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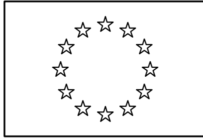

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,20.11.2007
SEC(2007) 1516

COMMISSION STAFF WORKING DOCUMENT

Frequently asked questions in relation with Commission Decision 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, and of the Community Framework for State aid in the form of public service compensation

Accompanying document to the

Communication on "Services of general interest, including social services of general interest: a new European commitment"

{COM(2007) 725 final}
{SEC(2007) 1514}
{SEC(2007) 1515}

COMMISSION STAFF WORKING DOCUMENT

Frequently asked questions in relation with Commission Decision 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[1], and of the Community Framework for State aid in the form of public service compensation[2]

In the framework of the consultation process launched by the Commission Communication on Social Services of General Interest (SSGI) of April 2006[3], the Commission received a number of questions concerning the application of the state aid rules to social services of general interest (SSGI). The present document provides answers to these queries. Where possible, the answers refer to case law or to specific provisions of the applicable texts to guide interested readers who would like to have further information.

This document is a Staff Working Paper prepared by the Commission services. It provides technical guidance notably on the basis of concise and sometimes simplified summary of legislation, case law and Commission decisions related to SGEI and particularly to SSGI issues in the field of State aid. This document is not binding on the European Commission as an Institution.

[1] Commission Decision 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 (OJ L 312, 29.11.2005, p. 67).

[2] Community Framework for State aid in the form of public service compensation (OJ C 397, 29.11.2005. p. 4).

[3] Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union - COM(2006) 177, SEC(2006) 516.

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1. INTRODUCTION

A number of questions have been raised concerning the application of State aid rules to services of general interest. These questions concern in the first place the precise conditions under which compensation for public service obligations constitute state aid. Secondly, they concern the conditions under which a state aid can be deemed compatible with the Treaty and when decisions to grant an aid must be notified to the Commission.

In its judgment in the case of Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH[4] (Altmark), the Court of Justice has addressed these issues. The Court held that public service compensation does not constitute State aid within the meaning of Article 87 of the Treaty provided that four cumulative criteria are met[5].

Where those four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the Treaty do not apply. If the Member States do not respect those criteria and if the general criteria for the applicability of Article 87(1) of the Treaty are met, public service compensation constitutes State aid.

In such cases, Article 86 and, for inland transport, Article 73 of the Treaty, allow the Commission to declare compensation for services of general economic interest (SGEI) compatible with the common market. Commission Decision of 28 November 2005 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI (hereinafter the "Decision") and, for land transport, Council Regulation 1191/69/EC[6] (hereinafter "Regulation 1191") specify the conditions under which certain compensation schemes are compatible with Articles 86(2) and 73 respectively and are not subject to the prior notification requirement of Article 88 (3) of the Treaty. Other public service compensation should be notified to the Commission which will assess its compatibility in line with the Community Framework for State aid in the form of public service compensation (hereinafter the "Framework") and, for land transport, Regulation 1191, Council Regulation 1192/69/EC[7] (hereinafter "Regulation 1192") and Council Regulation 1107/70/EC[8] (hereinafter "Regulation 1107").

The Altmark Judgment, the Decision and the Framework have made a significant contribution to the clarification and simplification of the rules applicable. Nevertheless, public authorities and stakeholders have asked several questions concerning the concrete application of the legal framework to specific cases. In particular, following the publication of the Commission Communication of Social

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4 (2003) ECR I-7747.

5 For more details, see answer provided in paragraph 3.1.

6 Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

7 Regulation (EEC) No 1192/69 of the Council of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings (OJ L 156, 28.6.1969, p. 8).

8 Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1).

Services of General Interest (SSGI) in April 2006[9], which followed up on the White Paper on Services of General Interest (SGI) of May 2004[10], Member States and stakeholders have been seeking clarification on a number of detailed issues.

In response, and in line with the approach set out in the Commission's document on "Services of general interest, including social services of general interest: a new European commitment" adopted in November 2007, the Commission services intend to offer to public authorities, practitioners, business and citizens an additional guidance on how to interpret and apply the EU rules in the area. The purpose of this Staff Working Paper is to provide in a concise and accessible way answers to the practical questions that, in light of the experience gained over the past two years, have been most frequently asked by stakeholders[11]. The Commission services intend to update this Paper on a regular basis when new issues arise, notably through the Interactive Assistance Service that the Commission services will put in place at the disposal of stakeholders concerning the application of competition and internal market rules on SGEI. The following questions and replies mainly refer to social services of general economic interest and transport, but are largely applicable to other SGEI.

2. APPLICABILITY OF STATE AID RULES TO SERVICES OF GENERAL INTEREST

2.1. When do the Treaty rules on State aid apply to the organisation and financing of SGEI/SSGI?

Competition rules only apply to "undertakings". This concept covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed[12].

2.2. When does an activity qualify as economic for the purposes of competition rules?

Any activity consisting in offering goods and/or services on a given market is an economic activity[13]. In this context, the fact that the activity concerned may be qualified as "social" is not relevant[14].

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9 Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union - COM(2006) 177, SEC(2006) 516.

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - White paper on services of general interest - COM(2004) 374.

11 These replies do not necessarily represent the views of the Commission. They are without prejudice to the interpretation of the Court of Justice and the Court of First Instance or evolving Commission decision making practice.

12 Joined cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.

13 Cases 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, Jointed cases C-180/98 to C-184/98, *Rec.2000, p.I-6451.*

14 Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 118, and Cases C-218/00 *Cisal* [2002] ECR I-691, paragraph 37, C-355/00, Freskot [2000] ECR I-5263.

Examples of activities considered to be economic in past cases and Court judgments

- The activity of public employment procurement exercised by public agencies[15].

- Optional insurance schemes operating according to the principle of capitalization, even in the case they are managed by non profit organisations[16]; by principle of capitalization is meant that the insurance benefits depend solely on the amount of contributions paid by the recipients and the financial results of the investments made.

- Emergency and patient transport services[17].

