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***The Uniform Interpretation of State Aid and SGEI Rules within
the EEA***

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Abstract

With the coming into age of the SGEI, the intricate problem that emerges is to know whether these types of EU public services should be assessed under the State aid rules. The conundrum is given a further dimension with the inclusion of the EFTA States. With the signing of the EEA Agreement in 1994, the Single Market was expanded with the effect of an additional court and surveillance authority. At a first glance, duplicate authorities might seem more effective. However, at a closer look, the risk of disparate interpretation and enforcement of the rules appears, jeopardizing the level playing field. So far, the informal and formal hierarchies among the Institutions have resulted in *Follow the Leader*, i.e. a somewhat harmonious interpretation and enforcement of the provisions through the art of mimicry. With the entry into force of the Lisbon Treaty, the question arises: for how long will the EFTA Institutions continue to partake in this game?

Le résumé

L'avènement des SIEG soulève la question suivante : ces genres de services publics de l'UE doivent-ils être soumis aux règles relatives aux aides d'Etat ? L'entrée en jeu des Etats membres de l'AELE donne une dimension supplémentaire au problème. Avec la signature de l'accord EEE en 1994, le marché unique a été élargi incluant une Cour et une autorité de surveillance supplémentaires. A première vue, ce dédoublement des institutions tend à plus d'efficacité. Cependant, à y regarder de plus près, le risque d'interprétations divergentes et d'application disparates des règles se fait plus sérieux mettant en péril le level playing field. Jusqu'à présent, les hiérarchies aussi bien formelles qu'informelles entre les institutions ont été régies par le principe suivant : *Follow the Leader*, c'est à dire une interprétation et un respect des dispositions plus ou moins harmonieux basé sur le mimétisme. Avec l'entrée en vigueur du Traité de Lisbonne la question se pose: jusqu'à quand les institutions de l'AELE continueront-elles à participer à ce jeu?

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Contents

1. Introduction	6
1.1. Background	6
1.2 Purpose.....	7
1.3 Method/Material	7
1.4 Delimitations.....	8
1.5. Disposition	9
2. Origin and Development of State aid and SGEI.....	10
2.1. State Aid – A General Prohibition.....	10
2.1.1. A Competitive European Market.....	11
2.1.2. A Single Market with Failures	13
2.1.3. Winds of Liberalisation	13
2.1.4. Extending the Competitive Market Rules and Actors Beyond the EU	14
2.2. SGEI – An Arbitrary Exception.....	15
2.2.1. Services of General Interest.....	15
2.2.2. A Social European Area	16
2.2.3. Exception to the Exception.....	17
2.3. State Aid = SGEI ?.....	19
3. Legal Framework.....	21
3.1. Legal Scope and Definition of State Aid	21
3.1.1. The Light of the EEA Agreement on State aid.....	21
3.1.2. In the Light of the EEA Agreement in Relation to the Lisbon Treaty	26
3.1.3. In the Light of the EEA Agreement in Relation to the EFTA Convention	27
3.2. Legal Scope and Definition of SGEI	28
3.2.1. The Light of the EEA Agreement on SGEI.....	29
3.2.3. In the Light of EEA Agreement in Relation to the Lisbon Treaty	31
3.2.3. In the Light of EEA Agreement in Relation to the EFTA Convention	33
4. The Institutions	34

4.1. The Institutions of the EEA	35
4.1.1. The Legal Framework of the Courts	36
4.1.2. The Legal Framework of the Monitors	37
4.2. Arbitrators of the Single Market	37
4.2.1. The Full Deference of the Independence of the Courts	38
4.2.2. Judicial Dialogue	41
4.2.3. Judicial Interpretation of State Aid	42
4.2.4. SGEI	54
4.2.5. Or Is It More of a Monologue?	59
4.3. Surveillants of the Single Market	60
4.3.1. Beyond Uniform Application to Full Cooperation	61
4.3.2. Means and Competences of the Monitors	63
4.3.3. Enforcement by the Monitors	72
4.3.4. Uniform or Diverse Enforcement?	75
5. Conclusions	77
6. Bibliography	83
6.1. Doctrine	83
6.2. Legal Documents	86
6.3. Case law	88
6.3.1. European Court of Justice	88
6.3.2. EFTA Court	89
6.4. Internet	89
6.5. Interviews	89
6.6. Further Reading	90

1. Introduction

The EEA Agreement breaks new territories and extends the frontier of the Single Market beyond what was envisaged by the founding fathers of the European Union (EU). Norway, Iceland and Liechtenstein while remaining sovereign, formally, have had their markets merged into one with that of the EU. In order to ensure a competitive and efficient Single Market and a level playing field for the actors, the EEA Agreement is equipped with necessary tools.

The competition provisions of the EEA Agreement, however, mirror those of the EU through *mutatis mutandis*. These rules cover a vast area, ranging from cartels and monopolies to mergers and State aids. For this reason and the fact that State aid is a unique characteristic of the Single Market, only the latter that shall be further developed. State aid is regulated in Articles 61 to 64 of the EEA Agreement.

As there are rules, there are also exceptions to prove those rules. Not only are there specific exceptions to the State aid rules, which are a constituent part of the competition rules, but there are also general exceptions. It is the intricate relation between the specific rules on State aid and the general exceptions of the competition rules, namely the rules on services of general economic interest (SGEI) that are regulated in article 59 (2) of the EEA Agreement, that will serve as the subject of this work.

Beyond the complex relation between the specific competition rule and its general exception, the paper aims to answer whether there exists a uniform application and interpretation of the SGEI and State aid rules, despite the existence of four independent authorities: the EFTA Court, the European Court of Justice, the EFTA Surveillance Authority and the European Commission.

1.1. Background

It must be recalled that the Single Market is the foundation of the EU, and any distortion of it may endanger the entire EU integration as a whole. With the ever growing integration of the markets of the EEA States into the Single Market, it becomes equally

important to monitor distortive effects that States may have on that market, through the award of State aids. The equation is rather simple = more integrated the markets become, bigger the distortive effects will be.

Nevertheless, this does not *per se* permit market Europe to surpass social Europe, or *vice versa* for that matter. It should instead strike a balance between the two objectives. As mentioned, there is an intricate relation between the State aid and SGEI rules, therefore a sustainable, rather than a hasty solution, should be sought.

The EEA Agreement recognizes the risk of disparate interpretations of its rules, due to its bicephalous character. It is, nonetheless, equipped with necessary tools in order to eschew such destiny and instead ensure a “homogenous” market. It is these tools and their effect in practice that will be examined.

1.2 Purpose

The primary purpose of this paper is to examine whether the two-pillar structure of the EEA, adopted by the Contracting parties as a consequence of the European Court of Justice’s Opinion 1/91, has resulted in a heterogeneous interpretation and application of the State aid rules in relation to the SGEI by the Surveillants and Arbitrators of the EEA, with the landmark decision *Altmark* as a point of departure. What is ensuring the unitary application? Is it the “rule of law or the governing guidelines”¹ or are they pulling in the same direction? Does *judicial dialogue* exist or is it a monologue in the case of the EEA Courts?

There are also secondary purposes. One is to highlight the coming into age of the SGEI, while another to sparkle up a debate about the future of the EFTA Institutions. A third being to initiate a discussion about the pertinence of the formal two pillar structure of the EEA.

1.3 Method/Material

The legal methodology used in this paper is rather conservative and traditional in the sense that the main sources have been treaties, legal documents, relevant protocols, case law of the EEA Courts, secondary legal acts issued by the Surveillants, relevant doctrine

¹ *Inda, BEVIS, State Aid Control – the rule of law or the governing guidelines (1997)*

and articles. In addition, interviews have also been conducted to some degree with professionals.

The sources used in the compilation of this paper can be divided into three categories: EU relevant, EFTA relevant and EEA relevant. With regard to the latter, there is very little doctrine on the subject. Therese Blanchet's *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules*, despite having been published in 1994, has proven to be an essential and guiding document in the procedure of writing this paper.

With regard to the EFTA relevant doctrine, there is some more written on the matter. However, it has been mainly carried out by the current incumbent of the President post of the EFTA Court, Carl Baudenbacher. The objectivity of the articles and conclusions drawn by Mr Baudenbacher could therefore be put into question.

With regard to the EU material, finding relevant material has not been the impediment, on the contrary; the selection procedure has proven to be more problematic. Nonetheless, an effort has been made to strike a balance in order to include not only professionals' perspective to the problematic but also that of the academics.

Finally, it shall be noticed that the Articles of the Lisbon Treaty are the underlying reference and not the previous Treaties, unless there is a direct reference made to them.

1.4 Delimitations

The State aid and SGEI are sensitive and complex areas of the competition rules. The focus of this paper is to treat this problematic from an EEA perspective, rather than to focus on the problematic itself. The reader's attention will therefore be drawn back to the subject matter throughout the paper when topics that fall outside the scope of the subject are glanced upon. As the attentive reader will notice, this distinction has proven to be more difficult than expected, that is, not to be drawn into the intricate problematic of the SGEI and State aid, but rather to focus on their homogenous application by the EEA Authorities. However, a balance has hopefully been struck as well in this regard.

A concrete delimitation, that must be mentioned, is the absence of reference to the General Court of the European Union and the General Advocates, besides when deemed

necessary. The reason for this is two folded. First, it is a question of limiting the points of reference, in order to render the comparative study more accessible. Second, the opinions and judgments of neither body are final, which always open up for an appeal which will be decided by the European Court of Justice. Additionally, it can be highlighted that equivalent institutions are absent within the EFTA pillar.

1.5. Disposition

Section 2 of the paper aims to give a vast and solid background of the State aid and SGEI rules, from an EEA, EU and EFTA perspective while focusing mainly on the historical, political and economical background of the rules. Section 3 intends to present the legal framework, which will serve as a basis for Section 4. The first part of this Section will examine the case law of the EEA Courts and compare them to each other, while the second part will study the enforcement tools of the Surveillants of the EEA and their use in practice. Section 5 aims to provide a summary of the paper and presents some final remarks and conclusions with regard to Section 2, 3 and 4. Section 6 provides an alphabetic list of the sources cited and used in the compilation of this paper.

2. Origin and Development of State aid and SGEI

The aim of this first part – although numerated with a two - is to provide a vast and solid understanding of the notion of State aid and SGEI. Although the SGEI are widely recognized today, not only within the treaties themselves but also through the European Charter of Fundamental Rights and the Protocol on Services of general economic interest to the Treaty of Lisbon, there remains an uncertainty on the application of these rules on State aid and the manner that Member States provide these services. Some would even go so far as to claim that there is a conflict between the two, social Europe vs. market Europe.² For this reason a transversal introduction will be given on the historical, economical and political background of the concepts at hand. This will facilitate the understanding of the two concepts when examining the approach of the institutions concerned, namely the European Commission, the EFTA Surveillance Authority, the European Court of Justice and the EFTA Court. It is therefore of great importance that we recollect what developed in this section so that we may somehow outline the approaches of these institutions with regard to the concepts at hand in order to establish whether there is a homogenous application of the rules on State aid and the interpretation and application of SGEI with regard to those rules.

2.1. State Aid – A General Prohibition

Free markets are considered to be the most efficient way of allocating resources and organizing the economy.³ At the very heart of the EU lies the Single Market, or Internal Market, previously known as the Common market. It was part of the the European Economic Community, renamed in 1993 the European Community with the entry into force of the Maastricht Treaty. It constituted one of the three pillars on which the EU crown rested. It came however to succeed to the crown with the Treaty of Lisbon, leading to the disappearance of the other pillars and equating itself with the EU. The goal of the Single Market was, and still is, to improve the living standards of European citizens on an economical level. It came, however, at a later an early stage also to

² Krajewski, M. *Providing Legal Clarity and Securing Policy Space for Public Services through a legal Framework for SGEI: Squaring the Circle?* (2008)

³ Santaolalla Gadea, Francisco *et al.* *EC State Aid law = Le droit des aides d'Etat dans la CE.* (2008) p 191

include social and political aspects, and today it also encapsulates environmental aspects. In the Single Market goods, services, capital and people are to move freely beyond the national boundaries. The competition rules, of which the State aid rules are a constituent part, are to ensure the proper functioning of the Single Market and can be regarded as its backbone. The State aid rules were introduced already in the first treaty, in 1957 in the Treaty of Rome. The rules have not been subjected to any greater amendments since their inception and are to be regarded as rather, ironically, lucid despite their place at the moment in the spot light and the lack of definition.

2.1.1. A Competitive European Market

Although the creation of common markets, like the Coal and Steel Treaty, can be regarded as a means of preventing war and the EU can be seen as peace project, the current market has gone beyond those objectives. The Single Market creates a free trade area with common frontiers towards the rest of the world.⁴ In other words, Portugal's and Poland's economical borders towards Ukraine are the same despite their almost geographical opposite locations. It is an area based on market ideas, where undertakings⁵ from different Member States are to compete according to the same rules and on the same market despite their locations in different countries. The idea is to remove the national restrictions on services, capital, goods and people and grant them all a unique waver to access the Single Market. Stringent and centralised competition rules become therefore quintessential in the creation of the Single Market.

As diverse and complex as the EU competition rules may seem to be, the State aid law stands out as a unique trait of EU competition rules with regard to traditional competition rules. As opposed to American antitrust regulations and laws, there is a general prohibition for the State, be it local, regional or national, to intervene in the market through any aid. The general prohibition reflects the liberal economic axiom, on which the Single Market is based, according to which State interventions have distortive effects on competition. In the United States of America, however, it is very common

⁴ *It is important not to confuse Free Trade Agreements with Customs Unions, Article XXIV of GATT. It is true that EU is a customs union. However, due to the extension of the Single Market to the EFTA Countries, which have their own custom rules, it becomes a mere free trade area. It is an area where goods, services, capital and people are to move freely, breaking down internal barriers while keeping diverse external barriers.*

⁵ *See Section 4.2.3.3.*

that subventions, tax cuts or other types of aids are granted in order to attract business investment, or to keep them from relocating to other parts of the country that may be more advantageous economically. In other words, the granting of aids by public bodies to companies is regarded as an integral part of the competition in the USA. The local, regional or State governments are therefore also players and variables to take into account in the competition of baking the best bread.

With regard to EU competition, and especially with regard to the State aid rules, this is an often general misunderstanding. The State aid rules are not only to ensure competition and manufacture a level playing field for the undertakings on the market but also to impede such a course from taking place among the Member States. It is important to clarify that the objectives of State aid rules are neither economic nor legal in character but rather political. The State aid rules serve first and foremost to hinder so-called “subsidies wars” between the Member States.⁶ One can also regard the State aid rules as a natural consequence of the abolition of custom duties, quotas and other equivalent measures in order to establish a free market. The effects of a free market would be useless if they could be replaced by State subsidies.⁷

However, as mentioned, the State aid rules serve also to ensure a level playing field among the undertakings acting on the market.⁸ Together with the other competition rules, they are to bring about efficiency, welfare and lower prices for the citizens of the EU. If non-viable undertakings are kept “artificially” alive this may hinder or render more difficult for new actors to enter the market that are more efficient and would therefore help to achieve more rapidly the objectives. There are no incentives for undertakings to become (more) efficient if they can make risky investments without taking into account the effects, since there is always the possibility of being bailed out by the State.

Before proceeding it is important to distinguish and clarify between State aid policy and State aid control. The former is primarily a competence of the Member States, in other words the policy on granting aid to undertakings while the latter is an exclusive matter

⁶ *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE. (2008) P 9*

⁷ *Rubini, Luca. The Definition of Subsidy and State Aid, WTO and EC Law in Comparative Perspective. (2010) p. 40*

⁸ *State Aid Action Plan – Less and better targeted State aid – a roadmap for State aid reform 2005-2009.*

of the EU, controlling and limiting the Member States.⁹ For example there is no harmonisation in the rules governing the award of State aid on a European level.¹⁰ The European Commission does not therefore intervene in national processes of award but rather supervises the award itself to ensure that there is no distortion in the competition.

