

**Between Scylla and Charybdis.
Whatever a Member State Does,
It May Expose Itself to Attacks From Both Sides.
Lux Express Estonia AS**
Case C-614/20, *Lux Express Estonia AS*,
Judgment of the Court of Justice (First Chamber)
of 8 September 2022, EU:C:2022:641*

by

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* Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:641.

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Abstract

Member States do not need to use state resources when they accomplish their mission. They may employ resources of private undertakings by imposing on them obligations to provide services of general interest (SGI). The latter choice provides Member States with many benefits. But Member States need to be sure that the scheme they created complies with the rules on State aid law. Some Member States make sure that private undertakings carrying out SGI do not obtain the full remuneration for their services. However, the Court's judgment in *Lux Express Estonia* has the potential to change this mechanism, especially as the Court stated that Member States must pay compensation for obligations they impose on private undertakings. What is more, Member States need to be certain they pay the right amount of compensation. Not a penny more, not a penny less.

Résumé

Les États Membres n'ont pas besoin d'utiliser des ressources d'État pour accomplir leur mission. Ils peuvent utiliser les ressources d'entreprises privées en leur imposant l'obligation de fournir des services d'intérêt général (SIG). Ce dernier choix leur offre de nombreux avantages. Mais ils doivent s'assurer que le régime ainsi créé est conforme aux règles relatives à la législation sur les aides d'État. Certains États Membres veillent à ce que les entreprises privées fournissant des SIG n'obtiennent pas la pleine rémunération de leurs services. Toutefois, l'arrêt de la Cour dans l'affaire *Lux Express Estonia* pourrait modifier ce mécanisme, d'autant plus que la Cour a déclaré que les États Membres doivent payer une compensation pour les obligations qu'ils imposent aux entreprises privées. De plus, les États Membres doivent s'assurer qu'ils versent le bon montant de compensation. Ni un sou de plus, ni un sou de moins.

Key words: State aid; services of general interest; public transport; Regulation (EC) No. 1370/2007; obligation to pay compensation.

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I. Introduction

EU law allows Member States to provide services of general interest (hereinafter: SGI) by using the formula of public service obligations (hereinafter: PSO). This means that Member States may impose an obligation on private undertakings to provide SGI under conditions that allow SGI to

fulfil their mission.¹ While doing this, Member States may define or determine specific requirements for the SGI that an operator, if it was considering its own commercial interests, would not assume, or would not assume to the same extent or under the same conditions, without receiving a reward.² Member States can impose such obligations by way of entrustment or based on a general rule. Member States enjoy this freedom in areas such as health care, childcare or care for the elderly, assistance to persons with disabilities or social housing. It provides Member States with an essential safety net for citizens and helps Member States to promote social cohesion.³ But the scope of SGI exceeds social matters and has a broader application.⁴ SGI can cover, e.g. energy, transportation, telecommunications, media, waste disposal and many other areas. Services that Member States at national, regional or local level classify as SGI cover both economic and non-economic activities. The former are subject to the rules on competition, only in so far as it does not obstruct their performance.⁵

By imposing obligations on private undertakings to provide SGI, Member States hope to achieve their goals cheaply and, at the same time, more effectively. They are also keen to escape from the scope of the application of EU rules on State aid. Member States enjoy broad discretion when giving financial assistance to private undertakings, upon which they impose the obligations to provide SGI. However, their discretion has its limits. As the guardian of the Treaties, the Commission has a duty to oversee the application of Union law.

¹ Article 14 of the TFEU. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Quality Framework for Services of General Interest in Europe', COM(2011) 900 final, 3.

² See, e.g. 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 [2007] OJ L 315/1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 [2016] OJ L 354/22.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Quality Framework for Services of General Interest in Europe', COM(2011) 900 final, 2.

⁴ Consolidated version of the TEU – Protocol (No 26) on services of general interest, OJ C 115/308.

⁵ Article 106 para 2 TFEU. See also Commission Staff Working Document, 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest', SWD(2013) 53 final/2, para 21.

