F. SECTOR - SPECIFIC RULES
INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Communication from the Commission on State aid for films and other audiovisual works
(Text with EEA relevance)
(2013/C 332/01)

1. INTRODUCTION

1. Audiovisual works, particularly films, play an important role in shaping European identities. They reflect the cultural diversity of the different traditions and histories of the EU Member States and regions. Audiovisual works are both economic goods, offering important opportunities for the creation of wealth and employment, and cultural goods which mirror and shape our societies.

2. Amongst audiovisual works, films still have a particular prominence, because of their cost of production and cultural importance. Film production budgets are substantially higher than for other audiovisual content, they are more frequently the subject of international co-production, and the duration of their exploitation life is longer. Films in particular face strong competition from outside Europe. On the other hand, there is little circulation of European audiovisual works outside their country of origin.

3. This limited circulation results from the fragmentation of the European audiovisual sector into national or even regional markets. While this is related to Europe's linguistic and cultural diversity, proximity is also built into the public support for European audiovisual works, with which national, regional and local funding schemes subsidise many small production companies.

4. It is generally accepted that aid is important to sustain European audiovisual production. It is difficult for film producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. The high risk associated with their businesses and projects, together with the perceived lack of profitability of the sector, make it dependent on State aid. Left purely to the market, many of these films would not have been made because of a combination of the high investment required and the limited audience for European audiovisual works. In these circumstances, the fostering of audiovisual production by the Commission and the Member States have a role to ensure that their culture and creative capacity can be expressed and the diversity and richness of European culture reflected.

5. MEDIA, the European Union's support programme for the film, television and new media industries, offers a variety of funding schemes, each targeting different areas of the audiovisual sector, including schemes for producers, distributors, sales agents, organisers of training courses, operators in new digital technologies, operators of video-on-demand (VoD) platforms, exhibitors and organisers of festivals, markets and promotional events. It encourages the circulation and promotion of European films
with particular emphasis on non-national European films. These actions will be continued in the MEDIA Sub-programme within Creative Europe, the new European support programme for the cultural and creative sectors.

2. WHY CONTROL STATE AID FOR FILMS AND OTHER AUDIOVISUAL WORKS?

6. Member States implemented a wide range of support measures for the production of films, TV programmes and other audiovisual works. Altogether, Member States provide an estimated EUR 3 billion of film support per year (1). This funding is provided through over 600 national, regional and local support schemes. The rationale behind these measures is based on both cultural and industrial considerations. They have the primary cultural aim of ensuring that the national and regional cultures and creative potential are expressed in the audiovisual media of film and television. On the other hand, they aim to generate the critical mass of activity that is required to create the dynamic for the development and consolidation of the industry through the creation of soundly based production undertakings and the development of a permanent pool of human skills and experience.

7. With this support, the EU has become one of the largest producers of films in the world. The EU cinema industry produced 1,299 feature films in 2012 compared to 817 in the US (2011), or 1,255 in India (2011). In 2012, Europe counted 933.3 million cinema admissions (2). In 2008, the European audiovisual market for filmed entertainment was valued at EUR 17 billion (3). Over one million people are employed in the audiovisual sector in the European Union (4).

8. This makes film production and distribution not only a cultural but also a significant economic activity. Furthermore, film producers are active on an international level and audiovisual works are traded internationally. This means that such aid in the form of grants, tax incentives or other types of financial support is liable to affect trade between Member States. The producers and audiovisual works which receive such support are likely to have a financial and hence competitive advantage over those which do not. Consequently, such support may distort competition and is regarded as State aid pursuant to Article 107(1) TFEU. According to Article 108 TFEU the Commission is therefore obliged to assess the compatibility of aid to the audiovisual sector with the internal market, as it does with State aid measures in other sectors.

9. In this context, it is important to stipulate that the Treaty recognises the utmost importance of promoting culture for the European Union and its Member States by incorporating culture among the Union’s policies specifically referred to in the Treaty on the Functioning of the European Union (TFEU). Article 167(2) TFEU provides that:

‘Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

[...]

— artistic and literary creation, including in the audiovisual sector.’

10. Article 167(4) TFEU provides that:

‘The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.’

(1) EUR 2.1 billion of support is provided annually by European film funds (http://www.obs.coe.int/about/oea/pr/ fundingreport2011.html). According to the study into the economic and cultural impact of territorial conditions in film support schemes, a further, estimated EUR 1 billion is provided annually by Member States through film tax incentives (http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#territorialisation).

(2) Source: Focus 2012 — World film market trends, European Audiovisual Observatory, May 2012.


11. Article 107(1) TFEU prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between Member States. However, the Commission may exempt certain State aid from this prohibition. One of these exemptions is Article 107(3)(d) TFEU for aid to promote culture, where such aid does not affect competition and trading conditions to an extent contrary to the common interest.

12. The Treaty rules on State aid control acknowledge the specificities of culture and the economic activities related to it. Audiovisual aid contributes to the medium- to long-term sustainability of the European film and audiovisual sectors across all Member States and increases the cultural diversity of the choice of works available to European audiences.

13. As Party to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the European Union, alongside the EU Member States, is committed to integrating the cultural dimension as a vital element in its policies.

3. DEVELOPMENTS SINCE 2001

14. The assessment criteria for State aid for the production of films and other audiovisual works were originally set out in the 2001 Cinema Communication (1). The validity of these criteria was extended in 2004 (2), 2007 (3) and 2009 (4) and expired on 31 December 2012. This Communication pursues the main lines of the 2001 Communication, whilst responding to a number of trends which have emerged since 2001.

15. The aid schemes approved by the Commission since the 2001 rules came into force show that Member States use a wide variety of aid mechanisms and conditions. Most schemes follow the model for which the assessment criteria of the 2001 Communication were designed, namely grants awarded to selected film productions, where the maximum aid is determined as a percentage of the production budget of the aid beneficiary. However, a growing number of Member States introduced schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting Member State only. These schemes are often designed in the form of a tax reduction or otherwise in a way which applies automatically to a film which fulfills certain criteria for its eligibility for aid. Compared to film funds which individually award support to single films upon application, these schemes with their automatic application allow film producers to factor in a foreseeable amount of funding already in the film planning and development phase.

16. Regarding the scope of aided activities, some Member States also offer aid to activities other than film production. This includes aid to film distribution or to cinemas, for example to support rural cinemas or arthouse cinemas in general or to cover their renovation and modernisation, including their transition to digital projection. Some Member States support audiovisual projects which go beyond the traditional concept of film and TV productions, in particular interactive products like transmedia or games. In these cases, the Commission applied the criteria of the Cinema Communication as a reference to assess the necessity, proportionality and adequacy of the aid, whenever such aid was notified to it. The Commission also noted a competition among Member States to use State aid to attract inward investment from large-scale film production companies of third countries. These issues were not addressed in the 2001 Communication.

17. Already the 2001 Communication announced that the Commission would review the maximum level of territorial spending obligations in this sector permitted under the State aid rules. Territorial spending obligations in film-funding schemes require a certain part of the supported film budget to be spent in the Member State granting the aid. The 2004 extension identified territorial spending obligations in film

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(1) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (OJ C 43, 16.2.2002, p. 6).
funding schemes as an issue which needs to be further assessed in view of its compliance with the internal market principles of the Treaty. Case law of the Court of Justice, adopted since 2001 on the importance of the internal market with regard to rules on the origin of goods and services, also needs to be taken into account (1).

18. Also the application of the ‘cultural test’ has raised issues in practice. The compatibility of aid to film production is assessed under Article 107(3)(d) TFEU which provides for the possibility to grant aid ‘to promote culture’. The 2001 Communication required that the aid was directed towards a cultural product. However, the Commission’s detailed scrutiny of cultural criteria in film support schemes has been controversial with Member States, particularly in view of the subsidiarity principle.

19. Accordingly, when extending the State aid assessment criteria of the 2001 Cinema Communication in 2009, the Commission noted the need for further reflection on the implications of these developments and a review of the assessment criteria.

4. SPECIFIC CHANGES

20. This Communication addresses the issues above and introduces amendments to the criteria of the 2001 Communication. In particular, it covers State aid for a wider scope of activities, highlights the principle of subsidiarity in the area of cultural policy and the respect of internal market principles, introduces a higher maximum aid intensity level for cross-border productions and caters for the protection of and access to film heritage. The Commission believes that these changes are necessary in view of the developments since 2001 and will help European works to be more competitive and pan-European in future.

4.1. Scope of activities

21. Regarding the scope of activities to which this Communication applies, the State aid criteria of the 2001 Cinema Communication focused on the production of films. As noted, some Member States however offer also support for other related activities, such as scriptwriting, development, film distribution, or film promotion (including film festivals). The objective of protecting and promoting Europe’s cultural diversity through audiovisual works can only be achieved if these works are seen by audiences. Aid to production alone risks stimulating the supply of audiovisual content without ensuring that the resulting audiovisual work is properly distributed and promoted. It is therefore appropriate that aid may cover all aspects of film creation, from story concept to delivery to the audience.

22. Regarding aid to cinemas, usually the amounts involved are small, so that for example rural and arthouse cinemas should be sufficiently served by the levels of aid which fall under the de minimis Regulation (2). However, if a Member State can justify that more support to cinemas is required, the aid will be assessed under the present Communication as aid to promote culture in the meaning of Article 107(3)(d) TFEU. Aid for cinemas promotes culture because the principle purpose of cinemas is the exhibition of the cultural product of film.

23. Some Member States considered support to audiovisual projects which go beyond the traditional concept of film and TV productions. Transmedia storytelling (also known as multi-platform storytelling or cross-media storytelling) is the technique of telling stories across multiple platforms and formats using digital technologies, like films and games. Importantly, these pieces of content are linked together (3). Since transmedia projects are inevitably linked to the production of a film, the film production component is considered to be an audiovisual work within the scope of this Communication.

(1) In particular the Judgment of the Court of Justice of 10 March 2005 in Case Laboratoires Fournier (C-39/04), ECR 2005 I-2057.


(3) Not to be confused with traditional cross-platform media franchises, sequels or adaptations.
24. Conversely, although games may represent one of the fastest-growing forms of mass media in the coming years, not all games necessarily qualify as audiovisual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply automatically to games. Furthermore, contrary to the film and television sector, the Commission does not have a critical mass of decisions on State aid to games. Consequently, this Communication does not cover aid granted to games. Any aid measures in support of games not meeting the conditions of the General Block Exemption Regulation (GBER) (1) or the de minimis Regulation will continue to be addressed on a case-by-case basis. To the extent that the necessity of an aid scheme targeted at games which serve a cultural or educational purpose can be demonstrated, the Commission will apply the aid intensity criteria of this Communication by analogy.

4.2. Cultural criterion

25. To be compatible with Article 107(3)(d) TFEU, aid to the audiovisual sector needs to promote culture. In line with the subsidiarity principle enshrined in Article 5 TEU, the definition of cultural activities is primarily a responsibility of the Member States. In assessing an audiovisual support scheme, the Commission acknowledges that its task is limited to verifying whether a Member State has a relevant, effective verification mechanism in place able to avoid manifest error. This would be achieved through the existence of either a cultural selection process to determine which audiovisual works should benefit from aid or a cultural profile to be fulfilled by all audiovisual works as a condition of the aid. In line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 (2), the Commission notes that the fact that a film is commercial does not prevent it from being cultural.

26. Linguistic diversity is an important element of cultural diversity; hence, defending and promoting the use of one or several of the languages of a Member State also serves the promotion of culture (3). According to the well-established case law of the Court, both the promotion of a language of a Member State (4) and cultural policy (5) may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. Therefore, Member States may require, as condition for the aid, inter alia, that the film is produced in a certain language, when it is established that this requirement is necessary and adequate to pursue a cultural objective in the audiovisual sector, which can also favour the freedom of expression of the different social, religious, philosophical or linguistic components which exist in a given region. The fact that such a criterion may constitute in practice an advantage for cinema production undertakings which work in the language covered by that criterion appears inherent to the objective pursued (6).

4.3. Territorial spending obligations

27. Obligations imposed by the authorities granting the aid on film producers to spend a certain part of the film production budget in a particular territory (territorial spending obligations) have been subject to particular attention since the Commission started looking into film support schemes. The 2001 Cinema Communication allowed Member States to require that up to 80% of the entire film budget needed to be spent on their territory. The schemes which define the aid amount as a percentage of the expenditure on production activity undertaken in the granting Member State do try already by

(2) The Convention states in Article 4(4): 'Cultural activities, goods and services refers to those activities, goods and services, which … embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.'.
(3) Judgment of the Court of 5 March 2009, UTECA, Case C-222/07, paragraphs 27-33.
(4) Judgment of the Court of 13 December 2007, United Pan-Europe Communications Belgium, Case C-250/06, paragraph 43.
(5) Judgment of the Court of 28 October 1999, ARD, Case C-6/98, paragraph 50.
(6) Judgment of the Court of 5 March 2009, UTECA, Case C-222/07, paragraphs 34, 36.
their design to draw as much production activity as possible to the aid granting Member State and contain an inherent element of territorialisation of expenditure. The Cinema Communication needs to take into account these different types of aid schemes now in place.

28. Territorial spending obligations constitute a restriction of the internal market for audiovisual production. Therefore, the Commission commissioned an external study on territorial conditions imposed on audiovisual production which was completed in 2008 (1). As stated in the 2009 extension of the Cinema Communication, overall, the study was inconclusive: it could not judge whether or not the positive effects of territorial conditions outweighed the negative effects.

29. However, the study found that the costs of film production seem to be higher in those countries which apply territorial conditions than in those which do not. The study also found that territorial conditions may cause some obstacles to co-productions and may make them less efficient. Overall, the study found that the more restrictive territorial spending obligations do not lead to sufficient positive effects to justify maintaining the current levels of restrictions. It also did not demonstrate the necessity of these conditions in view of the objectives pursued.

30. A national measure which hampers the exercise of fundamental freedoms guaranteed by the Treaty may only be acceptable when complying with several conditions: it has to pursue an overriding reason of general interest, it has to be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (2). The specific characteristics of the film industry, in particular the extreme mobility of productions, and the promotion of cultural diversity and national culture and languages, may constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms. Therefore, the Commission continues to acknowledge that, to a certain extent, such conditions may be necessary to maintain a critical mass of infrastructure for film production in the Member State or region granting the aid.

31. Hardly any Member States impose territorial spending obligations up to the ceiling of 80% of the production budget allowed by the 2001 Communication. Several Member States do not have territorial spending obligations at all in their schemes. Many regional schemes are linked to the aid amount and require that 100% or 150% of this amount must or should be spent in the granting Member State, without being specific on the origin of the subcontracted services or the origin of goods used in the production. In some schemes, the producer receiving the aid is free to spend at least 20% of the production budget outside that Member State. Certain Member States design the film aid as a percentage of just the local expenditure.

32. The amount of expenditure which is subject to territorial spending obligations should at least be proportionate to the actual financial commitment of a Member State and not with the overall production budget. This was not necessarily the case with the territorial criterion of the 2001 Communication (3).

33. There are essentially two, distinct aid mechanisms applied by Member States awarding aid for film production:

— aid awarded — for example by a selection panel — as direct grants, for example defined as a percentage of the production budget; and

— aid awarded and defined as a proportion of the production expenditure in the granting Member State (e.g. a tax incentive).

(2) Judgment UTECA, Case C-222/07, §25.
(3) For example: a producer is making a film with a budget of EUR 10 million and applies for aid to a scheme offering at most EUR 1 million per film. It is disproportionate to exclude the film from the scheme on the grounds that the producer does not expect to spend at least EUR 8 million of the production budget in the territory offering the aid.
34. Paragraph 50 sets the limits for each mechanism within which the Commission can accept that a Member State is applying territorial spending obligations which could be still considered as necessary and proportionate to a cultural objective.

35. In the case of aid awarded as grants, the maximum territorial spending obligation should be limited to 160 % of the aid amount. This corresponds to the previous ’80 % of the production budget’ rule when the aid intensity reaches the general maximum stated in paragraph 52(2), namely 50 % of the production budget (1).

36. In the case of aid awarded as a percentage of the expenditure on production activity in the granting Member State, there is an incentive to spend more in the Member State to receive more aid. Limiting the eligible production activity to that which takes place in the Member State granting the aid is a territorial restriction. Consequently, to establish a limit which is comparable to the limit for grants, the maximum expenditure subject to territorial spending obligations is 80 % of the production budget.

37. In addition, under either mechanism, any scheme may have an eligibility criterion requiring a minimum level of production activity in the territory of the granting Member State. This level shall not exceed 50 % of the production budget.

38. In any case, under EU law, Member States are under no obligation to impose territorial spending obligations.

4.4. Competition to attract major foreign productions

39. When the 2001 Cinema Communication was adopted, few Member States tried to use film aid to attract major foreign film projects to be produced in their territory. Since then, several Member States have introduced schemes with the objective to attract high profile productions to Europe, in global competition with the locations and facilities elsewhere, such as in Australia, Canada, New Zealand, or the United States. Contributors to the public consultations preceding the present Communication agreed that these productions were necessary to maintain a high-quality audiovisual infrastructure, to contribute to the employment of high class studio facilities, equipment and staff, and to contribute to transfer of technology, know-how and expertise. The partial employment of facilities by foreign productions would also help to have the capacities to realise high quality and high profile European productions.

40. Regarding the possible effect on the European audiovisual sector, foreign production may have a lasting impact as it usually makes wide use of this local infrastructure and of local cast. Overall, this may thus have a positive effect on the national audiovisual sector. It should also be noted that many of the films which are considered to be major third country projects are in fact co-productions involving also European producers. Thereby, these subsidies would contribute also to the promotion of European audiovisual works and to sustaining facilities for national productions.

41. Therefore, the Commission considers that such aid may in principle be compatible with Article 107(3)(d) TFEU as aid to promote culture under the same conditions as aid for European production. However, as the amounts of aid for major international productions can be very high, the Commission will monitor the further development of this type of aid to ensure that competition takes place primarily on the basis of quality and price, rather than on the basis of State aid.

4.5. Cross-border productions

42. Few European films are distributed outside their production territories. The likelihood that a European film is released in several Member States is higher in the case of co-productions involving producers.

(1) For example: a producer is making a film with a budget of EUR 10 million and applies for aid to a scheme offering at most EUR 1 million per film. The producer can only be expected to spend EUR 1.6 million of the production budget in the territory offering the aid. However, if the film budget had been EUR 2 million and received the maximum aid amount, the producer would face a territorial spending obligation corresponding to 80 % of the production budget.
from several countries. In view of the importance of co-operation of producers from different Member States for the production of European works which are seen across several Member States, the Commission considers that a higher aid intensity is justified for co-productions funded by more than one Member State and involving producers from more than one Member State.

4.6. Film heritage

43. Films should be collected, preserved and accessible for future generations for cultural and educational purposes (1). The Education, Youth, Culture and Sports Council Conclusions on European film heritage of 18 November 2010 (2) invited Member States to ensure that films that have been supported by State aid are deposited with a film heritage institution, together with all related material, where feasible, and the appropriate rights in relation to the preservation and cultural and non-commercial use of films and related material.

44. Some Member States have introduced the practice of paying the last instalment of the aid after the film heritage institution has certified the deposit of the aided film. This has proved to be an efficient instrument for enforcing the contractual deposit obligation.

45. Some Member States have also introduced provisions in their grant agreements to allow the use of publicly funded films for specified purposes in the execution of the public interest missions of the film heritage institutions after an agreed period of time and provided that this does not interfere with the normal use of the film.

46. Therefore, Member States should encourage and support producers to deposit a copy of the aided film in the film heritage institution designated by the funding body for preservation (3), as well as for specified non-commercial use agreed with the right holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.

5. ASSESSING THE COMPATIBILITY OF THE AID

47. When it assesses aid for films and other audiovisual works, the Commission verifies on the basis of the above considerations.

— First, whether the aid scheme respects the ‘general legality’ principle, i.e. the Commission must verify that the scheme does not contain clauses that would be contrary to provisions of the TFEU in fields other than State aid.

— Secondly, whether the scheme fulfils the specific compatibility criteria for aid, set out below.

5.1. General legality

48. The Commission must first verify that the aid respects the ‘general legality’ principle and that the eligibility conditions and award criteria do not contain clauses contrary to the TFEU in fields other than State aid. This includes ensuring that the TFEU principles prohibiting discrimination on the grounds of nationality, free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital have been respected (Articles 18, 34, 36, 43, 49, 54, 56 and 63 TFEU). The Commission enforces these principles in conjunction with the application of competition rules when the provisions in breach of these principles are inseparable from the operation of the scheme.

(3) Film Heritage Institutions are designated by Member States in order to collect, preserve and make available film heritage for cultural and educational purposes. In application of the 2005 European Parliament and Council Recommendation on film heritage, Member States have listed their Film Heritage Institutions. The current list is available online (http://ec.europa.eu/avpolicy/docs/reg/cinema/institutions.pdf).
49. In compliance with the above principles, aid schemes must not, for example, reserve the aid exclusively for nationals; require beneficiaries to have the status of national undertaking established under national commercial law (undertakings established in one Member State and operating in another by means of a permanent branch or agency must be eligible for aid; furthermore the agency requirement should only be enforceable upon payment of the aid); or oblige foreign companies providing filmmaking services to circumvent the terms and conditions of Directive 96/71/EC with respect to their posted workers (1).

50. In view of the specific situation of the European film sector, film production support schemes may either:

— require that up to 160 % of the aid amount awarded to the production of a given audiovisual work is spent in the territory granting the aid, or

— calculate the aid amount awarded to the production of a given audiovisual work as a percentage of the expenditure on film production activities in the granting Member State, typically in case of support schemes in the form of tax incentives.

In both cases, Member States may require a minimum level of production activity in their territory for projects to be eligible for any aid. This level cannot, however, exceed 50 % of the overall production budget. In addition, the territorial linking shall in no case exceed 80 % of the overall production budget.

5.2. Specific assessment criteria under Article 107(3)(d) TFEU

51. The objective for supporting the production of European audiovisual works and ensuring the existence of the infrastructure necessary for their production and exhibition is the shaping of European cultural identities and the enhancement of cultural diversity. Therefore, the purpose of the aid is the promotion of culture. Such aid may be compatible with the Treaty in accordance with Article 107(3)(d) TFEU. Undertakings in the film and TV programme production sector may also benefit from other aid types granted under Article 107(3)(a) and (c) TFEU (e.g. regional aid, aid for SME, Research and Development, training, or employment), within the maximum aid intensities in the case of cumulation of aid.

52. In the case of schemes designed to support the scriptwriting, development, production, distribution and promotion of audiovisual works covered by this Communication, the Commission will examine the following criteria with reference to the audiovisual work which will benefit from the aid to assess whether the scheme is compatible with the Treaty under Article 107(3)(d) TFEU.

1. The aid is directed to a cultural product. Each Member State ensures that the content of the aided production is cultural according to its own national criteria, through an effective verification process to avoid a manifest error: either through the selection of film proposals, for example by a panel or a person entrusted with the selection, or, in the absence of such a selection process, by establishing a list of cultural criteria against which each audiovisual work will be verified.

2. The aid intensity must in principle be limited to 50 % of the production budget, with a view to stimulating normal commercial initiatives. The aid intensity for cross-border productions funded by more than one Member State and involving producers from more than one Member State may be

up to 60% of the production budget. Difficult audiovisual works (1) and co-productions involving countries from the DAC List of the OECD (2) are excluded from these limits. Films whose sole original version is in an official language of a Member State with a limited territory, population or language area may be regarded as difficult audiovisual works in this context.

3. In principle, there is no limit for aid to scriptwriting or development. However, if the resulting script or project is ultimately made into a film, the costs of scriptwriting and development are subsequently included in the production budget and taken into account for calculating the maximum aid intensity for the audiovisual work as set out in sub-paragraph 2 above.

4. The costs of distributing and promoting audiovisual works which are eligible for production support may be supported with the same aid intensity as they were or could have been for their production.

5. Apart from scriptwriting, development, distribution or promotion, aid granted for specific production activities is not allowed. Consequently, the aid must not be reserved for individual parts of the production value chain. Any aid granted to the production of a specific audiovisual work should contribute to its overall budget. The producer should be free to choose the items of the budget that will be spent in other Member States. This is to ensure that the aid has a neutral incentive effect. The earmarking of aid to specific individual items of a film budget could turn such aid into a national preference to the sectors providing the specific aided items, which would be incompatible with the Treaty.

6. Member States should encourage and support producers to deposit a copy of the aided film in the film heritage institution designated by the funding body for preservation, as well as for specified non-commercial use agreed with the right holder(s) in compliance with intellectual property rights and without prejudice to fair remuneration for the right holder(s) after an agreed period of time set in the grant agreement and such that this does not interfere with the normal use of the film.

7. The aid is awarded in a transparent manner. Member States must publish at least the following information on a single website, or on a single website retrieving information from several websites: the full text of the approved aid scheme and its implementing provisions, the name of the aid beneficiary, the name and nature of the aided activity or project, the aid amount, and the aid intensity as a proportion of the total budget of the aided activity or project. Such information must be published online after the award decision has been taken, kept for at least 10 years and be available to the general public without restrictions (3).

53. The modernisation of cinemas, including their digitisation, may be aided where the Member States can justify the necessity, proportionality and adequacy of such aid. On this basis, the Commission would assess whether the scheme is compatible with the Treaty under Article 107(3)(d) TFEU.

54. In determining whether the maximum aid intensity is respected, the total amount of public support measures of Member States for the aided activity or project shall be taken into account, regardless of

(1) Such as short films, films by first-time and second-time directors, documentaries, or low budget or otherwise commercially difficult works. Under the subsidiarity principle, it is up to each Member State to establish a definition of difficult film according to national parameters.

(2) The DAC list shows all countries and territories eligible to receive official development assistance. These consist of all low and middle-income countries based on gross national income (GNI) per capita as published by the World Bank, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU. The list also includes all of the Least Developed Countries (LDCs) as defined by the United Nations (http://www.oecd.org/document/45/0,3746,en_2649_34447_2093101_1_1_1_1,00.html)

(3) This information should be regularly updated (e.g. every six months) and shall be available in non-proprietary formats.
whether that support is financed from local, regional, national or Union sources. However, funds awarded directly by EU programmes like MEDIA, without the involvement of Member States in the award decision, are not State resources. Therefore, their assistance does not count for the purposes of respecting the aid ceilings.

6. APPROPRIATE MEASURES

55. The Commission proposes as appropriate measures for the purposes of Article 108(1) TFEU that Member States bring their existing schemes regarding film funding in line with this Communication within 2 years of its publication in the Official Journal of the European Union. Member States should confirm to the Commission within one month of publication of this Communication in the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.

7. APPLICATION

56. This Communication will be applied from the first day following its publication in the Official Journal of the European Union.

57. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the aid measures were notified prior to that date.

58. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (1), in the case of non-notified aid the Commission will apply:

(a) this Communication, if the aid was granted after its publication in the Official Journal of the European Union;

(b) the 2001 Cinema Communication in all other cases.

PART III.9

SUPPLEMENTARY INFORMATION SHEET ON AID FOR AUDIOVISUAL PRODUCTION

This supplementary information sheet must be used for notifications of aid covered by the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works (¹).

1. The aid scheme

1.1. Please describe as accurately as possible the purpose of the aid and its scope, where appropriate, for each measure.

1.2. Does the aid directly benefit the creation of a cultural work (for cinema or television)?

1.3. Please indicate what provisions exist to guarantee the cultural objective of the aid:

1.4. Does the aid have the effect of supporting industrial investment?

2. Conditions for eligibility

Please indicate the conditions for eligibility for the planned aid:

2.2. Beneficiaries:

2.2.1. Does the scheme distinguish between specific categories of beneficiary (e.g. natural/legal person, dependent/independent producer/broadcaster, etc.)?

2.2.2. Does the scheme differentiate on grounds of nationality or place of residence?

2.2.3. In the case of establishment in the territory of a Member State, are beneficiaries obliged to fulfil any conditions other than that of being represented by a permanent agency? Note that the conditions of establishment must be defined with respect to the territory of the Member State and not to a subdivision of that State.

2.2.4. If the aid has a tax component, must the beneficiary fulfil any obligations or conditions other than that of having taxable revenue in the territory of the Member State?

3. Territorial coverage

3.1. Please indicate if there is provision for any form of obligation to spend in the territory of the Member State or in one of its subdivisions.

3.2. Is it necessary to comply with a minimum degree of territorial coverage in order to be eligible for the aid?

3.3. Is the required territorial coverage calculated with regard to the overall budget of the film or to the amount of aid?

3.4. Does the condition of territorial coverage apply to certain specific items of the production budget?

3.5. Is the absolute amount of aid adjustable in proportion to the expenditure carried out in the territory of the Member State?

3.6. Is the aid intensity directly proportional to the effective degree of territorial coverage?

3.7. Is the aid adjustable in proportion to the degree of territorial coverage required?

(¹) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43, 16.2.2002, p. 6.
B

4. Eligible costs

4.1. Please specify the costs which may be taken into account to determine the amount of aid.

4.2. Do the eligible costs all relate directly to the creation of a cinematographic or audiovisual work?

5. Aid intensity

5.1. Please indicate whether the scheme provides for use of the concept of difficult, low-budget film in order to obtain an aid intensity of over 50% of the production budget.

5.2. If so, please indicate the categories of film covered by this concept.

5.3. Please indicate whether the aid can be combined with other aid schemes (‘cumulation of aid’) or other provisions for aid and, if so, what arrangements are made to limit such cumulation or to ensure that, in the case of cumulation, the maximum aid intensity for the work is not exceeded.

6. Compatibility

6.1. Please provide a reasoned justification in support of compatibility of the aid in the light of the principles set out in the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works.

7. Other Information

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the Communication on certain legal aspects relating to cinematographic and other audiovisual works.

PART III.10

SUPPLEMENTARY INFORMATION SHEET ON ENVIRONMENTAL PROTECTION AID

This supplementary information sheet must be used for the notification of any aid covered by the Community Guidelines on State aid for environmental protection (1).

1. Objective of the aid

1.1. Which are the objectives aimed at in terms of environmental protection? Please submit a detailed description for each part of the scheme

If the measure in question has already been applied in the past, what have been the results in terms of environmental protection?

1.2. If the measure is a new one, what environmental results are anticipated, and over what period?

(1) Community Guidelines on State aid for environmental protection, JOC 37, 3.2.2001, p. 3.
II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission on the application of State aid rules to public service broadcasting
(Text with EEA relevance)
(2009/C 257/01)

1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

1. Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.

2. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Member States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent. This was confirmed in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty (hereinafter referred to as the Amsterdam Protocol).

3. At the same time, the increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission’s attention by private operators. The complaints allege infringements of Articles 86 and 87 of the EC Treaty in relation to public funding of public service broadcasters.

4. The 2001 Communication from the Commission on the application of State aid rules to public service broadcasting (1) has first set out the framework governing State funding of public service broadcasting. The 2001 Communication has served as a good basis for the Commission to develop significant decision-making practice in the field. Since 2001, more than 20 decisions have been adopted concerning the financing of public service broadcasters.

5. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and Internet companies, entering the market. Technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services. The provision of audiovisual services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services.

(1) OJ C 320, 15.11.2001, p. 5.
Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 Altmark judgment (7), the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new decision (8) and framework (9) on State aid in the form of public service compensation. In 2007, the Commission adopted a Communication accompanying the Communication on 'A single market for 21st century Europe' — Services of general interest, including social services of general interest: a new European Commitment (10). Furthermore, in December 2007, the Audiovisual Media Services Directive (11) entered into force, extending the scope of the EU audiovisual regulation to emerging media services.

7. These changes in the market and in the legal environment have called for an update to the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan (12) announced that the Commission would 'revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities'.

8. In the course of 2008 and 2009, the Commission held several public consultations on the review of the 2001 Broadcasting Communication. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual services in the broadcasting sector (13), taking into account recent market and legal developments. The present Communication is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

2. THE ROLE OF PUBLIC SERVICE BROADCASTING

9. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

10. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union (14) and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts (15).

11. The role of the public service (16) in general is recognised by the Treaty, in particular Articles 16 and 86(2). The interpretation of these provisions in the light of the particular nature of the broadcasting sector is outlined in the Amsterdam Protocol, which, after considering 'that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism', states that 'the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit.

(12) For the purpose of the present communication, the notion 'audiovisual service(s)' refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of 'audiovisual service(s)' must be distinguished from the narrower concept of 'audiovisual media service(s)', as defined in Article 1(a) of the Audiovisual Media Services Directive.
(15) For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term 'public service' as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term 'service of general economic interest' used in Article 86(2).
as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

12. The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution ‘broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting’. Moreover, public service broadcasting needs to ‘benefit from technological progress’, bring ‘the public the benefits of the new audiovisual and information services and the new technologies’ and to undertake ‘the development and diversification of activities in the digital age’. Finally, ‘public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences’ (12).

13. The role of public service broadcasting in promoting cultural diversity was also recognised by the 2005 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was approved by the Council on behalf of the Community and thus forms part of EC law (13). The Convention states that each party may adopt ‘measures aimed at protecting and promoting the diversity of cultural expressions within its territory’. Such measures may include, among others, ‘measures aimed at enhancing diversity of the media, including through public service broadcasting’ (14).

14. These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the recommendations of the Council of Europe concerning media pluralism and diversity of media content (15), and the remit of public service media in the information society (16). The latter recommendation calls upon the members of the Council of Europe to ‘guarantee public service media (…) in a transparent and accountable manner’ and to ‘enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions’.

15. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that ‘regulations governing State aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment’ while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency (17).

16. At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the Internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Audiovisual Media Services Directive (18), ‘the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.’ Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.

(14) Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 6(1) and (2)(h).
(15) Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.
(18) Cf. footnote 6 above.
3. THE LEGAL CONTEXT

17. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 concerning culture and Article 87(3) on aid to promote culture. The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.

18. The regulatory framework concerning ‘audiovisual media services’ is coordinated at European level by the Audiovisual Media Services Directive. The financial transparency requirements concerning public undertakings are regulated by the Transparency Directive (\(^{23}\)).

19. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules. In particular, in 2005, the Commission adopted the Services of General Economic Interest Framework (\(^{20}\)) and Decision (\(^{21}\)) clarifying the requirements of Article 86(2) of the EC Treaty. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(a) of the Decision are met (\(^{22}\)).

20. In line with Article 87(1), the concept of State aid includes the following conditions: (a) there must be an intervention by the State or by means of State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage of the beneficiary; (d) it must distort or threaten to distort competition (\(^{19}\)). The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Community Courts.

4. APPLICABILITY OF ARTICLE 87(1)

4.1. The State aid character of State financing of public service broadcasters

21. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources (\(^{24}\)).

22. State financing of public service broadcasters can also be generally considered to affect trade between Member States. As the Court of Justice has observed, ‘when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid’ (\(^{25}\)). This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.

23. Regarding the existence of an advantage, the Court of justice clarified in the Altmark case (\(^{26}\)) that public service compensation does not constitute State aid provided that four cumulative conditions are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well


\(^{(20)}\) Cf. footnote 4 above.

\(^{(21)}\) Cf. footnote 3 above.

\(^{(22)}\) According to Article 2(1)(a) of the Decision, it applies to State aid in the form of ‘public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million’.


\(^{(24)}\) Regarding the qualification of licence fee funding as State resources, see judgment in joined Cases T-09/04, T-317/04, T-329/04 and T-336/04 ‘TV2’ at 158-159.


\(^{(26)}\) Case C-280/2000, cf. footnote 2 above.
run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

24. To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

4.2. Nature of the aid: existing aid as opposed to new aid

25. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as 'existing aid' within the meaning of Article 88(1). In line with this provision, 'the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market'.

26. Pursuant to Article 1(b)(i) of the Procedural Regulation (27), existing aid includes ‘… all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty’.

27. In the cases of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the 10 Member States which acceded in 2004 (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) and Bulgaria and Romania which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called ‘interim procedure’ are considered as existing aid.

28. Pursuant to Article 1(b)(v) of the Procedural Regulation, existing aid also includes ‘aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State’.

29. In accordance with the case law of the Court (28), the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission believes that a case by case approach is the most appropriate (29), taking into account all the elements related to the broadcasting system of a given Member State.

30. According to the case law in Gibraltar (30), not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, ‘it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.’

31. In light of the above considerations, in its decision-making practice the Commission has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.

5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87(3)

32. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.


33. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

34. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable (33). Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se (32). Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d) (31).

35. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.

6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)

36. In accordance with Article 86(2), ‘undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in this 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.’

6.1. The Commission is to check for manifest errors (see Section 6.1). The Commission further verifies whether there is an explicit entrustment and effective supervision of the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test) (36).

37. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:

(i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition) (37);

(ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment) (38);

(iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account (proportionality).

38. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the ‘public service remit as conferred, defined and organised by each Member State’ (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting ‘insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account’ (proportionality).

39. It is for the Commission, as guardian of the Treaty, to assess, on the basis of evidence provided by the Member States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors (see Section 6.1). The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see Section 6.2).


(35) Judgment in the Case C-242/95 GT-Link; (1997) 4449.

(36) Judgment in the Case C-139/94 EDF and GDF; (1997) I-5815.
In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see Section 6.3 and following).

The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Commission is aware of the differences in the national broadcasting systems and in the other characteristics of the Member States’ media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 86(2) is made on a case-by-case basis, according to Commission practice (35), in line with the basic principles set out in the following sections.

The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, ceteris paribus, higher (38) while equally considering potential concerns of other media in these Member States.

### Definition of public service remit

In order to meet the condition mentioned in point 37(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.

### Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the Community concept of ‘services of general economic interest’.

The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States’ authorities can effectively monitor compliance, as described in the following chapter.

At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2) (39). Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the Court of First Instance, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster (40). The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audio-visual services on all distribution platforms.

### Qualitative requirements in order to adopt the conduct of a commercial operator

Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs. 

(37) See, for example, the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAO (TG4) (OJ C 121, 17.5.2008, p. 5); E 3/05, Aid to the German public service broadcasters (OJ C 185, 8.8.2007, p. 1); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/05, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); State aid E8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public service broadcasters (OJ L 49, 22.2.2008, p. 1).

(38) Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.


(40) These qualitative criteria are according to the Court of First Instance ‘the justification for the existence of broadcasting SGEIs in the national audiovisual sector’. There is ‘no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator’, T-442/03, SIC v Commission, paragraph 211.
48. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Amsterdam Protocol — the ‘democratic, social and cultural needs of each society’. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

49. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit.

6.2. Entrustment and supervision

50. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).

51. The entrustment act(s) shall specify the precise nature of the public service obligations in line with Section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

52. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment Act(s) should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in Part 6.7 below, before the original entrustment Act is formally consolidated.

53. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission’s communication on the principles and guidelines for the Community’s audiovisual policy in the digital era, it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit.

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.

55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

6.3. Choice of funding of public service broadcasting

56. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

(\(^41\)) Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgment of the Court in Case C-195/06 KommAustria v ORF of 18 October 2007.


(\(^43\)) COM(1999) 657 final, Section 3(6).

(\(^44\)) See judgment in the Case T-442/03 SIC/Commission (2008) at 212.
57. Funding schemes can be divided into two broad categories ‘single-funding’ and ‘dual-funding’. The ‘single-funding’ category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. ‘Dual-funding’ systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.

58. As stated in the Amsterdam Protocol: ‘The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...)’. The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.

59. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the State funding does not affect competition in the common market in a disproportionate manner, as referred to in paragraph 38 above.

6.4. Transparency requirements for the State aid assessment

60. The State aid assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.

61. Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Amsterdam Protocol.

62. Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i.e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established (45).

63. These general transparency requirements apply also to broadcasters, insofar as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.

64. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.

65. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.

66. Costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.

(45) Article 4 of Directive 2006/111/EC.
67. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities \(^{(46)}\). In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

68. The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.

69. The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

6.5. **Net cost principle and overcompensation**

70. As a matter of principle, since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State subject to the clarifications provided in the present chapter with regard to public service broadcasting.

71. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

72. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission \(^{(47)}\). However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

73. Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as public service reserves) to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

\(^{(46)}\) This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

\(^{(47)}\) Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.
74. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.

75. In order to allow the Commission to exercise its duties, Member States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.

76. The overcompensation mentioned above shall be used for the purpose of financing public service activities, only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

6.6. Financial control mechanisms

77. Member States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of ‘public service reserves’. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

78. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Member States shall make sure that effective measures can be put in place to recover over-compensation going beyond the provisions of the previous Chapter 6.5 and cross-subsidisation.

79. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the Member States, or in the absence thereof, a time period which normally should not exceed four years. Any ‘public service reserves’ existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of ‘public service reserves’ exceeding 10% of the annual public service costs on a recurring basis, Member States shall review whether the level of funding is adjusted to the public service broadcasters’ actual financial needs.

6.7. Diversification of public broadcasting services

80. In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.

81. In this respect, the Commission considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

82. In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).
83. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services — while having an impact on access by viewers (49) — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities (50). The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public service broadcasters with such a service as part of their public service remit.

84. As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Amsterdam Protocol are met. To this end, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.

85. It is up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as ‘significant new service’. The ‘new’ nature of an activity may depend among others on its content as well as on the modalities of consumption (49). The ‘significance’ of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.

86. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.

87. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.

88. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in

(49) As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, ‘(...) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...)’ When developing new funding systems, Member States should pay due attention to the nature of the content provided in the interest of the public and in the common interest.’

(50) For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.
terms of serving the social, democratic and cultural needs of society (52), taking also into account the existing overall public service offer.

89. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.

90. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.

91. The Commission considers that the above assessment at the national level will contribute to ensuring compliance with the EC State aid rules. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.8. Proportionality and market behaviour

92. In accordance with the Amsterdam Protocol, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Commission invites Member States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

93. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.

94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event 'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest' and thus infringe the Amsterdam Protocol.

95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights (53), shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

96. The Commission considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

(52) See also at footnote 40 on the justification of a broadcasting SGEI.

(53) For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.
7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the Official Journal of the European Union. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting.

99. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.

100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (\(^{(54)}\)), the Commission will apply, in the case of non-notified aid,

(a) this Communication, if the aid was granted after its publication;

(b) the 2001 Communication in all other cases.

\(^{(54)}\) OJ C 119, 22.5.2002, p. 22.
COMMISSION COMMUNICATION
relating to the methodology for analysing State aid linked to stranded costs

1. INTRODUCTION

European Parliament and Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity\(^1\) laid down the principles for opening up the European electricity industry to competition. The Commission attaches utmost importance to deepening the common market in electricity, this being a significant step towards completing the internal market in energy.