2.1.2. A Single Market with Failures

As ascertained earlier, the approach to State aid is rooted in a liberal political conception of the role of the State. Although a liberal market responds to a great amount of the needs of the citizens, it does not do so to all of them, it is not a panacea. These lacunas that arise are referred to in economic terms as *market failures*. The liberal conception of the market recognizes and regards market failures as an integral part and therefore permits State intervention, although in a limited degree. Additionally, it must be reiterated that the political goals of the EU also entail social objectives. These two reasons are rather illustrative than exhaustive with regard to why the prohibition on State aid is of a general character and not an absolute. The EU, through the treaties, recognizes the role of State interventions in the creation of a socio-economic market. The State Aid Action Plan, presented by the European Commission in order to support the priorities of the Lisbon Agenda¹¹, states in a clear way when one could derogate from the general prohibition: “state aid should only be used when it is an appropriate instrument for meeting a well defined objective, when it creates the right incentives, is proportionate and when it distorts competition to the least possible extent”¹². In other words, even though it may not directly alleviate a market failure, State aid may be justified to achieve socio-political goals, like any other public policy.¹³ There is a balancing test that must be made, whether the added value of the aid in question outweighs its distortive effects on the competition environment.

2.1.3. Winds of Liberalisation

The source of the subject at hand can be found in the winds of liberalisation that started to gain strength in the early 1980s. In the wake of this progress, the winds eventually

⁹ Santaolalla Gadea, Francisco et al. *EC state aid law = Le droit des aides d'Etat dans la CE.* (2008) p. 7

¹⁰ Nicolaidis, Phedon et al. *State Aid Policy in the European Community: A guide for practitioners.* (2005) p. 9

¹¹ Also known as the Lisbon strategy where it was expressed that the Union would become the world's leading knowledge-based economy, this is not to be confused with the Lisbon Treaty

¹² *State aid action plan - Less and better targeted state aid : a roadmap for state aid reform 2005-2009*

¹³ Vives, Xavier. *Competition Policy in the EU : Fifty Years on from the Treaty of Rome.* (2009) p. 186

reached the shores of the utilities sectors such as: energy, transport, telecommunications, postal services, public broadcasting, etc. By means of the modified Transparency Directive¹⁴ by the European Commission in 1985, these previously “excluded sectors” came within the scope of the State aid rules.¹⁵ These sectors were previously mostly organised around national monopolies, that is without competition and, if required, with financial support from the State, directly in the form of tax money or indirectly through tax cuts. It must, however, be highlighted that the European Commission’s modifications were at first merely of a formal character and nothing but a textual change, without any action being taken in this regard.¹⁶ The actual changes and actions were not taken until the potential and actual competitors of these sectors complained to the European Commission.

2.1.4. Extending the Competitive Market Rules and Actors Beyond the EU

The EEA Agreement between the EFTA countries and the EU entered into force in January 1994. It is important to clarify Switzerland’s special position rather early as a member of the EFTA but not a contracting party of the EEA Agreement. Switzerland concludes bilateral trade agreements with the EU and, for reasons that fall out of the scope of this paper, will not be further addressed.

With regard to the EEA Agreement, already the subsequent year of its entry into force, three former EFTA States (Sweden, Austria and Finland) joined the EU, and subsequently left the EFTA. The EEA Agreement serves to extend the Internal Market of the EU, that is to merge the two markets, the EFTA market and the EU’s Internal Market, into one Single Market. The EEA Agreement contains therefore provisions that correspond to the competition rules, of which the State aid rules are a constituent part, foreseen in the Lisbon Treaty.¹⁷ It would not be possible to achieve the objectives of the Single Market without common rules that would manufacture a level playing field where competition could thrive between the actors from the EFTA countries and the EU countries.

¹⁴ *Commission Directive 85/413/EEC amending Directive 80/723/EEC on the transparency of financial relations between the Member States and public undertakings*

¹⁵ *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE. (2089) p 194*

¹⁶ *Ibidem*

¹⁷ *Korah, Valentine. An Introductory Guide to EC Competition Law and Practice. (2007) p 37*

2.2. SGEI – An Arbitrary Exception

As ascertained previously under 2.1.2, there are market failures under the current system and beyond those there are also the social objectives of the Union that allow the State to intervene in the proper allocation of resources and in the organisation of the economy. Besides the expressed derogations from the State aid rules to achieve these goals, which can be found in the same Article as the general prohibition on awarding State aid, there are also general exceptions to the competition rules as a whole, of which the State aid rules are a constituent part. The general exception to the competition rules that shall be further examined in this paper is the special role of the SGEI in the creation of the Single Market. This exception is usually portrayed as a carrier of tension between the social Europe and the Single Market.¹⁸ However, this image can easily be dealt with taking into account the Union's objectives in promoting an economic, social and territorial cohesion, as stated in the Lisbon Treaty.¹⁹ It would therefore be perhaps more appropriate to say that the exception at hand attempts to strike a balance between the different objectives, the social Europe and the market integration. Most importantly, however, it aims to alleviate disparities that may exist between the EU's market integration objectives and the national public objectives.²⁰ The latter, is despite its interesting character, not an aspect that will be much further developed as it falls out of the scope of this paper.

2.2.1. Services of General Interest

The notion of services of general (hereinafter “SGI”) was introduced for the first time within EU primary law with the Protocol annexed to the Lisbon Treaty. The subcategory to this notion, SGEI, was introduced within the EU primary law almost half a century before by the Treaty of Rome.²¹ SGI are services that are regarded to be essential for the well-functioning of the society and they can be either of economic, SGEI, or non-economic nature, non-economic SGI. It is the former that shall be closer looked at, while the latter will serve to help us decide what falls within the scope of SGEI through a process of elimination. Non-economic SGI are typical state

¹⁸ Picard, Séverin, “Towards a European recognition of public services at last? The potential impact of the Lisbon Treaty”(2010)

¹⁹ Article 3, the Treaty on the European Union

²⁰ Sánchez Rydelski, Michael. *The EC State aid regime: distortive effects of state aid on competition and trade.* (2006) 543

²¹ However the Commission presented its first notice on SGI already in 1996

prerogatives such as judicial, police and social security schemes that fall outside of the competence of the EU.²² The lack of their economic nature brings about an even more natural consequence, the inapplicability of the competition rules to these type of services. If the service is not economic, or commercial, then it has no place on the market, and if the service is not provided for on the market, then the EU market competition rules do not apply to those services. Nevertheless, this does not exempt the application of other EU regulations such as the principle of non-discrimination or the application of public procurement rules set out by the Directive²³ on non-economic SGI.

2.2.2. A Social European Area

Although the SGEI can be regarded as an exception to the competition rules in order to achieve the social objectives of the EU, it differs from the non-economic SGI in a fundamental way.²⁴ The SGEI are carried out by undertakings whose activities are economic in nature.²⁵ As trivial as this may sound, the theoretical binary approach, economic or non-economic SGI, does not reflect the complexity of the real world.

The objective to construct a social Europe has gained strength and importance as the EU has developed. However, the social Europe cannot trump the core of what constitutes the European integration, the objective of an ever more integrated market, nor can it be trumped by the former. The social Europe shall rather take root in the latter. As demonstrated, further down in this paper, there has been a strengthening and a highlighting of the role of the SGEI in the development of the EU. It mirrors the evolution from an economic model to a social economic model.

SGEI are services that are transactional on the Single Market, as opposed to non-economic SGI that are not marketable.²⁶ The market does not provide for SGEI due to too high cost and insufficient profit in relation to the prevailing level of demand or conversely it can be due to too low level of demand in relation to the prevailing level of

²² *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, COM(2007) 725 final*

²³ *Directive 2004/18/EC of the European parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*

²⁴ *Sauter, Wolf. Services of general economic interest and universal service in EU law. (2008)*

²⁵ *Services of general interest, including social services of general interest: a new European Commitment, COM(2007) 725 final*

²⁶ *Sánchez Rydelski, Michael. The EC State aid regime: distortive effects of state aid on competition and trade. (2006) p 575*

cost.²⁷ The definition of SGEI is therefore closely linked to the capacity of the market. If the market can provide for the services in an adequate way, the service in question will not be regarded as an SGEI despite its social nature. It is the non-profitable segment of the service in relation to the inefficiency of the market that constitutes a SGEI.²⁸ Besides having a social character a SGEI must be of a general interest and unable to be provided for by the market voluntarily due its inefficiency. The market simply fails to provide the services at the politically desired quality, price, quantity or geographical location on a voluntary basis.²⁹ In other words providing the service in question voluntarily even on a not-for-profit basis does not qualify the service as a SGEI.³⁰

Considering the aforementioned, there is no clear definition of SGEI either in the EU primary or secondary law. The case law and practice on SGEI shall nevertheless be examined closer. Hopefully, a broad agreement will surge out of this examination on certain quintessential qualities of a SGEI.³¹

With regard to the European dimension of this social structure, it must be highlighted that the notion of SGEI and State aid are both EU concepts. They are therefore distinct and cannot be found in national legal orders. There may however be similarities between the national and the EU concepts, but they are far away from identical. For example SGEI corresponds to what is known as public services on a national level. They are, nonetheless, defined on two different levels and respond to two different needs.³²³³

2.2.3. Exception to the Exception

The derogatory characteristic of the SGEI from the general prohibition of the State aid rules have been confirmed and to some extent even justified. Cliché-wise one could even argue that it is the exception in itself that proves the rule. It is nevertheless

²⁷ *Ibidem*

²⁸ *Ibidem*

²⁹ *Ibidem*

³⁰ *Case C-222/04 Casa di Risparmio di Firenze [2006] ECR I-289*

³¹ *White paper on services of general interest. COM (2004) 374 final*

³² *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE. (2008) p 192*

³³ *The present Competition Commissioner, Joaquín Almunia, also refers to the SGEI as public services. 2May 2011, Brussels.*

important to state that, according to common legal principles, general exceptions to rules shall be interpreted in a restrictive manner.³⁴ The reason for this is rather clear: the general rule would otherwise be undermined and there would be no legal certainty. This legal principle is applicable to the case at hand. Besides and beyond its narrow interpretation, there are also limitations to the use of SGEI as an exception. One could argue that they are limits to the exception, or exceptions to the exception.

The first of such delimitation, on the use of the exception, is the existence of EU rules governing the subject matter, where there is harmonizing legislation adopted on the EU level.³⁵ This is the case since the competences and task with regard to SGEI reflect a shared responsibility. This applies therefore to, for example, the transportation, postal service and energy sector. The Member States have competence in the area in so far as the Union has not exercised, or decided to exercise its competence.³⁶ In addition, not to undertake measures where the Union has not yet acted but intends to act follows from the principle of sincere cooperation, which is a fundamental principle of the EU. Furthermore, the SGEI shall be implemented by the Member States in a way that fully respects the jurisprudence of the European Court of Justice. Consequently, the use of the exception is limited by the case-law of the Court.³⁷ Finally, there is also the delimitation of the existence of so-called manifest errors.³⁸ The exception cannot be pleaded erroneously by the Member States in order to justify aid awarded to undertakings that do not provide SGEI. Member States enjoy a wide range of discretion regarding the scope of SGEI. They decide individually which services they wish to guarantee for their citizens without those SGEI having to coincide with those provided by other Member States. However, the notion of SGEI is not a national concept; it is a Union concept and must therefore be limited even when there is no harmonisation in place. The SGEI may therefore operate as a maximum standard that the Member States

³⁴ Harris, H. Stephen and Calvin S. Goldman. *Competition laws outside the United States*. (2001) p 308

³⁵ T. Karayigit, Mustafa. "The Notion of Services of General Economic Interest Revisited". (2009) p 579

³⁶ http://europa.eu/scadplus/european_convention/competences_en.htm#COMPETENCES, 2011-02-07

³⁷ Declaration on Article 7d of the Treaty establishing the European Community, Amsterdam Treaty

³⁸ See Section 4.2.4.1.

are prohibited to go beyond.³⁹ The manifest error criteria, although rarely used and rather vague, serves as the borders of this standard.

2.3. State Aid = SGEI ?

The special and intricate relation between the State aid rules and the SGEI is a fact that must be addressed. One of the most important intricacies has been that of the definition of SGEI in the light of the State aid rules. The question has been the attempt to decide whether the pecuniary compensation awarded to undertakings that provide SGEI fall within the scope and definition of State aid, or not. There are two camps in the fight to answer this question, each camp having lost and won various battles before the European Court of Justice, and the General Court⁴⁰, while the war itself is yet to be settled. One camp advocates the 'objective' aid approach and the other, the non-aid aid approach.⁴¹ The former only considers the act of granting aid to an undertaking to be sufficient in order to apply the rules on State aid, without taking into account the circumstances and reasons for this grant. The latter advocates that the aid granted is to be regarded as a compensation for the obligation posed on the undertaking for the non-profitable segment of the service provided for. It cannot be forgotten that SGEI are services that are not provided for voluntarily, hence the obligation posed.

Intervention in the economy is a political tool, therefore fluctuant and at the whim of popular pressures. This is the reason why there is no clear definition of either SGEI or what constitutes State aid. There is a fear of circumvention of these rules, fear that the Member States would design the aid schemes in a matter that would formally be in line with the rules, despite the distortive effects on competition. Furthermore, being dynamic is also an inherent characteristic of the SGEI; it is subject to change over time.⁴² What constitutes SGEI today may not be so the following day. As explained earlier, the efficiency of the market is a decisive factor in assessing whether a service falls within the scope of SGEI or not. Finally, the principle of subsidiarity⁴³ shall also be mentioned

³⁹ *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE (2008) p 206*

⁴⁰ *Known as the Court of First Instance from its inception in 1989 until the entry into force of the Lisbon Treaty*

⁴¹ *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE. (2008) p 192*

⁴² *White paper on services of general interest, COM (2004) 374 final*

⁴³ *It ensures that decisions are taken as closely as possible to those concerned by them*

in this context. The subsidiarity principle is another strong argument for the maximum approach to the definition of SGEI. It is not believed adequate or possible to respond to local and regional or even national needs of public services from a European level.

3. Legal Framework

So far there has been an overwhelming EU approach to the topic at hand, although more EEA and EFTA perspectives will be presented, as this is a comparative study, the focus will remain on the EU approach. This must be the case since it is the EU Internal Market and accordingly the competition rules that are being exported beyond the territory of the EU. In this section the legal framework of the State aid law and SGEI rules will be presented.

The rules on State aid and SGEI in the EEA Agreement are common for both the EFTA States and the EU Member States. The EEA Agreement will therefore serve as a reference point in the comparison with the rules concerning State aid in the Lisbon Treaty, which are only applicable to the Member States of the EU, and the corresponding rules in the EFTA Convention, which are only applicable to the EFTA States.

3.1. Legal Scope and Definition of State Aid

Although the notion of State aid is an EU concept, both the EFTA Convention and the EEA Agreement are clearer in presenting the provisions related to such aids under specific Chapters entitled *State aid*, as opposed to the Lisbon Treaty where, the corresponding Chapter is entitled *Aid granted by States*. Nonetheless, substantially the provisions are the same.

3.1.1. The Light of the EEA Agreement on State aid

Despite the rather clear Chapter entitled *State aid* in the EEA Agreement, the provisions treating State aid can be found in other places than under this caption. Article 47 states that :

[a]id shall be compatible with this Agreement if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Even though it does not specify directly that it regards aid awarded by a State, it is agreed that the interpretation shall be such.⁴⁴

The Chapter on State aid runs from Article 61 to 64. Article 61 is substantive in nature and sets out the legal criteria and scope of State aid in its first Paragraph, while in the second and third, aids that are to *be* found compatible and those that *may* be found compatible with the Single Market rules are enumerated. Article 61 reads as follow:

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

The first Paragraph, 61(1), shall be dissected and examined more closely and rigorously as it is the foundation on which this paper is based. There are five cumulative criteria

⁴⁴ <http://www.eftasurv.int/state-aid/legal-framework/legal-texts/>, 2011-02-08

that must be fulfilled if an aid is to be classified as a prohibited State aid.⁴⁵ First, there is the criterion of transfer of the resources of the State to an undertaking. Second, there must be a distortion or a threat of distortion of the competition in the market. Third, there must be favouring, in other words, an element of discrimination i.e. an exclusion of other undertakings. Fourth, the awarded entity must be an undertaking. Finally, there must be a cross-border externality, that is, the aid in question must affect trade outside the national borders, in another State that is a partner of the EEA Agreement. The concept of State aid must be understood as giving an advantage to the awarded undertaking. It is this non-market-originated-advantage that is believed to distort the competition. Hence, the five criteria mentioned earlier must prove that the undertaking in question has been given an advantage, a relief of the charges that are usually born by its budget.⁴⁶

These criteria shall be further developed in relation to the jurisprudence of the European Court of Justice and the EFTA Court and the decisions and practice of the European Commission and the EFTA Surveillance Authority.