The Judgment of the Court of Justice (hereinafter: the Court) in *Lux Express Estonia* is a novelty, as it refers to Member States employing the PSO formula but choosing not to give them compensation.⁶ In the case at hand, the Member State was keen both: (a) not to give compensation, and (b) finance its public goals, from private resources of undertakings upon which it imposed the obligation to provide SGI. It is possible that the legal implications of this judgment will exceed the boundaries of the area in which it was given. The Court gave this judgment in the area of public passenger transport services under Regulation (EC) No. 1370/2007⁷, but one may say that the Court could have also given this judgment in any other sector. That would mean that compensation for other PSOs must also be paid, and the amount of the compensation may be the subject of the Court's review.

Even though, to present the opposite view. One may say, first, that in the case at hand, the Court referred specifically to the provisions of Regulation 1370/2007 and, second, that there are significant differences between the legal regime established in the area of public transportation (as *lex specialis*) and other SGEIs (*lex generalis*). There are also conceivable counter-arguments. First, the Court referred specifically to Regulation 1370/2007 only because the referring court asked for its interpretation, and in a reference for a preliminary ruling, the Court is bound by the question put to it.⁸ Second, the fact that the area of public transportation is – to a large extent – covered by *lex specialis* rules does not necessarily mean that the case-law from this area is irrelevant in other areas. It suffices to mention the *Altmark*⁹ case, which also concerned the area of public transportation but nobody denied its larger application. Neither does the Court when it refers to *Altmark* in its case-law concerning many different areas.¹⁰

Member States can derogate from market rules by applying public interventions in establishing the price for the supply of electricity to energy-

⁶ Opinion of the Advocate General Manuel Campos Sanchez-Bordona of 10 March 2022, Case C-614/20 *Lux Express Estonia AS*, EU:C:2022:180, para 55.

⁷ 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 [2007] OJ L 315/1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 [2016] OJ L 354/22.

⁸ Opinion of the Advocate General Mancini delivered on 10 February 1983, Case C-94/82 *De Kikvorsch Groothandel-Import-Export BV*, EU:C:1983:33; opinion of the Advocate General Mancini delivered on 10 March 1983, Case C-59/82 *Weinvertrieb*, EU:C:1983:64.

⁹ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

¹⁰ Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl* [2006] ECR I-2941, paras 55–67; Case C-76/15 *Paul Vervloet et al.* [2016] EU:C:2016:975, para 107; Case C-238/20 *Sātiņi-S' SIA* [2022] EU:C:2022:57, para 46.

poor or vulnerable household customers,¹¹ or to SMEs.¹² The Court's judgment specifically refers to actions taken by Estonia but again, it could have been, or rather it still could be, an action taken by any other Member State.

The Judgment in *Lux Express Estonia* has brought important new developments. Indeed, in its judgment, the Court stated that Member States, when following the PSO formula, are obliged to compensate private undertakings for the tasks imposed upon them. The Court clarified also how to calculate such compensation to escape from EU rules on State aid. However, the actions of Member States are no longer under scrutiny only from the perspective of EU rules on State aid. National courts may also adjudge claims from private undertakings claiming that a Member State caused damage by assigning SGI upon them without compensation, or with too little compensation. This is excellent news for private undertakings, but not for Member States. Any fault made by a Member State exposes it to attacks from the Commission or from a private undertaking.

Nevertheless, the legal appraisal of the Court's judgment in *Lux Express Estonia* should be more balanced. It must not be biased for or against any of those who may be affected by this judgment in the future. However, what is visible at the outset of such appraisal is that the Court has chosen to leave some issues unanswered, which it could have or even should have clarified.

II. Factual and legal background

According to the Law on public passenger transport (hereinafter: the Law) which, in Estonia, entered into force on 1 October 2015¹³, regular transport services are provided both under a public service contract, and as a commercial regular transport service. The tariff for commercial regular services is established by the carrier, while the maximum tariff within the framework of a regular service performed under a public service contract is established by the competent authority. Under Article 34 of the Law, the carrier is obliged, on domestic road, water and rail transport services, to provide transport services free of charge, and without compensation to:

¹¹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L 158/125.

¹² Council Regulation (EU) No 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L 261 I/1.

¹³ RT I, 30 June 2020, 24, in the version applicable to the dispute in the main proceedings.

