Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 10 March 2022 [1]

Case C-614/20

AS Lux Express Estonia
v
Majandus- ja Kommunikatsiooniministeerium

(Request for a preliminary ruling from the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia))

(Preliminary ruling proceedings – Public passenger transport services by rail and by road – Regulation (EC) No 1370/2007 – General rule which imposes a duty to provide free transport for certain categories of persons – Article 2(e) and Article 3(2) – Public service obligation – Right to compensation – Article 4(1)(b)(i) – Power of a Member State to exclude compensation – Article 3(3) – Scope – Exclusion)

1. Estonian law provides that road transport undertakings must transport certain categories of passenger (in short, children of pre-school age and persons with disabilities) free of charge.

2. The Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) asks, essentially, whether that legal duty comes within the concept of 'public service obligation', as defined by Regulation (EC) No 1370/2007, [2] and, if so, whether the undertakings concerned are entitled to receive compensation for the associated loss of revenue.

I. Legal framework

A. European Union law. Regulation No 1370/2007

3. Pursuant to Article 1 ('Purpose and scope'):

'1. The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

[1] Original language: Spanish.

[2] Regulation of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

…'

4. Article 2 ('Definitions') reads:

'For the purpose of this Regulation:

(a) "public passenger transport" means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;

…

(e) "public service obligation" means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward;

(f) "exclusive right" means a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator;

(g) "public service compensation" means any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period;

…

(l) "general rule" means a measure which applies without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible;

…'

5. In accordance with Article 3 ('Public service contracts and general rules'):

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

2. By way of derogation from paragraph 1, public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passenger may also be the subject of general rules. In accordance with the principles set out in Articles 4 and 6 and in the Annex, the competent authority shall compensate the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This shall

be so notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.

3. Without prejudice to the provisions of Articles 73, 86, 87 and 88 of the Treaty, Member States may exclude from the scope of this Regulation general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility. These general rules shall be notified in accordance with Article 88 of the Treaty. Any such notification shall contain complete information on the measure and, in particular, details on the calculation method.'

6. Article 4 ('Mandatory content of public service contracts and general rules') reads:

'1. Public service contracts and general rules shall:

(a) clearly set out the public service obligations, defined in this Regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner:

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and

(ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation.

…'

7. Article 6 ('Public service compensation') provides:

'1. All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4 …'

8. In accordance with the annex ('Rules applicable to compensation in the cases referred to in Article 6(1)'):

'1. The compensation connected with public service contracts awarded directly in accordance with Article 5(2), (4), (5) or (6) or with a general rule must be calculated in accordance with the rules laid down in this Annex.

2. The compensation may not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator. The effects shall be assessed by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect, the competent authority shall be guided by the following scheme:

…

3. Compliance with the public service obligation may have an impact on possible transport activities of an operator beyond the public service obligation(s) in question. In order to avoid overcompensation or lack of compensation, quantifiable financial effects on the operator's networks concerned shall therefore be taken into account when calculating the net financial effect.

…'

B. Estonian law. Ühistranspordiseadus, [3]

9. Paragraph 34 provides:

'On domestic road, water and rail transport services, the transport operator shall carry free of charge children who have not reached the age of 7 by 1 October of the current school year, as well as children for whom the start of compulsory schooling has been postponed, persons with disabilities under the age of 16, persons with severe disabilities aged 16 and over, persons with a significant visual impairment and persons accompanying a person with a severe or significant visual impairment, and guide dogs or assistance dogs of a person with disabilities. The transport operator shall not receive any compensation for the transport of those categories of passenger free of charge.'

II. Facts, dispute and questions referred for a preliminary ruling

10. On 5 June 2019, Eesti Buss OÜ and AS Lux Express Estonia, undertakings providing road passenger transport on a commercial basis, [4] applied to the Estonian Minister for Economic Affairs and Infrastructure for compensation for lost revenue of ticket sales under Paragraph 34 of the ÜTS.

11. On 10 July 2019, the Minister for Economic Affairs and Infrastructure rejected the applications arguing that, in accordance with Paragraph 34 of the ÜTS, the undertakings were not entitled to any compensation for providing transport free of charge for passengers belonging to the categories defined therein.

