Chapter 11
Transport

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Abstract This chapter explores the complexities of the transport sector and the way it has been influenced by recent legislative developments on Services of General Economic Interest (SGEI). Starting on the different legal bases, the authors examine Article 93 TFEU which applies to land transport and Article 106 TFEU which applies to air and maritime transport. It is argued that Article 93 TFEU takes a more permissible view on State aid. Given the diversity of legal bases in the transport sector, the remainder of the chapter is divided between an initial discussion on the applicable rules and case law in land transport and, lastly, air and maritime transport. With regard to land transport, it is argued that while the Commission is restricted by Articles 93, 91 and 109 TFEU, there are indications that the Commission has started taking a more assertive role here. This part of the chapter focuses on the applicable secondary legislation, including the new *de minimis* Regulation which exempts small local transport undertakings from notification under certain circumstances. The last part of the chapter examines air and maritime transport with particular focus on the new SGEI Decision which has lowered the notification thresholds and this is felt particularly with regard to airports. The new SGEI Framework applies, other than the 2005 framework, to air and maritime transport. The possible effects of the new rules are assessed on the basis of available figures from the transport sector as well as Commission Decisions and case law.

The views expressed in this chapter are strictly personal to the authors, and can in no way engage the Institution they are working for.

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11.1 Introduction

The aim of this chapter is to explore the rules applicable to public services and to SGEI in the field of transport following the adoption of the 2012 SGEI package (see for the references to the measures of this package Chap. 1 above, footnotes 1–4). Transport has in many regards always had a special place in EU law. In this diverse sector, the Union's powers are constraint and wide-ranging at the same time. On the one hand, the freedom to provide services only applies to transport if the Union legislators have adopted secondary legislation on market opening (see Article 58(1) TFEU[1]). On the other hand, the Court has emphasised on several occasions that the Treaty chapter on Transport, Title VI, confers wide-ranging competences on the Union, enabling it to develop a common transport policy.[2]

Within this, the powers of the Union with regard to State aid have steadily been growing in significance. The Transport chapter contains a special provision for State aid in Article 93 TFEU (ex Article 73 EC), and until the Barroso II Commission took office in 2010, State aid for transport was one of the competences of the Commissioner for transport. Since then it has become a competence of the Commissioner for competition; currently Vice President Almunia. This, as well as the trend of streamlining and harmonising the various State aid procedures in the different subsectors is symbolic of the growing significance of State aid control in transport.

The transport sector is not only 'special' when it comes to its place within EU law and State aid law in general, but also with regard to its place in SGEI. To start

[1] Article 58 (1) TFEU provides: 'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'.

[2] Standing case law since CJEU, Case 97/78 *Schumalla* [1978] *ECR* 2311, para 4.

with, SGEI are called 'public services' in transport. Very early on, in 1969, specific secondary legislation covering State aid for public services in land transport[3] was adopted (Regulations (EEC) No. 1191/1969 and 1192/1969[4]). It comes as no surprise that a substantive amount of case law, including the *Altmark* judgment, was given in the context of public transport services. Finally, Union regulation in transport has, to an important degree, harmonised rules on SGEI in sectoral legislation.[5] This restricts the otherwise very broad discretion that the Member States enjoy in defining and imposing SGEI. According to the case law, Article 106(2) TFEU cannot be relied on in a field which is the subject of harmonisation, in the context of which the Union legislature has taken account of the general interests, in contradiction to the rules of that harmonisation.[6]

In addition to taking a special place within general Union law, State aid law and SGEI, the transport sector 'offers' the further complication that it is split into several different subsectors. In spite of the recent attempts to streamline State aid rules, the transport sector remains complex and is, in and of itself, far away from being harmonised. This chapter will explore the differences and similarities within the transport sector, and the relationship to the general rules on SGEI. It aims to give a concise overview of the rules currently in force in the transport sector.

The chapter will proceed as follows: an initial examination of Articles 93 and 106 TFEU explains the differences with regard to the legal bases (Sect. 11.2). This is followed by an examination of the applicable rules, the case law and the case practice of the Commission in land transport (Sect. 11.3) and in air and maritime transport (Sect. 11.4).

11.2 Different Legal Bases: Article 93 TFEU (Land) Versus Article 106 TFEU (Air and Maritime)

Article 93 TFEU constitutes a *lex specialis* to Article 106(2) TFEU. Therefore, State aid for public services in the area of land transport has to be assessed on the basis of the former. Article 93 TFEU states:

> *Aids* shall be compatible with the Treaties *if* they meet the needs of coordination of transport *or if* they represent reimbursement for the discharge of certain obligations inherent in the concept of a *public service* [emphasis added].

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[3] 'Land transport' is commonly used as a short hand for transport by rail, road and inland waterway, as defined in Article 100 (1) TFEU.

[4] *OJ* 1969 L 156/1 respectively 8. The former has been repealed by Regulation (EC) No. 1370/2007, the latter is still in force. See detailed discussion in Sect. 11.2.

[5] Regulation (EC) No. 1370/2007 (land transport), Regulation (EC) No. 1008/2008 (air services) and Regulation (EC) No. 3577/92 (maritime services). These Regulations are discussed in more detail below.

[6] CJEU, Case C-206/98 *Belgium* v *Commission* [2000] *ECR* I-3509, para 45.

Comparing this to 106(2) TFEU, we note important differences:

> 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 the Treaties, in particular to the rules on competition, *in so far 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 Union*. [emphasis added].

Looking at the wording and scope of these two Articles it becomes clear that Article 93 TFEU takes a more permissible view on State aid in the land transport sector than on State aid for SGEI in general: Article 93 TFEU explicitly refers to 'aids' whereas Article 106(2) TFEU only implies their existence. They also approach aids from a different angle: Article 93 TFEU starts from the premise that aids *are* compatible, if they meet one of two broadly worded exceptions. In contrast, Article 106(2) TFEU starts with the opposite premise that SGEI are subject to the general *prohibition* of State aid contained 'in the Treaties', and are only exempt from control if the prohibition would obstruct their performance.

This difference in attitude is exacerbated by the fact that the exemptions in Article 106(2) TFEU for the performance of SGEI are limited by the second sentence which finds no equivalent in Article 93 TFEU: exemptions from the general prohibition for the benefit of SGEI are only permissible in so far as they do not affect trade to such an extent as would be contrary to the (potentially wide-ranging) 'interests of the Union'.

Finally, Article 106(3) TFEU grants exclusive competence to the Commission for adopting Directives and Decisions. There is no such provision with regard to land transport in Article 93 TFEU. When proposing Regulations (EEC) No. 1191/1969 and 1192/1969, the Commission based itself on what are today Articles 91 and 109 TFEU (at the time Articles 75 and 94 EEC).

In 2005, the Commission decided to adopt secondary legislation on SGEI (the 2005 SGEI Decision) on the basis of (the then) Article 86(3) EC. This raises the question as to whether it could also have adopted Regulations (EEC) No. 1191/1969 and 1192/1969 on the basis of Article 90(3) EEC. In 1969, the Commission had not yet 'discovered' that Article 90 EEC (today Article 106 TFEU) also applied to State aid. Furthermore, the Court had not yet handed down its judgment in *Nouvelles Frontières*, which clarified that 'rules in the Treaty on competition, in particular Articles 85–90, are applicable to transport'.[7] But the Commission stuck to its old habit of basing itself on Articles 71 and 89 EC when proposing in 2000 to Parliament and Council what has finally been adopted, after seven years of protracted negotiations, as Regulation (EC) No. 1370/2007.[8]

Could it have opted instead for Article 86(3) EC (now 106(3) TFEU)? At first sight, Article 93 TFEU is *lex specialis* only to Article 106(2) TFEU, but—as it does not foresee a legal basis by—*not* to Article 106(3) TFEU. On the basis of

[7] CJEU Joined Cases 209- 214/84 *Nouvelles Frontières* [1986] *ECR* 1457, para 42.

[8] Regulation EC 1370/2007 *OJ* 2007 L 315/1.

Nouvelles Frontières, Article 106(3) TFEU would thus be available as a legal basis for Directives and Decisions which concern public land transport services. However, the legal basis provided for in Article 106(3) TFEU is limited to Directives and Decisions for 'the application of the provisions of this article'. In State aid, the provision of Article 106(2) TFEU cannot be applied to public services in land transport, because Article 93 TFEU is *lex specialis*. This means that Article 106(3) TFEU can be relied upon for Directives and Decisions concerning, for example, the application of Articles 101 and 102 TFEU to undertakings entrusted with public land transport services. However, it cannot be relied upon for the application of State aid rules to these undertakings.

