Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

8 September 2022*

(Reference for a preliminary ruling – Regulation (EC) No 1370/2007 – Public passenger transport services by rail and by road – Imposition by means of general rules of an obligation to carry certain categories of passenger free of charge – Obligation for the competent authority to grant public service compensation to operators – Calculation method)

In Case C-614/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tallina Halduskohus (Administrative Court, Tallinn, Estonia), made by decision of 18 November 2020, received at the Court on 18 November 2020, in the proceedings

Lux Express Estonia AS

v

Majandus- ja Kommunikatsiooniministeerium,

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lux Express Estonia AS, by C. Ginter, K. Härginen and A. Jõks, vandeadvokaadid,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the European Commission, by K. Toomus and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2022,

* Language of the case: Estonian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 108 TFEU, Article 2(e), Article 3(2) and (3) and Article 4(1)(b)(i) 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 (OJ 2007 L 315, p. 1), as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22) ('Regulation No 1370/2007').

2 The request has been made in proceedings between Lux Express Estonia AS and Majandus- ja Kommunikatsiooniministeerium (Ministry of the Economy and Communications, Estonia) concerning the latter's refusal to remedy the harm which that company claims to have suffered as a result of discharging the obligation, laid down by Estonian law, to carry certain categories of passenger free of charge and without compensation from the Estonian State.

Legal context

European Union law

Decision 65/271/EEC

3 The first to third recitals of Council Decision 65/271/EEC of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition, Series I, Volume 1965-1966 p. 67) were worded as follows:

'Whereas one of the objectives of the common transport policy must be to eliminate disparities liable to cause substantial distortion in competition in the transport sector …;

Whereas differences are particularly prevalent in the realms of taxation, of State intervention in transport and of social legislation;

Whereas measures should accordingly be taken:

…

– as regards State intervention in transport: to reduce public service obligations to a minimum; to provide fair compensation for financial burdens resulting from those obligations which are maintained and from those involving reductions in rates on social grounds; to normalise the accounts of railway undertakings; to make such undertakings financially autonomous; and to lay down rules governing aids for transport, taking account of the distinctive features of that sector;

…'

4 Article 6 of that decision provided:

‘From 1 July 1967, compensation, determined in accordance with common procedures, shall be paid in respect of financial burdens devolving upon transport undertakings by reason of 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.’

Regulation (EEC) No 1191/69

5 The 1st to 3rd and 13th recitals Regulation (EEC) No 1191/69 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, English Special Edition, Series I, Volume 1969(I), p. 276) stated:

‘Whereas one of the objectives of the common transport policy is to eliminate disparities liable to cause substantial distortion in the conditions inherent in the concept of a public service which are imposed on transport undertakings by Member States;

Whereas it is therefore necessary to terminate the public service obligations defined in this Regulation; whereas, however, it is essential in certain cases to maintain such obligations in order to ensure the provision of adequate transport services; whereas the adequacy of transport services must be assessed in the light of the state of supply and demand in the transport sector and of the needs of the community;

Whereas these termination measures are not to apply to transport rates and conditions imposed on passenger transport undertakings in the interests of one or more particular categories of person;

…

Whereas, furthermore, Article 6 of [Decision 65/271] provides that Member States must make compensation in respect of financial burdens devolving upon passenger transport by reason of the application of transport rates and conditions imposed in the interests of one or more particular categories of person …’

6 Regulation 1 of that regulation provided:

‘1. Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

2. Nevertheless, such obligations may be maintained in so far as they are essential in order to ensure the provision of adequate transport services.

3. Paragraph 1 shall not apply, as regards passenger transport, to transport rates and conditions imposed by any Member State in the interests of one or more particular categories of person.

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, shall be subject to compensation made in accordance with common procedures laid down in this Regulation.’

7 Article 9 of that regulation was worded as follows:

‘1. The amount of 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 shall be determined in accordance with the common procedures laid down in Articles 11 to 13.

