COMMUNITY FRAMEWORK FOR STATE AID IN THE FORM OF PUBLIC SERVICE COMPENSATION

1. Purpose and scope

1. It results from the case law of the Court of Justice\(^1\) that public service compensation does not constitute state aid within the meaning of Article 87(1) of the Treaty if it meets certain conditions. If those conditions are not met and if the general criteria for the applicability of Article 87(1) are satisfied, such compensation does constitute state aid.

2. Decision No … of … on the application of Article 86 of the 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 (SGEIs) spells out the conditions under which public service compensation constitutes state aid compatible with Article 86(2) and exempts such aid from the prior notification requirement. Public service compensation that constitutes state aid and does not fall within the scope of Decision No … is subject to the prior notification requirement. The purpose of this framework is to specify under what conditions such state aid can be compatible with the common market in accordance with Article 86(2).

3. This framework is applicable in all the sectors governed by the EC Treaty, with the exception of transport.

4. The provisions of this framework apply without prejudice to the stricter specific provisions relating to public service obligations contained in sectoral Community legislation and measures. They are not applicable to public service broadcasting covered by the Commission communication on the application of state aid rules to public service broadcasting\(^2\).

5. This framework applies without prejudice to the Community provisions in force in the field of public procurement.

\(^{1}\) Judgment of 24 July 2003 in Case C-280/00 Altmark Trans and judgment of 27 November 2003 in Joined Cases C-34/01 to C-38/01 Enirirsorse SpA.

\(^{2}\) JO C 320, 15.11.2001.
2. Conditions governing the compatibility of public service compensation that constitutes state aid

2.1. General provisions

6. In its Altmark judgment of 24 July 2003, the Court laid down the conditions under which public service compensation does not constitute state aid. Fixing the amount of compensation under a genuine and effective competitive tendering procedure or on the basis of the costs of well-run medium-sized undertakings is such as to increase the effectiveness of SGEIs without jeopardising their operation. However, it appears that in some cases the criteria laid down in Altmark for the setting of the amount of compensation will not be met and that such compensation will, therefore, constitute state aid.

7. The Commission considers that such state aid may be declared compatible with the Treaty under Article 86(2) if it is necessary to the operation of the SGEIs and does not affect the development of trade to such an extent as would be contrary to the interests of the Community. However, the following conditions should be met.

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

8. It results from the case law that, in the absence of Community rules governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be classified as being SGEIs. Under these circumstances, the Commission’s task is therefore to ensure that these provisions are applied with no manifest error. It transpires from Article 86(2) that undertakings entrusted with the operation of SGEIs are undertakings entrusted with “a special task”.

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

9. The concept of service of general economic interest 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. Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and of the State. The term “State” covers the central, regional and local authorities.

10. The public service task must be assigned by way of an official act that, depending on the legislation in Member States, may take the form of a legislative or regulatory act or a contract. It may also be laid down in several acts. The act or series of acts should specify among other things:

- the precise nature of the public service obligations;
- the undertakings and territory concerned;

3 Such encouragement must not be taken to mean that, in the Commission’s view, undertakings entrusted with the operation of SGEIs are necessarily badly run.

4 See, in particular, the judgment by the Court of 21 March 1974 in Case C-127/73 BRT v SABAM [1974] ECR-313.
• the nature of any exclusive or special rights assigned to the undertakings;

• the parameters for calculating and reviewing any compensation and for calculating the reasonable profit. These parameters may include the specific costs actually borne by the undertakings in the regions referred to in Article 87(3)(a) and (c) of the EC Treaty;

• the arrangements for repaying any over-compensation and the arrangements for any intervention by the State in the event of under-compensation.

11. Point 10 does not apply in the case of social charges imposed by the State. In such cases, the Member State may compensate the undertakings concerned on the basis of figures subsequently provided by them.

2.4. Amount of compensation

12. The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. Such profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without affecting the quality level of the services laid down by the State. The costs to be taken into consideration are all the costs associated with operation of the SGEI. Where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the SGEI, only the costs associated with the SGEI may be taken into consideration. In this case, the provisions of the Commission Directive on the transparency of financial relations between Member States and certain undertakings must be complied with. The internal accounts must, in particular, show separately the costs and receipts associated with the SGEI and those of other services, as well as the parameters for allocating costs.

13. Where an undertaking is entrusted with the operation of several SGEIs either because the authority assigning the SGEI is different or because the nature of the SGEI is different, the undertaking’s internal accounts must make it possible to ensure that there is no over-compensation at the level of each SGEI.

14. The costs allocated to the SGEI may cover all the variable costs incurred in providing the SGEI, an appropriate contribution to fixed costs and an adequate return on the capital assigned to the SGEI. The costs linked to any activities outside the scope of the SGEI must comprise all the variable costs, an appropriate contribution to fixed costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the SGEI. Calculation of the costs must be based on generally accepted accounting principles.

15. The revenue to be taken into account must include at least the entire revenue earned from the SGEI. If the undertaking in question enjoys any special or exclusive rights

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5 Directive 80/723/EEC.

6 See the judgment by the Court of 3 July 2003 in Joined Cases C-83/01P, C-93/01P and C-94/01P Chronopost SA.
linked to another SGEI that generates profit in excess of the reasonable profit defined in the following point or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 87, and are added to its revenue. The Member State may also decide that the profits accruing from other activities outside the scope of the SGEI must be allocated in whole or in part to the financing of the SGEI.

16. “Reasonable profit” should be taken to mean a rate of return on capital that must take account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the SGEI, a comparison may be made with undertakings situated in other Member States or, if necessary, in other sectors. In determining reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided.

17. The amount of compensation includes all the advantages granted by the State through state resources. The latter must be effectively used by the undertaking for the operation of the SGEI for which they have been granted. State resources granted for the financing of an SGEI and used to intervene on other markets outside the scope of the SGEI constitute aid that is not justified by the public service obligation and is, therefore, incompatible. However, these provisions are without prejudice to the freedom of undertakings receiving public service compensation to use their reasonable profit as they wish.

18. Where identical public service obligations are incumbent on several undertakings, the parameters for calculating compensation must be the same for all of them.

3. Over-compensation

19. The Member State must check regularly, or arrange for regular checks to be made, on the absence of over-compensation. Since over-compensation is not necessary for the operation of the SGEI, it constitutes incompatible state aid that must be paid back to the State.

20. Where the amount of over-compensation does not exceed 10% of the amount of annual compensation, it may be carried forward to the next year. Some SGEIs may have costs that vary significantly each year. In such cases, over-compensation in excess of 10% over a number of years may prove necessary for the operation of the SGEI. However, the situation should be reviewed at intervals that should, in any event, not exceed three years and any over-compensation discovered at the end of that period should be paid back.

21. Any over-compensation may be used to finance another SGEI operated by the same undertaking, but such a transfer must be shown in the undertaking’s accounts.

22. In cases where compensation benefits a public undertaking, any over-compensation may be used by the 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 normal commercial procedures, 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. This operation must be clearly identified in the balance sheet of the recipient undertaking and must be the result of a formal decision by the public authorities. This decision must identify the exact use to which the financial transfer is to be put. If, though, the financial injection by the State does not comply with the private investor criterion, it must be notified to the Commission in accordance with Article 88(3) of the Treaty.

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

4. Application of the framework

24. This framework will apply as of its publication in the Official Journal of the European Union. Its validity will end on 31 December 2007. The Commission may, after consulting the Member States, amend this framework before 31 December 2007 for important reasons linked to the development of the common market.

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

- the provisions of this framework if the aid was granted after publication of the framework in the Official Journal;
- the provisions in force at the time the aid was granted in other such cases.