11.3 Land Transport

As outlined in the previous section, public services in the land transport sector occupy a special position in the SGEI field. The Commission's role is limited, not only by the restrictions deriving directly from Article 93 TFEU, but also by Articles 91 and 109 TFEU which give the last say to the Union legislator, rather than to the Commission as is the situation under Article 106(3) TFEU.

However, there may be room for the Commission to take a more assertive role in the field of land transport, as it has done recently in the air and maritime transport sector (see following section). In the second half of the 2000s, following the *Altmark* judgment, the Commission has opened eight formal investigation procedures[9] into public land transport services; thus far, it has closed four of them with positive decisions.[10] The remaining four investigations are, however, still pending. This year, it has launched another investigation concerning Italy.[11]

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[9] See the openings in State aid cases: C 58/2006 *Verkehrsverbund Rhein-Ruhr, OJ* 2006 C 74/18; C 16/2007, *Postbus AG, OJ* 2007 C 162/19; C 31/2007 *Córas Iompair Éireann Bus Companies*, *OJ* 2007 C 217/44; C 47/2007 *Deutsche Bahn Regio, OJ 2008* C 35/13; C 54/07 *Emsländische Eisenbahn GmbH, OJ* 2008 C 174/13; C 3/2008 *Bus transport CAS services, OJ* 2008 C 43/19; C 17/2008 *Bus transport in Usti Region, OJ* 2008 C 187/14; C 41/2008 *Danske Statsbaner*, *OJ* 2008 C 309/14; the opening of the EFTA surveillance authority concerning bus transport in Oslo, nyr in the *OJ,* press release PR/12/18, following the annulment of a no objection decision by the EFTA Court in Case E-14/10 *Konkurrenten.no AS* v *EFTA Surveillance Authority*, EFTA Court Report 2011, p. 266.

[10] Commission Decision 2009/845/EC of 26 November 2008 on State aid granted by Austria to the company Postbus in the Lienz district, *OJ* 2009 L 306/26; Commission Decision 2009/325/EC of 26 November 2008 on State aid concerning public service compensations for Southern Moravia Bus Companies, *OJ* 2009 L 97/14; Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner, *OJ* 2011 L 7/1; Commission Decision 2011/501/EU of 23 February 2011 on Aid for the Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBM) companies in the Verkehrsverbund Rhein Ruhr, *OJ* 2011 L 210/1.

[11] SA.33037, SIMET, nyr, see IP/12/518.

Land transport remains excluded, for the legal reasons set out above, from the scope of application of the 2012 SGEI decision[12] and the 2012 SGEI framework.[13] On the other hand, the new Communication on the notion of State aid and the *de minimis* Regulation also apply to public land transport services. With regard to the former, this follows from the fact that the notion of State aid is identical across all sectors. However, the *de minimis* Regulation could indicate that the Commission is moving towards a more unified approach to SGEI in general.

The remainder of this section will discuss the rules of secondary law, the Commission notices and guidelines, the principles the Commission has developed for the direct application of Article 93 TFEU and compare them to the general rules applicable to other sectors pursuant to the 2012 SGEI package.

11.3.1 Secondary Law in Land Transport: Regulations (EC) No. 1370/2007 and 1192/1969

11.3.1.1 Regulation (EC) 1370/2007 on Public Passenger Transport Services by Rail and by Road

The Regulation entered into force on 3 December 2009 and has been widely discussed in the academic literature[14]; therefore only a short summary of the Regulation will be given here. Secondly, while the Regulation is also of significance for public procurement of land transport service contracts and concessions, only its significance for State aid will be dealt with here.

The Regulation clarified the situations in which State aid in the land transport sector is exempted from prior notification to the Commission, and corresponds therefore in its function to the 2012 SGEI decision. According to its Article 9(1), aids, here called 'public service compensation', do not need to be notified to the Commission under Article 108(3) TFEU if they comply with the Regulation. It reads:

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[12] Commission Decision of 20 December on the application of Article 106(2) TFEU 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* L7, C(2011) 9380, Article 2.4.

[13] Recital 8.

[14] See for example Skovgaard Oelykke 2008; Kekelekis and Rusu 2010; Maxian Rusche and Schmidt 2011; Schröder 2010; Polster 2009, 2010; Pünder 2010a, b, c; Schmitz and Winkelhüsener 2009; Nettesheim 2009; Linke 2010; Saxinger 2010a, b; Scheps and Otting 2008; Ziekow 2009; Olgemöller and Otting 2009; Schön 2009; Wittig and Schimanek 2008; Schröder 2008; Winnes 2009; Bayreuther 2009; Röbke and Rechten 2010; Deuster 2010, p. 591; Kramer 2010; Deuster 2009; Haats and Richter 2010; Hübner 2009; Tegner and Wachinger 2010; Stickler and Feske 2010; Jasper et al. 2008; Winnes et al. 2009; Kaufmann et al. 2010.

> Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the common market.

The situation of public land transport services is to a certain extent comparable to social services under the 2012 SGEI decision, insofar as they are exempted from notification independently of the amount of compensation paid. However, the conditions for being exempt are far more demanding for public land transport services.

The precise conditions for complying with the Regulation can be found in Articles 4–7. Article 4 specifies the mandatory content of such 'public service contracts'. In particular, the public service obligation has to be clearly defined, establishing the parameters for compensation and nature of exclusive rights granted in advance. Article 5 sets out the principle that public service contracts have to be awarded on the basis of the public procurement Directives 2004/17/EC and 2004/18/EC and that public service concessions have to be awarded on the basis of a competitive tender procedure. This is subject to exceptions which apply mostly to in-house awards and rail services. Article 6 and the Annex specify the detailed rules on how compensation may be calculated. Article 7 contains publication obligations.

Comparing the conditions contained in the Regulation with the conditions of the 2012 SGEI decision, there are two main differences: the Regulation requires a competitive tender and compensation is more closely linked to efficiency. The first difference is that the Regulation requires compliance with the applicable rules on public procurement, and prescribes the use of a competitive tender also for concessions. The use of competitive tenders is therefore made mandatory also for concessions. State aid control in this instance is used as a tool to enforce compliance with public procurement rules. In contrast to this, the 2012 SGEI decision refers to 'the requirements flowing from the Treaty or from sectoral Union legislation'. This would appear to include the *Telaustria* case law[15] and the public procurement Directives.[16] However, the *Telaustria* case law leaves more discretion to the public authority awarding a concession than the Regulation, which requires not only transparency and non-discrimination, but also a competitive tender.

The second difference is that the Annex stipulates that the method of compensation must promote the maintenance or development of effective management by the public service operator, which can be the subject of an objective assessment. This is similar to the efficiency incentives prescribed under the 2012 SGEI

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[15] CJEU, Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH* v *Telekom Austria AG* [2000] *ECR* I-10745, para 60.

[16] This is also supported by an *e contrario* with comparison to the 2012 SGEI Framework. The Framework applies 'without prejudice to' the requirements flowing from the Treaty or from sectoral Union legislation, which therefore do not constitute a condition for compatibility, but makes the compliance with Union public procurement rules a condition for compatibility (point 2.6).

framework,[17] but goes even further: it implies that the compensation is reduced over time so as to comply with the fourth *Altmark* criterion.

With regard to the scope of application of the Regulation, it is important to note that it only applies where the operator of the service has been granted an exclusive right and/or compensation. Article 3(1) holds:

> Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.

It therefore does not apply to completely deregulated markets such as the United Kingdom with the exception of London,[18] or Poland outside the major conurbations.[19]

The Commission has thus far adopted two final Decisions on the basis of Regulation (EC) No. 1370/2007, namely *Danske Statsbaner*[20] and *Verkehrsverbund Rhein Ruhr*.[21] In both cases, the Commission applied the Regulation to public service contracts that had been concluded before its entry into force. This application *ratione temporis* has been hotly debated with Member States, beneficiaries[22] and in the academic literature.[23] It is currently also the object of a case pending before the General Court.[24]

It should be noted that there is divergence not only with regard to the question as to whether Regulation (EEC) No. 1191/1969 (in force at the time of the conclusion of the contract) or Regulation (EC) No. 1370/2007 should apply to these contracts, but also with regard to the question as to what the precise content of Regulation (EEC) No. 1191/1969 is. This is illustrated by the fact that both the complainant in the *Danske Statsbaner* case and the beneficiary claimed in the

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[17] 2012 SGEI framework, recital 39–43.

[18] Decision N 588/02, recital 47–49. Note, however, that the Commission concludes in this Decision that the measure at stake, the grant for long-distance coach services, does constitute a public service concession compatible on the basis of Article 93 TFEU.

[19] The Commission has recently adopted a number of restructuring aid Decisions concerning regional bus undertakings in Poland; in this context, it has stated that the Polish legislation provides neither for exclusive rights nor for compensation payments; see Decision SA.34088, recital 5; SA.33042, recital 5; SA.32612, recital 5.