12. On 12 August 2019, Lux Express Estonia brought an action before the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia), in which it sought, principally, damages [5] and, in the alternative, an order for the payment of financial compensation in a reasonable amount, as set by the court, together with interest.

13. According to the referring court:

– Paragraph 34 of the ÜTS lays down a general rule within the meaning of Articles 2(l) and 3(2) of Regulation No 1370/2007, since it establishes a maximum (free) tariff for certain categories of passenger. The aim of that provision is to ensure that those passengers are guaranteed

[3] Law on public passenger transport (RT I, 23 March 2015, 2), in the version applicable to the main proceedings (RT I, 30 June 2020, 24); 'the ÜTS'.

[4] From August 2013 and March 2015, respectively, those undertakings held licences to provide passenger transport services, under which they provided regular transport services by bus on a commercial basis in Estonian territory. Following their merger on 29 July 2019, Lux Express Estonia continued that activity.

[5] Since the application in the administrative proceedings was lodged, the amount claimed has changed, as regards its temporal scope, to encompass the period from 1 January 2016 to 31 January 2020.

economical transport. It is unlikely that a commercial operator would provide transport free of charge for passengers without the intervention of the public authorities.

– It appears to follow from Articles 3(2) and 4 of Regulation No 1370/2007 that a transport operator should receive compensation, but Article 4(1)(b)(i) of that regulation grants Member States the power to exclude compensation under national law.

– Article 3(3) of Regulation No 1370/2007 grants Member States the option to exclude from the scope of the regulation general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility.

14. The referring court also asks whether, in the event that Regulation No 1370/2007 is not applicable, the basis for compensation may be found in another EU act (for example, the Charter of Fundamental Rights of the European Union ('the Charter')) or whether the dispute must be settled under national law alone.

15. Lastly, if the transport operator must be awarded compensation, the national court's uncertainties also extend to the conditions for calculating the amount of that compensation in a way that is compatible with the EU rules on State aid.

16. Against that background, the Tallinna Halduskohus (Administrative Court, Tallinn) has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a situation in which the same obligation to transport free of charge certain categories of passenger (pre-school children, disabled persons up to the age of 16, severely disabled persons aged 16 and over, persons with a significant visual impairment and persons accompanying a person with a severe or significant visual impairment, and guide dogs or assistance dogs of a disabled person) is imposed on all private law undertakings that operate regular road, water and rail passenger transport services within the national territory on a commercial basis to be treated as a public service obligation within the meaning of Articles 2(e) and 3(2) of Regulation (EC) No 1370/2007 …?

(2) If it does constitute a public service obligation within the meaning of Regulation No 1370/2007: Is a Member State entitled under Article 4(1)(b)(i) of Regulation No 1370/2007 to exclude, by a national law, the payment of compensation to the carrier for the discharge of such an obligation?

If a Member State is entitled to exclude compensation to the carrier, under what conditions can it do so?

(3) Is it permissible under Article 3(3) of Regulation No 1370/2007 to exclude from the scope of that regulation general rules for establishing maximum tariffs for categories of passenger other than those referred to in that provision?

Does the obligation to notify the European Commission under Article 108 of the Treaty on the Functioning of the European Union apply even if the general rules for establishing maximum tariffs do not provide for compensation for the carrier?

(4) If Regulation No 1370/2007 is not applicable in the present case: Can the granting of compensation be based on another legal act of the European Union (such as the Charter of Fundamental Rights of the European Union)?

(5) What conditions must the compensation, if any, to be granted to the carrier meet in order to comply with the State aid rules?'

III. Procedure before the Court of Justice

17. The request for a preliminary ruling was received at the Registry of the Court of Justice on 18 November 2020.

18. Written observations were lodged by Lux Express Estonia, the Estonian Government and the European Commission.

19. It was not considered necessary to hold a hearing.

IV. Assessment

A. Question 1

20. In the Republic of Estonia, the organisation of public passenger transport is governed by the ÜTS. Its scope includes passenger transport by road, which may be in the form of regular or occasional services and taxi services.