The gradual transition from a situation of largely restricted competition to one of genuine competition at European level must take place under acceptable economic conditions that take account of the specific characteristics of the electricity industry. This concern is already reflected to a very large extent in the text of the Directive itself.

In order to enable them to cope with a number of very specific situations, Article 24 allows Member States to defer application of some of the provisions of the Directive for a transitional period. A number of Member States also wish to introduce State aid mechanisms designed to allow their electricity undertakings to adapt to the introduction of competition under favourable conditions; such aid mechanisms do not fall within the scope of the derogations provided for in Article 24.

The purpose of this Notice is to clarify how the Commission intends, in the light of Directive 96/92/EC, to apply the rules of the Treaty to State aid of this kind.

This Notice does not prejudice the rules on State aid that result from the ECSC Treaty, the Euratom Treaty and the relevant Commission frameworks, guidelines or notices. In particular, the Commission will continue to authorise regional aid and environmental aid in accordance with the respective guidelines. Similarly, aid that could not be authorised under Article 87 of the EC Treaty will, where appropriate, be open to examination in the light of Article 86(2).

2. TRANSITIONAL MEASURES AND STATE AID

With the exception of Belgium, Greece and Ireland, the Member States were required to transpose Directive 96/92/EC into national law by 19 February 1999 at the latest. Belgium and Ireland were required to do so by 19 February 2000 at the latest and Greece by 19 February 2001 at the latest.

Article 24 of the Directive stipulates, however, that transitional measures derogating temporarily from the Directive may be authorised by the Commission:

“1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapters IV, VI and VII of this Directive. Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.”

Most Member States wished to avail themselves of Article 24 and have, therefore, notified the Commission of transitional measures. It transpires that in several Member States the measures notified do not fall within the scope of Article 24.

Given the present state of play, the Commission considers that decisions taken by it pursuant to Article 24 can create a transitional regime only where it has previously found that the measures notified by the Member States pursuant to that Article are incompatible with the Directive’s provisions set out in Chapters IV, V, VI and VII. Under Article 24, the Commission alone may authorise derogations from those provisions.

Accordingly, a system of levies introduced by a Member State via a fund to offset the costs of commitments or guarantees that might not be honoured on account of the application of Directive 96/92/EC does not constitute a measure that could benefit from a Commission decision granting a transitional regime under Article 24 of that Directive; such a measure does not require a derogation from the relevant chapters of the Directive. It may, on the other hand, constitute State aid, which is covered by Articles 87 and 88 of the Treaty, without prejudice to the ECSC and Euratom Treaties.

The purpose of this Notice is to show how the Commission intends to apply the Treaty rules on State aid in the case of aid measures designed to compensate for the cost of commitments or guarantees that it might no longer be possible to honour on account of Directive 96/92/EC. In particular, the Notice does not apply to measures that could not be classified as State aid within the meaning of

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Article 87(1) of the EC Treaty pursuant to the ruling of the Court of Justice of 13 March 2001 in Case C-379/98, PreussenElektra AG v Schleswag AG.

3. **DEFINITION OF ELIGIBLE STRANDED COSTS**

Such commitments or guarantees of operation are normally referred to as “stranded costs”. They may, in practice, take a variety of forms: long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, investments undertaken outside the scope of normal activity, etc. In order to rank as eligible stranded costs that could be recognised by the Commission, such commitments or guarantees must satisfy the following criteria:

3.1 The “commitments or guarantees of operation” that could give rise to stranded costs must predate 19 February 1997, the date of entry into force of Directive 96/92/EC.

3.2 The existence and validity of such commitments or guarantees will be substantiated in the light of the underlying legal and contractual provisions and of the legislative context in which they were made.

3.3 Such commitments or guarantees of operation must run the risk of not being honoured on account of the provisions of Directive 96/92/EC. In order to qualify as stranded costs, commitments or guarantees must consequently become non-economical on account of the effects of the Directive and must significantly affect the competitiveness of the undertaking concerned. Among other things, this must result in that undertaking’s making accounting entries (e.g. provisions) designed to reflect the foreseeable impact of the commitment or guarantee.

Especially where, as a result of the commitments or guarantees in question, the viability of the undertakings might be jeopardised in the absence of aid or any transitional measures, the commitments or guarantees are deemed to meet the requirements laid down in the preceding paragraph.

The effect of such commitments or guarantees on the competitiveness or viability of the undertakings concerned will be assessed at the consolidated level. For commitments or guarantees to constitute stranded costs, it must be possible to establish a cause-and-effect relationship between the entry into force of Directive 96/92/EC and the difficulty that the undertakings concerned have in honouring or securing compliance with such commitments or guarantees. In order to establish such cause-and-effect relationship, the Commission will take into account any fall in electricity prices or market share losses suffered by the undertakings concerned. Commitments or guarantees that could not have been honoured irrespective of the entry into force of the Directive do not constitute stranded costs.

3.4 Such commitments or guarantees must be irrevocable. Should an undertaking have the possibility of revoking against payment, or modifying, such commitments or guarantees, account will have to be taken of this fact in calculating the eligible stranded costs.

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3 [2001] ECR I- ....
3.5 Commitments or guarantees linking enterprises belonging to one and the same group cannot, as a rule, qualify as stranded costs.

3.6 Stranded costs are economic costs that must correspond to the actual sums invested, paid or payable by virtue of the commitments or guarantees from which they result: flat-rate calculations cannot, therefore, be accepted unless it can be shown that they reflect economic realities.

3.7 Stranded costs must be net of the income, profits or added value associated with the commitments or guarantees from which they arise.

3.8 Stranded costs must be valued net of any aid paid or payable in respect of the assets to which they relate. In particular, where a commitment or a guarantee of operation corresponds to an investment which is the subject of State aid, the value of the aid must be deducted from any stranded costs resulting from the commitment or guarantee.

3.9 Wherever stranded costs arise from commitments or guarantees that are difficult to honour on account of Directive 96/92/EC, calculation of the eligible stranded costs will take account of the actual change over time in the economic and competitive conditions prevailing on the national and Community electricity markets. In particular, where commitments or guarantees could constitute stranded costs because of the foreseeable fall in electricity prices, calculation of the stranded costs must take account of actual movements in electricity prices.

3.10 Costs depreciated before the transposition of Directive 96/92/EC into national law cannot give rise to stranded costs. However, provisions or depreciation of assets entered in the balance sheet of the undertakings concerned with the explicit aim of taking account of the foreseeable effects of the Directive may correspond to stranded costs.

3.11 Eligible stranded costs may not exceed the minimum level necessary to allow the undertakings concerned to continue to honour or secure compliance with the commitments or guarantees called into question by Directive 96/92/EC. Consequently, they will have to be calculated by taking into account the most economic solution (in the absence of any aid) from the point of view of the undertakings concerned. This may involve, among other things, the termination of commitments or guarantees giving rise to stranded costs or the disposal of all or some of the assets giving rise to stranded costs (where this does not run counter to the very principles of the commitments or guarantees themselves).

4 In the case of a long-term contract of sale or purchase, the stranded costs will, therefore, be calculated by comparison with the conditions on which, in a liberalised market, the undertaking would normally have been able to sell or purchase the product under consideration, all things being equal.
3.12 Costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive (18 February 2006) cannot, as a rule, constitute eligible stranded costs within the meaning of this methodology. However, if it appears necessary, the Commission may in due course take into account such commitments or guarantees and, if appropriate, consider them as eligible stranded costs during the next stage of opening up the Community electricity market.

For Member States which open up their market more quickly than is required by the Directive, the Commission may agree to regard as eligible stranded costs under this methodology costs which some undertakings may have to bear after the time horizon indicated in Article 26 of the Directive if such costs result from commitments or guarantees which meet the criteria under points 3.1. to 3.12. and provided that they are limited to a period not extending beyond 31 December 2010.

4. STRANDED COSTS AND STATE AID

The general principle laid down in Article 87(1) of the EC Treaty is that State aid is prohibited. However, paragraphs 2 and 3 of that Article provide for a number of derogations from this general rule. Furthermore, in accordance with Article 86(2), “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-enhancing monopoly” are subject to the rules contained in the Treaty, in particular the rules on competition, in so far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In any event, trade must not be affected to an extent contrary to the interests of the Community.

The State aid corresponding to the eligible stranded costs defined in this Notice is designed to facilitate the transition for electricity undertakings to a competitive electricity market. The Commission may take a favourable view of such aid to the extent that the distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a Community objective which market forces could not achieve. Indeed, the distortion of competition that results from aid paid to facilitate the transition for electricity undertakings from a largely closed market to one that has been partially liberalised cannot be contrary to the common interest where it is limited in time and in its effects, since liberalisation of the electricity market is in the general interest of the common market in accordance with Articles 2 and 3(1)(t) of the EC Treaty and supplements moves to establish the internal market. The Commission also takes the view that aid granted for stranded costs enables electricity undertakings to reduce the risks relating to their historic commitments or investments and may thus encourage them to maintain their investments in the long term. Finally, if there were no compensation for stranded costs, there would be a greater risk that the undertakings concerned

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It must be understood that investments which cannot be recouped or are not economically viable as a result of the liberalisation of the internal market in electricity may constitute stranded costs within the meaning of this methodology, including in cases where they are, in principle, to extend beyond 2006. Furthermore, commitments or guarantees which must absolutely continue to be honoured after 18 February 2006 because failure to do so might give rise to major risks concerning protection of the environment, public safety, social protection of workers or the security of the electricity network may, if duly justified, constitute eligible stranded costs according to this methodology.
might pass on the entire cost of their non-economical commitments or guarantees to their captive customers.

Aid to compensate for stranded costs in the electricity industry can be further justified in relation to other liberalised sectors by the fact that liberalisation of the electricity market has not been accompanied by either faster technological progress or increased demand and by the fact that it is hardly conceivable, in the interests of environmental protection, security of supply and the smooth operation of the Community’s economy, to wait until electricity undertakings encounter difficulties before considering whether to grant them state support.

In this context, the Commission takes the view that aid designed to offset stranded costs normally qualifies for the derogation under Article 87(3)(c) if it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

Without prejudice to the specific provisions resulting from the ECSC and Euratom Treaties and from the Commission notices on State aid, including the Guidelines on State aid for environmental protection, the Commission may, in principle, accept as being compatible with Article 87(3)(c) of the EC Treaty aid designed to offset eligible stranded costs which satisfied the following criteria:

4.1 The aid must serve to offset eligible stranded costs that have been clearly determined and isolated. It may under no circumstances exceed the amount of the eligible stranded costs.

4.2 The arrangements for paying the aid must allow account to be taken of future developments in competition. Such developments may be gauged in particular by way of quantifiable factors (prices, market shares, other relevant factors indicated by the Member State). Since changes in the conditions of competition have a direct effect on the amount of eligible stranded costs, the amount of the aid paid will necessarily be conditional on the development of genuine competition, and the calculation of aid paid over time will have to take account of changes in the relevant factors in order to gauge the degree of competition achieved.

4.3 The Member State must undertake to send to the Commission an annual report that, in particular, describes developments in the competitive situation on its electricity market by indicating among other things the changes observed in the relevant quantifiable factors. The annual report will give details of how the stranded costs taken into account for the relevant year have been calculated and will specify the amounts of aid paid.

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6 OJ C 72, 10.3.1994, p. 3.
4.4 The degressive nature of aid intended to offset stranded costs will be viewed favourably by the Commission when making its assessment; it will, in fact, help the undertaking concerned to speed up its preparations for a liberalised electricity market.

4.5 The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance. It must take account of productivity gains that may be achieved by the undertaking.

Similarly, the detailed arrangements for calculating and financing aid designed to offset stranded costs and the maximum period for which such aid can be granted must be clearly spelt out in advance. Notification of the aid will specify in particular how calculation of the stranded costs will take account of changes in the various factors mentioned in point 4.2.

4.6 In order to avoid any cumulation of aid, the Member State will undertake in advance not to pay any rescue or restructuring aid to undertakings that are to benefit from aid in respect of stranded costs. The Commission takes the view that the payment of compensation for stranded costs linked to investments in assets that offer no prospects of long-term viability does not facilitate the transition of the electricity industry to a liberalised market and cannot therefore qualify for the derogation under Article 87(3)(c) of the EC Treaty.

However, the Commission entertains the most serious misgivings regarding aid intended to offset stranded costs which do not satisfy the above criteria or which are likely to give rise to distortions of competition contrary to the common interest for the following reasons:

4.7 The aid is not linked to eligible stranded costs that meet the above definition or to clearly defined and individualised stranded costs or exceeds the amount of eligible stranded costs.

4.8 The aid is intended to safeguard all or some of the income pre-dating the entry into force of Directive 96/92/EC, without taking strictly into account the eligible stranded costs that might result from the introduction of competition.

4.9 The amount of aid is not likely to be adjusted to take due account of the differences between the economic and market assumptions initially made when estimating stranded costs and real changes in them over time.

5. METHOD OF FINANCING AID INTENDED TO OFFSET STRANDED COSTS

Member States are free to choose the methods of financing aid intended to offset stranded costs which they consider to be the most appropriate. However, in order to authorise such aid, the Commission will make sure that the financing arrangements do not give rise to effects that conflict with the objectives of Directive 96/92/EC or with the Community interest. The Community interest takes into account, among other things, consumer protection, free movement of goods and services, and competition.

Consequently, the financing arrangements must not have the effect of deterring outside undertakings or new players from entering certain national or regional
markets. In particular, aid intended to offset stranded costs cannot be financed out of levies on electricity in transit between Member States or from levies linked to the distance between the producer and the consumer.

The Commission will also ensure that the arrangements for financing aid intended to offset stranded costs result in fair treatment for eligible and non-eligible consumers. To this end, the annual report referred to in point 4.3 will give the breakdown by eligible and non-eligible consumers of the sources of finance intended to offset the stranded costs. Where non-eligible consumers participate in the financing of stranded costs directly through the tariff for the purchase of electricity, this must be clearly stated. The contribution imposed on either group (eligible or non-eligible) must not exceed the proportion of stranded costs to be offset that corresponds to the market share accounted for by those consumers.

Where funds are raised by private undertakings with a view to financing aid mechanisms designed to offset stranded costs, the management of those funds will have to be clearly separate from that of the normal resources of those undertakings. Such investments must not benefit the undertakings managing them.

6. OTHER ASSESSMENT FACTORS

In examining State aid intended to offset stranded costs, the Commission takes particular account of the size and level of interconnection of the network concerned and of the structure of the electricity industry. Aid for a small network with a low degree of interconnection with the rest of the Community will be less likely to give rise to substantial distortions of competition.

This methodology for stranded costs is without prejudice to the application, in the regions covered by Article 87(3)(a), of the guidelines on national regional aid. Pursuant to Article 86(2) of the EC Treaty, where application of the rules on State aid to stranded costs obstructs the performance, in law or in fact, of the particular tasks assigned to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, those rules may be derogated from provided that trade is not affected to an extent contrary to the interests of the Community.

The rules laid down in this methodology for State aid intended to offset stranded costs arising from Directive 96/92/EC apply independently of the public or private ownership of the undertakings concerned.

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Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services

(98/C 39/02)

(Text with EEA relevance)

PREFACE

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services (1) and of a communication to the European Parliament and the Council, setting out the results of the consultations on the Green Paper and the measures advocated by the Commission (2), a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community. By Resolution of 7 February 1994 on the development of Community postal services (3), the Council invited the Commission to propose measures defining a harmonised universal service and the postal services which could be reserved. In July 1995, the Commission proposed a package of measures concerning postal services which consisted of a proposal for a Directive of the European Parliament and the Council on common rules for the development of Community postal services and the improvement of quality of service (4) and a draft of the present Notice on the application of the competition rules (5).

This notice, which complements the harmonisation measures proposed by the Commission, builds on the results of those discussions in accordance with the principles established in the Resolution of 7 February 1994. It takes account of the comments received during the public consultation on the draft of this notice published in December 1995, of the European Parliament’s resolution (6) on this draft adopted on 12 December 1996, as well as of the discussions on the proposed Directive in the European Parliament and in Council.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of new employment in the sector. As recognized by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the post sector (7). The Court stated that 'in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition' and that those rules 'must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject 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.' Questions are therefore frequently put to the Commission on the attitude it intends to take, for purposes of the implementation of the competition rules contained in the Treaty, with regard to the behaviour of postal operators and with regard to State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

This notice sets out the Commission’s interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Furthermore, this Notice sets out the approach the Commission intends to take when applying the competition rules to the behaviour of postal operators and when assessing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules and other rules of the Treaty. In addition, it addresses the issue of non-discriminatory access to the postal network and the safeguards required to ensure fair competition in the sector.

(1) COM(91) 476 final.
(2) 'Guidelines for the development of Community postal services' (COM(93) 247 of 2 June 1993).
(3) OJ C 48, 16.2.1994, p. 3.

Especially on account of the development of new postal services by private and public operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organisations to what is considered necessary for the realisation of the public-interest objective. At the same time, the Commission is faced with a growing number of complaints and cases under competition law on which it must take position. At this stage, a notice is therefore the appropriate instrument to provide guidance to Member States and postal operators, including those enjoying special or exclusive rights, to ensure correct implementation of the competition rules. This Notice, although it cannot be exhaustive, aims to provide the necessary guidance for the correct interpretation, in particular, of Articles 59, 85, 86, 90, and 92 of the Treaty in individual cases. By issuing the present notice, the Commission is taking steps to bring transparency and to facilitate investment decisions of all postal operators, in the interest of the users of postal services in the European Union.

As the Commission explained in its communication of 11 September 1996 on 'Services of general interest in Europe' (1), solidarity and equal treatment within a market economy are fundamental Community objectives. Those objectives are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices, and many of them even view services of general interest as social rights.

As regards, in particular, the postal sector, consumers are becoming increasingly assertive in exercising their rights and wishes. Worldwide competition is forcing companies using such services to seek out better price deals comparable to those enjoyed by their competitors. New technologies, such as fax or electronic mail, are putting enormous pressures on the traditional postal services. Those developments have given rise to worries about the future of those services accompanied by concerns over employment and economic and social cohesion. The economic importance of those services is considerable. Hence the importance of modernising and developing services of general interest, since they contribute so much to European competitiveness, social solidarity and quality of life.

The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality and lower prices, while at the same time helping, through its policies, to strengthen economic and social cohesion between the Member States and to reduce certain inequalities. Postal services have a key role to play here. The Community is committed to promoting their functions of general economic interest, as solemnly confirmed in the new Article 7d, introduced by the Amsterdam Treaty, while improving their efficiency. Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, those mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion in the Union may not be attained. The public authority must then ensure that the general interest is taken into account.

The traditional structures of some services of general economic interest, which are organised on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even where they are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The real challenge is to ensure smooth interplay between the requirements of the single market in terms of free movement, economic performance and dynamism, free competition, and the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a difficult balancing act, since the goalposts are constantly moving: the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements.

The basic concept of universal service, which was originated by the Commission (1), is to ensure the provision of high-quality service to all prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. Those criteria are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. Universal service is the expression in Europe of the requirements

(1) COM(96) 443 final.

(*) See footnote 8.
and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

High-quality universal postal services are of great importance for private and business customers alike. In view of the development of electronic commerce their importance will even increase in the very near future. Postal services have a valuable role to play here.

As regards the postal sector, Directive 97/67/EC has been adopted by the European Parliament and the Council (hereinafter referred to as 'the Postal Directive'). It aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets in a controlled way.

The aim of the Postal Directive is to safeguard the postal service as a universal service in the long term. It imposes on Member States a minimum harmonised standard of universal services including a high-quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as catalogues and parcels within certain price and weight limits. It also covers registered and insured (valeur déclarée) items and applies to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

To guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service. The scope of the reserved sector has been harmonised in the Postal Directive. According to the Postal Directive, Member States can only grant exclusive rights for the provision of postal services to the extent that this is necessary to guarantee the maintenance of the universal service. Moreover, the Postal Directive establishes the maximum scope that Member States may reserve in order to achieve this objective. Any additional funding which may be required for the universal service may be found by writing certain obligations into commercial operator's franchises; for example, they may be required to make financial contributions to a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries, as foreseen in Article 9 of the Postal Directive.

The Postal Directive lays down a minimum common standard of universal services and establishes common rules concerning the reserved area. It therefore increases legal certainty as regards the legality of some exclusive and special rights in the postal sector. There are, however, State measures that are not dealt with in it and that can be in conflict with the Treaty rules addressed to Member States. The autonomous behaviour of the postal operators also remains subject to the competition rules in the Treaty.

Article 90(2) of the Treaty provides that suppliers of services of general interest may be exempted from the rules in the Treaty, to the extent that the application of those rules would obstruct the performance of the general interest tasks for which they are responsible. That exemption from the Treaty rules is however subject to the principle of proportionality. That principle is designed to ensure the best match between the duty to provide general interest services and the way in which the services are actually provided, so that the means used are in proportion to the ends pursued. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the technical and budgetary constraints that may vary from one sector to another. It also makes for the best possible interaction between market efficiency and general interest requirements, by ensuring that the means used to satisfy the requirements do not unduly interfere with the smooth running of the single European market and do not affect trade to an extent that would be contrary to the Community interest (16).

The application of the Treaty rules, including the possible application of the Article 90(2) exemption, as regards both behaviour of undertakings and State measures can only be done on a case-by-case basis. It seems, however, highly desirable, in order to increase legal certainty as regards measures not covered by the Postal Directive, to explain the Commission's interpretation of the Treaty and the approach that it aims to follow in its future application of those rules. In particular, the Commission considers that, subject to the provisions of Article 90(2) in relation to the provision of the universal service, the application of the Treaty rules would promote the competitiveness of the undertakings active in the postal sector, benefit consumers and contribute in a positive way to the objectives of general interest.

The postal sector in the European Union is characterised by areas which Member States have reserved in order to guarantee universal service and which are now being

harmonised by the Postal Directive in order to limit
distortive effects between Member States. The
Commission must, according to the Treaty, ensure that
postal monopolies comply with the rules of the Treaty,
and in particular the competition rules, in order to
ensure maximum benefit and limit any distortive effects
for the consumers. In pursuing this objective by applying
the competition rules to the sector on a case-by-case
basis, the Commission will ensure that monopoly power
is not used for extending a protected dominant position
into liberalised activities or for unjustified discrimination
in favour of big accounts at the expense of small users.
The Commission will also ensure that postal monopolies
granted in the area of cross-border services are not used
for creating or maintaining illicit price cartels harming
the interest of companies and consumers in the European
Union.

This notice explains to the players on the market the
practical consequences of the applicability of the
competition rules to the postal sector, and the possible
derogations from the principles. It sets out the position
the Commission would adopt, in the context set by the
continuing existence of special and exclusive rights
as harmonised by the Postal Directive, in assessing
individual cases or before the Court of Justice in
cases referred to the Court by national courts under
Article 177 of the Treaty.

1. DEFINITIONS

In the context of this notice, the following defini-
tions shall apply (*):

'postal services': services involving the clearance,
sorting, transport and delivery of postal items;

'public postal network': the system of organisation
and resources of all kinds used by the universal service
provider(s) for the purposes in particular of:

— the clearance of postal items covered by a
universal service obligation from access points
throughout the territory,

— the routing and handling of those items from the
postal network access point to the distribution
centre,

— distribution to the addresses shown on items;

'access points': physical facilities, including letter
boxes provided for the public either on the public
highway or at the premises of the universal service
provider, where postal items may be deposited with
the public postal network by customers;

'clearance': the operation of collecting postal items
deposited at access points;

'distribution': the process from sorting at the
distribution centre to delivery of postal items to their
addresses;

'postal item': an item addressed in the final form in
which it is to be carried by the universal service
provider. In addition to items of correspondence,
such items also include for instance books, cata-
logues, newspapers, periodicals and postal packages
containing merchandise with or without commercial
value;

'item of correspondence': a communication in written
form on any kind of physical medium to be
conveyed and delivered at the address indicated by
the sender on the item itself or on its wrapping.
Books, catalogues, newspapers and periodicals shall
not be regarded as items of correspondence;

'direct mail': a communication consisting solely of
advertising, marketing or publicity material and
comprising an identical message, except for the
addressee’s name, address and identifying number as
well as other modifications which do not alter the
nature of the message, which is sent to a significant
number of addresses, to be conveyed and delivered
at the address indicated by the sender on the item
itself or on its wrapping. The National Regulatory
Authority should interpret the term 'significant
number of addressees' within each Member State
and publish an appropriate definition. Bills, invoices,
financial statements and other non-identical
messages should not be regarded as direct mail. A
communication combining direct mail with other
items within the same wrapping should not be
regarded as direct mail. Direct mail includes cross-
border as well as domestic direct mail;

'document exchange': provision of means, including
the supply of ad hoc premises as well as transpor-
tation by a third party, allowing self-delivery by

(*): The definitions will be interpreted in the light of the Postal
Directive and any changes resulting from review of that
Directive.
mutual exchange of postal items between users subscribing to this service;

'express mail service': a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and addressee in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an à la carte service, as and when required. Customers are in principle prepared to pay a higher price for this service;

'universal service provider': the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission;

'exclusive rights': rights granted by a Member State which reserve the provision of postal services to one undertaking through any legislative, regulatory or administrative instrument and reserve to it the right to provide a postal service, or to undertake an activity, within a given geographical area;

'special rights': rights granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

— limits, on a discretionary basis, to two or more the number of such undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings as undertakings authorised to provide a service or undertake an activity, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or undertake the same activity in the same geographical area under substantially comparable conditions;

'terminal dues': the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country;

'intermediary': any economical operator who acts between the sender and the universal service provider, by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country;

'national regulatory authority': the body or bodies, in each Member State, to which the Member State entrusts, inter alia, the regulatory functions falling within the scope of the Postal Directive;

'essential requirements': general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services (3). These reasons are: the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.

2. MARKED DEFINITION AND POSITION ON THE POSTAL MARKET

a) Geographical and product market definition

2.1. Articles 85 and 86 of the Treaty prohibit as incompatible with the common market any conduct by one or more undertakings that may negatively affect trade between Member States which involves the prevention, restriction, or distortion of competition and/or an abuse of a dominant position within the common market or a substantial part of it. The territories of the Member States constitute separate geographical markets with regard to the delivery of domestic mail and also with regard to the domestic delivery of inward cross-border mail, owing primarily to the exclusive rights of the operators

(3) The meaning of this important phrase in the context of Community competition law is explained in paragraph 5.3.
referred to in point 4.2 and to the restrictions imposed on the provision of postal services. Each of the geographical markets constitutes a substantial part of the common market. For the determination of 'relevant market', the country of origin of inward cross-border mail is immaterial.

2.2. As regards the product markets, the differences in practice between Member States demonstrate that recognition of several distinct markets is necessary in some cases. Separation of different product-markets is relevant, among other things, to special or exclusive rights granted. In its assessment of individual cases on the basis of the different market and regulatory situations in the Member States and on the basis of a harmonised framework provided by the Postal Directive, the Commission will in principle consider that a number of distinct product markets exist, like the clearance, sorting, transport and delivery of mail, and for example direct mail, and cross-border mail. The Commission will take into account the fact that these markets are wholly or partly liberalised in a number of Member States. The Commission will consider the following markets when assessing individual cases.

2.3. The general letter service concerns the delivery of items of correspondence to the addresses shown on the items.

It does not include self-provision, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail.

Also excluded, in accordance with practice in many Member States, are such postal items as are not considered items of correspondence, since they consist of identical copies of the same written communication and have not been altered by additions, deletions or indications other than the name of the addressee and his address. Such items are magazines, newspapers, printed periodicals catalogues, as well as goods or documents accompanying and relating to such items.

Direct mail is covered by the definition of items of correspondence. However, direct mail items do not contain personalised messages. Direct mail addresses the needs of specific operators for commercial communications services, as a complement to advertising in the media. Moreover, the senders of direct mail do not necessarily require the same short delivery times, priced at first-class letter tariffs, asked for by customers requesting services on the market as referred to above. The fact that both services are not always directly interchangeable indicates the possibility of distinct markets.

2.4. Other distinct markets include, for example, the express mail market, the document exchange market, as well as the market for new services (services quite distinct from conventional services). Activities combining the new telecommunications technologies and some elements of the postal services may be, but are not necessarily, new services within the meaning of the Postal Directive. Indeed, they may reflect the adaptability of traditional services.

A document exchange differs from the market referred to in point 2.3 since it does not include the collection and the delivery to the addressee of the postal items transported. It involves only means, including the supply of ad hoc premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service. The users of a document exchange are members of a closed user group.

The express mail service also differs from the market referred to in point 2.3 owing to the value added by comparison with the basic postal service. In addition to faster and more reliable collection, transportation and delivery of the postal items, an express mail service is characterised by the provision of some or all of the following supplementary services: guarantee of delivery by a given date; collection from the sender's address; delivery to the addressee in person; possibility of a change of destination and addressee in transit; confirmation to the sender of delivery; tracking and tracing; personalised treatment for customers and the offer of a range of services according to requirements. Customers are in principle prepared to pay a higher price for this service. The reservable services as defined in the Postal Directive may include accelerated delivery of items of domestic correspondence falling within the prescribed price and weight limits.

2.5. Without prejudice to the definition of reservable services given in the Postal Directive, different activities can be recognised, within the general letter service, which meet distinct needs and should in principle be considered as different markets; the markets for the clearance and for the sorting of mail, the market for the transport of mail and, finally, the delivery of mail (domestic or inward cross-border). Different categories of customers must be distinguished in this respect. Private customers demand the distinct products or services as one integrated service. However, business customers, which represent most of the revenues of the operators referred to in point 4.2, actively pursue the possibilities of substituting for distinct components of the final service alternative solutions (with regard to quality of service levels and/or costs incurred) which are in some cases provided by, or sub-contracted to, different operators. Business customers want to balance the advantages and disadvantages of self-provision versus provision by the postal operator. The existing monopolies limit the external supply of those individual services, but they would otherwise limit the external supply of those individual according to market conditions. That market reality supports the opinion that clearance, sorting, transport and delivery of postal items constitute different markets. From a competition-law point of view, the distinction between the four markets may be relevant.

That is the case for cross-border mail where the clearance and transport will be done by a postal operator other than the one providing the distribution. This is also the case as regards domestic mail, since most postal operators permit major customers to undertake sorting of bulk traffic in return for discounts, based on their public tariffs. The deposit and collection of mail and method of payment also vary in these circumstances. Mail rooms of larger companies are now often operated by intermediaries, which prepare and pre-sort mail before handing it over to the postal operator for final distribution. Moreover, all postal operators allow some kind of downstream access to distribution. Moreover, all postal operators allow some kind of downstream access to their postal network, for instance by allowing or even demanding (sorted) mail to be deposited at an expediting or sorting centre. This permits in many cases a higher reliability (quality of service) by bypassing any sources of failure in the postal network upstream.

(b) Dominant position

2.6. Since in most Member States the operator referred to in point 4.2 is, by virtue of the exclusive rights granted to him, the only operator controlling a public postal network covering the whole territory of the Member State, such an operator has a dominant position within the meaning of Article 86 of the Treaty on the national market for the distribution of items of correspondence. Distribution is the service to the user which allows for important economies of scale, and the operator providing this service is in most cases also dominant on the markets for the clearance, sorting and transport of mail. In addition, the enterprise which provides distribution, particularly if it also operates post office premises, has the important advantage of being regarded by the users as the principal postal enterprise, because it is the most conspicuous one, and is therefore the natural first choice. Moreover, this dominant position also includes, in most Member States, services such as registered mail or special delivery services, and/or some sectors of the parcels market.

(c) Duties of dominant postal operators

2.7. According to point (b) of the second paragraph of Article 86 of the Treaty, an abuse may consist in limiting the performance of the relevant service to the prejudice of its consumers. Where a Member State grants exclusive rights to an operator referred to in point 4.2 for services which it does not offer, or offers in conditions not satisfying the needs of customers in the same way as the services which competitive economic operators would have offered, the Member State induces those operators, by the simple exercise of the exclusive right which has been conferred on them, to limit the supply of the relevant service, as the effective exercise of those activities by private companies is, in this case, impossible. This is particularly the case where measures adopted to protect the postal service restrict the provision of other distinct services on distinct or neighbouring markets such as the express mail market. The Commission has requested several Member States to abolish restrictions resulting from exclusive rights regarding the provision of express mail services by international couriers.

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(\(^{(*)}\) See Commission Notice on the definition of the relevant market for the purpose of the application of Community competition law (OJ C 372, 9.12.1997, p. 5).)

(\(^{(*)}\) See footnote 13.)
Another type of possible abuse involves providing a seriously inefficient service and failing to take advantage of technical developments. This harms customers who are prevented from choosing between alternative suppliers. For instance, a report prepared for the Commission in 1994 showed that, where they have not been subject to competition, the public postal operators in the Member States have not made any significant progress since 1990 in the standardisation of dimensions and weights. The report also showed that some postal operators practised hidden cross-subsidies between reserved and non-reserved services (see points 3.1 and 3.4), which explained, according to that study, most of the price disparities between Member States in 1994, especially penalising residential users who do not qualify for any discounts schemes, since they make use of reserved services that are priced at a higher level than necessary.

The examples given illustrate the possibility that, where they are granted special or exclusive rights, postal operators may let the quality of the service decline and omit to take necessary steps to improve service quality. In such cases, the Commission may be induced to act taking account of the conditions explained in point 8.3.

As regards cross-border postal services, the study referred to above showed that the quality of those services needed to be improved significantly in order to meet the needs of customers, and in particular of residential customers who cannot afford to use the services of courier companies or facsimile transmission instead. Independent measurements carried out in 1995 and 1996 show an improvement of quality of service since 1994. However, those measurements only concern first class mail, and the most recent measurements show that the quality has gone down slightly again.

The majority of Community public postal operators have notified an agreement on terminal dues to the Commission for assessment under the competition rules of the Treaty. The parties to the agreement have explained that their aim is to establish fair compensation for the delivery of cross-border mail reflecting more closely the real costs incurred and to improve the quality of cross-border mail services.

2.8. Unjustified refusal to supply is also an abuse prohibited by Article 86 of the Treaty. Such behaviour would lead to a limitation of services within the meaning of Article 86, second paragraph, (b) and, if applied only to some users, result in discrimination contrary to Article 86, second paragraph, (c), which requires that no dissimilar conditions be applied to equivalent transactions. In most of the Member States, the operators referred to in point 4.2 provide access at various access points of their postal networks to intermediaries. Conditions of access, and in particular the tariffs applied, are however, often confidential and may facilitate the application of discriminatory conditions, Member States should ensure that their postal legislation does not encourage postal operators to differentiate unjustifiably as regards the conditions applied or to exclude certain companies.

2.9. While a dominant firm is entitled to defend its position by competing with rivals, it has a special responsibility not to further diminish the degree of competition remaining on the market. Exclusionary practices may be directed against existing competitors on the market or intended to impede market access by new entrants. Examples of such illegal behaviour include: refusal to deal as a means of eliminating a competitor by a firm which is the sole or dominant source of supply of a product or controls access to an essential technology or infrastructure; predatory pricing and selective price cutting (see section 3); exclusionary dealing agreements; discrimination as part of a wider pattern of monopolizing conduct designed to exclude competitors; and exclusionary rebate schemes.
3. CROSS-SUBSIDISATION

(a) Basic principles

3.1. Cross-subsidisation means that an undertaking bears or allocates all or part of the costs of its activity in one geographical or product market to its activity in another geographical or product market. Under certain circumstances, cross-subsidisation in the postal sector, where nearly all operators provide reserved and non-reserved services, can distort competition and lead to competitors being beaten by offers which are made possible not by efficiency (including economies of scope) and performance but by cross-subsidies. Avoiding cross-subsidisation leading to unfair competition is crucial for the development of the postal sector.

3.2. Cross-subsidisation does not distort competition when the costs of reserved activities are subsidised by the revenue generated by other reserved services since there is no competition possible as to these services. This form of subsidisation may sometimes be necessary, to enable the operators referred to in point 4.2 to perform their obligation to provide a service universally, and on the same conditions to everybody (**). For instance, unprofitable mail delivery in rural areas is subsidised through revenues from profitable mail delivery in urban areas. The same could be said of subsidising the provision of reserved services through revenues generated by activities open to competition. Moreover, cross-subsidisation between non-reserved activities is not in itself abusive.

3.3. By contrast, subsidising activities open to competition by allocating their costs to reserved services is likely to distort competition in breach of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities covered by a monopoly would have to bear costs which are unrelated to the provision of those activities. Nonetheless, dominant companies too many compete on price, or improve their cash flow and obtain only partial contribution to their fixed (overhead) costs, unless the prices are predatory or go against relevant national or Community regulations.

(b) Consequences

3.4. A reference to cross-subsidisation was made in point 2.7; duties of dominant postal operators. The operators referred to in point 4.2 should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area. However, in some justified cases, subject to the provisions of Article 90(2), cross-subsidisation can be regarded as lawful, for example for cultural mail (**), as long as it is applied in a non discriminatory manner, or for particular services to the socially, medically and economically disadvantaged. When necessary, the Commission will indicate what other exemptions the Treaty would allow to be made. In all other cases, taking into account the indications given in point 3.3, the price of competitive services offered by the operator referred to in point 4.2 should, because of the difficulty of allocating common costs, in principle be at least equal to the average total costs of provision. This means covering the direct costs plus an appropriate proportion of the common and overhead costs of the operator. Objective criteria, such as volumes, time (labour) usage, or intensity of usage, should be used to determine the appropriate proportion. When using the turnover generated by the services involved as a criterion in a case of cross-subsidisation, allowance should be made for the fact that in such a scenario the turnover of the relevant activity is being kept artificially low. Demand-influenced factors, such as revenues or profits, are themselves influenced by predation. If services were offered systematically and selectively at a price below average total cost, the Commission would, on a case-by-case basis, investigate the matter under Article 86, or under Article 86 and Article 90(1) or under Article 92.

4. PUBLIC UNDERTAKINGS AND SPECIAL OR EXCLUSIVE RIGHTS

4.1. The treaty obliges the Member States, in respect of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor maintain in force any measures contrary to the

(**) See these Postal Directive, recitals 16 and 28, and Chapter 5.

(**) Referred to by UPU as ‘work of the mind’, comprising books, newspapers, periodicals and journals.
Treaty rules (Article 90(1)). The expression ‘undertaking’ includes every person or legal entity exercising an economic activity, irrespective of the legal status of the entity and the way in which it is financed. The clearance, sorting, transportation and distribution of postal items constitute economic activities, and these services are normally supplied for reward.

The term ‘public undertaking’ includes every undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ownership of it, their financial participation in it or the rules which govern it (\(^{(\text{\textsuperscript{\textcircled{\textast}}}1)}\)). A dominant influence on the part of the public authorities may in particular be presumed when the public authorities hold, directly or indirectly, the majority of the subscribed capital of the undertaking, control the majority of the voting rights attached to shares issued by the undertaking or can appoint more than half of the members of the administrative, managerial or supervisory body. Bodies which are part of the Member State’s administration and which provide in an organised manner postal services for third parties against remuneration are to be regarded as such undertakings. Undertakings to which special or exclusive rights are granted can, according to Article 90(1), be public as well as private.

4.2. National regulations concerning postal operators to which the Member States have granted special or exclusive rights to provide certain postal services are ‘measures’ within the meaning of Article 90(1) of the Treaty and must be assessed under the Treaty provisions to which that Article refers.

In addition to Member States’ obligations under Article 90(1), public undertakings and undertakings that have been granted special or exclusive rights are subject to Articles 85 and 86.

4.3. In most Member States, special and exclusive rights apply to services such as the clearance, transportation and distribution of certain postal items, as well as the way in which those services are provided, such as the exclusive right to place letter boxes along the public highway or to issue stamps bearing the name of the country in question.

5. FREEDOM TO PROVIDE SERVICES

(a) Basic principles

5.1. The granting of special or exclusive rights to one or more operators referred to in point 4.2 to carry out the clearance, including public collection, transport and distribution of certain categories of postal items inevitably restricts the provision of such services, both by companies established in other Member States and by undertakings established in the Member State concerned. This restriction has a transborder character when the addresses or the senders of the postal items handled by those undertakings are established in other Member States. In practice, restrictions on the provision of postal services, within the meaning of Article 59 of the Treaty (\(^{(\text{\textsuperscript{\textcircled{\textast}}}2)}\)), comprise prohibiting the conveyance of certain categories of postal items to other Member States including by intermediaries, as well as the prohibition on distributing gross-border mail. The Postal Directive lays down the justified restrictions on the provision of postal services.

5.2. Article 66, read in conjunction with Article 55 and 56 of the Treaty, sets out exceptions from Article 59. Since they are exceptions to a fundamental principle, they must be interpreted restrictively. As regards postal services, the exception under Article 55 only applies to the conveyance and distribution of a special kind of mail, that is mail generated in the course of judicial or administrative procedures, connected, even occasionally, with the exercise of official authority, in particular notifications in pursuance of any judicial or administrative procedures. The conveyance and distribution of such items on a Member State’s territory may therefore be subjected to a licensing requirement (see point 5.5) in order to protect the public interest. The conditions of the other derogations from the Treaty listed in those provisions will not normally be fulfilled in relation to postal services. Such services cannot, in themselves, threaten public policy and cannot affect public health.

5.3. The case-law of the Court of Justice allows, in principle, further derogations on the basis of mandatory requirements, provided that they fulfil non-economic essential requirements in the general interest, are applied without discrimination, and are appropriate and proportionate to the objective to


\(^{(\text{\textsuperscript{\textcircled{\textast}}}2)}\) For a general explanation of the principles deriving from Article 59, see Commission interpretative communication concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3).
be achieved. As regards postal services, the essential requirements which the Commission would consider as justifying restrictions on the freedom to provide postal services are data protection subject to approximation measures taken in this field, the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, as well as, where justified under the provisions of the Treaty, environmental protection and regional planning. Conversely, the Commission would not consider it justified to impose restrictions on the freedom to provide postal services for reasons of consumer protection since this general interest requirement can be met by the general legislation on fair trade practices and consumer protection. Benefits to consumers are enhanced by the freedom to provide postal services, provided that universal service obligations are well defined on the basis of the Postal Directive and can be fulfilled.

5.4. The Commission therefore considers that the maintenance of any special or exclusive right which limits cross-border provision of postal services needs to be justified in the light of Articles 90 and 59 of the Treaty. At present, the special or exclusive rights whose scope does not go beyond the reserved services as defined in the Postal Directive are prima facie justified under Article 90(2). Outward cross-border mail is de jure or de facto liberalised in some Member States, such as Denmark, the Netherlands, Finland, Sweden, and the United Kingdom.