[20] Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner, *OJ* 2011 L 7/1.

[21] Commission Decision 2011/501/EU of 23 February 2011 on Aid for the Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBM) companies in the Verkehrsverbund Rhein Ruhr, *OJ* 2011 L 210/1.

[22] See the positions expressed by Denmark, Germany and the beneficiaries in the administrative procedure in the cases mentioned in the two previous footnotes.

[23] See for example: Maxian Rusche and Schmidt (2011); Linke (2010); Saxinger (2009a, b).

[24] GC, Case T 92/11 *Andersen v Commission*, notice of application published in *OJ* C 103/28. This application concerns Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner, *OJ* 2011 L 7/1.

course of the administrative procedure that the Commission should have applied Regulation (EEC) No. 1191/1969. According to *Danske Statsbaner*, this would have resulted in the disputed aid being exempt from notification, whereas according to the complainant, the aid would have to be declared incompatible under that Regulation.

In the meantime, the Court has, in the context of a different case, clarified the temporal application of State aid rules. It has found that unlawful State aid[25] is to be considered as an *on-going* situation, rather than an *existing* situation, and that therefore, the Commission—in absence of any transitional rules—has to apply the new rules to all pending cases involving illegal aid.[26] Therefore, it is now beyond doubt that the Commission has rightly decided to apply Regulation (EC) No. 1370/2007 to all pending cases of unlawful aid.

11.3.1.2 Regulation (EC) Nr. 1192/1969 on Common Rules for the Normalisation of the Accounts of Railway Undertakings

Regulation (EC) 1192/1969,[27] which is based—just like Regulation (EC) No. 1370/2007—on Articles 75 and 94 EEC (now Articles 91 and 108 TFEU), obliges Member States to determine the financial burden on, or benefits for, railway undertakings imposed by any laws, regulations or administrative acts. Member States then need to compare them to other transport undertakings, and pay railway undertakings compensation for any discrepancies (Article 2). This combined action is referred to as 'normalisation', as it has the purpose of creating a level playing field between railways and the other modes of transport (recital 1).

The Regulation distinguishes between three categories of burdens: those for which compensation must be paid (Article 4 (1)); those which must be abolished by 1971 or 1973 (Article 4 (2) and (3)); and those which may be subject to normalisation (Article 4 (4)). Compensation paid pursuant to the Regulation is exempted from prior notification under Article 108(3) TFEU (Article 13 (2)).

It is remarkable that this Regulation—just like its today defunct 'sister' Regulation (EEC) No. 1191/1969 (repealed and replaced by Regulation (EC) No. 1370/2007)—was based on a joint legal basis, and that potential State aid issues were in the mind of the Union legislator back in 1969. Indeed, back then, railway markets were still closed to competition, and therefore, the rationale for State aid control was a concern for intermodal competition.

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[25] That is, aid that has been granted in violation of the stand still obligation of Article 108(3) TFEU, see Article 1 letter f of Regulation (EC) Nr. 659/1999 on laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ* 1999 L 83/1.

[26] CJEU, Joined Cases C-465/09 P -C-470/09 P *Territorio Histórico de Vizcaya a.o. v Commissi*on [2011] *ECR*-I 0000, paras 124–127. This has been recently confirmed in CJEU, Case C-167/11 *De Poli v Commission* [2012] *ECR*-I-0000, para 51.

[27] Regulation (EC) 1192/1969, *OJ* 1969 L 156/8.

Based on the more recent case law in *Deutsche Bahn*[28] and *Antrop,*[29] it appears doubtful whether compensation paid under Article 4(1) actually constitutes State aid in the first place. It would seem—just as for compensation paid under Regulation (EEC) No. 1191/1969—that Member States have an obligation by virtue of Union law to pay the compensation, without any discretion.[30] In such a situation, the payments are not imputable to the State.[31]

The notification exemption remains of a certain importance until today for certain national railway undertakings. They mainly cover costs for social benefits and excessive staff levels, as well as costs resulting from political decisions to keep open certain establishments.

11.3.1.3 SGEI *de minimis* Regulation

Scope: Exclusion of Road Freight Transport

The rationale behind the new SGEI *de minimis* Regulation is to simplify the bureaucratic effort surrounding SGEI that are too small to distort competition or affect trade.[32] This is in line with Vice President Almunia's efforts to streamline State aid procedures.

This Regulation complements rather than replaces Regulation (EC) No. 1998/2006,[33] and Regulation 1998/2006 will remain in force until 31 December 2013.[34] It should be noted that the two Regulations are complimentary as the new Regulation will only apply where there is an SGEI: This Regulation applies to 'aid granted to undertakings providing a service of general economic interest within the meaning of Article 106(2) of the Treaty' (Article 1). In other words, the first *Altmark* condition (entrustment) has to be met.

The legal basis for the 2012 SGEI *de minimis* Regulation is Regulation (EC) No. 994/1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (hereafter: the Enabling Regulation),[35] which in turn is based on Article 94 EEC (now Article

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[28] GC, Case T-351/02 *Deutsche Bahn* v *Commission* [2006] *ECR* II-1047, para 102.

[29] CJEU, Case C-504/07 *Antrop* [2009] *ECR* I-3867.

[30] This has been held by the Court for Regulation (EEC) No. 1191/1969, which contains comparable wording, see CJEU, Case C-504/07 Antrop [2009] *ECR* I-3867, paras 19 and 20.

[31] GC, Case T-351/02 *Deutsche Bahn* v *Commission* [2006] *ECR* II-1047, para 102.

[32] Press release from 20 December 2011: State aid: Commission adopts new rules on services of general economic interest, IP/11/1571.

[33] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, *OJ* 2006 L 379/5.

[34] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimi*s* aid, *OJ* 2006 L 379, Article 6.

[35] *OJ* 1998 L 142/1.

109 TFEU). Therefore, there is no legal obstacle to its application to land transport.

The first *de minimis* Regulation of 2001[36]—in force at the time of the *Altmark* ruling—had nevertheless excluded transport from its scope of application (recital 3 and Article 1a). This is one of the reasons why the Court found in *Altmark* that there was—despite the rather small amount at stake (0.25 EUR per person-kilometre) and the rather local nature of the transport services (within a rural district in Eastern Germany)—an effect on trade.[37]

In the 2006 *de minimis* Regulation, transport is included, but aid for the acquisition of road freight transport vehicles is forbidden, and a lower *de minimis* threshold of 100,000 EUR applies to road transport undertakings. The 2012 SGEI de minimis Regulation excludes undertakings active in road *freight* transport (Article 1(2)(g)). The threshold for other transport undertakings is the same as for all other undertakings, i.e. 500,000 EUR.

Content of the New Regulation

According to this new Regulation on *de minimis* aid, if compensation granted to an undertaking for discharging SGEI fulfils the conditions set out in the Regulation, then the compensation does not need to be notified under 108(3) TFEU.[38] This notification exemption applies to compensation which does not exceed EUR 500,000 over any period of three fiscal years, no matter which form (i.e. a grant, loan, capital injection etc.) the aid takes.[39] If the aid does not come within the threshold of this Regulation, it needs to be assessed by the Commission.[40] Member States are charged with monitoring the correct application of this Regulation.[41] The Regulation entered into force on 28 April 2012 and will apply until 31 December 2018; however it already applies to aid complying with Articles 1 and 2 before its entry into force, and aid complying with it can continue to be implemented for six months after its expiry.[42]

The major differences to Regulation 1998/2006 are that the threshold for the notification exemption has been raised from EUR 200,000 generally and EUR 100,000 for road transport[43] over any period of three fiscal years to EUR 500,000 (Article 2(2) of the new Regulation).

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[36] Commission Regulation (EC) No 69/2001, *OJ* 2001 L 10/30.

[37] CJEU, Case C 280/00 *Altmark* [2003] *ECR* I-7727, para 80.

[38] Article 2(1).

[39] Articles 2 (2) and (3).

[40] Article 4.

[41] Article 3.

[42] Articles 4 and 5.

[43] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, *OJ* 2009 L 379/5, Article 2(2).

In the case of aid in the form of a guarantee, the guaranteed part of the underlying loan must not be above EUR 3,750,000 in order to benefit from this Regulation. In Regulation 1998/2006, the loan is not permitted to exceed EUR 1,500,000 per undertaking in general and EUR 750,000 per undertaking in the transport sector.[44]

As a result of the new SGEI *de minimis* Regulation, in particular small local transport undertakings, which—for whatever reason—fail to comply with Regulation (EC) No. 1370/2007 may not have to fear any negative consequences on the State aid side of things, as long as their compensation does not exceed EUR 500,000 over three years.