21. Regular services, which include means of public transport by road, are provided either under public service contracts or in the form of commercial services. [6]

22. The tariff applicable to regular commercial services is set by the transport operator. For regular services provided under a public service contract, the maximum tariff per kilometre or the maximum ticket price is set by the competent authority.

23. Under Paragraph 34 of the ÜTS, any operator which provides a regular domestic service has a duty to transport free of charge certain categories of passenger, such as children of pre-school age and persons with disabilities, as set out above. [7] The operator receives no compensation for transporting those passengers free of charge.

24. By its first question, the referring court asks whether the duty to provide free transport laid down by Estonian law is covered by the concept of public service obligation within the meaning of Regulation No 1370/2007.

[6] The Estonian Government (paragraphs 7 to 9 of its observations) states that, where regular transport services are freely provided by private undertakings, those undertakings assume their own commercial risk, select the regular service route that interests them and, in order to operate that route, submit an application for a licence. If any routes are not economically attractive to commercial transport operators but are of interest to users, the competent authority establishes a public service obligation by concluding a public service contract. That contact is usually awarded through a tendering procedure and sets out the conditions for provision of the service and any applicable subsidies.

[7] Point 9 of this Opinion.

25. Regulation No 1370/2007 defines 'public service obligation' as 'a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward'. [8]

26. The imposition of public service obligations is a method whereby the competent authorities may intervene in the passenger transport sector, which Regulation No 1370/2007 classifies as a service of general economic interest (Article 2(a)). The aim of this is '… to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed'. [9]

27. For the purpose of creating a public service obligation, Regulation No 1370/2007 provides that two types of legal tool may be used: public service contracts and general rules. [10]

28. Included among the public service obligations which Regulation No 1370/2007 cites by way of example are, specifically, those 'which aim at establishing maximum tariffs for … certain categories of passenger' by means of general rules (Article 3(2) of Regulation No 1370/2007).

29. The Estonian Government acknowledges that Paragraph 34 of the ÜTS [11] imposes the disputed obligation on commercial transport operators, with a view to 'enabling families with young children and persons with disabilities to use public transport by making it more affordable and accessible for them'. [12]

30. That assertion by the Estonian Government makes it quite clear that the establishment of a 'zero' tariff for certain social groups on commercial bus routes pursues a public interest aim, in accordance with social criteria.

31. That social interest would not be covered free of charge by an operator which cared only about the profits deriving from its commercial operation. The provision of a service without remuneration is alien to the logic of the market and, therefore, the law converts the duty to provide free transport into a mandatory public service obligation (imposed by a 'general rule' in this case).

8 Article 2(e) of Regulation No 1370/2007. Recital 5 of the regulation is similarly worded: 'many inland passenger transport services which are required in the general economic interest cannot be operated on a commercial basis. The competent authorities of the Member States must be able to act to ensure that such services are provided. The mechanisms that they can use to ensure that public passenger transport services are provided include the following: the award of exclusive rights to public service operators, the grant of financial compensation to public service operators and the definition of general rules for the operation of public transport which are applicable to all operators.'

9 Article 1(1) of Regulation No 1370/2007.

10 Defined in points (i) and (l) of Article 2 of Regulation No 1370/2007, respectively. A *public service contract* reflects an 'agreement between a competent authority and a public service operator'. A *general rule* means 'a measure which applies without discrimination to all public passenger transport services of the same type in a given geographical area'.

11 There is little doubt that the Estonian legislature qualifies as a competent authority within the meaning of Article 2(b) of Regulation No 1370/2007.

12 Observations of the Estonian Government, paragraph 11. According to the Estonian Government, the ÜTS 'echoes the Estonian Constitution' and 'the special care that society affords to families with young children and persons with disabilities, so that limitations of fundamental rights for that purpose must be regarded as lawful. The legislature has a broad discretion when it limits fundamental rights for social policy purposes'. The fact that a limitation of fundamental rights occurs is acknowledged more than once: not only in paragraph 11 (twice) but also in paragraphs 12, 22, 49 and 50 of the Estonian Government's observations.