2. Compensation shall be payable from 1 January 1971.

…’

Regulation No 1370/2007

8 Recitals 2 to 4, 34 and 35 of Regulation No 1370/2007 are worded as follows:

‘(2) Article 86(2) of the Treaty lays down that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, 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.

(3) Article 73 of the Treaty constitutes a *lex specialis* in relation to Article 86(2). It establishes rules applicable to the compensation of public service obligations in inland transport.

(4) The main objectives of the Commission’s White Paper of 12 September 2001 “European transport policy for 2010: time to decide” are to guarantee safe, efficient and high-quality passenger transport services through regulated competition, guaranteeing also transparency and performance of public passenger transport services, having regard to social, environmental and regional development factors, or to offer specific tariff conditions to certain categories of traveller, such as pensioners, and to eliminate the disparities between transport undertakings from different Member States which may give rise to substantial distortions of competition.

…

(34) Compensation for public services may prove necessary in the inland passenger transport sector so that undertakings responsible for public services operate on the basis of principles and under conditions which allow them to carry out their tasks. Such compensation may be compatible with the Treaty pursuant to Article 73 under certain conditions. Firstly, it must be granted to ensure the provision of services which are services of general interest within the meaning of the Treaty. Secondly, in order to avoid unjustified distortions of competition, it may not exceed what is necessary to cover the net costs incurred through discharging the public service obligations, taking account of the revenue generated thereby and a reasonable profit.

(35) Compensation granted by the competent authorities in accordance with the provisions of this Regulation may therefore be exempted from the prior notification requirement of Article 88(3) of the Treaty.’

9 Article 1 of that regulation provides:

‘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.

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.

2. This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [(OJ 1992 L 364, p. 7)], national sea waters.

…’

10 Article 2 of Regulation No 1370/2007 states:

‘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;

(b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

…

(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;

…

(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;

…’

11 Article 2a of the regulation provides, in paragraph 2 thereof:

‘The specifications of the public service obligations and the related compensation of the net financial effect of public service obligations shall:

(a) achieve the objectives of the public transport policy in a cost-effective manner; and

(b) financially sustain the provision of public passenger transport, in accordance with the requirements laid down in the public transport policy in the long term.’

12 Article 3 of that regulation is worded as follows:

‘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.’

13 Article 4(1) of that regulation provides:

‘Public service contracts and general rules shall:

…

(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.

…’

14 Article 6 of Regulation No 1370/2007 provides, in paragraph 1 thereof:

‘All compensation connected with a general rule or a public service contract shall comply with Article 4, irrespective of how the contract was awarded. All compensation of whatever nature

connected with a public service contract not awarded according to Article 5(1), (3) or (3b) or connected with a general rule shall also comply with the provisions laid down in the Annex.'

15 Article 9(1) of that regulation is worded as follows:

'Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the common market. Such compensation shall be exempt from the prior notification requirement laid down in Article 88(3) of the Treaty.'

16 Article 10 of that regulation provides, in paragraph 1 thereof:

'Regulation [No 1191/69] is repealed. …'

17 The annex to Regulation No 1370/2007, entitled 'Rules on compensation in the cases referred to in Article 6(1)', provides in point 2 thereof:

'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. …'

Estonian law

18 Article 34 of the ühistranspordiseadus (Law on public transport) of 1 October 2015 (RT I 2015, 2), in the version applicable to the dispute in the main proceedings ('the ÜTS'), 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.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 Eesti Buss OÜ and Lux Express Estonia are private undertakings providing regular commercial bus transport services in Estonia. On 5 June 2019, they applied to the Minister for Economic Affairs and Infrastructure (Estonia) for compensation in the sum of EUR 537 219 for the loss of revenue which they claimed to have suffered in 2018 as a result of the obligation, laid down in Article 34 of the ÜTS, to carry certain categories of passenger free of charge, without compensation from the State, in the context of the provision of regular commercial transport services in Estonian territory.

