree to take such aspects of solidarity into account in the light of other benefits they may obtain from intervening in the sector under consideration. Conversely, non-profit-making entities may compete with profit-making undertakings and may, therefore, constitute undertakings within the meaning of Article 87 of the EC Treaty.

34. Recent case law also shows that the concept of economic activity is an evolving concept linked in part to the political choices of each Member State. Member States may decide to transfer to undertakings certain tasks traditionally regarded as falling within the sovereign powers of States. Member States may also create the conditions necessary to ensure the existence of a market for a product or service that would otherwise not exist. The result of such state intervention is that the activities in question become economic and fall within the scope of the competition rules.

35. It should also be noted that an entity carrying out primarily non-economic activities may be engaged in secondary activities of an economic nature. In such cases, classification as an undertaking within the meaning of the competition rules will be confined to the economic activities involved.

36. It should be emphasised that, in the Commission's decision-making practice, classification of an activity as economic or non-economic seldom gives rise to any difficulties.[38] Generally speaking, the criteria laid down in what is now a substantial body of case law provide answers to the questions that may arise in classifying a particular activity. For example, on 23 August 2002 the Commission adopted a decision stipulating that the activities of Italian banking foundations

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36 Case C-368/98 [2001] ECR I-5363.

37 Opinion of Mr Advocate-General Jacobs delivered on 13 September 2001 in Case C-218/00 *Cisal di Battistello Venanzio & C. Sas*.

38 Certain activities may be presented by Member States as non-economic even if, according to the Commission, they constitute economic activities within the meaning of Article 87 of the EC Treaty.

consisting in managing their own assets and using the proceeds for making grants to not-for-profit bodies do not constitute economic activities.[39]

37. As a general rule, it is very difficult to envisage compiling a list of activities that would not *a priori* be economic. This is an evolving concept that depends in part on the political choices made by each Member State. Such a list would not, therefore, provide genuine legal certainty as it would never be up to date and so would be of little use. Moreover, in the interests of Community undertakings, competition law must be able to follow economic developments and, in particular, the fact that some Member States may decide to transfer to the market certain functions that traditionally fell within their public authority powers.

D.2 Concept of state resources

38. In its judgment of 13 March 2001 in *PreussenElektra*,[40] the Court recalled that only advantages granted directly or indirectly through state resources[41] are to be considered aid within the meaning of Article 87. Advantages financed directly from private resources may have the effect of strengthening the position of certain undertakings but do not fall within the scope of Article 87.

39. This transfer of state resources may take many forms, such as direct grants, tax credits and benefits in kind. In its judgment of 11 July 1996 in *SFEI*,[42] the Court thus held that "the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, without normal consideration in return, is capable of constituting state aid within the meaning of Article 87 of the Treaty". By not charging a normal price to its subsidiary, the State, represented by the parent company which is a public undertaking, waives state resources. In its judgment of 16 May 2002 in *Stardust*,[43] the Court confirmed *inter alia* that the resources available to a public undertaking constitute state resources within the meaning of Article 87.[44] Similarly, the fact that the State does not receive dividends from the undertakings in which it has holdings, under the same conditions as private investors, constitutes a transfer of public resources.

40. Member States may, in some instances, finance an SGEI from charges or contributions paid by certain undertakings or users and the revenue from which is transferred to one or more undertakings entrusted with the operation of that SGEI. This type of financing arrangement has been examined by the Court,

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39 Case C 54/2000.

40 Case C-379/98.

41 The word "state" should be taken to mean not only the central government but also all regional and local public authorities and public enterprises.

42 Case C-39/94.

43 Case C-482/99.

44 The concept of public undertaking is defined in 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), as last amended by Commission Directive 2000/52/EC of 26 July 2000 (OJ L 193, 29.7.2000).

notably in its judgment of 2 July 1974 in *Italy* v *Commission*, in which it held that "as the funds in question are financed through compulsory contributions imposed by state legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as state resources within the meaning of Article 87, even if they are administered by institutions distinct from the public authorities".[45] Similarly, in its judgment of 11 March 1992 in *Compagnie Commerciale de l'Ouest*,[46] the Court confirmed that aid financed through parafiscal charges constitutes aid within the meaning of Article 87.