11.3.2 Guidelines and Frameworks

The Commission has also adopted guidelines and frameworks on the basis of Article 93 TFEU. According to the case law of the Court, by adopting such pieces of soft law, the Commission auto-limits the broad discretion it enjoys when assessing the compatibility of State aid with the internal market.[45] Before presenting very briefly these guidelines and frameworks (which do not directly deal with public services), it is worth pausing on the general question whether the Commission actually enjoys discretion under Article 93 TFEU, so that it can adopt these texts without overstepping its powers.

11.3.2.1 Discretionary Power for the Commission Under Article 93 TFEU?

As set out above, Article 93 TFEU contains no equivalent to the second sentence of Article 106(2) TFEU. This could be understood as meaning that the Commission, in the application of Article 93 TFEU, is limited to a mere verification of the necessity of aid (i.e to a verification of the absence of an over-compensation). However, at the same time, Article 93 TFEU relies on two rather vague notions, namely 'coordination of transport' and 'reimbursement for the discharge of certain obligations inherent in the concept of a public service'. In order to assess whether a certain measure can be justified as 'coordination of transport' or whether a certain obligation is 'inherent in the concept of a public service', the Commission needs to carry out a complex economic assessment of the transport system. This is a first indication that the Commission, in the application of that provision, needs to enjoy a certain degree of discretion.

The Court was confronted with the challenge of interpreting Article 77 EEC (now Article 93 TFEU) relatively early on. In *Commission* v *Belgium*, it

[44] Ibid, Article 2(4)(d).

[45] See for example: CJEU, Case C-313/90 *CIRFS v Commission* [1993] *ECR* I-1177, para 36; CJEU, Case C-464/09 P *Holland Malt v Commission* [2010] *ECR* I-0000, para 47.

'imported' the missing second sentence of Article 106(2) TFEU into Article 93 TFEU (emphasis added)[46]:

> Moreover, the effect of the application of Article 77 of the Treaty, which acknowledges that aid to transport is compatible with the Treaty only in well-defined cases *which do not jeopardise the general interests of the Community*, cannot be to exempt aid to transport from the general system of the Treaty concerning aid granted by the States and from the controls and procedures laid down therein. (emphasis added).

After this ruling, it is clear that the Commission, when assessing an aid measure under Article 93 TFEU, not only has to establish the necessity, but also the proportionality of the aid. The guiding principle is—as under Article 106(2) TFEU—the interest of the Union. Therefore, it must be concluded that the Commission enjoys a certain amount of discretion also under Article 93 TFEU, and can adopt instruments of soft law on this basis.

11.3.2.2 Community Guidelines for State Aid to Railway Undertakings

The Community guidelines for State aid to railway undertakings[47] are based mainly on Article 93 TFEU, but deal only with the alternative 'coordination of transport', and do not contain any rules for transport infrastructure. They are therefore of little interest for the present chapter.

11.3.2.3 Community Guidelines for Cableways

In 2002, the Commission adopted Community guidelines for cableways.[48] These guidelines are different from the standard Community guidelines, as they are part of a 'no objection' Decision. Nevertheless, the Commission decided to publish the full text of that Decision in the Official Journal, and to give auto-limiting character to these guidelines. The guidelines distinguish between, on the one hand, cableways designed for a specific economic category of users (mainly ski installations), and on the other hand, cableways used for general mobility needs. With regard to the former, the guidelines provide for (generous) transitional rules for the full application of the regional aid guidelines; these rules are no longer of any practical relevance, as the transition period has expired.

With regard to the latter, the guidelines clarify, based on *Aeroports de Paris* (Case C-82/01, *ECR* 2002, I-9297), that 'private or public transport infrastructure manager, separate from the State administration, will always meet the definition of

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[46] CJEU, Case 156/77 *Commission v Belgium* [1978] *ECR* 1881, para 10.

[47] Commission Communication C(2008) 184, Community guidelines on State Aid for railway undertakings, *OJ* 2008 C 184/13.

[48] Commission communication concerning State aid N 376/01—Aid scheme for cableways—Authorisation of State aid under Articles 87 and 88 of the EC Treaty, *OJ* 2002 C 172/2.

"undertaking"'.[49] They go on to explain that aid for cableways meeting general transport needs may also threaten to distort competition and affect trade.[50] As for the compatibility of aid for cableways, the guidelines suggest the use of Article 93 TFEU in its alternative 'coordination of transport'. However, it has to be noted that the dividing line between 'coordination of transport' and 'obligation inherent in the notion of public service' is sometimes difficult to draw in the field of transport infrastructure. It is therefore worth briefly quoting the compatibility criteria set out in these guidelines[51]:

- state contribution towards total financing of the project is necessary to enable the realisation of the project or activity in the interest of the Community,
- access to the aid is granted on non-discriminatory terms,
- the aid does not give rise to distortion of competition to an extent contrary to the common interest.

11.3.3 Direct Application of Article 93 TFEU

In *Altmark*, the Court held that since the adoption of Regulation (EEC) No. 1107/1970[52] (in the meantime repealed by Regulation (EC) No. 1370/2007), it was no longer possible to apply Article 77 EEC (now Article 93 TFEU) directly[53]:

> Regulation No 1107/70 lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 77 of the Treaty.

This presented a certain challenge for the Commission, which had relied in a number of situations not covered by Regulation (EEC) No. 1107/1970 directly on Article 77 EEC, in particular for transport infrastructure, combined transport and inland waterway transport. The Commission relied, following the *Altmark* ruling, in its decision practice for these cases on Articles 86(2)EC and 87(3)(c) EC.

Nevertheless, the Union legislator felt that the Commission should be freed from the straightjacket. When adopting Regulation (EC) No. 1370/2007, it repealed Regulation (EEC) No. 1107/1970, and justified this with explicit reference to *Altmark*[54]:

> [Regulation (EEC) No. 1107/70] is considered obsolete while limiting the application of Article 73 of the Treaty without granting an appropriate legal basis for authorising current investment schemes, in particular in relation to investment in transport infrastructure in a

[49] Ibid, recital 16.

[50] Ibid, recital 18–28.

[51] Ibid, recital 39.

[52] *OJ* L 130/1.

[53] CJEU, Case C-280/00 *Altmark* [2003] *ECR* I-7747, para 108.

[54] Recital 37.

> public private partnership. It should therefore be repealed in order for Article 73 of the Treaty to be properly applied to continuing developments in the sector.

The Commission has not (yet) adopted any framework or guidelines on the application of Article 93 TFEU to reimbursement for the discharge of certain obligations inherent in the concept of a public service. Therefore, the Commission enjoys in principle full discretion for its application. The Union legislator has given the Commission some 'guidance' on this question in recital 36 of Regulation (EC) No. 1370/2007:

> Any compensation granted in relation to the provision of public passenger transport services other than those covered by this Regulation which risks involving State aid within the meaning of Article 87(1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in Case C-280/00 Altmark Trans GmbH. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest.

The main scope of application for this recital would seem to be passenger transport on inland waterways and cableways. Whether a recital of the Union legislator can legally bind the Commission in the exercise of its State aid competence appears doubtful; however, it would seem logical to treat all modes of land transport the same when it comes to public passenger transport.

Apart from this clear consequence, this recital raises more questions than it answers. First of all, it appears to imply that public passenger transport services covered by the Regulation can only be declared compatible with the internal market if it complies with the conditions set out in the Regulation. This conclusion is not the only possible interpretation: for block exemption regulations, the General Court has decided that the Commission may declare compatible any aid not covered by the notification exemption on the basis of Article 107(3)(c)TFEU, provided that its conditions are met. The Court came to this conclusion rather than any others because of the wording of a recital which hinted into that direction.[55] However, recital 36 appears to exclude this possibility. It would therefore seem that the situation is the same under Regulation (EC) No. 1370/2007 as it was under its predecessor, Regulation (EEC) No. 1191/1969: any aid which falls within its scope of application—but does not meet the conditions set out in it—cannot be declared compatible with the internal market on any other legal basis.[56]

Secondly, it leaves the question open as to what criteria shall be applied to compensation payments for public services outside public passenger transport services. This concerns in particular public service compensation for freight (for which Regulation (EEC) No. 1191/1969 has been grandfathered until the end of 2012, see Article 10(1)) and transport infrastructure. Ultimately, it would appear

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[55] GC, Case T-357/02 RENV *Freistaat Sachsen v Commission* [2011] *ECR* II-0000, paras 43 and 44.

[56] CJEU, Case C-504/07 *Antrop* [2009] *ECR* I-3867, para 28.

that in the absence of any secondary legislation, guidelines and frameworks, the Commission enjoys in this regard its full discretion.

