



Public Service Compensation in  
the Aviation Sector: The Swedish Airports  
State Aid Cases

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## ABSTRACT

For those EU airports whose catchment area is sparsely populated, it may be difficult to achieve the necessary air traffic volume that generates sufficient revenues to cover operating losses. Public financial support is often crucial to keep these airports operating, though it may be considered incompatible State aid under Article 107(1) TFEU.

To have such public aid cleared by the European Commission, two options are open to national authorities. Either they invoke the compatibility conditions for operating aid to airports recently introduced by the Commission's 2014 Aviation Guidelines on state aid to airports and airlines or they claim that the aided airports constitute SGEI and that compensation granted to airports for the provision of such services meet the compatibility conditions, laid down by the 2011 SGEI Decision or the SGEI Framework adopted by the Commission.

The article deals with the second option based on the State aid rules for SGEI. It delves into how the Commission has applied these rules in the aviation sector, looking in particular at the cases of *Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport*. These three Swedish State aid airport cases are noteworthy because they illustrate what the Commission expects from national authorities to demonstrate that airport aid complies with the SGEI rules. Arguably, on applying the criteria laid down by the 2014 Aviation Guidelines, the Commission has crafted a two-limb test for the qualification of airports as SGEI, revolving around the isolation condition and the market failure condition. After reviewing the Commission's decisional practice on the administration of this test, it can be submitted that small airports located in scarcely inhabited areas struggling to make profits are more likely to be considered by the Commission as SGEI.

National authorities should bear this point in mind either when drafting public service compensation arrangements for airports or when defending the Commission's objection that such arrangements constitute incompatible state aid in the context of Article 107 TFEU enquiries. National authorities should also make sure that the entrustment acts satisfy the formal and substantive requirements included in the compatibility conditions laid down by the Commission's 2011 SGEI Decision and SGEI Framework. A shoddy compliance is likely to result in the Commission finding that the national measures under scrutiny are outside the safe harbours provided by the 2011 SGEI Decision and SGEI Framework with the ensuing risk that the compensation may be viewed by the Commission as incompatible State aid.

## 1. INTRODUCTION

Regional airports are sometimes located in sparsely populated areas and achieve small traffic figures. Unsurprisingly, they are likely to struggle to generate enough revenues to cover their operating losses and earn a

profit. Support through public funds is then often crucial to keep these airports opened, but it may trigger the regulatory intervention of the European Commission to ascertain whether this kind of support constitute state aid under Article 107(1) TFEU.

European Commission's 2014 Aviation Guidelines indicate that, under certain conditions, the management and running of an airport can be considered as services of general economic interest (hereinafter SGEI)<sup>1</sup>. When an airport qualifies for SGEI, it may fall within the scope of application of the SGEI exception in Article 106(2) TFEU<sup>2</sup>. As a result, public financial sustain granted to such an airport can be found to be compatible with the internal market on the basis of Article 106(2) TFEU. To clarify under which conditions this exception applies, the Commission has adopted the so-called SGEI package to enact new State aid rules for SGEI<sup>3</sup>. The SGEI package includes hard-law and soft-law instruments

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<sup>1</sup> Communication from the Commission, Guidelines on State aid to airports and airlines, OJEU 2014 C99/3, Point 72 that reads that: 'As far as airports are concerned, the Commission considers that it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI. In the light of the principles outlined in point 69, the Commission considers that this can only be the case if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development. Such an assessment should take due account of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic. The Commission notes that certain airports have an important role to play in terms of regional connectivity of isolated, remote or peripheral regions of the Union. Such a situation may, in particular, occur in respect of the outermost regions, as well as islands or other areas of the Union. Subject to a case-by-case assessment and depending on the particular characteristics of each airport and the region which it serves, it may be justified to define SGEI obligations in those airports'.

<sup>2</sup> Article 106(2) TFEU lays down that: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union'.

<sup>3</sup> Nicola Pesaresi, Adinda Sinnaeve, Valérie Guigue-Koeppen, Joachim Wiemann, Madalina Radulescu, 'The New State Aid Rules for Services of General Economic Interest (SGEI): The Commission Decision and the Framework of 20 December 2011, available at [http://ec.europa.eu/competition/publications/cpn/2012\\_1\\_11\\_en.pdf](http://ec.europa.eu/competition/publications/cpn/2012_1_11_en.pdf), last visited 5 September 2018.

and namely the SGEI Communication<sup>4</sup>, the 2011 SGEI Decision<sup>5</sup>, the 2011 SGEI Framework<sup>6</sup> and the De Minimis Regulation<sup>7</sup>. Member States can defend the Commission's objections that airport aid constitutes incompatible State aid under Article 107(1) TFEU by invoking the rules in the SGEI package. By the same token, Member States can also forestall such objections by shaping financial aid packages for airports in accordance with the State aid rules for SGEI. Reliance on these rules, which in the context of this article will be labelled as the SGEI strategy, may be an effective way for public authorities to financially support loss-making airports that play a relevant role for local communities.

Since the enactment of the 2014 Aviation Guidelines, the European Commission has approved public service compensation for airports on the basis of the SGEI exception in the Swedish cases of *Kalmar Airport*<sup>8</sup>, *Sundsvall Timra Airport*<sup>9</sup>, *Skelleftea Airport*<sup>10</sup>. These decisions will be referred throughout this article as the Swedish airports State aid cases. The Commission considered the legality of airport aid in the form of public service compensation in a further case concerning a Swedish airport, *Västeras Airport*<sup>11</sup>. However, public aid in this case was approved on the

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<sup>4</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJEU 2012, C 8/4, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111(02)&from=EN), visited 5 September 2017.

<sup>5</sup> Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJEU 2012, L7/3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>, visited 5 September 2017.

<sup>6</sup> Communication from Commission, European Union Framework for State aid in the form of public service compensation, OJEU 2012 C8/15, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111\(03\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111(03)&from=EN), visited 5 September 2017.

<sup>7</sup> Commission Regulation no. 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJEU 2012 L 114/8, available, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0360&from=EN>, visited 5 September 2017.

<sup>8</sup> Commission Decision of 2 December 2016, Case SA.43964 – *Kalmar Öland Airport-entrustment of a Service of General Economic Interest*, C(2016) 7781 final.

<sup>9</sup> Commission Decision of 19 January 2016, Case SA.38892- *Sundsvall Timra Airport-entrustment of a Service of General Economic Interest*, C(2016) 133 final.