41. Accordingly, compensatory payments for the operation of SGEIs which are financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation, particularly where a fund is set up by the State, are compensatory payments made through state resources within the meaning of Article 87.

42. Irrespective of the question as to the nature of compensatory payments, the judgment of 22 November 2001 in *Ferring*[47] also provides useful insights into the concept of transfer of state resources. The case relates to the wholesale distribution of medicinal products in France via two networks competing directly with each other: wholesale distributors and pharmaceutical laboratories engaged in direct selling. The latter are required to pay a charge not imposed on the former. The Court held that the failure not to impose the tax on wholesale distributors equates to granting them a tax exemption. The national authorities have, in practice, waived their right to tax receipts, to the benefit of wholesale distributors.

D.3 Effects on trade

43. In order to fall within the scope of Article 87, aid must affect or threaten to affect trade between Member States and competition. As far as state aid is concerned, these two conditions are often linked. Effects on competition generally presuppose the existence of a liberalised market. This means that, as a rule, in the case of non-liberalised markets,[48] aid may therefore be caught by Article 87. Aid granted to an undertaking operating on a non-liberalised market may affect competition and trade if the recipient undertaking is also active on liberalised markets. It may be that, in some cases, competition on neighbouring liberalised markets and/or trade between Member States may also be affected.

44. On 29 September 2000 in *Confederacion Espanola de Transporte de Mercancias*,[49] the Court of First Instance recalled that "when financial aid strengthens the position of an undertaking compared with other undertakings

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45 Case C-173/73.

46 Joined Cases C-78/90 to C-83/90.

47 Case C-53/00.

48 The concept of liberalisation does not necessarily require a Community decision. Liberalisation may be achieved by a number of Member States in the absence of Community obligations.

49 Case T-55/99.

competing in intra-Community trade, the latter must be regarded as affected by that aid". This is so where the undertaking receiving the aid is actively involved in trade between Member States or participates in contracts awarded following a tendering procedure in several Member States.

45. However, aid may also "be of such a kind as to affect trade between Member States and distort competition even if the recipient undertaking, which is in competition with undertakings from other Member States, does not itself participate in cross-border activities. Where a Member State grants aid to an undertaking, internal supply may be maintained or increased, with the consequence that the opportunities for undertakings established in other Member States to offer their services to the market of that Member State are reduced".

46. The relatively small amount of aid or the relatively small size of the recipient undertaking does not *a priori* mean that trade is not affected. In order to ascertain whether this criterion is actually met, each case needs to be examined, and in particular the structure of the relevant market, notably the existence or otherwise of keen competition, and the number of undertakings present.

47. This does not, however, mean that the Commission has to examine all financial support granted by Member States. Accordingly, on 12 January 2001 the Commission adopted Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid,[50] which stipulates that aid amounting to less than €100 000 per undertaking over any period of three years is not caught by Article 87(1) of the Treaty. This Regulation is applicable to all sectors, with the exception of the transport sector and activities linked to the production, processing or marketing of products listed in Annex I to the Treaty, aid to export-related activities and aid contingent upon the use of domestic over imported goods.

48. In addition, while it is not possible to specify in advance all cases of aid that do not affect trade or competition, the Commission has nevertheless set out useful pointers in its decisions.

49. In 2000 the Commission decided that the annual grant made to the private operator of the swimming pool in Dorsten[51] does not constitute aid within the meaning of Article 87 of the Treaty since this sporting amenity will be used essentially by the inhabitants of the town and the surrounding area. Consequently, the criterion of effect on trade is not met.

50. Similarly, on 27 February 2002 the Commission adopted a decision on public support granted to certain hospitals in Ireland.[52] The measure in question provides for a tax benefit for individuals investing in the construction, extension and refurbishment of hospitals. The hospitals concerned must set aside some of their capacity for public health care. The Commission took the view that the measure confers an advantage on those hospitals, which are thus able to develop their

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50 OJ L 10, 13.1.2001.

51 Case N-258/2000; Commission press release IP /00/1509 of 21 December 2000.

52 Case N 543/2001 (Capital allowances for hospitals).

activities, but will essentially benefit local hospitals, where there is undercapacity, and will not result in the construction of hospital complexes likely to attract clients from other Member States. Accordingly, the measure is not such as to affect trade between Member States.