(b) Consequences

5.5. The adoption of the measures contained in the Postal Directive requires Member States to regulate postal services. Where Member States restrict postal services to ensure the achievement of universal service and essential requirements, the content of such regulation must correspond to the objective pursued. Obligations should, as a general rule, be enforced within the framework of class licences and declaration procedures by which operators of postal services supply their name, legal form, title and address as well as a short description of the services they offer to the public. Individual licensing should only be applied for specific postal services, where it is demonstrated that less restrictive procedures cannot ensure those objectives. Member States may be invited, on a case-by-case basis, to notify the measures they adopt to the Commission to enable it to assess their proportionality.

6. MEASURES ADOPTED BY MEMBER STATES

(a) Basic principles

6.1. Member States have the freedom to define what are general interest services, to grant the special or exclusive rights that are necessary for providing them, to regulate their management and, where appropriate, to fund them. However, under Article 90(1) of the Treaty, Member States must, in the case of public undertakings and undertakings to which they have granted special or exclusive rights, neither enact nor maintain in force any measure contrary to the Treaty rules, and in particular its competition rules.

(b) Consequences

6.2. The operation of a universal clearance and distribution network confers significant advantages on the operator referred to in point 4.2 in offering not only reserved or liberalised services falling within the definition of universal service, but also other (non-universal postal) services. The prohibition under Articles 90(1), read in conjunction with Article 86(b), applies to the use, without objective justification, of a dominant position on one market to obtain market power on related or neighbouring markets which are distinct from the former, at the risk of eliminating competition on those markets. In countries where local delivery of items of correspondence is liberalised, such as Spain, and the monopoly is limited to inter-city transport and delivery, the use of a dominant position to extend the monopoly from the latter market to the former would therefore be incompatible with the Treaty provisions, in the absence of specific justification, if the functioning of services in the general economic interest was not previously endangered. The Commission considers that it would be appropriate for Member States to inform the Commission of any extension of special or exclusive rights and of the justification therefor.

6.3. There is a potential effect on the trade between Member States from restrictions on the provision of postal services, since the postal services offered by operators other than the operators referred to in
point 4.2 can cover mailings to or from other Member States, and restrictions may impede cross-border activities of operators in other Member States.

6.4. As explained in point 8(b)(viii), Member States must monitor access conditions and the exercise of special and exclusive rights. They need not necessarily set up new bodies to do this but they should not give to their operator (\注) as referred to in point 4.2, or to a body which is related (legally, administratively and structurally) to that operator, the power of supervision of the exclusive rights granted and of the activities of postal operators generally. An enterprise in a dominant position must not be allowed to have such a power over its competitors. The independence, both in theory and in practice, of the supervisory authority from all the enterprise supervised is essential. The system of undistorted competition required by the Treaty can only be ensured if equal opportunities for the different economic operators, including confidentiality of sensitive business information, are guaranteed. To allow an operator to check the declarations of its competitors or to assign to an undertaking the power to supervise the activities of its competitors or to be associated in the granting of licences means that such undertaking is given commercial information about its competitors and thus has the opportunity to influence the activity of those competitors.

7. POSTAL OPERATORS AND STATE AID

(a) Principles

While a few operators referred to in point 4.2 are highly profitable, the majority appear to be operating either in financial deficit or at close to break-even in postal operations, although information on underlying financial performance is limited, as relatively few operators publish relevant information of an auditable standard on a regular basis. However, direct financial support in the form of subsidies or indirect support such as tax exemptions is being given to fund some postal services, even if the actual amounts are often not transparent.

The Treaty makes the Commission responsible for enforcing Article 92, which declares State aid that affects trade between Member States of the Community to be incompatible with the common market except in certain circumstances where an exemption is, or may be, granted. Without prejudice to Article 90(2), Articles 92 and 93 are applicable to postal services (\注).

Pursuant to Article 93(3), Member States are required to notify to the Commission for approval all plans to grant aid or to alter existing aid arrangements. Moreover, the Commission is required to monitor aid which it has previously authorised or which dates from before the entry into force of the Treaty or before the accession of the Member State concerned.

All universal service providers currently fall within the scope of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (\注), as last amended by Directive 93/84/EEC (\注). In addition to the general transparency requirement for the accounts of operators referred to in point 4.2 as discussed in point 8(b)(vi), Member States must therefore ensure that financial relations between them and those operators are transparent as required by the Directive, so that the following are clearly shown:

(a) public funds made available directly, including tax exemptions or reductions;

(b) public funds made available through other public undertakings or financial institutions;

(c) the use to which those public funds are actually put.

The Commission regards, in particular, the following as making available public funds:

(a) the setting-off of operating losses;

(b) the provision of capital;


(c) non-refundable grants or loans on privileged terms;

(d) the granting of financial advantages by forgoing profits or the recovery of sums due;

(e) the forgoing of a normal return on public funds used;

(f) compensation for financial burdens imposed by the public authorities.

(b) **Application of Articles 90 and 92**

The Commission has been called upon to examine a number of tax advantages granted to a postal operator on the basis of Article 92 in connection with Article 90 of the Treaty. The Commission sought to check whether that privileged tax treatment could be used to cross-subsidize that operator’s operations in sectors open to competition. At that time, the postal operator did not have an analytical cost-accounting system serving to enable the Commission to distinguish between the reserved activities and the competitive ones. Accordingly, the Commission, on the basis of the findings of studies carried out in that area, assessed the additional costs due to universal-service obligations borne by that postal operator and compared those costs with the tax advantages. The Commission concluded that the costs exceeded those advantages and therefore decided that the tax system under examination could not lead to cross-subsidization of that operator’s operations in the competitive areas (**).

8. **SERVICE OF GENERAL ECONOMIC INTEREST**

(a) **Basic principles**

8.1. Article 90(2) of the Treaty allows an exception from the application of the Treaty rules where the application of those rules obstructs, in law or in fact, the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of general economic interest. Without prejudice to the rights of the Member States to define particular requirements of services of general interest, that task consists primarily in the provision and the maintenance of a universal public postal service, guaranteeing at affordable, cost-effective and transparent tariffs nationwide access to the public postal network within a reasonable distance and during adequate opening hours, including the clearance of postal items from accessible postal boxes or collection points throughout the territory and the timely delivery of such items to the address indicated, as well as associated services entrusted by measures of a regulatory nature to those operators for universal delivery at a specified quality. The universal service is to evolve in response to the social, economical and technical environment and to the demands of users.

The general interest involved requires the availability in the Community of a genuinely integrated public postal network, allowing efficient circulation of information and thereby fostering, on the one hand, the competitivevnes of European industry and the development of trade and greater cohesion between the regions and Member States, and on the other, the improvement of social contacts between the citizens of the Union. The definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.

8.2. The financial resources for the maintenance and improvement of that public network still derive mainly from the activities referred to in point 2.3.

(**) Case NN 135/92, OJ C 262, 7.10.1995, p. 11.

Currently, and in the absence of harmonisation at Community level, most Member States have fixed the limits of the monopoly by reference to the weight of the item. Some Member States apply a combined weight and price limit whereas one Member State applies a price limit only. Information collected by the Commission on the revenues obtained from mail flows in the Member States seems to indicate that the maintenance of special or exclusive rights with regard to this market could, in the absence of exceptional circumstances, be sufficient to guarantee the improvement and maintenance of the public postal network.

The service for which Member States can reserve exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service, is harmonised in the Postal Directive. To the extent to which Member States grant special or exclusive rights for this service, the service is to be considered a separate product-market in the assessment of individual cases in particular with regard to direct mail, the distribution of inward cross-border mail, outward cross-border mail, as well as with regard to the collection, sorting and transport of mail. The Commission will take account of the fact that those markets are wholly or partly liberalised in a number of Member States.

8.3. When applying the competition rules and other relevant Treaty rules to the postal sector, the Commission, acting upon a complaint or upon its own initiative, will take account of the harmonized definition set out in the Postal Directive in assessing whether the scope of the reserved area can be justified under Article 90(2). The point of departure will be a presumption that, to the extent that they fall within the limits of the reserved area as defined in the Postal Directive, the special or exclusive rights will be prima facie justified under Article 90(2). That presumption can, however, be rebutted if the facts in a case show that a restriction does not fulfil the conditions of Article 90(2) (\(^*\)).

8.4. The direct mail market is still developing at a different pace from one Member State to the other, which makes it difficult for the Commission, at this stage, to specify in a general way the obligations of the Member States regarding that service. The two principal issues in relation to direct mail are potential abuse by customers of its tariffication and of its liberalisation (reserved items being delivered by an alternative operators as if they were non-reserved direct mail items) so as to circumvent the reserved services referred to in point 8.2. Evidence from the Member States which do not restrict direct mail services, such as Spain, Italy, the Netherlands, Austria, Sweden and Finland, is still inconclusive and does not yet allow a definitive general assessment. In view of that uncertainty, it is considered appropriate to proceed temporarily on a case-by-case basis. If particular circumstances make it necessary, and without prejudice to point 8.3, Member States may maintain certain existing restrictions on direct mail services or introduce licensing in order to avoid artificial traffic distortions and substantial destabilization of revenues.

8.5. As regards the distribution of inward cross-border mail, the system of terminal dues received by the postal operator of the Member State of delivery of cross-border mail from the operator of the Member State of origin is currently under revision to adapt terminal dues, which are in many cases too low, to actual costs of delivery.

Without prejudice to point 8.3, Member States may maintain certain existing restrictions on the distribution of inward cross-border mail (\(^*\)), so as to avoid artificial diversion of traffic, which would inflate the share of cross-border mail in Community traffic. Such restrictions may only concern items falling under the reservable area of services. In assessing the situation in the framework of individual cases, the Commission will take into account the relevant, specific circumstances in the Member States.

8.6. The clearance, sorting and transport of postal items has been or is currently increasingly being opened up to third parties by postal operators in a number

\(^*\) In relation to the limits on the application of the exception set out in Article 90(2), see the position taken by the Court of Justice in the following cases: Case C-179/90 Merci convenzionale porto di Genova v. Sidururgica Gabrielli [1991] ECR I-1979; Case C-41/90 Klaus Höfner and Fritz Elser v. Macroton [1991] ECR I-5889.

\(^*\) This may in particular concern mail from one State which has been conveyed by commercial companies to another State to be introduced in the public postal network via a postal operator of that other State.
of Member States. Given that the revenue effects of such opening up may vary according to the situation in the different Member States, certain Member States may, if particular circumstances make it necessary, and without prejudice to point 8.3, maintain certain existing restrictions on the clearance, sorting and transport of postal items by intermediaries (\(^{(\text{vi})}\)), so as to allow for the necessary restructuring of the operator referred to in point 4.2. However, such restrictions should in principle be applied only to postal items covered by the existing monopolies, should not limit what is already accepted in the Member State concerned, and should be compatible with the principle of non-discriminatory access to the postal network as set out in point 8(b)(vii).

(b) Conditions for the application of Article 90(2) to the postal sector

The following conditions should apply with regard to the exception under Article 90(2):

(i) Liberalisation of other postal services

Except for those services for which reservation is necessary, and which the Postal Directive allows to be reserved, Member States should withdraw all special or exclusive rights for the supply of postal services to the extent that the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of a general economic interest is not obstructed in law or in fact, with the exception of mail connected to the exercise of official authority, and they should take all necessary measures to guarantee the right of all economic operators to supply postal services.

This does not prevent Member States from making, where necessary, the supply of such services subject to declaration procedures or class licences and, when necessary, to individual licensing procedures aimed at the enforcement of essential requirements and at safeguarding the universal service. Member States should, in that event, ensure that the conditions set out in those procedures are transparent, objective, and without discriminatory effect, and that there is an efficient procedure of appealing to the courts against any refusal.

(ii) Absence of less restrictive means to ensure the services in the general economic interest

Exclusive rights may be granted or maintained only where they are indispensable for ensuring the functioning of the tasks of general economic interest. In many areas the entry of new companies into the market could, on the basis of their specific skills and expertise, contribute to the realisation of the services of general economic interest.

If the operator referred to in point 4.2 fails to provide satisfactorily all of the elements of the universal service required by the Postal Directive (such as the possibility of every citizen in the Member State concerned, and in particular those living in remote areas, to have access to newspapers, magazines and books), even with the benefit of a universal postal network and of special or exclusive rights, the Member State concerned must take action (\(^{(\text{vi})}\)). Instead of extending the rights already granted, Member States should create the possibility that services are provided by competitors and for this purpose may impose obligations on those competitors in addition to essential requirements. All of those obligations should be objective, non-discriminatory and transparent.

(iii) Proportionality

Member States should moreover ensure that the scope of any special and exclusive rights granted is in proportion to the general economic interest which is pursued through those rights. Prohibiting self-delivery, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail, or collection and transport of such items by a third party acting solely on its behalf, would for

\(^{(\text{vi})}\) Even in a monopoly situation, senders will have the freedom to make use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.

\(^{(\text{vi})}\) According to Article 3 of the Postal Directive, Member States are to ensure that users enjoy the right to a universal service.
example not be proportionate to the objective of guaranteeing adequate resources for the public postal network. Member States must also adjust the scope of those special or exclusive rights, according to changes in the needs and the conditions under which postal services are provided and taking account of any State aid granted to the operator referred to in point 4.2.

(iv) Monitoring by an independent regulatory body

The monitoring of the performance of the public-service tasks of the operators referred to in point 4.2 and of open access to the public postal network and, where applicable, the grant of licences or the control of declarations as well as the observance by economic operators of the special or exclusive rights of operators referred to in point 4.2 should be ensured by a body or bodies independent of the latter.(vi)

That body should in particular ensure: that contracts for the provision of reserved services are made fully transparent, are separately invoiced and distinguished from non-reserved services, such as printing, labelling and enveloping; that terms and conditions for services which are in part reserved and in part liberalised are separate; and that the reserved element is open to all postal users, irrespective of whether or not the non-reserved component is purchased.

(v) Effective monitoring of reserved services

The tasks excluded from the scope of competition should be effectively monitored by the Member State according to published service targets and performance levels and there should be regular and public reporting on their fulfilment.

(vi) Transparency of accounting

Each operator referred to in point 4.2 uses a single postal network to compete in a variety of markets. Price and service discrimination between or within classes of customers can easily be practised by operators running a universal postal network, given the significant overheads which cannot be fully and precisely assigned to any one service in particular. It is therefore extremely difficult to determine cross-subsidies within them, both between the different stages of the handling of postal items in the public postal network and between the reserved services and the services provided under conditions of competition. Moreover, a number of operators offer preferential tariffs for cultural items which clearly do not cover the average total costs. Member States are obliged by Article 5 and 90 to ensure that Community law is fully complied with. The Commission considers that the most appropriate way of fulfilling that obligation would be for Member States to require operators referred to in point 4.2 to keep separate financial records, identifying separately, inter alia, costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions, and making it possible to assess fully the conditions applied at the various access points of the public postal network. Services made up of elements falling within the reserved and competitive services should also distinguish between the costs of each element. Internal accounting systems should operate on the basis of consistently applied and objectively justified cost-accounting principles. The financial accounts should be drawn up, audited by an independent auditor, which may be appointed by the National Regulatory Authority, and be published in accordance with the relevant Community and national legislation applying to commercial organisations.

(vii) Non-discriminatory access to the postal network

Operators should provide the universal postal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.

Preferential tariffs appear to be offered by some operators to particular groups of customers in a non-transparent fashion. Member States should monitor the access conditions to the network with a view to ensuring that there is no discrimination.

(6) See in particular Articles 9 and 22 of the Postal Directive.
either in the conditions of use or in the charges payable. It should in particular be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network and obtain access within a reasonable period at price conditions based on costs, that take into account the actual services required.

The obligation to provide non-discriminatory access to the public postal network does not mean that Member States are required to ensure access for items of correspondence from its territory, which were conveyed by commercial companies to another State, in breach of a postal monopoly, to be introduced in the public postal network via a postal operator of that other State, for the sole purpose of taking advantage of lower postal tariffs. Other economic reasons, such as production costs and facilities, added values or the level of service offered in other Member States are not regarded as improper. Fraud can be made subject to penalties by the independent regulatory body.

At present cross-border access to postal networks is occasionally rejected, or only allowed subject to conditions, for postal items whose production process includes cross-border data transmission before those postal items were given physical form. Those cases are usually called non-physical remail. In the present circumstances there may indeed be an economic problem for the postal operator that delivers the mail, due to the level of terminal dues applied between postal operators. The operators seek to resolve this problem by the introduction of an appropriate terminal dues system.

The Commission may request Member States, in accordance with the first paragraph of Article 5 of the Treaty, to inform the Commission of the conditions of access applied and of the reasons for them. The Commission is not to disclose information acquired as a result of such requests to the extent that it is covered by the obligation of professional secrecy.

9. REVIEW

This notice is adopted at Community level to facilitate the assessment of certain behaviour of undertakings and certain State measures relating to postal services. It is appropriate that after a certain period of development, possibly by the year 2000, the Commission should carry out an evaluation of the postal sector with regard to the Treaty rules, to establish whether modifications of the views set out in this notice are required on the basis of social, economic or technological considerations and on the basis of experience with cases in the postal sector. In due time the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this notice.
1. **INTRODUCTION**

1. Since the early 1970s, State aid to shipbuilding has been subject to a series of specific State aid regimes, which have been gradually aligned with the horizontal State aid provisions. The current Framework on State aid to shipbuilding \(^1\) will expire on 31 December 2011. In line with its policy to ensure enhanced transparency and simplification of State aid rules, the Commission aims, to the greatest extent possible, to eliminate the differences between the rules applicable to the shipbuilding industry and to other industrial sectors, by extending general horizontal provisions to the shipbuilding sector \(^2\).

2. Nevertheless, the Commission acknowledges that certain features distinguish shipbuilding from other industries, such as the short production series, the size, value and complexity of the units produced and the fact that prototypes are generally used commercially.

3. In the light of those special characteristics, the Commission considers it appropriate to continue to apply specific provisions in respect of innovation aid for the shipbuilding sector while ensuring that such aid does not adversely affect trading conditions and competition to an extent contrary to the common interest.

4. State aid for innovation must lead to the recipient of aid changing its behaviour so that it increases its level of innovation activity and innovation projects or activities take place which would not otherwise be carried out, or which would be carried out in a more restricted manner. Incentive effect is identified by counterfactual analysis, comparing the levels of intended activity with aid and without aid. Therefore, this Framework identifies specific requirements which will enable Member States to ensure the presence of an incentive effect.

5. An informal set of rules concerning innovation aid for shipbuilding regarding, in particular, the eligible costs and the confirmation of the innovative character of the project, has been developed in conjunction with the industry and is applied by the Commission in its decision-making practice. In the interests of transparency, those rules should be formally integrated into the rules on innovation aid.

6. As regards regional aid, the Commission will review the horizontal Guidelines on national regional aid for 2007-2013 \(^3\) in 2013. Therefore, the Commission will continue to apply the same specific rules for regional aid in the shipbuilding sector that are currently foreseen in the 2003 Framework until that time. It will reassess the situation in the context of the revision of the Guidelines on national regional aid.

7. With regard to export credits, the objective of this Framework is to respect applicable international obligations.

8. This Framework therefore contains specific provisions in relation to innovation aid and regional aid for shipbuilding, as well as provisions on export credits. In addition, aid to the shipbuilding sector can be deemed compatible with the internal market under the Treaty on the Functioning of the European Union and under the horizontal State aid instruments \(^4\), unless otherwise provided for in those instruments.

9. In accordance with Article 346 of the Treaty and subject to the provisions of Article 348 of the Treaty, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security with respect to funding for military vessels.

10. The Commission intends to apply the principles set out in this Framework from 1 January 2012 to 31 December 2013. After that date the Commission envisages including the provisions on innovation aid in the Community framework for State aid for research and development and innovation \(^5\) and integrating regional aid for shipbuilding into the Guidelines on national regional aid.

2. **SCOPE AND DEFINITIONS**

11. Under this Framework, the Commission may authorise aid to shipyards or, in the case of export credits, aid to ship owners, which is granted for building, repair or conversion of ships, as well as innovation aid granted for the construction of floating and moving offshore structures.

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\(^1\) OJ C 317, 30.12.2003, p. 11.

\(^2\) See State aid action plan COM(2005) 107 final, pt. 65: ‘the Commission will decide whether a Framework for State aid to shipbuilding is still needed or if the sector should simply be governed by horizontal rules’.

\(^3\) OJ C 54, 4.3.2006, p. 13.

\(^4\) For instance, the Community Guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1) lay down the conditions under which aid to shipyards for more environmentally friendly production may be authorised. Moreover, aid for the acquisition of new transport vehicles which go beyond Union standards or which increase the level of environmental protection in the absence of Union standards can be granted to ship owners, thus contributing overall to cleaner maritime transport.

12. For the purposes of this Framework, the following definitions shall apply:

(a) ‘shipbuilding’ means the building, in the Union, of self-propelled commercial vessels;

(b) ‘ship repair’ means the repair or reconditioning, in the Union, of self-propelled commercial vessels;

(c) ‘ship conversion’ means the conversion, in the Union, of self-propelled commercial vessels of not less than 1,000 gt (1), on condition that conversion operations entail radical alterations to the cargo plan, the shell, the propulsion system or the passenger accommodation;

(d) ‘self-propelled commercial vessel’ means a vessel that, by means of its permanent propulsion and steering, has all the characteristics of self-navigability on the high seas or on inland waterways and belongs to one of the following categories:

(i) seagoing vessels of not less than 100 gt and inland waterway vessels of equivalent size used for the transportation of passengers and/or goods;

(ii) seagoing vessels of not less than 100 gt and inland waterway vessels of equivalent size used for the performance of a specialised service (for example, dredgers and ice breakers);

(iii) tugs of not less than 365 kW;

(iv) unfinished shells of the vessels referred to in points (i), (ii) and (iii) that are afloat and mobile;

(e) ‘floating and moving offshore structures’ means structures for the exploration, exploitation or generation of oil, gas or renewable energy that have the characteristics of a commercial vessel except that they are not self-propelled and are intended to be moved several times during their operation.

3. SPECIFIC MEASURES

3.1. Regional aid

13. Regional aid to shipbuilding, ship repair or ship conversion may be deemed compatible with the internal market if it fulfills, in particular, the following conditions:

(a) the aid must be granted for investment in upgrading or modernising existing yard(s), not linked to a financial restructuring of the yard(s) concerned, with the objective of improving the productivity of existing installations;

(b) in regions referred to in point (a) of Article 107(3) of the Treaty and complying with the map approved by the Commission for each Member State for the grant of regional aid, the intensity of the aid must not exceed 22.5 % gross grant equivalent;

(c) in regions referred to in point (c) of Article 107(3) of the Treaty and complying with the map approved by the Commission for each Member State for the grant of regional aid, the intensity of the aid must not exceed 12.5 % gross grant equivalent or the applicable regional aid ceiling, whichever is the lower;

(d) the aid must be limited to support eligible expenditure as defined in the Guidelines on national regional aid for 2007-2013.

3.2. Innovation aid

3.2.1. Eligible applications

14. Aid granted for innovation for shipbuilding, ship repair or ship conversion may be deemed compatible with the internal market up to a maximum aid intensity of 20 % gross provided that it relates to the industrial application of innovative products and processes, that is to say, technologically new or substantially improved products and processes when compared to the state of the art that exists in the shipbuilding industry within the Union, which carry a risk of technological or industrial failure. Innovation aid for the equipment and the modernisation of fishing vessels will not be deemed compatible with the internal market, unless the conditions laid down in Article 25(2) and (6) of Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund (2), or in its successor provisions, are fulfilled. No aid can be granted to a shipyard if aid from the European Fisheries Fund, or from its successor instrument, or other public aid, is granted in respect of the same vessel.

15. Innovative products and processes within the meaning of point 14 include improvements in the environmental field related to quality and performance, such as optimising fuel consumption, emissions from engines, waste and safety.

(1) Gross tons.

16. Where the innovation has the objective of increasing environmental protection and leads to compliance with adopted Union standards at least one year before those standards enter into force or increases the level of environmental protection in the absence of Union standards or makes it possible to go beyond Union standards, the maximum aid intensity can be increased to 30 % gross. The expressions 'Union standards' and 'environmental protection' have the meaning set out in the Community guidelines on State aid for environmental protection.

17. Provided that they comply with the criteria in point 14, innovative products will refer either to a new class of vessel as defined by the first vessel of a potential series of ships (prototype) or to innovative parts of a vessel, which can be isolated from the vessel as a separate element.

18. Provided that they comply with the criteria in point 14, innovative processes will refer to the development and implementation of new processes regarding production, management, logistic or engineering areas.

19. Innovation aid can only be deemed compatible with the internal market if it is granted for the first industrial application of innovative products and processes.

3.2.2. Eligible costs

20. Innovation aid for products and processes must be limited to supporting expenditure on investments, design, engineering and testing activities directly and exclusively related to the innovative part of the project and incurred after the date of the application for innovation aid (\(^\text{1}\)).

21. Eligible costs include costs of the shipyard as well as costs for the procurement of goods and services from third parties (for example, system suppliers, turnkey suppliers and subcontractor companies), to the extent that those goods and services are strictly related to the innovation. The eligible costs are defined in more detail in the Annex.

22. The relevant national authority, designated by the Member State for the purposes of the application of innovation aid, must examine the eligible costs on the basis of the estimations provided and substantiated by the applicant. Where the application includes costs for the procurement of goods and services from suppliers, the supplier must not have received State aid for the same objectives in respect of those goods or services.

23. In order for innovation aid to be deemed compatible with the internal market under this Framework, an application for innovation aid must be submitted to the relevant national authority prior to the applicant entering into a binding agreement to implement the specific project for which innovation aid is sought. The application must include a description of the innovation, in both qualitative and quantitative terms.

24. The relevant national authority must seek confirmation from an independent and technically competent expert that the aid is sought for a project that represents a technologically new or substantially improved product or process compared to the state of the art that exists in the shipbuilding industry within the Union (qualitative appraisal). The aid may only be deemed compatible with the internal market if the independent and technically competent expert confirms to the relevant national authority that the eligible costs for the project have been calculated to cover exclusively the innovative parts of the relevant project (quantitative appraisal).

3.2.3. Confirmation of the innovative character of the project

25. Innovation aid within the meaning of this Framework must have an incentive effect, that is to say, it must result in the recipient changing its behaviour so that it increases its level of innovation activity. As a result of the aid, the innovation activity must be increased in terms of size, scope, amount spent or speed.

26. In line with point 25, the Commission considers that aid does not present an incentive for the beneficiary where the project (\(^\text{2}\)) has already commenced before the beneficiary submits an application for aid to the national authorities.

27. In order to verify that the aid would induce the aid beneficiary to change its behaviour so that it increases its level of innovation activity, the Member States must provide an ex ante evaluation of the increased innovation activity on the basis of an analysis comparing a situation without aid and a situation with aid. The criteria to be used may include the increase in innovation activities in terms of size, scope amount spent or speed, together with other relevant quantitative and/or qualitative factors submitted by the Member State in its notification under Article 108(3) of the Treaty.

28. If a significant effect on at least one of those elements can be demonstrated, taking account of the normal behaviour of an undertaking in the respective sector, the Commission will normally conclude that the aid has an incentive effect.

(\(^\text{1}\)) Except for costs for feasibility studies undertaken within 12 months prior to the aid application for an innovative process.

(\(^\text{2}\)) This does not exclude that the potential beneficiary may have already carried out feasibility studies which are not covered by the request for State aid.
29. When assessing an aid scheme, the conditions relating to the incentive effect will be deemed to be satisfied if the Member State has committed itself to grant individual aid under the approved aid scheme only after it has verified that an incentive effect is present and to submit annual reports on the implementation of the approved aid scheme.

30. The approval of the aid application must be subject to the condition that the beneficiary enters into a binding agreement to implement the specific shipbuilding, ship repair or ship conversion project or process for which the innovation aid is sought. Payments can only be made after the relevant contract is signed. If the contract is cancelled or the project is abandoned, all aid disbursed must be reimbursed with interest from the date the aid was paid out. Equally, if the project is not completed, aid that has not been used for the eligible innovation expenditure must be reimbursed with interest. The rate of interest must be at least equal to the reference rates adopted by the Commission.

3.3. Export credits

31. Aid to shipbuilding in the form of State-supported credit facilities granted to national and non-national shipowners or third parties for the building or conversion of vessels may be deemed compatible with the internal market if it complies with the terms of the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits and with its Sector Understanding on Export Credits for Ships or any successive terms laid down in such an arrangement or replacing the Arrangement.

4. MONITORING AND REPORTING

32. Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1) and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (2) require the Member States to submit annual reports to the Commission on all existing aid schemes. When adopting a decision under this Framework for all innovation aid granted under an approved scheme to large undertakings, the Commission may request Member States to report on how the requirement for an incentive effect has been respected in relation to aid given to large undertakings, notably using the criteria mentioned in point 3.2.4.

5. CUMULATION

33. The aid ceilings stipulated in this Framework are applicable irrespective of whether the aid in question is financed wholly or in part from State resources or from Union resources. Aid authorised under this Framework may not be combined with other forms of State aid within the meaning of Article 107(1) of the Treaty or with other forms of Union financing, the cumulation of which produces an aid intensity higher than that laid down in this Framework.

34. Where aid serves different purposes and involves the same eligible costs, the most favourable aid ceiling will apply.

6. APPLICATION OF THIS FRAMEWORK

35. The Commission will apply the principles set out in this Framework from 1 January 2012 until 31 December 2013. The Commission will apply those principles to all notified aid measures in respect of which it is called upon to take a decision after 31 December 2011, even where the projects were notified prior to that date.

36. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (3), the Commission will apply the principles set out in this Framework to non-notified aid granted after 31 December 2011.

ANNEX

Eligible costs for innovation aid for shipbuilding

1. NEW CLASS OF VESSEL

For the construction of a new class of vessel that is eligible for innovation aid, the following costs are eligible:

(a) costs for the concept development;
(b) costs for the concept design;
(c) costs for the functional design;
(d) costs for the detailed design;
(e) costs for studies, testing, mock-ups; and similar costs related to the development and design of the vessel;
(f) costs for the planning of the implementation of the design;
(g) costs for tests and trials of the product;
(h) incremental labour and overhead costs for a new class of vessel (learning curve).

For the purposes of points (a) to (g), costs related to standard engineering design equivalent to a previous class of vessel are excluded.

For the purposes of point (h), additional production costs that are strictly necessary to validate the technological innovation can be eligible to the extent that they are limited to the minimum necessary amount. Due to the technical challenges associated with constructing a prototype, production costs of the first vessel normally exceed production costs of the subsequent sister ships. Additional production costs are defined as the difference between the labour costs and associated overhead costs for the first in a new class of vessel and the production costs of the subsequent vessels of the same series (sister ships). Labour costs include wages and social costs.

Accordingly, in exceptional and duly justified cases, a maximum of 10 % of the production costs associated with the construction of a new class of vessel can be considered as eligible costs: if those costs are necessary to validate the technical innovation. A case is considered to be duly justified if the additional production costs are estimated to exceed 3 % of the production costs of the subsequent sister ships.

2. NEW COMPONENTS OR SYSTEMS OF A VESSEL

For new components or systems that are eligible for innovation aid, the following costs are eligible to the extent that they are strictly related to the innovation:

(a) design and development costs;
(b) costs for the testing of the innovation part, mock-ups;
(c) costs for material and equipment;
(d) in exceptional cases, the costs of construction and installation of a new component or system that are necessary to validate the innovation, to the extent that they are limited to the minimum necessary amount.

3. NEW PROCESSES

For new processes that are eligible for innovation aid, the following costs are eligible to the extent that they are strictly related to the innovative process:

(a) design and development costs;
(b) costs for material and equipment;
(c) costs for the testing of the new process, where applicable;
(d) costs for feasibility studies undertaken within 12 months prior to the aid application.
COMMUNICATION FROM THE COMMISSION

Rescue and restructuring aid and closure aid for the steel sector
(notified under document No C(2002) 315)
(2002/C 70/05)
(Text with EEA relevance)

1. RESCUE AND RESTRUCTURING AID FOR FIRMS IN DIFFICULTY

In its Communication to the Council, the European Parliament, and the ECSC Consultative Committee on ‘The state of the competitiveness of the steel industry in the EU’ (1) adopted on 5 October 1999, the Commission stated that it is important that strict rules are maintained for the steel sector after the expiry of the ECSC Treaty on 23 July 2002. The European Parliament, Member States, the ECSC Consultative Committee and steel companies and their associations have also requested strict rules for State aid to the steel industry. The Commission considers that this objective may be attained by focusing on the types of State aid that, from the experience of the past and taking into account the features of the steel industry, have most distortive effects on competition in this sector. This is the case of investment aid and rescue and restructuring aid.

As for rescue and restructuring aid, the Commission bears in mind the fact that, in the last decisions adopted in 1993 on the basis of Article 95 of the ECSC Treaty, the Commission and the Council agreed that no further decisions of this nature would be taken to rescue Community steel firms. Following this, steel companies have been acting on the market on the assumption that no further restructuring aid was available to them. If this state of affairs were to change in future, there is no guarantee that steel firms would not relax their efforts towards costs reduction and increased competitiveness, thereby endangering the enormous efforts already made.

In these circumstances, the Commission considers that rescue aid and restructuring aid for firms in difficulty in the steel sector as defined in Annex B of the multicultural framework, are not compatible with the common market. The Commission considers that, taking into account the existing overcapacities at European and world level and the consequent inefficiencies as well as the prohibition of rescue and restructuring aid to the steel industry, aid to facilitate structural adjustment can contribute to the development of a healthier steel industry. Therefore, the following aid for firms in the steel industry as defined in Annex B of the multicultural framework may be regarded as compatible with the common market:

2. CLOSURE AID

By virtue of Article 87(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities may be considered to be compatible with the common market. The Commission considers that, taking into account the existing overcapacities at European and world level and the consequent inefficiencies as well as the prohibition of rescue and restructuring aid to the steel industry, aid to facilitate structural adjustment can contribute to the development of a healthier steel industry. Therefore, the following aid for firms in the steel industry as defined in Annex B of the multicultural framework may be regarded as compatible with the common market:

2.1. Aid to cover payments payable by steel firms to workers made redundant or accepting early retirement provided that:

— the payments actually arise from the partial or total closure of steel plants which have not already been taken into account for approval of aid,

— the payments do not exceed those customarily granted under the rules in force in the Member States, and

— the aid does not exceed 50 % of those payments.

2.2. Aid to steel firms which permanently cease production of steel products, provided that:

— the firms became legal entities before 1 January 2002,

— they regularly produced steel products up to the date of notification of the aid concerned,

— they have not reorganised their production or plant structure since 1 January 2002,

— they close and scrap the installations used to manufacture steel products within six months of the cessation of production or approval of the aid by the Commission, whichever is the later,

— the closure of their plants has not already been taken into account for approval of aid, and

— the amount of the aid does not exceed the residual book value of the plants to be closed, ignoring that portion of any revaluation since 1 January 2002 which exceeds the national inflation rate.

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(2) OJ C 70, 19.3.2002.
2.3. Aid to steel firms which satisfy the conditions set out in point 2.2 but which are directly or indirectly controlled by, or which themselves directly or indirectly control, a firm that is itself a steel firm may be deemed compatible with the common market provided that:

— the firm to be closed has been effectively and legally separated from the corporate structure for at least six months before payment of the aid,

— the accounts of the firm to be closed have been independently certified, by an auditor accepted by the Commission, to be a true and accurate account of the assets and liabilities of that firm, and

— there is a genuine and verifiable reduction in production capacity such as to yield an appreciable benefit over time for the industry as a whole in terms of a reduction in the production capacity for steel products over a period of five years following the date of the aided closure or the date of the last payment of aid approved under this point, if later.

3. NOTIFICATION OBLIGATION

All plans to grant aid for rescuing and restructuring firms in difficulty belonging to the steel industry and for closure aid to that sector shall be notified individually.

4. APPROPRIATE MEASURES

4.1. The Commission proposes as an appropriate measure pursuant to Article 88(1) of the EC Treaty, to exclude from the scope of their existing schemes for rescuing and restructuring firms in difficulties, as defined by the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1), aid to firms belonging to the steel sector, as defined by Annex B to the multisectoral framework, as from 24 July 2002.

4.2. Member States are invited to give their explicit agreement to the proposed appropriate measures within 20 working days from the date on which the letter is notified to them. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

5. APPLICATION OF THIS COMMUNICATION

This Communication will be applicable from 24 July 2002 for a period ending on 31 December 2009.

6. NON-NOTIFIED AID GRANTED TO THE STEEL INDUSTRY

The Commission will examine the compatibility with the common market of aid granted to the steel industry without its authorisation on the basis of the criteria in force at the time the aid was granted.

COMMUNICATION FROM THE COMMISSION
Multisectoral framework on regional aid for large investment projects
(notified under document No C(2002) 315)
(2002/C 70/04)
(Text with EEA relevance)

1. INTRODUCTION: SCOPE OF THE MEASURE

1. On 16 December 1997, the Commission adopted the ‘Multisectoral framework on regional aid for large investment projects’ (\(^1\)). The multisectoral framework became applicable from 1 September 1998 for an initial trial period of three years. Its validity was extended in 2001 until 31 December 2002.

2. In accordance with point 4.1 of the multisectoral framework, the Commission conducted a review in 2001 and concluded that it had to be revised. It also considered that the specific sectoral frameworks should be integrated into the new multisectoral framework.

3. This framework only applies to regional aid, as defined by the ‘Guidelines on national regional aid’ (\(^2\)), that aims to promote initial investment, including job creation linked to initial investment, on the basis of Article 87(3)(a) and (c) of the Treaty. This framework is without prejudice to the assessment of aid proposals under other provisions of the Treaty such as Article 87(3)(b) or (d). For the steel and synthetic fibres sectors, it also applies to large individual aid grants for small and medium-sized undertakings that are not exempted by Commission Regulation (EC) No 70/2001 (\(^3\)). This framework does not apply to restructuring aid cases, which will continue to be covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty (\(^4\)). Similarly, this framework will not affect the operation of the existing horizontal frameworks, such as the Community framework for State aid for research and development (\(^5\)) and the Community guidelines on State aid for environmental protection (\(^6\)).

4. This framework does not affect the operation of the specific State aid rules that apply to the agriculture, fisheries and transport sectors and to the coal industry.

5. The aid intensity of regional investment aid that is not exempted from the notification obligation laid down in Article 88(3) of the EC Treaty by an exemption regulation (EC) No 994/98 (\(^7\)) will be limited on the basis of the criteria laid down in this framework.

6. Under this framework no advance notification of aid below certain thresholds for large investment projects is required, provided that aid is granted in accordance with an aid scheme approved by the Commission. However, this framework does not affect the Member States’ obligation to notify new individual (ad-hoc) aid that is not exempted from the notification obligation laid down in Article 88(3) of the EC Treaty by an exemption regulation adopted by the Commission on the basis of Regulation (EC) No 994/98. The rules laid down in this framework apply also to the assessment of such individual (ad-hoc) State aid measures.

2. THE NEED FOR THE MEASURE

2.1. The reasons to have a simple and transparent instrument

7. Compared to the previous multisectoral framework, this framework is a simpler instrument. The Commission considers that regional investment aid to large projects should be controlled in a simple and transparent way. On the basis of experience with the previous multisectoral framework, the Commission has introduced several simplifications, changes and clarifications.

8. Firstly, the previous multisectoral framework did not have a significant impact on State aid levels for large investment projects in the Community. The Commission considers it necessary to have a restrictive approach with regard to regional aid granted to large-scale projects, whilst preserving the attraction of the less favoured regions. The need for a more restrictive approach on regional aid to large-scale mobile investment projects has been widely acknowledged in recent years. The completion of the single market makes it more important than ever to maintain tight controls on State aid for such projects, since the distortive effect of aid is magnified as other government-induced distortions of competition are eliminated and markets become more open and integrated. An appropriate balance between the three core objectives of Community policy, namely undistorted competition in the internal market, economic and social cohesion, and industrial competitiveness, must therefore entail stricter rules for regional aid granted to large-scale projects.

\(^1\) OJ C 107, 7.4.1998, p. 7.
\(^2\) OJ C 74, 10.3.1998, p. 9.
\(^5\) OJ C 45, 17.2.1996, p. 5.
\(^6\) OJ C 37, 3.2.2001, p. 3.
9. Secondly, the incorporation of several frameworks into a unified instrument will have the effect of simplifying the existing legislation and increasing the accountability and transparency of State aid control.

10. Third, the utilisation of a much simpler instrument will reduce the administrative burden within the administrations and will enhance the predictability of decisions of allowable aid amounts for investors and administrations alike.

11. And fourth, in order to prevent serious distortions of competition, the framework provides for stricter rules for sectors suffering from structural problems.

2.2. The need for a more systematic control on regional aid to large-scale mobile investment projects

12. The maximum aid ceilings fixed by the Commission for all areas eligible for regional aid are in general designed to provide an appropriate level of incentive necessary for the development of the assisted regions. However, as they provide a single ceiling, they are usually in excess of the regional handicaps when applied to large-scale projects. The purpose of this framework is to limit the level of incentive available for large projects to a level that avoids as much as possible unnecessary distortions of competition.

13. Large investments can effectively contribute to regional development, amongst other things by attracting other companies to the region and introducing advanced technologies as well as by contributing to the training of workers. However, these investments are less affected by important region-specific problems in disadvantaged areas. First of all, large investments can produce economies of scale that reduce location-specific initial costs. Secondly, they are in many respects not tied to the region in which the physical investment takes place. Large investments can easily obtain capital and credit on global markets and are not constrained by the more limited offer of financial services in a particular disadvantaged region. Moreover, companies making large investments can access a geographically wider pool of labour, and can more easily transfer a skilled workforce to the chosen location.

14. At the same time, if large investments receive large amounts of State aid by benefiting from the full regional ceilings, there is an increased risk that trade will be affected and thus of a stronger distortion effect vis-à-vis competitors in other Member States. This is because the beneficiary of the aid is more likely to be a significant player on the market concerned and, consequently, the investment for which the aid is awarded may modify the conditions of competition in that market.

15. Additionally, companies making large investments usually possess a considerable bargaining power vis-à-vis the authorities granting aid. Indeed, investors in large projects often consider alternative sites in different Member States, which may lead to a spiral of increasingly generous promises of aid, possibly to a level much higher than what is necessary to compensate for the regional handicaps.