<sup>10</sup> Commission Decision of 19 January 2016, Case SA.38757-*Skelleftea Airport-entrustment of a Service of General Economic Interest*, C(2016) final.

<sup>11</sup> Commission Decision of 1 October 2014, Case SA.18857, *Alleged aid to Västeras Airport and Ryanair Ltd*, Case SA.18857.

basis of the compatibility conditions in the 2014 Aviation Guidelines. Incidentally, the SGEI exception was accepted by the Commission also in *Angoulême Airport*<sup>12</sup> and *Inverness Airport*<sup>13</sup>, which were determined before and after the Swedish airports State aid cases, respectively.

Whether and when, in the decisional practice of the Commission, financial aid granted to airports entrusted with public tasks can be considered as a compensation for SGEI is the issue addressed by this article. Compensation granted to airports for performing public service obligation (PSO) does not constitute state aid if it satisfies the four cumulative conditions set out in the *Altmark* doctrine<sup>14</sup>. The focus of this article is, however, on the different scenario where public aid does not meet the requirements for the application of the *Altmark* doctrine and its legality is assessed on the basis of the State aid rules for SGEI. More precisely, this article examines the findings of the Commission in the Swedish airports State aid cases. These cases well illustrate the decisional practice developed by the Commission for the application of the State aid rules for SGEI in the aviation sector given that in these cases the SGEI strategy was the main defensive argument invoked by the national authorities. In that regard, the article gives readers an insight into which facts and circumstances public authorities have to submit in support for their SGEI-related claims to have the airport aid cleared by the Commission.

The remaining structure of the article is as follows. First, the article introduces readers to the relevant EU regulatory framework for airport aid in the form of public service compensation. Second, the article describes the facts of the *Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport*, distinguishing them from those in *Västerås Airport*. Third and fourth, the article considers how the Commission administered the *Altmark* test and applied the State aid rules for SGEI to the above Swedish airports State aid cases. Lastly, the article draws some conclusions.

## 2. THE RELEVANT EU REGULATORY FRAMEWORK FOR PUBLIC SERVICE COMPENSATION TO AIRPORTS

Member States planning to give financial support to regional airports, which are ailing because revenues are lower than expenses, can argue that such financial sustain covers the operating losses of the beneficiary and then invoke the compatibility conditions for operating aid set out in the 2014 Aviation Guidelines<sup>15</sup>. When these public aid measures meet the above compatibility conditions they are approved by the

<sup>12</sup> European Commission, Decision of 23 July 2014 (SA.33963) concerning *Aéroport d'Angoulême*.

<sup>13</sup> European Commission, Decision of 18 July 2017 (SA.45692) concerning *Airport of Inverness*.

<sup>14</sup> European Court of Justice, Case C-280/00, *Altmark Trans GmbH, Regierungspräsident Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

<sup>15</sup> Points 112-137 of the 2014 Aviation Guidelines, above note n. 1.

Commission. It should be borne in mind, however, that the compatibility conditions for operating aid to airports will be available only throughout the 10-year transitional period, which started on the date of the enactment of the 2014 Aviation Guidelines<sup>16</sup>.

Alternatively, public authorities can rely on the SGEI strategy, arguing that the PSO imposed on airports have the nature of an SGEI. As said above, Point 72 of the 2014 Guidelines expressly says that in well-justified cases the overall management of an airport can be considered as SGEI. It is submitted that what differentiate SGEI from PSO is a *quid plus*,<sup>17</sup> as reflected by the fact that SGEI have special characteristics if compared to other economic activities. Typically, the notion of SGEI comprises services addressed to citizens or are supplied in the interest of society as a whole. Such services are not and cannot be satisfactorily provided by the market 'under conditions such as price, objective quality characteristics and access to the service consistent with the public interest, as defined by the State'.<sup>18</sup> The power to determine which public tasks constitute SGEI and set the compensation to which the services suppliers are entitled is within the competences of the Member States. These powers, however, are not unfettered as Member States have to exercise them in compliance with the EU relevant provisions and case law. The measures enacted by Member States are subject to the scrutiny of the Commission that has to check whether the former have made no manifest errors in the definition of SGEI<sup>19</sup>.

## 2.1. THE *ALTMARK* DOCTRINE

The underpinning for the *Altmark* doctrine is that the public service compensation awarded to the airport is not state aid due to the lack of an economic advantage for the recipient. For Article 107(1) TFEU to apply, several cumulative conditions must be fulfilled by the national measures alleged to constitute state aid, among which the award of an economic

<sup>16</sup> Point 112 of the 2014 Aviation Guidelines, above note n. 1.

<sup>17</sup> Caroline Wehlander, 'Services of General Economic Interest as a Constitutional Concept' (Asser Press -Springer, The Hague 2016) 200. On the relevance of the concept of SGEI in state aid cases, see also Erika Szyszczak, 'Altmark Assessed' in Erika Szyszczak (ed.) *Research Handbook on European State aid law* (Edward Elgar, Cheltenham 2011), 248.

<sup>18</sup> See, for example, European Commission, 'The new State Aid Package for SGEI', available at [http://ec.europa.eu/competition/state\\_aid/overview/presentation\\_sgei\\_de\\_minimis\\_en.pdf](http://ec.europa.eu/competition/state_aid/overview/presentation_sgei_de_minimis_en.pdf), visited 5 September 2017.

<sup>19</sup> See Point of the 2011 SGEI Decision, above note n 5, according to which '... It is clear from the case-law that, in the absence of sectoral Union rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest'.

advantage to the beneficiary. In the seminal *Altmark* judgment<sup>20</sup> the Court of Justice of the EU (hereinafter CJEU) has developed a four-limb test to establish whether the compensation paid to the supplier of a public service is an economic advantage under Article 107(1) TFEU.<sup>21</sup> A national measure that meets all the four cumulative conditions required by the *Altmark* test does not constitute a State aid and need not to be notified to the Commission.

## 2.2. THE RELEVANT STATE AID SGEI RULES FOR PSO COMPENSATION TO AIRPORTS

Where an airport public service compensation failed the *Altmark* test, thereby falling within the reach of Article 107(1) TFEU, it can nevertheless be found to be compatible with the internal market if it satisfies the criteria laid down by the State aid rules for SGEI. The criteria set by the 2011 SGEI Decision and the SGEI Framework are of particular relevance for the purpose of this article.