51. On 6 June 2002 the Commission adopted a decision on public support for the renovation of Brighton West Pier.[53] The UK authorities are planning to grant aid to the owner of the West Pier for its restoration, which will be financed in part by a private undertaking that will then be entrusted with the task of operating the pier commercially and will, in this connection, be able to use public land made available to it for a symbolic amount. The Commission took the view that these measures, financed out of public resources, will confer an advantage on the pier's owner and on the undertaking that will operate it commercially. However, it held that the measures were not such as to affect trade between Member States. There is no similar construction in the other Member States and the pier is likely above all to attract British tourists. The pier's international reputation is insufficient to attract tourists from other Member States.

52. On 17 July 2002 the Commission adopted a decision to the effect that subsidies for the construction of service areas for road hauliers in Tenerife do not affect trade and do not, therefore, constitute state aid.[54]

53. These recent decisions illustrate the Commission's concern to focus on cases that could have a significant impact on trade between Member States.

D.4 Concept of advantage

54. If it is to constitute aid within the meaning of Article 87, compensation granted through state resources must confer an advantage, and that advantage must be selective. The selectivity criterion is met in cases where the advantage is confined to a number of undertakings or to an individual sector.

55. In its judgment of 22 November 2001 in *Ferring*, the Court examined the nature of the tax advantage granted to wholesale distributors not subject to payment of a tax that laboratories were required to pay on their direct sales to pharmacies. It ruled that "provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not state aid within the meaning of Article 87 of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 87(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing."

56. It would seem to result from this case law that compensatory payments made by Member States to undertakings entrusted with the provision of SGEIs do not confer on the latter an advantage within the meaning of Article 87 when their

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53 Cases N 560/01 and NN 17/02 (OJ, 5.7.2002).

54 Press release 02/1081 of 17 July 2002.

amount corresponds to the additional costs incurred in performing public service obligations.[55] However, compensatory payments not corresponding to the additional costs associated with public service obligations or the amount of which exceeds those additional costs confer an advantage on the recipient undertakings and are such as to constitute state aid within the meaning of Article 87 of the EC Treaty.

This analysis will have to be supplemented or amended in the light of the Court's future decisions. In his conclusions of 19 March 2002 in Case C-280/00 Altmark Trans GmbH, Mr Advocate-General Jacobs suggests that the Court reverse its judgment in Ferring and rule that public service compensation ranks as state aid even where it merely offsets the costs of the public service.

In his conclusions of 30 April 2002 in Case C-126/01 GEMO SA, Mr Advocate-General Jacobs proposes that a distinction be established between two categories of case, based on the nature of the link between the financing granted and the duties imposed and on how clearly those duties are defined.

D.5 Notification

57. In accordance with Article 88(3) of the EC Treaty, Member States must inform the Commission in advance of any plans involving state aid.[56] The Commission conducts an investigation in accordance with Procedural Regulation (EC) No 659/99 of 22 March 1999.[57] This notification requirement does not concern plans for compensatory payments that are not liable to constitute state aid. If the ruling in *Ferring* is upheld, this requirement will not apply where the amount of compensation does not exceed the additional costs associated with public service obligations.

58. Regardless of the legal characterisation of compensation, in cases where the amount of such compensation is liable to exceed the additional costs of the public service, the entire measure will have to be notified in accordance with Article 88(3) so that the Commission can analyse the state aid elements.

Point to be developed further in the light of the Court's rulings.[58]

E. THE QUESTION OF INFRASTRUCTURES

59. Occasionally, the provision of an SGEI entails the construction of infrastructure that may not be economically viable for a private operator,[59] in which case financing can be provided, in whole or in part, by the public authorities.

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55 See, for example, the Commission decision of 2 July 2002 in Case N 749/01 Swedish Posten (IP/02/982).

56 Without prejudice to exemption regulations, which provide exemption from the notification requirement if certain conditions are met.

57 OJ L 83, 27.3.1999.

58 Once the Court's case law has been consolidated, the Commission will decide how to ensure legal certainty, notably in the light of experience gained in the transport field.

60. In certain circumstances, such financing of infrastructure by the State need not constitute state aid where no advantage is conferred on an undertaking competing with other undertakings. This is generally the case with infrastructures displaying certain characteristics:

- infrastructures which are needed to supply a service regarded as falling within the responsibility of the State to the public and are limited to meeting the requirements of that service;
- the market will never provide them on the same conditions;
- infrastructures not likely to favour a particular undertaking.