Continuing our substantive rules classification approach, the Article next in line is Article 63. It is a rather short provision and reads as follow:

Annex XV contains specific provisions on State aid.

The text stands out as a rather weak stipulation. However, if it is examined together with Article 7 of the Agreement, it suddenly gains strength. Article 7 of the Agreement states that:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows :

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

⁴⁵ Sánchez Rydelski, Michael. *The EC State aid regime: distortive effects of state aid on competition and trade.* (2006) p 24

⁴⁶ *Ibidem*

In other words, this Article makes binding secondary legislation out of the Annex in question.

In this regard, it is of interest to have a better understanding of the modification procedure of the Annex, as it is an important document. In order to ensure the homogeneity principle, the EEA Joint Committee⁴⁷ meets regularly and discusses new EU legislations that are of relevance to the EEA Agreement. Based on those discussions it then decides on whether an amendment is necessary or not for the correct functioning of the Single Market. The Annex of the EEA Agreement is therefore on a regular basis updated to with EU *acquis*.⁴⁸ This is original character of the EEA Agreement, which distinguishes it from other international treaties.⁴⁹

Before moving on to the procedural rules of the State aid law contained in the Agreement, it must be stated that the procedural rules only become relevant once Article 61(1) has been found applicable. If there is no State aid, then there is no procedure to follow. Hence, only once Article 61 has been activated does Article 62 come into play and it reads as follows:

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

⁴⁷ It consist of the representatives of the contracting parties

⁴⁸ Vahl, Marius, "Models for the European Neighbourhood Policy, The European Economic Area and the Northern Dimension", (2005) p 7

⁴⁹ Kronenberger, Vincent, "Does the EFTA Court interpret the EEA agreement as if it were the EC Treaty? Some questions raised by the Restmark judgment", (1996) p 207

The bicephalous characteristic of the EEA Agreement becomes rather apparent in this Article. The same rules are to be reviewed by two different institutions. In the second paragraph, there is a reference made to Protocol 26 that entrusts the EFTA Surveillance Authority with equivalent powers and similar functions as the ones entrusted to the European Commission in order to ensure the uniform application of the rules.

However, the Agreement is not naive in its approach and does not only require uniform application of the rules and cooperation between the two surveillance authorities, but it also foresees eventual disagreements on the implementation of the State aid rules. Article 64 states therefore the following:

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

Article 64 of the Agreement recognizes the differences between the two “cephals” and tries to align them as much as possible. Whether the Agreement achieves this objective shall be examined in Section 4, and concluded in Section 5.

3.1.2. In the Light of the EEA Agreement in Relation to the Lisbon Treaty

At a first glance, the inconsistency in the nomination of the Chapters treating the State aid rules between the EEA Agreement and the Lisbon Treaty may deceive one in to believing that the same inconsistency will apply to the substantial rules as well. However, as it has been mentioned, the EEA Agreement intends to expand the Single Market beyond the borders of the EU Member States and, accordingly, extend the application of the rules of that market. It would therefore be illogic to have inconsistent rules between something, the EEA Agreement, which is to reflect something else, the Single Market competition provisions of the Lisbon Treaty. This conclusion becomes rather apparent if the wording of the two Articles is juxtaposed.

The State aid rules in the Treaty on the functioning of the European Union (hereinafter “TFEU”) run from Article 107 to 109. However, precisely as the EEA Agreement, there are other sections outside the Chapter entitled *Aids granted by States* that treat the State aid phenomena, for example Article 93 on State aid to the transport sector.

The State aid rules in the TFEU are designed in the same way as the rules in the EEA Agreement (this seems rather strange as a statement as the latter is to reflect the former). Article 107 is of a substantive nature, setting up the criteria for classifying an aid as State aid. It reads as follow:

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Internal Market.

The second and third Paragraphs have the same approach as Article 61(2) and (3) of the EEA Agreement, the former, stating those aids that are to *be* considered as compatible and the latter, those that *may be* regarded as compatible with the Internal Market.

Concerning the procedural rules, there cannot be a difference between the two since Article 62 (1) (a) refers to the procedural rules set out by the TFEU. The procedural rules are rather complicated and a further development of those rules would be the topic for another dissertation. It falls for this reason outside the scope of this paper and shall only be referred to when deemed necessary.

Article 109 makes it possible for the Commission, together with the Council and the European Parliament, to regulate and develop the application of the State aid rules. This Article has been used for example for the introduction of the General Block Exemption Regulation⁵⁰ (see Section 4.3.2.1.1.).

The conclusion would therefore be that the EU Member States are in fact only applying one set of State aid rules since the EEA Agreement reflects the rules on State aid inscribed in the TFEU.

3.1.3. In the Light of the EEA Agreement in Relation to the EFTA Convention

Contrary to the previous Section, the consistency in the nomination of the Chapters between the EEA Agreement and the EFTA Convention on State aid rules may deceive one into believing that the two documents are similar in their approach to defining these rules. However, as the Single Market is a free trade area that is being accessed by the EFTA Countries it is rather logic that there is some inconsistency in their approach to the market rules, of which the State aid and SGEI rules are a constituent part.

The approach of the EFTA Convention with regard to the State aid rules may seem fairly shocking as it only consists of one Article and does not contain any direct reference to the rules of the EEA or the TFEU. Article 16 of the EFTA Convention reads as follow:

- 1. The rights and obligations of the Member States relating to State aid shall be based on Article XVI of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures, which are incorporated and made part of the Convention, except as otherwise provided for in Annex Q.*
- 2. Member States shall not apply countervailing measures as provided for under Part V of the WTO Agreement on Subsidies and Countervailing Measures in relation to any other Member State in accordance with Article 36.*
- 3. The Member States shall review the scope of application of this Chapter with a view to extending the disciplines with respect to State aid to the field of services, taking into account international developments in the sector. The reviews shall take place at yearly intervals.*

⁵⁰ The general block exemption means automatic approval by the Commission for aid in certain categories

The EFTA Convention seems at a first glance to base its provisions on State aid solely on the rules on Subsidies originating from the World Trade Organisation (hereinafter “WTO”) and the General Agreement on Tariffs and Trade (hereinafter “GATT”). However, there is a rather vague and weak reference to international development with regard to the application of the rules of State aid in the third Paragraph. Nevertheless, the lack of a definition of State aid and concrete procedural rules in the Convention renders the provision futile, or as Chairman Mao Zedong would have put it: *a paper tiger*.

Furthermore, whether subsidy is to be interpreted in the same way as State aid is another topic that merits a dissertation alone, comparing WTO, GATT, EU, EFTA and EEA law. It goes therefore without saying that this too falls out of the scope of this paper, even if reference may be made to the WTO and GATT as statutory examples. It can, however, quickly be mentioned that WTO subsidies law and EU State aid law are fundamentally different, and the latter is not to be interpreted in conformity with the former.⁵¹ They are fundamentally so different that the transposition of the doctrine of one legal order might in some cases be harmful to the legal order of the other.

It can therefore be concluded that the EFTA States run on two different State aid rules, one originating from the international community at large and the other one originating from the European Union.

3.2. Legal Scope and Definition of SGEI

SGI was introduced as a concept in 1996 by the European Commission in its Communication on Services on General Interests.⁵² It was used, for the first time, by the EU legislator through secondary law in 2006 in the Services Directive.⁵³ However it is the narrower term, SGEI, which was introduced already in Article 90(2) of the Treaty of

⁵¹ *Santaolalla Gadea, Francisco et al. EC state aid law = Le droit des aides d'Etat dans la CE. (2008) p 467*

⁵² *Services of General Interest, OJ 1996, C 281/3*

⁵³ *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market. OJ 2006, L 376/76*

Rome, the Treaty establishing the European Economic Community, which we shall examine closer.⁵⁴

SGEI is a term that has been the subject of much discussion since its inception. This does not however hinder us from further discussing the subject in this paper (may it be added that nor does this paper in any way aim to put an end to the discussion, conversely it aims adding fuel to the already heated debate). What can be said in a general way is that SGEI are marketable services with a special status.⁵⁵

3.2.1. The Light of the EEA Agreement on SGEI

Although the term SGEI has existed for over half a century in the context of the EU, it must be considered relatively more logic to start off with the legal basis of the subject matter at hand provided in the EEA Agreement, since the rules apply to both the EFTA and EU States.

Under the Chapter entitled *rules applicable to undertakings* in Article 59, just before the Chapter on State aid, the following is stated:

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, 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 Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.

⁵⁴ Scott, Colin. "Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Private Sectors". (2000) p 310

⁵⁵ Krajewski, M. *Providing Legal Clarity and Securing Policy Space for Public Services through a legal Framework for SGEI: Squaring the Circle?* (2008) p 385

The first Paragraph insinuates that there are at least two types of undertakings, one that is public in character and another that is special or exclusive. However, there is also a third type of undertaking that must be mentioned, which is of course the private undertaking, or undertaking simply. The private and public qualifications added to the noun are signs of ownership, whether the undertaking is State run or not. Furthermore, there is a Protocol⁵⁶ concerning the definition of “undertaking” in relation to Article 56 of the Agreement. This definition is nevertheless also applicable to the definition of undertaking in Article 59. The Protocol states the following in Article 1:

For the purposes of the attribution of individual cases pursuant to Article 56 of the Agreement, an ‘undertaking’ shall be any entity carrying out activities of a commercial or economic nature.

This definition of undertaking, which is a constituent part of SGEI, gives a better understanding of the relation between SGEI and the competition rules, since the entities that are providing these types of services are carrying out an activity of commercial or economic nature. As the nature of their activity is economic, it must therefore appear as a natural consequence that the competition rules apply to them, especially the State aid rules.

It is nevertheless the second Paragraph that contains the core of the discussion. It is the only Article in the EEA Agreement that mentions SGEI. The Article is formulated in such a way that one might believe that undertakings providing SGEI are subject to the competition rules, of which the State aid rules are a constituent part. However, they are subject to those rules as long as they do not hinder the undertakings from supplying the service in question, in *de jure* or *de facto*. This is a rather strong exception to the competition rules, which form the backbone of the EEA. It can be added that the definition of SGEI is mainly a competence of the Contracting Parties, Member States of the EU and EFTA.⁵⁷ Having stated the aforementioned it becomes apparent quite quickly why SGEI is the subject of such a heated discussion. Imagine 30 States, the 3 EFTA and the 27 EU States, all trying to derogate from the competition rules on different basis since the SGEI definition given in one country does not have to correspond to that of another. Suddenly, we would have a multitude of exceptions to the general prohibition which could, if not controlled, undermine the prohibition. It can

⁵⁶ Protocol 22, Concerning the definition of ‘undertaking’ and ‘turnover’ (Article 56)

⁵⁷ EFTA Surveillance Authority, *State Aid Guidelines*, 1994 p. 330

finally be highlighted that contrary to the first Paragraph, the term undertaking in the second Paragraph is not endowed with a determinative adjective, such as private, special, exclusive or public. This is in line with the maximum approach philosophy mentioned earlier, under 2.2.3. By not defining what type of undertaking that is being sought, the authors of the text must have aspired for an inclusive and wide interpretation of the concept rather than a narrow and exclusive, making it more difficult for the Member States to circumvent the competition rules.

The third Paragraph is of a declaratory nature and rather self-explanatory and requires for this reason no further comment. It can be highlighted that the two territories within the Single Market become suddenly very apparent in the final phrase. It gives the idea of two parallel running territories.

3.2.3. In the Light of EEA Agreement in Relation to the Lisbon Treaty

The term SGEI was introduced more than 50 years ago within the EU context. Yet, still today, it remains without a clear definition. This might seem quite strange, or even contradictory, since significant progress has been made in the field. Today, the term SGEI can be found in several places in the EU's primary law, and in even more places in its secondary law.

Already in Article 14 of TFEU under the caption "*provisions having general application*" the following is stated:

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

This Article was introduced with the Amsterdam Treaty, and was last modified with the Lisbon Treaty. It did not really introduce any new information with regard to SGEI

when first added to the Treaty; it was conceived more as a consolation prize for the French that were strong advocates of promoting the concept.⁵⁸ It has therefore been regarded as having more political weight rather than legal. It can nevertheless be stipulated that the special role of the Member States in designing SGEI has been promoted with this Article.

It is argued that the SGEI have in a similar manner, declaratory, found their way into the Charter of Fundamental rights of the European Union (hereinafter “CFR” or the “Charter”).⁵⁹ The Charter became EU primary law with the entry into force of the Lisbon Treaty.⁶⁰ Article 36 of the Charter entitled access to *services of general economic interest* states that:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Once again, the discretion of the Member States in designing and defining SGEI is ascertained, however it is encapsulated by the EU rules in order to establish some kind of cohesion.

Since its inception in the Rome Treaty, Article 106(2) has not been subject of basically any change at all. The only modifications have been linguistic in character, for example replacing the term *enterprise* with the term *undertaking*, in order to mark the specific legal character of the Union.⁶¹ Otherwise, Article 59(2) in the EEA Agreement reflects entirely Article 106(2) TFEU.

As it has been presented there has been no addition to or clarification of the notion despite the propagation of the term in both primary and secondary law since about half a century. However there are discussions about the effects of this propagation. There are those who are of the idea that the European Commission and the European Court of Justice have now incentives to interpret SGEI in a wider term, more coherent with the

⁵⁸ Sauter, Wolf. *Services of general economic interest and universal service in EU law.* (2008) p 6

⁵⁹ *Ibidem*

⁶⁰ Article 6, the Treaty on the European Union

⁶¹ Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585

social dimension of the Union as opposed to the market-based dogma that has dominated previously.⁶²

3.2.3. In the Light of EEA Agreement in Relation to the EFTA Convention

There is very little to be commented, or presented, in this regard as the EFTA Convention despite its Chapter on State aids has no provision on SGEI, or anything corresponding to that. The EFTA Court and the EFTA Surveillance Authority have therefore only the provisions in the EEA Agreement to take into consideration.

This might seem rather contradictory with regard to the nomination of the institutions. One would assume that the EEA Court and EEA Surveillance Authority would be more appropriate names in this regard since the EEA Agreement seems to be the only document they interpret in this regard.

⁶² Picard, Séverin, *“Towards a European recognition of public services at last? The potential impact of the Lisbon Treaty”*(2010)

4. The Institutions

At the outset of the EEA Agreement, in 1991, a common EEA Court was envisaged in order to ensure uniform application and interpretation of the rules foreseen for the extension of the Single Market. The EEA Court was to be composed of judges from both the EU and EFTA Member States.⁶³ “The agreement provides for a system of judicial supervision for the settlement of disputes between the Contracting Parties and the settlement of conflicts within EFTA, and procedures designed to strengthen the uniformity of the law within the EEA”.⁶⁴ At first, this judicial mechanism seemed flawless and the negotiations on the EEA Agreement were concluded on 22 October 1991 in Luxembourg between the partners on this basis. The occasion was even celebrated with the opening of “[s]ome bottles of champagne”⁶⁵. However, previous to the conclusion of the negotiations of the EEA Agreement, already on 14 August 1991 the European Commission had requested for an opinion of the European Court of Justice with regard to the compatibility of the EEA Agreement on grounds of legal certainty in relation to the Community law.