20 On 10 July 2019, the Minister for Economic Affairs and Infrastructure rejected that application on the ground that, under Article 34 of the ÜTS, the transport operator does not receive any compensation for the transport of passengers free of charge.

21 On 29 July 2019, Eesti Buss merged with Lux Express Estonia and was removed from the companies register.

22 On 12 August 2019, Lux Express Estonia brought an action before the referring court, the Tallinna Halduskohus (Tallinn Administrative Court, Estonia), seeking an order for payment by the Republic of Estonia of the sum of EUR 851 960, corresponding to the value of the loss of revenue which it claimed to have suffered as a result of the application of Article 34 of the ÜTS, during the period from 1 January 2018 to 31 July 2019, together with default interest. Lux Express Estonia extended that claim to the loss of revenue allegedly suffered between 1 January 2016 and 31 January 2020, that is to say, the sum of EUR 2 061 781, together with default interest.

23 Lux Express Estonia claimed, inter alia, that the obligation laid down in Article 34 of the ÜTS constitutes a public service obligation within the meaning of Article 2(e) of Regulation No 1370/2007. It follows from Article 1(1) of that regulation that the Member States must grant compensation to transport undertakings in return for the costs incurred in discharging public service obligations. Since it prohibits the payment of compensation for the discharge of such an obligation, Article 34 of the ÜTS is incompatible with that regulation. The fact that the Republic of Estonia did not notify that provision beforehand to the Commission, in accordance with Article 3(3) of Regulation No 1370/2007 and Article 108 TFEU, does not preclude the granting of compensation. Lux Express Estonia also submitted that, if it were to be held that Regulation No 1370/2007 is not applicable to the dispute in the main proceedings, it should be granted compensation on the basis of the principle of proportionality and Articles 16, 17, 41 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter').

24 The Ministry of the Economy and Communications argued that Regulation No 1370/2007 does not apply to the dispute in the main proceedings because Lux Express Estonia did not enter into a public service contract with a competent authority; it operates commercial lines. Moreover, Article 3(3) of Regulation No 1370/2007 allows situations in which a general rule lays down maximum tariffs for certain categories of passenger to be excluded from the scope of that regulation. Furthermore, since no compensation is granted, there is no need to inform the Commission thereof. The Ministry of Economy and Communications also maintained that, even if the obligation laid down in Article 34 of the ÜTS were to constitute a public service obligation within the meaning of that regulation, that regulation does not require the transport operator to be compensated. Nor do the provisions of the FEU Treaty require the award of State aid. The supply of services by Lux Express Estonia is economically profitable even without compensation.

25 The referring court states that Lux Express Estonia operates commercial bus transport services on the basis of a Community operating licence and has not entered into any public service contract with national or local authorities. That company does not receive any compensation from public funds for the operating costs of those services.

26 The referring court asks, first, whether the facts of the case in the main proceedings are governed by Regulation No 1370/2007. In that regard, it observes that Lux Express Estonia provides a passenger transport service of general economic interest for the purposes of Article 2(a) of that regulation, since there is a public interest in a regular coach service being provided between the various cities in Estonia and that service is such as to guarantee the free movement of persons. In those circumstances, the question arises whether, where a competent authority, within the meaning of Article 2(b) of that regulation, has not entered into a public service contract with a transport undertaking, but has laid down in law an obligation for transport operators operating

regular services in the national territory to carry certain categories of passenger free of charge, that obligation can be classified as a 'public service obligation' within the meaning of Article 2(e) of that regulation.

27 According to the referring court, the ÜTS may be regarded as a general rule within the meaning of Article 2(l) and Article 3(2) of Regulation No 1370/2007 and, consequently, that regulation applies to the case in the main proceedings. Article 34 of the ÜTS lays down a maximum tariff (free transport) for certain categories of passenger. The fixing of such a maximum tariff by a general rule may, according to Article 3(2) of that regulation, constitute a public service obligation. Furthermore, by granting certain categories of passenger the right to free transport, Article 34 of the ÜTS serves the objective of allowing passengers to benefit from a lower cost service, referred to in Article 1(1) of that regulation. Moreover, it is unlikely that an undertaking which considers its own commercial interests would provide those passengers with a free transport service without the intervention of the State.