32. Thus, Paragraph 34 of the ÜTS reflects a genuine public service obligation, imposed on operators providing a regular domestic service, which consists of transporting certain categories of passenger free of charge. [13]

33. Since the ÜTS takes the tariff limitation to its limits ('zero' amount), the outcome is that, by means of a general rule, transport operators are made subject to a genuine public service obligation aimed at favouring 'certain categories of passenger'.

34. A separate issue is whether, under Regulation No 1370/2007, that obligation must be accompanied by compensation [14] payable to the transport operator, which is the subject of question 2.

B. Question 2

35. The referring court rightly takes the view that, if the ÜTS lays down a public service obligation within the meaning of Regulation No 1370/2007, any transport operator fulfilling that obligation must, in principle, be compensated under Articles 3(2) and 4 of that regulation.

36. However, the referring court is uncertain whether, under Article 4(1)(b)(i) of Regulation No 1370/2007, a Member State is entitled, by virtue of a national law, to avoid the payment of such compensation to a transport operator and, if so, under what conditions.

37. The examination of this question must deal, first of all, with the issue of compensation and, second, with the possible exclusion of that compensation under Article 4(1)(b)(i) of Regulation No 1370/2007.

1. Consideration for public service obligations

38. Regulation No 1370/2007 provides for *consideration* [15] in return for compliance with public service obligations that are costly for the undertakings concerned. Any transport operator which assumes those obligations is entitled to compensation [16] or to the grant of an exclusive right. [17]

39. The concept of 'public service compensation' creates a link between a benefit, particularly financial, and the implementation of a public service obligation which involves the provision of services of no commercial interest.

[13] In the judgment of 14 October 2021, *Viesgo Infraestructuras Energéticas* (C-683/19, EU:C:2021:847), the Court categorised as a public service obligation (within the meaning of Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55)) a duty having similar features, which was imposed on retail undertakings to supply electricity at a reduced rate to vulnerable customers.

[14] In the judgment of 14 October 2021, *Viesgo Infraestructuras Energéticas* (C-683/19, EU:C:2021:847), the Court held that Directive 2009/72 did not preclude 'the system for financing a public service obligation consisting in the supply of electricity at a reduced rate to certain vulnerable consumers from being established … without any compensatory measure' (paragraph 61).

[15] Article 3(1) of Regulation No 1370/2007 refers specifically to consideration '*in return for the discharge of public service obligations*'.

[16] Under Article 2(g) of Regulation No 1370/2007, compensation is identified as 'any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period'.

[17] Article 2(f) of Regulation No 1370/2007 treats as such 'a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator'.

40. The precursors to Regulation No 1370/2007 took the same approach, which may be termed 'remunerative':

– In accordance with Article 6 of Council Decision 65/271/EEC, [18] compensation was to be paid in respect of financial burdens derived from the application to passenger transport of rates and conditions of transport imposed by a Member State in the interests of one or more particular categories of person.

– Articles 1(4) and 9 of Regulation (EEC) No 1191/69 [19] laid down the same provision. Under Article 1(4), 'financial burdens devolving on transport undertakings by reason of the maintenance of the obligations referred to in paragraph 2, or of the application of the transport rates and conditions referred to in paragraph 3 [imposed by a Member State in the interests of one or more particular categories of person], shall be subject to compensation made in accordance with common procedures laid down in this Regulation.' [20]

– Under Regulation No 1191/69, the tariff obligation the cost of which had to be compensated to the transport operator was an obligation that satisfied the double condition of introducing 'special' tariff provisions for certain specified categories of passenger while also being contrary to the commercial interests of the undertaking. [21]

41. The principle of paying compensation for the costs deriving from public service obligations is now reflected in a number of provisions of Regulation No 1370/2007:

– Article 3(2) provides, in mandatory terms: 'the competent authority shall compensate' operators for public service obligations unilaterally imposed by the public authorities.

– The second subparagraph of Article 1(1) is equally explicit when it refers to 'the conditions under which competent authorities, when imposing … public service obligations, compensate public service operators for costs incurred …'

– Paragraph 3 of the annex on the rules applicable to compensation takes into account quantifiable financial effects on the operator's networks 'in order to avoid … lack of compensation'.