The European Court of Justice announced on 15 November 1991 that an audience would be held “[a]u vu des problèmes graves et complexes que soulève la demande d’avis de la Commission”.⁶⁶ About a month later, on 14 December 1991, the European Court of Justice presented its Opinion where it declared the EEA Agreement incompatible with the European Community Treaty. The Court stated in its Opinion that “[i]n this case, the incompatibility results from the proposed court machinery”. The creation of the EEA Court was regarded as a threat to the European Court of Justice’s supreme authority in its position on Community law (EU law) since the EU judges

⁶³ Haukeland Fredriksen, Halvard, “One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic” (2010), p 482

⁶⁴ Opinion 1/91 of 14 Dec. 1991 [1991] ECR I-6079

⁶⁵ Blanchet, Thérèse et al. *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules.* (1994) p 3

⁶⁶ Blanchet, Thérèse et Maria Westmann-Clément. « La Cour de l’AEELE dans le cadre de l’accord sur l’Espace économique européen » (1995) p 745

were not only to decide on EU rules but also on EEA rules.⁶⁷ There was therefore a fear of conflict of interest.

Due to this negative Opinion, there was no choice but to restart negotiations on how to structure a judicial mechanism that could guarantee the homogeneity of the EEA Agreement by striking a balance between the European Court of Justice's supreme interpretation of EU law and the sovereignty of the EFTA States. The new EEA Agreement was negotiated rather quickly and concluded on 14 February 1992. This time, however, there were no signs of opened champagne bottles. Instead, about two weeks later, on 27 February, the European Commission requested for a new Opinion on the renegotiated EEA Agreement. About a month and a half later, the European Court of Justice finally found in its Opinion 1/92, delivered on 10 April 1992, the new judicial mechanism compatible with the European Community Treaty.⁶⁸ The extension of the Single Market could finally be assured. However, there was no change of mind with regard to the fear of divergent application of the rules, but rather the EFTA Court would "exercise its jurisdiction only within the EFTA"⁶⁹ and the envisaged EEA Court would not become a reality, hindering the future interpretation of the EU rules by the European Court of Justice.⁷⁰

4.1. The Institutions of the EEA

The judicial mechanism that was finally acknowledged by the European Court of Justice, and which is still in practice, is based on a two-pillar solution. One being the EU institution pillar, composed of the European Commission and on the European Court of Justice, and the other the EFTA institution pillar. However, the latter pillar lacked contents and had to be filled with institutions equivalent to the ones of the EU pillar. This was achieved through an internal agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA-Court Agreement), as required by Article 108 of the EEA Agreement. The ESA-Court Agreement, as its name reveals, intends to introduce a surveillance authority mirroring

⁶⁷ Haukeland Fredriksen, Halvard, "One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic ". *Nordic Journal of International Law* 79, p 482

⁶⁸ P. Craig, Paul et Gráinne de Búrca. *EU law : text, cases, and materials.* (2008) p 21

⁶⁹ *Opinion 1/92 [1992] ECR I-2821, para 19*

⁷⁰ Haukeland Fredriksen, Halvard. *The EFTA Court 15 Year on.* (2010). 736

the functions of the European Commission in relation to its monitoring tasks, to enforce the competitions rules and to ensure that the EFTA States fulfill their obligations stemming from the EEA Agreement.⁷¹ Article 108 of the EEA Agreement states namely that:

The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

The EFTA States shall establish a court of justice (EFTA Court).

In respect to the aforementioned Article, the ESA-Court Agreement also introduced the EFTA Court, which was empowered with comparable competences to that of the European Court of Justice in the field of competition. Nevertheless, due to the sovereignty of the EFTA States in relation to the EEA Agreement, the powers of the EFTA Court were less prominent, in opposition to that of the Member States of the EU, which have given up some of their sovereignty in relation to the EU.

4.1.1. The Legal Framework of the Courts

The legal framework of the two Courts is mainly based on the EEA Agreement. However, it regulates rather poorly the working procedures of the institutions. There are several reasons for this, basically the same as those uttered in the Opinion 1/91 by the European Court of Justice.

With regard to the EFTA Court, its framework is to be found mainly in the ESA-Court Agreement, as mentioned above. More precise and developed procedures can be found in the Agreement, and its Protocols. In addition, it is worth mentioning that according to Article 43 of that same Agreement, the EFTA Court is empowered to adopt its own rules of procedure.

Not surprisingly, with regard to the European Court of Justice the EU Treaties form the basis of its procedure and due the multitude of outstanding *oeuvres* on the legal framework of this Court it suffices to refer to some of those scripts.

⁷¹ *Blauberger, Michael and Rike U. Krämer, "European Competition vs. Global Competitiveness: Transferring EU Rules on State Aid and Public Procurement beyond Europe". (2010) p 13*

4.1.2. The Legal Framework of the Monitors

First, reference can be made to the previous caption, 4.1.1., as the same structure applies. The functions and procedures of the EFTA Surveillance Authority and the European Commission are to be found primarily in the EEA Agreement. As mentioned, the more detailed provisions are to be found in the ESA-Court Agreement and the EU Treaties, respectively.

Nevertheless, the Surveillance institutions differ in one significant way from the Courts of the EEA. The former are namely bound by the decisions of the latter. The decisions of the Courts form the framework in which the Surveillance institutions give recommendations, opinions, issue non-binding acts and most importantly monitor. The work of the Institutions is therefore to ensure the compliance of the EEA Member States in accordance with the case law of the EEA Courts.

4.2. Arbitrators of the Single Market

The initial rejection of the European Court of Justice, with regard to the introduction of an EEA Court that would have jurisdiction over the whole EEA, led to a bicephalous judicial mechanism. However, the system endured very early in its inception a concussion, a significant loss of power and status due to the accession of Sweden, Finland and Austria to the EU, leaving the EFTA cooperation.

It must not be forgotten that at the time of the EEA Agreement, in 1992, the EU consisted of 12 Member States compared to the 7 States of the EFTA, of which only 6 acceded to the Agreement. The Agreement entered into force on 1 January 1994. Nonetheless, already the subsequent year, on 1 January 1995, the somewhat equilibrium that existed between the pillars, with regard to amount of States, was disrupted. On that very day, and due to the late accession of Liechtenstein to the EEA Agreement, there were 15 EU Member States compared to 2 EFTA States, Iceland and Norway, making the EEA. This is fairly remarkable if one would compare the constellation of the EFTA Court through its very first decision, Case E-1/94, to one of its more recent ones, Case E-11/10. In the former, one finds the signature of six Judges (Leif Sevón, Björn Haug, Thór Vilhjálmsón, Kurt Herndl and Sven Norberg) compared to only three signatures in the latter (Carl Baudenbacher, Thorgeir Örlygsson and Henrik Bull). This is a much

different evolution than that of the European Court of Justice, which has seen an increase from 12 to 27 Judges since the entry into force of the EEA Agreement.

It may be recalled that the European Court of Justice stated in its first Opinion on the EEA Agreement that the interpretation of the identical provisions of the Agreement and the EC may have a “polluting effect” for its interpretation on those same provisions within the EU Law.⁷² In order to eschew this contamination, and ensure a harmonized application of “the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the”⁷³ EU Treaties, several principles and mechanism were introduced.

Although this paper intends to focus on the interpretation and application of the State aid rules and SGEEI, it is indispensable to give an overview of the underlying principles on the application of the EEA Agreement order to understand the relation of the two Courts, and especially the reasoning of the decisions of the EFTA Court.

4.2.1. The Full Deference of the Independence of the Courts

As stated earlier, the EEA intends to extend the application of the Single Market beyond the borders of the Members of the EU. This is the reason why the provisions of the EEA Agreement mirrors those of the EU Treaties with regard to the market rules, as discussed under Section 3. Having chosen the bicephalous solution, the uniform application of the rules becomes essential, in order to guarantee a level playing field among the EFTA and EU States. The homogeneity principle expressed in the preamble of the EEA Agreement intends to achieve this objective:

[T]he objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties

The homogeneity principle is a key objective that is reiterated already in Article 1, Paragraph 1 of the EEA Agreement:

⁷² Blanchet, Thérèse et al. *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules.* (1994) p 30

⁷³ Article 6, EEA Agreement

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

The principle of homogeneity, the incitement to apply the provisions as uniform as possible, is recurrent throughout the EEA Agreement. Nevertheless, since the EEA legal system is based on EU law, it is essential to take into account the jurisprudence of the Courts, notably that of the European Court of Justice.⁷⁴ The case law of the European Court of Justice makes up a substantial amount of the EU law and respecting those decisions is therefore of great significance in order to achieve the homogeneity objective. It is therefore stated in Article 6 of the EEA Agreement that:

[w]ithout prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

This provision is strengthened and reiterated in Article 3 of the ESA-Court Agreement. Despite the recognition of the case law of the European Court of Justice, the provision refers solely to those decisions that were rendered prior to the date of the signature of the Agreement. Nevertheless, this restriction has been somewhat alleviated by Article 3 of the ESA-Court Agreement, which in its first Paragraph reaffirms the case law of the European Court of Justice prior to the signature. The second Paragraph develops and extends the role of the posterior decisions of the European Court of Justice.

Without prejudice to future developments of case law, the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall in their

⁷⁴ Graver, Hans Petter, "The Effects of the EFTA Court Jurisprudence on the Legal Orders of the EFTA States", (2004) p 5

implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

The wording of the second Paragraph, “pay due account”, is not as legally, i.e. formally, strong as the formulation of the first Paragraph, in which the EFTA institution in question *shall* interpret in conformity with the case law of the European Court of Justice. It must, furthermore, be stressed that paying due account to the future decisions of the European Court of Justice is stated outside the scope of the EEA Agreement – the ESA-Court Agreement is an intergovernmental agreement between the EFTA States – and it does not for this reason create obligations towards the EU.

Nevertheless, going back to the EEA Agreement, in order to ensure its future uniform interpretation, the national courts of the EFTA States may ask for preliminary rulings from the European Court of Justice, just like the national courts of the EU States. Article 107 of the EEA Agreement states that:

[p]rovisions on the possibility for an EFTA State to allow a court or tribunal to ask the Court of Justice of the European Communities to decide on the interpretation of an EEA rule are laid down in Protocol 34.

It can however be clarified that this provision has not yet been put to use, and there seems to be no change of attitude among the national courts of the EFTA State in this regard.

There are other provisions in the EEA Agreement that aim to ensure the uniform application of the substantial identical rules within the two pillars. However, they take

account of other institutions, such as the EEA Joint Committee, and fall for this reason out of the scope of this paper.

Finally, the sincere and loyal cooperation of the institutions may also be mentioned as a contractual legal principle enshrined in the EEA Agreement. Within the EU, a Member State or an Institution can be subject of breach of EU law if it does not cooperate in a way that can be expected from a contracting party in order to achieve a harmonious and effective administration. This principle, although not as effective as within the scope of the EU Treaties, can be found in Article 3 of the EEA Agreement.⁷⁵

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

4.2.2. Judicial Dialogue

Judicial dialogue is a term promoted by the President of the EFTA Court, Carl Baudenbacher, and confirmed as a means of cooperation by Vassilios Skouris, the President of the European Court of Justice.⁷⁶ According to Mr Baudenbacher, the judicial dialogue is separate from the written homogeneity rules that can be found in the EEA Agreement and serves instead to complement those rules.⁷⁷ It is a term that confirms the full deference and independence of the Courts, putting them on an equal footing, yet ensuring a uniform and harmonious application of the rules. Judicial dialogue takes various forms and can be found within national legal systems, between the different appeal instances, or between national and supranational courts, like the national courts of the Member States of the EU and the European Court of Justice. It can also be found between supranational courts, like the one between the European Court of Human Rights and the European Court of Justice.

⁷⁵ Lang, John. *The Principle of loyal cooperation and the role of the national judge in Community, Union and EEA law.* (2006) p 497

⁷⁶ Baudenbacher, Carl. *The goal of homogeneous interpretation of the law in the European, Two courts and two separate legal orders, but law that is essentially identical in substance.* (2008) p 31

⁷⁷ *ibidem*

Judicial dialogue could be described as a specific branch of the more general principle of loyal cooperation, which was mentioned above. The aim is to see whether the Courts at hand are dialoguing in order to ensure a uniform application of the rules, and therefore to guarantee the correct functioning of the Single Market, especially in relation to the State aid rules and the provisions on SGEI.⁷⁸ Whether such a dialogue takes place may perhaps be answered through a closer examination of the case law of the two Courts in relation to the notions, and their interpretation.

4.2.3. Judicial Interpretation of State Aid

As mentioned under Section 3.1.1., Article 61 (1) of the EEA Agreement sets out five cumulative criteria that must be fulfilled so that an aid can be classified as State aid. First, there is the criterion of transfer of State resources to an undertaking. Second, there must be a distortion or a threat of distortion of the competition in the market. Third, there must be favouring, in other words, there must be an element of discrimination i.e. exclusion of other undertakings. Fourth, the awarded entity must be an undertaking. Finally, there must be a cross-border externality, that is, the aid in question must affect trade outside the national borders, in another State that is a partner of the EEA Agreement. Conclusively, the concept of State aid must be understood as giving an advantage to the awarded undertaking. In *Traghetti del Mediterraneo* the European Court of Justice held that:

[m]easures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid⁷⁹

Although the abovementioned criteria are interrelated, and therefore the risk for repetition is high, they will nevertheless still be treated piecemeal. This is very important as the concept of aid is objective.⁸⁰

4.2.3.1. State Resources

According to the wording of Article 61 (1), any aid granted through State resources, in any form whatsoever, is caught by the general prohibition on State aid. Despite the

⁷⁸ Baudenbacher, Carl, "The EFTA Court, the ECJ and the Latter's Advocate General – a Tale of Judicial Dialogue", (2008) p 91

⁷⁹ Case C-140/09 *Traghetti del Mediterraneo* [2010] ECR I-00000, para 34

⁸⁰ Case C-83/98 *Ladbroke* [2000] ECR I-3271

literal wording of the Article and the extensive interpretation on these types of provisions by the EEA Courts, the provision is to be given a rather restrictive interpretation. That is, it is not only required that the aid granted be given through State resources, but the act of granting itself must furthermore be attributed to the State, the so-called *authorship*.⁸¹

First, it is not always easy to detect transfers of resources from the State budget to undertakings, for the aid schemes are many times disguised as other types of measures, as will be shown from the case law of the Courts. In addition, often there is no intention to covert such schemes, but it is rather the lack of legal certainty in the field that results in that the measure is caught by the prohibition.

Already in 1978, the European Court of Justice stated in its *Openbaar Ministerie v. Van Tiggele* decision that advantages not given directly or indirectly through resources are not to be considered within the scope of the State aid provision.⁸² This was reiterated again in 2001 by the Court in its famous *PreussenElektra* decision where it wrote that “[o]nly advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article” 107 (1).⁸³ However, even earlier than *PreussenElektra*, the Court wrote in *Ecotrade* that aid “necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose”⁸⁴.

Several methods have been developed by the EEA Courts in order to decide whether a scheme falls within the scope of the State aid rules. One of these methods developed by the European Court of Justice, and applied by the EFTA Court, is the so-called “effect-based test”: it is not the form that is important but rather the effect of the scheme that must be examined. Once it is established that the scheme in question is authored by a public body, the scheme can only then despite its form, be regarded to have the effect of giving advantage selectively to undertakings. The EFTA Court stated, in reference to

⁸¹ Sánchez Rydelski, Michael. *The EC State aid regime : distortive effects of state aid on competition and trade*. London : Cameron , May, 2006. P 39

⁸² Case C-82/77 *Openbaar Ministerie v. Van Tiggele* [1978] ECR 25

⁸³ Case C-379/98 *PreussenElektra* [2001] ECR I-2099

⁸⁴ Case C-200/97 *Ecotrade* [1998] ECR I-7907

the European Court of Justice's decision in *Italy v. Commission*⁸⁵, in *Norway v. EFTA Surveillance Authority* that Article 107 (1) does not “distinguish between the measures of State intervention by reference to their causes and aims but rather defines them in relation to their effects”⁸⁶.