28 Second, in the event that Regulation No 1370/2007 is applicable to the dispute in the main proceedings, the referring court asks whether a Member State may exclude the granting of compensation to the transport operator for costs arising from a public service obligation. It follows from the second sentence of Article 3(2) of that regulation that the competent authority is to compensate the transport operator for the discharge of the tariff obligation laid down by a general rule. It is also possible to infer from the second subparagraph of Article 1(1) and from Article 4(1)(b)(i) of that regulation that, where it imposes a public service obligation on a transport operator, the competent authority provides compensation for the discharge of that obligation. However, that latter provision also refers to the possibility of not granting any compensation.

29 Third, the referring court asks whether Article 3(3) of Regulation No 1370/2007 allows not only general rules on financial compensation granted for public service obligations which lay down maximum tariffs for pupils, students, apprentices and persons with reduced mobility, to be excluded from the scope of that regulation, but also general rules on fixing maximum tariffs for categories of passenger other than those referred to in that provision, such as children of pre-school age, minors 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, covered by Article 34 of the ÜTS. The referring court also asks whether the notification obligation referred to in Article 3(3), and Article 108 TFEU applies to situations in which the general rules fixing maximum tariffs do not provide for the compensation of transport operators entrusted with a public service obligation, since, in those situations, there is no risk of State aid being awarded.

30 Fourth, in the event that the Court should find that Regulation No 1370/2007 does not apply in the case in the main proceedings, the referring court asks whether an obligation to grant transport undertakings compensation in return for the discharge of the obligation laid down in Article 34 of the ÜTS arises from another act of EU law, such as the Charter.

31 Fifth, if it decides to grant such compensation to Lux Express Estonia, that court seeks to ascertain the conditions that it must comply with when determining the amount of the compensation so that the latter is not contrary to the State aid rules. According to that court, since Lux Express Estonia is free to fix the price of tickets and the routes served in Estonian territory are not very competitive in nature, the loss of revenue on the sale of tickets cannot constitute an adequate basis for calculating the costs of discharging the obligation laid down in Article 34 of the ÜTS.

The referring court asks whether, in order to avoid overcompensation in that calculation, it could, even if Regulation No 1370/2007 were not applicable in the main proceedings, refer by analogy to the rules set out in the annex to that regulation.

32 In those circumstances, the Tallinna Halduskohus (Administrative Court, Tallinn) decided to stay the proceedings and to refer 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 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 [TFEU] 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?'

Consideration of the questions referred

The first question

33 By its first question, the referring court asks, in essence, whether Article 2(e) of Regulation No 1370/2007 must be interpreted as meaning that the concept of 'public service obligation', referred to in that provision, covers the obligation for undertakings providing in the territory of the Member State concerned a regular transport service by land, inland waterway and rail, laid

down in Article 34 of the ÜTS, to carry free of charge and without receiving compensation from the State certain categories of passenger, in particular, children of pre-school age and certain categories of persons with disabilities.

34 It must be borne in mind that, according to the first subparagraph of Article 1(1) of Regulation No 1370/2007, the purpose of that regulation is to define how, in accordance with the rules of EU 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. In addition, it is apparent from Article 1(2) of that regulation that it applies to the national and international operation of public passenger transport services by rail and other track-based modes of transport and by road, except for services which are operated mainly for their historical interest or their tourist value. In particular, public passenger transport by inland waterway is excluded from the scope of that regulation. However, Member States may apply that regulation to the latter form of transport. It is not apparent from the evidence submitted to the Court that the Republic of Estonia made use of that option.

35 Article 2(e) of Regulation No 1370/2007 defines the concept of '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'.

36 Under Article 2(b) of Regulation No 1370/2007, for the purposes of that regulation, 'competent authority' means 'any public authority, or group of public authorities, of one or more Member States, which has the right to intervene in public passenger transport in a given geographical area, or any body vested with such a power'.