61. So as not to favour certain undertakings, the infrastructure should not normally be reserved for a single user but should be available to different operators and, where possible, for different activities. If the public authorities retain control of it, the infrastructure should be available to users on a non-discriminatory basis. If the infrastructure is hired out to undertakings, an appropriate level of fees should be charged. In the case of limited use by a single undertaking, the Member State should comply with the conditions as regards transparency and non-discrimination.

F. "PUBLIC SERVICE ASSIGNMENT"

62. The concept of SGEI within the meaning of Article 86 of the Treaty means that the undertakings in question have been entrusted with a special task by the State.[60] Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and the State.

63. The public service task must be assigned by way of an official public instrument that may take the form of a legislative or regulatory instrument or a contract or instruction. This official instrument must specify :

- the nature of the public service obligations;
- the undertakings and territory concerned;
- the responsibility for determining the undertaking's selling prices and the conditions for reviewing such prices;
- the nature of any exclusive or special rights assigned to the undertakings;
- the amount of any compensation granted to the undertakings and any revision clauses;
- the period covered by the obligations.

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[59] Such an infrastructure project is not normally regarded as an SEIG but it may be used to provide an SEIG. In this case, the price paid for using the infrastructure may serve to finance the SEIG.

[60] See, in particular, Case 127/73 *BRT* v *SABAM* [1974] ECR 313.

64. The instrument must be public and/or accessible on demand.

65. The public service assignment should be limited over time in order to allow proper competitive tendering. The Commission takes the view that a period of five years is sufficient, except in cases duly justified by the nature of the investment.[61]

66. The Member State must monitor the situation regularly in order to ensure that the tasks assigned to the undertaking entrusted with the provision of an SGEI are effectively performed and that, consequently, the public service compensation remains justified.

G. PROCEDURES FOR SELECTING UNDERTAKINGS ENTRUSTED WITH THE PROVISION OF SGEIs

67. Member States are free to choose the way in which SGEIs are to be performed and may decide to provide them themselves or to entrust their provision to public or private undertakings.[62] In the latter case, they must comply with the Community rules governing the selection of service providers.

68. A contract whereby a public authority entrusts the provision of an SGEI to an undertaking and that satisfies the conditions laid down in the Community public procurement directives[63] is subject to the obligations deriving from those directives. The award of the contract will, therefore, have to comply with the rules set out in the directives, and in particular those applicable to competitive tendering and transparency of award procedures.

69. In accordance with the case law of the Court,[64] the assignment of SGEIs covered by the public procurement directives must nevertheless comply with the relevant rules and principles laid down in the Treaty, i.e. the rules governing the freedom to provide services and the freedom of establishment, and the principles of transparency, equality of treatment and proportionality.

70. Accordingly, the rules and principles to be complied with by the public authorities when selecting the service provider (and the services to be provided) stem directly from the Treaty and apply to all contracts as well as to any state

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61 A period of five years was stipulated in the proposal for a European Parliament and Council Regulation on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM(2000) 7 final).

62 The competition rules apply to public and private undertakings.

63 Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992), Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993) and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993).

64 See, in particular, Case C-324/98 *Telaustria*.

instrument that is unilateral or attributable to the State, is concluded by the public authorities and has the effect of delegating the performance of economic activities within the meaning of the Treaty. These rules and principles, which were recalled by the Commission in its interpretative communication on concessions dated 12 April 2000[65] and confirmed by the Court,[66] are the rules governing freedom to provide services and freedom of movement and the principles of transparency, equality of treatment and proportionality.

71. The principle of transparency means that, in the interests of any potential tenderer, an appropriate degree of publicity should be guaranteed permitting opening-up of the service contract to competition and monitoring of the impartiality of award procedures. It is for the Member States to determine the appropriate degree of publicity in the light of objective criteria, such as the size and nature of the contracts in question. While a maximum degree of publicity must be encouraged, it is established that the requirements may be more limited in the case of low-value contracts than in the case of large contracts, for which undertakings established in other Member States can compete. The same requirements must, however, apply to similar contracts. In the event of any dispute, it would be for the Member States to justify the degree of publicity selected for a given contract.