16. The outcome of such subsidy auctions is likely to be that large investments receive aid intensities that exceed the additional costs resulting from the choice of locating the investment in a disadvantaged area.

17. The amount of aid exceeding the minimum necessary to compensate for the regional disadvantages is a very likely cause of perverse effects (inefficient location choices), higher distortion of competition and, since aid is a costly transfer from taxpayers in favour of aid recipients, net welfare losses.

18. Recent experience has shown that large investment projects benefiting from regional investment aid are more capital-intensive than smaller investment projects. As a consequence, a more favourable treatment of smaller investment projects translates into a more favourable treatment in assisted areas of projects that are more labour intensive, thus contributing to job creation and unemployment reduction.

19. Certain types of investment are likely to cause serious distortion of competition, and their beneficial effect on the region concerned is doubtful. This is true in particular for investments in sectors where a single company has a high market share, or where the existing sectoral production capacity increases significantly, without a corresponding increase in demand for the products concerned. More generally, distortion of competition is likely in sectors suffering from structural problems, where the existing production capacity already exceeds the market demand for the product, or where the demand for the products concerned is persistently declining.

20. In line with Article 159 of the EC Treaty, due account must be taken of the coherence between the State aid decisions taken pursuant to this framework and the actions of the structural funds leading to a strengthening of the economic and social cohesion of the Community, in particular those aimed at reducing disparities between the levels of development of the various regions, and the backwardness of the least-favoured regions. Projects co-financed from the structural funds effectively contribute to economic and social cohesion within the Community and should therefore be duly taken into consideration.
3. REDUCTION OF AID LEVELS FOR LARGE INVESTMENT PROJECTS

21. Without prejudice to the compatibility criteria laid down in the guidelines on national regional aid and in Regulation (EC) No 70/2001, and without prejudice to the notification obligation laid down in point 24 or to the transitional rules laid down in section 8, regional investment aid concerning investments involving eligible expenditure (9) for the thresholds set out below shall be subject to an adjusted lower regional aid ceiling, on the basis of the following scale:

<table>
<thead>
<tr>
<th>Eligible expenditure</th>
<th>Adjusted aid ceiling</th>
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<tbody>
<tr>
<td>Up to EUR 50 million</td>
<td>100 % of regional ceiling</td>
</tr>
<tr>
<td>For the part between EUR 50 million and EUR 100 million</td>
<td>50 % of regional ceiling</td>
</tr>
<tr>
<td>For the part exceeding EUR 100 million</td>
<td>34 % of regional ceiling</td>
</tr>
</tbody>
</table>

22. Thus, the allowable aid amount for a project above EUR 50 million will be calculated according to the formula: maximum aid amount = R × (50 + 0,50 B + 0,34 C); where R is the unadjusted regional ceiling; B is the eligible expenditure between EUR 50 million and EUR 100 million; and C is the eligible expenditure above EUR 100 million, if any (9).

(9) Under the guidelines on national regional aid, the eligible expenditure for regional investment aid is defined either by the rules laid down in its points 4.5 and 4.6 (option 1) or by the rules laid down in its point 4.13 (option 2). In line with point 4.19 of the guidelines on national regional aid, aid calculated on the basis of option 1 (investment aid) can be combined with aid calculated on the basis of option 2 (job creation aid) provided the combined amount of aid does not exceed the regional aid ceiling multiplied by the higher of the two possible eligible expenditures. In line with this rule, and for the purposes of the present framework, the eligible expenditure of a specific investment project is defined on the basis of the option that leads to the higher amount. The eligible expenditure amount will be determined in such a way as not to exceed the higher investment amount resulting from the higher of the job creation method and the initial investment method, subject to the intensity ceiling laid down for the region.

23. By way of example, for a large company investing EUR 80 million in an assisted area where the unadjusted regional aid ceiling is 25 % net grant equivalent (nge), the maximum allowable aid amount would be EUR 16.25 million nge, which corresponds to an aid intensity of 20,3 % nge. For a large company investing EUR 160 million in the same area, the maximum allowable aid amount would be EUR 23.85 million nge, which corresponds to an aid intensity of 14,9 % nge.

24. However, Member States are required to notify every case of regional investment aid if the aid proposed is more than the maximum allowable aid that an investment of EUR 100 million can obtain under the scale and the rules laid down in paragraph 21 (10). Individually notifiable projects will not be eligible for investment aid in either of the following two situations:

(a) the aid beneficiary accounts for more than 25 % of the sales of the product concerned before the investment or will, after the investment, account for more than 25 %; or

(b) the capacity created by the project is more than 5 % of the size of the market measured using apparent consumption data of the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Areas’s GDP.

The burden of proving that the situations to which points (a) and (b) refer do not obtain lies with the Member State (11). For the purpose of applying points (a) and (b) apparent consumption will be defined at the appropriate level of the Prodcom classification (12) in the EEA, or, if such information is not available, on the basis of any other market segmentation generally accepted for the products concerned and for which statistical data are readily available.

(10) Proposals to award ad-hoc aid must in any event be notified and will be assessed on the basis of the rules laid down in section 3 of the Framework, and in line with the general assessment criteria laid down in the guidelines on national regional aid.

(11) If the Member State demonstrates that the aid beneficiary creates, through genuine innovation, a new product market, the tests laid down in letters (a) and (b) do not need to be carried out, and the aid will be authorised under the scale in paragraph 21.

25. The maximum allowable aid intensity that a notifiable project can receive under point 24 may be increased by multiplying it by the factor 1,15 if the project is co-financed from structural funds resources as a major project within the meaning of Article 25 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the structural funds (13), in line with the provisions laid down in Article 26 of the same Regulation. The rate of co-financing must be at least 10 % of the total public expenditure if the project is located in an area eligible for aid under Article 87(3)(c) of the Treaty and at least 25 % of the total public expenditure if the project is located in an area eligible for aid under Article 87(3)(a) thereof.

26. However, the aid increase resulting from point 25 must not lead to an aid intensity higher than the maximum aid intensity allowed for an investment of EUR 100 million, i.e. 75 % of the unadjusted regional aid ceiling.

4. AN AID PROHIBITION FOR INVESTMENT PROJECTS IN THE STEEL INDUSTRY

27. As regards the steel industry as defined in Annex B to this framework (14), the Commission notes that for a fairly long period of time, ECSC steel companies functioned without recourse to investment aid such as had been available to the rest of the industrial sectors. Steel companies have integrated this factor in their strategies and are used to it. Given the specific features of the steel sector (in particular its structure, the existing over-capacity at European and world level, its highly capital intensive nature, the location of the majority of steel plants in regions eligible for regional aid, the substantial amounts of public funds devoted to the restructuring of the steel sector, and the conversion of the steel areas) and the experience gained when less strict rules on State aid applied in the past, it appears justified to continue to prohibit investment aid to this sector, irrespective of the size of the investment. Accordingly, the Commission considers that regional aid to the steel industry is not compatible with the common market. This incompatibility also applies to large individual aid grants made to small and medium-sized enterprises within the meaning of Article 6 of Regulation (EC) No 70/2001, which are not exempted by the same Regulation.

28. The Commission has consistently considered in the past that investment in sectors that do, or might, suffer from serious overcapacity or persistent decline in demand increase the risk of distortion of competition, without bringing the necessary counterbalancing benefits to the region concerned. The proper way to recognise that these investments are less beneficial from a regional point of view is to reduce investment aid to projects in sectors where structural problems prevail, to a level below that permitted for other sectors.

29. Until now, several sensitive industrial sectors have been subject to specific, stricter rules on State aid (15). In accordance with point 1.3 of the previous multisectoral framework, these specific sectoral rules continued to apply.

30. One of the objectives of the previous multisectoral framework was to provide for the possibility of replacing the existing sectoral rules with a single instrument. Subject to the transitional rules laid down in section 8 below, the Commission wishes through the present revision to include these sensitive industrial sectors within this framework.

31. By 31 December 2003, sectors where serious structural problems prevail will be specified in a list of sectors annexed to the framework. No regional investment aid will be authorised in these sectors, subject to the provisions laid down in this section.

32. For the purpose of drawing up the list of sectors, serious structural problems will in principle be measured on the basis of apparent consumption data, at the appropriate level of the CPA classification (16) in the EEA, or, if such information is not available, on the basis of any other market segmentation generally accepted for the products concerned and for which statistical data are readily available. Serious structural problems will be deemed to exist when the sector concerned is declining (17). The list of sectors shall be updated periodically, with a frequency to be determined at the time at which the list of sectors is decided.

5. INVESTMENT PROJECTS IN SECTORS WITH STRUCTURAL PROBLEMS OTHER THAN STEEL

28. The Commission has consistently considered in the past that investment in sectors that do, or might, suffer from

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33. As from 1 January 2004, and for sectors included in the list of sectors with serious structural problems, all regional investment aid concerning an investment project involving eligible expenditure above an amount to be determined by the Commission at the time of drawing up the list of sectors (19) must be individually notified to the Commission, without prejudice to the provisions laid down in Regulation (EC) No 70/2001. The Commission will examine such notifications in accordance with the following rules: firstly, the aid project must comply with the general assessment criteria laid down in the guidelines on national regional aid; secondly, the eligible expenditure as defined under point 50 exceeding an amount to be determined by the Commission at the time of drawing up the list of sectors will not be eligible for investment aid, except for the cases referred to in point 34.

34. By way of derogation from point 33, the Commission may authorise investment aid for sectors included in the list of sectors on the basis of the aid intensities laid down in section 3 of this framework, provided that the Member State demonstrates that, although the sector is deemed to be in decline, the market for the product concerned is fast growing (19).

6. EX-POST MONITORING

35. In drawing up this framework, the Commission has attempted to ensure that, as far as possible, it is clear, unambiguous, predictable and efficient and that the additional administrative burden it entails is kept to a minimum.

36. In order to ensure transparency and effective monitoring, it is appropriate to establish a standard format in which Member States should provide the Commission with summary information in the form laid down in Annex A, whenever aid for investments above EUR 50 million is granted in pursuance of this framework. On implementation of aid falling under this framework, Member States must, within 20 working days starting from the granting of the aid by the competent authority, forward to the Commission such summary information. The Commission will make this information available to the public through its website (http://europa.eu.int/comm/competition/).

37. Member States must maintain detailed records regarding the granting of individual aid falling under this framework. Such records must contain all information necessary to establish that the maximum aid intensity determined under this framework is observed. Member States must keep a record regarding an individual aid for 10 years from the date on which it was granted. On written request, the Member State concerned must provide the Commission, within a period of 20 working days or such longer period as may be fixed in the request, with all the information that the Commission considers necessary to assess whether the provisions of this framework have been complied with.

7. VALIDITY OF THE FRAMEWORK

38. This framework will be applicable for a period ending on 31 December 2009. Before 31 December 2009, the Commission will evaluate the framework. The Commission may amend this framework before 31 December 2009 on the basis of important competition policy considerations or in order to take into account other Community policies or international commitments. Such review will not, however, affect the prohibition of investment aid to the steel industry.

39. As regards the steel sector as defined in Annex B, the provisions of the framework will be applied as from 24 July 2002. The existing specific sectoral rules for certain steel sectors not covered by the ECSC Treaty (20) will cease to be applicable from that date. As regards the motor vehicle sector as defined in Annex C, and the synthetic fibres sector as defined in Annex D, the provisions of the framework will be applied as from 1 January 2003. However, notifications registered by the Commission before 1 January 2003 for the motor vehicle sector and the synthetic fibres sector will be examined in the light of the criteria in force at the time of notification.

40. As regards sectors other than those mentioned in point 39, the provisions of this framework will be applied as from 1 January 2004. The previous multisectoral framework will remain applicable until 31 December 2003. However, notifications registered by the Commission before 1 January 2004 will be examined in the light of the criteria in force at the time of notification.

41. The Commission will examine the compatibility with the common market of investment aid granted without its authorisation:

(a) on the basis of the criteria set out in this framework if the aid was granted:

— on or after 24 July 2002, as regards investment aid to the steel sector,

— on or after 1 January 2003, as regards investment aid to the motor vehicle sector, and the synthetic fibres sector,

— on or after 1 January 2004, as regards investment aid to all other sectors subject to this framework;

(b) on the basis of the criteria in force at the time the aid was granted, in all other cases.

8. TRANSITIONAL PROVISIONS

42. Until the date of applicability of the list of sectors to which point 31 refers, and without prejudice to Regulation (EC) No 70/2001:

(a) the maximum aid intensity for regional investment aid in the motor vehicle sector as defined in Annex C granted under an approved scheme in favour of projects that involve either eligible expenditure above EUR 50 million or an aid amount above EUR 5 million expressed in gross grant equivalent, will be equal to 30% of the corresponding regional aid ceiling (21);

(b) no expenditure incurred in the context of investment projects in the synthetic fibres sector as defined in Annex D will be eligible for investment aid.

43. Before the date of applicability of the list of sectors to which point 31 refers, the Commission will decide whether and to what extent the motor vehicle sector as defined in Annex C and the synthetic fibres sector as defined in Annex D must be included in the list of sectors.

44. As regards the shipbuilding sector, the existing rules under Regulation (EC) No 1540/98 will be in force until 31 December 2003. Before this date, the Commission will have examined whether aid to the shipbuilding sector is to be covered by this framework and included in the list of sectors.

9. APPROPRIATE MEASURES

45. In order to ensure the implementation of the rules laid down in this framework, the Commission will propose appropriate measures within the meaning of Article 88(1) of the Treaty. These appropriate measures will include the following:

(a) modifying existing regional aid maps by adapting:

— as from 24 July 2002 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 4 of this framework,

— as from 1 January 2003 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 8,

— as from 1 January 2004 the current regional aid ceilings to the aid intensities resulting from the rules laid down in section 3;

(b) adjusting all existing regional aid schemes, as defined by the guidelines on national regional aid, including those exempted from notification pursuant to a block exemption regulation, in order to make sure that for regional investment aid granted:

(i) they respect the regional aid ceilings as laid down in the regional aid maps, as modified in accordance with (a) above as from 1 January 2004, as regards sectors other than those mentioned in point 39;

(ii) they provide for the individual notification of regional investment aid where the aid is more than the maximum allowable aid that an investment of EUR 100 million can obtain under the scale shown in point 21 of this framework as from 1 January 2004;

(iii) they exclude from their scope aid to the steel industry as from 24 July 2002;

(iv) they exclude from their scope aid to the synthetic fibres industry as from 1 January 2003 and until the list of sectors becomes applicable;

(v) they limit regional investment aid in the motor vehicle sector as defined in Annex C in favour of projects that involve either eligible expenditure above EUR 50 million or an aid amount above EUR 5 million expressed in gross grant equivalent to 30% of the corresponding regional aid ceiling, as from 1 January 2003 and until the list of sectors becomes applicable;

(21) Proposals to award ad-hoc aid must in any event be notified and will be assessed on the basis of this rule, and in line with the general assessment criteria laid down in the guidelines on national regional aid.
(c) ensuring that the forms mentioned in point 36 are forwarded to the Commission from the date this framework becomes applicable;

(d) ensuring that the records mentioned in point 37 are maintained as from the date this framework becomes applicable;

(e) complying, until 31 December 2003, with the rules of the previous multisectoral framework on regional aid for large investment projects, and in particular with the notification requirements laid down therein.

46. The necessary amendments must be made by the Member States within a period ending on 31 December 2003, except for the measures regarding the steel sector, for which the amendments must be in place from 24 July 2002, and regarding the synthetic fibres sector and the motor vehicle sector for which the amendments must be in place as from 1 January 2003. The Member States are invited to give their explicit agreement to the proposed appropriate measures within 20 working days from the date on which the letter is notified to them. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

10. NOTIFICATIONS UNDER THIS FRAMEWORK

47. Member States are invited to use the notification form attached to this framework (Annex E) for the purpose of notifying aid proposals pursuant to this framework.

11. DEFINITION OF TERMS USED

48. The following definitions of the terms used in this framework will apply:

11.1. Investment project

49. 'Investment project' means an initial investment within the meaning of section 4 of the guidelines on national regional aid. An investment project should not be artificially divided into sub-projects in order to escape the provisions of this framework. For the purpose of this framework an investment project includes all the fixed investments on a site, made by one or more undertakings, in a period of three years. For the purpose of this framework, a production site is an economically indivisible series of fixed capital items fulfilling a precise technical function, linked by a physical or functional link, and which have clearly identified aims, such as the production of a defined product. Where two or more products are produced from the same raw materials, the production units of such products will be deemed to constitute a single production site.

11.2. Eligible expenditure

50. 'Eligible expenditure' shall be determined in accordance with the rules laid down in the guidelines on national regional aid for this purpose.

11.3. Regional aid ceiling

51. 'Regional aid ceiling' refers to the maximum aid intensity authorised for large companies in the assisted area concerned at the time of the granting of the aid. Maximum aid intensities are determined in accordance with the guidelines on national regional aid, on the basis of the regional aid map approved by the Commission.

11.4. Product concerned

52. 'Product concerned' means the product envisaged by the investment project and, where appropriate, its substitutes considered to be such, either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations). When the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned will be deemed to include the downstream products.

11.5. Apparent consumption

53. 'Apparent consumption' of the product concerned is production plus imports minus exports.

54. Where the Commission determines in accordance with this framework the average annual growth of the apparent consumption of the product concerned, it will take into consideration, where appropriate, any significant change in that trend.

55. Where the investment project concerns a service sector, and in order to determine the size and the evolution of the market, the Commission will, instead of using apparent consumption, use the turnover of the services concerned on the basis of the market segmentation generally accepted for the services concerned and for which statistical data are readily available.
ANNEX A

FORM FOR EX-POST MONITORING

— Scheme title (or indicate if it is an ‘ad-hoc’ aid)

— Public entity providing the assistance

— If the legal basis is an aid scheme approved by the Commission, provide the date of the approval and the State aid case reference number

— Specify the region and the municipality

— Specify company name, whether it is an SME or a large company and, where relevant, the name of the parent companies

— Specify the type of the project and whether it is a new establishment or a capacity expansion or other

— Specify the total cost and the eligible cost of capital expenditure to be invested over the lifetime of the project

— Nominal amount of support and its gross and net grant equivalent

— Provide the conditions attached to the payment of the proposed assistance, if any

— Products or services concerned and their Prodcom nomenclature or CPA nomenclature for projects in the service sectors.
ANNEX B

DEFINITION OF THE STEEL INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The steel industry, for the purposes of the multisectoral framework consists of the undertakings engaged in the production of the steel products listed below:

<table>
<thead>
<tr>
<th>Product</th>
<th>Combined nomenclature code (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pig iron</td>
<td>7201</td>
</tr>
<tr>
<td>Ferro-alloys</td>
<td>7202 11 20, 7202 11 80, 7202 99 11</td>
</tr>
<tr>
<td>Ferrous products obtained by direct reduction of iron ore and other spongy ferrous products</td>
<td>7203</td>
</tr>
<tr>
<td>Iron and non-alloy steel</td>
<td>7206</td>
</tr>
<tr>
<td>Semi-finished products of iron or non-alloy steel</td>
<td>7207 11 11; 7207 11 14; 7207 11 16; 7207 12 10; 7207 19 11; 7207 19 14; 7207 19 16; 7207 19 31; 7207 20 11; 7207 20 15; 7207 20 17; 7207 20 32; 7207 20 51; 7207 20 55; 7207 20 57; 7207 20 71</td>
</tr>
<tr>
<td>Flat rolled products of iron and non-alloy steel</td>
<td>7208 10 00; 7208 25 00; 7208 26 00; 7208 27 00; 7208 36 00; 7208 37; 7208 38; 7208 39; 7208 40; 7208 51; 7208 52; 7208 53; 7208 54; 7208 90 10; 7209 15 00; 7209 16; 7209 17; 7209 18; 7209 25 00; 7209 26; 7209 27; 7209 28; 7209 90 10; 7210 11 10; 7210 12 11; 7210 12 19; 7210 20 10; 7210 30 10; 7210 11 00; 7210 11 10; 7210 12 11; 7210 12 19; 7210 20 10; 7210 30 10; 7210 41 10; 7210 49 10; 7210 50 10; 7210 61 10; 7210 69 10; 7210 70 31; 7210 70 39; 7210 90 31; 7210 90 33; 7211 00 10; 7211 01 00; 7211 02 00; 7211 13; 7211 14; 7211 19; 7211 23 10; 7211 23 31; 7211 29 20; 7211 90 10; 7211 90 11; 7212 10 10; 7212 10 91; 7212 12 10 11; 7212 12 15 10; 7212 14 10; 7212 30 11; 7212 40 10; 7212 40 91; 7212 50 31; 7212 50 51; 7212 60 11; 7212 60 91</td>
</tr>
<tr>
<td>Bars and rods, hot rolled, in irregularly wound coils, of iron or non-alloy steel</td>
<td>7213 10 00; 7213 20 00; 7213 91; 7213 99</td>
</tr>
<tr>
<td>Other bars and rods or iron and non-alloy steel</td>
<td>7214 20 00; 7214 30 00; 7214 91; 7214 99; 7215 90 10</td>
</tr>
<tr>
<td>Angles, shapes and sections of iron or non-alloy steel</td>
<td>7216 10 00; 7216 21 00; 7216 22 00; 7216 31; 7216 32; 7216 33; 7216 40; 7216 50; 7216 99 10</td>
</tr>
<tr>
<td>Stainless steel</td>
<td>7218 10 00; 7218 91 11; 7219 91 19; 7218 99 11; 7218 99 20</td>
</tr>
<tr>
<td>Flat rolled products of stainless steel</td>
<td>7219 11 00; 7219 12; 7219 13; 7219 14; 7219 21; 7219 22; 7219 23 00; 7219 24 00; 7219 31 00; 7219 31; 7219 32; 7219 33; 7219 34; 7219 35; 7219 90 10; 7220 11 00; 7220 12 00; 7220 20 10; 7220 90 11; 7220 90 31</td>
</tr>
<tr>
<td>Bars and rods of stainless steel</td>
<td>7221 00; 7222 11; 7222 19; 7222 30 10; 7222 40 10; 7222 40 30</td>
</tr>
<tr>
<td>Flat rolled products of other alloy steel</td>
<td>7225 11 00; 7225 19; 7225 20 20; 7225 30 00; 7225 40; 7225 50 00; 7225 91 10; 7225 92 10; 7225 99 10; 7226 11 10; 7226 19 10; 7226 19 30; 7226 20 20; 7226 91; 7226 92 10; 7226 93 20; 7226 94 20; 7226 99 20</td>
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<tr>
<td>Bars and rods of other alloys steels</td>
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</tr>
<tr>
<td>Sheet piling</td>
<td>7301 10 00</td>
</tr>
<tr>
<td>Rails and cross ties</td>
<td>7302 10 31; 7302 10 39; 7302 10 90; 7302 20 00; 7302 40 10; 7302 10 20</td>
</tr>
<tr>
<td>Seamless tubes, pipes and hollow profiles</td>
<td>7303; 7304</td>
</tr>
<tr>
<td>Welded iron or steel tubes and pipes, the external diameter of which exceeds 406,4 mm</td>
<td>7305</td>
</tr>
</tbody>
</table>

ANNEX C

DEFINITION OF MOTOR VEHICLE INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The ‘motor vehicle industry’ means the development, manufacture and assembly of ‘motor vehicles’, ‘engines’ for motor vehicles and ‘modules or sub-systems’ for such vehicles or engines, either direct by a manufacturer or by a ‘first-tier component supplier’ and, in the latter case, only in the context of an ‘overall project’.

(a) Motor vehicles

The term ‘motor vehicles’ means passenger cars, vans, trucks, road tractors, buses, coaches and other commercial vehicles. It does not include racing cars, vehicles intended for off-road use (for example, vehicles designed for use on snow or for carrying persons on golf courses), motorcycles, trailers, agricultural and forestry tractors, caravans, special purpose vehicles (for example, firefighting vehicles, mobile workshops), dump trucks, works’ trucks (for example, forklift trucks, straddle carrier trucks and platform trucks) and military vehicles intended for armies.

(b) Engines for motor vehicles

The term ‘motor vehicle engines’ means compression and spark ignition engines as well as electric motors and turbine, gas, hybrid or other engines for motor vehicles.

(c) Modules and sub-systems

A ‘module’ or a ‘sub-system’ means a set of primary components intended for a vehicle or engine which is produced, assembled or fitted by a first-tier component supplier and supplied through a computerised ordering system or on a just-in-time basis. Logistical supply and storage systems and subcontracted complete operations which form part of the production chain, such as the painting of sub-assemblies, should likewise be classified among these modules and sub-systems.

(d) First-tier component suppliers

A ‘first-tier component supplier’ means a supplier, whether independent or not, supplying a manufacturer, sharing responsibility for design and development (12), and manufacturing, assembling or supplying a vehicle manufacturer during the manufacturing or assembly stage with sub-assemblies or modules. As industrial partners, such suppliers are often linked to a manufacturer by a contract of approximately the same duration as the life of the model (for example, until the model is restyled). A first-tier component supplier may also supply services, especially logistical services, such as the management of a supply centre.

(e) Overall project

A manufacturer may, on the actual site of the investment or in one or several industrial parks in fairly close geographical proximity (13), integrate one or more projects of first-tier component suppliers for the supply of modules or sub-systems for the vehicles or engines being produced. An ‘overall project’ means one which groups together such projects. An overall project lasts for the life of the vehicle manufacturer’s investment project. An investment of one first-tier component supplier is integrated within the definition of a global project if at least half the output resulting from that investment is delivered to the manufacturer concerned at the plant in question.

ANNEX D

DEFINITION OF SYNTHETIC FIBRES INDUSTRY FOR THE PURPOSES OF THE MULTISECTORAL FRAMEWORK

The synthetic fibres industry is defined, for the purposes of the multisectoral framework, as:

— extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses, or

— polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used, or

— any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity by the prospective beneficiary or by another company in the group to which it belongs and which, in the specific business activity concerned, is normally integrated with such capacity in terms of the machinery used.
ANNEX E

NOTIFICATION FORM (1)

SECTION 1 — MEMBER STATE

1.1. Information on notifying public authority:

1.1.1. Name and address of notifying authority.

1.1.2. Name, telephone, fax and e-mail address of, and position held by, the person(s) to be contacted in case of further inquiry.

1.2. Information of contact in permanent representation:

1.2.1. Name, telephone, fax and e-mail address of, and position held by, the person to be contacted in case of further inquiry.

SECTION 2 — AID RECIPIENT

2.1. Structure of the company or companies investing in the project:

2.1.1. Identity of aid recipient.

2.1.2. If the legal identity of the aid recipient is different from the undertaking(s) that finance(s) the project or that receive(s) the aid, describe also these differences.

2.1.3. Identify the parent group of the aid recipient, describe the group structure and ownership structure of each parent company.

2.2. For a company or companies investing in the project, provide the following data for the last three financial years:

2.2.1. Worldwide turnover, EEA turnover, turnover in Member State concerned.

2.2.2. Profit after tax and cash flow (on a consolidated basis).

2.2.3. Employment worldwide, at EEA level and in Member State concerned.

2.2.4. Market breakdown of sales in the Member State concerned, in the rest of the EEA and outside the EEA.

2.2.5. Audited financial statements and annual report for the last three years.

2.3. If the investment takes place in an existing industrial location, provide the following data for the last three financial years of that entity:

2.3.1. Total turnover.

2.3.2. Profit after tax and cash flow.

2.3.3. Employment.

2.3.4. Market breakdown of sales: in the Member State concerned, in the rest of the EEA and outside the EEA.

(1) For aid granted outside authorised schemes, the Member State must provide information detailing the beneficial effects of the aid on the assisted area concerned.
SECTION 3 — PROVISION OF PUBLIC ASSISTANCE

For each measure of proposed public assistance, provide the following:

3.1. Details:

3.1.1. Scheme title (or indicate if it is an ad-hoc aid).

3.1.2. Legal basis (law, decree, etc.).

3.1.3. Public entity providing the assistance.

3.1.4. If the legal basis is an aid scheme approved by the Commission, provide the date of the approval and the State aid case reference number.

3.2. Form of the proposed assistance:

3.2.1. Is the proposed assistance a grant, interest subsidy, reduction in social security contributions, tax credit (relief), equity participation, debt conversion or write off, soft loan, deferred tax provision, amount covered by a guarantee scheme, etc.?

3.2.2. Provide the conditions attached to the payment of the proposed assistance.

3.3. Amount of the proposed assistance:

3.3.1. Nominal amount of support and its gross and net grant equivalent.

3.3.2. Is the assistance measure subject to corporate tax (or other direct taxation)? If only partially, to what extent?

3.3.3. Provide a complete schedule of the payment of the proposed assistance. For the package of proposed public assistance, provide the following:

3.4. The characteristics of the assistance measures:

3.4.1. Are any of the assistance measures of the overall package not yet defined? If yes, specify.

3.4.2. Indicate which of the abovementioned measures does not constitute State aid and for what reason(s).

3.5. Financing from Community sources (EIB, ECSC instruments, Social Fund, Regional Fund, other):

3.5.1. Are some of the abovementioned measures to be co-financed by Community funds? Explain.

3.5.2. Is some additional support for the same project to be requested from any other European or international financing institutions? If so, for what amounts?

3.6. Cumulation of public assistance measures:

3.6.1. Estimated gross grant equivalent (before taxation) of the combined aid measures.

3.6.2. Estimated net grant equivalent (after taxation) of the combined aid measures.

SECTION 4 — ASSISTED PROJECT

4.1. Location of the project:

4.1.1. Specify the region and the municipality as well as the address.
4.2. Duration of the project:

4.2.1. Specify the start date of the investment project as well as the completion date of the investment.

4.2.2. Specify the planned start date of the new production and the year by which full production may be reached.

4.3. Description of the project:

4.3.1. Specify the type of the project and whether it is a new establishment or a capacity expansion or other.

4.3.2. Provide a short general description of the project.

4.4. Breakdown of the project costs:

4.4.1. Specify the total cost of capital expenditure to be invested and depreciated over the lifetime of the project.

4.4.2. Provide a detailed breakdown of the capital and non-capital expenditure associated with the investment project.

4.5. Financing of total project costs:

4.5.1. Indicate the financing of the total cost of the investment project.

SECTION 5 — PRODUCT AND MARKET CHARACTERISTICS

5.1. Characterisation of product(s) envisaged by the project:

5.1.1. Specify the product(s) that will be produced in the aided facility upon the completion of the investment and the relevant (sub-)sector(s) to which the product(s) belong(s) (indicate the Prodcom code or CPA nomenclature for projects in the service sectors).

5.1.2. What product(s) will it replace? If these replaced products are not produced at the same location, indicate where they are currently produced.

5.1.3. What other product(s) can be produced with the same new facilities at little or no additional cost?

5.2. Capacity considerations:

5.2.1. Quantify the impact of the project on the aid recipient's total viable capacity in the EEA (including at group level) for each of the product(s) concerned (in units per year in the year preceding the start year and on completion of the project).

5.2.2. Provide an estimate of the total capacity of all EEA producers for each of the products concerned.

5.3. Market data:

5.3.1. Provide for each of the last six financial years data on apparent consumption of the product(s) concerned. If available, include statistics prepared by other sources to illustrate the answer.

5.3.2. Provide for the next three financial years a forecast of the evolution of apparent consumption of the product(s) concerned. If available, include statistics prepared by independent sources to illustrate the answer.

5.3.3. Is the relevant market in decline and for what reasons?

5.3.4. An estimate of the market shares (in value) of the aid recipient or of the group to which the aid recipient belongs in the year preceding the start year and on completion of the project.
Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty

(2002/C 152/03)

(Text with EEA relevance)

1. INTRODUCTION

1. By virtue of its Article 97, the Treaty establishing the European Coal and Steel Community (ECSC Treaty) expires on 23 July 2002 (1). This means in principle that as from 24 July 2002 the sectors previously covered by the ECSC Treaty and the procedural rules and other secondary legislation derived from the ECSC Treaty will be subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty (2).

2. The purposes of this Communication are — in its section 2, to summarise for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime,

— in its section 3, to explain how the Commission intends to deal with specific issues raised by the transition from the ECSC to the EC regime.

3. The principles that underlie the competition rules of the two Treaties are similar. Articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7) of the ECSC Treaty. Furthermore, practices under the two Treaties have been converging for many years. In its Twentieth Report on Competition Policy (1990) (3), the Commission announced that the time had come to align the enforcement of ECSC competition rules as much as possible with the practice under the EC Treaty. In 1998, it published a notice (4) dealing with the alignment of procedures for processing mergers under the ECSC and EC Treaties. In practical terms, the changes, both substantial and procedural, arising from the expiry of the ECSC Treaty are likely to be limited in scope. The objective of this Communication is to facilitate the changeover by setting out how certain situations will be dealt with in the transition from the ECSC to the EC regime. This Communication is made without prejudice to the interpretation of the ECSC rules and EC rules by the Court of First Instance and the European Court of Justice.

2. THE MOST IMPORTANT CHANGES DUE TO THE EXPIRY OF THE ECSC TREATY

2.1. Antitrust

2.1.1. Jurisdiction

4. Under the ECSC regime, as the Commission had exclusive jurisdiction, the national competition authorities and national courts could not apply either Articles 65 and 66 ECSC Treaty (7) or their national competition rules to deal with coal and steel cases.

5. With the transition to the EC regime, the national authorities and courts responsible for competition will become competent (5) to apply the European competition rules in the coal and steel sectors as the relevant provisions of the EC Treaty have direct effect, with the exception of Article 81(3), for which the Commission retains at present sole competence (6). Thus, under the principles of the EC regime, the Commission and the national authorities and courts will have parallel powers to apply Community competition law (10).

6. It should also be noted that, unlike Articles 65 and 66(7) ECSC Treaty, which did not include any conditions relating to effect on trade, Articles 81 and 82 EC Treaty apply only if trade between Member States is affected. Thus, where agreements or practices restricting competition, or an abuse of a dominant position, do not affect trade between Member States, the national competition authorities and the national courts will, from 24 July 2002, be authorised to apply their national competition rules in the field of coal and steel (11).

7. The national competition authorities and the national courts, which had no powers to apply competition law under the ECSC regime, will now be able to apply either national law and Community law or, where trade between Member States is not affected, only the relevant national law.
2.1.2. Substantive antitrust rules

8. As regards the question of an appreciable restriction of competition under Article 81(1) of the EC Treaty, the Commission would first point out that the policy concerning agreements of minor importance in terms of market share (12) (agreements that are not therefore covered by Article 81(1) (13)) will apply in full to the coal and steel sectors as from 24 July 2002.

9. Under the ECSC regime, joint ventures have generally been regarded as being covered by the provisions on concentrations (Article 66(1) to (6) of the ECSC Treaty) (14). Joint ventures notified after 23 July 2002 that do not have the characteristics of a 'full-function' joint venture within the meaning of Regulation (EEC) No 4064/89 (15) will be regarded as agreements within the meaning of Article 81 EC Treaty (16). Agreements concluded by such undertakings will therefore be covered by the relevant provisions of Regulation No 17 (17).

10. The system requiring price lists and conditions of sale to be notified to the Commission and made public will be abolished (18). Effectively, the undertakings concerned will no longer be required systematically to communicate such data to the Commission before making use of it (19).

2.1.3. Procedural rules relating to antitrust

11. The Commission has for many years (20) endeavoured to apply the same principles, inter alia at procedural level, to practices under the ECSC Treaty and to those under the EC Treaty: thus important procedural features such as access to the file, hearings or the closing of a case with a comfort letter were introduced into ECSC practice on the basis of EC practice. The transition to the EC regime will enhance the transparency of these practices.

12. As regards agreements restricting competition, two innovative factors will be introduced into the sectors concerned: the requirement, where parties apply to the Commission for negative clearance or exemption, that the agreements be notified on form A/B (21) will be officially introduced (22). In addition, prior consultation of an Advisory Committee will be required before the adoption of any Commission decision mentioned in Article 10 of Regulation No 17 (17).

13. Undertakings are also informed that the provisions implementing the ban on abuse of a dominant position are more straightforward under the EC regime than under the ECSC regime. Indeed, under the Article 82 EC Treaty procedure, the Commission can immediately adopt directly applicable decisions, whereas under Article 66(7) ECSC Treaty, it must first send the undertaking concerned an ECSC recommendation and only then can it take a decision in consultation with the Member State concerned.

2.2. Merger control

2.2.1. Jurisdiction

14. As far as jurisdiction is concerned, the ECSC Treaty gives the Commission exclusive jurisdiction over all concentrations involving coal and steel undertakings. On the other hand, the EC Merger Regulation (23) gives the Commission jurisdiction only over concentrations involving undertakings whose turnover exceeds certain thresholds. Therefore, some operations which would have required prior authorisation from the Commission under ECSC rules, but do not meet the thresholds under the EC Merger Regulation, will after the expiry of the ECSC Treaty fall outside the Commission's jurisdiction and fall to be examined by the national authorities in so far as national merger rules exist.

2.2.2. Substantive law relating to concentrations

15. In relation to substance, the tests under Article 66(2) ECSC Treaty (24) and under Article 2 EC Merger Regulation (25) though not expressed in the same language, are similar.

2.2.3. Procedural law relating to concentrations

16. The procedures for the treatment of concentrations have been aligned to a large extent since March 1998 when the Commission started to apply the provisions of its Notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties (26).

17. However, the timing of notifications under the ECSC regime and the EC regime is different. The ECSC rules allow notification at any time, while the proposed concentration cannot, however, be legally completed without the prior authorisation of the Commission. The EC Merger Regulation requires parties to notify within one week of the 'triggering event', i.e. the moment when the operation becomes irrevocable. The Commission must then adopt its decision(s) within the time limits prescribed by the EC Merger Regulation, otherwise the proposed operation is automatically authorised.

2.3. Control of State aid to the steel industry

2.3.1. Substantive rules relating to steel aid

18. As for the notion of State aid, Article 4(c) ECSC Treaty does not require the affectation of trade between Member States for a measure to be considered State aid, contrary to Article 87 EC Treaty. In practice, this difference will be, however, of very limited importance given the intense trade between Member States in steel products.
19. Under the EC rules, the criteria for assessment of compatibility of State aid with the common market will be in summary the following:

— Regional investment aid will continue to be forbidden (27). This prohibition also covers the granting of regional aid supplements to small and medium-sized enterprises (SMEs).

— Rescue and restructuring aid will continue to be forbidden (28).

— Under the ECSC rules, environment aid was permitted in accordance with the Community guidelines on State aid for environmental protection adopted in 1994 (29) and with the annex to the Steel Aid Code (30). From 24 July 2002, the Community guidelines on State aid for environmental protection adopted in 2000 will apply (31). The most important difference of these guidelines in comparison with the guidelines applicable to the steel industry before the expiry of the ECSC Treaty is that aid granted for conforming with standards will no longer be allowed (except for aid to SMEs in limited conditions).

— Research and development aid will continue to be permitted in line with the Community framework for State aid for research and development (32).

— Aid in connection with closures will continue to be permitted (33).

— Aid for small and medium-sized enterprises at aid rates of up to 15% and 7.5% respectively will be permitted in line with Commission Regulation (EC) No 70/2001 (34) (except for large individual aid grants as defined in Article 6 of that Regulation which will continue to be forbidden).

— De minimis aid will be permitted in line with Commission Regulation (EC) No 69/2001 (35).

— Training aid will be permitted in line with Commission Regulation (EC) No 68/2001 (36).

— Employment aid will be permitted in line with the guidelines on aid to employment (37).

20. Council Regulation (EC) No 659/1999 (38) will apply as from 24 July 2002. This will not entail major changes as compared with the provisions established in Article 6 of the Steel Aid Code (39).

21. As for notification requirements, unless otherwise established, aid granted to the steel industry under schemes authorised by the Commission will no longer be subject to the prior notification requirement established in the Steel Aid Code. The same applies to aid block-exempted by virtue of Commission Regulations (EC) No 70/2001 (40) and (EC) No 68/2001 (41).

24. Control of State aid to the coal industry

2.4.1. Substantive rules relating to steel aid

22. Until the expiry of the ECSC Treaty, State aid to the coal industry will be assessed on the basis of the rules as laid down in Decision 3632/93/ECSC (42).

23. On 25 July 2001, the Commission adopted a proposal for a Council Regulation on State aid to the coal industry after the expiry of the ECSC Treaty (43). The proposal is based on Articles 87(3)(e) and 89 EC Treaty. It has to be adopted by the Council, after an opinion from the European Parliament (44). It would apply from 24 July 2002. The draft Regulation stipulates that aid covering costs for the year 2002 will, on the basis of a reasoned request by the Member State, continue to be subject to the rules and principles laid down in Decision No 3632/93/ECSC.

2.4.2. Procedural rules relating to coal aid


3. SPECIFIC ISSUES RAISED BY THE TRANSITION FROM THE ECSC REGIME TO THE EC REGIME

25. When assessing the impact of the expiry of the ECSC Treaty on cases which would so far have been covered by the ECSC rules, three situations have to be distinguished:

— First, cases, which have been completed in all factual and legal respects on or before 23 July 2002, will be subject to the ECSC rules only and are therefore unproblematic.
26. With regard to procedural law, the basic principle for all
three areas (antitrust, merger control, State aid control) is
that the rules applicable are those in force at the time of
taking the procedural step in question (46). This means that
as from 24 July 2002 on, the Commission will exclusively
apply the EC procedural rules in all pending and new
cases. Unless otherwise stated in this Communication,
procedural steps validly taken under the ECSC rules
before expiry of the ECSC Treaty will after the expiry be
taken to have fulfilled the requirements of the equivalent
procedural step under the EC rules.

3.1. Antitrust

3.1.1. The position which restrictive agreements/concerted practices
exempted by the Commission on the basis of Article 65(2)
ECSC Treaty before or on 23 July 2002 will have after 23
July 2002

27. From 24 July 2002, all the EC competition rules will apply
to those agreements or practices which have previously
been authorised or the subject of a comfort letter
adopted under the ECSC rules. Authorisations granted
under the ECSC regime will also cease to be valid upon
expiry of the ECSC Treaty.

28. It will therefore be for the undertakings concerned to
review the legality of their agreements or practices in
the light of Articles 81 and 82 EC Treaty. The Commission
draws attention to the many block exemptions and
guidelines applicable in this area. In addition, in view of
the similarity of Articles 65(2) ECSC Treaty and 81(3) EC
Treaty and the convergence policy applied by the
Commission when examining ECSC cases over the years,
the Commission informs undertakings that it does not
intend, after 23 July 2002, to initiate proceedings under
Article 81 EC Treaty in respect of agreements previously
authorised under the ECSC regime and that, under the
circumstances, it does not intend to impose any financial
penalty on undertakings which are party to such
agreements. This presupposes that, where Commission
approval was subject to conditions or obligations, these
continue to be complied with by the parties concerned.