- The provision by legal entities, set up by employers or trade union organisations and authorised by the State, of assistance to employees and employers, related to the completion of the income tax declaration, and other relative advice[18].

- The management of transport infrastructure[19].

- Medical services provided either in a hospital environment or outside such an environment[20].

- The provision of funds to municipalities and voluntary housing bodies for housing at cheaper rents; provision of general mortgage funds, affordable housing schemes aiming at providing low-cost housing, rental subsidy schemes and grant schemes for elderly and disabled persons, as well as socially disadvantaged households[21].

- The provision of infrastructure ancillary to social dwellings, such as roads, shops, playgrounds, places of recreation, parks, allotments, open spaces, sites for places of worship, factories, schools, offices and other buildings or land and such other works and services, which is needed to ensure a good environment for social housing[22].

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15 Case C-41/90, Höffner and Elser, 1991, ECR I-197, paragraph 21.

16 Cases C-244/94, FFSA, [1995], ECR I-4013, paragraphs17-22 , C-67/96, Albany, [1999], ECR I-5751, paragraphs 80-87.

17 Case C-475/99, Glöckner, 2001 ECR I-8089, paragraph. 20.

18 Case C-451/03, Servizi Ausiliari Dottori Commercialisti, 2006, ECR I-2941, paragraph 63.

19 Case C-82/01 P Aéroports de Paris v. Commission [2002] ECR 1-9297.

20 Cases C-157/99, Smits, 2001, ECR I-5473, para 53, 286/82 and 26/83 Luisi and Carbone, 1984, ECR 377 paragraph 16; C-159/90, Society for the Protection of Unborn Children Ireland, 1999, ECR I-4685, paragraph 18, C-368/98 Abdon Vanbraekel, 2001, ECR I-5363, para 43, T-167/04, Asklepios Kliniken GmbH, [2007], paragraphs 49-55.

21 Commission Decision in case N 89/2004 - Ireland - Guarantee in favour of the Housing Financing Agency, Social housing schemes funded by the HFA, OJ C 131 of 28.05.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n089-04.pdf.

22 Commission decision in case N 395/05 - Ireland – Loan guarantees for social infrastructure schemes funded by the Housing Finance Agency (HFA), OJ C 77 of 05.04.2007, http://ec.europa.eu/community_law/state_aids/comp-2005/n395-05.pdf.

2.3. May members of a liberal profession constitute "undertakings" within the meaning of competition rules?

Yes, members of a liberal profession may constitute undertakings. The Court of Justice considered that medical specialists may provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services, and thus constitute undertakings. The fact that they provide complex and technical services and the fact that the practice of their profession is regulated cannot alter that conclusion[23].

2.4. When is an activity non economic?

Two relevant categories of activities which have been determined to be non economic are:

- Non economic activities related to the exercise of State prerogatives

Activities linked to the exercise of State prerogatives by the State itself or by authorities functioning within the limits of their public authority, do not constitute economic activities for the purposes of competition rules. In this context, it is irrelevant whether the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights[24].

Examples of non-economic activities linked to the exercise of state prerogatives:

- Activities related to the army or the police.
- The maintenance and improvement of air navigation safety[25], security, air traffic control, customs[26], maritime traffic control and safety[27].
- The anti-pollution surveillance which is a task in the public interest that forms part of the essential functions of the State as regards the protection of the environment in maritime areas[28].
- Standardisation activities as well as related research and development activities[29].
- The organization, financing and enforcement of correctional measures in order to ensure the enforcement of the penal system[30].
- The financing and the supervision of the construction of the railway infrastructure[31].
- The closing down of coal mines and the management of assets[32], as well as the provision of funds for the work of rehabilitation and supervision of sites and for the eradication of the consequences of mining activity[33].

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23 Joined cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.

24 Case 118/85, Commission/Italian Republic, [1987], ECR 2599, paragraphs 7 and 8.

25 Case C-364/92, SAT/Eurocontrol,[1994], ECR I-43, paragraph 27.

- Certain activities of a purely social nature

The case law has established a set of criteria under which certain activities with a purely social function can be considered as non economic.

Examples of non-economic activities of a purely social nature:

- The management of compulsory insurance schemes pursuing an exclusively social objective, functioning under the principle of solidarity, offering insurance benefits independently of contributions[34].
- The provision of public education financed as a general rule by the public budget and carrying out a State task in the social, cultural and educational fields towards the population[35].

2.5. May the Treaty rules on State aid apply to non-profit service providers?

Yes, the rules may apply. The mere fact that an entity is non-profit making does not mean that the activities which it carries on are not of an economic nature[36]. The legal status of the entity providing SSGI does not affect the nature of the activity concerned. The relevant criterion is whether the entity concerned pursues an economic activity.

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[26] Commission Decisions in case N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001, OJ C 148 of 25.06.2003, and in case N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian sector, OJ C 284 of 21.11.2002, http://ec.europa.eu/community_law/state_aids/transports-2002/n438-02-fr.pdf.

[27] Commission Decision in case N 438/02 of 16 October 2002, Belgium – Aid to port authorities, OJ C 284 of 21.11.2002, http://ec.europa.eu/community_law/state_aids/transports-2002/n438-02-fr.pdf.

[28] Case C-343/95, Calì & Figli, ,[1997], ECR I-1547, paragraph 22.

[29] Case T-155/04, [2006], Selex, paras 73-82, not published yet.

[30] Commission Decision in case N140/2006 – Lithuania – Allotment of subsidies to the State Enterprises at the Correction Houses (OJ C 244, 11.10.2006, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-140-2006-WLWL-en-19.07.2006.pdf

[31] Commission Decision in case N 478/2004 – Ireland - State guarantee for capital borrowings by Coràs Iompair Eirann (CIÉ) for infrastructure investment (OJ C 207, 31.8.2006, http://ec.europa.eu/community_law/state_aids/transports-2004/n478-04.pdf.