The effect-based test is, as mentioned above, the result of the existence of indirect aids, since State aids may be granted in *any form whatsoever*. This approach has in some ways extended the competences of the EEA. The EEA Agreement does not cover tax systems, as competences of fiscal nature are prerogatives of the Member States. Nonetheless, as mentioned in the two latter cases and according to the effect-based test, the EEA Courts have empowered themselves with the authority to scrutinize national tax systems. In the abovementioned case of the European Court of Justice, *Italy v. Commission*, it was concluded that “the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article”⁸⁷ 107. More recently, in another judgment, where the parties were the European Commission and Italy once again, the Court held that:

*[i]t follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article [61 (1) EEA Agreement] (see Case C-387/92 Banco Exterior de España [1994] ECR I-877, paragraph 14). Similarly, a measure which grants to certain undertakings a tax reduction or a deferral of liability to tax that would otherwise be payable may constitute State aid.*⁸⁸

Although the effect-based test has been useful in deciding whether a scheme falls within the scope of the State aid rules or not, it is not a panacea. The cases that have been decided upon by the EEA Courts are far too diverse to apply one set of approach. The *PreussenElektra*, mentioned above, and the *Kirsammer Hack* illustrate the deviation from the effect-base test approach to the form approach. In the latter case, the European Court of Justice found that the German legislator's intention was more important than the effect, therefore stating that:

⁸⁵ Case C-173/73 *Italy v. Commission* [1974] ECR 709

⁸⁶ Case E-6/98 *Norway v. EFTA Surveillance Authority*

⁸⁷ Case C-173/73 *Italy v. Commission* [1974] ECR 709

⁸⁸ Case C-66/02 *Italy v Commission* [2005] ECR I-10901

the exclusion of a category of businesses from the protection system in question does not entail any direct or indirect transfer of State resources to those businesses but derives solely from the legislature's intention to provide a specific legislative framework for working relationships between employers and employees in small businesses and to avoid imposing on those businesses financial constraints which might hinder their development.

Furthermore, it can also be added that the so-called *logic of the system* may be used as a means to deviate from the effect-based test approach. This will be further developed below in Section 4.2.3.3.

It can thus so far be concluded that “the effect-based test remains valid but may not always be solely determinative of the identification of State aid”⁸⁹. Nevertheless, the questions of whether the resources at hand belong to the State and whether the alleged aid can be imputed to the State have to be treated.

As mentioned earlier, in this section, the two criteria are cumulative, the ownership and authorship of the alleged aid. In other words, they must both be established in order for the first criterion to be fulfilled i.e. State resources.⁹⁰ For this reason, the criteria may be addressed without any particular order.

Pearle serves as a case in point with regard to the ownership. If the resources belong to the State then their transfer would logically lead to a decrease of the State budget. The European Court of Justice stated in that decision that “[s]ince the costs incurred by the public body for the purposes of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom, the Board's action did not tend to create an advantage which would constitute an additional burden for the State or that body”⁹¹. This was, nevertheless, a reiteration of the decision rendered in 1998 in the *Ecotrade* case where the Court reasoned that the State resources criterion is either satisfied when an advantage is granted directly or indirectly through State resources or, as developed in

⁸⁹ Sánchez Rydelski, Michael. *The EC State aid regime : distortive effects of state aid on competition and trade.* (2006) p 28

⁹⁰ Biondi, Andrea. “Some Reflections on the Notion of ‘State Resources’ in European Community State Aid Law”. (2006) p 1434

⁹¹ Case C-345/02 *Pearle* [2004] ECR I-07139

the *Pearle* case, when there is a burden on the State budget, that is “an additional charge for the State or for bodies designated or established by the State”⁹².

With regard to the authorship criterion, the European Court of Justice took a rather strict stand on the imputability of an aid granted by the State. In the famous *Stardust Maritime*⁹³ case, the Court wrote that:

[t] here is no dispute that, in the contested decision, the Commission inferred the imputability of the financial assistance granted to Stardust by Altus and SBT to the State simply from the fact that those two companies, as subsidiaries of Crédit Lyonnais, were indirectly controlled by the State. Such an interpretation of the condition that, for a measure to be capable of being classified as State aid within the meaning of Article [107(1) TFEU], it must be imputable to the State, which infers such imputability from the mere fact that that measure was taken by a public undertaking, cannot be accepted.

In other words, indirect State control of the undertaking is not sufficient, this influence must in addition be exercised, it cannot be presumed. The Court went further and stated that:

*[a] public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. That might be the situation in the case of public undertakings such as Altus and SBT. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.*⁹⁴

It is therefore not the mere ownership or the control of the shares of an undertaking by the State that will suffice, but the actual exercise of that control. However, in order not to render the work of the European Commission or the EFTA Surveillance Authority impossible, to actually prove that the measure taken was due to State influence, the Court developed a non-exhaustive list of indicators which might alleviate the surveillance work of the Monitors of the EEA Agreement in that decision. It can therefore be concluded that, to be State authorship, the decision to grant the aid must

⁹² Case C-200/97 *Ecotrade* [1998] ECR I-7926

⁹³ Case C-482/99 *Stardust Maritime* [2002] ECR I-4397

⁹⁴ *Ibidem*, para 52

stem from State. Once again, the *Pearle* decision serves a case in point to illustrate one of those indicators set up by the Court.

[b]ye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, do not constitute an integral part of an aid measure within the meaning of those provisions⁹⁵

It can therefore be acknowledged that where there is no direct transfer of State resources there are two criteria that must be fulfilled. First, there must be a burden on the State budget and second, the aid granted must stem from a decision influenced by the State.

4.2.3.2. Distortion of Competition

Distortion of competition has proven to be a more complex issue in practice than in theory. This is the case since, according to the wording of the provision, it is sufficient that there is a hanging *threat* of distortion of the competition. There does not therefore actually have to be any distortion at hand, the mere probability suffices. Due to this relatively large criterion, the Courts have adopted a somewhat strict interpretation and application of the measure.

In *Germany v. Commission*, the European Court of Justice took a teleological approach to the notion and stated that an aid “is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities” and, as such, it “distorts the conditions of competition”⁹⁶.

Incorrectly, the distortion of competition has many times been equal to the effects on cross-border trade (see below, 4.2.3.5). It is clear from the approach of the European Court of Justice in the *Germany v Commission* that they are two separate conditions that must be met. In its decision, the Court developed separately the fulfilment of this criterion.⁹⁷

⁹⁵ Case C-345/02 *Pearle* [2004] ECR I-07139, para 41

⁹⁶ Case C-156/98 *Germany v Commission* [2000] ECR I-6857

⁹⁷ *Ibidem* para 32

This is, however, not the approach taken by the EFTA Court in its application of the provision. In one of its more recent cases, *Fesil and others*⁹⁸, it repeatedly assessed the distortion of competition and trade effects together as the same criterion.

[R]easons for its decision on the effect on intra-EEA trade and the distortion of competition.

As concerns reasoning with regard to distortion of competition and effect on trade...

Consequently, the Applicants' argument concerning an alleged failure to state reasons with regard to distortion of competition and effect on trade between Contracting Parties must be rejected. On all those grounds, the pleas that the tax exemption at issue does not constitute State aid within the meaning of Article 61(1) EEA, does not distort competition and does not affect intra-EEA trade, and that, in this respect, the contested Decision is not sufficiently reasoned, must be dismissed as unfounded.

However, it can be noted that this position was held previously by the European Court of Justice. In *Philip Morris v Commission*, the Court held that “[w]hen stata financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid”⁹⁹.

Another perspective of the distortion of competition criterion is the amount of aid in question. The Courts have repeatedly stated that the size of the amount of the aid *per se* does not exclude a measure to fall within the scope of the State aid rules.¹⁰⁰

It can finally be mentioned that for there to be a question of distortion there must also exist competition. Although the undertaking might be acting on the market, it might be not be in competition with other undertakings. That is so for example in the case of monopolies but also private undertakings such as Boeing. This leads in turn to the importance of defining the market in which the undertakings act. The European Court of Justice held therefore in its *Papierwarenfabriek*¹⁰¹ case that:

⁹⁸ *Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and others*, para 96, 98 and 101

⁹⁹ *Case C-730/79 Philip Morris v Commission* [1980] ECR 2671

¹⁰⁰ *Case C-280/00 Altmark* [2003] ECR I-1115, para 81

¹⁰¹ *Case C-296/82 Papierwarenfabriek* [1985] ECR 809, para 24

[e]ven if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its Decision. In this case it has failed to do so since the contested Decision does not contain the slightest information concerning the situation of the relevant market, the place of leeuwarder in that market, the pattern of trade between Member States in the products in question or the undertaking 's exports.

4.2.3.3. Discrimination

First, it must be stressed that the criterion of *favour*, or selectivity, must be viewed with regard to the fundamental principle of non-discrimination enshrined already in the founding treaties and reiterated and protected by the European Court of Justice in its rendered decisions over the years, since its inception. When some undertakings are favoured, given an advantage or selected, other undertakings are logically discriminated against.

Second, the concept of competition rests on the idea of level playing field. If some undertakings are therefore given an advantage, the competition must be regarded as distorted. This criterion is, for these two reasons, of utmost importance.

More importantly, it is *the* criterion that coincides with the SGEI. However, discrimination will be developed separately below in this regard, Section 4.2.4.

The distortion of competition is a criterion assessed according to its effects rather than simply to its aims. However, this does not entail that such an objective is not taken into account. The European Court of Justice held in *Germany v Commission* that, since the provision in question did not have “the effect of reducing the costs of certain financing charges for the undertakings in question”¹⁰², it could not be concluded that the measure in question distorted the competition. The Court developed its reasoning in the subsequent paragraph and stated that:

[i]n principle, operating aid ... is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition

¹⁰² Case C-156/98 *Germany v Commission* [2000] ECR I- 6857, para 29

This criterion must be examined together with the State resource criterion, see above Section 4.2.3.1. A burden on the State budget would logically result in a release on the budget of the undertaking, since the advantage in question regards a transfer of resources.¹⁰³ This illustrates the interrelation of the criteria very well.

The EFTA Court has taken the same approach in its interpretation of the criterion as the European Court of Justice, according to its obligation stemming from Article 6 of the EEA Agreement.¹⁰⁴ However, in order to prevent every agreement concluded between the State and an undertaking to fall within the scope of the State aid rules, the so-called *market investor test* has been developed. It is a test to decide whether the undertaking would have achieved the same alleged *favourable* agreement under normal market conditions.¹⁰⁵ It is an indicator that has been used by the European Court of Justice in many of its judgements, although never under that name.¹⁰⁶ In *Tubemeuse*, the Court held that:

[i]n order to determine whether such measures are in the nature of State aid, the relevant criterion is that indicated in the Commission's decision, and not contested by the Belgian Government, namely whether the undertaking could have obtained the amounts in question on the capital market.

In relation to this, it can be added that the European Court of Justice has “consistently held that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected (Case C- 142/87 Belgium v Commission [1990] (Tubemeuse) ECR I-959, paragraph 43, and Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103, paragraphs 40 to 42)”¹⁰⁷. This will, however, be further developed below, under section 4.2.3.5.

¹⁰³ Hancher, Leigh et al. *EC state aids*. (2006) p 3-064

¹⁰⁴ See Case E-6/98 Norway v EFTA Surveillance Authority and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and others*

¹⁰⁵ Sánchez Rydelski, Michael. *The EC State aid regime : distortive effects of state aid on competition and trade*. (2006) p 30

¹⁰⁶ See Case 234/84 *Belgium v Commission* [1986] ECR 2263, para 14; Case 40/85 *Belgium v Commission* [1986] ECR 2321, para 13; Case C-142/87 *Belgium v Commission* [1990] ECR I-959, para 25; Case C-482/99 *France v Commission* [2002] ECR I-4397; and Case C-140/09 *Traghetti del Mediterraneo* [2010] ECR I-00000

¹⁰⁷ Case C-156/98 *Germany v Commission* [2000] ECR I-06857, para 32

It should be concluded, that where the measure is general in character, and effect, it cannot be regarded to constitute aid within the meaning of Article 61 of the EEA Agreement, since it does not discriminate. Nonetheless, an aid that covers a whole “economic sector”¹⁰⁸ may still fall within the scope of the State aid rules.

4.2.3.4. Undertaking

This is a criterion not usually assessed separately. It is often taken for granted that the *advantagee* is an undertaking. However, in the current case, it must be assessed separately as it plays an important role in the evaluation of whether a measure fall within the scope of the SGEI, since only undertakings are caught by the competition rules.

First, the rules on State aid should be recalled in their initial form, according to the Treaty of Rome. A quick comparison with Article 61 of the EEA Agreement will give a very important indication of how the notion “undertaking” should be interpreted. The initial provision prescribed “enterprise”; this was later changed to “undertaking”, see above 3.2.3. Another term that has been frequently used as a synonym by the Courts is “company”.

*There is no dispute that, in the contested decision, the Commission inferred the imputability of the financial assistance granted to Stardust by Altus and SBT to the State simply from the fact that **those two companies**, as subsidiaries of Crédit Lyonnais, were indirectly controlled by the State. Such an interpretation of the condition that, for a measure to be capable of being classified as State aid within the meaning of Article [107(1) TFEU], it must be imputable to the State, which infers such imputability from the mere fact that that measure was taken by a public undertaking, cannot be accepted.^{109 110}*

As mentioned above, under section 3.2.1., there are different types of undertakings, both public and private. Their qualification is, nonetheless, irrelevant in the assessment of whether the measure in question is caught by the State aid rules. This is due to the principle of neutrality and equality.¹¹¹ Despite its irrelevance, the character of the

¹⁰⁸ Case C- 148/04 Unicredito [2005] ECR I-11137, para 45

¹⁰⁹ Case C-482/99 Stardust Maritime [2002] ECR I-04397, para 50

¹¹⁰ My own bolding

¹¹¹ Case C-188/80 France, Italy and UK v Commission [1982] ECR 2545, para 3

undertaking creates difficulties in assessing whether the measure taken by the State falls within the scope of the State aid rules, especially in the case of public undertakings.

The EFTA Court has stated clearly in its *Barnhagen*¹¹² judgement, based on the case-law of the European Court of Justice, that:

Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement and Landsorganisasjonen, at paragraph 62).

In other words, it is the economic activity that must be scrutinized. The legal status and/or the way of finance, being public or private, of the undertaking are not of interest. This definition is shared by the European Court of Justice.¹¹³ The European Court of Justice has also held in *Wouters* that “[i]t is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity”¹¹⁴. The EFTA Court continues this reasoning in the *Barnhagen* case with regard to the notion of services and refers to Article 37 of the EEA Agreement, stating that:

[a]ccording to the first paragraph of Article 37 EEA, only services normally provided for remuneration are to be considered as services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service rendered (see for comparison, Humbel, at paragraph 17, and Case 76/05 Schwarz, judgment of 11 September 2007, not yet reported, at paragraph 38).

The Court concludes, eventually, that:

element of remuneration is absent in the activity of municipal kindergartens in Norway. The parents’ fee which constitutes only a fraction of the true costs of the service cannot be qualified as a quid pro quo vis-à-vis the municipal kindergartens, but only as a contribution to a system which is predominantly funded by the public purse. It is therefore clear that the Norwegian State, when establishing and maintaining a system where every child increases the costs

¹¹² Case E-5/07 *Barnhagen*

¹¹³ Case C-309/99 *Wouters* [2002] ECR I-1577

¹¹⁴ *Ibidem*, para 47

*incurred, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Accordingly, the Defendant did not need to entertain doubts as to whether the municipal kindergartens might constitute undertakings within the meaning of Article 61(1) EEA.*¹¹⁵

At a first glance, this seems to fit in well with the interpretation given by the European Court of Justice with regard to the definition of economic activity. In *Pavlov et al*, the Court held that “any activity consisting in offering goods and services on a given market is an economic activity”¹¹⁶. However, the European Court of Justice emphasized not the remuneration but rather the economic/financial risk that is carried by the undertaking in its assessment of whether the measure is caught by the State aid rules.

They [the medical specialists] are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.

Conclusively, an actor on the market who runs an economic risk is to be considered as an undertaking within the meaning of Article 61 of the EEA Agreement, despite its legal status (e.g. being not-for-profit).