11.4 Maritime and Air: On the Way to Normality… and Beyond!

Article 93 TFEU applies only to land transport; the Council and the Parliament could in theory extend, based on a proposal by the Commission, its application to air and maritime transport.[57] The Commission has, however, never made such a proposal—probably for the same reason for which turkeys do not vote for Thanksgiving. The Commission would actually weaken its competence and discretion if it was to make such a proposal, as it would mean that rather than applying the restrictive rules of Article 106(2) TFEU, it would have to apply the more permissible rules of Article 93 TFEU, and lose the possibility to create secondary law itself based on Article 106(3) TFEU.[58]

The new Communication on the notice of State aid and the new *de minimis* Regulation (see above) do apply to air and maritime transport without any limitation or particularities. There are, however, particularities with regard to the SGEI Decision and the SGEI framework, which merit closer assessment.

11.4.1 SGEI Decision 2005 Versus 2012

11.4.1.1 Tighter Thresholds in 2012

The new 2012 SGEI Decision (hereafter: 2005 Decision) [59] replaces Decision 2005/842/EC which formed part of the so-called 'Monti-Kroes-Package'. Both Decisions foresee situations in which State aid is deemed 'compatible' with the internal market and thereby avoids the notification obligation under Article 108(3) TFEU.[60] However, there are important differences as to the thresholds which need to be met in order to avoid notification.

Under the 2005 Decision, aid for SGEI was exempted from notification if the compensation was less than €30 million annually and the undertaking entrusted

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[57] Article 100 TFEU.

[58] CJEU, Joined Cases 209–213/84 *Asjes* [1986] *ECR* 1425, paras 39 and 42.

[59] Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), 2012/21/EU.

[60] Article 3 of both the 2005 and the 2012 Decision.

with the SGEI had an annual turnover of less than EUR 100 million during the two financial years prior to the award of the SGEI.[61] This general threshold was also applicable to undertakings entrusted with maritime and air connections qualified as SGEI, as well as to ports and airports entrusted with SGEI.

The 2005 Decision foresaw a second alternative specific to air and maritime transport: air and maritime links to islands were exempt from notification if the 'average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 300,000 passengers'.[62] Aids for airports were exempted if the average annual traffic did not exceed one million passengers and aids for ports were exempted if the annual traffic did not exceed 300,000 passengers.[63]

Under the 2012 SGEI Decision, it remains the case that State aids for SGEI which fulfil the conditions of the Decision constitute 'compatible' State aids (i.e. compatible with the internal market and therefore do not need to be notified to the Commission according to 108(3).[64] However, the 2012 SGEI Decision declares that the general notification threshold—which is lowered from €30 million to €15 million[65]—no longer applies to transport and transport infrastructure.

The only threshold applicable to air and maritime links to islands is now that they must not exceed 300,000 passengers.[66] The only threshold for State aids to ports is that they do not exceed 300,000 passengers. There is no direct link between the number of passengers and the amount of compensation paid, as the amount of compensation paid may depend on many other factors (distance to be travelled; efficiency of the undertaking entrusted; geographic situation;…). However, it is certain that many air and maritime services as well as ports which exceeded 300,000 passengers received less than EUR 30 million in compensation. This means that, whereas there has in general been a tightening of conditions, this has been particularly harsh for the air and maritime transport sector.

The strongest tightening of the screw took place with regard to airports. Here, not only did the EUR 30 million alternative threshold disappear, but at the same time, the threshold for the annual traffic changed from not exceeding 1 million passengers to 200,000 passengers.[67] The 2012 SGEI Decision itself states that lowering the threshold is appropriate 'due to the development of intra-Union trade, of multinational providers within the internal market and the amount should be calculated as an annual average.'[68]

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[61] Commission Decision 2005/842/EC, Article 2.1(a).

[62] Ibid, Article 2.1(c).

[63] Ibid, Article 2.1(d).

[64] SGEI Decision, Article 3.

[65] Ibid, Article 2.1(a).

[66] Commission Decision C(2011) 9380 final, Article 2.1(d).

[67] Ibid, Article 2.1(e).

[68] Ibid, para 10 of the preamble.

Apart from these thresholds, the other condition for this Decision to apply is that the State aid must not exceed ten years, except for cases where the amortisation period is longer.[69] This is often going to be the case for ports and airports.

This means that, while more social services (see the chapter by van de Gronden and Rusu) are exempt from notification, more SGEI in the air and maritime transport sector are obliged to notify the Commission, once the two year grace period expires. This will significantly increase the number of cases that are subject to the notification obligation.

11.4.1.2 Compliance with Treaty Rules

Furthermore, Article 3 of the 2012 SGEI Decision holds that the State aid must also comply 'with the requirements flowing from the Treaty or from sectoral Union legislation.' This reference to Treaty requirements is new—the 2005 Decision only referred to 'stricter provisions relating to public service obligations contained in sectoral Community legislation.'[70] The Treaty requirements include in particular the so-called *Telaustria* case law on the minimal requirements for the awards of concessions, which are of particular importance for airports and ports.

11.4.1.3 Compliance with Air and Maritime Regulation

As was the case for the 2005 Decision, for the 2012 SGEI Decision to apply, the State aid in question needs to also comply with sectoral legislation. These are Regulation 1008/2008 on air services (which repealed Regulation 2408/92)[71] and Regulation 3577/92 on maritime transport. These Regulations are also expressly mentioned in both the 2005 and the 2012 SGEI Decision.

Regulation 1008/2008, the so-called 'Air Services Regulation', applies to licensing Union air carriers, air services and the pricing of intra-Union air services (Article 1.1). This Regulation sets out the conditions under which Member States can impose public service obligations for air services to airports in peripheral regions or on other thin routes.

The basic requirement is that the route has to be 'vital for the economic and social development of the region which the airport serves.' In ensuring the 'minimum provision' necessary on those routes, Member States may impose conditions such as standards of continuity, regularity, pricing, minimum capacity

[69] Ibid, Article 2.2.

[70] Commission Decision 2005/842/EC, Article 3.

[71] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, *OJ* 2008 L 293/3.

which would not otherwise be assumed by air carriers.[72] If no air carrier takes over the route, then the Member State may limit access to one carrier for up to four or five years.[73]

Importantly, Member State will have to organise a call for tender if they decide to award the route to one carrier.[74] The now repealed Regulation (EC) No. 2408/92 did set out (in its Article 4) circumstances under which Member States were obliged to call for a public tender. However, it did not specify the particularities of such a tender. In contrast to this, the new Regulation, in Article 17, sets out detailed tender requirements: the invitation to tender has to be communicated to the Commission and published in the *OJ*. In it, the Member States need to specify the following points: necessary standards, conditions for amendment or termination, contractual duration, penalties for non-compliance and objective parameters for the compensation.[75] Selection should 'take into consideration' the following factors: adequacy of the service, prices and conditions and the amount of compensation.[76]

In order to be permissible, the compensation paid in accordance with Regulation (EC) No. 1008/2008 still needs to be assessed by the Member States according to the *Altmark* criteria.[77] While it is the Member States who are responsible for ensuring compatibility, the Commission may still examine the public service obligations (PSO) and suspend them if they do not comply with the Regulation. Therefore, this does not constitute a 'full' notification exemption: the Commission needs to be kept informed of the PSO procedure and a notice needs to be published in the OJ.[78]

The equivalent of Regulation (EC) No. 1008/2008 for maritime transport is Regulation (EC) No. 3577/92 on maritime cabotage. This Regulation applies to maritime transport and also allows for PSO to be imposed 'for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands.'[79] The obligation has to be imposed on a 'non-discriminatory basis'.[80] The Court of Justice also found that in order to be permissible, there needs to be a 'real public service need', the 'prior administrative authorisation scheme [has to be] necessary and proportionate to the aim pursued' and the

[72] Ibid, Article 16(1).

[73] Ibid, Article 16(9).

[74] Ibid, Article 16(10).

[75] Ibid, Article 17(3).

[76] Ibid, Article 17(7).

[77] Commission staff working paper: The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation. Brussels, 23.03.2011, SEC (2011) 397, pp. 11–12.

[78] Ibid, p. 9.

[79] Regulation EEC 3577/92, Article 4(1).

[80] Ibid, Article 4(1).

'scheme' has to be based 'on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.'[81]

The Member State may impose the following requirements on public service obligations: 'ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.'[82] There is also a long list of exemptions for certain coastal services mainly in the Mediterranean area in Article 6; the last one of these exemptions expired on 1 January 2004.[83]

Consequences of Non-compliance

If the conditions of the 2012 SGEI Decision and of the Regulations are not met, then the Commission will assess the State aid 'in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation.'[84] Equally, if during the course of the State aid, the conditions change, then it needs to be notified according to Article 108(3) TFEU.[85]

11.4.1.4 Impact of the 2012 SGEI Decision

Based on the country reports which Member States submitted to the Commission before the adoption of the 2012 SGEI package and publicly available information, we try to gauge the impact of the 2012 SGEI Decision.