The 2011 SGEI Decision is a hard law instrument, being binding in its entirety<sup>22</sup>. It applied to public service compensation schemes meeting some quantitative and qualitative criteria<sup>23</sup>. As far as the aviation sector is concerned, the 2011 SGEI Decision applies to smaller airports with an average annual traffic not exceeding 200,000 passengers over the duration of the SGEI entrustment period<sup>24</sup>. Public service compensation granted to such airports is exempt from the obligation of prior notification to the Commission under Article 108(3) TFEU and can be cleared if it fulfils the compatibility conditions laid down by the 2011 SGEI Decision<sup>25</sup>. In practice, the 2011 SGEI Decision lays down a set of de minimis rules for public service compensation. More importantly, it provides for a safe

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<sup>20</sup> See above note n.14.

<sup>21</sup> The four conditions of the *Altmark* test are as follows: i) The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined; ii) The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; iii) 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; iv) Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been 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.

<sup>22</sup> On the legal nature of decisions adopted by the European Commission, see Article 288 TFEU.

<sup>23</sup> The criteria are laid down in Article 2 of the 2011 SGEI Directive.

<sup>24</sup> Article 2(e) of 2011 SGEI Decision, above note n. 5.

<sup>25</sup> Article 1 of 2011 SGEI Decision, above note n. 5.

harbour for the eligible airports whereby public authorities can award public service compensation to these airports without being subject to the Commission's regulatory scrutiny.

On the contrary, public service compensation for larger airports having more than 200,000 passengers per year falls outside the 2011 SGEI Decision and have to be assessed on the basis of the rules in the 2011 SGEI Framework. Though not legally binding, the SGEI Framework is however of great practical relevance as it states how the Commission applies in practice the State aid rules for SGEI rules<sup>26</sup>. Unlike the 2011 SGEI Decision, public service compensation under the SGEI Framework have to be notified to the Commission. The compatibility conditions laid down by the SGEI Framework also differ from those in the 2011 SGEI Decision in other aspects, thereby requiring a more thorough analysis<sup>27</sup>. The SGEI Framework stipulates that the responsibility for the provision of SGEI must be entrusted to the undertaking concerned by way of one or more acts<sup>28</sup>. These acts have to specify the entrusted SGEI by indicating the following elements: a) the content and duration of the PSO; b) the undertaking and the territory concerned; c) the nature of any exclusive special rights awarded to the undertaking; d) the methods for calculating compensation; and e) the arrangements for preventing and recovering any over-compensation<sup>29</sup>.

The other basic compatibility conditions in the SGEI Framework are as follows: a) duration of the entrustment which should be set by reference to objective criteria<sup>30</sup>; b) the compensation amount must not exceed the net cost of discharging the PSO inclusive of a reasonable profit<sup>31</sup>; c) periodic overcompensation checks during the entrustment period and at the end of it<sup>32</sup>; and d) compliance with the Transparency Directive 2006/111/EC<sup>33</sup>.

Additional compatibility conditions include: a) public consultation to weight interests of users and providers<sup>34</sup>; b) compliance with the EU public procurement rules<sup>35</sup>; c) no discrimination to determine

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<sup>26</sup> The Commission often relies on soft law instruments to clarify its approach to certain matters in the field of competition and state aid law. See, Alison Jones and Brenda Sufrin, 'EU Competition Law (5<sup>th</sup> Edition, OUP 2014), p. 118.

<sup>27</sup> Nicola Pesaresi, Adinda Sinnaeve, Valérie Guigue-Koeppen, Joachim Wiemann, Madalina Radulescu, above note n. 3.

<sup>28</sup> Point 15 of the SGEI Framework, above note n. 6.

<sup>29</sup> Point 16 of the SGEI Framework above note n. 6.

<sup>30</sup> Point 17 of the SGEI Framework, above note n. 6.

<sup>31</sup> Point 21 of the SGEI Framework, above note n. 6.

<sup>32</sup> Point 49 of the SGEI Framework, above note n. 6.

<sup>33</sup> Point 18 of the SGEI Framework, above note n. 6.

<sup>34</sup> Points 14 and 60 of the SGEI Framework, above note n. 6.

<sup>35</sup> Point 19 of the SGEI Framework, above note n. 6.

compensation<sup>36</sup>; d) incentives for the efficient provision of SGEI<sup>37</sup>; e) careful assessment for serious competition distortions expected from compensation<sup>38</sup>.

Sections 5.1, 5.2 and 5.3 of the article delves into the approach followed by the Commission to assess compliance of the national measures under scrutiny with the compatibility conditions to which the Commission appeared to have attached more weight in assessing whether the aid was lawfully granted to the airports of Kalmar, Sundsvall Timra and Skelleftea. In addition to the clear entrustment of SGEI, such compatibility conditions have been identified in those concerning the methods for the determination of compensation and avoiding overcompensation, compliance with EU public procurement rules. Section 5.4, instead, has a brief look at the other compatibility conditions considered in the State aid to Swedish airports cases.

### 3. THE FACTS OF THE SWEDISH STATE AID AIRPORT CASES

Before starting the analysis of the findings of the Commission in the Swedish airports State aid cases, it may be helpful having a quick look at the financial aid provided by the challenged national measures. In that regard, it can be said that the public aid measures in *Kalmar Airport*, *Sundsvall Timra Airport* and *Skelleftea Airport* are rather different from those considered in *Västerås Airport*.

*Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport* all concerned financial arrangements put in place by the contracting authorities as a compensation for the provisions of the SGEI entrusted to the beneficiary airports. The measures by which the Swedish authorities entrusted the SGEI to the airports of Kalmar, Sundsvall Timra and Skelleftea, which will be referred to in this article as the Entrustment Acts, were similarly worded and imposed on airports similar duties and obligations<sup>39</sup>. The subject matter of the Entrustment Acts was to give the addressees the task to keep the airports open to commercial air links. Accordingly, the airports had to supply carriers with all the services that were necessary for the operation of commercial traffic. The Entrustment Acts provided for the compensation of the net costs incurred by the airport to discharge their public tasks. It also included an efficiency mechanism whereby the airport had to supply key indicators for the efficiency (KPI). If the KPI showed that the airport was less efficient than comparable Swedish airports, the airport had to give an acceptable explanation. When no explanation was

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<sup>36</sup> Point 20 of the SGEI Framework, above note n. 6.

<sup>37</sup> Point 39 of the SGEI Framework, above note n. 6.

<sup>38</sup> Points 51-59 of the SGEI Framework, above note n. 6.