4.2.3.5. Cross border Effects

As mentioned above under 4.2.3.2., this is a criterion that is often assessed together with the distortion of competition criterion.¹¹⁷ As argued, and illustrated, they are two distinct criteria that interact intricately. The EFTA Court’s judgement in *Norway v EFTA Surveillance Authority* is a case in point with regard to the case law of the EEA *vis-à-vis* the intra-EEA trade effects.

According to established case law of the ECJ, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-[EEA] trade, the latter must be regarded as affected by that aid. For that purpose, it is not necessary for the beneficiary undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may, for that reason, be maintained or increased, with the result that undertakings established in other Member States have less chances of exporting their products to the market in that Member State (see Joined Cases C-278/92 C-279/92 and C-280/92 Spain v

¹¹⁵ *Ibidem*, para 83-84

¹¹⁶ Case C-180/98 *Pavlov et al* [2000] ECR I-6451

¹¹⁷ Sánchez Rydelski, Michael. *The EC State aid regime : distortive effects of state aid on competition and trade.* (2006) p 48

Commission [1994] ECR I-4103, at paragraph 40; Case 730/79 Philip Morris v Commission [1980] ECR 2671, at paragraph 11; and Case 102/87 France v Commission [1988] ECR 4067, at paragraph 19). This case law is relevant in interpreting Article 61 EEA.¹¹⁸

In other words, the undertaking does not have to act outside the borders of the State in which it has been awarded the aid in order to be caught by the State aid rules. This holds true even when the undertaking is only acting on a local level, according to the European Court of Justice.

In this respect, it must be observed, first, that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States. Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State.¹¹⁹

Finally, some words can also be said about the size of the amount of the grant, mentioned above under 4.2.3.2. The European Court of Justice wrote in *Spain v Commission* that “it is settled case-law of the Court that the relatively small amount of aid or the relatively small size of the undertaking which receives [aid] does not as such exclude the possibility of intra-[EEA] trade may be affected”¹²⁰.

4.2.4. SGEI

The notion SGEI has already been developed rather extensively in theory above, under Sections 2 and 3. It is a term that is defined by the Member States within the framework of the EEA Agreement, as interpreted by the EEA Courts. In this Section the constituent parts of the SGEI shall be addressed. It shares some qualities with the notion State aid, however, it remains distinct.

An undertaking entrusted with a public service obligation is only exempted from the competition rules, of which the State aid rules are a constituent part, in so far as those rules do not obstruct *de facto* or *de iure* the undertaking from delivering the SGEI.

¹¹⁸ *Case E-6/98 Norway v EFTA Surveillance Authority, para 59*

¹¹⁹ *Case C-280/00 Altmark [2003] ECR I-1115, para 77-78*

¹²⁰ *Case C-113/00 Spain v Commission [2002] ECR I-7601, para 30*

Nevertheless, the rules may only be excused as long as the development of trade within the EEA is not affected to such an extent that is contrary to the interest of the contracting parties.

As mentioned earlier, under section 2.3., there are two main camps, the objective and non-aid approach towards the problematics. The more prominent approach can hopefully be identified by examining closer the case law of the Courts. In 2003, the landmark case *Altmark* was delivered by the European Court of Justice in the problematic field of State aid and SGEI. Although it did not define and give a finite answer to the relation between the State aid rules and SGEI, it paved a way. The Court developed four cumulative criteria that must be fulfilled in order for the measure to fall within Article 59(2), and hence outside the scope of Article 61, the State aid rules.

First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings.

Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty.

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.

Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community,

*the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.*¹²¹

The following subsections will be based on these criteria rather than the deductible criteria of Article 61(2) of the EEA Agreement. However, as the observant eye may remark, the first and third *Altmark* criteria reflect the SGEI provision set out in the EEA Agreement.

4.2.4.1. Clearly Defined Public Service Obligations

This criterion is easily deducted from the wording of the provision; however, it is further elaborated by the European Court of justice. The elaboration consists of two parts. First, a service that is of general interest must be defined by the State. Second, it must be entrusted to an undertaking.

With regard to the first part, the definition of the SGEI, both EEA Courts have stressed and protected the prerogative of the contracting States to the EEA Agreement with regard to the designation of national social objectives to be attained within the limit of manifest error. This was clearly held by the EFTA Court in the *Bankers' Association* case, where it held that:

*[t]he Court must nevertheless take into account that [the Surveillance Authority's] role is limited to arresting manifest error by the [EEA] States as concerns the issue of whether the service in question qualifies as a service of general economic interest. As a consequence of the discretion enjoyed by the Contracting Parties in deciding which services they consider to be of general economic interest, it is for the Court to examine only whether there were doubts that the State did not commit manifest error in deeming the service in question to be a service of general economic interest.*¹²²

There is no exhaustive list of what falls within the definition of SGEI, as national characteristics are taken into account. The Court elaborates this reasoning by specifying a requirement: the SGEI must be clearly defined.

¹²¹ *Case C-280/00 Altmark [2003] ECR I-07747*

¹²² *Case E-9/04 Bankers' Association, para 65*

What is decisive in the assessment of whether certain services are services of general economic interest within the meaning of Article 59(2) EEA, are the essence of the services deemed to be of general economic interest and the special characteristics of this interest that distinguish it from the general economic interest of other economic activities. Furthermore, Contracting Parties may take account of objectives pertaining to their national policy when defining the services of general economic interest which they entrust to certain undertakings. The service of general economic interest must be clearly defined by the Contracting Party. (See Case E-4/97 Norwegian Banking Association v EFTA Surveillance Authority [1999] EFTA Court Report 1, at paragraph 47 and 48; hereinafter “Husbanken II.”)¹²³

Despite the judgment being rendered posterior to and in consistence with the *Altmark* decision, it is surprising that no reference is made to this land mark case, but only to its own case law.

With regard to the second part of the judgment, entrustment, it goes beyond than just defining the SGEL, it entails that the State puts a legal/formal obligation on the undertaking(s) in question to provide for those services accordingly. This interpretation finds support in the *Bankers’ Association*¹²⁴ case. In the *Barnhagers* case, the EFTA Court took into account that there was “statutory duty”¹²⁵ on the municipalities to provide for kindergartens.

4.2.4.2. Ex Ante Calculation Parameter of Compensation

What distinguished, and supplemented, the *Altmark* case from the previous definitions given by the EEA Courts in this regard was the *ex ante* character of the calculation of the compensation. This requires that the parameters of how to calculate the discharge of the public service obligation be established in advance. The requirements for the calculation to be made in a transparent way and on market terms have been settled case-law for a long time.

¹²³ *Ibidem*, para 67

¹²⁴ *ibidem*

¹²⁵ Case E-5/07 *Barnhagers*, para 82

Unfortunately, there is no input in this regard from the EFTA Court. Nevertheless, it has rather recently been reiterated and upheld by the European Court of Justice in the *Traghetti del Mediterraneo* case.¹²⁶

4.2.4.3. Overcompensation

This is a crucial criterion in order to decide whether the compensation granted is to be regarded as State aid or not. More importantly, it is a weapon in the war being fought between the two camps mentioned above. In the *Altmark* decision, the European Court of Justice further developed the third criterion by stating that:

*the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations*¹²⁷

Despite the importance of this part of the assessment, the EFTA Court has not yet enounced itself on the matter, although the argument has been put forward to the Court.¹²⁸

4.2.4.4. Public Procurement

The fourth and last criterion has been the subject of much discussion.¹²⁹ In order to guarantee that the service is attained according to market terms, i.e. no advantage is being granted, the European Court of Justice provided for two disjunctional options. Either the contract has to have been concluded through public procurement, through a call for tender procedure on the market, or based on the costs of a theoretical undertaking.¹³⁰

In the absence of any further clarification on this part from either of the Courts, there is not much that can be added. Therefore, the actual application of this fourth criterion is welcome.

¹²⁶ Case C-140/09 *Traghetti del Mediterraneo* [2010] ECR I-00000, para 44

¹²⁷ Case C-280/00 *Altmark* [2003] ECR I-07747, para 95

¹²⁸ Case E-6/98 *Norway v Surveillance Authority*, para 6

¹²⁹ Bartosch, Andreas. "The Ruling in BUPA – Clarification or Modification of Altmark?". (2008)

¹³⁰ Renzulli, Annalisa, "Services of General Economic Interest: The Post-Altmark Scenario", (2008) p 411

4.2.5. Or Is It More of a Monologue?

The judicial dialogue, one of many safeguards of homogeneity of the EEA, seems to be rather absent, seen from a practical view, in the relation between the SGEI and State aid rules. Although there seems to be a shared approach to the application of the State aid rules, this common conceptualization is even less evident in the field of the interpretation of the SGEI provision.

There are surely several reasons for this, one being the lack of cases before the EFTA Court treating the issue. However, another more convincing reason may be the nature of the SGEI. Due to their specificity, being defined by the Member States according to their national political and social objectives, it is rather difficult to find a panacea towards the problematic. This is quite troubling for two reasons. First, there is the problem of legal certainty but, more importantly, there is the risk of having an unlevelled playing field, where States distort competition in the disguise of assuring services that are of a general interest to their populations.

Due to the special character of the SGEI and the presence of two interpreters, it is inevitable that two parallel monologues be held. Furthermore, a divergent path may also have initiated with regard to the definition of *undertaking*, which is fundamental in the assessment of State aid and SGEI. The EFTA Court argued in *Barnhagen* that the fact that the Norwegian State was not seeking “to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields”¹³¹ speaks for the non-existence of economic activity, and therefore absence of undertakings. This is not in consistence with the approach taken by the European Court of Justice in the *Van Landwyck* case, where it held that even non-profit organizations are caught by the competition rules.¹³² This is of great importance since the EFTA Court is obliged according to the EEA Agreement and the ESA-Court Agreement, to interpret the EEA rules in conformity with the case law of the European Court of Justice in order to ensure homogeneous application of the EEA rules.

¹³¹ *Case E-5/07 Barnhagers*, para 83

¹³² *Case C-209/78 Van Landewyck* [1980] ECR I-3125, para 88

4.3. Surveillants of the Single Market

The Surveillants of the EEA function according to the same logic as the EEA Courts, namely each within its pillar. However, that is where the similarities end. The latter, being independent judicial bodies, and the former, being administrative bodies and even parties in cases before the EEA Courts. The EEA States are submitted to the control of the Surveillants with regard to the State aid rules and the rules on SGEI, while those controls are subject to scrutiny by the EEA Courts.

As the latter case has already been treated under Section 4.2., this Section will focus on the methods of enforcement of the EEA rules by the Surveillants. What instruments are at their disposal and how are they coordinated in order to ensure a level playing field? The point of departure will be the so-called *Altmark package*¹³³ and the Transparency Directive. The recent European Commission Communication on *Reform of the EU State Aid Rules on Services of General Economic Interest* will also be commented.

Before proceeding a few words are required on the differences that exist between the two Monitors of the EEA Agreement. In theory, the EFTA Surveillance Authority is to have equivalent powers and similar functions to those of the European Commission in its surveillance task.¹³⁴ First, it must be stressed that the powers of the EFTA Surveillance Authority are less prominent to those of the European Commission. The legislative initiative power, or monopoly, of the European Commission is a case in point. This is however inherent in the EFTA, it is an intergovernmental agreement and not a supranational one like the EU Treaties.¹³⁵ Furthermore, the EFTA Surveillance Authority, is as mentioned above, established through the EFTA-Court Agreement, which falls out of the scope of the EEA Agreement. It is a separate agreement between the signatory EFTA Countries of the EEA.

Second, the composition of the two Monitors is also worth mentioning. Every Member States has a representative at the Monitor Institutions. In other words, the College of the

¹³³ It includes besides an amendment to the Transparency Directive the Commission Decision on the application of Article 86(2) 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 (OJ L 312, 29.11.2005, p. 67-73) and Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7).

¹³⁴ Blanchet, Thérèse et al. *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules.* (1994), p 29

¹³⁵ Sverdrup, Ulf, "Compliance and styles of conflict management in Europe". (2008) p 8

European Commission consists of 27 members and that of the EFTA Surveillance Authority of 3 members. However, what distinguishes them more than the amount of members is their way of appointment. Following the entry into force of the Lisbon Treaty, the members of the College of the European Commission are appointed by the European Council; however, the accord of the European Parliament is required. In other words, the European Parliament is indirectly participating in the nomination of the members of the European Commission.¹³⁶ This is however not the case for the EFTA Surveillance Authority whose members are appointed in unanimity by the governments of the EFTA States. It could therefore be argued that the EFTA Surveillance Authority reflects to a higher degree the governments of the EFTA States than the European Commission does with regard to the government of the EU States.

4.3.1. Beyond Uniform Application to Full Cooperation

That uniformity of the application of the provisions is one of the key objectives of the EEA Agreement must by now be regarded as an axiom. This objective is to be achieved through several guiding principles such as the homogeneity principle and judicial dialogue, among others. Indeed, as it has been demonstrated, there are no concrete indications for the EEA Courts, on how to go about in order to achieve this objective. This is, however, not the case with regard to the Monitors. There are concrete procedures provided in the EEA Agreement in order to ensure the uniform surveillance of the competition rules, especially with regard to the State aid rules. Article 109 (2) of the EEA Agreement states that:

[i]n order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases.

The EEA Agreement, together with the Protocols, further define how this cooperation, exchange of information and consultation is to take place. There are general provisions on how the cooperation is to take place in practice, but there is also, as mentioned, a specific Protocol that regulates how uniformity is to be achieved in the enforcement of

¹³⁶ It is, nonetheless, important to highlight that this difference did not exist when the EEA Agreement was signed by the Contracting parties. The empowerment of the European Parliament is due to the supranational characteristics of the EU, which is absent in the case of the EFTA.

the State aid rules. Protocol 27 of the EEA Agreement spells out the procedure on cooperation in the field of State aid, more precisely it states that:

[i]n order to ensure a uniform implementation, application and interpretation of the rules on State aid throughout the territory of the Contracting Parties as well as to guarantee their harmonious development, the EC Commission and the EFTA Surveillance Authority shall observe the following rules:

(a) exchange of information and views on general policy issues such as the implementation, application and interpretation of the rules on State aid set out in the Agreement shall be held periodically or at the request of either surveillance authority;

(b) the EC Commission and the EFTA Surveillance Authority shall periodically prepare surveys on State aid in their respective States. These surveys shall be made available to the other surveillance authority;

(c) if the procedure referred to in the first and second subparagraphs of Article 93(2) of the Treaty establishing the European Economic Community or the corresponding procedure set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority is opened for State aid programmes and cases, the EC Commission or the EFTA Surveillance Authority shall give notice to the other surveillance authority as well as to the parties concerned to submit their comments;

(d) the surveillance authorities shall inform each other of all decisions as soon as they are taken;

(e) the opening of the procedure referred to in paragraph (c) and the decisions referred to in paragraph (d) shall be published by the competent surveillance authorities;

(f) notwithstanding the provisions of this Protocol, the EC Commission and the EFTA Surveillance Authority shall, at the request of the other surveillance authority, provide on a case-by-case basis information and exchange views on individual State aid programmes and cases;

(g) information obtained in accordance with paragraph (f) shall be treated as confidential.

There are two interesting observations to be made with regard to this Protocol. First, the provision is rather detailed with regard to the procedure that the institutions must undertake; they shall periodically prepare surveys, they shall exchange information and

views etc. Second and most importantly, in contrast to the EEA Courts there is no unilateral commitment from the EFTA pillar to conform to the EU pillar in order to ensure a level playing field. Rather they are treated as equals, the cooperation is set to function “*at the request of either surveillance authority*”.

There are also general principles to ensure the uniform surveillance and application of the EEA rules. One such principle is the so-called ‘one stop shop’ principle, i.e. a case can only be the subject of only one of the Surveillants and the decision taken on the matter by the competent Authority will be valid throughout the entire EEA.¹³⁷ This principle brings about a fundamental requirement of any legal order, which is legal certainty. This does not, however, prevent the EEA Courts to ultimately guarantee a correct and uniform interpretation of the rules, since there is always the possibility to appeal the decisions of the Surveillants.