- a) children who have not reached the age of 7 on 1 October of the current school year,
- b) children for whom the start of compulsory schooling has been postponed,
- c) disabled persons up to the age of 16,
- d) severely disabled persons aged 16 and over,
- e) persons with a significant visual impairment and persons accompanying a person with a severe or significant visual impairment, and
- f) guide dogs or assistance dogs of a disabled person.

Eesti Buss and Lux Express Estonia (hereinafter: Lux Express) obtained a Community licence to provide passenger transport services. They provided domestic regular transport services by bus on a commercial basis. In 2019, they submitted an application for compensation to the Minister for Economic Affairs and Infrastructure (Minister). They argued that the damage arose from their obligation to transport certain categories of passengers free of charge without receiving any compensation from the State for doing so. The Minister rejected this application on the grounds that the carrier is not to receive compensation for transporting passengers free of charge. In July 2019, Lux Express merged with Eesti Buss and, on 12 August 2019, it brought an action for compensation against Estonia before the national court in Estonia.

The applicant took the view that there is a public service obligation under Article 2(e) of Regulation No. 1370/2007. No commercial operator acting in its own economic interests would provide the service free of charge without being subject to a statutory obligation. The fact that the State did not notify the European Commission of this general rule in advance (Article 3(3) of Regulation No. 1370/2007 and Article 108 TFEU) does not preclude the granting of compensation. Moreover, if Regulation No. 1370/2007 is not applicable, compensation should be granted under general principles of EU law.

The defendant (Estonia) denied those claims. It took the view that the contested requirement was imposed to make public transport more affordable for disabled persons and families with small children, and to increase the mobility of those persons. It was also imposed as a requirement with the objective of ensuring the proper use of, and saving public money. However, according to the defendant, Regulation No. 1370/2007 is not applicable as it governs PSOs and, in the case at hand, no public service contract was concluded with the applicant. Hence, if a Member State pays no compensation, there is no need to notify the Commission.

The national court stayed the proceedings and sent questions to the Court which, in essence, referred to the following doubts:

- 1) Does an obligation to transport certain categories of passengers free of charge, imposed on all private law undertakings that operate regular road, water and rail passenger transport services within the national

- territory on a commercial basis, constitute a public service obligation under Articles 2(e) and 3(2) of Regulation No. 1370/2007?
- 2) If it does constitute a public service obligation under 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 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 certain categories of passengers 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 national rules for establishing maximum tariffs do not provide for compensation for the carrier?
 - 4) If Regulation No. 1370/2007 is not applicable, 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? and
 - 5) What conditions must the compensation meet to comply with State aid rules?

III. Judgment of the Court

On 8 September 2022, the Court delivered its judgment in *Lux Express Estonia*. The Court took its decision without holding an oral hearing. This means that it had sufficient information to give a ruling¹⁴ and suggests that it did not regard the case to be controversial.

The Court answered the 1st question in the affirmative, saying that the concept of a ‘public service obligation’, referred to in Articles 2(e) and 3(2) of Regulation No. 1370/2007, covers the obligation for undertakings providing a public transport service by road and by rail to carry certain categories of passengers free of charge and without receiving compensation.

The Court answered the first part of the 2nd question in the negative. It said that a Member State is not entitled under Article 4(1)(b)(i) of Regulation No. 1370/2007 to exclude, via national law, the payment of compensation to the carrier for the discharge of such obligation. As the Court answered

¹⁴ Article 76(2) of the Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L 265/1.

the first part of the 2nd question in the negative, and the referring court asked the second part of the second question only if the answer to the first part of that question was in the affirmative, the Court did not find it necessary to answer the second part of the 2nd question.

The Court found the 3rd question to be hypothetical. It stated that the referring court had, in essence, asked whether Article 3(3) of Regulation No. 1370/2007 allows Member States to exclude, from the scope of that EU regulation, general rules designed to fix maximum tariffs for categories of passengers other than those referred to in that provision. Since the Court found, on the basis of the documents before it, that the Republic of Estonia had not taken any steps to exclude certain general rules relating to financial compensation granted for PSOs from the scope of Regulation No. 1370/2007, the 3rd question was thus ruled inadmissible.

The Court also abstained from answering the 4th question which, in its opinion, the referring court asked only if Regulation No. 1370/2007 is not applicable to the case in the main proceedings.