37 Furthermore, it follows from Article 3 of that regulation that public service obligations may be the subject of either a public service contract or a general rule, within the meaning of Article 2(l) of that regulation, that is to say, a measure which applies without discrimination to all public passenger transport services of the same type in an area.

38 In the present case, it is for the referring court, which alone has jurisdiction to assess the facts, to determine whether the obligation laid down in Article 34 of the ÜTS satisfies the conditions set out in Article 2(e) of Regulation No 1370/2007.

39 That said, it is apparent from the information available to the Court that that obligation stems from legislation. Consequently, it may be concluded, first, that that obligation is defined or determined by a public authority of a Member State which has the power to intervene in public passenger transport, that is to say, by a 'competent authority' within the meaning of Article 2(b) and (e) of Regulation No 1370/2007, and, second, that obligation is established by means of a 'general rule' within the meaning of Article 2(l) of that regulation.

40 Next, it follows from Article 34 of the ÜTS that any transport operator providing regular transport services by road, inland waterway and rail must carry certain categories of passenger free of charge, inter alia, children of pre-school age and certain categories of persons with disabilities. In its written observations, the Estonian Government states that the obligation laid down in that

provision is imposed in order to allow families with young children and persons with disabilities to use public transport by making them more affordable and more accessible to them. Article 34 of the ÜTS reflects the particular attention paid to those persons by Estonian society.

41 That objective forms part of the main objectives of the Commission's White Paper of 12 September 2001, specifically referred to in recital 4 of Regulation No 1370/2007, including the objective of offering specific tariff conditions to certain categories of traveller, such as pensioners. The obligation laid down in that provision therefore appears to be defined with a view to guaranteeing public passenger transport services in the general interest.

42 Last, the referring court states that it is unlikely that an undertaking, if it were to consider its own commercial interests, would assume that obligation without consideration in return.

43 In those circumstances, subject to the referring court's definitive assessment of all the relevant factors, it must be held that, in so far as it imposes on any undertaking providing in the national territory a regular transport service by road and by rail to carry certain categories of passenger free of charge, inter alia, children of pre-school age and certain categories of persons with disabilities, Article 34 of the ÜTS lays down a 'public service obligation' within the meaning of Article 2(b) of Regulation No 1370/2007.

44 That finding is not invalidated by the Estonian Government's argument that that regulation does not apply to transport lines operated outside of the framework of public service contracts.

45 Suffice it to note, first, that the second subparagraph of Article 1(1) of Regulation No 1370/2007 does not distinguish public service obligations according to the manner in which they are established.

46 Second, as has been noted in paragraph 37 of the present judgment, it follows from Article 3 of Regulation No 1370/2007 that that regulation applies both to public service obligations laid down in a public service contract and to those imposed by means of general rules. Article 3(2) refers expressly to national measures, laid down in general rules, which establish maximum tariffs for certain categories of passenger. Those measures include the obligations to carry passengers free of charge, such as that laid down in Article 34 of the ÜTS.

47 In the light of the foregoing considerations, the answer to the first question is that Article 2(e) of Regulation No 1370/2007 must be interpreted as meaning that the concept of 'public service obligation', referred to in that provision, covers an obligation for undertakings providing in the territory of the Member State concerned a public transport service by road and by rail – laid down in national legislation – to carry free of charge and without receiving compensation from the State certain categories of passenger, in particular, children of pre-school age and certain categories of persons with disabilities.

The second question

48 By its second question, the referring court asks, in the event of an affirmative answer to the first question, first, in essence, whether Article 4(1)(b)(i) of Regulation No 1370/2007 must be interpreted as allowing the competent authorities to exclude the granting of compensation for the costs incurred in discharging a public service obligation to undertakings providing in the

territory of the Member State concerned a public transport service by road and by rail. Second, in the event that those authorities may exclude the granting of such compensation, the referring court asks the Court about the conditions under which they may have recourse to that option.