<sup>39</sup> The terms of the Entrustment Acts are reported in the decisions of the Commission. See, in particular, *Skelleftea Airport*, above note n. 10, paras. 7-17; *Sundsvall Timra Airport*, above note n. 9, paras. 9-19; *Kalmar Airport*, above note n. 8, paras. 4-16.

given, the compensation must not exceed the net cost incurred by the airport if it were as efficient as the comparison airports.

As hinted before, the factual context in *Västeras Airport* was rather dissimilar as national authorities granted different types of public financial aid caught by the scope of Article 107(1) TFEU<sup>40</sup>. The Commission enquiry not only targeted the airport charges and the marketing incentives applied by the airport manager (VFAB) to Ryanair but also to the public financial sustain directly granted to VFAB. To cover the long-standing losses from which VFSB was suffering, the local public authorities crafted and implemented a package of financial aid. This package included contributions by public authorities to the equity capital of VFAB and operating support granted to VFAB under the Local Airport Scheme over the 2001-2010 period. To dispel the Commission's concerns that aid granted to VFAB infringed Article 107(1) TFEU, Sweden argued that the majority of the activities of the Västeras Airport were not economic in nature. As the airport hosted flight schools and an aero club that did not perform economic activities, the airport services provided to those entities, so the argument run, did not have an economic nature<sup>41</sup>. Rather, the services supplied by the airport to them had to be qualified as SGEI. Hence, Sweden claimed that the financial aid given to VFAB had the nature of an SGEI compensation and did not constitute State aid.

#### 4. THE APPLICATION OF THE *ALTMARK* DOCTRINE

All the aid measures considered in *Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport* and *Västeras Airport* failed the four-limb *Altmark* test because they did not satisfy the fourth condition. This condition, which is arguably the most problematic for national authorities to be met, comes into play when the firm on which the PSO is imposed is chosen outside a competitive tender procedure. To satisfy this condition, national authorities must show that the PSO compensation was determined on the basis of the analysis of the costs that a typical well-run undertaking would have incurred in the provision of the public service plus a reasonable profit.<sup>42</sup> Yet, in *Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport* and *Västeras Airport* the Swedish authorities failed to correctly discharge this burden of proof. No analysis showing that the costs structure of the aided airport corresponded to that of an efficient comparable airport was provided. As a result, the Commission took the view that the

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<sup>40</sup> *Västeras Airport*, above note n. 11, paras. 13-36.

<sup>41</sup> *Västeras Airport*, above note n. 11, paras. 89-92.

<sup>42</sup> *Västeras Airport*, above note n. 11, para. 109; *Skelleftea Airport*, above note n. 10, para. 33; *Sundsvall Timra Airport*, above note n. 9, para.35.

compensation for the airports was not determined on the basis of the costs of an efficient firm.<sup>43</sup>

The aid package reviewed in *Västeras Airport* also breached the first and second conditions of the *Altmark* test. It infringed the first *Altmark* condition because neither the entrustment act nor the by-laws of VFAB, clearly defined the PSO with which the airport was tasked. In the Commission's view, the bylaws of the airport manager made no reference to the PSO imposed on the airport of Västeras but only contained a general description of the corporate object of VFAB.<sup>44</sup> The second *Altmark* condition requires that the entrustment act sets out in advance in an objective and transparent manner the parameters for the calculation of the PSO compensation. Considering the lack of a clear act of entrustment of an SGEI to VFAB, the Commission concluded that there was no evidence of an ex ante definition of the PSO compensation but rather only of ex post compensation of unanticipated losses.<sup>45</sup> This element was not sufficient to consider the national measures compliant with the second *Altmark* condition.

## 5. THE APPLICATION OF THE STATE AID RULES FOR SGEI

At this point the arguments submitted by the Swedish authorities employed in *Västeras Airport* diverged from those relied on in *Kalmar Airport*, *Sundsvall Timra Airport*, *Skelleftea Airport*. Though the Västeras Airport, with less than 200,00 annual passengers, was within the scope of application of the 2011 SGEI Decision, Sweden did not go on with the SGEI strategy but rather it relied on the provisions in the 2014 Aviation Guidelines. This change turned out to be successful as the Commission held that the financial support granted to the airport satisfied the compatibility conditions for operating aid.<sup>46</sup> On the contrary, in *Kalmar Airport*, *Sundsvall Timra Airport* and *Skelleftea Airport* Sweden still pursued the SGEI strategy. Because the annual passengers of the airports exceeded the 200,000 thresholds, whether the SGEI exception applied to them had to be assessed in accordance with the rules in the SGEI Framework. The article now focuses on how the Commission applied the rules in the SGEI Framework.

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<sup>43</sup> *Kalmar Airport*, above note n.8, paras. 24-32; *Sundsvall Timra Airport*, above note n. 9, paras. 27-38; *Skelleftea Airport*, above note n. 10, paras. 25-36; *Västeras Airport*, above note n. 11, para. 109.

<sup>44</sup> *Västeras Airport*, above note n. 11, para. 108.

<sup>45</sup> *Västeras Airport*, above note n. 11, para. 109.

<sup>46</sup> For the sake of completeness, the Commission ruled that also the financial measures in favour of the airport that had the nature of investment aid met the compatibility conditions for the investment aid in the 2005 Aviation Guidelines and were accordingly declared compatible with the internal market.

### 5.1. THE QUALIFICATION OF PUBLIC TASKS ENTRUSTED TO AIRPORTS AS SGEI

Logically the first issue to be considered to ascertain whether a PSO compensation awarded to airports does not breach EU law is whether such PSO constitute genuine SGEI. As said above, the clear entrustment of SGEI to the beneficiary airport is enlisted as compatibility conditions for aid by both the 2011 SGEI Decision and the SGEI Framework<sup>47</sup>. The 2014 Guidelines provide for guidance on which factors and economic evidence can be relied on to demonstrate that the recipient is amongst the well justified cases in which the overall management of an airport can be considered as genuine SGEI.<sup>48</sup> In that regard, national authorities have to consider whether, absent the aided airport, its catchment area would be in such a situation of isolation, taking also into account alternative modes of transport, to prejudice the economic and social development of this area.

Applying these criteria, the Commission considered the public tasks entrusted to the airports of Kalmar, Sundsvall Timra Airport and Skelleftea Airport as being a genuine SGEI for the following reasons. First, the aided airports played a very important role in ensuring accessibility to their catchment areas from the main Swedish and EU destinations. Competing airports did not represent an acceptable alternative for passengers because they were at more than 100 km away from the aid recipient and a travelling distance of at least 90 minutes<sup>49</sup> or because they lacked the necessary infrastructure for the operation of a sufficient level of commercial traffic.<sup>50</sup> Moreover, the travelling distance from some parts of the catchment areas of the recipients could be even longer,<sup>51</sup> especially during winter time due to rough weather conditions.<sup>52</sup> Neither the maritime and rail links to/from the catchment areas of the airports of Kalmar, Sundsvall Timra and Skelleftea were satisfactory nor

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<sup>47</sup> See above at section 2.2 of this article.