For the 5th question, the Court said that compensation for the net financial effect on costs incurred, and revenues generated by complying with the tariff obligations established through general rules, must be granted under the principles set out in Articles 4 and 6 of Regulation No. 1370/2007, and in point 2 of the annex thereto, in a way that prevents overcompensation.

IV. Comments

The Court answered the 1st, the 2nd, and the 5th questions. It found the 3rd question to be inadmissible and, as the referring court asked its 4th question only *if* Regulation No. 1370/2007 is not applicable, which turned out to be a false presumption, the Court refused to answer the 4th question. The Court's findings in that regard may seem clear; however, they are not. Before analysing the answers the Court gave in its judgment, it is worth analysing the questions the Court refused to answer.

Specifically, it is worth analysing why the Court decided to abstain from answering the 3rd question, but not the 5th question, which seems to be manifestly hypothetical. Why did the Court decide to abstain from answering the 4th question, which it may have done, but also could have decided differently? Answering the 4th question would be beneficial for the sake of legal certainty and useful to national courts that deal with similar matters in the case at hand. It would be useful for the uniform application of EU law in Member States. After all, one of the reasons the Court has jurisdiction to

provide preliminary rulings on the interpretation of EU law is precisely to ensure the uniform interpretation and application of EU law by the national courts.¹⁵ The Court answering the 4th question would have been welcomed and useful in attaining that goal.

1. Comments on the Court's refusals to answer the 3rd and the 4th questions

The 3rd question

In the first part of the 3rd question, the referring court asked if Article 3(3) of Regulation No. 1370/2007 allows Member States to exclude, from the scope of that Regulation, general national rules designed to fix maximum tariffs for categories of passengers other than those referred to in that provision. Should that answer be in the affirmative, in the second part of that question, the referring court asked if the obligation to notify such measure, 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 compensation.

The Court found, in para 80 of the judgment *Lux Express Estonia*, that the Republic of Estonia had not taken any steps to make use of the option to which the first part of the 3rd question referred to. It is hard to accept this finding of the Court. First of all, it is not for the Court to make any appraisals of the accuracy of questions on the interpretation of EU law referred to it by a national court in the factual and legislative context. It is the sole responsibility of the referring court to define the accuracy of such questions, which enjoy a presumption of relevance. The Court must take into account, under the rules on the division of jurisdiction between the Courts of the European Union and the national judiciary, the factual and legislative context (set out in the request) of the questions referred for a preliminary ruling.¹⁶ Besides, the Republic of Estonia had, in fact, made use of the option to which the first part of the 3rd question referred to. In Article 34 of the Law, it obliged transport undertakings to carry certain categories of passengers free of charge. In its request for a preliminary ruling, the referring court stated that those categories of passengers were not the same as those stipulated in Article 3(3) of Regulation No. 1370/2007. The first part of the 3rd question then made sense, and was linked to the facts of the case. Where the question referred

¹⁵ Alexandre Geulette, 'Preliminary Rulings on Interpretation' in Viktor Luszcz (ed.), *European Court Procedure. A Practical Guide* (Hart/Bloomsbury 2020), p. 69.

¹⁶ Judgment of the Court of 7 April 2022, Case C-385/20 *EL and TP v Caixabank SA* [2022] EU:C:2022:278, paras 34 and 38.

concerns the interpretation or the validity of a rule of EU law, the Court is, in principle, bound to give a ruling unless:

- a) it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or to its purpose,
- b) the problem is hypothetical, or
- c) the Court does not have before it the factual or legal materials necessary to give a useful answer to that question.¹⁷

None of the above exceptions existed in the case at hand. The Court could have applied its case-law where it found that it is not manifestly obvious that the problem is hypothetical.¹⁸ It cannot be ruled out that the applicant before the referring court has an interest in obtaining an answer to the first part of the 3rd question.¹⁹ Therefore, the first part of the 3rd question was admissible.

However, the Republic of Estonia failed to notify the Commission about the actions it had taken.²⁰ That was the reason why the referring court asked the second part of the 3rd question. It wanted to know if a Member State is under an obligation to notify the Commission about the measures taken if the Member State has no intention to grant any compensation. The second part of the 3rd question was no more hypothetical than its first part.