72. The principle of equality of treatment requires that all Community undertakings should be able to bid for SGEIs under the same conditions. The conditions and criteria must be objective and applied in a transparent and non-discriminatory manner.

H. EXCLUSIVE OR SPECIAL RIGHTS

73. In some cases, undertakings entrusted with the operation of SGEIs enjoy exclusive or special rights granted by Member States. In this connection, the Court of Justice ruled[67] that Article 86(2) of the Treaty "permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest exclusive rights which may hinder the application of the rules of the Treaty on competition insofar as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights".

74. It is important to stress that such restrictions on competition can be justified only inasmuch as they are necessary for performing the public service task. In particular, the obligations should be clearly identified in order to assess the need for the rights granted.[68] Restrictions going beyond what is necessary are liable to contravene Article 86, read in conjunction with Articles 5 and 81 and/or 82 of the

65 OJ C 121, 29.4.2000.

66 Case C-324/98 *Telaustria*.

67 See, in particular, Case C-320/91 *P. Corbeau*.

68 See, in particular, the judgment in Case 66/86 *Ahmed Saeed Flugreisen.*

EC Treaty. Similarly, the pricing behaviour of undertakings benefiting from exclusive rights remains subject to Articles 81 and 82. The same reasoning applies to special rights conferred by Member States.

75. Generally speaking, exclusive or special rights may limit competition on certain markets only in so far as they are necessary for performing the particular public service task.

I. TRANSPARENCY OF FINANCIAL RELATIONS BETWEEN THE STATE AND UNDERTAKINGS ENTRUSTED WITH THE OPERATION OF SGEIs

76. Undertakings entrusted with the operation of SGEIs enjoy exclusive or special rights and thus fall within the scope of Commission Directive 80/723/EC 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,[69] as last amended by Commission Directive 2000/52/EC of 26 July 2000.[70] Member States must ensure that financial relations between themselves and undertakings entrusted with the operation of SGEIs are transparent, so that the following clearly emerge:

- public funds made directly available, including tax exemptions and reliefs; public funds include capital injections, the setting-off of operating losses, non-refundable grants or loans on privileged terms, the forgoing of profits or of the recovery of sums due, and the forgoing of a normal return on public funds used;

- public funds made available through the intermediary of other public undertakings or financial institutions;

- the use to which these public funds are put.

77. In cases where an undertaking entrusted with the operation of an SGEI also carries out other activities open to competition outside the scope of the SGEI, separate accounts must be kept in order to be able to ensure that the compensation granted for the public service is not used in part to finance the activities open to competition. The accounting provisions contained in other Community instruments must also be complied with, and in particular those laid down in European Parliament and Council Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service[71] and in European Parliament and Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity.[72]

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69 OJ L 195, 29.7.1980.

70 OJ L 193, 29.7.2000.

71 OJ L 15, 21.1.1998.

72 OJ L 27, 30.1.1997.

78. The provisions of Directive 80/723/EEC do not apply to undertakings whose annual turnover is less than €40 million (Article 4, as amended by Directive 2000/52/EC of 26 July 2000). However, when a Member State grants public service compensation to an undertaking that is also active on a market outside the SGEI, it is only by keeping separate accounts in the manner spelt out in the aforementioned Directive that the absence of excess compensation can be guaranteed and that genuine legal certainty can be provided for the undertakings concerned.[73]

J. FINANCING OF THE PUBLIC SERVICE

79. Member States are free to choose the way in which they finance SGEIs. Four main categories of financing can be identified: (i) the users of the service finance it by way of fees; (ii) the provider of the SGEI receives public service compensation from the State; (iii) the provider finances the public service by way of cross-subsidisation between profitable and non-profitable activities under the exclusive rights it enjoys; or (iv) the provider ensures the financing by carrying out commercial activities outside the scope of the SGEI that benefit from the resources necessary for the SGEI. These different means of financing can, of course, be combined.

80. Public broadcasting provides one example of an SGEI that can be financed, at least in part, by revenue derived from commercial activities outside the scope of the SGEI, such as the sale of advertising spots or programmes, that benefit indirectly from the resources made available to the SGEI.[74] Another example is the commercial use of a network needed for an SGEI (e.g. postal[75] or telecommunications network). In these cases, the behaviour of the undertakings on markets outside the scope of the SGEI is subject to Articles 81 and 82 of the EC Treaty. Moreover, anti-competitive behaviour that adds to the amount of public financing channelled to the SGEI is an indicator of excess compensation that may constitute incompatible state aid.