– The new Article 2a(2) of Regulation No 1370/2007 [22] refers to 'the specifications of the public service obligations and the *related compensation* of the net financial effect of public service obligations'.

[18] Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ 1965 L 88, p. 1500).

[19] Regulation of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ 1969 L 156, p. 1).

[20] Although the amendment effected by Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 (OJ 1991 L 169, p. 1) deleted Article 1(4) of Regulation No 1191/69, it retained Article 9, which meant that compensation in respect of financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person continued to exist.

[21] Therefore, the compensation obligation did not cover 'general measures of price policy' or 'measures taken with respect to transport rates and conditions in general with a view to the organization of the transport market or of part thereof'. See judgment of 27 November 1973, *Nederlandse Spoorwegen* (36/73, EU:C:1973:130, paragraphs 11 to 13).

[22] Added pursuant to Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22).

42. This has the effect of ensuring that, where public service obligations are costly, those obligations are not financially detrimental to the operators who have to discharge them: those operators are, I repeat, either compensated for the costs incurred as a result of the obligations or granted exclusive rights.

43. Therefore, Regulation No 1370/2007 does not provide that the costs incurred as a result of public service obligations laid down for the benefit of certain categories of passenger are to be borne solely by transport operators (if that were the case, as the referring court states, it is unlikely that anyone would agree to provide the service, which is of no commercial interest in itself).

44. In summary, those obligations, which may be reflected in a public service contract or, as occurs here, in a general rule, must be accompanied by appropriate financial compensation or by the grant of an exclusive right.

45. It is important to note that general rules relating to tariffs such as those at issue in these proceedings are not of the same nature as rules relating to passenger safety, environmental and employment protection and transport service quality standards.[23] Compliance with those standards, in so far as they shape the regulatory – as opposed to the tariff – framework in which the activity is performed, does not qualify for compensation.

2. Is it possible to exclude consideration?

46. Article 4(1)(b)(i) of Regulation No 1370/2007 refers to 'the parameters on the basis of which the compensation payment, *if any*, is to be calculated'.[24]

47. That provision, the interpretation of which the referring court seeks, should not be read as though it gives Member States the power to grant or refuse compensation. Rather, it reflects the possibility that, where a public service contract is entered into pursuant to Article 3(1) of Regulation No 1370/2007, 'a competent authority [may decide] to grant the operator of its choice an exclusive right', as an alternative to financial compensation.

48. While the consideration 'in return for the discharge of public service obligations', as required by Article 3(1), has to be recorded in a public contract,[25] that will not be the case where the obligation consisting of setting maximum tariffs is imposed by 'general rules' (Article 3(2) of Regulation No 1370/2007).

49. As I have already observed, in the latter situation (which is the situation in this case), in accordance with Article 3(2) of Regulation No 1370/2007, 'the competent authority *shall compensate* the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation.'

[23] These are referred to in recital 17 of Regulation No 1370/2007.

[24] Italics added.

[25] See Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (OJ 2014 C 92, p. 1) ('the Commission Communication'), section 2.2.3, second paragraph.

50. It could be counter-argued that, since the public service obligation affects all transport operators equally, there is no reason why compensation should be payable in respect of it, since it does not involve competitive disadvantages for some to the benefit of others.

51. However, I do not believe that Regulation No 1370/2007 supports that view.

52. The Court ruled that Regulation No 1191/69, the precursor to the current regulation, authorised 'the Member States to impose public service obligations on a public undertaking entrusted with the provision of public passenger transport in a municipality and that it [provided] for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation is to be determined in accordance with the provisions of that regulation.' [26]

53. Regulation No 1370/2007 provides an equivalent basis for maintaining that position. The fact that, in the case giving rise to the judgment in *Antrop*, the operator was a public undertaking while in this case it is a private undertaking does not create an obstacle. [27] Rather, the imposition of a costly public service obligation on private entities of a commercial nature, which are deprived of some of the remuneration inherent in their activity, [28] justifies the introduction of compensation payments to balance the negative effects which may have an impact on their competitiveness in the market.