The answer to the second part of the 3rd question may be necessary for the referring court to ascertain the legal consequences of Estonia's failure to notify the Commission about its actions. It may depend on what goal does such notification seek to achieve. As these changes must be notified under Article 108 TFEU, it seems that this duty has been established to prevent Member States from granting illegal State aid. According to paragraph 5 of Regulation No. 1370/2007, if a Member State chooses to exclude certain general rules from its scope, the general regime for State aid should apply.

However, this duty may have been established to achieve different goals. The Member State's failure to notify the Commission would, for example, make Article 34 of the Law inapplicable and unenforceable against individuals.²¹

¹⁷ Judgment of the Court of 5 May 2022, Case C-567/20 *A.H. v Zagrebačka banka d.d.*, [2022] EU:C:2022:352, para 43 and the case-law cited.

¹⁸ Judgment of the Court of 19 November 2009, Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu*, EU:C:2009:719[2009] ECR I-11049, para 44; Judgment of the Court of 12 December 2019, Case C-376/18 *Slovenské elektrárne a.s. v Úrad pre vybrané hospodárske subjekty, formerly Daňový úrad pre vybrané daňové subjekty*, [2019] EU:C:2019:1068, para 24.

¹⁹ Judgment of the Court of 8 December 2022, Case C-600/21 *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest* [2022] EU:C:2022:970, para 25.

²⁰ See also the opinion of AG Manuel Campos Sanchez-Bordona in C-614/20 *Lux Express Estonia AS* EU:C:2022:180, para 68.

²¹ See e.g. Judgment of the Court of 30 April 1996, Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL*, EU:C:1996:172[1996] ECR I-2201, para 54.

Nevertheless, the Court did not speak in favour of any of the above. So what does that mean? Do the actions of a Member State constitute State aid even though they do not grant an advantage to some undertakings? This is rather doubtful.²² Maybe they are inapplicable and unenforceable against individuals? That would mean that private undertakings are not obliged to transport any passengers free of charge under Article 34 of the Law. This is not impossible. However, to declare Article 34 of the Law inapplicable and unenforceable against individuals, because a Member State did not notify the Commission, there must be a clear legal basis in EU law for doing so, and there is none. In cases such as *CIA Security International*, the Court based its findings on the clear wording of Directive 83/189/EEC.²³

It seems then, that the Court misapplied its own case-law concerning the applicability of preliminary rulings, and refused to answer the 3rd question, which it should have answered. It is doubtful whether the 3rd question was hypothetical, and, evidently, the 3rd question made sense and was linked to the facts of the case. It cannot be ruled out that the applicant before the referring court has an interest in obtaining an answer to the 3rd question. Such answer would also be useful for the uniform application of EU law in Member States.

The 4th question

In its 4th question, the referring court asked – if Regulation No. 1370/2007 is not applicable to the case in the main proceedings – whether an obligation to grant compensation to transport undertakings in return for the discharge of the obligation laid down in Article 34 of the Law, arises from another act of EU law, such as the Charter of Fundamental Rights of the European Union. The Court did not answer this question.

That suits perfectly well the main goal of the preliminary reference procedure, namely to provide referring courts with a useful answer to its questions. As the referring court asked its 4th question only *if* Regulation No. 1370/2007 does *not* apply in the case in the main proceedings, which turned out to be untrue in the light of the answer to the 1st question, the 4th question lost its main purpose. However, the Court still could have answered this question, especially as not all cases in which Member States impose SGI on private undertakings can be

²² Judgment of the Court of 24 January 1978, Case 82/77 *Openbaar Ministerie (Public Prosecutor) of the Kingdom of the v Jacobus Philippus van Tiggele*, [1978] ECR 25, paras 25 and 26; Judgment of the Court of 12 December 1996, Case T-358/94 *Air France v Commission* [1996] ECR II- 02109, para 63.

²³ Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ L 109/8, as amended by Council Directive 88/182/EEC of 22 March 1988 [1988] OJ L 81/75.

categorised as falling under Regulation No. 1370/2007. It may not be ruled out that some of them may not even be categorised as falling under any sectorial rules. Even if the Court had answered this question in a general manner, this would have given national courts more useful guidance than in a situation where the Court abstained from answering this question.