29. The Commission reserves the right, however, under the EC
rules, to initiate proceedings in respect of the future
implementation of the practices and agreements referred
to in the preceding paragraph if, owing to substantial
factual or legal developments, such practices and
agreements are clearly not eligible for exemption under
Article 81(3) EC Treaty. In that case, the Commission
would respect the legitimate expectation of the undertakings
concerned and would intervene only in the
following cases: where there has been a change in any
of the facts which were basic to the making of the
authorising decision; where the parties commit a breach of any
condition or obligation attached to the decision; where
the decision is based on incorrect information or was induced
by deceit; where the parties abuse the authorisation
pursuant to Article 65(2) of the ECSC Treaty granted
to them by the decision.

3.1.2. Notification cases in which the Commission started its
procedure before expiry of the ECSC Treaty and in which
this procedure is still pending after 23 July 2002

30. As regards notifications made under the ECSC regime that
are still being examined at the time of the transition, the
Commission will apply Article 65(2) of the ECSC Treaty as
regards the period before the date of expiry of that Treaty
and Article 81(3) of the EC Treaty as regards the period
thereafter. In any event, as regards procedure, the law
applicable after the expiry of the ECSC Treaty will be
the EC law.

3.1.3. Application of Articles 65 ECSC Treaty and 81 EC Treaty to
other types of agreements

31. If the Commission, when applying the Community
competition rules to agreements, identifies an infringement
in a field covered by the ECSC Treaty, the substantive law
applicable will be, irrespective of when such application
takes place, the law in force at the time when the facts
constituting the infringement occurred. In any event, as
regards procedure, the law applicable after the expiry of
the ECSC Treaty will be the EC law (47).

3.2. Merger control

3.2.1. Clearance decisions with conditions/obligations adopted by the
Commission under the ECSC Treaty before expiry of that
Treaty, compliance with these conditions/obligations to be
monitored after 23 July 2002

32. Where a concentration has been cleared under the ECSC
Treaty subject to conditions and/or obligations, which
continue after 23 July 2002, and these conditions and/or
obligations are not satisfactorily fulfilled after 23 July
2002, the Commission will take action under the appro-
priate provisions of the EC Merger Regulation (47).
33. Similarly, if it proves necessary to modify after 23 July 2002 conditions and/or obligations based on commitments given by undertakings in order to secure the authorisation of their concentrations prior to the expiry of the ECSC Treaty, the Commission will take action as if the original authorisation decision had been adopted under the EC Merger Regulation.

3.2.2. Concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty

34. Three principal possibilities arise in relation to concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty:

— Where the notified ECSC case does not meet the thresholds of the EC Merger Regulation, there is no longer a case with the Commission. In this situation, the parties must as of 24 July 2002 notify the case to the competent national authorities, where appropriate.

— If the notified ECSC case meets the thresholds of the EC Merger Regulation, its instruction by the Commission will continue under the EC Merger Regulation and it will be treated as though it had been originally notified under that Regulation, if the triggering event in the sense of that Regulation took place on or before 23 July 2002. If the triggering event occurs afterwards, the operation should be renotified.

— In cases where a triggering event has occurred and a case which meets the thresholds under the EC Merger Regulation has entered the informal second phase (initiated by means of a letter setting out the Commission's concerns) at the expiry of the ECSC Treaty, but where a statement of objections has not yet been adopted, the Commission will adopt a decision under Article 6(1)(c) EC Merger Regulation as soon as is practically possible after the expiry of the ECSC Treaty. The Commission will endeavour in such cases to adhere to the timetable set out in the EC Merger Regulation to the greatest extent possible, counting from the date of notification. In particular, it will endeavour to ensure that the statement of objections is sent out at the appropriate time and that the overall five-month deadline for the adoption of a final decision is respected.

3.2.3. Form of notification

35. The approach to pending notified ECSC transactions outlined above only applies to ECSC notifications made using Form CO and which are complete. Furthermore, it is clear from the EC Merger Regulation itself that its time periods only start to run once the Commission is in possession of a complete notification, in the form provided for (48).

3.2.4. Operations exempted from the requirement of prior authorisation under Article 66 ECSC Treaty

36. Decision No 25/67/ECSC (49) exempts certain operations from the requirement of prior authorisation under Article 66 ECSC Treaty. However neither the ECSC Treaty nor Decision No 25/67/ECSC set out when the exemption takes effect. There is no equivalent under the ECSC rules of the 'triggering event' under the EC Merger Regulation (50). When an operation, which is exempted by Decision No 25/67/ECSC, has reached an irrevocable stage (for instance if the sale and purchase agreements have been finalised and signed) on or before 23 July 2002, then this operation remains exempted from the requirement of prior authorisation under the EC Merger Regulation. On the other hand, if the operation has not reached an irrevocable stage before 24 July 2002, the operation must be notified if necessary to the Commission under the EC Merger Regulation upon the occurrence of the triggering event.

3.2.5. Non-exempted ECSC transaction that has not been notified before expiry of the ECSC Treaty

37. Where a transaction which is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty has not been notified before expiry of that Treaty, the parties must notify the transaction under the EC Merger Regulation if the conditions for such notification are satisfied. Where the transaction is not notified in such circumstances, fines may be imposed for non-notification in accordance with Article 14(1)(a) of the EC Merger Regulation as of 31 July 2002 (i.e. one week after the EC Merger Regulation applied).

3.2.6. Non-exempted ECSC transaction that has been implemented and not been notified before expiry of the ECSC Treaty

38. Where a transaction, which in the sense of the preceding point 3.2.5. is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty and has not been notified, has in addition been implemented before the expiry of the ECSC Treaty, fines may be imposed for non-authorised implementation of the concentration in accordance with Article 14(2)(b) of the EC Merger Regulation as of 24 July 2002, provided the transaction comes within the scope of that Regulation (51).
3.2.7. Joint ventures

39. The practice under the ECSC Treaty has been to treat most joint ventures (with the exception of joint buying, joint selling and specialisation agreements and agreements strictly analogous to them) as concentrations under the provisions of Article 66. Therefore, certain operations which are subject to the requirement of prior authorisation under Article 66 ECSC Treaty may not be notifiable under the EC Merger Regulation, for example if they are not full function (52). If notifications of such joint ventures which would not be notifiable under the EC Merger Regulation are pending at the time of the expiry of the ECSC Treaty, the notifications could, in appropriate cases be converted under the provisions of Article 5 of the Implementing Regulation (53) into notifications under Regulation No 17.

40. The expiry of the ECSC Treaty will have no effect on joint ventures (full function or otherwise) authorised under Article 66(2) ECSC Treaty on or before 23 July 2002 or benefiting from an exemption within the meaning of paragraph 36 above.

41. After the expiry of the ECSC Treaty, Article 2(4) of the EC Merger Regulation will be applied to concentrations in the coal and steel sectors which fall within the scope of that Regulation. This Article, which has no equivalent in the ECSC rules, provides that where the creation of a full-function joint venture constituting a concentration in the sense of that Regulation has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 81 EC Treaty (54).

3.3. Control of State aid to the steel industry

42. With regard to State aid authorised by the Commission under the Steel Aid Code (55) or Article 95 ECSC Treaty subject to conditions, the Commission will after 23 July 2002 continue to monitor their fulfilment. In case of non-compliance, Article 88 EC Treaty will be applicable.

43. Where the aid was notified before or on 31 December 2001 (56) and the Commission has initiated the procedure of Article 6(5) of the Steel Aid Code, it will endeavour to adopt a decision at the latest on 23 July 2002 on the basis of the information available to it. However, if for objective reasons, this is not possible, the Commission will investigate under the provisions of Regulation (EC) No 659/1999 and adopt a final decision under Article 88(2) EC Treaty.

44. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (57). According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

3.4. Control of State aid to the coal industry

45. After the expiry of the ECSC Treaty, the Commission will continue to monitor the application by the Member States of the decisions authorising State aid adopted under Decision No 3632/93/ECSC (58). In case of non-compliance, the case will be investigated following the procedures as laid down in Regulation (EC) No 659/1999.

46. It is expected that the majority of State aid which covers costs prior to 23 July 2002 will be the subject of Commission decisions before the expiry of the ECSC Treaty. However, there may be cases where the Commission is not in a position to adopt a decision before the expiry of the ECSC Treaty. These possible cases, and the Commission's proposed course of action in respect of them, are as follows.

— In accordance with Article 9(4) of Decision No 3632/93/ECSC, the Commission has to decide on the measures notified by a Member State within three months of receipt of notification. It may consequently happen that aid notified less than three months before the expiry of the ECSC Treaty (i.e. notification after 23 April 2002) is not the subject of a Commission decision before the expiry of this Treaty. This could also be the case of a notification made earlier, if the Commission considered that the notification was insufficient and requested further information from the Member State or, having doubts about the compatibility of the aid, decided to initiate the procedure provided for under Article 88 ECSC Treaty.

— If there has been no Commission decision when three months from notification have passed, the expiry of the ECSC Treaty means that the Member State does not have the right to implement the notified measure at the end of the three-month period referred to above, as it would have had were Article 9(4) Decision No 3632/93/ECSC still in force. Indeed, any notification presented by the Member State before the expiry of the ECSC Treaty, which has not been the subject of a formal Commission decision, will have to be considered obsolete (i.e. non-existent from a legal point of view) after 23 July 2002.
— The Member State would have to proceed with a new notification under the provisions of the EC Treaty and of the possible new Council Regulation (9) which, once adopted, would be applicable as from 24 July 2002. Alternatively, and more simply, the Member State could inform the Commission that the initial notification can be regarded as a newly submitted notification. The period in which the Commission will have to decide would start to run as of the date of this (new) notification. If such a case arose, the Commission would make the utmost efforts to ensure that a decision on the measure is adopted as soon as possible.

— The draft Council Regulation (9), currently under discussion (8) and intended to be applicable after the expiry of the ECSC Treaty, stipulates that Member States will be able to opt, for aid covering costs for 2002, for the application of the rules and of the principles laid down in Decision No 3632/93/ECSC.

47. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the specific provisions in the Council Regulation currently under discussion (9). When assessing aid, which does not fall under that Regulation and which has been granted on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (9). According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

(9) Article 97 ECSC Treaty provides: 'This Treaty is concluded for a period of 50 years from its entry into force.'.

(8) The question which rules are applicable to individual cases, which started before the expiry of the ECSC Treaty and are not fully completed by 23.7.2002, is tackled under section 3 below.

(9) In this Communication, the term 'antitrust' refers to the prohibition of restrictive agreements between undertakings, decisions by associations of undertakings and concerted practices, as well as the prohibition of abuses of dominant positions (Articles 65 and 66(7) ECSC Treaty; Articles 81 and 82 EC Treaty).

(9) In this communication, the term 'merger control' refers to the control of any concentrations no matter whether they are effected by mergers between previously independent undertakings or acquisition of control of other undertakings (see Article 66(1) ECSC Treaty and Article 3 Council Regulation (EEC) No 4064/89 as amended by Regulation (EC) No 1310/97).

(9) European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.


(9) Where national administrations are concerned, on condition that their national law allows them to apply Community law.

(9) The proposed amendment of Council Regulation No 17 (COM(2000) 582 final of 27.9.2000), currently before the Council and the European Parliament, foresees to give the national competition authorities and the national courts the power to apply Articles 81 and 82 EC Treaty in full.

(9) The details of the cooperation between the Commission and the competent national authorities are defined in the Notice on cooperation between the national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13.2.1993, p. 6) and in the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ C 313, 15.10.1997, p. 3).

(9) This does not of course prevent national law from applying in parallel with Community law where the condition of effect on trade is satisfied.

(9) Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 66, 2.3.1998).

(9) Provided they do not contain any 'hard core' restrictions.

(9) However, in the case of undertakings whose object was a joint buying or a joint selling agreement, a specialisation agreement or agreements establishing the European Community (de minimis) (OJ C 368, 22.12.2001, p. 13).


(9) The sole exception will be transactions which benefited from an exemption from the requirement of prior authorisation under Article 66 of the ECSC Treaty and which have become irrevocable before 24 July 2002; see paragraph 36 below.

(9) This will involve a modification of the timetable (there being much fewer rules on the time limits for the examination of such agreements by the Commission than for 'merger'-type procedures, except in the specific case of cooperative joint ventures 'of a structural character' where an accelerated procedure is established by Commission Regulation (EC) No 3385/94 of 21 December 1994), and of the criterion of compatibility of the agreement.

(9) Pursuant to Article 60(2) ECSC Treaty, Decision No 4-53 of 12.2.1953 (OJ of the High Authority of 12.2.1953, p. 3) and, as regards coal only, Decision 72/443/ECSC of 22.12.1972 on alignment of prices for sales of coal in the common market (OJ L 297, 30.12.1972, p. 45). In practice, the implementation of this obligation had been gradually relaxed, but certain undertakings in the coal sector nonetheless continued to send this information to the Commission.

(9) The removal of this requirement is without prejudice to the Commission's power to seek from the undertakings concerned all the information it requires to carry out the tasks assigned to it by the Treaty and Community law.

(9) European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.

The Commission had already asked the undertakings concerned to use a simplified form for their applications for authorisation (Twenty-first OJ C119, 22.5.2002, p. 22).

See paragraph 23 above.

See paragraph 23 above.

See footnote 44.

See paragraph 23 above.

See paragraph 23 above.


OJ C 37, 3.2.2001, p. 3.


OJ C 152/12

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION
EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks
(2013/C 25/01)

1. INTRODUCTION

(1) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and for social and territorial cohesion. The Europe 2020 Strategy (EU2020) underlines the importance of broadband deployment as part of the EU’s growth strategy for the coming decade and sets ambitious targets for broadband development. One of its flagship initiatives, the Digital Agenda for Europe (DAE) (1) acknowledges the socio-economic benefits of broadband, highlighting its importance for competitiveness, social inclusion and employment. The achievement of Europe 2020 objective of a smart, sustainable and inclusive growth depend also on the provision of widespread and affordable access to high-speed Internet infrastructure and services. Meeting the challenge of financing a good-quality and affordable broadband infrastructure is a crucial factor for Europe to increase its competitiveness and innovation, provide job opportunities for young people, prevent relocation of economic activity and attract inward investments. The DAE restates the objective of the EU2020 to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher Internet speeds of above 30 Mbps and (ii) 50 % or more of European households subscribe to Internet connections above 100 Mbps.

(2) To achieve the objective of access to Internet speeds of above 30 Mbps it is estimated (2) that up to EUR 60 billion of investment would be necessary and up to EUR 270 billion for at least 50 % of households to take up Internet connections above 100 Mbps (3). Such investments shall primarily come from commercial investors. However, the DAE objectives cannot be reached without the support of public funds. For this reason, the DAE calls on Member States to use ‘public financing in line with EU competition and State aid rules’ in order to meet the coverage, speed and take-up targets defined in EU2020 (4). Demand for capacity-intensive services is expected to increase in the future, as cloud computing, a more intense use of peer-to-peer technologies, social networks and video on demand services will develop further.

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(1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 245 final, A Digital Agenda for Europe.
(3) The actual investments costs could be significantly lower depending on the reusability of existing infrastructures and depending on the market, technology and regulatory developments.
(4) Paragraph 2.4, Key Action 8.
(3) The electronic communication sector has undergone a thorough liberalisation process and is now subject to sectoral regulation. The EU regulatory framework for electronic communications also provides harmonisation rules concerning broadband access (5). With regard to legacy broadband networks, wholesale markets are to date subject to ex ante regulation in the majority of Member States. The regulatory approach has proved successful to foster competitive markets, to encourage investment and to increase consumer choice: for example, the highest broadband coverage and take-up is found in Member States with infrastructure competition, combined with effective ex ante regulation to promote service competition. Further deployment of broadband networks and in particular of Next Generation Access (NGA) networks continues to require the intervention of the national regulatory authorities (NRAs) due to their role in the electronic communications sector.

(4) It is all the more important that public funds are carefully used in this sector and that the Commission ensures that State aid is complementary and does not substitute investments of market players. Any State intervention should limit as much as possible the risk of crowding out private investments, of altering commercial investment incentives and ultimately of distorting competition contrary to the common interest of the European Union.

(5) In its Communication on State Aid Modernisation (SAM), the Commission notes that State aid policy should focus on facilitating well-designed aid targeted at market failures and objectives of common European interest (6). State aid measures can, under certain conditions, correct market failures, thereby improving the efficient functioning of markets and enhancing competitiveness. Further, where markets provide efficient outcomes but these are deemed unsatisfactory from a cohesion policy point of view, State aid may be used to obtain a more desirable, equitable market outcome. In particular, a well-targeted State intervention in the broadband field can contribute to reducing the ‘digital divide’ (7) between areas or regions where affordable and competitive broadband services are on offer and areas where such services are not.

(6) However, if State aid for broadband were to be used in areas where market operators would normally choose to invest or have already invested, this could significantly undermine the incentives of commercial investors to invest in broadband in the first place. In such cases, State aid to broadband might become counterproductive to the objective pursued. The purpose of State aid control in the broadband sector is to ensure that State aid measures will result in a higher level, or a faster rate, of broadband coverage and penetration than would be the case without State aid, while supporting higher quality, more affordable services and pro-competitive investments. The positive effects of the aid should outweigh the distortions of competition.

(7) In response to the Commission’s calling on them to do so in the DAE, most Member States developed national broadband strategies to achieve the DAE objectives in their respective territories. Most of these strategies envisage using public funds to extend broadband coverage in areas where there is no incentive for commercial operators to invest in and accelerate the deployment of very high speed, next generation access networks.

(8) These guidelines summarise the principles of the Commission’s policy in applying the State aid rules of the Treaty to measures that support the deployment of broadband networks in general (Section 2). They explain the application of these principles in the assessment of aid measures for the rapid roll-out of basic broadband and very high speed, next generation access (NGA) networks (in Section 3). The Commission will apply the guidelines in the assessment of State aid for broadband. This will increase the legal certainty and transparency of its decision-making.

(7) The term ‘digital divide’ is most commonly used to define the gap between those individuals and communities that have access to the information technologies and those that do not. Although there are several reasons for this ‘digital divide’, the most important is the lack of an adequate broadband infrastructure. From the regional point of view, the degree of urbanisation is an important factor for access to and use of ICTs. Internet penetration remains thus much lower in thinly populated areas throughout the European Union.
2. THE MAIN PRINCIPLES OF THE COMMISSION’S POLICY ON STATE AID FOR BROADBAND

(9) According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market’. It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (a) the measure has to be granted out of State resources, (b) it has to confer an economic advantage to undertakings, (c) the advantage has to be selective and (d) distort or threaten to distort competition, (e) the measure has to affect trade between Member States.

2.1. Article 107(1) TFEU: Presence of aid

(10) The use of State resources: The transfer of State resources may take many forms such as direct grants, tax rebates (8), soft loans or other types of preferential financing conditions. State resources will also be involved if the State provides a benefit in kind, for instance investing in the construction of (part) of the broadband infrastructure. State resources can be used (9) at the national, regional or local level. Funding from European funds such as the European Agricultural Fund for Rural Development (EAFRD) and the European Regional Development Fund (ERDF) (10) will likewise constitute State resources, when these funds are allocated at a Member State’s discretion (11).

(11) Undertaking: State measures supporting broadband investments usually address the exercise of an economic activity, such as the construction, operation and granting of access to broadband infrastructure or enabling the provision of connectivity to end-users. Also, the State itself can carry out an economic activity when it operates and exploits (parts of) a broadband infrastructure, for instance via an in-house company or as part of the State administration. The construction of a broadband network infrastructure with a view of its future commercial exploitation by the State or third-party operators, will also constitute an economic activity (12). The roll-out of a broadband network for non-commercial purposes might not constitute State aid (13), because the network construction does not favour any undertaking (14). However, if such a network is subsequently opened for the use of broadband investors or operators, State aid is likely to be involved (15).

(12) Advantage: The aid is usually granted directly to investors of the network, which in most cases are chosen by means of a competitive tender process. When the State’s contribution is not provided on normal market terms and consequently qualifies as State aid under the market economy investor

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(8) See, for instance, Commission Decision N 398/05 — Hungary, Development Tax Benefit for Broadband.

(9) Resources of a public undertaking constitute State resources within the meaning of Article 107 of the Treaty because the public authorities control these resources. Case C-482/99 France v Commission, [2002] ECR I-4397. In line with this judgment, it will further have to be assessed whether financing via a public undertaking is imputable to the State.


(11) See, for instance, Commission Decision in Case N 157/06 — United Kingdom South Yorkshire Digital Region Broadband Project. The Court has confirmed that once financial means remain constantly under public control and are therefore available to the competent national authorities, this is sufficient for them to be categorised as State aid, see Case C-83/98 P France v Ladbroke Racing Ltd and Commission [2000] ECR I-3271, paragraph 50.

(12) Case T-443/08 and T-455/08 Freistaat Sachsen and Others v Commission (not yet published), paragraphs (93) to (95).

(13) See, for instance, Commission Decision in Case NN 24/07 — Czech Republic, Prague Municipal Wireless Network.

(14) Similarly, if a network is constructed or broadband services are procured to satisfy the own needs of the public administration, under certain circumstances, such intervention might not confer advantage to economic undertakings. See Commission Decision in Case N 46/07 — United Kingdom, Welsh Public Sector Network Scheme.

(15) Commission Decision in Case SA.31687(N 436/10) — Italy Broadband in Friuli Venezia Giulia (Project Ermes) and in Case N 407/09 — Spain, Xarxa Oberta.
principle (see paragraph 16 below), the use of a competitive selection process ensures that any aid is limited to the minimum amount necessary for the particular project. However, it does not eliminate the aid, as the public authority will still provide a subsidy to the winning bidder (for instance, in terms of ‘gap funding’ or in-kind contribution) and the purpose of such procedure is precisely the selection of the aid beneficiary. The financial support received will enable the successful bidder to conduct this commercial activity on conditions which would not otherwise be available on the market. Besides the direct beneficiary of the aid, third-party operators receiving wholesale access to the subsidised infrastructure may be indirect beneficiaries (16).

(13) Selectivity: State measures supporting the deployment of broadband networks are selective in nature in that they target broadband investors and third-party operators which are active only in certain segments of the overall electronic communications services market. As regards the business end-users of the subsidised network (17), by contrast, the measure might not be selective as long as the access to the subsidised infrastructure is open to all sectors of the economy. Selectivity will exist if broadband deployment is specifically addressed to dedicated business users, for instance if the State support is geared toward the deployment of a broadband network in favour of predetermined companies which are not chosen according to general criteria applicable in the entire area for which the granting authority is responsible (18).

(14) Distortion of competition: According to the case law of the Court of Justice of the European Union (the Court), financial support or support in kind distorts competition insofar as it strengthens the position of an undertaking compared with other undertakings (19). Due to the State aid granted to a competitor, existing operators might reduce capacity or potential operators might decide not to enter into a new market or a geographic area. Distortions of competition are likely to be enhanced if the beneficiary of the aid has market power. Where the aid beneficiary is already dominant on a market, the aid measure may reinforce this dominance by further weakening the competitive constraint that competitors can exert.

(15) Effect on trade: Finally, insofar as the State intervention is liable to affect service providers from other Member States (also by discouraging their establishment in the Member States in question) it also has an effect on trade since the markets for electronic communications services (wholesale and retail broadband markets) are open to competition between operators and service providers (20).

2.2. Absence of aid: the application of the market economy investor principle

(16) Article 345 TFEU provides that ‘this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’. According to the case law of the Court, it follows from the principle of equal treatment that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid. When equity participation or capital injections by a public investor do not present sufficient prospects of profitability, even in the long term, such intervention must be regarded as aid within the meaning of Article 107 TFEU, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision (21).

(16) It is likely that the benefit of the subsidy is at least partially passed on to third-party operators even if they pay a remuneration for the wholesale access. Indeed, wholesale prices are often regulated. Price regulation leads to a lower price than the one which the wholesaler could otherwise achieve on the market (which could be a monopoly price if there is no competition with other networks). Where prices are not regulated, the wholesaler will in any case be required to benchmark his prices on the average prices applied in other, more competitive areas (see paragraph 78 h) below which is also likely to lead to a price lower than the one which the wholesaler could otherwise have achieved on the market.

(17) Subsidies to residential users fall outside the scope of Article 107(1) TFEU.

(18) An example would be aid to a business districts, see for instance, Commission Decision in Case N 626/09 — Italy, NGA for industrial districts of Lucca.


(20) See Commission Decision in Case N 237/08 — Germany, Broadband support in Niedersachsen.


F.7.1
In its Amsterdam decision, the Commission has examined the application of the principle of the market economy private investor in the broadband field. As underlined in this decision, the conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, either by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment. Where private investors take part in the project, it is a sine qua non condition that they would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor. This also applies to other forms of State supports such as soft loans or guarantees.

2.3. State aid for broadband deployment as a service of general economic interest — Altmark and compatibility under Article 106(2) TFEU

In some cases, Member States may consider that the provision of a broadband network should be regarded as a service of a general economic interest (SGEI) within the meaning of Article 106(2) TFEU and the Altmark jurisprudence and provide public funding on this basis. In such cases, Member States measures have to be assessed in line with the Commission Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest, the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, the Commission Communication on a European Union framework for State aid in the form of public service compensation and the Commission Regulation of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest. These Commission documents (referred to all together as the ‘SGEI package’), indeed, also apply to State aid for broadband deployment. What follows will only illustrate the application of some of the principles clarified in these documents to broadband financing, in the light of certain sectoral specificities.

The SGEI definition

Concerning the SGEI definition, the Commission has already clarified, in general terms, that Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions.

Applying this principle to the broadband sector, the Commission considers that in areas where private investors have already invested in a broadband network infrastructure (or are further expanding the network) and are already providing competitive broadband services with an adequate broadband coverage, setting up a parallel competitive and publicly funded broadband infrastructure cannot be...

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(24) According to the case law, undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority. In this respect, a service of general economic interest may be entrusted to an operator through the grant of a public service concession; see Joined Cases T-204/97 and T-270/97 EPAC — Empresa para a Agroalimentação e Cereais, SA v Commission [2000] ECR II-2267, paragraph 126 and Case T-17/02 Fred Olsen, SA v Commission [2005] ECR II-2031, paragraphs 186, 188-189.


(30) See point 48 of the Commission Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest and point 13 of the Commission Communication on a European Union framework for State aid in the form of public service compensation (2011).
considered as an SGEI within the meaning of Article 106(2) TFEU (31). However, where it can be demonstrated that private investors are not in a position to provide in the near future (32) adequate broadband coverage to all citizens or users, thus leaving a significant part of the population unconnected, a public service compensation may be granted to an undertaking entrusted with the operation of an SGEI provided the conditions of the SGEI communication cited above are fulfilled. In this respect, the networks to be taken into consideration for assessing the need for an SGEI should always be of comparable type, namely either basic broadband or NGA networks.

(21) Moreover, the deployment and the operation of a broadband infrastructure can qualify as an SGEI only if such infrastructure provides all users in a given area with universal connectivity, residential and business users alike. Support for connecting businesses only would not be sufficient (33).

(22) The compulsory nature of the SGEI mission also implies that the provider of the network to be deployed will not be able to refuse wholesale access to the infrastructure on a discretionary and/or discriminatory basis (because, for instance, it may not be commercially profitable to provide access services to a given area).

(23) Given the degree of competition that has been achieved since the liberalisation of the electronic communications sector in the Union, and in particular the competition that exists today on the retail broadband market, a publicly funded network set up within the context of an SGEI should be available to all interested operators. Accordingly, the recognition of an SGEI mission for broadband deployment should be based on the provision of a passive (34), neutral (35) and open infrastructure. Such a network should provide access seekers with all possible forms of network access and allow effective competition at the retail level, ensuring the provision of competitive and affordable services to end-users (36).

(24) Therefore, the SGEI mission should only cover the deployment of a broadband network providing universal connectivity and the provision of the related wholesale access services, without including retail communication services (37). Where the provider of the SGEI mission is also a vertically integrated broadband operator, adequate safeguards should be put in place to avoid any conflict of interest, undue discrimination and any other hidden indirect advantages (38).

(25) Given that the market for electronic communications is fully liberalised, it follows that an SGEI mission for broadband deployment cannot be based on the award of an exclusive or special right to the provider of the SGEI within the meaning of Article 106(1) TFEU.

Calculation of the compensation and clawback

(26) For the calculation of the SGEI compensation the principles of the SGEI package fully apply. However, in the light of the specificities of the broadband sector, it is useful to add a clarification for SGEI intended to cover unconnected neighbourhoods or districts (so called white spots) within a broader

(31) See paragraphs 49 of the Commission Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest.
(32) The term in the ‘near future’ should be understood as referring to a period of 3 years in line with paragraph 63 of these Guidelines.
(33) In line with the principle expressed in paragraph 50 of the Commission Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest. See also Commission Decision N 284/05 — Ireland, Regional broadband Programme: Metropolitan Area Networks (MANs), phases II and III and N 890/06 — France, Aide du Sicoval pour un réseau de très haut débit.
(34) The passive network infrastructure is basically the physical infrastructure of the networks. For a definition, see the Glossary.
(35) A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end-users.
(36) In line with paragraph 78(g) of these Guidelines.
(37) This limitation is justified by the fact that, once a broadband network providing universal connectivity has been deployed, the market forces are normally sufficient to provide communication services to all users at a competitive price.
(38) Such safeguards should include, in particular, an obligation of accounting separation, and may also include the setting up of a structurally and legally separate entity from the vertically integrated operator. Such entity should have sole responsibility for complying with and delivering the SGEI mission assigned to it.
area in which some operators have already deployed their own network infrastructure or may plan to do so in the near future. In cases in which the area for which the SGEI is entrusted is not limited just to the ‘white spots’, because of their size or location, the SGEI provider may need to deploy a network infrastructure also in the profitable areas already covered by commercial operators. In such situation, any compensation granted should only cover the costs of rolling out an infrastructure in the non-profitable white spots, taking into account relevant revenue and a reasonable profit (\(^{29}\)).

\[27\] In many circumstances, it may be appropriate to fix the compensation amount on an \textit{ex ante} basis, so as to cover the expected funding gap over a given period, rather than to establish the compensation merely on the basis of costs and revenues as they occur. In the former model, there are typically more incentives for the company to contain costs and to develop the business over time (\(^{40}\)). Where an SGEI mission for the deployment of a broadband network is not based on the deployment of a publicly owned infrastructure adequate review and clawback mechanisms should be put in place to prevent the SGEI provider from obtaining an undue advantage by retaining ownership of the network that was financed with public funds when the SGEI concession expires.

\[28\] As also explained in the Commission’s Broadband Communication (\(^{41}\)), Member States may choose several types of measures in order to accelerate the deployment of broadband and in particular NGA networks besides providing direct funding to companies. These measures do not necessarily need to involve State aid within the meaning of Article 107(1) TFEU.

\[29\] Given that generally a large part of the cost of deploying NGA networks is in the civil engineering work (\(^{42}\)), Member States may decide in accordance with the EU regulatory framework for electronic communications, for instance, to facilitate the acquisition process of rights of ways, to require that network operators coordinate their civil engineering works and/or that they share part of their infrastructure. In the same vein, Member States may also require that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a connection suitable for NGA should be in place. Third parties may also place at their own cost their passive network infrastructure when general civil engineering works are carried out in any event. This opportunity should be offered in a transparent and non-discriminatory way to all interested operators and should in principle be open to all potential users and not just electronic communications operators (i.e. electricity gas, water utilities, etc.) (\(^{43}\)). A centralised inventory of the existing infrastructure (subsidised or otherwise),

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\(^{29}\) It is for Member States to devise, given the particularities of each case, the most appropriate methodology to ensure that the compensation granted will only cover the costs of discharging the SGEI mission in the white spots in line with the principles of the SGEI package, taking into account the relevant revenue and a reasonable profit. For instance, the compensation granted could be based on a comparison between revenues accruing from the commercial exploitation of the infrastructure in the profitable areas already covered by commercial operators and the revenues accruing from the commercial exploitation in the white spots. Any profit in excess of a reasonable profit, i.e. profits beyond the average industry return on capital for deploying a given broadband infrastructure, could be assigned to the SGEI provider from obtaining an undue advantage by retaining ownership of the network that was financed with public funds when the SGEI concession expires.

\(^{40}\) However, where future costs and revenue developments are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the public authority may also wish to adopt compensation models that are not entirely \textit{ex ante}, but rather a mix of \textit{ex ante} and \textit{ex post} (e.g. using clawbacks such as to allow a balanced sharing of unanticipated gains).

\(^{42}\) For instance, digging, laying down cables, in-house wirings. In case of deploying fibre to the home networks, such costs could entail up to 70%-80% of the total investment costs.

\(^{43}\) For reference, see footnote 2.

\(^{43}\) See also N 383/09 — Germany — Amendment of N 150/08 Broadband in the rural areas of Saxony. This case concerned a situation where general civil engineering works, like road maintenance, did not constitute State aid. The measures taken by the German authorities constituted ‘general civil engineering works’ which would have been carried out by the State for maintenance purposes in any event. The possibility of placing ducts and broadband infrastructure at the occasion of the road maintenance — and at the costs of the operators — was announced publicly and not limited to or geared towards the broadband sector. However, it cannot be excluded that public funding of such works falls within the notion of aid of Article 107(1) TFEU if they are limited to or clearly geared towards the broadband sector.
possibly also including planned works, could help the roll-out of commercial broadband \(^{(44)}\). Existing infrastructure does not only concern telecommunication infrastructure, such as wired, wireless or satellite infrastructure, but also alternative infrastructures (sewers, manholes, etc.) of other industries (such as utilities) \(^{(45)}\).

2.5. **The compatibility assessment under Article 107(3) TFEU**

(30) Where State intervention to support broadband deployment fulfils the conditions defined in Section 2.1, its compatibility will generally be assessed by the Commission under Article 107(3)(c) TFEU \(^{(46)}\). To date, regional and local authorities have adopted different models of intervention. A non-exhaustive list of these models is provided in the Annex. Apart from those described in the Annex, public authorities may also develop other models of supporting broadband deployment \(^{(47)}\). For all types of intervention forms all the compatibility criteria set out in these Guidelines must be applied \(^{(48)}\).

(31) Broadband State aid projects may be implemented in assisted areas within the meaning of Article 107(3)(a) and (c) TFEU, and the Regional Aid specific rules \(^{(49)}\). In this case, aid for broadband may qualify as aid for an initial investment within the meaning of the regional aid rules. Where a measure falls within the scope of such rules, and where it is envisaged to grant individual ad hoc aid to a single firm, or aid confined to one area of activity, the Member State is responsible for demonstrating that the conditions of the regional aid rules have been fulfilled. This includes in particular that the project in question contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition.

**Overview of the common principles of compatibility**

(32) In the assessment under Article 107(3)(c) of the TFEU the Commission ensures that the positive impact of the aid measure in reaching an objective of common interest outweighs its potential negative side effects, such as distortions of trade and competition. This exercise is conducted in two steps.

(33) First, every aid measure has to comply with the below necessary conditions. Failure to comply with one of the following conditions will result in declaring the aid incompatible with the internal market.

1. Contribution to the achievement of objectives of common interest
2. Absence of market delivery due to market failures or important inequalities
3. Appropriateness of State aid as a policy instrument
4. Existence of incentive effect
5. Aid limited to the minimum necessary
6. Limited negative effects
7. Transparency

\(^{(44)}\) See, for instance, the German NRA’s ‘Infrastrukturatlas’, where operators voluntarily share information on the available and potential reusable infrastructures.

\(^{(45)}\) It should be recalled that the EU regulatory framework for e-communications gives the competent national authorities the possibility to require undertakings to provide the necessary information in order for these authorities to be able to establish, in conjunction with NRAs, a detailed inventory of the nature, availability and geographical location of network elements and facilities, and make it available to interested parties. See Article 12(4) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory Framework for Electronic Communications Networks and services (Framework Directive) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

\(^{(46)}\) The list of all the Commission decisions taken under the State aid rules concerning broadband is available at http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf

\(^{(47)}\) For instance, loans (as opposed to grants) may be a useful tool to counteract the lack of credit for long-term infrastructure investments.

\(^{(48)}\) This is without prejudice to the possible application of the Regional Aid Guidelines as referred to in paragraph 31.

\(^{(49)}\) Guidelines on national regional aid applicable ratis Rex temporis (e.g. Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).
Second, if all necessary conditions are met, the Commission balances the positive effects of the aid measure in reaching an objective of common interest against the potential negative effects.

The individual steps of the Commission assessment in the field of broadband are set out in further detail in what follows.

1. Contribution to the achievement of objectives of common interest

As regards the common interest objective, the Commission will assess to what extent the planned intervention will contribute to the achievement of the objectives of common interest explained above as further specified in the DAE.

2. Absence of market delivery due to market failures or important inequalities

A ‘market failure’ exists if markets, left to their own devices, without intervention fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds the cost (50). In such cases, the granting of State aid may produce positive effects and overall efficiency can be improved by adjusting the economic incentives for firms. In the broadband sector, one form of market failure is related to positive externalities. Such externalities arise where market players do not internalise the whole benefit of their actions. For example, the availability of broadband networks paves the way for the provision of more services and for innovation, both of these are likely to benefit more people than the immediate investors and subscribers to the network. The market outcome would therefore generate insufficient private investment in broadband networks.

Due to economics of density, the deployment of broadband networks is generally more profitable where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs of investment, unit costs increase significantly as population densities drop (51). Therefore, when deployed on commercial terms, broadband networks tend to profitably cover only part of the population. However, as acknowledged in the DAE, widespread and affordable access to broadband generates positive externalities because of its ability to accelerate growth and innovation in all sectors of the economy. Where the market does not provide sufficient broadband coverage or the access conditions are not adequate, State aid may therefore help to remedy such market failure.

A second possible objective of common interest is related to equity. Governments may choose to intervene to correct social or regional inequalities generated by a market outcome. In certain cases, State aid for broadband may also be used to achieve equity objectives, i.e. as a way of improving access to an essential means of communication and participation in society as well as freedom of expression for all members of society, thereby improving social and territorial cohesion.

3. Appropriateness of State aid as a policy instrument and the design of the measure

Public intervention in support of broadband networks may take place at State, regional or municipal level (52). Therefore, coordination of the various interventions is essential to avoid duplications and incoherence. To ensure consistency and coordination of the local interventions, it is necessary to ensure a high level of transparency of local initiatives.

Wherever possible and respecting competences and specificities, Member States are encouraged to design nationwide schemes containing the main principles underlying the public initiatives and to

(50) However, the fact that a specific company may not be capable of undertaking a project without aid does not mean that there is a market failure. For instance, the decision of a company not to invest in a project with low profitability or in a region with limited market demand and/or poor cost competitiveness may not be an indication of a market failure, but rather of a market that functions well.

(51) Satellite systems also have unit costs, but in larger steps and, therefore, tend to be more independent of population density.

(52) For municipal and regional funding, see Commission Decisions in Cases SA.33420 (11/N) — Germany, Breitband Lohr am Main, N 699/09 — Spain, Desarrollo del programa de infraestructuras de telecomunicaciones en la Región de Murcia.
indicate the most relevant features of the planned networks (53). National framework schemes for broadband development ensure coherency in the use of public funds, reduce administrative burden on smaller granting authorities and accelerate the implementation of the individual aid measures. Further, Member States are encouraged to give clear guidance at central level for the implementation of State aid-financed broadband projects.

(42) The role of NRAs in designing a pro-competitive State aid measure in support of broadband is particularly important. The NRAs have gained technical knowledge and expertise due to the crucial role assigned to them by sectoral regulation (54). They are best placed to support public authorities with regard to the State aid schemes and should be consulted when target areas are being identified. NRAs should also be consulted with regard to determining the wholesale access prices and conditions and solving disputes between access seekers and the subsidised infrastructure operator. Member States are encouraged to provide NRAs with the resources they need to give such support. Where necessary, Member States should provide an appropriate legal basis for such involvement of NRAs in State aid broadband projects. In keeping with best practice, NRAs should issue guidelines for local authorities which include recommendations on market analysis, wholesale access products and pricing principles taking into account the Electronic Communications Regulatory Framework and relative Recommendations issued by the Commission (55).

(43) In addition to the involvement of NRAs, National Competition Authorities may also provide useful advice in particular in relation to large framework schemes to help establishing a level playing field for the bidding operators and to avoid that a disproportionately high share of State funds is earmarked to one operator, thereby strengthening its (possibly already dominant) market position (56). In addition to the role of NRAs, some Member States set up national competence centres to help small, local authorities to design adequate State aid measures and ensure consistency in the application of the State aid rules as specified in these Guidelines (57).

(44) So that the measure is properly designed, the balancing test further requires that State aid is an appropriate policy instrument to address the problem. In this respect, whilst ex ante regulation has in many cases facilitated broadband deployment in urban and more densely populated areas, it may not be a sufficient instrument to enable the supply of broadband service, especially in underserved areas where the inherent profitability of investment is low (58). Likewise, although they can contribute positively to broadband penetration (59), demand-side measures in favour of broadband (such as vouchers for end-users) cannot always solve the lack of broadband provision (60). Hence, in some situations there may be no alternative to granting public funding to overcome the lack of broadband connectivity. Granting authorities shall also take into account spectrum (re-)allocations leading to possible network roll-out in the target areas that could achieve the objectives of the granting authorities without the provision of direct grants.

(53) Often Member States notify framework programmes which describe under which conditions municipal or regional funding can be granted to broadband deployment. See, for instance, N 62/10 — Finland, High-speed broadband construction aid in sparsely populated areas of Finland, N 53/10 — Germany, Federal framework programme on duct support, or N 30/10 — Sweden, State aid to Broadband within the framework of the rural development program.

(54) For reference, see above footnote 5.

(55) This would increase transparency, ease the administrative burden on local authorities and could mean that NRAs would not have to analyse each State aid case individually.

(56) See, for instance, Avis N° 12-A-02 du 17 janvier 2012 relatif à une demande d’avis de la commission de l’économie, du développement durable et de l’aménagement du territoire du Sénat concernant le cadre d’intervention des collectivités territoriales en matière de déploiement des réseaux à très haut débit (French Competition Authority’s opinion in relation to the deployment of very high speed broadband networks).