<sup>48</sup> Point 72 of the 2014 Aviation Guidelines, above note n. 1.

<sup>49</sup> *Kalmar Airport*, above note n. 8, paras. 59-66; *Skelleftea Airport*, above note n. 10, paras. 61-71; *Sundsvall Timra Airport*, above note n. 9, paras. 62-64.

<sup>50</sup> *Sundsvall Timra Airport*, above note n. 9, para. 63.

<sup>51</sup> In *Kalmar Airport*, above note n. 8, paras. 64-65, the Commission observed that the airports of Växjö and Ronneby, were at an approximately 3h travelling time from the island of Öland that was comprised within the catchment area of the airport of Kalmar. Therefore, especially for the inhabitants of the island of Öland it was impossible to fly out to Stockholm and return on the same day without an overnight stay at Växjö or Ronneby. These airports, then, could not ensure the needed connectivity between Stockholm and the catchment area of the airport of Kalmar, especially the island of Öland.

<sup>52</sup> *Skelleftea Airport*, above note n. 10, paras. 62 and 69; being the airport in the Far North of Sweden, close to the Arctic circle, travelling time may be significantly prolonged by severe winter weather conditions.

they could be seen as an effective alternative to flying.<sup>53</sup> Therefore, the Commission considered that the lack of acceptable connections would harm the standard of living of the inhabitants and the business prospective of the firms in the catchment areas of the aided airports, thereby prejudicing the social and economic development of those areas.<sup>54</sup>

The second reason on which the qualification of the airports of Kalmar, Sundsvall Timra and Skelleftea as SGEI was grounded was that the airports would cease operating without the SGEI compensation. All these airports were located in sparsely populated and remote areas, whereas the airports of Sundsvall Timra and Skelleftea were close to the arctic zone.<sup>55</sup> The aided airports also implemented the Basic Airport concept, which is a management tool that can boost the efficient use of the airports' resources. Notwithstanding that, the airports were unable to generate enough profit to cover their operating losses and without public support, in the form of an SGEI compensation, they were likely to exit the market.<sup>56</sup>

After having established that the public authorities have correctly qualified the public tasks of the aided airports as SGEI, the Commission went on to assess whether the national measures under scrutiny also met the other compatibility conditions in the SGEI Framework.

## 5.2. THE COMPATIBILITY CONDITIONS REGARDING COMPENSATION AND OVERCOMPENSATION

The SGEI Framework requires an entrustment act to specify the PSO and the methods to determine compensation<sup>57</sup>. The Commission found that the Entrustment Acts were officially adopted by the contracting authorities and that such acts clearly indicated the content, the duration of the PSO, the firm upon which the PSO is imposed, the methods for calculating compensation and the arrangements for avoiding and recovering overcompensation. The compensation to be paid to the airports covered only the net costs of the SGEI, as calculated on the basis of the observed factual operating losses suffered by the airport over a given year. To prevent overcompensation, the Entrustments Acts correctly laid down that the profits generated by the non-commercial

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<sup>53</sup> *Kalmar Airport*, above note n. 8, para. 68; *Skelleftea Airport*, above note n. 10, para. 73; *Sundsvall Timra Airport*, above note n. 9, para. 65.

<sup>54</sup> *Kalmar Airport*, above note n. 8, para. 69; *Skelleftea Airport*, above note n. 10, para. 74; *Sundsvall Timra Airport*, above note n. 9, para. 66.

<sup>55</sup> *Skelleftea Airport*, above note n. 10, paras. 78-79; *Sundsvall Timra Airport*, above note n. 9, paras. 69-71.

<sup>56</sup> *Skelleftea Airport*, above note n. 10, paras. 79-81; *Sundsvall Timra Airport*, above note n. 9, paras. 71-73.

<sup>57</sup> See Section 2.8 of the 2011 SGEI Framework, above note n. 6.

activities outside the SGEI have to be used to reduce the SGEI compensation.<sup>58</sup>

From the SGEI Framework it emerges that the Commission's favourite approach to calculate the compensation for SGEI is the net avoided cost methodology<sup>59</sup>. However, the application of this methodology to the airports of Kalmar, Sundsvall Timra and Skelleftea was inappropriate. The net avoided cost methodology requires the determination of the costs and revenues of the provider of the SGEI in a hypothetical scenario where there are no SGEI. Since all the commercial activities of the airports outside the entrustment acts depended on the existence of the SGEI, a hypothetical scenario where only the non-SGEI activities are conducted could not be envisaged. For this reason, the Commission employed the alternative methodology of the cost allocation, according to which the net cost for SGEI corresponds to the difference between the costs and revenues for the provider of SGEI. Considering the reports delivered by the aided airports before the closing of each financial year, the compensation granted to them did not exceed the net costs of the SGEI. For the above reasons, the Commission concluded that the proper application of the net costs methodology based on the actually incurred costs prevented possible overcompensation.<sup>60</sup>

### 5.3. THE COMPATIBILITY CONDITION OF COMPLIANCE WITH EU PUBLIC PROCUREMENT RULES

According to the SGEI Framework, the provider of the SGEI must be selected in accordance with the EU public procurement rules<sup>61</sup>. Prior to establishing that the Entrustments Acts complied with these rules, the Commission had to assess whether the objected national measures fell within the scope of the EU public procurement legislation. The Entrustment Acts were qualified as service concession contracts because the major source of revenues for airports was the SGEI compensation. Next, the Commission took the view that the mode for the provision of the entrusted SGEI chosen by the contracting authorities was the in-house model in the sense of the *Teckal* judgment.<sup>62</sup> In *Teckal* the CJEU ruled that when the provider of public services is controlled by the public authorities to which the major part of its activities are directed it must be considered as an in-house service provider in relation to the controlling public

<sup>58</sup> *Skelleftea Airport*, above note n. 10, paras. 85-90; *Sundsvall Airport*, above note n. 9, paras. 77-81; *Kalmar Airport*, above note n. 8, paras. 76-79.