2. Comments on the Court's decision to answer the fifth question and on the answer's content

The 5th question

In its 5th question, the referring court asked about the conditions the granting of public service compensation must meet to comply with EU rules on State aid.²⁴ The Advocate General found that this question is more like a question seeking hypothetical advice than a real preliminary question seeking the interpretation of a rule of EU law, with implications to the result of the original case.²⁵ It is hard not to agree with the Advocate General.

However, the Court answered this question even though it seems more hypothetical than the 3rd question, which the Court refused to answer. The Court found the 3rd question to be hypothetical, despite the fact that 1) the Republic of Estonia made use of the option to oblige transport undertakings to carry certain categories of passengers free of charge, and 2) those categories of passengers were not the same as those stipulated in Article 3(3) of Regulation No. 1370/2007. The Court answered the 5th question regardless of the fact that the Republic of Estonia did not intend to grant any compensation. In fact, the notion of State aid is objective in character,²⁶ and the State's intentions are not conclusive in that matter. It is evident, however, that the situation where the Member State decided *not* to grant any compensation at all, did not bear any risk of being classified as State aid. If a Member State does not grant any compensation, the question about the method of calculating compensation, to avoid EU rules on State aid, not only may, but *must* be seen as hypothetical and thus inadmissible.

²⁴ Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:641, para 84.

²⁵ Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:180, Opinion of AG Manuel Campos Sanchez-Bordona, para 55.

²⁶ Judgment of the Court of 22 December 2008, Case C-487/06 P *British Aggregates Association v Commission of the European Communities and United Kingdom*, EU:C:2008:757[2008] ECR I-10515, para 111.

Lux Express did not ask the referring court to grant it compensation for discharging public service obligations. It brought an action for compensation for the damages it had already suffered. It asked the referring court to order Estonia to cover the damage it sustained. Both types of performance may be called compensation, but they must not be confused. The former is granted *ex ante*, the latter *ex post*. The former is to prevent the damage, the latter to repair it. The former is granted by the body imposing the obligation to provide SGI, the latter by the national court to which an action for damages is brought. The compensation granted in return for the discharge of public service obligations under Article 3 of Regulation No. 1370/2007 is the former, not the latter. To calculate the former, the body imposing the obligation to provide SGI may refer to the method stipulated in *Altmark*.²⁷ To calculate the latter, the national court must refer to case-law, according to which, a Member State may be rendered liable to make reparation for loss and damage caused if:

- a) the rule of EU law that is infringed intends to confer rights on individuals,
- b) the breach of that rule is sufficiently serious, and
- c) there is a direct causal link between that breach and the loss or damage.²⁸

It is visible that the question from the national court where it referred to the former, not to the latter, was thus manifestly hypothetical. As the Court's judgment in *Raffinerie Mediterranée (ERG) SpA* seems to suggest, where the conditions under which the Court may refuse to rule on a question referred by a national court are met, the Court must refuse to rule on such question.²⁹

However, the Court answered the 5th question and, in its answer, referred by analogy to *Altmark*.³⁰ By doing this, the Court not only answered a manifestly hypothetical question but gave the answer that seems not to assist the referring court.

²⁷ Judgment of the Court of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, (n 10), paras 43–53.

²⁸ Judgment of the Court of 5 March 1996, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:[1996] ECR I-01029, para 51; judgment of the Court of 30 September 2003, Case C-224/01 *Gerhard Köbler v Republik Österreich*, EU:C:2003:513[2003] ECR I-10239, para 51; judgment of the Court of 28 July 2016, Case C-168/15 *Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR and Pohotovost s.r.o.*, [2016] EU:C:2016:602, para 22.

²⁹ Judgment of the Court of 9 March 2010, Case C-378/08 *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, EU:C:2010:126 et al [2010] ECR I-01919, para 74, and the case-law cited.

³⁰ Judgment of the Court of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, (n 10), paras 43–53.