81. A Member State may arrange for the financing of a public service by granting the undertaking entrusted with the provision of the SGEI exclusive or special rights enabling it to carry out some cross-subsidisation between profitable and non-profitable activities.[76] This means of financing is compatible with Community law provided that the rights thus granted do not go beyond what is necessary for the operation of the SGEI.

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73 Similar obligations are imposed by Article 1 of Council Regulation (EEC) No 1191/69.

74 See, in particular, the Commission communication on the application of state aid rules to public service broadcasting (OJ C 320, 15.11.2001).

75 See, in particular, the Commission notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998).

76 See in this connection the exclusive rights traditionally granted in the postal sector.

82. Lastly, Member States may grant undertakings entrusted with the provision of SGEIs public service compensation enabling them to ensure the proper operation of the services in question.

K. AMOUNT OF COMPENSATION

83. Pursuant to the Court's case law, compensation may cover all the additional costs incurred in performing the public service task. The undertaking in question must be able to perform its public service obligations under conditions of economic equilibrium and must therefore be able to earn a normal return.

A distinction should be drawn here according to whether or not the SGEI has been assigned following a tendering procedure.

K.1 Amount of compensation in the case of a tendering procedure

84. The precise conditions for operating the SGEI must be fixed and known by all the undertakings wishing to participate in the tendering procedure. If the Member State wishes to amend those conditions, all the undertakings must be informed of the new conditions.

85. Where the tendering procedure is preceded by a pre-selection procedure and/or a procedure for verifying the conditions of eligibility, the conditions applied by the Member State must be proportional, open, transparent and non-discriminatory.

86. When a tendering procedure is launched, the information made available to interested undertakings should include the following at least:

- the standards laid down by public service obligations;
- the selection criteria applied by the Member State, particularly in cases where it reserves the right not to select the bid entailing the lowest level of compensation;
- the rules governing changes to and cancellation of the contract or assignment of the SGEI, notably in order to take account of unforeseeable developments;
- the period of validity of the contract or assignment of the SGEI;
- the penalties applicable in the event of non-compliance with the operating conditions for the public service;
- the pricing conditions for operating the SGEI.

87. The amount of compensation corresponds to the "market price" and does not include any elements of excess compensation where the following conditions are met:

- the relevant market is, economically speaking, an effectively contestable market (i.e. there are other operators potentially capable of submitting valid bids);

- the procedure has resulted in genuinely competitive tendering;

- the SGEI is awarded to the undertaking requesting the lowest level of compensation and the other conditions (quality of service, employment, investment, etc.) are imposed simply as minimum criteria.

88. When a tendering procedure has been organised but the relevant market is not an effectively contestable market or when the SGEI is not awarded to the undertaking requesting the lowest level of compensation or is awarded to an undertaking proposing a service different from that publicised prior to the selection of the undertaking, the amount of compensation is not presumed to reflect the market price.[77]

89. To sum up, the organisation of a transparent and competitive tendering procedure (where the conditions for such a procedure are met, i.e. a market that, economically speaking, is effectively contestable, a sufficient number of bidders, a contract value sufficient to justify administrative costs) can but present advantages:

- Following an official invitation to tender, the award of the contract will be in the nature of an official award.

- The procedure will satisfy the requirements relating to definition of the public service obligations provided that those requirements are published in the invitation to tender.

- The procedure will avoid the risk of excess compensation if the contract is awarded to the lowest bidder.

K.2 Amount of compensation in the absence of a tendering procedure

90. Notwithstanding the tendering obligations relating to the choice of the provider of an SGEI, the amount of compensation may, in some cases, be determined in advance and may not result from a tendering procedure. In such cases, the amount of compensation may not exceed the difference between the costs borne by the undertaking in providing the SGEI and the revenue accruing from that activity, account being taken of the margin normally applied by undertakings operating in the sector in question. For the purpose of determining the size of the margin, a comparison should be made with the margins applied by undertakings carrying out comparable activities with a comparable level of risk. Generally speaking, this level of risk is low on account of the grants and/or exclusive or special rights from which the undertaking entrusted with the operations of the SGEI may benefit.