<sup>59</sup> See, Point 24, and especially, Point 27 of the SGEI Framework, above note n. 6, which states that the Commission regards the net avoided cost methodology as the most accurate method for determining the cost of a PSO.

<sup>60</sup> *Skelleftea Airport*, above note n.10, paras. 117-119; *Sundsvall Airport*, above note n. 9, paras. 107-109; *Kalmar Airport*, above note n. 8, paras. 96-103.

<sup>61</sup> Section 2.6 of the 2011 SGEI Framework, above note n. 6.

<sup>62</sup> European Court of Justice, Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] I ECR 08121.

authorities. Hence, the provision of public service under the in-house model is outside the reach of the EU public procurement rules.

That said, the Commission went on to apply these rules to the facts of the Swedish airports State aid cases. It observed that the managers of the aided airports were indirectly controlled by the contracting authorities and the main activity of the airport managers was to run the airports in the concession contracts concluded with the public authorities. The result of the qualification of the relationship between the contracting authorities and the airports as ‘in-house provision of services’ was that such relationship was outside the scope of the EU public procurement rules. Hence, the Commission concluded that the acts by which the beneficiary airports were entrusted with the SGEI were exempt from the EU public procurement rules. The important consequence of this finding was that the compatibility condition of compliance with EU public procurement rules could not apply to the aid received by the airports of Skelleftea, Sundsvall and Kalmar<sup>63</sup>.

#### 5.4. THE OTHER RELEVANT COMPATIBILITY CONDITIONS

This section of the article briefly discusses the compatibility conditions that apparently played a minor or no role in the line of reasoning followed by the Commission in the Swedish airports State aid cases.

The absence of discrimination compatibility condition requires that in cases in which the same SGEI were entrusted to several undertakings, the same methodology must be used to calculate the related compensation for all the suppliers of such services<sup>64</sup>. Because the management of the airports of Kalmar, Sundsvall Timra and Skelleftea was assigned only to one undertaking, this principle was not applicable in the State aid to Swedish airports cases<sup>65</sup>.

To meet the public consultation compatibility condition, Member States have to publish on the internet or by alternative appropriate means the pieces of information enlisted by the SGEI Framework<sup>66</sup>. The Commission considered that Sweden submitted a report with a socio-economic cost estimate for the aided airports prepared before the

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<sup>63</sup> *Skelleftea Airport*, above note n. 10, paras. 101-106; *Sundsvall Airport*, above note n. 9, paras. 92-97; *Kalmar Airport*, above note n. 8, paras. 88-93.

<sup>64</sup> Point 20 of the SGEI Framework, above note n. 6.

<sup>65</sup> *Skelleftea Airport*, above note n. 10, para. 122; *Sundsvall Airport*, above note n. 9, para. 112; *Kalmar Airport*, above note n.8, para. 110.

<sup>66</sup> According to Point 60 of the SGEI Framework, above note n. 6, these data are as follows: (a) the results of the public consultation concerning the interests of users and suppliers; (b) the content and duration of the public service obligations; (c) the undertaking and, where applicable, the territory concerned; (d) the amounts of aid granted to the undertaking on a yearly basis.

adoption of the SGEI entrustment acts<sup>67</sup>. Sweden also reported to the Commission that the airports of Kalmar, Sundsvall Timra and Skelleftea carried out frequent surveys on travel needs in the region and customer satisfaction. The results of these surveys would be published on the airports' websites<sup>68</sup>. Lastly, Sweden informed that the public has access to all the relevant documents on the basis of the principle of public access to documents enshrined in the Swedish Constitution.<sup>69</sup> Considering the submissions made by Sweden, the Commission reached the conclusion that the challenged national measures fulfilled the transparency compatibility condition.

The Commission was also satisfied that the Entrustment Acts met the compatibility condition of efficiency incentives. Under the SGEI Framework this compatibility condition comes into relevance when appraising the criteria laid down by the contracting authorities for the determination of the compensation for the SGEI supplier<sup>70</sup>. The Commission considered that the efficiency mechanisms in the Entrustment Acts complied with the requirement in the SGEI framework to introduce incentives for the efficient provision of SGEI. More specifically, the Commission positively viewed the duty for the aided airports to submit an annual report on KPI, as well as the obligation of airports and national authorities to take action in case, the KPI show a decrease in efficiency. It also believed that the implementation of the 'Basic Airport' concept was instrumental in achieving the required efficiency<sup>71</sup>.

A further compatibility condition is that SGEI suppliers comply with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings<sup>72</sup>. Though the SGEI in question were entrusted to the airport managers that were fully owned by the contracting authorities, the provisions of directive 206/111/EC, however, could not apply to the cases of *Skelleftea Airport*, *Sundsvall Airport*, and *Kalmar Airport*. Indeed, the airports did not meet the financial threshold triggering the application of the directive, which was a total net turnover of at least EUR 40 million over the financial years preceding the payment of the compensation for the provision of the SGEI<sup>73</sup>.

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<sup>67</sup> *Skelleftea Airport*, above note n. 10, paras. 107-108; *Sundsvall Airport*, above note n. 9, paras. 98-99; *Kalmar Airport*, above note n.8, paras. 94-95.

<sup>68</sup> *Skelleftea Airport*, above note n. 10, para. 123; *Sundsvall Airport*, above note n. 9, para. 113; *Kalmar Airport*, above note n.8, para. 111.

<sup>69</sup> *Skelleftea Airport*, above note n. 10, para. 125; *Sundsvall Airport*, above note n. 9, para. 114; *Kalmar Airport*, above note n.8, para. 113.

<sup>70</sup> SGEI Framework, above note n. 6, especially Points 39-43.

<sup>71</sup> *Skelleftea Airport*, above note n. 10, paras. 117-119; *Sundsvall Airport*, above note n. 9, paras. 113-115; *Kalmar Airport*, above note n.8, paras. 105-106.

<sup>72</sup> Point 18 of the 2011 SGEI Framework, above note n. 6.

<sup>73</sup> *Skelleftea Airport*, above note n. 10, paras. 91-96; *Sundsvall Airport*, above note n. 9, paras. 88-91; *Kalmar Airport*, above note n. 8, paras. 84-87.