54. It is true that Regulation No 1370/2007 ensures that overcompensation, which would constitute State aid, to which I shall refer below, does not occur. It therefore lays down a number of containment mechanisms, [29] but does not permit the imposition of public service obligations, such as that at issue here, without compensation.

55. The Court has dealt with the scale of compensation payments and their compatibility with the State aid rules. [30] Unless I am mistaken, the Court has not given a ruling on national legislation which simply excludes the payment of compensation in the passenger transport sector for the discharge of public service obligations such as that under examination now.

56. In the judgment in *Altmark*, [31] the Court examined the lawfulness of certain public subsidies which were intended to enable the operation of regular transport services. When determining whether those subsidies were subject to Article 107 TFEU, the Court had to assess whether they were to be 'regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations'. [32]

[26] Judgment of 7 May 2009, *Antrop and Others* (C-504/07, EU:C:2009:290; 'judgment in *Antrop*'), paragraph 21.

[27] In accordance with recital 12 of Regulation No 1370/2007, 'it is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings'.

[28] The Estonian Government and Lux Express Estonia disagree when estimating the *real* effect of the measure in economic terms. The Estonian Government submits that that effect is 'low' (paragraph 15 of its observations), whereas the operator submits that it places a significant burden on its turnover.

[29] Article 4, Article 6 and the annex.

[30] Judgment in *Antrop*, paragraph 23: 'Article 73 EC creates an exception in the field of transport to the general rules applicable to State aid, by providing that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.'

[31] Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415; 'judgment in *Altmark*').

[32] *Ibidem*, paragraph 87.

57. The judgment in *Altmark* thus presupposed that an undertaking responsible for the discharge of clearly defined public service obligations was entitled to consideration (reimbursement), the calculation of which was not to exceed what was necessary to cover all or part of the costs incurred in discharging the public service obligations. [33]

58. Accordingly, the judgment in *Altmark* confirmed the general principle (that a transport operator should be compensated for a public transport obligation that is costly for it), and also dealt with setting out the conditions 'for such compensation to escape classification as State aid in a particular case'. [34]

59. The particular feature of this dispute is, as I have noted, the fact that the national law excludes compensation. Against that background, it must be established whether Regulation No 1370/2007 can be used as a basis for the service provider to demand compensation from the authorities of the Member State.

60. In my view, the right to receive payment for the provision of the services supplied to users is inseparable from the pursuit of a commercial activity in the road passenger transport sector, where the transport undertaking has no revenue other than fare revenue. [35] Payment for those services is met either by users or by the authorities which impose the obligation to transport users free of charge.

61. Moreover, the limitation imposed does not affect 'mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but applies to rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit'. [36]

62. Accordingly, Article 4(1)(b)(i) of Regulation No 1370/2007 does not authorise the exclusion of appropriate compensation in a situation such as that at issue.

C. Question 3

63. By the third question, the referring court seeks to ascertain whether Article 3(3) of Regulation No 1370/2007 provides a basis for excluding from the scope of that regulation general rules for establishing maximum tariffs for categories of passenger other than those referred to in that provision. [37]

[33] The conditions in the *Altmark* judgment appear to have inspired the wording of a number of provisions of Regulation No 1370/2007.

[34] Judgment in *Altmark*, paragraph 88.

[35] Lux Express Estonia notes (paragraph 3 of its observations) that ticket sales are its sole source of revenue as it does not receive State subsidies. It adds (paragraph 28 of its observations) that it does not benefit from other elements of compensation, such as the grant of exclusive rights, either.

[36] Judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 60). As I have already pointed out, how such a right is quantified in each case is a separate matter. Certain obligations imposed (for example, the obligation relating to very young children who do not occupy a seat) may have no negative effects on an operator's finances.

[37] The list of beneficiaries under Article 3(3) of Regulation No 1370/2007 (pupils, students, apprentices and persons with reduced mobility) could include, by analogy, the categories under Paragraph 34 of the ÜTS. The latter refers to children of pre-school age and to other persons, minors and adults, who have disabilities. As the Estonian Government states (paragraph 41 of its observations), the general rules which establish maximum tariffs for categories of passenger similar to those referred to in Article 3(3) should comply with that article for the same reasons of general interest.