Airports

It is as of yet unclear to what extent the 2012 SGEI Decision has had an impact. However, it is conceivable that it will be taken under consideration during some of the ongoing investigations for State aid to airports. To take but one example: the airport Erfurt-Weimar in Germany has traditionally benefitted from State aid.[86] However, as it never reached more than 500,000 passengers a year, these State aids would not have needed to be notified: In 2010 the airport served 323,000 passengers.[87] On the other hand, Thuringia's second largest airport, Altenburg-

[81] CJEU, Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others* [2001] *ECR* I-1271, para 40.

[82] Regulation EEC 3577/92, Article 4(2).

[83] Ibid, Article 6.

[84] Commission Decision 2012/21/EU, para 26 of the preamble.

[85] Ibid, Article 2(3).

[86] *Das teure Sorgenkind der Landesregierung*, MDR Thüringen, available at: http://www.mdr.de/thueringen/mitte-west-thueringen/hintergrundflughafen100.html.

[87] *Flughafen Erfurt erhält Zusatz "Weimar"*, published 21/03/2011 http://www.airliners.de/management/marketing/flughafen-erfurt-erhaelt-zusatz-weimar/23685.

Nobitz, formally serviced by the low-cost carrier Ryanair, could still potentially benefit from block-exempted SGEI compensation as it only processed 140,000 passengers in its busiest year in 2009.[88] Ryanair stopped serving the airport in March 2011[89] and there are currently no other lines serving it. In spite of Altenburg falling below the passenger threshold, the European Commission is investigating potentially illegal State aid under Article 108(2) TFEU for alleged State aid for infrastructure, operational State aid for Altenburg Nobitz GmbH and rebates for Ryanair. Therefore, airports analysing the potential threat of being investigated, should not only focus on the laws outlined above but also take into account the rules and guidelines applying to general State aid and competition law. Rostock-Laage is also far below the 500,000 passenger threshold. It may, however, be affected by the 2012 SGEI Decision: in 2010, it carried 219,489 passengers.[90] The German airport of Leipzig also received public service compensation..[91]

There might be other category D airports which will be similarly affected. For example, Nîmes Airport, 176 521 passengers in 2010, is being investigated for State aid, marketing arrangements and rebates for Ryanair.[92] Similarly, the airport of La Rochelle, 191,599 passengers in 2010 is also being investigated for its financial arrangements with the public authorities, rebates and marketing arrangements and some of the airlines servicing it.[93] Again, according to the press releases, emphasis seems to be mostly on the market economy investor principle and in particular, rebates on airport charges, infrastructure and operating aid and arrangements which potentially create an unfair economic advantage for certain airline carriers. These principles were outside the scope of this chapter but these investigations show the variety of laws and regulations that can be of importance in the transport sector.

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[88] Bekanntmachung, 25/05/2012, Europäische Kommission: Staatliche Beihilfe SA.26500 (ex 227/2008)—Flughafen Altenburg-Nobitz—Beihilfe zugunsten von Ryanair (Beschwerde des Bundesverbandes der Deutschen Fluggesellschaften), (2012/C 149/02), p. 2.

[89] *Ryanair gibt Altenburg auf*, published 07/01/2011, available at: http://www.airliners.de/verkehr/netzwerkplanung/ryanair-gibt-altenburg-auf/23041.

[90] *Flughafen Rostock-Laage mit Rekord-Passagierzahlen im Jahr 2010*, Reisenews Online, 04/01/2011, available at http://www.reisenews-online.de/2011/01/04/flughafen-rostock-laage-mit-rekord-passagierzahlen-im-jahr-2010/

[91] This one had not been notification-exempted and was assessed in Commission Decision 2009/948/EC, *OJ* 2008 L 346/1.

[92] Press release: *State aid: Commission opens in-depth investigation into potential State aid at Nîmes airport in France*, 25/04/2012, IP/12/400.

[93] Press release: *State aid: Commission investigates potential state aid at La Rochelle airport in France*, 08/02/2012, IP/12/108. For similar investigations see the following Press releases on State aid: *Commission opens in-depth investigations in air transport sector in Germany and Austria*, 22/02/2012, IP/12/156; *Commission opens in-depth investigation in air transport sector in Belgium, France and Germany*, 21/03/2012, IP/12/265; *Commission investigates potential State aid at Carcassonne airport in France*, 04/04/2012, IP/12/350; *Commission opens in-depth investigations in air transport sector in France, Germany and Sweden*, 25/01/2012, IP/12/44; *Commission opens in-depth investigations in air transport sector in Belgium, France and Germany*. 21/03/2012, IP/12/265.

Looking further at the country reports, the Irish airports of Knock, Kerry and Galway might be affected as figures from 2006 to 2008 show that the total amount of passengers at these airports was above 200,000 which is the new threshold for airports.[94] None of the compensation receiving Swedish airports carry more than 200,000 passengers a year and will therefore not be affected.[95] The same holds true for Portuguese airports on the Azores. Luxembourg informed the Commission of a Media Plan for Luxembourg airport, which it considered a public service compensation in compliance with *Altmark*.

Ports

Ireland subsidises its harbours for maintenance works but there are no ongoing public service compensation being paid.[96] The Walloon region in Belgium finances infrastructure investment in its ports, which it considers to be services of general economic interest, with 80 % of infrastructure investment costs. It appears questionable whether this is in line with the Commission's decision practice, which usually relies on Article 107(3)(c) TFEU for port infrastructure, see the recently authorised aid for a new ferry terminal in Lithuania co-financed from the Cohesion Fund and 107(3)(c).[97]

Maritime and Air Links

As far as maritime and air links are concerned, in Germany, there was no compensation for maritime and air links to islands of fewer than 300,000 passengers a year.[98] Similarly, Sweden did not pay any compensation for maritime and air links to islands.[99] In France there were 11 air links to islands in 2005, carrying less than

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[94] Public consultation: State aid rules on services of general economic interest, Member States reports on the application of the SGEI package. Ireland: *Report on the implementation of the Commission Decision of 28 November 2005,* available at http://ec.europa.eu/competition/consultations/2010_sgei/reports.html.

[95] Ibid, Sweden: *Regeringskansliet, Rapport om genomförandet av kommissionens beslut av den 28 november 2005 om tillämpningen av artikel 86.2 i EG-fördraget på statligt stöd i form av ersättning för offentliga tjänster som beviljas vissa företag som fått i uppdrag att tillhandahålla tjänster av allmänt ekonomiskt intresse*, p. 4.

[96] Report on the implementation of the Commission Decision of 28 November 2005, comprising a detailed description of the conditions of application in all sectors, including the social housing and the hospital sectors, to be submitted to the Commission by each Member State every three years.

[97] Press release: Commission authorises €18 million public financing for new ferry terminal in Lithuania, 22/02/2012, IP/12/155.

[98] Supra at 110: Germany: *Bericht der Bundesrepublik Deutschland zum, "Altmark-Paket" der Europäischen Kommission*, p. 22.

[99] Ibid, Sweden: *Regeringskansliet, Rapport om genomförandet av kommissionens beslut av den 28 november 2005 om tillämpningen av artikel 86.2 i EG-fördraget på statligt stöd i form av*

300,000 passengers—10 to Corsica and one to Ouessant.[100] The UK pays compensation for a few flights to Scottish islands but they would remain included in the exemption as they carry fewer than ten thousand passengers/year.[101] In Romania, there are two links to the Delta peninsula which carried both less than 200,000 passengers/year; one of them was awarded a public service obligation and complies with *Altmark* according to the Romanian authorities. It is not easy to decide whether these links in the Delta of the Danube are inland waterway or maritime transport.[102] In Spain, links to the canary islands are financed, in Portugal links to the Azores.

Germany paid compensation for several air routes originating from the airports Erfurt, Hof and Rostock-Laage.[103] These were based on Regulation (EC) No. 2408/92 (see above) and assessed to be compatible with it by Germany. The benefitting airports are Erfurt, Hof and Rostock-Laage. As stated above, Erfurt never reached the 500,000 passengers/year mark. State aid for an air route from Hof was discontinued as of 31 March 2010[104] and there are currently no air routes servicing that airport.[105] The CEO of the Hof airport stated as one of the reasons for the discontinuance the lack of passenger numbers who found it easier, through improved infrastructure, to access other, bigger, airports in the region.[106] The airline carrier in charge of two of those lines, Cirrus-Airlines, has since become insolvent.[107] Rostock-Laage is the only one of the three that was able to keep its air route despite of State aid being discontinued on 31 October 2009. The air route under State aid was carried out by OLT and is now being serviced by Lufthansa.