Lastly, the SGEI Framework also sets out the compatibility condition that the length of entrustment must be justified by reference to objective criteria<sup>74</sup>. The Entrustment Acts determined the duration of the entrustment period in 10 years. The Commission took the view that the 10-year period is objectively justified as it refers to the 10-year maximum depreciation period chosen by the aided airports. Indeed, such a long period of time is appropriate for the depreciation of the many tangible assets that are normally used by an airport.<sup>75</sup>

## 6. CONCLUSIVE REMARKS

The examination of the Commission's decision on the Swedish State aid airport cases has shown that reliance on the *Altmark* doctrine is frayed with difficulties. This legal argument was rejected in all the cases in which it was invoked because the national measures failed to satisfy the highly controversial fourth condition of the *Altmark* test. Similarly, public authorities intending to draft aid packages for airports in accordance with the *Altmark* doctrine, so to put these measures beyond the reach of Article 107(1) TFEU, should be aware that that may not be the best available option. Difficulties in correctly fulfilling the fourth *Altmark* condition may result in breaching this criterion with the ensuing risk of a State aid enquiry being opened by the Commission. On the other hand, the SGEI strategy looks more promising, as reflected by the higher success rate with which this argument was invoked in the Swedish airports State aid cases.

### 6.1. FINDING THAT PUBLIC TASKS OF BENEFICIARY AIRPORTS ARE GENUINE SGEI

The first issue to be considered when the public authorities played the card of the SGEI strategy is to demonstrate that the aided airport is tasked with an SGEI. The Commission has crafted a two-limb test to establish whether a PSO imposed on airports constitute an SGEI. Under the test, it must be established that, absent the aided airport, its catchment area would be isolated; and that there is a market failure in the sense that, without public financial support to the airport, no market economy operator would be ready to take up the provision of the SGEI in question.

The isolation criterion is assessed by the Commission with a counterfactual. The question is whether, in a scenario where the aided airport is absent, its catchment area is in such a situation of isolation to prejudice its economic and social development. In *Kalmar Airport, Sundsvall Timra Airport* and *Skelleftea Airport* the Commission established that, had the aided airport left the market, their catchment areas would be isolated due to the poor or no connections other than the air links ensured by the

<sup>74</sup> Point 17 of the 2011 SGEI Framework, above note n. 6.

<sup>75</sup> *Skelleftea Airport*, above note n. 10, paras. 97-100; *Sundsvall Airport*, above note n. 9, paras. 82-87; *Kalmar Airport*, above note n. 8, paras. 81-83.

aid recipients<sup>76</sup>. From that the Commission reached the conclusion that the lack of connections would negatively affect persons and business in the catchment areas. And all that would harm the social and economic development of these areas. It can be said that it is the isolation of the catchment areas to be the key factor in the counterfactual. From the hypothetical scenario of isolation of the catchment areas, the Commission seemed to infer a deterioration of the welfare of individuals and businesses with the resulting prejudice of the local social and economic development. No discussion of the causality links between the condition of isolation of the catchment areas and the prejudice suffered by the social and economic development of those areas was, however, made by the Commission.

Turning to the market failure requirement, what public authorities have to do to meet this condition was well illustrated in *Sundsvall Timra Airport* and *Skelleftea Airport*<sup>77</sup>. The Commission found that in these cases the concerned airports were unable to obtain a significant increase in revenues and, accordingly, to survive without continuous cost compensation because an increase in air traffic was unlikely due to the scarce population in their catchment areas. The efficiency measures implemented by the airports with the view of cutting costs where possible were not enough to cover the operating losses suffered by them in the provision of the SGEI. These cases then highlight the importance for public authorities to demonstrate that, due to structural conditions such as the geographical position or scarcely populated catchment areas, the aided airport has limited prospects to attract a significant passenger traffic. The implementation of efficiency measures, like the Basic Airport concept in these cases, may also help to convince the Commission about a market failure affecting the aided airports. Also in *Kalmar Airport*, the Swedish authorities contended that the airport was unable to function without sustainable financial support despite the adoption of the Basic Airport concept<sup>78</sup>. The Commission did not discuss these arguments, neither did it explicitly reject them. Thus, it can be argued that the Commission considered that the market failure condition was satisfied also in *Kalmar Airport*.

In sum, the key factor here is the hypothetical isolation of the catchment area of aid recipients that occurs due to the lack of acceptable alternative domestic and international connections. This proof was reached in *Kalmar Airport*, *Sundsvall Timra Airport* and *Skelleftea Airport* where all the concerned airports were located in remote sparsely populated areas. Incidentally, the airports of Skelleftea and Sundsvall Timra were in an outermost region close to the Arctic Circle. It should also be observed that the airports of Kalmar, Sundsvall Timra and Skelleftea were all small regional airports with a limited air traffic, comprised between 200,000 and

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<sup>76</sup> See section 5.1 of the article.

<sup>77</sup> *Ibidem*.

<sup>78</sup> *Kalmar Airport*, above note n.8, paras. 52-53.

700,000 annual passengers, thereby falling under the “B” category of the 2014 Guidelines classification<sup>79</sup>. A further element that the airports of Kalmar, Skelleftea and Sundsvall Timra had in common was that they were all suffering from operational losses notwithstanding the implementation of management tools aimed at improving the efficient use of airport resources.

The take home lesson for public authorities is that the Commission appears ready to consider as SGEI airports that find themselves in a factual and geographical context similar of those of the airports of Kalmar, Skelleftea and Sundsvall Timra<sup>80</sup>. The above factors and circumstances should be taken into great consideration by public authorities. In order to successfully invoke the SGEI strategy to lawfully grant financial sustain to airports, public authorities should employ this legal argument only in relation to small regional airports serving scarcely inhabited areas. The acts entrusting the SGEI should also provide detailed reasons why the contracting authorities believe that, in the absence of the aided airport, its catchment area would be isolated and that, without public aid, the airport would leave the market. By the same token, the Commission will accept the SGEI strategy as defense in the context of State aid investigations if the public authorities can prove to the requisite standard that the aid airports constitute SGEI on the basis of the criteria of isolation and market failure.

## 6.2. MEETING THE COMPATIBILITY CONDITIONS IN THE STATE AID RULES ON SGEI

In addition to correctly qualifying the aided airports as genuine SGEI, contracting authorities also have to make sure that the related entrustment acts comply with the substantive and formal requirements included in the compatibility conditions laid down by the 2011 SGEI Decision and the SGEI Framework. The decisional practice developed by the Commission in the application of such conditions is a remainder for public authorities of the importance of carefully drafting the entrustment acts. Not only the national contracting authorities have to correctly define a genuine SGEI but they also have to draft the entrustment acts in such a manner to comply with the SGEI rules regarding the methodologies for the determination of compensation, the need to avoid overcompensation, compliance with the EU public procurement rules and the presence of

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<sup>79</sup> Points 89 and 118 of the 2014 Aviation Guidelines, above note n. 1.