[32] Commission Decision in case N 571/2004 of 22 June 2005, Poland – State aid to Polish Coal Sector 2004-2006 (OJ C 87, 11.4.2006, http://ec.europa.eu/community_law/state_aids/transports-2004/n571-04.pdf.

[33] Commission Decision CZ 45/2004 and CZ 110/2004 – Czech Republic - State Aid to the Czech Coal Industry 2003-2007 (OJ C 87, 1.4.2006, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2004/2004_0045_cz_cz.pdf

[34] Cases C-159/91, Poucet et Pistre, ,[1993], ECR I-637, C-218/00, Cisal and INAIL, ,[2002], ECR I-691, paragraphs 43-48, C-264/01, C-306/01, C-354/01 and C-355/01, AOK Bundesverband, [2004], ECR I-2493, paragraphs 51-55, and C-355/00, Freskot, ,[2003], ECR I-5263.

[35] Cases 263/86, Humbel, [1988], ECR 5365, paragraph 18, C-318/05 Commission/Germany, [2007], paragraphs 74 -75, not yet published, as well as Commission Decisions N118/00 – Public grants to professional sports clubs (OJ C 333, 28.11.2001, http://ec.europa.eu/community_law/state_aids/comp-2000/n118-00.pdf, NN54/2006 – Prerov Logistics College (OJ C 291, 30.11.2006, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-54-2006-WLWL-EN-08.11.2006.pdf.

[36] Joined cases 209/78 to 215/78 and 218/79 Van Landewyck [1980], ECR p. 3125 and case C-244/94,FFSA and Others [1995] ECR I-.4013, paragraph 21.

For example, a non-profit association or a charitable organisation pursuing an economic activity will constitute an "undertaking", but only for the part of the activity which is economic. Competition rules will not apply to their non economic activities.

> **Example:**
>
> The provision of emergency transport services and patient transport services by non profit organisations may constitute an economic activity. Public service obligations may render the services provided by such organisations less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities[37].

2.6. What are the legal consequences if a municipality decides to distribute vouchers to certain categories of individual users to acquire SGEI/SSIG?

Member States, including local authorities, may grant such support to individual service users, provided that such aid is granted without discrimination related to the origin of the products or services concerned.

2.7. A non-profit service provider would like to create a shelter for women in difficulties which needs a financial support of EUR 150 000: do State aid rules apply to such a grant by a public authority?

Such a financing may occur without meeting the criteria specified in the Decision, notably the existence of an act of entrustment, if the total amount of aid granted per period of three years is less than € 200 000. If the conditions of the de minimis Commission Regulation[38] are met, such support does not constitute State aid, in the meaning of article 87(1) and should not be notified to the Commission.

Therefore, a public authority can provide such a grant of limited amount without further concerns as for the application of State aid rules, even when the activity to be financed is deemed to be economic.

For all other cases, the measure will still be compatible, if the criteria of the Decision are fulfilled.

2.8. Can a public authority finance a pilot initiative in order to define the content of SGEI/SSGI missions?

Yes, public authorities can launch a pilot initiative in order to define the mission of the SGEI they want to put in place. In order to finance such pilot initiatives, public authorities can rely on the opportunities offered by the de minimis exemption regulation, which stipulates that article 87(1) does not apply to the grant of aid of up to 200 000 EUR over a period of 3 years.

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[37] Case C-475/99 Glöckner, paragraph 21.

[38] Commission Regulation n° 1998/2006 of 15 December 2006 on the application of articles 87 and 88 of the Treaty to de minimis aid, OJ L 379/5 of 28.12.2006.

2.9. SGEI/SSGI are often provided in a local context. Do they really affect trade between Member States?

In the field of State aid law, the effect on trade does not depend on the local or regional character of the service supplied, or on the scale of the activity concerned. There is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the entity which receives it, does not as such exclude the possibility that trade between Member States might be affected[39].

Example of effect on trade between Member States:

Subsidies payable to Dutch service stations located near the German border, as a result of the increase in national fuel prices following the rise in excise duties in the Netherlands, were affecting trade between Member States, since their purpose was to mitigate the disparity between the levels of excise duties payable in Netherlands and the amount of excise duty levied on light oils in Germany[40].

2.10. Are there examples of local SGEIs/SSGIs which do not really seem to affect trade between Member States?

There are some Commission decisions in the State aid field, where state measures financing local services, have been considered as not affecting intra-Community trade:

[39] Cases T-214/95, Vlaams Gewest/Commission, 1998, ECR. p. II-717, paragraphs 48 to 50, C-280/00, Altmark Trans and Regierungspräsidium Magdeburg, 2003, ECR p. I-7747, paragraphs 81-82 and C-172/03, Heiser,2005, p. I-1627, paragraphs 32-33.

[40] Commission decision 1999/705/CE of 20 July 1999, OJ L 280/87 of 30.10.1999, confirmed by the ECJ case C-382/99, Netherlands v. Commission, 2002 ECR I-5163.

Examples of measures considered to have no effect on trade between Member States:

- In the case of the Dorsten swimming pool, an annual subsidy for the construction and operation of a public swimming pool in Dorsten which would be used only by the local population, could not affect trade between Member States[41].
- In the case of Irish hospitals, a system of capital allowances aiming at the creation of facilities for public local and relatively small hospitals, serving a local hospital market with clear undercapacity, could not attract investment nor customers from other Member States and consequently could not affect trade between Member States[42].
- In the case of service areas in Tenerife, subsidies allocated for the construction by local road haulage associations, of municipal service areas for their members could not affect trade between Member States, because of their exclusively local use[43].
- The Community Guidelines for State aid to airports of 2005 provide that compensation payments for small regional airports[44] are not likely to distort competition, neither affect trade between Member States to a degree contrary to the common interest[45].

2.11. What if an activity is economic and affects trade between Member States?

If an activity is economic and affects trade between Member States, competition rules apply to it. This however does not mean that public authorities have to ensure that a multiplicity of service providers is present in the market. Moreover, this does not mean that public authorities have an obligation to privatize entities providing SGEI/SSGI or abolish special or exclusive rights already granted to service providers, which are necessary and proportionate for the performance of the SGEI/SSGI concerned.