64. Pursuant to Article 3(3) of Regulation No 1370/2007, Member States may exclude from the scope of the regulation 'general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility.'

65. That option is conditional on the Member State notifying the Commission of those general rules, providing 'complete information on the measure and, in particular, details on the calculation method.'

66. The previous rules, contained in Regulation No 1191/69,[38] also laid down a similar option, applicable to undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

67. As in other cases already examined by the Court,[39] the conditions laid down in Article 3(3) of Regulation No 1370/2007 are not satisfied in this case either, in the light of the information provided in the order for reference and the observations of the parties who have participated in the preliminary ruling proceedings.

68. There is nothing in the information and observations concerned to indicate that the Republic of Estonia expressed the intention to exclude its general rules (on maximum tariffs applicable to certain categories of person) from the scope of Regulation No 1370/2007, or that it notified any such rules to the Commission.

69. In those circumstances, the third question is rather hypothetical in nature (and, therefore, inadmissible), since the factual condition to which the application of Article 3(3) of Regulation No 1370/2007 is linked is not fulfilled in the dispute.

70. In any event, the power to exclude those general rules from the scope of Regulation No 1370/2007 does not authorise Member States to disregard the requirements derived from other rules and principles of EU law. I do not believe there is any need for me to expand on this point, for, as I have already noted, the Republic of Estonia has not made use of that option.

D. Question 4

71. The fourth question is raised in the event that 'Regulation No 1370/2007 is not applicable in the present case'. In those circumstances, the referring court asks whether the grant of compensation may be based on another legal act of the Union, such as the Charter.

72. It is not necessary to reply to that question, in view of the fact that Regulation No 1370/2007 applies to the dispute and that it sets out the rules applicable to compensation inherent in public service obligations which are laid down by general rules.

[38] Second subparagraph of Article 1(1), as amended by Regulation No 1893/91.

[39] Judgment of 3 April 2014, *CTP* (C-516/12 to C-518/12, EU:C:2014:220, paragraph 20): 'nothing in the documents before the Court suggests that the Italian Republic has made use of the option, provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69, of excluding from the scope of that regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services. Consequently, the provisions of that regulation are fully applicable to the cases in the main proceedings and the question referred for a preliminary ruling must be examined in the light of those provisions'. See also judgment in *Antrop*, paragraph 17.

73. There is therefore no need to refer to the Charter in order to provide legal cover for the compensation payments with which these proceedings are concerned.

74. The Charter may be used as an interpretation tool in view of the fact that, as the Estonian Government acknowledges, Paragraph 34 of the ÜTS entails a limitation of the fundamental rights of transport operators. The Estonian Government repeats more than once [40] that Paragraph 34 does not *excessively* limit the freedom to conduct a business [41] and the right to property, thus agreeing that such a limitation exists.

75. Limitations of fundamental rights may be permissible if regard is had to Article 52(1) of the Charter. [42] For the sectors in which the European Union exercises its powers, such as the road passenger transport sector, the balance between the recognition of a fundamental right and permissible limitations (based on legitimate objectives of general interest) under that article of the Charter, is struck by the Union. [43]

76. As far as compensation payable for public service obligations in the road passenger transport sector is concerned, that balance is struck by the provisions of Regulation No 1370/2007.

E. Question 5

77. The referring court asks 'what conditions must the compensation, if any, to be granted to the carrier meet in order to comply with the State aid rules'.

78. Worded thus, the question resembles an enquiry rather than a genuine question referred for a preliminary ruling which seeks the interpretation of specific provisions of EU law that have a bearing on the dispute.

79. Inevitably, the reply must be equally abstract and confined to pointing out that:

– Under Article 93 TFEU, included in Title VI ('Transport'), 'aids shall be compatible with the Treaties … if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

– Article 3(2) of Regulation No 1370/2007 provides that the competent authority 'shall compensate the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation.'