Finally, it can be added that the effectiveness of a law may be best estimated by regarding the means it has been attributed in order to achieve its aims i.e. how the law practically can be enforced.¹³⁸ The following sections will therefore address the means at the disposal of the European Commission and the EFTA Surveillance Authority and the practical outcomes of those means based on the landmark case *Altmark*.

4.3.2. Means and Competences of the Monitors

According to Article 59 (3) of the EEA Agreement, the Surveillants shall through adoption of appropriate measures addressed to States falling within their territory ensure the application of the rules on SGEL.

Despite the rather detailed description of the cooperation procedures *inter* the Monitors, the EEA Agreement does not attempt to define the measures which the Surveillants are to undertake in order to enforce and apply the provisions efficiently and correctly. The appropriate measures at the disposal of the Surveillants vary, they are not identical within the two pillars. Nonetheless, they are to bring about the same effects, i.e. guarantee a level playing field in the area of competition. In order to examine the different instruments one must take a closer look at the treaties regulating the separate

¹³⁷ Blanchet, Thérèse et al. *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules.* (1994) p 184

¹³⁸ *Idem*, p 183

pillars. First, the instruments at the disposition of the European Commission through the EU treaties will be examined and then those of the EFTA Surveillance Authority through the ESA/Court Agreement.

4.3.2.1. The Instruments of the European Commission

The powers of the European Commission are so essential to the functioning of the institutional balance, within the Union, that they must be safeguarded. That is why the European Court of Justice concluded, in its Opinion 1/92, where it accepted the conclusion of the EEA Agreement, that the Union is competent to conclude international agreements in the competition field “provided that those rules do not change the nature of the power of the [Union] and its institutions as conceived in the Treaty”.¹³⁹

There are, therefore, several instruments provided for within the EU treaties to ensure that the European Commission can enforce and monitor the State aid and SGEI rules efficiently. First, a difference should be made between binding and non-binding acts. Decisions, frameworks, recommendations, regulations and directives fall within the former category while resolutions, deliberations, opinions and simple information fall within the latter category. The distinction is of great importance, as only the former may be subject to scrutiny by the European Court of Justice.¹⁴⁰ However, in practice, both type of acts intend to improve the enforcement of EU law by clarifying the interpretation of the provisions at hand.

In this respect, the European Commission adopted a package of instruments after the landmark case *Altmark* in 2005 and more recently a communication, 2011, with regard to the State aid and SGEI rules, the so-called *Altmark package*.

4.3.2.1.1. Altmark 1: European Commission Decision

The First part of the *Altmark* package was published in the Official Journal of the European Union on 29 November 2005 through a European Commission decision entitled *Commission Decision of 28 November 2005 on the application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to*

¹³⁹ *Idem*, p 185

¹⁴⁰ *Bebr, Gerhard. Development of judicial control of the European communities. (1981) p 23*

certain undertakings entrusted with the operation of services of general economic interest. The Decision is:

*to a large extent a specification of the meaning and extent of the exception under Article 86(2) of the Treaty as it has been consistently applied in the past by the Court of Justice and the Court of First Instance and by the Commission.*¹⁴¹

Besides the clarification that the Decision aims to bring to this somewhat unclear area of the competition law, it also intends to go:

beyond the status quo by setting out additional requirements aimed at enabling effective monitoring of the criteria set out in Article 86(2).

In other words, the Decisions intends to specify the conditions under which public service compensations to undertakings for the provision of public service obligations is considered compatible with the State aid rules, and as a result exempted from the notification obligation. The approach that the European Commission has taken in its Decision is the so-called ‘block exemption’ rules.

When public service compensation does not fulfil the cumulative criteria set out by the *Altmark* case the compensation may constitute State aid. Since there is a possibility that the compensation may constitute State aid the granter of that compensation, the State in its national, regional or local form, must notify the European Commission about the transfer of State resources according to Article 108 (3) TFEU. The block exemption rules represents a set of cases that fall between public service compensations compatible with Article 106 (2) TFEU and those that are regarded to possibly constitute State aid and might affect trade to such an extent that would be contrary to the interest of the Contracting Parties of the EEA Agreement.

The block exemption set out by the Decision applies to undertakings acting within specific sectors such as social housing and hospitals and to undertakings that receive public service compensation below a certain threshold and fulfill certain other conditions, such as turnover.

The Decision also, as mentioned, attempts to further clarify the four cumulative criteria.

¹⁴¹ Article 106 (2) TFEU

4.3.2.1.2. Altmark 2: European Commission Framework

The second part of the *Altmark* package was published together with the first part on 29 November 2005 in the Official Journal of the European Union. The second part of the package was issued under the form of a framework, which is a soft law instrument, entitled *Community framework for State aid in the form of public service compensation*. It is a document that intends to explain the future approach of the European Commission as regards to Article 106 (2) TFEU.

*The purpose of this framework is to spell out the conditions under which such State aid can be found compatible with the common market pursuant to Article 86(2).*¹⁴²

In other words, the Framework is to define and set out the conditions under which cases not covered by the abovementioned Decision, first part of the Package, may still be found compatible and approved by the European Commission.

The European Commission initiates by recognizing the Member States' wide margin of discretion in the classification of the SGEI and thus reduces its monitoring work to so-called *manifest error* as regards the definition of SGEI. It then sets out the instruments for specifying public service obligations and methods of calculating compensation. It further develops this latter by addressing more specifically the amount of the compensation, costs to be taken into consideration, revenue to be taken into account and reasonable profit that the undertaking may do and which should be taken into account when deciding the compensation. The Framework also addresses the issue with overcompensation, how it can be carried forward and be incorporated into the next annual compensation, without forcing the undertaking to pay back the compensation already received. This is a practical and simple solution to an otherwise lengthy and bureaucratic problem.

The Framework was given a validity of six years from the date of its publication in the Official Journal of the European Union, which means that latest by November of this year, 2011, the European Commission has to issue new guiding documents. This will be further developed under section 4.3.2.1.5.

¹⁴² *Community framework for State aid in the form of public service compensation, paragraph 2*

4.3.2.1.3. Altmark 3: European Commission Directive

This package differs in several aspects from the two previous ones. First, it is a European Commission directive based on Article 106 (3) TFEU, which permits the European Commission on its own without the need of any other institution to adopt a directive. It must nevertheless be stated that the scope of such directive is only with regard to the implementation of Article 106 (1) and/or (2) TFEU.

Second, the use of such instrument is highly politically sensitive, and has for this reason been used only on a few occasions. The Member States' sensitiveness came to expression when the European Commission first adopted *Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings* which was published in the Official Journal of the European Union on 29 July 1980. The validity of the Directive was put into question by some of the Member States; however, it was upheld by the European Court of Justice.¹⁴³

The Directive intends to facilitate the monitoring work of the European Commission with regard to public undertakings, and has in fact achieved this objective to a large extent.¹⁴⁴ Due to the various forms that public undertakings take within the Member States and the winds of liberalisation that blew under the 80's, see Section 2.1.3., and the principle of equality between public and private undertakings, the European Commission regarded such a provision as essential for it to enforce EU law and guarantee a level playing field within the Internal Market. The reasoning of the European Court of Justice expresses quite well the delicacy and need of the Directive:

[i]n view of the diverse forms of public undertakings in the various Member States and the ramifications of their activities, it is inevitable that their financial relations with public authorities should themselves be very diverse, often complex and therefore difficult to supervise, even with the assistance of the sources of published information to which the applicant governments have referred. In those circumstances there is an undeniable need for the Commission to seek additional information on those relations by establishing common criteria for all the Member States and for all the undertakings in question. So far as the precise

¹⁴³ *Joined Cases 188/80, 189/90 and 190/80, Transparency Directive [1982] ECR I-2545*

¹⁴⁴ *Gyselen, Luc. "Services of General Economic Interest and Competition under European Law—A Delicate Balance", (2006)*

*determination of those criteria is concerned, the applicant governments have not established that the Commission has exceeded the limits of the discretion conferred upon it*¹⁴⁵

The third part of the *Altmark* package was therefore, in this regard, only an amendment to the already existing Directive from 1980. The *Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings* was thus only of limited scope, and regarded technical accounting matters.

The aforementioned Amendment to the Directive was not the first and will surely not be the last one, there has been several others made across the years since its inception, more than 30 years ago. There is a consolidated/codified version of it, *Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*, which aims to render more accessible and facilitate the interpretation of the provisions concerning the public service compensation that undertakings receive.

4.3.2.1.4. European Commission Website

Despite its informal character, the information on the website of the European Commission with regard to the State aid rules and SGEI serve as an important indicative for the assessment of whether a compensation is to be caught by the rules or not. Especially the State aid register website¹⁴⁶ aims to achieve this, it is a search tool that provides access to all the cases that have been object of a European Commission decision since 1 January 2000.

By making available its decisions on a daily basis the Member States and undertakings concerned may have an up to date knowledge about the approach of the European Commission in their field which, if done thoroughly, could lead to more legal certainty.

¹⁴⁵ *Idem*, para 18

¹⁴⁶ http://ec.europa.eu/competition/state_aid/register/, 2011-04-16

4.3.2.1.5. European Commission Communication

On 23 March 2011, the European Commission published a *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* entitled *Reform of the EU State Aid Rules on Services of General Economic Interest*.

Despite the Communication being solely addressed to the institutions of the EU, it aims to launch a political debate where stakeholders are to have a say in the upcoming revision of the *Altmark* package. The revision is necessary in several regards, one being that a new Treaty has come into force since its adoption, but more importantly because the Framework, see above under section 4.3.2.1.2, will expire in November 2011.

The Communication serves to alleviate the transition from the current binding and non-binding acts on the interpretation of the State aid and SGEI rules to the upcoming revised ones. The Reform document envisages two key principles in the upcoming revision.

The first, being to clarify further, if possible, key concepts relevant to the application of State aid and SGEI rules. The European Commission seems to want to achieve this goal, in a somewhat contradictory manner, through the introduction of new concepts and notions such as *SGEI aid*¹⁴⁷. In addition, the Reform will focus on clarifying the distinction between economic and non-economic activities and the clarification of the definition of undertaking. It will further shed light on the limits within which the Member States may design SGEI. It will also, evidently, continue on the *Altmark* heritage and set out the requirements which public authorities have to follow when granting public service compensation especially with regard to the efficient and “well-run” undertaking criteria, the fourth criterion.

The second key principle is the so-called diversified and proportionate approach with regard to different types of SGEI. This approach recognizes to some extent the diversity of SGEI and tries to find a harmonized approach with regard to their monitoring. It intends to focus more on the nature of the SGEI, the scale of it, the limited trade impact and the commercial dimension of the service in question. It is a move from a general

¹⁴⁷ *Commission communication, Reform of the EU State Aid Rules on Services of General Economic Interest*, p 6

approach to a sectorial approach in the monitoring of the SGEI. The European Commission will continue with its *de minimis* and block exemption approach. There is nonetheless also an efficiency perspective to all this. The Reform also aims ensuring high quality public services and efficient allocation of State resources by taking into account how the costs are incurred by the SGEI provider and compare those to the “well-run” undertaking i.e. bringing about efficiency in public spending.

4.3.2.2. The Instruments of the EFTA Surveillance Authority

The EFTA Surveillance Authority’s instruments can be found in Article 5 (2) of the ESA/Court Agreement. The Agreement empowers the Monitor to take decisions, to formulate recommendations, deliver opinions, issue notices and guidelines. However, in practice, the EFTA Surveillance Authority also issues communication and frameworks as well. Nonetheless, neither of these acts is binding, although they are the only quasi-legislative power of the EFTA Surveillance.¹⁴⁸

Besides the substantive rules on the principle of homogeneity and close cooperation Article 24 of the ESA/Court Agreement requires the EFTA Surveillance Authority to:

give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I.

This has been done in a rather innovative and meticulous way, which will be further developed under the subsequent subsection.

4.3.2.2.1. The Single Entry Point

The Single Entry Point refers to the approach that EFTA Surveillance Authority has taken in the field of State aids. It has, with regard to its obligation stemming from Article 24 of the ESA/Court Agreement, produced one single document that consolidates all the different State aid guidelines that it has issued over the years by integrating the *EU acquis* in Annex I and the European Commission acts adopted

¹⁴⁸ Blanchet, Thérèse et al. *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules.* (1994) p 30

between the signature of the EEA Agreement and its entry into force. This single document is named the State Aid Guidelines.

The State Aid Guidelines is a very important instrument in the enforcement of the State aid and SGEI rules since it sheds light on a sombre area of the EEA Competition taking into account not only the development within the EFTA pillar but also, and especially, the development within the EU pillar with great attention to the European Court of Justice and the European Commission. Due to its reader friendly format, contrary to the approach taken by the European Commission with regard to language but also the dispersion of all the acts, the State Aid Guidelines provides more legal certainty which is sought by the stakeholders and States.¹⁴⁹

It is therefore logical that the repercussions of the *Altmark* ruling can be found within the Guideline. It is, however, not only the four cumulative criteria that resulted from that landmark ruling that are clarified but also concrete examples of their application based on decisions of the European Commission.¹⁵⁰ The State Aid Guidelines has thus dedicated an entire Chapter, Part VI, to the interpretation of the relation between the State aid rules and SGEI, Article 59 (2) of the EEA Agreement. There are specific references made under this Chapter to the European Commission *Altmark* package i.e. the Decision, 4.3.2.1.1., the Framework, 4.3.2.1.2., and the Transparency Directive, 4.3.2.1.3. The Guideline not only refers to these European Commission acts but it also aims to shed some further light.

4.3.2.2.2. The State Aid Register

The EFTA Surveillance Authority has taken the same approach as the European Commission in its information dispersion on Internet, through the creation of a State aid register. The Register contains the full text decisions adopted by the EFTA Surveillance Authority. There is, in other words, no consolidation with the decisions of the European Commission.

By publishing all the decisions on Internet, the EFTA Surveillance Authority aims to achieve the same objectives as the European Commission, creating legal certainty.

¹⁴⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled Reform of the EU State Aid Rules on Services of General Economic Interest*, p 8

¹⁵⁰ *EFTA Surveillance Authority, State Aid Guidelines*, p 330

However, due to the lack of a search engine making it possible to access relevant decision, like the one provided for by the European Commission, the accessibility of the decisions on Internet remains formal and the objective falls short.

4.3.2.2.3. The Upcoming Reform

The EFTA Surveillance Authority has not issued any documents in relation to the recent European Commission Communication on *Reform of the EU State Aid Rules on Services of General Economic Interest*. Nor is it decided at the moment if any response will be made to it. It seems that it will continue to take the same approach it has taken previously, i.e. wait for the European Commission to adopt a new act and then update the Guideline based on that.

4.3.3. Enforcement by the Monitors

In this section it is not the tools in abstract that shall be examined but rather their deployment in practice by their creators. This is the case since the aim of this paper is to study whether the homogeneity principle with regard to the State aid and SGEI rules are respected in practice. It would thus be fruitless to stop at this stage.

As demonstrated, the European Commission has several instruments at its disposition, spread out in different types of documents, while the EFTA Surveillance Authority has compiled all relevant material under one headline, the Guideline. It is therefore of interest to see whether the Monitors make use of these instruments in their reasoning when deciding upon the compatibility of a public service compensation or an aid, or whether the tools are only mere formalities addressed to the Member States and other stakeholders. In other words, can the addressees rely on the guidelines provided by the Surveillants ?