3. Comments on the Court's answer to the 1st and 2nd questions

The 1st question seems to be the most important question the referring court asked. It justifies all other doubts the referring court had, and all of the following questions it asked the Court were relevant only if the answer to the 1st question was in the affirmative. By that question, the referring court asked whether Articles 2(e) and 3(2) of Regulation No. 1370/2007 must be interpreted as meaning that the concept of a 'public service obligation', referred to in those provisions, 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 Law, to carry certain categories of passengers free of charge and without receiving compensation from the State.

The Court answered this question by employing grammatical, historical and teleological methods of legal interpretation and answered it in the affirmative. According to the Court, public service obligations may be the subject of either a public service contract or a general rule, that is, a measure which applies without discrimination to all public passenger transport services of the same type in the same area.³¹ According to the Court, it is unlikely that an undertaking, if it were to consider its own commercial interests, would assume that obligation without a return. The Court stated that the second subparagraph of Article 1(1) of Regulation No. 1370/2007 does not distinguish between public service obligations according to the manner in which they are established.

The 1st question seems to have been the most important from the referring court; however, the Court gave its most important answer with regard to the first part of the 2nd question. The answer to the 1st question can hardly be regarded as surprising or unexpected. However, this is not the case with the answer to the first part of the 2nd question on whether a Member State is entitled to exclude the payment of compensation for the discharge of a PSO. Member States frequently employ the PSO formula when they impose SGI on undertakings but, on such occasions, they usually grant undertakings financial assistance for performing those services. When the case becomes contentious in front of the Commission, Member States usually defend their case by claiming that the financial assistance they have given is not State aid. Member States are interested in granting as much financial assistance as it is possible, without classifying it as State aid.

Having said that, Member States sometimes try to achieve their goals by imposing obligations on private undertakings to perform public goals, normally

³¹ Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS*, EU:C:2022:641, (n 1), para 37.

placed on Member States, and do not provide private undertakings with the financial means they need to perform such obligations. In such instances, Member States try to achieve their goals with the use of private resources. Such practices by Member States may be harmful for the internal market, and may damage the financial situation of the undertakings upon which Member States impose such obligations. Eventually, they can lower the quality of SGI private undertakings offer, in contradiction with the very idea of the PSO formula. Therefore, the answer that the Court gave for the first part of the 2nd question, according to which Member States are not entitled to exclude the payment of compensation for the discharge of the PSO,³² seems to be justified and correct.

According to the Court, the interpretation in which a Member State has not merely an option to compensate an undertaking for the costs incurred in discharging the public service obligations, but is indeed obliged to do so, gains additional support from the objectives of the relevant EU legislation. There is nothing to indicate that 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 Regulation No. 1370/2007.

V. Conclusions

The Court's judgment in *Lux Express Estonia* raises mixed feelings. Member States should have the opportunity to impose SGI on private undertakings by using the PSO formula. However, Member States must not carry out their tasks at the expense of private undertakings, and by using the private resources of those undertakings. The Court's answer that Member States cannot exclude the payment of compensation for the performance of SGI is definitively a good answer.

Nevertheless, this answer exposes Member States to real threats. Their actions will be no longer under scrutiny only from the perspective of EU rules on State aid. National courts may also rule on claims submitted by private undertakings claiming that a Member State caused damage to them by imposing SGI upon them with no compensation, or with too little compensation. It is to be seen in the future how a national court and the Court will, should it receive a preliminary question on that matter, decide on Member States' responsibility for possible damages. In a legislative context characterised by the exercise of

³² *Ibid.*, para 75.

wide discretion, essential for implementing EU policy, Member States cannot incur liability unless they manifestly and gravely disregarded the limits on the exercise of their powers.³³

The last note on the Court's judgment in *Lux Express Estonia* concerns the Court's failure to follow its own case-law on the admissibility of preliminary questions. The Court refused to answer the 3rd question, which it should have answered, but it answered the 5th question, which was manifestly hypothetical. The Court refused to answer the 4th question, and although formally the Court did not err in doing so, it could have answered it for the sake of legal certainty and the uniform application of EU law in Member States.

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³³ Judgment of the Court of 25 May 1978, Joined cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities*, EU:C:1978:113, *et al.* [1978] ECR I-01209 paras 5 and 6; judgment of the Court of 5 March 1996, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:[1996] ECR I-01029, para 45.