49 It is apparent from the grounds of the order for reference that the first part of that question is based on the premiss that Regulation No 1370/2007 requires the competent authorities to provide compensation for the financial burdens resulting from public service obligations.

50 In order to provide a useful answer to the referring court, it is necessary, first of all, to determine the validity of that premiss.

51 In that regard, Article 3(1) of that regulation provides that, 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 must do so within the framework of a public service contract.

52 That provision thus lays down the principle that public service obligations and the compensation relating thereto must be established in the context of a public service contract.

53 By way of derogation from that provision, the first sentence of Article 3(2) of that regulation authorises the introduction, by means of general rules, of public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passenger.

54 Under the second sentence of Article 3(2) of Regulation No 1370/2007, the competent authority is to compensate 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 is to be granted in accordance with the principles set out in Article 4, Article 6 of that regulation and the annex thereto.

55 It follows from the use of the imperative wording 'the competent authority shall compensate' that that provision imposes on the competent authorities not a mere option but an obligation.

56 That interpretation is supported by the context of that article. The second subparagraph of Article 1(1) of Regulation No 1370/2007 refers to 'the conditions under which competent authorities, when imposing … public service obligations, compensate public service operators for costs incurred'. Article 2a(2) of that regulation deals with specifications of public service obligations and the 'related compensation of the net financial effect of public service obligations'.

57 Furthermore, it is apparent from the development of EU legislation on the subject that the obligation to compensate for the costs arising from public service obligations may be traced back to Decision 65/271, Article 6 of which provided that, from 1 July 1967, compensation, determined in accordance with common procedures, must be paid in respect of financial burdens devolving upon transport undertakings by reason of 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.

58 That obligation was then replicated, in essence, in Article 1(4) of Regulation No 1191/69, which was repealed and replaced by Regulation No 1370/2007.

59 It is true that the wording of that first provision was amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 (OJ 1991 L 169, p. 1). However, the Court has held, in essence, that Regulation No 1191/69, as amended, provides 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 (see, to that effect, judgment of 7 May 2009, *Antrop and Others*, EU:C:2009:290, paragraph 21).

60 In addition, as the Commission pointed out in its written observations, the EU legislature did not amend Article 9 of Regulation No 1191/69, from which it is apparent that compensation in respect of financial burdens devolving upon transport 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 was payable upon request of those undertakings as from 1 January 1971.

61 The interpretation according to which Article 3(2) of Regulation No 1370/2007 does not merely set out an option, but imposes an obligation for the competent authorities to compensate for the costs incurred in discharging the public service obligations referred to in that provision is also supported by the objectives of the relevant EU legislation.

62 In the first place, it is apparent from the first to third recitals of Decision 65/271 that that decision was intended to achieve the objective of the common transport policy of eliminating disparities liable to cause substantial distortion in the conditions inherent in the concept of a public service which are imposed on transport undertakings by Member States, in particular by adopting measures seeking fair compensation for financial burdens resulting from public service obligations involving reductions in rates on social grounds.

63 The 1st to 3rd and 13th recitals of Regulation No 1191/69 state, in essence, that that regulation was intended to achieve the same objective.

64 Regulation No 1370/2007, which, like Regulation No 1191/69, was adopted on the basis both of the Treaty provisions relating to the common transport policy and of those relating to State aid (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 35) also pursues that objective.

65 Recitals 2 and 3 of Regulation No 1370/2007 state that, subject to the derogations provided for in Article 73 EC (now Article 93 TFEU), in accordance with Article 86(2) EC (now Article 106(2) TFEU), undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, 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.

66 Recital 4 of that regulation also mentions, inter alia, the objective of eliminating disparities between transport undertakings from different Member States, pursued by the Commission's White Paper of 12 September 2001, entitled 'European transport policy for 2010: time to decide'.