91. The costs to be taken into consideration are all the costs linked to operation of the SGEI in question.

Where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration.

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77 The tendering procedure must not, of course, give rise to behaviour on the part of certain undertakings that is contrary to Article 81 of the EC Treaty.

Where the undertaking engages in activities outside the scope of the SGEI, its accounts must distinguish clearly between the costs and revenue associated with the SGEI and those relating to services not covered by public service obligations. The undertaking's internal accounts must be based on consistent application of objectively justifiable cost accounting principles, in particular for allocating fixed costs between the activities relating to the public service and the undertaking's other activities.

The costs associated with the activities falling outside the scope of the SGEI must be clearly identified and must not be set off in whole or in part against the public service costs. In addition, where the same resources (staff, equipment, fixed installations, etc.) are used for both types of activity, their costs must be allocated on the basis of objectively justified criteria. Verification of the undertaking's accounts by an independent auditor helps to guarantee their reliability.

92. The revenue to be taken into account is the entire revenue earned from the SGEI. The Member State in question may decide that the profits accruing from other activities must be allocated to financing the SGEI. It may also decide that those profits are not to be taken into account for financing the SGEI.

The amount of compensation includes all the benefits granted by the Member State through state resources. Where benefits are in kind, e.g. the provision of land or premises, they are considered as compensating for the costs that would have otherwise had to be financed. If these contributions in kind benefit the commercial activities falling outside the scope of the SGEI, their amount must be determined in terms of gross grant equivalent and taken into consideration in calculating compensation.

93. Assessing the need for compensation means making an overall evaluation of the economic conditions in which the undertaking concerned performs its activities. Such evaluation must take account of all the revenue accruing to the undertaking by virtue of the public service, irrespective of whether it ranks as aid or compensation.

94. The Member State determines the frequency of compensatory payments. However, an annual assessment must be carried out by the national authorities to ensure that no excess compensation has been paid.

95. When the exact costs and compensation are not known in advance, the Member State must ensure at the end of each year that the amount of compensation received is not excessive in terms of the costs actually incurred.

L. EXCESS COMPENSATION

96. Any excess compensation constitutes state aid within the meaning of Article 87(1) of the EC Treaty. Since it is not indispensable to the performance of the SGEI, it cannot be declared compatible under Article 86(2). Consequently, the amount in question must normally be repaid to the Member State. However, the Commission considers that, where the amount of excess compensation is only marginal in terms of the normal amount of compensation, this need not be repaid to the Member State but can be deducted from the amount of compensation

planned for the following year. Any systematic excess compensation should though be avoided, and an assessment must be carried out at regular intervals, with any excess compensation being repaid.

97. There may also be a number of SGEIs where the costs differ significantly from one year to the next. In this case, excess compensation of a non-marginal nature may prove necessary over several years to guarantee performance of the service in question. As in the previous case, an assessment must be carried out at regular intervals, with any excess compensation being repaid.

98. Any excess compensation may also be used to finance another SGEI operated by the same undertaking, but such a transfer must be shown in the undertaking's accounts.

99. An undertaking may operate several SGEIs some of which may be loss-making and some profit-making. In such a case, where the undertaking provides only SGEIs, some offsetting between them may be carried out.

When the undertaking also provides services outside the scope of SGEIs, offsetting may be carried out between those services but the accounts must clearly show the financial flows involved.

100. In cases where excess compensation benefits a public undertaking, the proceeds of such excess compensation may be used by the Member State in its capacity as shareholder to inject finance into that undertaking provided that the private investor criterion is met. However, such transfers must be carried out in accordance with the normal procedures of private undertakings, i.e. in the form of a capital increase or the granting of loans, and must comply with the relevant national rules, notably in the commercial and tax fields. They must be identified in the balance sheet of the recipient undertakings and must be the result of a formal decision by the public authorities. This decision must identify the exact use to which the financial contribution is to be put.

101. Nevertheless, the Commission takes the view that the amount of excess compensation cannot remain available to the undertaking performing the SGEI on the ground that it would rank as aid compatible with the Treaty (e.g. environmental aid, employment aid and regional aid).

If a Member State wishes to grant such aid, it must comply with the prior notification procedure laid down in Article 88(3). Aid may be disbursed only if the Commission has taken a favourable decision.