4.3.3.1. Secondary Legal Basis

According to the European Commission's State Aid Register there are 11 cases where the *Altmark* package¹⁵¹ has been used as a legal basis for a decision.¹⁵² In a recent decision taken by the European Commission with regard to a Maltese environmental power project the Monitor stated that:

¹⁵¹ *The Framework and /or the Decision*

¹⁵² http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result, 2011-04-19

*[t]he rules which the Commission follows for the assessment of State aid under Article 106(2) TFEU are set out in the Community framework for State aid in the form of public service compensation (“the SGEI framework”) (1). As indicated in the SGEI framework, where the four criteria of the Altmark case law are not met and the general criteria of Article 107(1) TFEU are met, public compensation constitutes State aid (2). As further shown above, at this stage, the Commission considers that the Altmark criteria are not met and that the general criteria of Article 107(1) TFEU are met (3).*¹⁵³

In another recent case concerning broadband infrastructure in Estonia the European Commission referred to the Decision stating that:

*[a]ccording to paragraph 30 of the Broadband Guidelines, in this case, State aid in the form of public service compensation could be regarded as compatible with the Internal Market and exempt from the requirement of notification laid down in Article 108(3) TFEU if it meets the conditions set out in the Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*¹⁵⁴

It is therefore beyond doubt that the European Commission in practice makes use of its own guidelines in its State aid and SGEI assessments. It shall, nonetheless, be recalled that this has only been done in a relatively few cases in the past six years.

4.3.3.2. Following the Leader

As concluded above, the EFTA Surveillance Authority does not issue any own original documents, it rather consolidates every relevant source under its State Aid Guidelines, which consists of the case law of the EEA Courts and the documents issues by the European Commission.

Despite this rather meticulous work of the EFTA Surveillance Authority, reference to the Guideline seems to be rather absent in the assessment of the State aid and SGEI rules. The absence may even be perceived as complete. According to the literature the absence of reference to the State Aid Guidelines in decisions concerning SGEI and State aid is not a conscious policy approach i.e. the EFTA Surveillance Authority does not have it as its policy to eschew reference to the Guideline but the *mode à faire* is rather a

¹⁵³ *State aid 2011/C 52/03, France, para 81*

¹⁵⁴ *State aid N 196/2010 – Estonia, para 64*

question of habit. The Authority is more prone to refer to the case law of the European Court of Justice, especially the *Altmark case*, or to that of the EFTA Court.

A case in point, with regard to one of the more recent decisions of the EFTA Surveillance Authority, where it has referred to the European Court of Justice's landmark decision, *Altmark*, in its assessment of the State aid and SGEI rules is the *Oslo Sporveier* decision.

*On the basis of the above, the Authority considers that scheduled bus transport services in Oslo has, both in the case of AS Oslo Sporveier and AS Sporveisbussene, therefore not been discharged in accordance with the fourth criterion of the Altmark judgment, i.e. the compensation has not been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred. Already for that reason the presence of state aid can therefore not be excluded on the basis of the Altmark case law.*¹⁵⁵

The EFTA Surveillance Authority highlights one of the most important discussions in the field in this decision, namely, the fourth *Altmark* criterion. Not only has this criterion created much debate among academics but also among professionals.

Despite the rather otherwise poor practical utilisation of the Guideline, there is one case where the EFTA Surveillance Authority has referred to its own enforcement tools with regard to the compatibility of compensation with Article 59 (2) of the EEA Agreement.

[T]he Authority has doubts as to whether the operation the fitness centre at the KLC can constitute a service of general economic interest within the meaning of Article 59(2) of the EEA Agreement.

*In this respect, reference is made to the Authority's guidelines on state aid in the form of public service compensation. The following cumulative criteria must be fulfilled in order for a state aid measure to be considered compatible with the functioning of the EEA Agreement on the basis of Article 59(2) in conjunction with the public service guidelines*¹⁵⁶

Nonetheless, the reference remains rather vague and does not specify exactly where in Part VI of the State Aid Guidelines that is intended, which opens up for legal uncertainty contrary to the intention of the Guideline.

¹⁵⁵ State aid decision, Case No: 60510, Dec No:254/10/COL, p 11

¹⁵⁶ State aid decision, Case No: 67385, Dec No:537/09/COL, p 13

Finally, it is important to mention that at the time of writing there has been no case concerning SGEI in relation to a new State aid. The cases that have been treated by the EFTA Surveillance Authority are all cases regarding existing State aid cases. To make a long story short, the procedure for new and existing aids are different, however the elaboration on that distinction on the consequences thereof would fall out of the scope of this paper.

4.3.4. Uniform or Diverse Enforcement?

Whether the Monitors enforce the State aid and SGEI rules in the same manner, respecting the principle of homogeneity and ensuring a level playing field throughout the Single Market, has two replies, although interrelated. First, there is the theoretical or formal reply and then there is the practical one.

In theory the two Institutions have the same authority and powers with regard to the competition field with regard to the enforcement of the EEA Agreement, Article 108 (1) of the EEA Agreement states clearly that:

[t]he EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

Indeed, this is contrary in the case of the EEA Courts, where the EFTA Court has to take into consideration the jurisprudence of the European Court of Justice according to the EEA Agreement and the ESA/Court Agreement, see section 4.2.1.¹⁵⁷ There is no such hierarchy between the Surveillants. Formally their work is guided by full cooperation, exchange of information and regular contact, see section 4.3.1.

However, this equality of powers does not come to expression in practice. On the contrary, the EFTA Surveillance Authority merely integrates the acts adopted by the European Commission through mimicry. The EFTA Surveillance Authority does not in any way try to adopt acts on its own initiative, it rather waits for its “big brother” to

¹⁵⁷ Gallo, Daniele, “From Autonomy to Full Deference in the Relationship between the EFTA Court and the ECJ: The Case of International Exhaustion of the Rights Conferred by a Trademark”, (2010) p 7

pave the way. As concluded previously, the State Aid Guidelines developed by the EFTA Surveillance Authority does not add anything to what already exists or can be deducted from the case law of the EEA Courts and the enforcement instruments of the European Commission, it only renders the information that already exist more reader friendly and accessible.

There is therefore basically no deviation in practice from the enforcement of the EEA provisions by the EFTA Surveillance Authority with regard to that of the European Commission. There are two reasons for this in my opinion. First, although the EFTA Surveillance Authority is empowered with the same tools as the European Commission with regard to the competition field, of which the State aid rules are a constituent part, contrary to the latter, it does not carry out policy work, and issuing quasi-legislative acts is highly linked to such conduct. It therefore refrains from paving the way and plays the role of the “little sister” because of the intergovernmental character of the EFTA. It must be added that the European Commission hesitates from using its powers, although it has been conferred the tools in a supranational context because of the political sensitivity. Second, since the original documents are that of the European Commission and the EFTA Surveillance Authority takes *mutatis mutandis* approach it is rather evident that the interpretation and way of enforcement will be according to the original, i.e. according to the interpretation of the European Commission.

Surprisingly and despite the distinctive feature of the SGEI and the Member States discretion in the field, the enforcement of the EEA rules with regard to the State aid and SGEI rules by the two Monitors are relatively very harmonious.

5. Conclusions

After having hopefully been provided with a vast and solid understanding of the political, historical and economic background of State aid and SGEI as phenomenon and how these regulations and their enforcement are specific characteristics of the Single Market, the reader should by now be able to follow the conclusions that are to be drawn in this section.

The State aid and SGEI rules are as old as the European Union, dating from the Rome Treaty of 57. The envisaged Single Market by the founding fathers recognized the potential distortive role that States can play in the objective of creating an efficient market first, by giving unfair competition advantages to public undertakings with regard to private ones and second, by giving unfair competition advantages to companies located within their territory in order to safeguard employment. In order to evade this type of *subsidy war*, or what in EU terms would be *State aid war*, the rules on State aid were introduced. However, an absolute prohibition could not be justified, the recognition of market failures being one reason for that. Therefore, besides the specific State aid exceptions provided for in the same provision, general exceptions to the competition rules were also inserted. The rule on the SGEI being one of these general exceptions.

It is the application of that general exception with regard to the State aid rules, being a constituent part of the competition rules, which has created the heated debate. There is a fear that the Member States will design their State aids schemes as SGEI and therefore fall outside the scrutiny of the European Commission. This was especially feared when the winds of liberalisation blew in the early 80s demanding public undertakings, which had been privileged previously, to act according to market rules. The extension of the Single Market beyond the borders of the EU through the EEA Agreement further complicated the situation and added to the already existing tension between the social and market Europe.

The complication has several aspects. First, the definition of the SGEI is a question and within the discretion of the States. However, this prerogative is to be exercised within the case law of the EEA Courts and *manifest errors*. Second, SGEI is an EU/ EEA concept, hence the complication when States are to design these types of services using their *State glasses*. Third, and probably the most important, there is the bicephalous solution in the monitoring and arbitration of the Single Market following the European Court of Justice's Opinion 1/91. Following the bifurcated path chosen due to this Opinion, there was a fear that the idiom *too many cooks spoil the broth* would become a reality. Undertakings would act on a Single Market but the enforcement of the Market rules would be carried out by two independent surveillance authorities, the EFTA Surveillance Authority and the European Commission, and the correct interpretation of those same rules would be guaranteed by two courts in full deference of each other, the EFTA Court and the European Court of Justice. Fourth and final, there is the question that is much debated among academics and professionals, which was somewhat clarified by the European Court of Justice through its landmark decision *Altmark*, whether the State aid = SGEI or whether State aid and SGEI are two separate concepts. Otherwise, should an aid or non-aid approach be adopted towards the interpretation of the SGEI?

In order to ensure a level playing field throughout the Single Market, the EEA Agreement provides for several tools to safeguard a harmonious application and interpretation of its provisions. The overarching principle and guiding star of this task is the *homogeneity principle*. There are also more concrete and practical tools to ensure the uniform interpretation of the EEA rules, e.g. the possibility for the EFTA States to ask for a preliminary ruling from the European Court of Justice. Nonetheless, it is worth reiterating that this provision has not been used, and this will probably not change in the future.

Despite the safeguards for uniform interpretation provided for by the EEA Agreement, there seems to be signs of diversion in the interpretation of the rules by the EEA Courts. A case in point is the assessment of the *distortion of competition* and *trade effects*. Another case in point is the definition given to the concept of *undertaking*, which is fundamental in the assessment of the State aid and SGEI rules. This diversion is rather

surprising as the EEA Agreement and the ESA/Court Agreement poses a hierarchy between the two Courts, subjugating the EFTA Court to the authority of the European Court of the Justice, which should be regarded as an invitation for the former to partake in *Following the Leader*¹⁵⁸.

With regard to the Surveillants of the EEA, the degree of harmonious interpretation of the EEA rules and their enforcement is astoundingly high. This is rather unexpected, if examined formally, as the two Authorities are defined as equals, contrary to the EEA Courts. However, in practice, the EFTA Surveillance Authority has subjugated itself to the authority of the European Commission, by playing the role of the “little sister” who awaits prudently “big brother’s” next move.

So what conclusions can be drawn from this summary? Besides the formally, and informally, unilateral commitment of the EFTA pillar to take part in *Follow the Leader*, there are some additional comments to be made.

A first comment can be made on the notions. There is no clear and uniform approach on the utilisation of the notions, neither between nor within the pillars. For example, at present, any transfer of resources or financial compensation from the part of the State to an undertaking is *prima facie* seen as State aid.¹⁵⁹ This is however not a correct assessment of what constitutes as State aid, as we have seen under Section 4.2.3. Furthermore, there seems to be no distinction made between the term *compensation* and *aid*, which is and should be quintessential. I would define the former as being a transfer of resources from the State that would not bring an advantage to the recipient since the pecuniary award is to remedy an economical loss that is incurred on the undertaking through a public service obligation, while the latter would lead to an advantage since there is an absence of non-market loss. In other words, in the case of *compensation*, the undertaking is being recompensed for a disadvantage inflicted by the State. The obligation to make good for a loss is a general legal principle that exist not only in contractual law but also tort law. It is a fundamental principle for the functioning of the modern society. None of the Institutions, the Courts or the Surveillants, seems to be interested in making this fundamental distinction, on the contrary. There seems to be a

¹⁵⁸ A game from Peter Pan, J.M. Barrie, where the children are to mimic the movements of the leader.

¹⁵⁹ Santaolalla Gadea, Francisco et al. *EC State Aid law = Le droit des aides d'Etat dans la CE*, (2008) p 192

silent accord to render and keep the concepts with regard to State aid and SGEI unclear. This theory can find support in the European Commission's latest communication, *Reform of the EU State Aid Rules on Services of General Economic Interest*, where further confusion is added to the broth. The European Commission seems to be developing a new concept going under the name *SGEI aid* (a mixture of State aid and SGEI?). In addition the European Commission states that:

[o]ver-compensation constitutes incompatible state aid since it does not serve the SGEI's function¹⁶⁰

Can it then be concluded that a mere compensation is to be regarded as compatible aid since it does serve the SGEI's function? What is the difference between aid and SGEI compensation then? If taken a step further, what would then the meaning of under-compensation be? The European Commission, and consequently also the EFTA Surveillance Authority, due to its mimicry approach, do not seem to want to shed too much light on the area.

There are nonetheless explanations for why there is no aspiration to provide clarity in the area of State aid and SGEI. The Monitors fear that the clearer the rules, the higher the risk that Member States shield State aid schemes behind the SGEI rules. Thus, the creation of a gray zone permits the Authorities to conduct their monitor work effectively while giving vague indications on the interpretation of the rules. Besides the legal uncertainty that this creates for the stakeholders, there is also the possibility, as we have seen in the case of the EEA Courts, that a different interpretation is given to fundamental concepts e.g. undertaking, which could lead to an unlevel playing field.

The effects and amplitude of an unlevel playing field, through the award of State aids, will become greater as the Single Market continues to develop and further integrate. It is therefore a question of time when the gray zone strategy approach must be deserted for a more sustainable solution.

At a first glance, the block exemption and *de minimis* approach of the European Commission seems to be one such solution. However, if the case law of the EEA Courts is taken into account, one would quickly come to realise that such an approach is

¹⁶⁰ http://europa.eu/legislation_summaries/competition/state_aid/126127_en.htm, 2011-04-22

contrary to what the Arbitrators have settled. According to the case law of the EEA Courts the size of the aid or the undertaking cannot be used as arguments to eschew the competition rules.¹⁶¹

This approach is however the result of what I would like to call the *economisation* of the State aid and SGEI rules. The Surveillants and the Arbitrators are more and more using numbers in their reasoning and assessments rather than letters. There are those who welcome this approach, which is why the European Commission has announced that efficiency will be one of its key principles in its upcoming reform, but there are also those who oppose this approach arguing based on the case law of the EEA Courts, that size should not matter.

The *economisation* of the rules is to some great extent a consequent of the fourth *Altmark criterion*, which has, as mentioned, created much problem in the application of the SGEI rules. The calculated costs of a benchmark undertaking are many times too far from reality. This is especially the case of former public undertakings that have been privatised, in particular in the utility sector, where it is impossible to imagine a theoretical/fictional undertaking to compare it with. One may take the example of the postal service or train tracks; how can the cost of such infrastructures be calculated and then compared to a non-existing undertaking?

The bigger questions merge when an undertaking not only provides SGEI but also market services, the potential risk of so-called cross-subsidisation. However, as many other interesting topics and fields mentioned, the further development of this one like those before falls outside the scope of this paper. It might nonetheless be important for the interested reader in the field to know what the next step could, should or would be.

Finally, some concerns and remarks about the development of the SGEI and/within the EEA should be mentioned. First, there is the crisis that has brought Iceland to apply for an EU membership. On one hand, this would further weaken the status of the EFTA as an independent pillar, going from three countries to two.¹⁶² On the other hand, the weakness would probably result in a further subjugation and therefore a more

¹⁶¹ *Case C-156/98 Germany v Commission* [2000] ECR I-06857, para 32

¹⁶² Dupont, Cédric, "The Failure of the Nest-Best Solution: EC-EFTA Institutional Relationships and the European Economic Area", (1998). p 55

harmonious application of the State aid and SGEI rules throughout the EEA. Second, and final, it is the potential role of the Charter of Fundamental Rights of the European Union in the future development of the SGEI. Since the entry into force of the Lisbon Treaty, the Charter has become legally binding, i.e. the European Court of Justice can, and should, include the Charter in its SGEI assessment. This may lead to a further diversion in the application of the rules since the Charter is not a constituent part of the EEA Agreement and the EFTA Court has recently stated that it may interpret the rules differently in specific circumstances.¹⁶³

¹⁶³ *Joined Cases E-9/07 and E-10/07 - L'Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norge, para 27*

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