2.12. What if a public authority allocates a compensation for a service of general interest which is considered economic?

A public service compensation provided by a public authority to a service provider may constitute State aid if the criteria established by the Court of Justice in its Altmark ruling are not cumulatively met (see paragraph 3.1). Nevertheless, the fact

41 Commission Decision in case N 258/2000 – Germany – Leisure Pool Dorsten, IP/001509 of 21/12/2000 (OJ C 172, 16.6.2001, http://ec.europa.eu/community_law/state_aids/comp-2000/n258-00.pdf.

42 Commission Decision in case N 543/2001 – Ireland – Capital allowances for hospitals (OJ C 154, 28.6.2002, http://ec.europa.eu/community_law/state_aids/comp-2001/n543-01.pdf.

43 Commission Decision in case NN 29/02 – Spain – Aid for the installation of service areas on Tenerife (OJ C 110, 8.5.2003, http://ec.europa.eu/community_law/state_aids/transports-2002/nn029-02.pdf.

44 With less than one million passengers.

45 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1, point 39).

that a public service compensation constitutes a State aid does not per se mean that it is not allowed, since that compensation may be compatible with the Treaty (see paragraphs 3.3 and 3.4).

2.13. How can a public authority finance a SGEI/SSGI?

Member States have a wide margin of discretion in the organisation and finance of their SGEIs/SSGIs. Public authorities can allocate a subsidy or a tax benefit, but they can also award an exclusive or special right to the service provider, in order to ensure the performance of the SGEI/SSGI provision, as long as this right does not exceed what is necessary to ensure the performance of the SGEI/SSGI under economically acceptable conditions[46].

3. ALTMARK RULING AND SGEI PACKAGE

3.1. What does the Court state in the Altmark ruling?

In its Altmark ruling, the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 87 (1) of the EC Treaty provided that four cumulative criteria are met.

- First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
- Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder 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 equipped, would have incurred.

Examples of cases where the Commission considered that the Altmark criteria were met and consequently, the compensation did not constitute State aid:

- The finance of a scheme promoting investments in order to ensure security of electricity supply in Ireland was not considered to be a State aid;

(a) The provision of new electricity reserve generation capacity in order to face electricity demand at any time of the year, including in peak periods, was considered to be a SGEI.

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46 Cases C-320/91, Corbeau [1993], ECR p. I-2533, paragraphs 14-16, C-67/96, Albany, [1999], ECR I-5751, paragraph 107.

(b) Moreover, the open transparent and non discriminatory competitive procedure which took place guaranteed that all the other three conditions laid down by the Altmark decision were met[47].

- Subsidies financing broadband infrastructure in France were also not considered aid because;

(a) The generalized access to broadband infrastructure for all the population was a SGEI.

(b) Specific parameters predefined the amount of the compensation in the Concession contract.

(c) There was no risk of overcompensation since the parameters for the calculation of the compensation were precisely defined within the business plans of the operators, which were based on the specific data provided by the public authority itself. The absence of any risk of overcompensation was also ensured by the fact that the public authority required from the operators who would provide the service to set up an ad hoc company for that service which would guarantee the neutrality of the service provider in question.

(d) A thorough and detailed analysis of the needs of the project and the offers of the candidates took place. In addition, the procedure chosen permitted the selection of the most efficient candidate offering the service at the least cost to the community[48].

In the Dorsal case, the Commission considered that the 4th Altmark criterion was met because a thorough comparative report analysis of the specific needs of the project and the offers of the candidates, as well as the competitive procedure itself allowed for the compensation to be estimated on the basis of the costs of a well run and adequately equipped undertaking[49].

- The Commission found that the rated fees paid by "Casa Depositi e Prestiti" – a state controlled financial body – to "Poste Italiane" were not considered to be State aid:

(a) The distribution of postal savings books was considered as a SGEI.

(b) The market fee was an appropriate estimate of the level of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from

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47 Commission Decision in case N 475/2003 – Ireland - Public Service Obligation in respect of new electricity generation capacity for security of supply (OJ C 34, 7.2.2004, http://ec.europa.eu/community_law/state_aids/comp-2003/n475-03.pdf.

48 Commission Decisions in case N 381/2004 – France – Setting up of a high speed infrastructure in Pyrénées-Atlantiques (OJ C 162, 2.7.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n381-04.pdf.

49 N 382/2004 – France – Setting up of a high speed infrastructure in the Limousin (Dorsal) (OJ C 230, 20.9.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n382-04.pdf.

50 Commission Decision in case C 49/06 – Poste Italiane – Banco Posta – Remuneration paid for the distribution of postal savings financial products (OJ C 31, 13.2.2007).

discharging the obligations. Therefore, the 4th Altmark criterion was fulfilled[50].

3.2. What are the consequences of application/non application of the Altmark criteria?

Where all the Altmark criteria are met, the public service compensation does not constitute State aid.

Where at least one of the Altmark criteria is not met, and the other State aid criteria[51] are also present, the public service compensation constitutes State aid.

3.3. What are the consequences if a compensation for a SGEI/SSGI is indeed a State aid?

The fact that public service compensation constitutes State aid does not mean that this compensation is forbidden. This compensation is compatible with the Treaty when the conditions specified in the Decision or the Framework are met[52].

3.4. What is the difference between the Decision and the Framework?

Both texts specify under which conditions the public service compensation constituting State aid is compatible with the Treaty.

The only **major difference** lies in the fact that public service compensations covered by the Decision **do not need to be notified** to the Commission. As soon as the criteria of the Decision are met, the Member State concerned may grant the compensation without delay. However, when the conditions of the Decision are not met (for example because larger amounts of compensation are concerned), the compensation must be notified in advance to the Commission so that it can check whether the State aid concerned is compatible with the Treaty.