(57) See, for instance, Commission Decisions in Cases N 237/08 Broadband support in Niedersachsen, Germany or SA.33671 Broadband Delivery UK, United Kingdom.

(58) See, for instance, Commission Decision N 473/07 — Italy, Broadband connection for Alto Adige, Decision N 570/07 — Germany, Broadband in rural areas of Baden-Württemberg.

(59) In particular to promote take-up of already available broadband solutions, be they locally available terrestrial fixed or wireless networks or generally available satellite solutions.

(60) See, for instance, Commission Decision N 222/06 — Italy, Aid to bridge the digital divide in Sardinia.
4. Existence of incentive effect

(45) Regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same time frame without any State aid. Where an operator is subject to certain obligations to cover the target area (61), it may not be eligible for State aid, as the latter is unlikely to have an incentive effect.

5. Aid limited to the minimum necessary

(46) In assessing the proportional character of the notified measures, the Commission has highlighted a number of necessary conditions to minimise the State aid involved and the potential distortions of competition as explained more in detail in the following sections.

6. Limited negative effects

(47) The change in the beneficiary's behaviour because of the aid may also have negative effects on competition and trade, however. The significance of the distortion of competition can be assessed in terms of effects on competitors. If competitors see the profitability of their prior investment decreasing because of the aid, they may decide to reduce their own future investment or even withdraw from the market altogether (62). Additionally, where the aid beneficiary to be chosen following the competitive selection process is likely to be an undertaking already dominant on a market or may become dominant due to the State funded investment, the aid measure could weaken the competitive constraint that competitors can exert. Moreover, if a State aid measure or the conditions attached to it (including its financing method when it forms an integral part of it) entail a non-severable violation of EU law, the aid cannot be declared compatible with the internal market (63).

7. Transparency

(48) Aid shall be awarded in a transparent manner; in particular, it must be ensured that the Member States, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid awarded thereunder. The details of the transparency requirements are specified in paragraph 78.

8. The overall balancing exercise and the compatibility conditions to limit the distortion of competition

(49) A carefully designed State aid scheme for broadband should ensure that the overall balance of the effects of the measure is positive.

(50) In this regard, the effect of the State aid measure can be described as a change of activity compared with what would have happened without the aid. The positive effects of the aid are directly linked to the change in the aid beneficiary's behaviour. This change should enable the achievement of the desired common interest goal. In the broadband sector, the aid leads to the rollout of a new infrastructure which would not have been there otherwise, thus delivering additional capacity and speed on the market as well as lower prices and better choice for consumers, higher quality and innovation. This would also result in more access for consumers to online resources and, together with increased consumer protection in this area, it is likely to stimulate an increase in demand. This will contribute to the completion of the Digital Single Market and bring benefits to the EU economy as a whole.

(51) A subsidised network should be able to ensure a 'step change' in terms of broadband availability. A 'step change' can be demonstrated if as the result of the public intervention (i) the selected bidder

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(61) This may, for instance, apply to mobile LTE (long-term evolution) or LTE advanced operators with coverage targets under their licence conditions, in the target area. Similarly, if an operator designated with an universal service obligation (USO) receives public service compensation, no additional State aid can be granted to finance the same network.

(62) This type of effects can be referred to as 'crowding out'.

makes significant new investments in the broadband network (64) and (ii) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity (65), speeds and competition (66). The step change shall be compared to that of existing as well as concretely planned network roll-outs.

Moreover, to ensure that the negative effects on competition are minimised, a number of conditions have to be fulfilled in the design of the aid measure, as specified below in Section 3.4.

To further ensure that distortion of competition are limited, the Commission may require that certain schemes are subject to a time limitation (of normally 4 years or less) and to an evaluation in order to verify (i) whether the assumptions and conditions which led to the compatibility decision have been realised; (ii) the effectiveness of the aid measure in light of its predefined objectives; (iii) its impact on markets and competition and that no undue distortive effects arise under the duration of the aid scheme that is contrary to the interests of the Union (67). Given its objectives and in order not to put disproportionate burden on Member States and on smaller aid projects, this only applies for national aid schemes and aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation shall be carried out by an expert independent from the State aid granting authority on the basis of a common methodology (68) and shall be made public. The evaluation shall be submitted to the Commission in due time to allow for the assessment of the possible prolongation of the aid measure and in any case upon expiry of the scheme. The precise scope and modalities of the evaluation shall be defined in the approval decision of the aid measure. Any subsequent aid measure with a similar objective shall take into account the results of that evaluation.

If the balancing test shows that the negative effects outweigh the benefits, the Commission may prohibit the aid, or ask for remedial action, either in the design of the aid, or in the harm it does to competition.

3. THE ASSESSMENT OF STATE AID FOR BROADBAND

3.1. Types of broadband networks

For the purposes of State aid assessment, the present Guidelines distinguish between basic and NGA networks.

Several different technology platforms can be considered as basic broadband networks including asymmetric digital subscriber lines (up to ADSL2+ networks), non-enhanced cable (e.g. DOCSIS 2.0), mobile networks of third generation (UMTS) and satellite systems.

(64) For instance, marginal investments related merely to the upgrade of the active components of the network should not be considered eligible for State aid. Similarly, although certain copper enhancing technologies (such as vectoring) could increase the capabilities of the existing networks, they may not require significant investments in new infrastructure hence should not be eligible for State aid.

(65) For instance, an upgrade from a basic to an NGA broadband network. Also certain upgrades of an NGA network (such as extension of fibre connectivity nearer to the end-user) could constitute a step change. In areas where broadband networks are already present, the application of the step change should ensure that the use of State aid does not lead to a duplication of existing infrastructure. Similarly, a small, gradual upgrade of existing infrastructures, for instance from 12 Mbps to 24 Mbps is unlikely to bring additional service capabilities (and would likely disproportionately favour the existing operator).

(66) The subsidised network should be pro-competitive, i.e. allow for effective access at different levels of the infrastructure in the way indicated in paragraph 78 and, in the case of support to NGA deployment, also in paragraph 80.

(67) See, for instance, Commission Decision in Case SA.33671 Broadband Delivery UK, United Kingdom.

(68) Such a common methodology may be provided by the Commission.
At the current stage of market and technological development, NGA networks are access networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing basic broadband networks.

NGA networks are understood to have at least the following characteristics: (i) deliver services reliably at a very high speed per subscriber through optical (or equivalent technology) backhaul sufficiently close to user premises to guarantee the actual delivery of the very high speed; (ii) support a variety of advanced digital services including converged all-IP services; and (iii) have substantially higher upload speeds (compared to basic broadband networks). At the current stage of market and technological development, NGA networks are: (i) fibre-based access networks (FTTx); (ii) advanced upgraded cable networks; and (iii) certain advanced wireless access networks capable of delivering reliable high speeds per subscriber.

It is important to bear in mind that in the longer term NGA networks are expected to supersede existing basic broadband networks and not just to upgrade them. To the extent that NGA networks require a different network architecture, offering significantly better quality broadband services than today as well as the provision of multiple services that could not be supported by today's broadband networks, it is likely that in the future there will be marked differences emerging between areas that will be covered and areas that will not be covered by NGA networks.

Member States can freely decide what form their intervention will take, provided it complies with State aid rules. In some cases, Member States might decide to finance so-called next generation networks (NGN), i.e. backhaul networks which do not reach the end-user. Backhaul networks are a necessary input for retail telecommunication operators to provide access services to the end-users. These types of networks are able to sustain both basic and NGA types of networks; it is the (investment) choice of the telecommunication operators what type of infrastructure they wish to connect to the backhaul network. Public authorities may also decide to undertake just civil engineering works (such as digging on public land, construction of ducts) in order to enable and accelerate the deployment by the operators concerned of their own network elements. Furthermore, when suitable, public authorities might also wish to take satellite solutions into account.

Due to rapid technological development, in the future other technologies may also be able to deliver NGA services. Coaxial, wireless and mobile technologies make use, to a certain extent, of a fibre support infrastructure, thereby making them conceptually similar to a wired network using copper to deliver the service for the part of the last mile not covered by fibre.

The final connection to the end-user may be ensured both by wired and wireless technologies. Given the rapid evolution of advanced wireless technologies such as LTE-Advanced and the intensifying market deployment of LTE or Wi-Fi, next generation fixed wireless access (e.g. based on possibly tailored mobile broadband technology) could be a viable alternative to certain wired NGA (FTTCab, for example) if certain conditions are met. Since the wireless medium is 'shared' (the speed per user depends on the number of connected users in the area covered) and is inherently subject to fluctuating environmental conditions, in order to provide reliably the minimum download speeds per subscriber that can be expected of an NGA, next generation fixed wireless networks may need to be deployed at a certain degree of density and/or with advanced configurations (such as directed and/or multiple antennas). Next generation wireless access based on tailored mobile broadband technology must also ensure the required quality of service level to users at a fixed location while serving any other nomadic subscribers in the area of interest.

The term FTTx refers to FTTC, FTTN, FTTP, FTTH and FTTB. Using at least the 'DOCSIS 3.0' cable modem standard. See, for instance, Commission Decision in Case SA.33671 Broadband Delivery UK, United Kingdom. If today the differences between an area where only narrowband Internet is available (dial-up) and an area where broadband exists means that the former is a 'white' area, likewise an area that lacks a next generation broadband infrastructure, but may still have one basic broadband infrastructure in place should also be considered a 'white' NGA area.

In comparison to other networks which do not reach the end consumer (like FTTC), an important characteristic of NGN backhaul infrastructure is that it is open for interconnection with other networks.

Commission Decision in Case N 407/09 — Spain — Optical fibre Catalonia (Xarxa Oberta).
3.2. The distinction between white, grey and black areas for basic broadband networks

(61) In order to assess market failure and equity objectives, a distinction can be made between the types of areas that may be targeted. This distinction is explained in the following sections. In the identification of the targeted areas, whenever the public intervention is limited to the backhaul part of the network, the State aid assessment will take into account the situation on both the backhaul markets and the access markets (78).

(62) The different standards to justify public interventions in these geographical areas will be described below.

(63) For the purpose of identifying the geographical areas as white, grey or black as described below, the aid granting authority needs to determine whether broadband infrastructures exist in the targeted area. In order to further ensure that the public intervention does not disrupt private investments, the aid granting authorities should also verify whether private investors have concrete plans to roll out their own infrastructure in the near future. The term ‘near future’ should be understood as referring to a period of 3 years (79). If the granting authority takes a longer time horizon for the deployment of the subsidised infrastructure, the same time horizon should also be used to assess the existence of commercial investment plans.

(64) To verify that there are no private investors planning to roll out their own infrastructure in the near future, the aid granting authority should publish a summary of the planned aid measure and invite interested parties to comment.

(65) There exists the risk that a mere ‘expression of interest’ by a private investor could delay delivery of broadband services in the target area if subsequently such investment does not take place while at the same time public intervention has been stalled. The aid granting authority could therefore require certain commitments from the private investor before deferring the public intervention. These commitments should ensure that significant progress in terms of coverage will be made within the 3-year period or for the longer period foreseen for the supported investment. It may further request the respective operator to enter into a corresponding contract which outlines the deployment commitments. This contract could foresee a number of ‘milestones’ which would have to be achieved during the 3-year period (80) and reporting on the progress made. If a milestone is not achieved, the granting authority may then go ahead with its public intervention plans. This rule applies both for basic and for NGA networks.

'White areas': promoting territorial cohesion and the economic development objective

(66) ‘White areas’ are those in which there is no broadband infrastructure and it is unlikely to be developed in the near future. The Commission targets for the DAE aim for a ubiquitous coverage of basic broadband services in the EU by 2013 and of at least 30 Mbps by 2020. It is therefore a priority to ensure timely investment in areas which are not yet sufficiently covered. The Commission acknowledges therefore that by providing financial support for the provision of broadband services in areas where broadband is currently not available, Member States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest, provided the conditions set out in Section 3.4 below are fulfilled (81).

(78) Commission Decisions in Cases N 407/09 — Spain — Optical fibre Catalonia (Xarxa Oberta) and SA.33438 — Poland, Broadband network for Eastern Poland.

(79) The 3-year period would start from the moment of publication of the planned aid measure.

(80) In this regard, an operator should be able to demonstrate that within the 3-year period it will cover a substantial part of the territory and of the population concerned thereby. For instance, the aid granting authority may request any operator who declares an interest in building its own infrastructure in the target area to deliver a credible business plan, supporting documents like bank loan agreements and a detailed calendar deployment plan within 2 months. In addition, within 12 months the investment should be started and permission should be obtained for most of the rights of ways necessary for the project. Additional milestones on the progress of the measure can be agreed for every 6-month period.

(81) See, for instance, Commission Decisions in Cases N 607/09 — Ireland, Rural Broadband Reach, or N 172/09 — Slovenia, Broadband development in Slovenia.
'Grey areas': need for a more detailed assessment

(67) 'Grey areas' are those in which one network operator is present and another network is unlikely to be developed in the near future. The mere existence of one network operator does not necessarily imply that no market failure or cohesion problem exists. If that operator has market power (monopoly) it may provide citizens with a suboptimal combination of service quality and prices. Certain categories of users may not be adequately served or, in the absence of regulated wholesale access tariffs, retail prices may be higher than those charged for the same services offered in more competitive but otherwise comparable areas or regions of the country. If, in addition, there are only limited prospects that alternative operators enter the market, the funding of an alternative infrastructure could be an appropriate measure.

(68) On the other hand, in areas where there is already one broadband network operator, subsidies for the construction of an alternative network could distort market dynamics. Therefore, State support for the deployment of broadband networks in 'grey' areas is only justified when it can be clearly demonstrated that a market failure persists. A more detailed analysis and a thorough compatibility assessment will be necessary.

(69) Grey areas could be eligible for State support, provided the compatibility conditions of in Section 3.4 are met, if it is proved that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.

(70) To establish (i) and (ii), the Commission will assess in particular whether:

(a) the overall market conditions are not adequate, by looking, inter alia, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto;

(b) in the absence of ex ante regulation imposed by an NRA, effective network access is not offered to third parties or access conditions are not conducive to effective competition;

(c) overall entry barriers preclude the potential entry of other electronic communication operators; and

(82) The same company may operate separate fixed and mobile networks in the same area but this will not change the 'colour' of such area.

(83) The competitive situation is assessed according to the number of existing infrastructure operators. In Commission Decision N 330/10 — France, Programme national Très Haut Débit, it was clarified that the existence of several retail providers on one network (including Local Loop Unbundling (LLU)) does not turn the area into a black area, but that the territory remains a grey area as only one infrastructure is present. At the same time, the existence of competing operators (at the retail level) will be considered an indication that, albeit grey, the area in question may not be problematic in terms of presence of a market failure. Convincing proof of access problems or quality of service will have to be supplied.

(84) In its Decision N 131/05 — United Kingdom, FibreSpeed Broadband Project Wales, the Commission had to assess whether the financial support given by the Welsh authorities for the construction of an open, carrier-neutral, fibre-optic network linking 14 business parks could still be declared compatible even if the target locations were already served by the incumbent network operator, who provided price regulated leased lines. The Commission found that the leased lines offer by the incumbent operator was very expensive, almost unaffordable for SMEs. See also Commission Decision N 890/06 — France, Aide du SICOVAL pour un réseau de très haut débit and Commission Decision N 284/05 — Ireland, Regional Broadband Programme: Metropolitan Area Networks (MANs), phases II and III.

(85) In addition to the specifications of paragraph 70, the granting authorities could take into consideration indicators such as: the penetration rate for services with the highest performance levels, excessively high prices for high-performance services (including leased lines for end-users as explained in the previous footnote) having the effect of discouraging take up and innovation, e-government services in the process of being developed which require performances beyond the ones offered on the existing network. Where in the target area a significant proportion of citizens and business users are already adequately served, it has to be ensured that the public intervention does not lead to an undue overbuilt of the existing infrastructure. In that case, the public intervention may be limited to 'gap-filling' measures only.

(86) For instance, whether the broadband network already in place was built on the basis of a privileged use/access to ducts not accessible by or not shared with other network operators.
(d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider have not been able to overcome such problems.

(71) Only grey areas that meet the eligibility criteria listed above will undergo the compatibility test described in Section 3.4.

‘Black areas: no need for State intervention

(72) When in a given geographical zone there are or there will be in the near future at least two basic broadband networks of different operators and broadband services are provided under competitive conditions (infrastructure-based competition (87)), it can be assumed that there is no market failure. Accordingly, there is very little scope for State intervention to bring further benefits. On the contrary, State support for the funding of the construction of an additional broadband network with comparable capabilities will, in principle, lead to an unacceptable distortion of competition, and the crowding out of private investors. Accordingly, in the absence of a clearly demonstrated market failure, the Commission will take a negative view of measures to fund the roll-out of an additional broadband infrastructure in a ‘black area’ (88).

3.3. The distinction between white, grey and black areas for NGA networks

(73) The distinction made above in Section 3.2 between ‘white’, ‘grey’ and ‘black’ areas is relevant also for assessing whether State aid for NGA networks is compatible with the internal market under Article 107(3)(c).

(74) At present, by upgrading active equipment, certain advanced basic broadband networks can also support some broadband services which in the future are likely to be offered over NGA networks (such as triple play services) and thereby contribute to meeting the DAE targets. However, novel products or services which are not substitutable from the perspective of either demand or supply may emerge and will require capacity, reliability and substantially higher upload and download speeds beyond the upper physical limits of basic broadband infrastructure.

‘White NGA areas

(75) Accordingly, for the purposes of assessing State aid for NGA networks, an area where NGA networks do not at present exist and where they are not likely to be built within 3 years in line with paragraphs 63 to 65 by private investors, should be considered to be a ‘white NGA’ area. Such an area is eligible for State aid to NGA provided the compatibility conditions indicated in Sections 3.4 and 3.5 are fulfilled.

‘Grey NGA areas

(76) An area should be considered a ‘grey NGA’ area where only one NGA network (89) is in place or is being deployed in the coming 3 years and there are no plans by any operator to deploy a NGA network in the coming 3 years. In assessing whether other network investors could deploy additional NGA networks in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructure, etc.). The Commission will need to carry out a more detailed analysis in order

(87) If only one infrastructure is present, even if this infrastructure is used — via unbundling (LLU) — by several electronic communication operators, such situation shall be considered to be a competitive grey area. It is not considered as a ‘black area’ within the meaning of these Guidelines. See also Commission Decision in Case SA.31316 Programme national «Très haut débit», France.

(88) See Commission Decision of 19 July 2006 on the measure C 35/05 (ex N 59/05) — The Netherlands Broadband infrastructure in Appingedam (OJ L 86, 27.3.2007, p. 1). In this decision, the Commission noted that the competitive forces of the specific market were not duly taken into account. In particular, that the Dutch broadband market was a fast-moving market in which providers of electronic communications services, including cable operators and Internet Service Providers, were in the process of introducing very high capacity broadband services without any State support.

(89) The same company may operate separate fixed and wireless NGA networks in the same area but this will not change the ‘colour’ of such area.
to verify whether State intervention is needed since State intervention in such areas carries a high risk of crowding out existing investors and distorting competition. In this respect, the Commission will carry out its assessment on the basis of the compatibility conditions established in these Guidelines.

‘Black NGA areas’

(77) If at least two NGA networks of different operators exist in a given area or will be deployed in the coming 3 years, such an area should be considered a ‘black NGA’ area. The Commission will consider that State support for an additional publicly funded, equivalent NGA network in such areas is likely to seriously distort competition and is incompatible with the internal market under Article 107(3)(c) of the TFEU.

3.4. Design of the measure and the need to limit distortions of competition

(78) Every State measure in support of broadband deployment should fulfil all compatibility principles described above in Section 2.5, including the common interest objective, the existence of market failure, the appropriateness and the incentive effect of the measure. As regards limiting the distortions of competition, besides the demonstration of how a ‘step change’ is achieved in all cases (in white, grey and black areas) (\(^{(90)}\)), the following necessary conditions must be fulfilled to demonstrate the proportionality of the measure. Failure to meet any of these conditions would most likely require an in-depth assessment (\(^{(91)}\)) which could result in a conclusion that the aid is incompatible with the internal market.

(a) Detailed mapping and analysis of coverage: Member States should clearly identify which geographic areas will be covered by the support measure in question (\(^{(92)}\)), whenever possible in cooperation with the competent national bodies. The consultation of the NRA is encouraged but optional. Best practice examples suggest creation of a central database of the available infrastructure at a national level thereby increasing transparency and reducing the costs for the implementation of smaller, local projects. Member States have the freedom to define the target areas, however, they are encouraged to take into account economic conditions in the definition of relevant regions before launching the tender (\(^{(93)}\)).

(b) Public consultation: Member States should give adequate publicity to the main characteristics of the measure and to the list of target areas by publishing the relevant information of the project and inviting to comment. A publication on a central web page at national level would in principle ensure that such information is made available to all interested stakeholders. By also verifying the results of the mapping in a public consultation Member States minimise distortions of competition with existing providers and with those who already have investment plans for the near future and enable these investors to plan their activities (\(^{(94)}\)). A detailed mapping exercise and a thorough consultation ensure not only a high degree of transparency but serve also as an essential tool for defining the existence of ‘white’, ‘grey’ and ‘black’ areas (\(^{(95)}\)).

\(^{(90)}\) See paragraph 51 above.
\(^{(91)}\) The detailed assessment could necessitate the opening of a procedure according to Article 108(2) TFEU.
\(^{(92)}\) This mapping should be done on the basis of homes passed by a particular network infrastructure and not on the basis of the actual number of homes or customers connected as subscribers.
\(^{(93)}\) For instance, target areas that are too small might not provide sufficient economic incentives for market players to bid for the aid, while areas that are too big might reduce the competitive outcome of the selection process. Several selection procedures also allow different potential undertakings to benefit from State aid thereby avoiding that one (already dominant) operators’ market share is further strengthened by State aid measures by favouring large market players or discouraging technologies which would mainly be competitive in smaller target areas.
\(^{(94)}\) In case where it can be demonstrated that existing operators did not provide any meaningful information to a public authority for the purposes of the required mapping exercise, such authorities would have to rely only on whatever information has been made available to them.
\(^{(95)}\) See, for instance, Commission Decision in Case N 266/08 — Germany, Broadband in rural areas of Bayern.
(c) **Competitive selection process.** Whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with spirit and the principles of the EU Public Procurement Directives. It ensures that there is transparency for all investors wishing to bid for the implementation and/or management of the subsidised project. Equal and non-discriminatory treatment of all bidders and objective evaluation criteria are indispensable conditions. The competitive tender is a method to reduce budgetary costs, to minimise the potential State aid involved and at the same time reduces the selective nature of the measure insofar as the choice of the beneficiary is not known in advance. Member States shall ensure a transparent process and a competitive outcome and shall use a dedicated central website at the national level to publish all on-going tender procedures on broadband State aid measures.

(d) **Most economically advantageous offer.** Within the context of a competitive tender procedure, the aid granting authority shall establish qualitative award criteria on which the submitted bids are assessed. Relevant award criteria may include, for instance, the achieved geographical coverage, sustainability of the technological approach or the impact of the proposed solution on competition. Such qualitative criteria have to be weighed against the requested aid amount. In order to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid. The awarding authority shall always specify in advance the relative weighting which it will give to each of the (qualitative) criteria chosen.

(e) **Technological neutrality.** As different technological solutions exist to provide broadband services, the tender should not favour or exclude any particular technology or network platform. Bidders should be entitled to propose the provision of the required broadband services using or combining whatever technology they deem most suitable. On the basis of the objective tender criteria, the granting authority is then entitled to select the most suitable technological solution or mix of technology solutions. In principle, universal coverage of larger target areas can be reached with a mix of technologies.

(f) **Use of existing infrastructure.** Since the reusability of existing infrastructure is one of the main determinants for the cost of broadband roll-out, Member States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful

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(99) The situation is different when the public authority decides to deploy and manage the network directly (or through a fully owned entity) such as in Commission Decision in Case N 330/10 — France Programme national Très Haut Débit and SA.33807 (11/N) — Italy, National Broadband Plan. In such cases, to safeguard the results of competition that have been achieved since the liberalisation of the electronic communications sector in the Union, and in particular the competition that exists today on the retail broadband market, in case of a publicly managed subsidised networks, (i) the publicly owned network operators shall limit their activity on the predefined target areas and shall not expand to other commercially attractive regions; (ii) the public authority shall limit its activity to maintain the passive infrastructure and to grant access to it, but shall not engage in competition on the retail levels with commercial operators; and (iii) to have an accounting separation between the funds used for the operation of the networks and the other funds at the disposal of the public authority.


(101) See, for instance, Commission Decision N 475/07 — Ireland, ‘National Broadband Scheme (NBS)’, Commission Decision N 157/06 — United Kingdom, ‘South Yorkshire Digital region Broadband Project’.

(102) When the object of such a competitive selection process is a public contract covered by the EU public procurement directives 2004/17/EC or 2004/18/EC, the tender notice shall be published in the Official Journal in order to ensure European-wide competition, in accordance with the requirements of these directives. In all other cases, tender information should be publicised at least nationwide.

(103) In the case that a competitive selection process does not generate a sufficient number of bidders, the cost calculation proposed by the winning bidder may be put to examination by an external auditor.

(104) If for technical reasons, it is not feasible to set up a national website, regional websites should be put in place. Such regional websites should be interconnected.

(105) In terms of the geographic area as defined in the call for the competitive selection process.

(106) For instance, network topologies allowing full and effective unbundling could receive more points. It should be noted that at this stage of market development, a point-to-point topology are more conducive for long-term competition in comparison with point-to-multipoint topology, while the deployment costs are comparable especially in urban areas. Point-to-multipoint networks will be able to provide full and effective unbundling only once wavelength-division-multiplexed passive optical network (WDM-PON) access is standardised and requested under the applicable regulatory frameworks.
duplication of resources and to reduce the amount of public funding. Any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the tender, should fulfil the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. Member States should setup a national database on the availability of existing infrastructures that could be reused for broadband roll-out.

(g) Wholesale access: Third parties’ effective wholesale access to a subsidised broadband infrastructure is an indispensable component of any State measure supporting broadband. In particular, wholesale access enables third-party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of regional service monopolies. Applying only to State aid beneficiaries, this condition is not contingent on any prior market analysis within the meaning of Article 7 of the Framework Directive (104). The type of wholesale access obligations imposed on a subsidised network should be aligned with the portfolio of access obligations laid down under the sectoral regulation (105). In principle, subsidised companies should provide a wider range of wholesale access products than those mandated by NRAs under sectoral regulation to the operators who have significant market power (106) since the aid beneficiary is using not just its own resources but taxpayers’ money to deploy its own infrastructure (107). Such wholesale access should be granted as early as possible before starting the network operation (108).

Effective wholesale access to the subsidised infrastructure (109) should be offered for at least a period of 7 years. If at the end of the 7-year period the operator of the infrastructure in question is designated by the NRA under the applicable regulatory framework as having significant market power (SMP) in the specific market concerned, access obligations would need to be imposed in accordance with the Electronic Communications Regulatory Framework. NRAs or other competent national bodies are encouraged to publish guidance for granting authorities on the principles to set wholesale access conditions and tariffs. In order to allow effective access, the same access conditions shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used (110). The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.

(h) Wholesale access pricing: Benchmarking is an important tool for ensuring that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets. Wholesale access price, should be based on the pricing principles set by the NRA and on

(104) Moreover, whenever Member States opt for a management model whereby the subsidised broadband infrastructure offers only wholesale access services to third parties, not retail services, the likely distortions of competition are further reduced as such a network management model helps to avoid potentially complex issues of margin squeeze and hidden forms of access discrimination. See, for instance, SA.30317 High-speed broadband in Portugal.

(105) Whenever the State aid measure covers the funding of new passive infrastructure elements such as ducts or poles, access to those should also be granted and be unlimited in time. See, for instance, Commission Decisions in Cases N 53/10 — Germany, Federal framework programme on ducts support, N 596/09 — Italy — Bridging the digital divide in Lombardia, N 383/09 — Germany — Amendment of N 150/08 Broadband in the rural areas of Saxony, N 330/10 — France, Programme national Très Haut Débit.

(106) For example, for NGA networks, the point of reference should be the list of access products included in the NGA recommendation.

(107) If State aid is provided to fund the construction of ducts, the latter should be large enough to cater for several cable networks and to host point-to-multipoint as well as point-to-point solutions.

(108) Where the network operator also provides retail services, in line with the NGA recommendation, this would normally imply granting access at least 6 months before the launch of such retail services.

(109) Effective wholesale access to the subsidised infrastructure can be provided by means of the wholesale access products detailed in Annex II.

(109) For instance, the usage of wholesale access by third parties cannot be limited only to retail broadband services.
benchmarks and should take into account the aid received by the network operator (111). For the benchmark, the average published wholesale prices that prevail in other comparable, more competitive areas of the country or the Union shall be taken or, in the absence of such published prices, prices already set or approved by the NRA for the markets and services concerned. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing should follow the principles of cost orientation pursuant to the methodology established in accordance with the sectorial regulatory framework (112). Given the complexity of benchmarking wholesale access prices, Member States are encouraged to provide a mandate and the necessary staffing to the NRA to advice aid granting authorities on such matters. A detailed description of the aid project should be sent to the NRA at least 2 months prior to the notification to allow the NRA to have a reasonable period of time to provide its opinion. Where the NRA has obtained such competence, the aid granting authority should seek advice from the NRA in setting the wholesale access prices and conditions. The benchmarking criteria should be clearly indicated in the tender documents.

(i) Monitoring and clawback mechanism: The granting authorities shall closely monitor the implementation of the broadband project during the entire duration of the project. Where the operator is selected on the basis of a competitive procurement procedure, there is typically less need to monitor the subsequent development of the profitability of the project. In many circumstances, it may be appropriate to fix the aid amount on an ex ante basis, so as to cover the expected funding gap over a given period, rather than to establish the aid amount on the basis of costs and revenues as they are incurred. In the former model, there are typically more incentives for the company to contain costs and to become more efficient over time. However, where future costs and revenue developments are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the public authority may also wish to adopt financing models that are not entirely ex ante, but rather a mix of ex ante and ex post (e.g. using clawbacks such as to allow a balanced sharing of unanticipated gains). In order not to put a disproportionally high burden on small, local projects, a minimum threshold may be justified for the clawback mechanism. Therefore, Member States should implement the clawback mechanism if the aid amount of the project is above EUR 10 million (113). Granting authorities can foresee that any extra profit reclaimed from the selected bidder could be spent for further broadband network expansion within the framework scheme and at the same conditions of the original aid measure. An accounting separation obligation for the winning bidder as regards the subsidy received will make it easier for the granting authorities to monitor the implementation of the scheme as well as any extra profit generated (114).

(j) Transparency: Member States shall publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology. Such information shall be published after the granting decision has been taken and shall be kept for at least 10 years and shall be available for the general public without restrictions. The aid beneficiary is obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including, inter alia, ducts, street cabinets and fibre) deployed under a State aid measure (115). This will enable other operators to easily ascertain the possibility to access such

(111) To what extent the aid amount is taken into account may vary depending on the competitive situation in the competitive selection process and in the target area. The benchmark would therefore be the upper limit of the wholesale price.
(112) So that operators do not artificially inflate their costs, Member States are encouraged to use contracts which incentivise firms to reduce their costs with time. For instance, in contrast to cost-plus contracts, a fixed-price contract would give the company the incentive to reduce costs over time.
(113) The clawback is not necessary in case of publicly owned, wholesale only infrastructures, managed by the public authority with the sole purpose to grant fair and non-discriminatory access to all operators if the conditions specified in footnote 96 are met.
(114) Best practice examples suggest monitoring and clawback for a minimum of 7 years, and any extra profit (i.e. profit higher than in the original business plan or the industry average) to be shared between the beneficiary and the public authorities according to the aid intensity of the measure.
(115) This information should be regularly updated (for example every 6 months) and shall be available in non-proprietary formats.
infrastructure and should provide all relevant information about the broadband network to a central register of broadband infrastructures, if such database exists within the Member State, and/or to the NRA.

(k) Reporting: Starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority should report every 2 years key information on the aid projects to the European Commission \(^{(116)}\). In the case of national or regional framework schemes, the national or regional authorities should consolidate the information of the individual measures and report to the European Commission. When adopting a decision under these Guidelines the Commission may require additional reporting regarding the aid granted.

3.5. Supporting the rapid deployment of NGA networks

(79) As with the policy followed with respect to basic broadband deployment, State aid in favour of NGA network deployment may constitute an appropriate and justified instrument, provided that a number of fundamental conditions are fulfilled. While commercial operators take their investment decisions in NGA networks on the basis of the expected profitability, the choice of the public authority has to take into account also the public interest in funding an open and neutral platform on which multiple operators will be able to compete for the provision of services to the end-users.

(80) Any measure to support NGA deployment must fulfil the compatibility conditions indicated in Sections 2.5 and 3.4. In addition, the following conditions must be met, taking into account the specific situations in which the public investment in NGA networks will occur.

(a) Wholesale access: Due to the economics of NGAs, it is of utmost importance to ensure effective wholesale access for third-party operators. Especially in areas in which there are already competing basic broadband operators \(^{(117)}\), in which it has to be ensured that the competitive market situation which existed before the intervention is preserved. The access conditions described above in Section 3.4 are specified as follows. The subsidised network must therefore offer access under fair and non-discriminatory conditions to all operators who request it and will provide them with the possibility of effective and full unbundling \(^{(118)}\). Moreover, third-party operators must have access to passive and not only active \(^{(119)}\) network infrastructure \(^{(120)}\). Apart from bitstream access and unbundled access to the local loop and sub-loop, the access obligation should therefore also include the right to use ducts and poles, dark fibre or street cabinets \(^{(121)}\). Effective wholesale access should be granted for at least 7 years and the right of access to ducts or poles should not be limited in time. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted during or after the expiry of that period \(^{(122)}\).

\(^{(116)}\) Such information should at least include: besides the information already made public following paragraph 78(j), the date when the network is put into use, the wholesale access products, the number of access seekers and service providers on the network, the number of houses passed, take-up rates.

\(^{(117)}\) Including LLU operators.

\(^{(118)}\) At this stage of market development, a point-to-point topology can be effectively unbundled. If the selected bidder rolls out a point-to-multipoint topology network, it shall have a clear obligation to provide effective unbundling via wavelength division multiplexing (WDM) as soon as the access is standardised and commercially available. Until WDM unbundling becomes effective, the selected bidder shall be required to provide access seekers with a virtual unbundling product, as close as possible to physical unbundling.

\(^{(119)}\) If they are indirect beneficiaries, when they obtain access at the wholesale level, third-party operators may have to give bitstream access themselves. In spite of the fact that aid was only granted for passive infrastructure, also active access was requested, for instance in Commission Decision in Case N 330/10 — France, *Programme national Très Haut Débit*.

\(^{(120)}\) Such as Customer premise equipment (CPEs) or other equipment needed to operate the network. If it proves necessary to upgrade certain parts of the network in order to provide effective access, this shall be foreseen in the granting authorities’ plans, for example: foreseeing adequately sized ducts, increasing the size of street cabinets to provide effective unbundling.

\(^{(121)}\) A strong access obligation is all the more crucial in order to deal with the temporary substitution between the services offered by existing ADSL operators and those offered by future NGA network operators. The access obligation will ensure that competing ADSL operators can migrate their customers to a NGA network as soon as a subsidised network is in place and thus start planning their own future investments without suffering a competitive handicap. See, for instance, N 461/09 — United Kingdom, *Cornwall and Isles of Scilly Next Generation Broadband*.

\(^{(122)}\) In this regard, the possible persistence of the specific market conditions that justified the granting of an aid for the infrastructure in question should be taken into consideration.
It may be the case that in areas with low population density, where there are limited broadband services, or for small local companies, the imposition of all types of access products might disproportionately increase investment costs (123) without delivering significant benefits in terms of increased competition (124). In such a situation, one may envisage that access products requiring costly interventions on the subsidised infrastructure not otherwise foreseen (e.g. co-location in intermediary distribution points) be offered only in case of a reasonable demand from a third-party operator. The demand is considered reasonable if (i) the access seeker provides a coherent business plan which justifies the development of the product on the subsidised network and (ii) no comparable access product is already offered in the same geographic area by another operator at equivalent prices to those of more densely populated areas (125).

By contrast, the preceding paragraph cannot be invoked in more densely populated areas where one may expect infrastructure competition to develop. Therefore, in such areas, the subsidised network should satisfy all types of network access products that operators may seek (126).

(b) Fair and non-discriminatory treatment: The subsidised infrastructure must enable the provision of competitive and affordable services to end-users by competing operators. Where the network operator is vertically integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages. In the same vein, the award criteria should contain the provision that bidders proposing a wholesale-only model, a passive-only model or both shall receive additional points.

(81) State aid projects aiming at the funding of backhaul networks (127) or limited to civil works open for access to all operators and technologies exhibit especially pro-competitive features. This feature will be taken into account in the assessment of such projects.

3.6. Aid to ultra-fast broadband networks

(82) In light of the Digital Agenda objectives, in particular achieving 50 % penetration to Internet connections above 100 Mbps, and taking into account that especially in urban areas there may be higher performance needs compared to what commercial investors are willing to offer in the near future, by way of derogation to paragraph 77, public intervention could exceptionally be allowed for NGA networks able to provide ultra-fast speeds well above 100 Mbps.

(83) In ‘black NGA’ areas, such intervention could only be allowed if the ‘step change’ required by paragraph 51 is proved on the basis of the following cumulative criteria:

(a) the existing or planned (128) NGA networks do not reach the end-user premises with fibre networks (129);
(b) the market situation is not evolving towards the achievement of a competitive provision of ultra-
fast services (130) above 100 Mbit/s in the near future by the investment plans of commercial
operators in accordance with paragraphs 63 to 65;

(c) there is expected demand for such qualitative improvements (131).

(84) In the situation described in the previous paragraph, any new subsidised network must respect the
compatibility conditions of paragraphs 78 and 80. In addition, the aid granting authority must also
demonstrate that:

(a) the subsidised network exhibits significant enhanced technological characteristics and performance
compared to the verifiable characteristics and performance of existing or planned networks (132);
and

(b) the subsidised network will be based on an open architecture operated as a wholesale only
network; and

(c) the aid does not lead to an excessive distortion of competition with other NGA technologies that
have recently been the subject of significant new infrastructure investments by market operators in
the same target areas (133).

(85) Only if these additional conditions are fulfilled, public funding of such networks might be considered
compatible under the balancing test. In other words, such funding would have to lead to a significant,
sustainable, pro-competitive and non-temporary technological advancement without creating
disproportionate disincentives to private investments.

4. FINAL PROVISIONS

(86) These Guidelines will be applied from the first day following its publication in the Official Journal of the
European Union.

(87) The Commission will apply these Guidelines to all notified aid measures in respect of which it is called
upon to take a decision after the Guidelines are published in the Official Journal, even where the
projects were notified prior to that date.

(88) In accordance with the Commission notice on the determination of the applicable rules for the
assessment of unlawful State aid (134), the Commission will apply to unlawful aid the rules in force
at the time when the aid was granted. Accordingly, it will apply these Guidelines in the case of
unlawful aid granted after its publication.

(89) The Commission herewith proposes to Member States, on the basis of Article 108(1) TFEU, to take
appropriate measures and amend, where necessary, their existing aid schemes in order to bring them
into line with the provisions of these Guidelines within 12 months after their publication in the Official
Journal of the European Union.

(90) The Member States are invited to give their explicit unconditional agreement to these proposed
appropriate measures within 2 months from the date of publication of the Guidelines in the Official
Journal of the European Union. In the absence of any reply, the Commission will assume that the
Member State in question does not agree with the proposed measures.

(91) The Commission may review the present Guidelines on the basis of future important market,
technological and regulatory developments.

(130) For example, in an area where there is an FTTC or equivalent network and an upgraded cable network (at least
DOCSIS 3.0) the market conditions are generally considered competitive enough to be able to evolve towards the
provision of ultra-fast services without the need of public intervention.

(131) See for example the indicators in footnote 84 and 85.

(132) See paragraphs 63 to 65 above.

(133) This would normally be the case when, due to the aid, market operators cannot recoup the infrastructure
investments undertaken in an appropriate period taking into account normal amortisation time. The following
(interconnected) factors will in particular be taken into account: the size of the investment, how recent it is, the
minimum period required in order to get an adequate return on the investment and the likely effect of the roll-out
of the new subsidised ultra-fast network on the number of subscribers to the existing NGA networks and the relative
subscription prices.

TYPICAL INTERVENTIONS FOR BROADBAND SUPPORT

In its case practice, the Commission has observed certain most recurrent funding mechanisms used by Member States to foster broadband deployment, assessed under Article 107(1) TFEU. The following list is illustrative and not exhaustive, as public authorities might develop different ways of supporting broadband deployment or deviate from the models described. The constellations typically involve State aid, unless the investment is carried out in line with the market economy investor principle (see Section 2.2).

1. Monetary allocation (gap funding (1)); In the majority of cases examined by the Commission, the Member State (2) awards direct monetary grants to broadband investors (3) to build, manage and commercially exploit a broadband network (4). Such grants normally involve State aid within the meaning of Article 107(1) TFEU, as the grant is financed by State resources and gives an advantage to the investor to conduct a commercial activity under conditions which would not have been available on the market. In such cases both the network operators receiving the grant and the electronic communication providers seeking wholesale access to the subsidised network are beneficiaries of the aid.

2. Support in kind: In other cases, Member States support broadband deployment by financing the roll-out of a full broadband network (or parts thereof) which is subsequently put at the disposal of electronic communication investors which will use these network elements for their own broadband deployment project. This support can take many forms, with the most recurring being Member States providing broadband passive infrastructure by carrying out civil engineering work (for instance by digging up a road) or by placing ducts or dark fibre (5). Such forms of support create an advantage for the broadband investors who save the respective investment costs (6) as well as for electronic communication providers which seek wholesale access to the subsidised network.

3. State-operated broadband network or parts thereof: State aid can also be involved if the State, instead of providing support to a broadband investor, constructs (parts of) a broadband network and operates it directly through a branch of the public administration or via an in-house company (7). This model of intervention typically consists of the construction of a publicly owned passive network infrastructure, with a view of making it available to broadband operators by granting wholesale access to the network on non-discriminatory terms. Operating the network and granting of wholesale access to it against remuneration is an economic activity within the meaning of Article 107(1) TFEU. The construction of a broadband network with a view to its commercial exploitation constitutes an economic activity according to case law (i.e. State aid within the meaning of Article 107(1) TFEU can already be present at the moment of the construction of the broadband network) (8). Electronic communication providers seeking wholesale access to the publicly operated network will also be considered aid beneficiaries.