– That compensation must comply with Articles 4 and 6 of Regulation No 1370/2007 and with the annex thereto. The annex contains the rules applicable to compensation for the cases

[40] See footnote 12 of this Opinion.

[41] Since 'a burden … capable of affecting his economic activity' is placed on the transport operator, the right of freedom to conduct a business, protected by Article 16 of the Charter, is applicable (see judgment of 15 September 2016, *McFadden* (C-484/14, EU:C:2016:689, paragraph 82)) in addition to the right to property.

[42] Judgment of 21 May 2019, *Commission* v *Hungary* (usufruct over agricultural land) (C-235/17, EU:C:2019:432, paragraph 88): 'under [Article 52(1) of the Charter] limitations may be imposed on the exercise of the rights recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.'

[43] Subject, naturally, to the review by the Court of the validity of provisions of EU secondary law.

indicated in Article 6(1) (public service obligations imposed by general rules), so that any compensation is not excessive. [44]

– In so far as compensation payments for compliance with tariff obligations laid down by general rules are paid under Regulation No 1370/2007, they will be compatible with the internal market and exempt from the requirement of prior notification to the Commission. [45]

– Compensation may constitute State aid, which a Member State must notify to the Commission under Article 108 TFEU, only if that compensation is excessive in relation to the calculation parameters laid down in the provisions referred to above. [46]

– Ultimately, account must be taken of the criteria laid down by the Court in the *Altmark* judgment [47] for identifying the existence of State aid, which is governed by Article 107 TFEU. State aid is to be understood as aid which affords an advantage, not that which is strictly compensatory. 'State aid' within the meaning of Article 107 TFEU is not the same as aid which merely compensates for the fulfilment of public service obligations. [48]

80. The function of *applying* those criteria to the dispute goes beyond the role of *interpreting* EU law, which Article 267 TFEU assigns to the Court. It is, therefore, for the referring court to determine whether, in this case, the amount of compensation should be estimated as any loss of profits suffered by the transport undertaking, calculated by reference to the basic ticket price or such other criteria as the referring court may consider appropriate. The provisions of the annex to Regulation No 1370/2007, to which the referring court refers in the final part of the order for reference, will provide it with guidance for that task.

V. Conclusion

81. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia):

(1) Articles 2(e) and 3(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 are to be interpreted as meaning that the general rule which requires all undertakings providing regular passenger transport services by road to transport certain categories of passenger free of charge constitutes a public service obligation.

[44] Compensation must not place an operator in a more favourable position than its competitors on the market. Therefore, in accordance with paragraph 2 of the Annex to Regulation No 1370/2007, the financial effects are assessed 'by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met.' If the net financial effect limit is exceeded, the excess will constitute State aid.

[45] Commission Communication, section 2.4.1: 'In the case of public passenger transport services by rail and by road, provided that compensation for those services is paid in accordance with Regulation (EC) No 1370/2007, such compensation shall be deemed compatible with the internal market and shall be exempt from the prior notification requirement laid down in Article 108(3) TFEU, in accordance with Article 9(1) of that Regulation.'

[46] Ibid., section 2.2.4.

[47] Ibid., section 2.4.1: 'In order not to constitute State aid, such compensation would have to respect the four conditions laid down by the European Court of Justice in the *Altmark* judgement'.

[48] Judgment in *Altmark*, paragraph 87.

(2) Article 4(1)(b)(i) of Regulation No 1370/2007 does not authorise the exclusion, by a national law, of payment to a transport operator of the compensation due for that public service obligation.

(3) In accordance with Article 3(3) of Regulation No 1370/2007, a Member State may exclude from the scope of that regulation general rules on financial compensation for public service obligations which establish maximum tariffs for certain categories of passenger, notifying those rules to the Commission with complete information on the measure.

(4) Any compensation due for the discharge of public service obligations must comply with Articles 4 and 6 of Regulation No 1370/2007 and the annex thereto. Where, in order to comply with tariff obligations laid down by general rules, compensation is paid under Regulation No 1370/2007, that compensation will not be regarded as State aid, will be compatible with the internal market and will be exempt from the requirement of prior notification to the Commission.