Conclusion

For airports, the 2012 SGEI Decision means a considerable tightening of the screw. For ports and maritime and air links, even if they are not directly affected by the

(Footnote 99 continued)
ersättning för offentliga tjänster som beviljas vissa företag som fått i uppdrag att tillhandahålla tjänster av allmänt ekonomiskt intresse, p. 3.

[100] Ibid, France, Rapport sur les compensations de services d'intérêt économique général : mise en œuvre de la décision de la Commission européenne du 28 novembre 2005.

[101] Ibid, UK: Letter to the State Aid Greffe, 18 February 2009.

[102] Ibid, Romania: Department for reporting, monitoring and control of State aid, Raport privind ser viciile de interes economic general din Romania, pp 20–25.

[103] Ibid, Annex 15.

[104] Ibid and see: *Stadt Plauen will Zuschuss kürzen*, Studio Franken, published 23/05/2012, available at: http://www.br.de/franken/inhalt/aktuelles-aus-franken/flughafen-hof-cirrus100.html

[105] http://www.airport-hof-plauen.de/

[106] Hanel (2012).

[107] *Europe loses four airlines in an unhappy start to 2012*, Centre for Aviation, published on 31/01/2012, available at http://www.centreforaviation.com/analysis/europe-loses-four-airlines-in-an-unhappy-start-to-2012-67001.

changes, the new Decision will bring more clarity as the thresholds and method of calculation have been streamlined. This was necessary, as a lot of Member States found that the 2005 rules were not correctly applied as many of the regional and local stakeholders were unaware of the obligations.[108] This should be easier with the 2012 SGEI package. This is particularly important, as monitoring the implementation/observance of the Decision is the responsibility of the Member States.

11.4.2 SGEI Framework

The 2005 SGEI framework excluded the entire transport sector, including air and maritime transport, from its scope of application. The 2012 SGEI framework,[109] on the contrary, applies to air and maritime transport.

The 2012 SGEI framework applies to those public service contracts in the air and maritime transport sector which are not covered by the 2012 SGEI Decision and also lays down conditions under which State aid is deemed compatible with the internal market under Article 106(2) TFEU.[110] The Commission will apply the provisions contained in the 2012 SGEI Framework from 31 January 2012 and this will also include unlawful aid which has been granted before that date.[111]

This section will briefly examine the content of the 2012 SGEI Framework in general (Sect. 11.4.2.1), and then address its relationship to the compatibility rules contained in the sectoral frameworks (Sect. 11.4.2.2). It will conclude with a preliminary examination of the impact of the changes of the 2012 SGEI Framework compared to the existing rules (Sect. 11.4.2.3).

11.4.2.1 Content of the 2012 SGEI Framework

According to para 11 of the 2012 SGEI Framework, State aid which falls outside the scope of Decision 2012/21/EU may still be compatible 'if it is necessary for the operation of the service of general and economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union.'

In order for the State aid to be compatible, the conditions of Sections 2.2–2.10 must be fulfilled: it must be a 'genuine service of general economic interest' (Section 2.2). This refers to Article 106(2) TFEU. Accordingly, the State aid must

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[108] Commission staff working paper: The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation. Brussels, 23.03.2011, SEC(2011) 397, pp 33–35.

[109] Communication from the Commission: *European Union framework for State aid in the form of public service compensation* (2011), *OJ* 2012 C 08/3.

[110] 2012 SGEI Framework, paras 7 and 8.

[111] 2012 SGEI Framework, para 67.

be awarded to undertakings entrusted with the operation of SGEI or be a 'revenue-producing monopoly' and trade may only be affected to the extent that it is not contrary to the interests of the Union.

Furthermore, there has to be an 'entrustment act specifying the public service obligations and the methods of calculating compensation' (Section 2.3). Paragraph 16 specifies the minimum content of the entrustment act, such as the content and duration of the PSO; the duration should, under Section 2.4 be justified in the entrustment act. The act must also include the undertaking, the nature of any exclusive rights assigned to the undertaking, details and parameters of the compensation mechanism (described in more detail in Section 2.8) and arrangements for avoiding and recovering overcompensation.

Under Section 2.6, aid will only be compatible if the 'responsible authority' has complied with the 'applicable Union rules in the area of public procurement.' This raises the difficult question as to whether the sectoral rules on public procurement contained in Regulations (EC) No 1008/2008 (air services) and (EC) 3577/92 (maritime services) constitute 'applicable Union rules in the area of public procurement'. A literal interpretation would suggest that this is the case, as they prescribe detailed rules for public procurement of these services. At the same time, one can make the argument that whereas the 2012 SGEI Decision explicitly mentions compliance with these Regulations as a condition for the notification exemption,[112] there is no equivalent compatibility condition in the SGEI Framework. Following this interpretation, the two Regulations would merely constitute 'sectoral rules', which apply 'without prejudice' to the 2012 SGEI Framework.[113] Given that compliance with the two Regulations is a requirement for compatibility under the sectoral State aid guidelines (see Sect. 11.3.2.2), an interpretation of Section 2.6 in the broader context would point towards the view that the public procurement rules contained in these two sectoral regulations constitute public procurement rules in the sense of Section 2.6 of the SGEI Framework. Therefore, the Commission cannot declare State aid to be compatible if it was contained in a PSO contract that has been awarded in violation of Regulations (EC) No. 1008/2008 (air services) or (EC) 3577/92 (maritime services).

According to Section 2.5, State aid falling under this Communication must comply with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings. This Directive is beyond the scope of this chapter. Furthermore, under Section 2.7, when compensating several undertakings for the same SGEI, this must be done without any discrimination. In order to monitor that the Communication's provisions have been complied with, Section 2.10 holds that Member States must publish certain information, such as details on the PSO, the undertaking and territory and the aid amount. This is mirrored by Section 3 which holds that Member States have a reporting obligation towards the Commission.

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[112] 2012 SGEI Decision, Article 2 (4).

[113] SGEI Framework, recital 10.

Section 2.9 leaves room for the Commission to intervene in the award of PSO. This is the case when aid falls within the scope of the Communication and should therefore be compatible with the internal market but still affects 'trade to such an extent as would be contrary to the interest of the Union' (para 52). However, the power of the Commission to intervene in such cases, giving it an unusually broad leeway, is restricted to exceptions and serious distortions having a 'significant' effect on other Member States and the internal market (para 54). This section is re-enforced by Section 4 explaining that conditions and obligations may be necessary to ensure that SGEI do not unduly distort competition (para 66).

11.4.2.2 Relationship to Rules on SGEI in Sectoral Guidelines and Frameworks

Prior to the extension of the general SGEI Framework to maritime and air transport, there was no 'legal vacuum' with respect to the compatibility of compensation payments for SGEI in the air and maritime field. On the contrary: the 1994 Aviation Guidelines,[114] which remain in force until today, were arguably the first framework to deal with SGEI compensation payments under State aid rules. The 2004 Maritime Guidelines (*OJ* 2004 C 13/3) and the 2005 Airport Guidelines[115] also contain detailed rules on this question.

The co-existence of these different texts raises the question as to what the precise relationship between these texts is. The two classical rules of interpretation, namely *lex specialis derogat legi generali* and *lex posterior derogat legi priori*, lead to conflicting results in the present case. As will be shown in this section, the dilemma can be overcome, as there is no direct contradiction between the different sets of rules.

The 1994 Aviation Guidelines address compensation payments for public service obligations in their recitals 15–23. It is important to keep in mind that they pre-date the Court's ruling in *Altmark.* They are also based on Regulation (EC) No. 2408/92, which left much more discretion to Member States for the organisation of tenders for public service obligations than Regulation (EC) No. 1008/2008. However, it would seem that the essential statement of the 1994 Aviation Guidelines, which can be found in Recital 20 and 21, is still valid. There, the Commission holds that where the Member State has not selected the best offer, the chosen operator has most likely received State aid, and that the best offer is usually the offer requiring the lowest financial compensation. It would seem that, where the Commission finds that aid has been granted, because the Member State did not select the best offer, the Commission would deem such aid to be incompatible with the internal market. In other words: if Regulation (EC) No. 1008/2008 is not

[114] *OJ* 1994 C 350/5.

[115] Communication from the Commission, Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, 2005/C 312/01.

complied with, because the Member State does not select the best offer, the compensation cannot be declared compatible. Therefore, a coherent application of both the 1994 Aviation Guidelines and the 2012 SGEI Framework is possible, if Regulation (EC) No. 1008/2008 is to be considered as a public procurement rule in the sense of Section 2.4 of the 2012 SGEI Framework.