4. Broadband network, managed by a concessionary: Member States may also fund the roll-out of a broadband network, that remains in public ownership, but whose operation will be offered through a competitive tender procedure to a commercial operator to manage and exploit it at the wholesale level (9). Also in this case, as the network is constructed with a view to its exploitation, the measure may constitute State aid. The operator managing and exploiting the network as well as third-party electronic communication providers seeking wholesale access to the network will also be considered aid beneficiaries.

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(1) 'Gap funding' refers to the difference between investment costs and expected profits for private investors.
(2) Or any other public authority granting the aid.
(3) The term ‘investors’ denotes undertakings or electronic communications network operators that invest in the construction and deployment of broadband infrastructures.
(4) Examples of gap funding are Commission decisions in Cases SA.33438 a.o — Poland — Broadband network project in Eastern Poland, SA.32866 — Greece — Broadband development in Greek rural areas, SA.31831 — Italy — Broadband Marche, N 368/09 — Germany — Amendment of State aid broadband scheme N 115/08 — Broadband in the rural areas of Germany.
(5) Commission decisions in Cases N 53/10 — Germany, Federal framework programme on ducts support, N 396/09 — Italy — Bridging the digital divide in Lombardia, see also N 383/09 — Germany — Amendment of N 130/08 Broadband in the rural areas of Saxony.
(6) Civil engineering costs and other investment in passive infrastructure can constitute up to 70% of the total cost of a broadband project.
(7) Commission decision in Case N 330/10 — France — Programme national Très Haut Débit, which covered various intervention modalities, inter alia one in which the collectivités territoriales can operate their own broadband networks as a ‘regie’ operation.
(8) Case T-443/08 and T-455/08 Freistaat Sachsen v Commission (not yet published).
(9) Commission decisions in Cases N 497/10 — United Kingdom, SHEFA — 2 Interconnect, N 330/10 — France — Programme national Très Haut Débit, N 183/09 — Lithuania, RAIN project.
ANNEX II

GLOSSARY OF TECHNICAL TERMS

For the purpose of these Guidelines, the following definitions should apply. The definitions are without prejudice to further market, technological and regulatory changes.

**Access segment**: ‘Last mile’ segment connecting the backhaul network with the end-user premises.

**Backhaul network**: The part of the broadband network which constitutes the intermediate link between the backbone network and the access network and carries data to and from the global network.

**Bitstream access**: Wholesale access provider installs a high-speed access link to the customer premises and makes this access link available to third parties.

**Dark fibre**: Unlit fibre without transmission systems connected.

**Duct**: Underground pipe or conduit used to house (fibre, copper or coax) cables of a broadband network.

**Full unbundling**: Physical unbundling grants access to the end-consumer access line and allows the competitor’s own transmission systems to directly transmit over it. In certain circumstances, virtual unbundling may be considered equivalent to physical unbundling.

**FTTH**: Fibre-to-the-home network, which reaches the end-user premises with fibre, i.e. an access network consisting of optical fibres lines in both the feeder and the drop segments of the access network (including in-house wiring).

**FTTB**: Fibre-to-the-building, which reaches the end-user premises with fibre, i.e. fibre is rolled out to the building, but copper, coax or LAN is used within the building.

**FTTN**: Fibre-to-the-nodes, the fibre is terminated in a street cabinet up to several kilometres away from the customer premises, with the final connection being copper (in fibre to the cabinet/VDSL networks) or coax (in the cable/DOCSIS 3 network). Fibre-to-the-node is often seen as a temporary, interim step towards full FTTH.

**Neutral networks**: Networks which can sustain any type of network topologies. In case of FTTH networks, the infrastructure shall be able to support both point-to-point and point-to-multipoint topologies.

**Next Generation Access Network**: Access networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing basic broadband networks.

**Passive network**: Broadband network without any active component. Typically comprises civil engineering infrastructure, ducts and dark fibre and street cabinets.

**Passive wholesale access**: Access to a transmission medium without any electronic component.

**Point-to-multipoint**: A network topology that has dedicated individual customer lines to an intermediate passive node (e.g. street cabinet) where these lines are aggregated onto a shared line. Aggregation could be either passive (with splitters such as in a PON architecture) or active (such as FTTC).

**Point-to-point**: Network topology whereby the customer lines remain dedicated all the way from the customer to the metropolitan point of presence.

**Wholesale access products**: Access enables an operator to utilise the facilities of another operator. The wholesale access products that can be provided over the subsidised network are the following.

- FTTH/FTTB network: ducts access, access to dark fibre, unbundled access to the local loop (WDM-PON or optical distribution frame (ODF) unbundling), and bitstream access.
- Cable networks: duct access and bitstream access.
- FTTC networks: duct access, sub-loop unbundling and bitstream access.
- Passive network infrastructure: duct access, access to dark fibre and/or unbundled access to the local loop. In case of an integrated operator, the access obligations (differing from the passive infrastructure access) shall be imposed in accordance with the provisions of the NGA Recommendation.
— ADSL-based broadband networks: unbundled access to the local loop, bitstream access.
— Mobile or wireless networks: bitstream, sharing of physical masts and access to the backhaul networks.
— Satellite platform: bitstream access.
I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 71 and 89 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (3),

Whereas:

(1) Article 16 of the Treaty confirms the place occupied by services of general economic interest in the shared values of the Union.

(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.

(5) At the present time, many inland passenger transport services which are required in the general economic interest cannot be operated on a commercial basis. The competent authorities of the Member States must be able to act to ensure that such services are provided. The mechanisms that they can use to ensure that public passenger transport services are provided include the following: the award of exclusive rights to public service operators, the grant of financial compensation to public service operators and the definition of general rules for the operation of public transport which are applicable to all operators. If Member States, in accordance with this Regulation, choose to exclude certain general rules from its scope, the general regime for State aid should apply.

(6) Many Member States have enacted legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several public service operators are now providing public passenger transport services in more than one Member State. However, developments in national legislation have led to disparities in the procedures applied and have created legal uncertainty as to the rights of public service operators and the duties of the competent authorities. Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (1), does not deal with the way public service contracts are to be awarded in the Community, and in particular the circumstances in which they should be the subject of competitive tendering. The Community legal framework ought therefore to be updated.

(7) Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the Commission, the Council and the Member States, each in accordance with their respective powers, to 'speed up liberalisation in areas such as … transport'.

(8) Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements.

(9) In order to be able to organise their public passenger transport services in the manner best suited to the needs of the public, all competent authorities must be able to choose their public service operators freely, taking into account the interests of small and medium-sized enterprises, under the conditions stipulated in this Regulation. In order to guarantee the application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a public service contract between the competent authority and the chosen public service operator defines the nature of the public service obligations and the agreed reward. The form or designation of the contract may vary according to the legal systems of the Member States.

(10) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to public passenger transport services by inland waterway, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. The organisation of public passenger transport services by inland waterway and, in so far as they are not covered by specific Community law, by national sea water is therefore subject to compliance with the general principles of the Treaty, unless Member States choose to apply this Regulation to those specific sectors. The provisions of this Regulation do not prevent the integration of services by inland waterway and national sea water into a wider urban, suburban or regional public passenger transport network.

(11) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to freight transport services, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. Three years after the entry into force of this Regulation the organisation of freight transport services should therefore be made subject to compliance with the general principles of the Treaty.

(12) It is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings. This Regulation is based on the principles of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, of the freedom of Member States to define services of general economic interest, referred to in Article 16 of the Treaty, and of subsidiarity and proportionality referred to in Article 5 of the Treaty.

(13) Some services, often linked to specific infrastructure, are operated mainly for their historical interest or tourist value. As the purpose of these operations is manifestly different from the provision of public passenger transport, they need not therefore be governed by the rules and procedures applicable to public service requirements.

(14) Where the competent authorities are responsible for organising the public transport network, apart from the actual operation of the transport service, this may cover a whole range of other activities and duties that the competent authorities must be free either to carry out themselves or entrust, in whole or in part, to a third party.

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(15) Contracts of long duration can lead to market foreclosure for a longer period than is necessary, thus diminishing the benefits of competitive pressure. In order to minimise distortions of competition, while protecting the quality of services, public service contracts should be of limited duration. The extension of such contracts could be subject to positive confirmation from users. In this context, it is necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator must invest in assets for which the depreciation period is exceptional and, because of their special characteristics and constraints, in the case of the outermost regions as specified in Article 299 of the Treaty. In addition, where a public service operator makes investments in infrastructure or in rolling stock and vehicles which are exceptional in the sense that both concern high amounts of funds, and provided the contract is awarded after a fair competitive tendering procedure, an even longer extension should be possible.

(16) Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses (1). This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights other than those covered by Directive 2001/23/EC and thereby, if appropriate, taking into account social standards established by national laws, regulations or administrative provisions or collective agreements or agreements concluded between social partners.

(17) In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.

(18) Subject to the relevant provisions of national law, any local authority or, in the absence thereof, any national authority may choose to provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering. However, this self-provision option needs to be strictly controlled to ensure a level playing field. The competent authority or group of authorities providing integrated public passenger transport services, collectively or through its members, should exercise the required control. In addition, a competent authority providing its own transport services or an internal operator should be prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory. Restrictions on the activities of an internal operator do not interfere with the possibility of directly awarding public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. Furthermore, the direct award of public service contracts for heavy rail does not preclude the possibility for competent authorities to award public service contracts for public passenger transport services on other track-based modes, such as metro and tramway, to an internal operator.

(19) Subcontracting can contribute to more efficient public passenger transport and makes it possible for undertakings to participate, other than the public service operator which was granted the public service contract. However, with a view to the best use of public funds, competent authorities should be able to determine the modalities for subcontracting their public passenger transport services, in particular in the case of services performed by an internal operator. Furthermore, a subcontractor should not be prevented from taking part in competitive tenders in the territory of any competent authority. The selection of a subcontractor by the competent authority or its internal operator needs to be carried out in accordance with Community law.

(20) Where a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with Community law on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment. In particular, the provisions of this Regulation are to be without prejudice to the obligations applicable to public authorities by virtue of the directives on the award of public contracts, where public service contracts fall within their scope.

(1) OJ L 82, 22.3.2001, p. 16.
Effective legal protection should be guaranteed, not only for awards falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2), but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (3) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (4).

Some invitations to tender require the competent authorities to define and describe complex systems. These authorities should therefore have power, when awarding contracts in such cases, to negotiate details with some or all of the potential public service operators once tenders have been submitted.

Invitations to tender for the award of public service contracts should not be mandatory where the contract relates to modest amounts or distances. In this respect, greater amounts or distances should enable competent authorities to take into account the special interests of small and medium-sized enterprises. Competent authorities should not be permitted to split up contracts or networks in order to avoid tendering.

Where there is a risk of disruption in the provision of services, the competent authorities should have power to introduce emergency short-term measures pending the award of a new public service contract which is in line with all the conditions for awarding a contract laid down in this Regulation.

Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004, the Commission presented a proposal to amend Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (5) so as to guarantee access for all Community railway undertakings to the infrastructure of all Member States for the purpose of operating international passenger services. The aim of this Regulation is to establish a legal framework for compensation and/or exclusive rights for public service contracts and not the further opening of the market for railway services.

In the case of public services, this Regulation allows each competent authority, within the context of a public service contract, to select its operator of public passenger transport services. Given the differences in the way Member States organise their territory in this respect, competent authorities may justifiably be allowed to award public service contracts directly for railway travel.

The compensation granted by competent authorities to cover the costs incurred in discharging public service obligations should be calculated in a way that prevents overcompensation. Where a competent authority plans to award a public service contract without putting it out to competitive tender, it should also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of service.

By appropriately considering the effects of complying with the public service obligations on the demand for public passenger transport services in the calculation scheme set out in the Annex, the competent authority and the public service operator can prove that overcompensation has been avoided.

With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react.

Directly awarded public service contracts should be subject to greater transparency.

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Given that competent authorities and public service operators will need time to adapt to the provisions of this Regulation, provision should be made for transitional arrangements. With a view to the gradual award of public service contracts in line with this Regulation, Member States should provide the Commission with a progress report within the six months following the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports.

During the transitional period, the application of the provisions of this Regulation by the competent authorities may take place at different times. It may therefore be possible, during this period, that public service operators from markets not yet affected by the provisions of this Regulation tender for public service contracts in markets that have been opened to controlled competition more rapidly. In order to avoid, by means of proportionate action, any imbalance in the opening of the public transport market, competent authorities should be able to refuse, in the second half of the transitional period, tenders from undertakings, more than half the value of the public transport services performed by which are not granted in accordance with this Regulation, provided that this is applied without discrimination and decided in advance of an invitation to tender.

In paragraphs 87 to 95 of its judgment of 24 July 2003 in Case C-280/00 Altmark Trans GmbH (1), the Court of Justice of the European Communities ruled that compensation for public service does not constitute an advantage within the meaning of Article 87 of the Treaty, provided that four cumulative conditions are satisfied. Where those conditions are not satisfied and the general conditions for the application of Article 87(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 73, 86, 87 and 88 of the Treaty.

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.

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.

This Regulation replaces Regulation (EEC) No 1191/69, which should therefore be repealed. For public freight transport services, a transitional period of three years will assist the phasing out of compensation not authorised by the Commission in accordance with Articles 73, 86, 87 and 88 of the Treaty. Any compensation granted in relation to the provision of public passenger transport services other than those covered by this Regulation which risks involving State aid within the meaning of Article 87(1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in Case C-280/00 Altmark Trans GmbH. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest.

The scope of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (2) is covered by this Regulation. That Regulation is considered obsolete while limiting the application of Article 73 of the Treaty without granting an appropriate legal basis for authorising current investment schemes, in particular in relation to investment in transport infrastructure in a public private partnership. It should therefore be repealed in order for Article 73 of the Treaty to be properly applied to continuing developments in the sector without prejudice to this Regulation or Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings (3). With a view to further facilitating the application of the relevant Community rules, the Commission will propose State aid guidelines for railway investment, including investment in infrastructure in 2007.

With a view to assessing the implementation of this Regulation and the developments in the provision of public passenger transport in the Community, in particular the quality of public passenger transport services and the effects of granting public service contracts by direct award, the Commission should produce a report. This report may, if necessary, be accompanied by appropriate proposals for the amendment of this Regulation.

(1) [2003] ECR I-7747.


HAVE ADOPTED THIS REGULATION:

Article 1

Purpose and scope

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

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) (1), national sea waters.

3. This Regulation shall not apply to public works concessions within the meaning of Article 1(3)(a) of Directive 2004/17/EC or of Article 1(3) of Directive 2004/18/EC.

Article 2

Definitions

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;

(c) ‘competent local authority’ means any competent authority whose geographical area of competence is not national;

(d) ‘public service operator’ means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services;

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

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

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

(h) ‘direct award’ means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

(i) ‘public service contract’ means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

— taking the form of an individual legislative or regulatory act, or

— containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;

(j) ‘internal operator’ means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

(k) ‘value’ means the value of a service, a route, a public service contract, or a compensation scheme for public passenger transport, corresponding to the total remuneration, before VAT, of the public service operator or operators, including compensation of whatever kind paid by the public authorities and revenue from the sale of tickets which is not repaid to the competent authority in question;

(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;

(m) ‘integrated public passenger transport services’ means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable.

Article 3

Public service contracts and general rules

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

2. By way of derogation from paragraph 1, public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passengers 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.

Article 4

Mandatory content of public service contracts and general rules

1. Public service contracts and general rules shall:

(a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

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

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

(ii) the nature and extent of any exclusive rights granted,

in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

(c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.

2. Public service contracts and general rules shall determine the arrangements for the allocation of revenue from the sale of tickets which may be kept by the public service operator, repaid to the competent authority or shared between the two.

3. The duration of public service contracts shall be limited and shall not exceed 10 years for coach and bus services and 15 years for passenger transport services by rail or other track-based modes. The duration of public service contracts relating to several modes of transport shall be limited to 15 years if transport by rail or other track-based modes represents more than 50 % of the value of the services in question.

4. If necessary, having regard to the conditions of asset depreciation, the duration of the public service contract may be extended by a maximum of 50 % if the public service operator provides assets which are both significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract and linked predominantly to the passenger transport services covered by the contract.

If justified by costs deriving from the particular geographical situation, the duration of public service contracts specified in paragraph 3 in the outermost regions may be extended by a maximum of 50 %.
If justified by the amortisation of capital in relation to exceptional infrastructure, rolling stock or vehicular investment and if the public service contract is awarded in a fair competitive tendering procedure, a public service contract may have a longer duration. In order to ensure transparency in this case, the competent authority shall transmit to the Commission within one year of the conclusion of the contract the public service contract and elements justifying its longer duration.

5. Without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC. Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services.

6. Where competent authorities, in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts.

7. Tender documents and public service contracts shall indicate, in a transparent manner, whether, and if so to what extent, subcontracting may be considered. If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. A public service contract covering at the same time design, construction and operation of public passenger transport services may allow full subcontracting for the operation of those services. The public service contract shall, in accordance with national and Community law, determine the conditions applicable to subcontracting.

Article 5
Award of public service contracts

1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

(a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100 % ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

(c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;

(d) in the absence of a competent local authority, points (a), (b) and (c) shall apply to a national authority for the benefit of a geographical area which is not national, provided that the internal operator does not take part in competitive tenders concerning the provision of public passenger transport services organised outside the area for which the public service contract has been granted;
3. Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

4. Unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services.

5. In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take an emergency measure. This emergency measure shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years.

6. Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies.

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law.

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made so that any alleged illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

**Article 6**

**Public service compensation**

1. All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule shall also comply with the provisions laid down in the Annex.

2. At the written request of the Commission, Member States shall communicate, within a period of three months or any longer period as may be fixed in that request, all the information that the Commission considers necessary to determine whether the compensation granted is compatible with this Regulation.

**Article 7**

**Publication**

1. Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible, the selected public service operators and the compensation payments and exclusive rights granted to the said public service operators by way of reimbursement. This report shall distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted.

2. Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the **Official Journal of the European Union**:

   (a) the name and address of the competent authority;

   (b) the type of award envisaged;

   (c) the services and areas potentially covered by the award.

Competent authorities may decide not to publish this information where a public service contract concerns an annual provision of less than 50 000 kilometres of public passenger transport services.
Should this information change after its publication, the competent authority shall publish a rectification accordingly as soon as possible. This rectification shall be without prejudice to the launching date of the direct award or of the invitation to tender.

This paragraph shall not apply to Article 5(5).

3. In the case of a direct award of public service contracts for transport by rail, as provided for in Article 5(6), the competent authority shall make public the following information within one year of granting the award:

(a) name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control;

(b) duration of the public service contract;

(c) description of the passenger transport services to be performed;

(d) description of the parameters of the financial compensation;

(e) quality targets, such as punctuality and reliability and rewards and penalties applicable;

(f) conditions relating to essential assets.

4. When so requested by an interested party, a competent authority shall forward to it the reasons for its decision for directly awarding a public service contract.

**Article 8**

**Transition**

1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directive 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 4 of this Article shall not apply.

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States’ progress reports, the Commission may propose appropriate measures addressed to Member States.

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

(a) before 26 July 2000 on the basis of a fair competitive tendering procedure;

(b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;

(c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;

(d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

4. Without prejudice to paragraph 3, the competent authorities may opt, in the second half of the transitional period specified in paragraph 2, to exclude from participation in the award of contracts by invitation to tender those public service operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right granted in accordance with this Regulation represents at least half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right. Such exclusion shall not apply to public service operators running the services which are to be tendered. For the application of this criterion, no account shall be taken of public service contracts awarded by emergency measure as referred to in Article 5(5).

Where competent authorities make use of the option referred to in the first subparagraph, they shall do so without discrimination, exclude all potential public service operators meeting this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.
The competent authorities concerned shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender.

**Article 9**

**Compatibility with the Treaty**

1. 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.

2. Without prejudice to Articles 73, 86, 87 and 88 of the Treaty, Member States may continue to grant aid for the transport sector pursuant to Article 73 of the Treaty which meets transport coordination needs or which represents reimbursement for the discharge of certain obligations inherent in the concept of a public service, other than those covered by this Regulation, and in particular:

   (a) until the entry into force of common rules on the allocation of infrastructure costs, where aid is granted to undertakings which have to bear expenditure relating to the infrastructure used by them, while other undertakings are not subject to a like burden. In determining the amount of aid thus granted, account shall be taken of the infrastructure costs which competing modes of transport do not have to bear;

   (b) where the purpose of the aid is to promote either research into, or development of, transport systems and technologies which are more economic for the Community in general.

Such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies.

**Article 10**

**Repeal**

1. Regulation (EEC) No 1191/69 is hereby repealed. Its provisions shall however continue to apply to freight transport services for a period of three years after the entry into force of this Regulation.

2. Regulation (EEC) No 1107/70 is hereby repealed.

**Article 11**

**Reports**

After the end of the transitional period specified in Article 8(2), the Commission shall present a report on the implementation of this Regulation and on the developments in the provision of public passenger transport in the Community, assessing in particular the development of the quality of public passenger transport services and the effects of direct awards, accompanied, if necessary, by appropriate proposals for the amendment of this Regulation.

**Article 12**

**Entry into force**

This Regulation shall enter into force on 3 December 2009.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 23 October 2007.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
M. LOBO ANTUNES
ANNEX

Rules applicable to compensation in the cases referred to in Article 6(1)

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

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

- costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority/authorities, contained in a public service contract and/or in a general rule,
- minus any positive financial effects generated within the network operated under the public service obligation(s) in question,
- minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,
- plus a reasonable profit,

equals net financial effect.

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

4. Costs and revenue must be calculated in accordance with the accounting and tax rules in force.

5. In order to increase transparency and avoid cross-subsidies, where a public service operator not only operates compensated services subject to public transport service obligations, but also engages in other activities, the accounts of the said public services must be separated so as to meet at least the following conditions:

- the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with the accounting and tax rules in force,
- all variable costs, an appropriate contribution to the fixed costs and a reasonable profit connected with any other activity of the public service operator may under no circumstances be charged to the public service in question,
- the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.

6. ‘Reasonable profit’ must be taken to mean a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention.
7. The method of compensation must promote the maintenance or development of:

— effective management by the public service operator, which can be the subject of an objective assessment, and

— the provision of passenger transport services of a sufficiently high standard.
II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road

(2014/C 92/01)

1. INTRODUCTION

Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and 1107/70 (1) was adopted on 23 October 2007. This Regulation, which entered into force on 3 December 2009, aims to create an internal market for the provision of public passenger transport services. It does so by complementing the general rules on public procurement. It also lays down the conditions under which compensation payments stipulated in contracts and concessions for public passenger transport services shall be deemed compatible with the internal market and exempt from prior State aid notification to the Commission.

Regulation (EC) No 1370/2007 is of major importance for the organisation and financing of public transport services by bus, tram, metro and rail in the Member States. A coherent and correct application of its provisions is economically and politically important. This is because the value added and employment in the public transport sector each correspond to about 1% of GDP and of total employment, respectively, of the Union. A well performing public transport sector is a cornerstone of effective social, economic and environmental policy.

Both an external ex-post assessment of the implementation of Regulation (EC) No 1370/2007 (2) conducted by an external consultant as well as representatives of European associations and of Member States speaking at an EU-wide stakeholders' conference organised by the Commission on the implementation of that Regulation on 14 November 2011 (3) called on the Commission to provide guidance on certain provisions of that Regulation. Diverging interpretations of provisions concerning the definition of public service obligations, the scope of public service contracts, the award of such contracts and the compensation of public service obligations can hamper the creation of an internal market for public transport and lead to undesired market distortions.

Before adopting this Communication, the Commission consulted Member States and stakeholders representing parties interested in this issue, such as European associations of the public transport sector, including transport staff and passenger organisations.

In this Communication, the Commission sheds light on its understanding of a number of provisions of the Regulation, inspired by best practices, to help Member States reap the full benefits of the internal market. This Communication does not aspire to cover all provisions in an exhaustive manner, nor does it create any new legislative rules. It should be noted that, in any event, the interpretation of Union law is ultimately the role of the Court of Justice of the European Union.

On 30 January 2013, the Commission adopted a proposal to amend Regulation (EC) No 1370/2007 in anticipation of the opening up of the market for domestic passenger transport services by rail (1). Some of the provisions of the Regulation that the Commission proposed to modify, such as the provisions on the award of public service contracts in rail, are interpreted in the present Communication. As regards these provisions, the guidance provided in this document should be considered valid until any amendment to Regulation (EC) No 1370/2007 enters into force.

2. THE COMMISSION’S UNDERSTANDING OF REGULATION (EC) No 1370/2007


2.1.1. Article 1(3) and Article 5(1). Relationship between Regulation (EC) No 1370/2007 and the public procurement and concession directives

Regulation (EC) No 1370/2007 governs the award of public service contracts, as defined in Article 2(6) thereof, in the field of public passenger transport by road and by rail. However, these public service contracts may also fall within the scope of the public procurement directives (Directive 2014/24/EU and Directive 2014/25/EU). Since the directives referred to in Regulation (EC) No 1370/2007 (Directive 2004/17/EC and Directive 2004/18/EC) have been repealed and replaced by the above-mentioned directives, the references in Regulation (EC) No 1370/2007 should be understood as relating to the new directives.

Article 1(3) provides that Regulation (EC) No 1370/2007 shall not apply to public works concessions within the meaning of Article 1(3)(a) of Directive 2004/17/EC or Article 1(3) of Directive 2004/18/EC. After the entry into force of Directive 2014/23/EU on the award of concession contracts, the term ‘works concession’ is defined in Art 5(1)(a) of this Directive. Therefore, works concessions for public passenger transport services by rail and other track-based modes and by road are governed solely by Directive 2014/23/EU.

For the relationship between Regulation (EC) No 1370/2007 and the public procurement directives as well as Directive 2014/23/EU, it is important to distinguish between service contracts and service concessions.

Article 2 points (1), (2) and (5) of Directive 2014/25/EU defines ‘service contracts’ as contracts for pecuniary interest concluded in writing between one or more contracting entities and one or more economic operators and having as their object the provision of services. When these contracts involve ‘contracting authorities’ within the meaning of Article 2(1) point (1) of Directive 2014/24/EU, they are considered as ‘public service contracts’ in accordance with Article 2(1) points (6) and (9) of Directive 2014/24/EU.

Article 5(1)(b) of Directive 2014/23/EU on the award of concession contracts defines a ‘service concession’ as ‘a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment’. Art 5(1) specifies further that ‘the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible’.

This distinction between (public) service contracts and concessions is important because according to Article 10(3) of Directive 2014/23/EU this Directive shall not apply to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007. The award of service concessions for these public passenger transport services is solely governed by Regulation (EC) No 1370/2007.

Article 5(1) of Regulation (EC) No 1370/2007 specifies that the award of (public) service contracts for transport services by bus or tram is governed by Directives 2004/17/EC (1) and 2004/18/EC (2), except where such contracts take the form of service concessions. The award of (public) service contracts for public passenger services by bus or tram is thus solely governed by Directives 2014/24/EU and 2014/25/EU.

The award of (public) service contracts for public passenger transport services by railway and metro is governed by Regulation (EC) No 1370/2007 and excluded from the scope of Directive 2014/24/EU according to its Recital 27 and Article 10(i) and from the scope of Directive 2014/25/EU according to its Recital 35 and Article 21(g).

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<td>Summary of the applicable legal basis for contract awards by type of contractual arrangement and by transport mode</td>
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<td>Public passenger services by</td>
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2.1.2. Article 1(2). Application of Regulation (EC) No 1370/2007 to inland waterways and national seawaters

Article 1(2) states that Regulation (EC) No 1370/2007 shall apply to national and international public passenger transport services by rail, by other track-based modes and by road and that Member States may apply that Regulation to public passenger transport by inland waterways. To ensure legal certainty, a Member State’s decision to apply Regulation (EC) No 1370/2007 to public passenger transport by inland waterways should be adopted in a transparent manner through a legally binding act. Applying Regulation (EC) No 1370/2007 to inland waterway passenger transport services may be especially useful where those services are integrated into a wider urban, suburban or regional public passenger transport network.

(1) Repealed and replaced by Directive 2014/25/EU.
(2) Repealed and replaced by Directive 2014/24/EU.
In the absence of a decision to apply Regulation (EC) No 1370/2007 to inland waterway passenger transport services, these services will be governed directly by Article 93 of the Treaty on the Functioning of the European Union (TFEU). Certain aspects of passenger transport by inland waterways are further covered by Council Regulation (EEC) No 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterways within a Member State (1) and by Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services (2).

Article 1(2) also provides that Member States may apply Regulation (EC) No 1370/2007 to national seawater transport services only if this is 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) (3). Certain key provisions of that Regulation do not fully match with those of Regulation (EC) No 1370/2007 (such as the provisions on its application to freight transport, contract duration, exclusive rights and on the thresholds for directly awarding small-scale contracts). Applying Regulation (EC) No 1370/2007 to national seawaters raises a number of difficulties. In a Communication (4), the Commission provides guidance on Regulation (EEC) No 3577/92, where these difficulties are addressed.

2.1.3. Article 10(1). Applicability of Regulation (EEC) No 1191/69 to freight transport contracts until 2 December 2012

In the past, some specific rail freight transport services may have been subject to public service obligations covered by Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (5). Regulation (EC) No 1370/2007, which repeals Regulation (EEC) No 1191/69, does not, however, apply to freight transport services. To help phase out compensation not authorised by the Commission in accordance with Articles 93, 107 and 108 TFEU, Article 10(1) of Regulation (EC) No 1370/2007 states that Regulation (EEC) No 1191/69 shall remain applicable to freight transport services for a period of three years after the entry into force of Regulation (EC) No 1370/2007 (i.e. until 2 December 2012). Freight transport services can only be qualified as services of general economic interest when the Member State concerned establishes that they have special characteristics compared to those of commercial freight services (6). If Member States wish to keep State aid schemes in place for rail freight transport services which do not fulfil the specific conditions defined in the Altmark judgment (7), they must notify those schemes to the Commission so that they can be approved in advance. Those schemes shall be assessed under Article 93 TFEU directly. If those schemes are not notified in advance, they will constitute new and unlawful aid, as they will no longer be exempted from the obligation to notify State aid.

2.2. Definition of public service obligations and general rules/contents of public service contracts

This chapter provides interpretative guidance on the constitutive features of public service contracts, key characteristics of general rules, and how competent authorities define the nature and extent of public service obligations and of exclusive rights in the context of Regulation (EC) No 1370/2007. Furthermore, it addresses the conditions under which extensions of the duration of public service contracts can be granted as well as the conditions for subcontracting, including in the case of internal operators.

(4) Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (not yet published in the Official Journal).
2.2.1. Article 2(i). Constitutive features of a public service contract

According to Article 2(i), a public service contract consists of ‘one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations’. The contract may also consist of a decision adopted by a competent authority taking the form of an individual legislative or regulatory act or containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator. The notion of ‘public service contract’ as defined by Regulation (EC) No 1370/2007 also covers public service concessions.

To take account of the different legal regimes and traditions in the Member States, the definition of a public service contract provided by Regulation (EC) No 1370/2007 is very broad and includes various types of legally binding acts. It thereby ensures that no legal situation escapes the scope of that Regulation, even if the relationship between the competent authority and the operator is not formally and strictly expressed in the form of a contract within the strictest meaning of the term. For this reason, the definition also includes public service contracts consisting of a decision taking the form of an individual legislative or regulatory act. A combination of a general legal act, assigning the operation of services to an operator, with an administrative act, setting out the detailed requirements concerning the services to be provided and the method of compensation calculation to be applied, can also constitute a public service contract. The definition also covers decisions adopted by the competent authority stating the conditions under which the authority itself provides the services or entrusts the provision of services to an internal operator.

2.2.2. Article 2(l). Characteristics and establishment process of general rules

General rules are defined in Article 2(l) as measures that apply ‘without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible’. General rules are therefore measures for one or several types of public transport services by road or by rail that may be imposed unilaterally by public authorities on public service operators in a non-discriminatory manner or that may be included in contracts concluded between the competent authority and the public service operators. The measure is restricted to the geographical area for which a competent authority is responsible, but does not necessarily need to cover the entire geographical area. A general rule can also be a regional or national law applicable to all existing or potential transport operators in a region or a Member State. It is therefore usually not negotiated with individual public service operators. Even if the general rule is imposed by a unilateral act, it is not excluded that public service operators are consulted in a transparent and non-discriminatory manner before general rules are established.

2.2.3. Article 3(2) and (3). Setting up general rules inside and outside a public service contract. Scope of general rules

Recital 17 of Regulation (EC) No 1370/2007 states that ‘competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards’.

Member States and/or competent authorities may organise public transport through general rules such as laws, decrees or regulatory measures. However, when these general rules involve compensation or an exclusive right, there is an additional obligation to conclude a public service contract pursuant to Article 3(1) of Regulation (EC) No 1370/2007. This obligation does not exist when general rules establish maximum tariffs for all passengers or for certain categories of passengers pursuant to Article 3(2) of that Regulation. In that case, there is no obligation to conclude a public service contract and the compensation mechanism can be defined on a non-discriminatory, generally applicable basis.
A competent authority may decide to use general rules to establish social or qualitative standards in accordance with national law. If the general rules provide for compensation or if the competent authority thinks that the implementation of the general rules requires compensation, a public service contract or public service contracts defining the obligations and the parameters of the compensation of their net financial effect will also have to be concluded, in accordance with Articles 4 and 6 as well as with the Annex to Regulation (EC) No 1370/2007.

2.2.4. Article 3(3). Notification under Union rules on State aid of general rules on maximum tariff schemes for transport of pupils, students, apprentices and persons with reduced mobility that are outside the scope of Regulation (EC) No 1370/2007

Article 3(3) allows the Member States to exclude from the scope of Regulation (EC) No 1370/2007 general rules on financial compensation for public service obligations which establish maximum tariffs for the transport of pupils, students, apprentices and persons with reduced mobility. If a Member State decides to do so, the national authorities must assess the compensation provisions under the Treaty rules instead, in particular those relating to State aid. If those general rules constitute State aid, the Member State must notify those rules to the Commission in accordance with Article 108 TFEU.

2.2.5. Article 2(e) and Article 4(1). Definition by competent authorities of the nature and extent of public service obligations and of the scope of public service contracts

Article 14 TFEU and Protocol No 26 on services of general interest annexed to the TFEU lay out the general principles of how Member States define and provide services of general economic interest. Article 14 TFEU states that ‘the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services (of general economic interest (SGEI)) operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions’. According to Protocol No 26, national, regional and local authorities play an essential role and have wide discretion in providing, commissioning and organising SGEIs tailored as closely as possible to the needs of the users. It is a shared value of the Union that SGEIs strive for a high level of quality, safety, affordability, equal treatment and the promotion of universal access and the rights of users.

The possibilities for Member States to provide, commission and organise SGEIs in the field of public passenger transport by rail and by road are regulated by Regulation (EC) No 1370/2007. Article 1 of Regulation (EC) No 1370/2007 states that its purpose is ‘to define how, in accordance with the rules of Union 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’. As mentioned in Article 2(e) of Regulation (EC) No 1370/2007, a public service obligation is a requirement 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 (1). Thus, within the framework laid down by Regulation (EC) No 1370/2007, Member States have wide discretion to define public service obligations in line with the needs of end users.

Typically but not exclusively, public service obligations can refer to specific requirements placed on the public service operator as regards, for instance, the frequency of services, service quality, service provision in particular at smaller intermediate stations which may not be commercially attractive, and the provision of early morning and late evening trains. As an illustrative example, the Commission considers that the services to be classified as public services must be addressed to citizens or be in the interest of society as a whole. Competent authorities define the nature and scope of public service obligations while respecting general principles of the Treaty. To achieve the objectives of the Regulation, which means to guarantee safe, cost-effective and high-quality passenger transport services, competent authorities have to strive for an economically and financially sustainable provision of these services. In the context of contractualisation as

(1) This approach is consistent with the Commission’s general approach to Services of General Economic Interest in other sectors. See, in particular, point 48 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).
defined by Article 3(1) of Regulation (EC) No 1370/2007, both parties to the contract can expect their rights to be respected and must fulfil their contractual obligations. These rights and obligations include financial ones. The geographical scope of public service contracts should enable competent authorities to optimise the economics of public transport services operated under their responsibility including, where appropriate, local, regional and sub-national network effects. Reaping network effects allows for a cost-effective provision of public transport services due to the cross-financing between more than cost-covering services and not cost-covering services. This should in turn enable the authorities to achieve established transport policy objectives whilst guaranteeing, where applicable, the conditions for effective and fair competition on the network, for instance, potentially for some high-speed rail services.

2.2.6. Article 2(f) and Article 3(1). Definition of the nature and extent of exclusive rights to ensure compliance with Union law

Under Article 3(1), a public service contract must be concluded if a competent authority decides to grant an operator an exclusive right and/or compensation in return for the discharge of public service obligations. An exclusive right is defined in Article 2(f) as ‘a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator’. This right may be established in a legislative, regulatory or administrative instrument. Very often, the public service contract specifies the conditions for exercising the exclusive right, in particular the geographical scope and the duration of the exclusive right. Exclusivity protects the undertaking from competition by other operators in a specific market in so far as no other undertaking may provide the same service. However, Member States may grant certain rights that appear non-exclusive but de facto prevent other undertakings from participating in the market through legal rules or administrative practices. For example, administrative arrangements granting authorisation to operate public transport services subject to criteria, such as relating to a desirable volume and quality of such services, could have the practical effect of limiting the number of operators on the market. The Commission considers that the notion of exclusivity used in Regulation (EC) No 1370/2007 also covers the latter situation.

To ensure the smooth functioning of the internal market for public transport services, the competent authorities should give a precise definition of exclusive rights as rights that do not exceed what is necessary to provide the required economic protection for the services in question, while leaving room, where possible, for other types of services. In this context, recital 8 of Regulation (EC) No 1370/2007 states that ‘passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements’. The Commission would like to point out, however, that even under a deregulated system, introducing contractual arrangements to promote the accessibility of bus services to certain segments of the population constitutes a public service obligation. This obligation falls under Regulation (EC) No 1370/2007 (1).

If all conditions for the application of Regulation (EC) No 1370/2007 apply, including the condition that a public transport operator benefits from an exclusive right, the public service contract that has to be concluded may be directly awarded, for instance in the case of a small value contract and in the case of a small and medium sized operating company, if the conditions of Article 5(4) are met.

2.2.7. Article 4(4). Conditions under which a 50 % extension of the duration of the public service contract can be granted

Article 4(3) states that the maximum duration of a public service contract shall be ‘10 years for coach and bus services and 15 years for passenger transport services by rail or other track-based modes’. Article 4(4) allows for an extension of the duration of a public service contract by 50 %, if necessary, having regard to the conditions of asset depreciation. Such an extension can be granted if the public service operator

provides assets that are significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract and are predominantly linked to the passenger transport services covered by the contract.

The interpretation of these two conditions depends on the particular circumstances of each case. As recital 15 of Regulation (EC) No 1370/2007 underlines, ‘contracts of long duration can lead to market foreclosure for a longer period than is necessary, thus diminishing the benefits of competitive pressure. In order to minimise distortions of competition, while protecting the quality of services, public service contracts should be of limited duration’. Additionally, in the case of very long contract durations it becomes difficult to correctly attribute risks between the operator and the authority due to increasing uncertainties. On the other hand, recital 15 explains that ‘it is necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator must invest in assets for which the depreciation period is exceptional and, because of their special characteristics and constraints, in the case of the outermost regions as specified in Article 349 TFEU’.

Any decision about extending the duration of a public service contract by 50 % should be subject to the following considerations: the public service contract must oblige the operator to invest in assets such as rolling stock, maintenance facilities or infrastructure for which the depreciation period is exceptionally long.

Normally, the competent authority will decide to extend the contract's duration before the award of a new contract. If an extension of the duration needs to be decided while the contract is running, because intended investments in new rolling stock are made not at the beginning of the contract period but, for instance, due to technical reasons at a later stage, this possibility shall be clearly indicated in the tender documents and this option shall be adequately reflected in terms of compensation. In any event, the total contract extension must not exceed 50 % of the duration stipulated in Article 4(4).

2.2.8. Article 4(5). Available options to competent authorities, if they consider desirable to take measures of staff protection in case of a change of operator

Article 4(5) provides that ‘without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (1). Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services'.

In compliance with the principle of subsidiarity and as set out in recitals 16 and 17, competent authorities basically have the following options in the case of a change of operator as regards staff protection:

(i) Not to take any specific action. In this case, employees’ rights such as a transfer of staff only have to be granted where the conditions for the application of Directive 2001/23/EC are fulfilled, for instance, where there is transfer of significant tangible assets such as rolling stock (2).

(1) OJ L 82, 22.3.2001, p. 16.
(2) In accordance with the case-law of the Court of Justice of the European Union, Directive 2001/23/EC is applicable to a transfer of undertakings which takes place following a tendering procedure for the award of a public service contract. In sectors of activity based on tangible assets, such as bus or rail transport, the Directive applies if significant tangible assets are transferred. The existence of a transfer within the meaning of Directive 2001/23/EC is not precluded by the fact that ownership of the tangible assets previously used by a transferor and taken over by a transferee is not transferred, for example in case the tangible assets taken over by the new contractor did not belong to its predecessor but were provided by the contracting authority; see in this regard Commission Memorandum on rights of workers in cases of transfers of undertakings at: http://ec.europa.eu/social/main.jsp?catId=7478langId=en&intpagId=208
(ii) To require a transfer of staff previously taken on to provide services with the rights to which the staff would have been entitled, whether or not Directive 2001/23/EC applies, if there has been a transfer within the meaning of Directive 2001/23/EC. Recital 16 of Regulation (EC) No 1370/2007 explains that ‘this Directive does not preclude Member States from safeguarding transfer conditions of employees’ rights other than those covered by Directive 2001/23/EC and thereby, if appropriate, taking into account social standards established by national laws, regulations or administrative provisions or collective agreements or agreements concluded between social partners’.

(iii) To require the public transport operator to respect certain social standards for all staff involved in the provision of public transport services ‘in order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping’ as set out in recital 17 of Regulation (EC) No 1370/2007. For instance, these standards could possibly relate to a collective agreement at company level or a collective agreement concluded for the relevant market segment.

(iv) To apply a combination of options (ii) and (iii).