67 It follows that the objective of eliminating those disparities has been pursued persistently by the EU legislature.

68 The attainment of that objective requires all the competent authorities to compensate for the costs incurred in discharging public service obligations which seek to establish maximum tariffs for certain categories of passenger and not merely an option to grant such compensation, which could give rise to disparities in the conditions for the functioning of the public transport market within the European Union.

69 In the second place, as is apparent from the first subparagraph of Article 1(1) and recital 4 of Regulation No 1370/2007, that objective is additional to that of guaranteeing through regulated competition 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.

70 The EU legislator acknowledged, in recital 34 of that regulation, that compensation for public services may prove necessary in the inland passenger transport sector so that undertakings responsible for public services operate on the basis of principles and under conditions which allow them to carry out their tasks.

71 It follows from the foregoing considerations that Regulation No 1370/2007 requires the competent authorities to grant compensation for the financial burdens resulting from public service obligations.

72 Next, as regards Article 4(1)(b)(i) of Regulation No 1370/2007, that provision provides that public service contracts and general rules are to establish in advance, in an objective and transparent manner, the parameters on the basis of which compensation, 'if any', is to be calculated.

73 In that regard, there is nothing to indicate that, by that provision, the EU legislature intended to authorise the competent authorities to depart from the principle of compensation for the financial effect of compliance with tariff obligations established through general rules, laid down in Article 3(2) of that regulation.

74 As regards the expression 'if any', used in Article 4(1)(b)(i) of that regulation, it is apparent from the context of that provision that that expression refers to the possibility for the competent authorities, provided for in the second subparagraph of Article 1(1) and in Article 3(1) of that regulation, to choose, in the context of a public service contract, to grant operators, in addition to or instead of exclusive rights, compensation in return for the discharge of public service obligations.

75 In the light of the foregoing considerations, the answer to the first part of the second question is that Article 3(2) and Article 4(1)(b)(i) of Regulation No 1370/2007 must be interpreted as meaning that the competent authorities are required to compensate undertakings providing in the territory of the Member State concerned a public transport service by road and by rail for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the obligation for those undertakings, established through a general rule, to carry certain categories of traveller free of charge, in particular, children of pre-school age and certain categories of persons with disabilities.

76 Having regard to the answer to the first part of the second question, there is no need to answer the second part thereof.

The third question

77 By its third question, the referring court asks, in essence, first, whether Article 3(3) of Regulation No 1370/2007 must be interpreted as allowing Member States to exclude from the scope of that regulation general rules designed to fix maximum tariffs for categories of passenger other than those referred to in that provision. If the answer is in the affirmative, the referring court asks, second, whether the obligation to notify laid down in that provision and in Article 108 TFEU also applies to the general rules excluded from the scope of that regulation which do not provide for the granting of any public service compensation.

78 In that connection, it must be borne in mind that, according to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Consequently, where the question referred concerns the interpretation or the validity of a rule of EU law, the Court is, in principle, bound to give a ruling, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, if the problem is hypothetical, or if the Court does not have before it the factual or legal material necessary to give a useful answer to that question (judgment of 5 May 2022, *Zagrebačka banka*, C-567/20, EU:C:2022:352, paragraph 43 and the case-law cited).

79 It should be noted that Article 3(3) of Regulation No 1370/2007 authorises Member States to exclude from the scope of that regulation general rules on financial compensation granted for public service obligations which establish maximum rates for pupils, students, apprentices and persons with reduced mobility. Such an exclusion is therefore not automatic but involves active steps on the part of the Member States.

80 In the present case, it is apparent from the documents before the Court that the Republic of Estonia has not taken any steps to make use of the option, laid down in that provision, of excluding from the scope of Regulation No 1370/2007 certain general rules relating to financial compensation granted for public service obligations.

81 Therefore, the third question is manifestly hypothetical. That question is therefore inadmissible.

The fourth question

82 It is apparent from the very wording of the fourth question that it is asked only in the event that Regulation No 1370/2007 is not applicable to the case in the main proceedings.