A similar conclusion can be drawn with regard to the 2004 Maritime Guidelines. These stipulate in Section 9 with regard to public service compensations:

> In the field of maritime cabotage, public service obligations (PSOs) may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92. For those services, PSOs and PSCs as well as their compensation must fulfil the conditions of that provision and the Treaty rules and procedures governing State aid, as interpreted by the Court of Justice.
>
> […]
>
> The duration of public service contracts should be limited to a reasonable and not overlong period, normally in the order of six years, since contracts for significantly longer periods could entail the danger of creating a (private) monopoly

As for aviation, compliance with the sectoral rules on public service obligations is a precondition for compatibility of the aid. Coherence between the Maritime Guidelines and the 2012 SGEI Framework can be ensured by considering that Regulation (EEC) No 3577/92 constitutes a public procurement rule in the sense of Section 2.4 of the 2012 SGEI Framework. With regard to the maximum duration of the entrustment, it would seem appropriate to regard the six years contained in the Maritime Guidelines as *lex specialis* compared to the longer period foreseen in the 2012 SGEI Framework.

The 2005 Airport Guidelines contain special rules for public service compensation for airports in their recitals 34 and 64–67. Member States may impose public service obligations for airports 'to ensure that the general public interest is appropriately served'.[116] In exceptional cases, this can be extended to the overall management of an airport if it is considered an SGEI. This is permissible for example if the airport is in an 'isolated region'. Activities subject to a public service obligation may not be those which are not directly linked to its management. Paragraph 53(iv) lists as those unrelated activities: 'pursuit of commercial activities not directly linked to the airport's core activities.'

The conditions for permissible compensation in this case are the *Altmark* criteria: compensation will not constitute State aid if it complies with *Altmark*.[117] If compensation does not come within these guidelines, then it constitutes State aid under then Article 87(1) EC 'if it has an effect on intra-Community competition and trade.'[118] Compensation to airports that falls into category A or B[119] would 'normally' be considered to have an effect on trade. Airports with an annual passenger

[116] Communication from the Commission, 2005/C 312/01, para 34.

[117] Ibid, para 36.

[118] Ibid, para 37.

[119] Ibid, para 15.

volume of less than 1 million, so-called category D airports, are 'unlikely to distort competition'. As no detailed conditions can be determined from the outset, any compensatory measure, also within category C and D, has to be notified to the Commission.[120] The only notification exemptions are category D airports which are carrying out a mission of general economic interest.[121]

The 2012 SGEI Framework goes beyond these requirements, as it also requires compliance with the *Telaustria* case law for the award of any public service concession. The two sets of rules do not, however, openly contradict each other. Therefore, it would in this case seem the most convincing to apply both texts in parallel.

11.4.3 Court Cases and Commission Decision Practice

As far as aviation in general is concerned, no public service obligation has ever been notified to the Commission. The only (negative) Decision that the Commission has taken was a case where a PSO was granted without a prior call for tender.[122] Similarly, the Commission has not taken any final decisions on public service compensation for airports.[123]

There has been a number of Commission Decisions in the cases field of maritime transport, which have often led to Court challenges. While the cases do not consider transport law specific issues, the breadth of potentially important areas which must be considered by transport undertakings, is telling of the complexity in this sector. The most important ones are summarised below and range from the question of new/existing aid to restructuring aid.

In *Tirrenia*[124] the GC decided on the partial annulment of Decision 2005/163/EC which concerned State aid given by Italy to certain maritime companies. In the Decision, the Commission had declared most aids to be compatible with the internal market if certain conditions were going to be met. Those provisions which declared the aid to be incompatible with the internal market were attacked by the concerned undertakings. The GC first considered whether the subventions constituted State aid, whether they constituted existing or new aid and then, whether they were compatible with the internal market. On the question of new and existing aid, the GC held that legislative changes to an aid regime constitute new aid in certain circumstances (para 124). In this instance, the Commission's

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[120] Ibid, para 39.

[121] Ibid, para 41.

[122] C 79/2002, Commission Decision 2005/351/EC, *OJ* 2005 L 110/56.

[123] Commission staff working paper: The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation. Brussels, 23.03.2011, SEC(2011) 397, pp 11–12.

[124] GC, Joined Cases, T-265/04, T-292/04, T-504/04, *Tirerenia di Navigazione v Commission* [2009] *ECR* II-21.

qualification of the aids as new aids was held to be insufficiently supported by arguments. As insufficient reasons were given by the Commission, the GC was unable to verify the legality of the Decision and this part was consequently annulled (para 134). The GC also considered 3577/92 and again pointed to the lack of reasons provided by the Commission (para 151). As far as the public service obligations are concerned, the GC considered that the Decision should be partially annulled to the extent that it qualifies aids given to maritime lines as new aids (para 146). The GC points out that the Commission had held the entirety of the aid measures to the maritime lines as compatible as they were necessary and proportional to the additional cost incurred by the public service obligation (para 146).

In the *Corsica Ferries*[125] case, the then CFI considered Decision 2004/166/EC on State aid for the restructuring of a shipping company which operates regular maritime services from mainland France to Corsica. These services are operated as public service obligations. The Corsican authority called for a tender on services from Corsica to Marseille in 2001 and awarded this jointly to two undertakings. One of these undertakings, SNCM, received rescue aid for restructuring. The Commission found that the aid granted until 2001 as compensation for discharge of public service obligations was compatible with the common market. In addition to this aid, the Commission also investigated restructuring aid granted to SNCM, registered under C-58/2002. With regard to the restructuring aid, the Commission found in its Decision 2004/166/EC[126] that it was compatible with the internal market under certain conditions, including the disposal of certain properties. This Decision was challenged by Corsica Ferries. The Court of First Instance only found for the appellant with regard to the condition imposed by the Commission that the aid must be kept to a minimum. In particular, the Commission ought to have had regard for the actual net proceeds of a proposed property sale within the restructuring plan, rather than only the estimated proceeds, particularly as the figure was already available. In not doing so, the Commission breached the guidelines on State aid for restructuring[127]

In the case of *Fred Olsen*,[128] the Court considered State aid in the maritime sector under Regulations 3577/92 EC, 659/1999, Community guidelines on State aid to maritime transport, and the Communication on services of general economic interest in Europe. The Court looked into subsidies paid by Spain to an undertaking for the operation of maritime services of national interest between 1978 and 1997. A competitor complained about the contract, and in particular the subsidy that was paid towards the end of the contractual period to settle past expenses.

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[125] GC Case T-565/08, *Corsica Ferries France* v *Commission* [2005] *ECR* II-2197.

[126] Commission Decision 2004/166/EC on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM), *OJ* 2004 L 61/13.

[127] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, *OJ* 1999 C 288/2, applicable from 9 October 1999.

[128] GC, Case T-17/02, *Fred Olsen* [2005] *ECR* II-2031. This judgment has been confirmed on appeal:C-320/05 P *Fred Olsen* [2007] *ECR* I-131.

The competitor alleged that this subsidy was new aid but the Commission held that it was within the existing scheme and therefore existing aid. However, the Court found with Spain and the Commission that the later subsidies fell within existing aid and therefore dismissed the application.

In a Decision to raise no objections, the Commission considered a public service contracts on a maritime line between Italy, Slovenia and Croatia.[129] This decision is based on the 2005 SGEI Decision.

The Decision N 265/2006[130] concerned public service obligations for maritime lines to Sicily and the surrounding minor islands. In its Decision to raise no objections, the Commission considered that the maritime links to islands constitute State aid (para 40) which should be assessed in the light of the 2005 SGEI Decision. It further considered that, under Article 86(2) EC, the compensation serves a general economic interest, is necessary and proportionate and is not contrary to the Union's interests.

Furthermore, the Commission found that the existing State aid granted under public service contracts for maritime links to Scottish islands was compatible under Article 86(2) EC was compatible. However, this time, it imposed certain conditions with regard to one of the routes operated by one of the operators.[131]

11.5 In Lieu of a Conclusion…

This chapter has illustrated the specificities of SGEI and public services in transport and its rich history in terms of legislation, decisions and Court cases. Despite this rich history, many legal questions remain open. The interpretation of Regulation (EC) No. 1370/2007 has been debated extensively already by scholars, and there is already a certain amount of litigation in national Courts. This may in the near future trigger interesting references to the CJEU. The Commission has announced in its 2011 Transport White Paper further market opening in the railway sector, which will certainly as well raise important State aid questions…

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[129] Case N 62/2005, contrat de service public sur une ligne maritime Frioul-Vénétie-Juliennes et Slovénie et Croatie, *OJ* 2007 C 90/10.

[130] Case N 265/2006, *Aide au transport maritime-Società Ustica Lines e Società N.G.I. OJ* 2007 C 196/3.

[131] Commission Decision 2011/98/EC *OJ 2011* L 45/33.

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