Scope of the Decision; the Decision applies to:

- public service compensation of less than EUR 30 million on an annual basis, granted to undertakings with an annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned.
- public service compensation granted to hospitals carrying out activities qualified

[51] i.e. (1) transfer of State resources and imputability to the State, (2) affectation of trade between Member states and distortion of competition, (3) economic advantage, as well as (4) selectivity of the measure at stake.

[52] In the land transport sector such compatibility is ruled by Regulations 1191, Regulation 1192 and Regulation 1107. In air and maritime transport such compatibility may be assessed on the basis of the 2005 Community Guidelines on financing of airports and start up aid to airlines departing from regional airports, or of the Community Guidelines for state aid in maritime transport (OJ C 13, 17.1.2004).

as services of general economic interest by the Member State concerned, irrespective of the amount.

- public service compensation granted to social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned, irrespective of the amount.

- in the field of transport, this Decision only applies to public service compensation for maritime links to islands granted in accordance with sectoral rules, on which annual traffic does not exceed 300 000 passengers; the Decision applies also to public service compensation for airports and ports for which the average annual traffic during the financial years preceding that in which the SGEI was assigned, does not exceed 1 000 000 passengers, in the case of airports and 300 000 passengers, in the case of ports.

Criteria of compatibility. The Decision and the Framework essentially require:

- An act of entrustment specifying, in particular, the nature and duration of the public service obligations, the undertaking and the territory concerned, the nature of any exclusive or special rights assigned to the undertaking, the parameters of calculating, controlling and reviewing the compensation, as well as the arrangements for avoiding and repaying any overcompensation;

- The compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations; a calculation of all costs as well as revenues of any kind received is necessary in that purpose.

- The control of overcompensation by the Member State's public authorities.

3.5. Do the airports of more than 1 million passengers fall within the scope of the Decision in cases where the public service compensation is less than EUR 30 million and the undertaking managing the airport has an annual turnover of less than EUR 100 million?

Yes, in such cases, the most favourable ceiling will apply[53].

In this context, it is important to note that State aid to the air transport sector is governed by the Community guidelines on financing of the airports and start-up aid to airlines departing from regional airports (hereinafter the "2005 Guidelines"). These Guidelines allow the possibility for certain economic activities carried out by airports to be considered by the public authority as constituting SGEI. However, the overall management of an airport could be considered as a SGEI when it is linked to its basic activities.

Example:

A public authority might impose public service obligations on an airport located for

[53] See Recital 19 of the Decision.

example in an isolated region, and might decide to pay compensation for these obligations. It is important to note that the overall management of an airport as a SGEI should not cover activities which are not directly linked to its basic activities (i.e. commercial activities, including construction, financing, use and renting of land and buildings, not only for offices and storage but also for hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks).

3.6. What is the relationship between the Decision and Regulations 1191, 1192 and 1107?

The Decision does not apply to public service compensation in the land transport sector[54]. Compensation payments for public service obligations in the land transport sector are only exempted from prior notification, if they fulfill the conditions laid down in Regulations 1191[55], 1192[56] or 1107[57].

There are three cases:

- The notification exemption of Regulation 1191 **only** applies, following the Combus judgment[58], to compensation paid for discharging public service obligations which have been **unilaterally imposed**[59] upon a transport undertaking[60].
- When compensation payments are foreseen by **public service contracts**[61], they have to be notified to the Commission for prior approval.
- Finally, in certain Member States undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services have been excluded from the scope of application of Regulation 1191[62]. In this case, there is again no notification exemption; any State aid paid to these undertakings has to be notified to the Commission.

The Council and the Parliament have agreed on 18 September 2007 on a new Regulation on public passenger transport services by rail and by road which is not

54 See Recital 17 of the Decision.
55 Article 17(2) of Regulation 1191.
56 Article 13 of Regulation 1192.
57 Article 5(2) of Regulation 1107.
58 Case T-157/01, Danske Busvognmænd v. Commission, [2004], ECR p. II-917.
59 The conditions for such an imposition are defined in Article 1 (5) of Regulation 1191/69/EC.
60 See Commission Decision in case NN 53/2006 of 21 March 2007, Malta - State aid (public service compensations) to bus operators in Malta (OJ C 145, 30.6.2007, http://ec.europa.eu/community_law/state_aids/transports-2006/nn053-06.pdf.
61 The conditions for such a public service contract are defined in Article 1(4) of Regulation 1191/69/EC and Article 14 of Regulation 1191/69/EC.
62 This possibility is offered by Article 1(1) of Regulation 1191/69/EC.

yet in force[63]. This new Regulation foresees that all public service compensation paid pursuant to its rules will be exempted from notification[64].

3.7. What is the difference between the Framework and special rules for compatibility in the transport sector?

The Framework does not apply to the transport sector[65]. For the transport sector, the special rules for compatibility are those already mentioned and set out in the above mentioned Regulations for land transport[66], as well as in the 2005 Guidelines and in the Community Guidelines on State aid to maritime transport[67].

3.8. What is the difference between the conditions in the Altmark ruling and the conditions laid down in the Decision, the Framework, and Regulations 1191/69 and 1107/70?

The Altmark ruling determines when a measure is caught by the definition of a State aid while the Decision and the Framework further determine the conditions under which compensation, if it is a State aid, can be allowed. The main substantial difference between the ruling and the SGEI texts concerns the amount/calculation of the compensation.

According to the 4th criterion of the **Altmark judgment**, the amount of the compensation must be defined, in order not to constitute State aid[68]:

– through an open, transparent and non discriminatory public tender procedure, or

– through a procedure whereby public authorities have to define the amount of the compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped.

According to the **Decision**, the amount of the compensation does not necessarily have to be defined through a public procurement procedure, or by comparison with the costs of a typical well run company.

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63 This new Regulation will repeal Regulations 1191 and 1107.