83 In the light of the answer to the first two questions, the fourth question need not be considered.

The fifth question

84 By its fifth question, the referring court asks the Court, in essence, about the conditions which the granting of public service compensation must meet in order to comply with the EU rules on State aid. It is apparent from the grounds of the order for reference that the referring court seeks to ascertain, in particular, whether the loss of revenue on the sale of tickets, incurred by a transport

operator as a result of compliance with a public service obligation, constitutes an adequate basis for calculating the costs of discharging that obligation which must be taken into account in order to determine the amount of that compensation.

85 In that regard, as set out in the first subparagraph of Article 1(1) of Regulation No 1370/2007, the purpose of that regulation is to define how, in accordance with the rules of EU law, competent authorities may act in the field of public passenger transport.

86 It follows that, like Regulation No 1191/69, which it repealed and replaced, Regulation No 1370/2007 establishes a system which the Member States must comply with when they consider imposing public service obligations on undertakings in the land transport sector (see, by analogy, judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 43 to 53).

87 As is apparent from Article 9(1) and recital 35 of Regulation No 1370/2007, public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with that regulation is compatible with the internal market. That compensation is exempt from the prior notification obligation laid down in Article 108(3) TFEU.

88 As regards compensation for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules which aim at establishing maximum tariffs for certain categories of passenger, Article 3(2) of Regulation No 1370/2007 provides that such compensation is to be granted in accordance with the principles set out in Article 4 and Article 6 of that regulation and the annex thereto, in a way that prevents overcompensation.

89 It follows from point 2 of the annex to that regulation that 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 is 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.

90 As the Commission noted, in essence, in its written observations, the loss of revenue on the sale of tickets does not necessarily represent the effect of compliance with the obligation to carry certain passengers free of charge on the costs and revenue of the public service operator. The carriage of those passengers deprives the transport undertaking concerned of the possibility of carrying passengers who have to purchase a ticket only in cases where there is no longer any space for those passengers. The additional costs to the operator arising from the presence on board a coach of passengers who must be carried free of charge may also prove to be negligible.

91 It is for the referring court, which alone has jurisdiction to assess the facts, to verify the amount corresponding to the net financial effect of compliance with the obligation laid down in Article 34 of the ÜTS on the costs and revenue of the applicant in the main proceedings and to satisfy itself that the compensation does not exceed that amount.

92 In the light of the foregoing considerations, the answer to the fifth question is that Article 3(2) of Regulation No 1370/2007 and point 2 of the annex thereto must be interpreted as meaning that compensation for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules, which aim at

establishing maximum tariffs for certain categories of passenger, must be granted in accordance with the principles set out in Article 4 and Article 6 of that regulation and in the annex thereto, in a way that prevents overcompensation. 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, which 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.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 2(e) 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, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016**

   must be interpreted as meaning that:

   the concept of 'public service obligation', referred to in that provision, covers an obligation for undertakings providing in the territory of the Member State concerned a public transport service by road and by rail – laid down in national legislation – to carry free of charge and without receiving compensation from the State certain categories of passenger, in particular, children of pre-school age and certain categories of persons with disabilities.

2. **Articles 3(2) and Article 4(1)(b)(i) of Regulation No 1370/2007, as amended by Regulation (EU) 2016/2338**

   must be interpreted as meaning that:

   the competent authorities are required to compensate undertakings providing in the territory of the Member State concerned a public transport service by road and by rail for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the obligation for those undertakings, established through a general rule, to carry certain categories of traveller free of charge, in particular, children of pre-school age and certain categories of persons with disabilities.

3. **Article 3(2) of Regulation No 1370/2007, as amended by Regulation (EU) 2016/2338, and point 2 of the annex thereto**

must be interpreted as meaning that:

compensation for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules, which aim at establishing maximum tariffs for certain categories of passenger, must be granted in accordance with the principles set out in Article 4 and Article 6 of that regulation and in the annex thereto, in a way that prevents overcompensation. 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, which 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.

[Signatures]