<sup>80</sup> Similar factors were found in relation to the public service compensation granted to the airport of Angoulême, that is the only other case in which the Commission accepted the SGEI strategy. In comparison with the Swedish airports, the airport of Angoulême was much smaller, falling within the category “A” of the 2014 Guidelines with a volume of air traffic lower than 200,000 passengers per year. See *Angoulême Airport*, above note n. 12.

efficiency incentives. Several lessons can then be drawn from the Commission's findings on these issues.

First, to determine the compensation of the SGEI, the Commission may be willing to accept the alternative methodology based on cost allocation instead of the application of its favoured net avoided cost methodology where this approach is not appropriate. Second, the reimbursement to the airport of a reasonable profit is acceptable provided that the profit does not go beyond the margin determined in the SGEI Framework, which is the relevant swap rate plus a premium of 100 basis point<sup>81</sup>. Third, an acceptable length of the entrustment should be that corresponding to the maximum depreciation period applied by the aided airport. Fourth, a claw back provision imposing the obligation on airports to pay back the portion of compensation received in excess of the net cost of the SGEI was considered by the Commission as a suitable tool to combat overcompensation. Fifth, mechanisms, such as those framed by the Swedish authorities imposing efficiency targets and linking the calculation of compensation to the meeting of such targets, were found to be appropriate efficiency incentives for the purpose of the SGEI Framework. Sixth, the Commission drew a line of distinction between public aid granted for compensation of an SGEI, on one hand, and aid to promote certain economic activities or rescue aid awarded to ailing firms, on the other hand. The Commission also highlighted that these instruments pursue different policy goals and are subject to different legal regimes. Seventhly and finally, as required by point 73 of the 2014 Guidelines<sup>82</sup>, for an activity entrusted to an airport to be qualified as an SGEI it must not cover the development of commercial air transport services. Consistently with this requirement, in *Kalmar Airport*, *Sundsvall Timra Airport* and *Skelleftea Airport* Sweden confirmed that car parks and services consisting in renting premises to restaurant and café services and other sales outlets did not receive any public support<sup>83</sup>.

Having that said, it may be worth noting before concluding that also the EFTA Surveillance Authority (ESA) has adopted guidelines on state aid to the aviation sector (the EFTA Aviation Guidelines), which are similar to the European Commission's 2014 Aviation Guidelines<sup>84</sup>. The

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<sup>81</sup> Point 36 of the 2011 SGEI Framework, above note n. 6.

<sup>82</sup> Point 73 of the 2014 Aviation Guidelines, above note n. 1, provides that 'In the light of the specific requirements attached to public service obligations for air transport services and in view of the complete liberalisation of air transport markets, the Commission considers that the scope of public service obligations imposed on airports should not encompass the development of commercial air transport services'.

<sup>83</sup> *Skelleftea Airport*, above note n. 10, paras. 82-83; *Sundsvall Airport*, above note n. 9, paras. 74-75; *Kalmar Airport*, above note n. 8, paras. 73-74.

<sup>84</sup> EFTA Surveillance Authority no. 216/14/COL of 28 May 2014, amending for the 96<sup>th</sup> time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid to airports and airlines [2016/2051], available at <http://eur-lex.europa.eu/legal->

EFTA Aviation Guidelines allow national authorities to qualify certain economic activities of airports as SGEI and provide compensation for discharging such services<sup>85</sup> and give guidance on which factors to be considered to qualify airports as SGEI<sup>86</sup>. The ESA has also enacted a set of State aid rules for SGEI similar to the corresponding EU rules by adopting the Framework for state aid in the form of public service compensation<sup>87</sup> and a communication on SGEI compensation<sup>88</sup>. As of the time of writing, the ESA has not yet applied the EFTA SGEI rules in the aviation sector<sup>89</sup>. Bearing in mind the similarities between the EU and

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content/EN/TXT/?uri=uriserv:OJ.L\_.2016.318.01.0017.01.ENG&toc=OJ:L:2016:318:TOC, visited 5 September 2017.

<sup>85</sup> EFTA Aviation Guidelines, above note n.68, Point 69.

<sup>86</sup> Similarly to Point 72 of the 2014 Aviation Guidelines of the Commission, Point 72 of the EFTA Aviation Guidelines state that: ‘As far as airports are concerned, the Authority considers that it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI. In the light of the principles outlined in point 69, the Authority considers that this can only be the case if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the EEA to an extent that would prejudice its social and economic development. Such an assessment should take due account of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic. The Authority notes that certain airports have an important role to play in terms of regional connectivity of isolated, remote or peripheral regions of the Union. Such a situation may, in particular, occur in respect of the outermost regions, as well as islands or other areas of the EEA. Subject to a case-by-case assessment and depending on the particular characteristics of each airport and the region which it serves, it may be justified to define SGEI obligations in those airports.

<sup>87</sup> Available at <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Framework-for-state-aid-in-the-form-of-public-service-compensation.pdf>, visited 5 September 2017.

<sup>88</sup> Application of the state aid rules to compensation granted for the provision of services of general economic interest, available at <http://www.eftasurv.int/media/state-aid-guidelines/Part-VI---Compensation-granted-for-the-provision-of-services-of-general-economic-interest.pdf>, visited 5 September 2017.

<sup>89</sup> The only State aid case so far determined by the ESA in which SGEI-related arguments have been submitted was *Hurtigruten* in the maritime sector (ESA decision no. 070/17/COL of 29 March 2017 on Coastal Agreement on *Hurtigruten* Maritime Service 2012-2019, available at <http://www.eftasurv.int/media/esa-docs/physical/Final-decision-non-confidential-version---Formal-investigation---Alleged-unlawful-aid-in-Coastal-Agreement-for-Hurtigruten-Maritime-Services-2012-2.pdf>, visited 5 September 2017). This case was about a public aid granted to a ferry operator for providing maritime links between the coastal town of Bergen and Kirkenes in Norway over the 2012-2019 period under a coastal agreement concluded with the Norwegian public authorities. The ESA took the view that the PSO imposed on the aided ferry operator constituted genuine SGEI. The public financial support granted to the ferry operator was considered as a compensation for discharging such SGEI. Hence, the aid was cleared by the ESA.

the EFTA State aid rules for SGEI, it can be argued that should the ESA open a State aid enquiry into PSO compensation to airports, it might follow an approach similar to that of the European Commission to assess the legality of the objected national measures.