64 See Article 9(1) of the new Regulation, not yet published.

65 See point 3 of the Framework.

66 As far as land transport is concerned, it is necessary to distinguish between undertakings which are within the scope of Regulation 1191/69/EC, and undertakings which Member States have excluded from the scope of Regulation 1191/69/EC.
For the first group, where compensation payments are foreseen by public service contracts, they can be declared compatible on the basis of Article 14 of Regulation 1191/69/EC. For that purpose, the conditions set out in the Framework will have to be respected by analogy.
For the second group, where operation of urban, suburban or regional services have been excluded by a Member State, compensation payments contained in public service contracts can be declared compatible on the basis of Regulation 1107/70/EC.

67 Commission Communication C(2004) 43, Community Guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

68 As long as the other three criteria of the Altmark judgment are fulfilled (see 3.1).

As long as the public authority proves that the compensation allocated corresponds to the net costs estimated on the basis of the precisely defined parameters included in the act of entrustment, and that there is no overcompensation, the compensation in question is considered as a State aid compatible with the Treaty rules[69].

Example:

A public authority decides to finance a SGEI provided by an undertaking whose net costs of doing so (after deducing the revenues) amount to 100.

- This service could be provided by an operator selected through a tender procedure with a price of just 90. In accordance with the Altmark conditions, the compensation of 90 will not constitute State aid.
- This service could be provided by a typical undertaking, well run and adequately equipped with net costs of just 90. In accordance with the Altmark conditions, the compensation of 90 will not constitute State aid.
- The Decision will consider a compensation of 100 as a compatible State aid, provided that the total net costs of the service compensated are actually 100.

4. NOTIFICATION OF AID EXCEEDING THE THRESHOLDS OF THE DECISION

4.1. Is it necessary for aid exceeding the thresholds defined in Article 2a) of the Decision, to be notified to the Commission?

The Decision applies to public service compensation of less than EUR 30 million, granted to undertakings with an annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned. As regards hospitals and social housing companies, there is no limitation on the amounts which are exempt from notification.

These thresholds are already high, and are expected to cover the vast majority of local social services.

If the compensation exceeds these thresholds, a prior notification is required. This will be assessed in accordance with the provisions of the Framework which are analogous to the conditions of the Decision. Notification does not mean that the compensation is automatically not compatible with the Treaty, but because of the high amount of aid concerned and the higher risk of distortion of competition, the aid must be checked by the Commission in order to ensure that all the conditions for compatibility are actually fulfilled.

[69] As long as the other conditions laid down by the Decision are fulfilled (see 3.5).

5. THE NOTION OF "ACT OF ENTRUSTMENT" FOR THE PURPOSES OF THE DECISION AND THE FRAMEWORK

5.1. What is the purpose of an "act of entrustment"?

An act of entrustment is necessary in order to set out the organisation of a public service mission. It is the official act which entrusts the company to carry out the SGEI, spells out the mission of general interest of the undertaking concerned, as well as the scope and the general conditions of the functioning of the SGEI/SSGI. A public service assignment is necessary in order to define the obligations of the undertaking and of the State. In the absence of such an official act, the specific task of the undertaking is unknown and a fair compensation cannot be determined.

5.2. What types of acts of entrustment are considered to be adequate in the meaning of the Decision?

The Decision only requires that the act of entrustment be one or more official acts carrying legal force in national law. The specific form of the act (or acts) may be determined by each Member State, depending notably on its political/administrative organisation.

Indeed, according to basic rules of administrative law, every public authority needs a legal basis in order to define a SGEI and to finance it. Consequently, the notion of act of entrustment can largely correspond to the legal basis that the public authority concerned will choose at each time at its own discretion.

There is therefore no standard "one size fits all" act of entrustment; it really depends both on the public authority entrusting the service and on the activity concerned.

It should be noted that the entrustment requirements under the State aid rules are rather basic: this does not exclude the possibility for Member States' authorities to add more detail into the act of entrustment, such as, for example, quality requirements.

An approval given by a public authority to a service provider, authorizing him to provide some services does not correspond to the notion of act of entrustment. This is because it does not create an obligation for the operator to provide the services concerned, but just allows him to exercise an economic activity by offering some services in a market. Such an example could be the approval given to an operator to open a centre of childcare or a centre for elderly people just based on the compliance of the operator with public health and/or safety regulation.

Examples of acts of entrustment:

- Concession contract and tender documents[70].

[70] Commission Decision in case N 562/2005 – Italy - Allongement de la durée des concessions de sociétés d'autoroutes du Tunnel du Mont-Blanc (ATMB) et du Tunnel Maurice Lemaire (OJ C 90, 25.4.2007, http://ec.europa.eu/community_law/state_aids/transports-2005/n562-05.pdf.

- Ministerial program contracts[71].
- Ministerial instructions[72].
- Laws[73] and Acts[74].
- Yearly or pluriannual performance contracts[75].
- Legislative decrees[76] and any kind of regulatory and municipality acts and decisions.

5.3. Should the act of entrustment define a "mission" or "specific activities" to be accomplished?

The act of entrustment does not have to define each specific activity concerned in the provision of the relevant SGEI/SSGI.

Where it is not possible to define more specifically the services concerned, broad definitions of the public service mission can be accepted, as long as the scope of the mission is clearly set out. Nevertheless, the more precisely an entrustment specifies the mission assigned, the greater the level of protection from challenge under state aid law (for example by competitors) for the compensation granted.

It is also in public authorities' discretion and best interest to specify further the requirements linked to the accomplishment of SGEI missions, for instance by indicating quality requirements or making appropriate public consultation when defining the tasks to be entrusted. In this way, not only the quality of the SGEI becomes better, but also the transparency towards citizens and taxpayers is increased.

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71 Commission Decision in the case NN 51/2006 – Italy – Compensation for the universal postal service 2000-2005 (OJ C 291, 30.11.2006, http://ec.europa.eu/community_law/state_aids/comp-2006/nn051-06.pdf.

72 Commission Decision in case N 166/2005 – UK – Government rural network support funding to Post Office Limited for 2006-2008 (OJ C 141, 16.6.2006, http://ec.europa.eu/community_law/state_aids/comp-2005/n166-05.pdf.

73 Commission Decision in case NN 8/2007 – Spain – Financing of workforce reduction measures of RTVE (OJ C 109, 15.5.2007, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-8-2007-WLWL-07.03.2007.pdf.

74 Commission Decision in case N 395/05 – Ireland – Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency (OJ C 77, 5.4.2007, http://ec.europa.eu/community_law/state_aids/comp-2005/n395-05.pdf.

75 Commission Decision in case C 24/2005 – France – Laboratoire National d'Essai (OJ L 95, 5.4.2007).

76 See case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006], ECR I-2941.

5.4. How to draft an act of entrustment concerning services that have to be on the one hand looked at through a global approach, and on the other tailor made to the specific needs of individual users? Does the act of entrustment have to describe each service that should be provided?

The act of entrustment needs to define the nature and the duration of the public service obligations, the entities entrusted with the provision of such services, the parameters of calculation of the compensation (and not the exact amount of compensation to be allocated), as well as the safeguards to avoid overcompensation.

It is not always necessary to include in the act of entrustment each type of the services which have to be provided. For instance, there is no need to refer to each type of healthcare needed, but for instance the definition of "daily medical assistance at home to elderly people in the city x" could suffice. However, the entrustment must allow the correct allocation of costs between SGEI and non SGEI activities which the service provider may offer.

Certain SGEI/SSGI, like for instance the assistance to disadvantaged or elderly people, may require various kinds of services within the framework of a global public service mission. The purpose of the act of entrustment is not to restrain the organisation of the provision of SGEI, but to have a clear view of the framework in which those services are provided and the scope of the services concerned.

The elements that have to be included in the act of entrustment for the purpose of the application of State aid rules do not in any case limit the discretion public authorities have in the definition and organisation of their SGEI. Member States and public bodies have a wide margin of discretion in defining the public service missions they want to put in place and the specific/very detailed services which are included in these missions do not need to be specified[77].

Public authorities can go beyond the basic entrustment requirements and specify criteria they want to set for performance improvement by the undertakings entrusted with SGEI. The Decision and the Framework just require the definition of the SGEI framework-mission within which new or improved SGEI will be delivered.

Examples:

- In case a public authority wants to set up a shelter for women in need, it would be sufficient to specify within the act of entrustment that the SSGI provider is entrusted with the mission to set up a shelter which will provide the necessary assistance to women in need, taking into account the multiplicity of these needs, in particular where necessary at the medical, psychological and social level (for example housing problems, failures in families etc.).

- In case a public authority wants to set up a drug rehabilitation centre, it would be sufficient to specify that the service provider is entrusted with the mission to organise a drug rehabilitation service, that would provide drug addicts with the necessary

[77] It has to be noted that the wide margin of discretion Member States have in defining their public service missions is always subject to control for manifest error made by the Commission and the Court of Justice.

medical assistance but also include other services directly related to the effective rehabilitation of the persons to be treated (for example, psychological support, contacts with families, assistance with social problems etc.).

5.5. How to draft an act of entrustment concerning services that have to be adapted in the process of delivery to changing situations in terms of care intensity, users' profiles, and users' number?

Public authorities and service providers have, most of the time, an experience of the personalised services and the specific needs that may arise during the provision of SGEI, as well as the differentiations of the conditions that may arise. On the basis of their experience, they can make a safe estimation of the possible additional needs that may arise and reflect this estimation in the act of entrustment.

2 options are possible:

- The public authority may define in the act of entrustment an ex post correction mechanism which will allow for periodic revision of the mission entrusted[78].
- The public authority may update the act of entrustment if it sees that a specific service was not envisaged and could be supplied by the same entity.

Example:

A municipality would like to provide integrated services covering the various needs of elderly people (medical assistance at home, meal delivery, home cleaning services, etc) How to ensure that the municipality can compensate the service provider for the provision of additional services responding to needs which were not initially foreseen?

It is always possible to update the entrustment act if one sees that a specific service was not envisaged and could be supplied by the same association. As clarified above the municipality could also make an estimation of such additional services from its prior experience in the field, or define ex post correction mechanisms for such needs.

5.6. How can the requirement for an act of entrustment for SGEI/SSGI providers be reconciled with the autonomy and the freedom of initiative of such providers that various Member States recognise and respect, according to their constitutional/legal framework?

The requirement related to an act of entrustment does in no way limit the autonomy and the freedom of initiative of entities which provide social services. Such entities are absolutely free to take initiatives in developing and improving or innovating such services and make proposals to public authorities.

[78] For this point see Commission Decision in cases N 541/2004 and N 542/2004 – Pays Bas – Retention of financial reserves by sickness funds and Risk equalisation system (OJ C 324, 21.12.2005, http://ec.europa.eu/community_law/state_aids/comp-2004/n541-542-04.pdf.

The notion of the act of entrustment is flexible enough to correspond in this case to the decision of the public authority approving and financing such proposals. Therefore, in case a public authority approves a proposal made by a service provider, in accordance with the provisions of the Decision, the definition of the SGEI mission, as well as the parameters for the calculation of the compensation and the safeguards to avoid overcompensation, made by the service provider, have to be included in the content of such a decision.

6. COMPENSATION

6.1. The Decision asks for the parameters of costs to be defined in the entrustment act. How is it possible to do it before offering the service?

It is often impossible to know all the details of costs when an undertaking starts providing a SSGI/SGEI. Consequently, the Decision does not request to provide a detailed calculation in advance of, for example, a price per day, per meal, per care to be reimbursed by the public funding, when this is not possible. Public authorities remain of course free to specify such parameters if they wish.

The Decision only requires that the entrustment includes the basis for the future calculation of the compensation, for example that the compensation will be determined on the basis of a price per day, per meal, per care based on an estimation of the number of potential users…

What is important is that there is clarity over the basis on which the funding body (the State, the local authority) will finance the provider. Such a transparency is also beneficial to taxpayers.

Examples:

- In case a public authority wants to set up a shelter for women in need, the parameters for cost compensation could be:
  - the number of women and children accommodated in the shelter over a one year period;
  - the number of days spent in the shelter during this period.
- In case a public authority wants to set up a drug rehabilitation centre, the parameters for cost compensation could be:
  - the number of drug addicts undergoing treatment over a one year period;
  - the volume of medication needed over a one year period.

6.2. Even for experienced entities providing SGEI/SSGI, there may be a high level of cost unpredictability and a risk for an ex-post deficit: unpredictable changes in care intensity; in users' profiles; in users' number and in the level of revenues (user fees not paid, fluctuation in quantity of users, refusal of contributions by other public authorities). How can public entities cope with this situation?

A company in charge of a SGEI/SSGI, especially when it starts its activity or has a limited size, can not commit itself on a fixed budget or on a price per unit. Clearly, if there are more users, the costs will increase; if some of them cannot pay a predefined participation, the revenues will be lower, etc.

However this does not change the way the costs incur (salaries paid, rent…) or can be established (per care…). It mainly means that the provider will face higher costs and the public body will have to pay higher compensations.

All these situations can be taken into account under the Decision and the Framework. When an estimation of changing or unpredictable situations that may arise during the provision of SGEI is not provided for in the act of entrustment, the definition of ex post correction mechanisms of the estimated costs in relation to the real costs may be a way of anticipating such situations.

2 options are possible:

- The public authority may define in the act of entrustment an ex post correction mechanism which will allow for periodic revision of the cost parameters.

- The public authority may update the act of entrustment if it sees that a cost parameter has to be modified.

6.3. How to determine the parameters for cost compensation (article 4(d) of the Decision) and how to define the arrangements for overcompensation (article 4(e) of the Decision) in case a given SGEI/SSGI is financed by two or several public authorities?

In case two or several public authorities (the town and the region for instance) want to finance partially for instance a centre for disadvantaged persons, each authority may determine the parameters of the compensation according to the service under consideration, eventually following discussions with the service provider.

The public authorities determine their individual contribution to the compensation as they wish, as long as the total amount corresponding to all different kinds of compensations received does not exceed the real net costs supported by the SGEI provider.

6.4. Is there a need to keep separate accounts for an undertaking providing a SGEI, while carrying out other commercial activities?

Yes, there is a specific need and obligation for undertakings providing SGEI while carrying out other commercial activities, to keep separate accounting for each separate activity. It is the only way for such undertakings to prove that the

compensation allocated does not exceed the exact net costs of the SGEI provided and that thus no overcompensation is involved. At the same time separate accounting for activities falling inside and outside of the scope of SGEI allows the Commission to assess whether the criteria laid down by the Decision and the Framework are fulfilled[79].

6.5. Is there a need to keep separate accounts for an entity which is entrusted with the provision of SGEI and realises also non economic activities?

In such a situation, there is no legal obligation of keeping separate accounting. Nevertheless, the internal accounts should enable the identification of the costs linked to the provision of the SGEI; otherwise, the amount of the compensation cannot be established. Moreover, in case of complaint, the undertaking in charge of the SGEI should be able to demonstrate the absence of overcompensation.

6.6. Which costs can be compensated when an undertaking uses the same infrastructure to provide both SGEI and economic activities which are not qualified as SGEI?

The undertaking must allocate costs for both activities. Costs allocated to the SGEI may cover all the variable costs incurred in providing the SGEI, a proportionate contribution to fixed costs common to both SGEI and non SGEI, and a reasonable profit.

6.7. What is the meaning of reasonable profit within the calculation of the compatible compensation?

According to article 5.4 of the Decision, reasonable profit means 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.

This rate shall not normally exceed the average rate for the sector concerned in recent years[80].

6.8. Should tax benefits arising from the welfare status of an entity be counted among the revenues within the meaning of Article 5.3 of the Decision?

The compensation may cover the difference between the costs actually incurred in providing the SGEI and the relevant receipts. A tax benefit can be either a revenue or

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[79] SeeArticle 5, point 5 of the Decision, as well as paragraph 19 of the Framework.

[80] According to Article 5.4 of the Decision: "*For the purposes of this Decision "reasonable profit" means 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 shall not normally 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 constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency*".

a cost reduction. Irrespective of its nature it has to be taken into account when determining the amount of compensation necessary to provide the SGEI.

When the tax benefit consists in a cost reduction, this means that no compensation can be awarded for the amount corresponding to that reduction. When the tax benefit consists in a revenue for the service provider, this means that it will have to be deducted from the compensation to be allocated.

6.9. Should payments made under a profit-and loss transfer agreement within a public holding be counted among the revenues within the meaning of Article 5.3 of the Decision?

In several Member States, public holding undertakings have profit and loss transfer agreements, pursuant to which a profitable subsidiary has to transfer its profits to the holding, which then uses these profits to cover losses generated by a loss-making subsidiary, which performs SGEI.

Such payments received to cover losses of SGEI are to be counted among the revenues within the meaning of Article 5.3 of the Decision and will accordingly reduce the net costs eligible for compensation.

6.10. When the parameters for the compensation are defined for a given entity, should there be a comparison with other entities? Should there be a judgement on efficiency? How can the value of pastoral care, spiritual guidance, additional time taken, etc be compared?

It is for the public authority to define the extent of the mission concerned and if non-measurable tasks (for instance for elderly or disabled people…) have as a consequence to generate more costs, for instance in terms of time spent by the people providing the service. These costs can of course be taken into account and compensated. The Decision does not require any judgement of efficiency, just as it leaves judgments on quality of service required to the public authorities concerned.

For example, when two entities provide SGEI/SSGI for which a different level of quality is defined in the act of entrustment, each one of the service providers will receive the compensation corresponding to its own different costs made for reaching the level of quality required.

6.11. Does the Decision require the selection of the least expensive company for the provision of SGEI/SSGI?

No, the Decision and the Framework do not require this. Member States are responsible for defining the SGEI they want and notably the quality of these services. Where the quality is higher, the costs to provide the service may be higher and the compensation can cover all the costs actually incurred by the company.