In order to ensure transparency of employment conditions, competent authorities have the obligation, if they require a transfer of staff or impose certain social standards, to clearly specify these obligations in detail in the tender documents and the public service contracts.

2.2.9. Article 5(2)(e). Conditions of subcontracting in the case of public service contracts awarded by internal operators

Public service contracts directly awarded to an internal operator may be subcontracted under strict conditions. In such a case, pursuant to Article 5(2)(e), the internal operator must provide ‘the major part’ of the public passenger transport services itself. With this provision, the legislator intended to avoid that the concept of an ‘internal operator’ under the control of the competent authority would be devoid of meaning, since the internal operator would otherwise be allowed to subcontract all or a very important share of the transport services to another entity. Article 5(2)(e) therefore aims to avoid the establishment of false internal operators. The provision of public passenger transport services by an internal operator is an exception to the principle set out in Article 5(3), according to which public service contracts shall be awarded ‘on the basis of a competitive tendering procedure’. According to recital 7 of Regulation (EC) No 1370/2007, ‘the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost’. Without prejudice to a case-by-case analysis, it would seem reasonable to consider that subcontracting more than one third of the public transport services would require a strong justification, in particular in view of the objectives of Article 5(2)(e) as explained. Typically, these transport services are expressed in value terms. In any case, subcontracting by internal operators must be carried out respecting relevant public procurement legislation.

Finally, Regulation (EC) No 1370/2007 does not prevent the public service contract from stipulating a minimum percentage of transport services in value terms to be subcontracted by the operator under a public service contract. The contract can stipulate this, provided the provisions of that Regulation are respected, especially those on the maximum share of a public service contract that may be subcontracted.

2.3. Award of public service contracts

This chapter provides interpretative guidance on a number of provisions related to the award of public services contracts. The guidance covers the conditions under which public service contracts can be directly awarded as well as the procedural requirements for the competitive tendering of contracts.

2.3.1. Article 5(2)(b). Conditions under which a public service contract may be directly awarded to an internal operator

Regulation (EC) No 1370/2007 allows local competent authorities to provide public passenger transport services by rail and by road themselves or to award a public service contract directly to an internal operator. However, if they choose the second option, they must respect a number of strict rules and conditions set out in Article 5(2). The Commission notes the following:
(i) Article 5(2) provides that a public service contract may be awarded directly to internal operators by a competent local authority or a group of such authorities providing integrated public passenger transport services. This means that the public passenger transport services under a contract directly awarded by a group of competent local authorities must be integrated from a geographical, transport or tariff point of view across the territory for which such a group of authorities is responsible. The Commission also considers that the geographical scope of such services provided under the responsibility of a competent local authority or a group of such authorities should be defined in a manner that, typically, these local services would serve the needs of an urban agglomeration and/or a rural district.

(ii) The rules on control of the internal operator by the competent authority defined in Article 2(j) and specified in Article 5(2) must in any event be respected. An internal operator must be ‘a legally distinct entity over which a competent local authority [...] exercises control similar to that exercised over its own departments’. Article 5(2)(a) lays down a set of criteria that shall be taken into consideration in assessing whether a competent authority effectively controls its internal operator. These criteria are: the degree of representation on administrative, management or supervisory bodies, specifications relating to this representation in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions. The assessment of control must be based on all the criteria, if relevant.

With regard to the ownership criterion, Regulation (EC) No 1370/2007 does not require the competent authorities to hold 100% of the internal operator’s capital. This could be relevant, for example, in cases of public-private partnerships. In this respect, Regulation (EC) No 1370/2007 interprets ‘in-house’ operator more broadly than the Court of Justice of the European Union in its case-law (1). However, effective control by the competent authority has to be proven by other criteria as mentioned in Article 5(2)(a).

(iii) To reduce distortions of competition, Article 5(2)(b) requires that the transport activities of internal operators and any body or bodies under their control should be geographically confined within the competent authority’s territory or jointly controlled by a local competent authority. Thus, these operators or bodies may not participate in competitive tender procedures related to the provision of public passenger transport services organised outside the territory of the competent authority. Article 5(2)(b) is deliberately drafted in broad terms to prevent the creation of corporate structures that aim to circumvent this geographical confinement. Without prejudice to the provisions on outgoing lines, as mentioned in point (v), the Commission will be particularly strict in the application of this provision on geographical confinement, in particular when the internal operator and another body providing transport services are both controlled by a local competent authority.

(iv) By analogy with the case-law on public procurement and concessions which provides that the in-house operator’s activities should not be ‘market-oriented’ (2), the condition of Article 5(2)(b) that ‘the internal operator [...] perform their public passenger transport activity within the territory of the competent local authority, [...] and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority’ should be interpreted as follows: the internal operator or the entity influenced by the internal operator must not operate public passenger transport services, including as a subcontractor, or participate in tender procedures outside the territory of the internal operator’s territory within the Union or, due to a possible indirect effect on the internal market, elsewhere in the world.

(v) Article 5(2)(b) allows internal operators to operate ‘outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities’. This provision provides some flexibility by catering for transport between neighbouring regions. Internal operators may therefore operate services beyond the territory of their competent local authority to a certain extent. To assess whether the services under public service contract are compliant with this provision, the

(2) The case-law related to ‘in-house’ undertakings does not refer to a condition prohibiting those undertakings from taking part in competitive tenders outside the territory of the competent authority. However, the case-law has clearly indicated that an undertaking that becomes market-oriented renders the municipality’s control tenuous (see, Case C-458/03 Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG [2005] ECR I-08385).
following criteria should be applied: whether those services connect the territory of the competent authority in question to a neighbouring territory and whether they are ancillary rather than the main purpose of the public transport activities under public service contract. The Commission will assess whether the public transport activities are of a secondary nature by comparing their volume in vehicle or train km with the total volume of the public transport activities covered by the internal operator's contract(s).

2.3.2. Article 5(3). Procedural requirements for the competitive tendering of public service contracts

Article 5(3) stipulates that, if a competent authority uses a third party other than an internal operator to provide public passenger transport services, it shall award public service contracts through a fair, open, transparent and non-discriminatory competitive tendering procedure.

Article 5(3) provides few other details on the conditions under which a competitive tendering procedure should be organised. As laid out under point 2.4.1, contract award procedures must be designed so as to create conditions for effective competition. The application of the general principles of the Treaty, such as the principles of transparency and non-discrimination, implies, for instance, that the assessment criteria for the selection of offers must be published with the tender documents. The more detailed procedural rules of Union public procurement legislation, such as Directives 2014/24/EU and 2014/25/EU, or Directive 2014/23/EU on concessions, although not required, may be applied if Member States so wish.

However, according to Article 5(3) of Regulation (EC) No 1370/2007, the competent authority may also choose to negotiate with the pre-selected parties, after a pre-selection of tenders, in the case of specific or complex requirements. An example of this is when bidding operators must come up with technologically innovative transport solutions to meet the requirements published in the tender documents. Even when using pre-selection and negotiation, the selection and award procedure must nevertheless comply with all the conditions set out in Article 5(3).

In order to provide potential tenderers with fair and equal opportunities, the period between the launching of the competitive tendering procedure and the submission of the offers, as well as the period between the launching of the competitive tendering procedure and the moment from which the operation of the transport services has to start, shall be of appropriate and reasonable length.

To make the competitive tendering procedure more transparent, competent authorities should provide all the relevant technical and financial data, including information about the allocation of costs and revenues if available, to potential bidders to assist in the preparation of their offers. However, this shared information cannot undermine the legitimate protection of the commercial interests of third parties. Railway undertakings, rail infrastructure managers and all other relevant parties should make available appropriate accurate data to the competent authorities to enable them to comply with their information obligation.

2.3.3. Article 5(4). Conditions under which a competent authority may directly award a public service contract in case of a small contract volume or a SME

In the case of a direct award of a public service contract of small value or to a small or medium-sized operator (Article 5(4)), the competent authority may directly award the contract without a competitive tendering procedure. A public service contract is considered to be of small value if its average annual value is less than EUR 1 million or if it involves the annual provision of less than 300 000 kilometres of public passenger transport services. A small or medium-sized operator is an enterprise operating not more than 23 vehicles. In this case, the thresholds may be increased to an average annual value estimated at less than EUR 2 million or the annual provision of less than 600 000 kilometres of public transport services.

The SME threshold defined in terms of ‘vehicles’ indicates that this provision is geared to the transport by bus, but not to transport by tram, metro or train. The threshold of 23 vehicles has to be interpreted in a restrictive manner to avoid abuse of the exceptional character of Article 5(4). Therefore, the terms ‘vehicles being operated’ must be interpreted as referring to the total number of vehicles being operated by the public transport operator and not the number of vehicles operated for services covered by a particular public service contract.
However, the national legislator may decide to oblige its competent authority to apply to such cases the rule that public service contracts should be awarded in a fair, open, transparent and non-discriminatory competitive tendering process.

2.3.4. Article 5(4). Possibility of Member States to set lower thresholds allowing for a direct award in the case of contracts of small value or small and medium-sized operators

To the same extent that Article 5(4) allows the Member States (i) to oblige their competent authorities to apply the rule that public service contracts should be awarded in a fair, open, transparent and non-discriminatory competitive tendering procedure in the case of contracts of small value or small and medium-sized operators, the Member States may also decide (ii) to lower the thresholds set out in that provision for direct awards of such contracts or (iii) to use the thresholds provided for in Article 5(4) of Regulation (EC) No 1370/2007.

2.3.5. Article 5(6). Rail services that qualify for the direct award procedure

Article 5(6) allows competent authorities to award public service contracts directly for rail transport, ‘with the exception of other track-based modes such as metro and tramways’.

The award by an authority of contracts for the provision of services of general interest to a third party has to respect general Treaty principles, such as transparency and equal treatment (1). Contracts directly awarded under Article 5(6) are not exonerated from compliance with these Treaty principles. This is the reason why Regulation (EC) No 1370/2007 requires notably, in Article 7(2) and (3), that competent authorities publish certain information about directly awarded public service contracts in rail at least one year before and one year after the award.

The exception to the general rule of a competitive award procedure must also be applied restrictively. Rail substitute services, for instance, by bus and coach that may be contractually required from the public service operator in cases of disruption of the rail network cannot be considered as rail transport services and thus do not fall under Article 5(6). Subcontracting such rail substitute services by bus and coach according to relevant public procurement legislation is thus required.

Whether certain types of urban or suburban rail transport systems, such as the S-Bahn (in Austria, Germany and Denmark) and the RER (in France), or modes of transport that are similar to ‘other track based modes’ (for instance, metro or tram services), such as tram-train services and certain automatic train services operated under optical guidance systems, are included in the rail exemption of Article 5(6) must be assessed on a case-by-case basis, applying suitable criteria. In particular, this will depend on factors such as whether the systems in question are normally interoperable and/or share infrastructure with the traditional heavy rail network. Although tram-train services do use heavy rail infrastructure, their special characteristics mean they should nonetheless be regarded as an ‘other track based mode’.

2.3.6. Modifications of public service contracts

Where a running public service contract needs to be amended, for instance where the transport service volume and corresponding compensation amount need to be adapted due to an extension of a metro line, the question arises whether the competent authority should start a new award procedure or whether the contract can be amended without a new award.

The Court of Justice has held that in the case of minor, non-substantial modifications a new award may not be necessary to ensure that general Treaty principles such as transparency and non-discrimination are

(1) See for instance recital 20 of Regulation (EC) No 1370/2007: ‘Where a public authority chooses to entrust a general interest service to a third party, it must select the public service operator in accordance with Community law on public contracts and concessions, as established by Articles 43 to 49 of the Treaty, and the principles of transparency and equal treatment’.
complied with and a simple amendment of the contract may be sufficient (1). According to the Court, in order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract or to contracts subject to the public procurement directives require the award of a new contract in certain cases. This is the case, in particular, if the new provisions are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract.

According to the Court, an amendment to a contract during its term may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted.

In the absence of specific provisions in Regulation (EC) No 1370/2007, the principles of the above case-law are fully applicable to modifications of public service contracts covered by that Regulation. In order to determine what constitutes non-substantial modifications, a case-by-case assessment based on objective criteria is required (2).

2.4. Public service compensation

The rules on compensation laid down in Regulation (EC) No 1370/2007 ensure the absence of overcompensation and compliance with the Treaty rules. They also address the concepts of reasonable profit and efficiency incentive, the issues of cross-subsidisation of commercial activities with compensation paid for public service obligations and of under-compensation, and the Commission’s ex ante and ex post investigation procedures regarding public service compensation.

2.4.1. Article 4(1) and Article 5(3). Absence of overcompensation in the case of a public service contract awarded on the basis of an open and competitive public tendering procedure

Unlike other economic sectors, Article 106(2) TFEU does not apply in cases where compensation is paid for public service obligations in land transport. Rather, such compensation is covered by Article 93 TFEU. Accordingly, the Union rules regarding compensation for services of general economic interest (3) which are based on Article 106(2) TFEU, do not apply to inland transport (4).

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

This presumption of compatibility and exemption from the notification requirement does not address the question of the possible State aid character of the compensation paid for the provision of public transport services. In order not to constitute State aid, such compensation would have to respect the four conditions laid down by the European Court of Justice in the Altmark judgement (5).

(2) The Court of Justice pointed out in the Wall AG case that a change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute a substantial amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.
(3) Notably Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3) and EU framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).
(4) However, Commission Regulation (EU) No 360/2012 on the application of Articles 107 and 108 to de minimis aid granted to undertakings providing services of general economic (OJ L 114, 26.4.2012, p. 8) does apply to land transport.
An open, transparent and non-discriminatory competitive tendering procedure within the meaning of Article 5(3) will minimise the public compensation that the competent authorities will need to pay to the service provider to obtain the level of public service imposed in the tender, thus preventing overcompensation. In such a case, there is no need to apply the detailed rules on compensation set out in the annex.

In order to comply with Article 5(3), public procurement procedures must be designed in such a way that they create conditions for effective competition. The exact characteristics of the tender can vary in accordance with Article 5(3) which allows, for example, for a certain margin of negotiation between the competent authority and companies having submitted bids in the tender procedure. However, such negotiations must be fair and respect the principles of transparency and non-discrimination. For example, a purely negotiated procedure without prior publication of a contract notice is against the principles of transparency and non-discrimination of Article 5(3). Therefore, such a procedure does not comply with Article 5(3). Similarly, a tender procedure which is designed in such a way as to unduly restrict the number of potential bidders does not comply with Article 5(3). In this context, competent authorities should be particularly vigilant when they have clear indications of non-effective competition, in particular, when only one bid is submitted. In such cases, the Commission is also more likely to enquire about the specific circumstances of the tender procedure.

The selection criteria, including for example quality related, environmental or social criteria, should be closely related to the subject-matter of the service provided. The awarding authority is not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in its award decision.

Finally, there can be circumstances where a procurement procedure in accordance with Article 5(3) does not give rise to a sufficiently open and genuine competition. This could be the case, for example, due to the complexity or extent of the services to be provided or to the necessary infrastructure or assets owned by a particular service provider or to be provided for the execution of the contract.

2.4.2. Article 6. Absence of overcompensation in the case of directly awarded public service contracts

The direct award of a public service contract in accordance with Article 5(2), (4), (5) or (6), or the imposition of general rules within the meaning of Article 3(2), do not guarantee that the level of compensation is reduced to the minimum. This is because that direct award will not result from the interaction of competitive market forces, but rather from a direct negotiation between the competent authority and the service provider.

Article 6(1) provides that in the case of directly awarded public service contracts or general rules compensation must comply with the provisions of Regulation (EC) No 1370/2007 as well as with its Annex to ensure the absence of overcompensation. The Annex to that Regulation establishes an ex post check to ensure that the compensatory payments are not higher than the actual net cost for the provision of the public service over the lifetime of the contract. Additionally, the Commission considers that regular checks are in principle needed during the lifetime of the contract in order to detect and avoid at an early stage clear overcompensation situations from developing. This is the case, in particular, for long-term contracts.

Compensation must be limited to the net financial effect of the public service obligation. This is calculated as costs minus revenues generated by the public service operations, minus potential revenues induced by network effects, plus a reasonable profit.

On the cost side, all costs directly linked to the provision of the public service can be taken into account (such as train drivers’ salaries, traction current, rolling stock maintenance, overhead costs (such as cost of management and administration) and contract-related costs of affiliated undertakings). Where the undertaking also carries out activities that fall outside the scope of the public service, an appropriate part of the costs that are shared between public service and other activities (such as office rental costs, the salaries of accountants or administrative personnel) may also be taken into account on top of the direct costs necessary to discharge the public service. Where the undertaking holds several public service contracts, the common costs must not only be allocated between the public service contracts and other activities, but
also between the different public service contracts. To determine the appropriate proportion of common costs to be taken into account in the public service costs, market prices for using the resources, if available, may be taken as a benchmark. If such prices are not available, other methodologies may be used where appropriate.

Revenues directly or indirectly related to the provision of the public service, such as revenues from the sale of tickets or from the sale of food and drinks, must be deducted from the costs for which compensation is claimed.

The operation of public passenger transport services under a public service contract by a transport undertaking also involved in other commercial operations may bring about positive induced network effects. For example, by serving a certain network under a public service contract which links to other routes operated under commercial terms, an operator may be able to increase its client base. The Commission welcomes induced network effects such as those brought about by through-ticketing and integrated timetabling, provided they are designed to benefit passengers. The Commission is also aware of the practical difficulties in quantifying these potential network effects. Nevertheless, in accordance with the Annex to Regulation (EC) No 1370/2007, any such quantifiable financial benefits shall be deducted from the costs for which compensation is claimed.

2.4.3. Article 4(1) and the Annex. The notion of ‘reasonable profit’

Article 4(1)(c) provides that the costs to be taken into account in a public service contract may include ‘a suitable return on capital’. The Annex specifies that compensation for a public service obligation may not exceed the net financial effect of the obligation, defined as costs minus revenues generated by public service operations, minus potential induced network revenues, plus a ‘reasonable profit’.

The Annex states that ‘“reasonable profit” must be taken to mean a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention’. However, no further guidance is offered on the correct level of ‘return on capital’ or ‘reasonable profit’.

While the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (1) (SGEI Communication) is based on a different legal basis than Regulation (EC) No 1370/2007 and thus not applicable in cases where compensation is paid for public service obligations in land transport, it provides some guidance on the determination of the level of reasonable profit that may serve as an indicator for competent authorities when awarding public service contracts under Regulation (EC) No 1370/2007 (2). The SGEI Communication explains that ‘where generally accepted market remuneration exists for a given service, that market remuneration provides the best benchmark for the compensation in the absence of a tender’ (3). Such benchmarks would ideally be found in contracts in the same sector of activity, with similar characteristics and in the same Member State. The reasonable profit must therefore be in line with normal market conditions and should not exceed what is necessary to reflect the level of risk of the service provided.

However, such market benchmarks do not always exist. In that case, the level of reasonable profit could be determined by comparing the profit margin required by a typical well run undertaking active in the same sector to provide the service in question (4).

A standard way in which to measure the return on capital of a public service contract is to consider the internal rate of return (IRR) that the company makes on its invested capital over the lifetime of the project, that is to say the IRR on the cash flows of the contract. However, accounting measures, such as the return on equity (ROE), the return on capital employed (ROCE) or other generally accepted economic indicators for the return on capital may also be used.

(2) See in particular point 61 of the SGEI Communication.
(3) Point 69 of the SGEI Communication.
(4) Further guidance is given in the SGEI Communication on what is to be considered a ‘typical well-run undertaking’. See in particular points 70-76.
It should be noted that indicators may be influenced by the accounting methods used by the company and reflect the company situation only in a given year. Where this is the case, it should be ensured that the accounting practices of the company reflect the long-term economic reality of the public service contract. In that context, whenever feasible, the level of reasonable profit should be assessed over the lifetime of the public service contract. The differences in the economic models of railways, tramways, metro and bus transport should also be taken into account. For example, while railway transport is generally very capital-intensive, bus transport tends to be more dependent on personnel costs.

In any event, depending on the particular circumstances of each public service contract, a case-by-case assessment by the competent authority is needed to determine the adequate level of reasonable profit. Among other things, it must take into account the specific characteristics of the undertaking in question, the normal market remuneration for similar services and the level of risk involved in each public service contract. For example, a public service contract that includes specific provisions protecting the level of compensation in the case of unforeseen costs is less risky than a public service contract that does not contain such guarantees. All other things being equal, the reasonable profit in the former contract should therefore be lower than in the latter contract.

The use of efficiency incentives in the compensation mechanism is generally to be encouraged (1). It should be underlined that compensation schemes which simply cover actual costs as they occur provide few incentives for the transport company to contain costs or to become more efficient over time. Their use is therefore better confined to instances where uncertainty about costs is large and the transport provider needs a high degree of protection against uncertainty.

2.4.4. Article 4(1) and (2) and the Annex. Preventing compensation received for a public service obligation from being used to cross-subsidise commercial activities

When a public service provider also carries out commercial activities, it is necessary to ensure that the public compensation it receives is not used to strengthen its competitive position in its commercial activities. In this context, the Annex lays down rules to avoid the cross-subsidisation of commercial activities with revenues from public service operations. These rules essentially consist of accounting separation between the two types of activities (public service and commercial) and a sound cost allocation method reflecting the real costs of providing the public service.

Article 4(1) and (2), together with the rules laid down in the Annex, require costs and revenues pertaining to the provision of services under each public service contract awarded to a transport undertaking and to commercial activities to be correctly allocated between the two types of activities. This is to effectively monitor public compensation and possible cross-subsidisation between the two activities. The adequacy of the cost-sharing and ring-fencing measures between the public service obligation and the commercial activities are crucial in this respect. For example, when means of transport (such as rail rolling stock or buses) or other assets or services needed to discharge the public service obligation (such as offices, personnel or stations) are shared between public service and commercial activities, the costs of each must be allocated to the two different types of activities in proportion to their relative weight in the overall transport services provided by the transport undertaking.

If, for example, the public service and the commercial activities of the same transport undertaking made use of services in stations, but the full costs of those services were allocated only to the public service activities, this would constitute a cross-subsidisation incompatible with Regulation (EC) No 1370/2007. Directive 2012/34/EC of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (2) also lays down specific obligations for the separation of accounts of railway undertakings.

(1) See in particular point 7 of the Annex to the Regulation.
Each public service contract should contain specific rules on compensation and should give rise to specific accounting entries. In other words, if the same undertaking has entered into several public service contracts, the accounts of the transport undertakings should specify which public compensation corresponds to which public service contract. At the written request of the Commission, these accounts must be made available in accordance with Article 6(2) of Regulation (EC) No 1370/2007.

2.4.5. Article 4(1). Design of compensation schemes to promote efficiency

Recital 27 of Regulation (EC) No 1370/2007 states that in the case of a direct award or general rules, the parameters for compensation should be set in such a way that compensation is appropriate and reflects a 'desire for efficiency and quality of service'. This means that the competent authorities should, through the compensation mechanism, encourage the service providers to become more efficient, by providing the required level and quality of service with the fewest resources possible.

The rules on compensation in Regulation (EC) No 1370/2007 leave some leeway for the competent authorities to design incentive schemes for the public service provider. In any event, competent authorities are obliged to 'promote the maintenance or development of effective management by the public service operator, which can be the subject of an objective assessment' (point 7 of the Annex). This implies that the compensation system must be designed to ensure at least a certain improvement in efficiency over time.

Efficiency incentives should nevertheless be proportionate and remain within a reasonable level, taking into account the difficulty in attaining the efficiency objectives. This may, for example, be ensured through a balanced sharing of any rewards linked to efficiency gains between the operator, the public authorities and/or the users. In any event, a system must be put in place to ensure that the undertaking is not allowed to retain disproportionate efficiency benefits. In addition, the parameters of these incentive schemes must be fully and precisely defined in the public service contract.

Incentives to provide public services more efficiently should not, however, prevent the provision of high-quality services. In the context of Regulation (EC) No 1370/2007, efficiency must be understood as the relation between the quality or level of the public services and the resources used to provide those services. Efficiency incentives should therefore focus on reducing costs and/or increasing the quality or level of service.

2.4.6. Article 6(1). Circumstances under which the Commission will investigate whether a compensation scheme complies with Regulation (EC) No 1370/2007

Public service compensation paid in accordance with Regulation (EC) No 1370/2007 is exempt from the requirement to notify State aid before it is implemented as laid down in Article 108(3) TFEU. Nevertheless, the Commission may be asked to assess a compensation scheme for reasons of legal certainty if a Member State is not sure whether the scheme complies with the Regulation. The Commission may also assess a compensation scheme on the basis of a complaint or an ex officio investigation if it is aware of evidence pointing to the non-compliance of that scheme with the compensation rules of the Regulation.

2.4.7. Article 6(1). Differences between the Commission's ex ante and ex post investigations into compensation schemes

The main difference between the Commission's ex ante and ex post investigations into compensation schemes relates to the time at which the Commission assesses the scheme, not in the method used for analysing whether overcompensation is present.

When assessing whether a compensation scheme prevents overcompensation ex ante, for example in the context of a notification, the Commission will assess, among other things, the precise compensation parameters. In particular, it will pay attention to the cost categories that are taken into account for the calculation of the compensation, as well as to the proposed level of reasonable profit. Furthermore, it will consider whether an adequate mechanism is in place to ensure that, in the event revenues from the provision of public services are higher than expected over the lifetime of the public service contract, the operator is not allowed to keep any excessive compensation over and above the actual net costs, a reasonable profit margin and any rewards for efficiency gains stipulated in the contract.
The public service contract must also in principle provide for regular checks during the lifetime of the contract in order to detect and avoid at an early stage clear overcompensation situations from arising, in particular in the case of long-term contracts. The competent authorities are obliged to verify compliance with the terms of the public service contract during the lifetime of the contract. Computerised tools can be developed to help perform these checks in a standardised manner. Overcompensation must be assessed separately for each public service contract to avoid excessive profits for individual public services that are averaged out across several contracts.

In the case of an *ex post* investigation, whether the compensation received exceeds the net financial effect of the public service as defined in the annex to Regulation (EC) No 1370/2007 can be assessed on the basis of actual financial revenue and cost data, since the compensation schemes have already been put in place. The method does not change however: compensation should not exceed the compensation amount to which the undertaking was entitled according to the parameters set out in the contract in advance, even if this amount is not sufficient to cover the actual net costs.

2.4.8. Article 1(1) and Article 6(1). Ensuring that competent authorities will pay operators ‘appropriate’ compensation for the discharge of public service obligations

According to Article 1 of Regulation (EC) No 1370/2007, ‘the purpose of this Regulation is to define how, in accordance with the rules of [Union] 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’. Moreover, according to point 7 of the Annex to Regulation (EC) No 1370/2007, ‘the method of compensation must promote the maintenance or development of […] the provision of passenger transport services of a sufficiently high standard’.

This means that not only do the rules of Regulation (EC) No 1370/2007 aim to prevent any possible overcompensation for public service obligations, but also that they aim to ensure that the offer of public services defined in the public service contract is financially sustainable to reach and maintain a high level of service quality. The public service obligation should therefore be appropriately compensated so that the operator's own funds under a public service contract are not eroded in the long run, preventing the efficient fulfilment of its obligations under the contract and the maintenance of the provision of passenger transport services of a high standard as referred to in point 7 of the Annex to Regulation (EC) No 1370/2007.

In any event, if the competent authority does not pay appropriate compensation, it risks reducing the number of bids submitted in response to a competitive tendering procedure for the award of a public service contract, creating serious financial difficulties for the operator if the public service contract is awarded directly and/or reducing the overall level and quality of the public services provided during the lifetime of the contract.

2.5. Publication and transparency

The interpretative guidance provided in this chapter covers the obligation of competent authorities to publish annual reports on the public service contracts they are responsible for, as well as their obligations to ensure transparency about the award of public service contracts before and after the award procedure.

2.5.1. Article 7(1). Publication obligations of competent authorities with regard to their annual reports on public service contracts under their responsibility

Article 7(1) requires each competent authority to publish an aggregated report once a year on the public service obligations for which it is responsible, the selected public service operators, and the compensation payments and exclusive rights granted to public service operators by way of reimbursement. This report shall distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed, and, if appropriate, provide information on the nature and extent of any exclusive rights granted.
The Commission understands the term ‘aggregated report’ in the sense that a competent authority should publish a comprehensive report about all the public service contracts it has awarded, while these contracts should all be individually identified. The information provided should therefore, besides the total values, refer to each contract, while ensuring the protection of the legitimate commercial interests of the operators concerned.

The public transport operators must provide all information and data to the competent authority in order to enable the latter to comply with its publication obligations.

To achieve the objective of this provision, which is to enable the monitoring and assessment of the public transport network in a meaningful manner allowing for a comparison with other public transport networks in a transparent, structured framework, the Commission encourages Member States and their authorities to voluntarily ensure ease of access to this information and to allow useful comparisons to be made. This could mean, for instance, that the information is published on a central website, such as that of an association of competent authorities or that of the transport ministry. The information and data should also be prepared in a methodologically consistent manner and presented in common units of measure.

2.5.2. Article 7(2) and (3). Possibilities of competent authorities to discharge their publication obligations concerning public service contracts pursuant to Article 7(2) and (3)

Competent authorities have certain obligations under Article 7 of Regulation (EC) No 1370/2007 to publish the intended (and concluded) award of public service contracts in the Official Journal of the European Union.

Article 7(2) states that at least one year before the publication of an invitation to tender or the direct award of a public service contract, competent authorities shall publish certain information on the contract envisaged in the Official Journal of the European Union.

Article 7(3) states that within one year of the direct award of a public service contract for rail services, competent authorities shall publish certain information on the awarded contract.

The Commission services have developed model forms and procedures that allow competent authorities to comply with these publication requirements. Through the possibility to reuse data, the forms and the publication procedure should also allow competent authorities, if they so wish, to reap synergies with the publication of a public tender for services pursuant to Article 5(3) of Regulation (EC) No 1370/2007.

The forms have been designed to fulfil the following requirements:

— to allow authorities easy access to the web application, to navigate the web application and to be comprehensible and clear;

— to clearly distinguish the publication requirements under Regulation (EC) No 1370/2007 from publication requirements under Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;

— to request a level of detail of information that is not perceived as burdensome and thus can be acceptable to authorities;

— to be suitable for generating useful statistics on the award procedure of public service contracts and hence on the effective implementation of Regulation (EC) No 1370/2007.

During 2013, the Publications Office made an online publication procedure available on ‘eNotices’ (1). The procedure is based on these model forms for publication in the Official Journal of the European Union, in accordance with Article 7(2) and (3) of Regulation (EC) No 1370/2007. The publication of information about directly awarded public service contracts for rail transport in the Official Journal of the European Union according to Article 7(3) is done on a voluntary basis.

(1) http://simap.europa.eu/enotices/choiceLanguage.do
2.5.3. Article 7(4). Right of interested parties to request information on public service contracts to be awarded directly before the actual date of award

Article 7(4) provides that a competent authority, when so requested by an interested party, shall forward to it the reasons for directly awarding a public service contract. Recital 30 states that 'directly awarded public service contracts should be subject to greater transparency'. This needs to be read in conjunction with recital 29, which states the need to publish the intention to award a contract and to enable potential public service operators to react. A competent authority must determine its intention to award a contract directly at least one year in advance, since this information must be published in the Official Journal of the European Union (Article 7(2), in particular point (b)). Thus, interested parties are placed in a position to formulate questions a long time before the contract is awarded, which will be one year later at the earliest. In order to grant effective legal protection, the information requested in accordance with Article 7(4) should be provided without undue delay.

Making contracts more transparent is, by definition, also related to the procedure for awarding a contract. The greater transparency required by recital 30 therefore not only implies transparency after the award of the contract, but also relates to the procedure before the contract is actually awarded to the public transport operator concerned.

2.6. Transitional arrangements

This chapter provides interpretative guidance on some aspects of the provisions on transitional arrangements concerning contracts awarded before the entry into force of Regulation (EC) No 1370/2007 and those awarded during the transitional period from 2009 until December 2019.

2.6.1. Article 8(2). Scope of application of the transitional period of 10 years starting from 3 December 2009

Article 8(2) states that, without prejudice to its paragraph 3, 'the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019'. During this transitional period, Member States shall take measures to gradually comply with Article 5 to avoid serious structural problems, in particular relating to transport capacity.

Article 8(2) refers to Article 5 in its entirety. However, the Commission considers that only Article 5(3) concerning the obligation to apply open, transparent, non-discriminatory and fair procedures when granting public service contracts seems pertinent in this context. As stated in recital 31, the objective of the transitional provisions is to give competent authorities and public service operators enough time to adapt to the provisions of Regulation (EC) No 1370/2007. The obligation imposed on Member States to gradually comply with Article 5 is reasonable only if it concerns the obligation to apply open, transparent, non-discriminatory and fair procedures when granting public service contracts. It does not make sense that Member States 'gradually' apply the notion of internal operator or the exceptions defined in paragraphs 4, 5 and 6 of Article 5 of Regulation (EC) No 1370/2007 as they introduce more lenient provisions compared to the general Treaty principles and corresponding case-law. It does also not seem reasonable to say that the legislator wanted to postpone the full application of Article 5(7) concerning procedural guarantees and judicial review until 3 December 2019.

2.6.2. Article 8(2). Obligations of Member States during the transitional period until 2 December 2019

Article 8(2) states that within six months of the first half of the transitional period (by 3 May 2015), 'Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5'. This clearly indicates that Member States cannot wait until 2 December 2019 before starting to comply with the general rule of ensuring competitive tendering procedures for public service contracts that are open to all operators on a fair, transparent and non-discriminatory basis. Member States should take appropriate measures to gradually comply with that requirement during the transitional period to avoid a situation in which available transport capacity in the public transport market will not allow transport operators to satisfactorily respond to all competitive tendering procedures that would be launched at the end of the transitional period.
2.6.3. Article 8(3). Meaning of 'limited duration Comparable to the durations specified in Article 4’

Article 8(3)(d) states that public service contracts awarded ‘as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure […] may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4’.

The Commission considers that the term ‘comparable to the durations specified in Article 4’ should be interpreted restrictively, so as to ensure that Member States work towards achieving the objectives of the Regulation from the date of its entry into force on 3 December 2009. The Commission therefore takes the view that it would be sensible to consider that the duration of public service contracts should be similar to those indicated in Article 4.
Communication from the Commission

Community guidelines on State aid for railway undertakings

(2008/C 184/07)

1. INTRODUCTION

1.1. General context: the railway sector

1. The railways have unique advantages: they are a safe and clean mode of transport. Rail transport therefore has great potential for contributing to the development of sustainable transport in Europe.

2. The White Paper 'European transport policy for 2010: time to decide' (1) and its mid-term review (2) underline to what extent a dynamic railway industry is necessary for establishing an efficient, clean and safe goods and passenger transport system that will contribute to the creation of a single European market enjoying lasting prosperity. The road congestion plaguing the towns and certain areas of the European Community, the need to face up to the challenges of climate change, and the increase in fuel prices show how necessary it is to stimulate the development of rail transport. In this respect it should be pointed out that the common transport policy also has to pursue the environmental objectives set by the Treaty (3).

3. However, rail transport in Europe has an image problem, having declined steadily from the 1960s to the end of the 20th century. Both goods and passenger traffic volumes have fallen in relative terms compared with the other transport modes. Rail freight has even shown a decline in absolute terms: loads transported by rail were higher in 1970 than in 2000. The traditional railway undertakings were unable to offer the reliability and good timekeeping their customers expected of them, which led to a shift of traffic from rail to the other modes of transport, chiefly road (4). Although passenger transport by rail might have continued to grow in absolute terms, this increase seems very limited compared with that of road and air transport (5).

4. This trend seems to have reversed recently (6), but there is still a long way to go for rail transport to become sound and competitive. Particularly in the rail freight transport sector there continue to be major difficulties which call for public-sector action (7).

5. The relative decline in Europe’s railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.

6. First of all, in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services. Their activities did not bring in sufficient revenue to cover all the costs and investments necessary. These essential investments were not always made and sometimes the Member States forced the national railway undertakings into

(3) Article 2 of the Treaty stipulates as one of the main objectives of the Community that of promoting ‘sustainable and non-inflationary growth respecting the environment. These provisions are supplemented by specific objectives set out in Article 174, which provides that Community environment policy shall contribute in particular to preserving, protecting and improving the quality of the environment. Article 6 of the Treaty provides that ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development’.
(4) From 1995 to 2005 rail freight (expressed in tonne-km) increased by 0.9 % per year on average, as against + 3.3 % average annual growth for road during the same period (source: Eurostat).
(5) From 1993 to 2004 passenger rail transport (expressed in passenger-km) increased by 0.9 % per year on average, as against + 1.8 % average annual growth for private vehicles during the same period (source: Eurostat).
(6) Since 2002, particularly in those countries which have opened up their markets to competition. In 2006 there was a 3.7 % growth on the year in rail freight performance and 3 % in the performance of passenger transport. This improvement is likely to continue in 2007.
making them when they were not in a position to finance them adequately from their own resources. The result was heavy indebtedness for these undertakings, which itself had a negative impact on their development.

7. Secondly, the development of rail transport in Europe was hamstrung by the lack of standardisation and interoperability on the networks, while road hauliers and air carriers had been able to develop a whole range of international services. The Community has inherited a mosaic of national rail networks characterised by different track gauges and incompatible signalling and safety systems, which do not allow the railway undertakings to benefit from the economies of scale which would result from designing infrastructure and rolling stock for a large single market rather than for 25 (1) national markets.

8. The Community is conducting a three-pronged policy to revitalise the rail industry by:

(a) gradually introducing conditions fostering competition on the rail transport services markets;

(b) encouraging standardisation and technical harmonisation on the European rail networks, aiming at full interoperability at the European level;

(c) granting financial support at Community level (in the TEN-T programme and the Structural Funds framework).


(1) Malta and Cyprus do not have rail transport networks.
(7) OJ L 164, 30.4.2004, p. 44.
and finally from 1 January 2007 for rail cabotage. The third railway package sets 1 January 2010 as
the date for opening up international passenger transport to competition. Some of the Member
States, such as the United Kingdom, Germany, the Netherlands and Italy, have already (partially)
opened up their domestic passenger transport markets.

Community’s railways (1), put in place a new institutional and organisational framework for the
players in the railway industry, involving:

(a) separating railway undertakings (2) from infrastructure managers (3) as regards accounts and orga-
nisation;

(b) management independence of railway undertakings;

(c) management of railway undertakings according to the principles which apply to commercial
companies;

(d) financial equilibrium of railway undertakings according to a sound business plan;

(e) compatibility of Member States’ financial measures with the State aid rules (4).

11. Alongside this liberalisation process, the Commission has undertaken, on a second level, to promote
the interoperability of European rail networks. This approach has been accompanied by Community
initiatives to improve the safety standard of rail transport (5).

12. The third level of public intervention in favour of the railway industry lies in the area of financial
support. The Commission considers this support to be justified in certain circumstances in view of
the substantial adaptation costs necessary in that industry.

13. The Commission notes, furthermore, that there has always been considerable injection of public
funds in the rail transport sector. Since 2004 the States of the European Union when it comprised
25 Member States (EU-25) have overall contributed funds totalling some EUR 17 billion to the
construction and maintenance of railway infrastructure (6). The Member States pay railway undertak-
ings EUR 15 billion annually in compensation for the provision of unprofitable passenger transport
services (6).

14. The granting of State aid to the railway industry can be authorised only where it contributes to the
completion of an integrated European market, open to competition and interoperable and to Com-
munity objectives of sustainable mobility. The Commission will accordingly make sure that public-
sector financial support does not cause distortions of competition contrary to the common interest.
Here the Commission will in certain cases be able to ask Member States for commitments on the
Community objectives in return for the granting of aid.

1.2. Objective and scope of these guidelines

15. The objective of these guidelines is to provide guidance on the compatibility with the Treaty of State
aid to railway undertakings as it is defined in Directive 91/440/EEC and in the context described
above. In addition, Chapter 3 also applies to urban, suburban and regional passenger transport undertak-
ings. The guidelines are based in particular on the principles established by the Community legis-
lator in the three successive railway packages. Their aim is to improve the transparency of public

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(2) Article 3 of Directive 91/440/EEC defines a railway undertaking as ‘any public or private undertaking licensed according to
applicable Community legislation, the principal business of which is to provide services for the transport of goods and/or
passengers by rail with a requirement that the undertaking must ensure traction; this also includes undertakings which
provide traction only’.
(3) Article 3 of Directive 91/440/EEC defines an infrastructure manager as ‘any body or undertaking responsible in particular
for establishing and maintaining railway infrastructure. This may also include the management of infrastructure control
and safety systems. The functions of the infrastructure manager on a network or part of a network may be allocated to
different bodies or undertakings’.
(4) Article 9(3) of Directive 91/440/EEC states: ‘Aid accorded by Member States to cancel the debts referred to in this Article
shall be granted in accordance with Articles 73, 87 and 88 of the Treaty’.
(5) In particular, Directive 2004/49/EC.
(6) Source: European Commission, on the basis of the data communicated annually by the Member States. The figures may be
even higher in that not all financial support has been notified, in particular co-financing through the Structural and Cohes-
sion Funds.
financing and legal certainty with regard to the Treaty rules in the context of the opening-up of the markets. These guidelines do not concern public financing intended for infrastructure managers.

16. Article 87(1) of the Treaty provides that in principle any aid granted by a Member State which threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Nevertheless, such State aid may in certain situations be justified in the light of the common interest of the Community. Some of these situations are mentioned in Article 87(3) of the Treaty, and apply to the transport sector as they do to other sectors of the economy.

17. Also, Article 73 of the Treaty provides that aids are compatible with the common market 'if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'. This Article constitutes a lex specialis in the general scheme of the Treaty. On the basis of this Article the Community legislator has adopted two instruments specific to the transport sector: Council 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 (1) and Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (2). Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings (3) likewise provides that certain compensation may be granted by Member States to railway undertakings.

18. Article 3 of Regulation (EEC) No 1107/70 provides that Member States are neither to take coordination measures nor to impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 73 of the Treaty except in the cases or circumstances provided for by the Regulation in question, without prejudice, however, to Regulations (EEC) No 1191/69 and (EEC) No 1192/69. According to the judgment of the Court of Justice of the European Communities in Altmark (4), it follows that State aid which cannot be authorised on the basis of Regulations (EEC) No 1107/70, (EEC) No 1191/69 or (EEC) No 1192/69 cannot be declared compatible on the basis of Article 73 of the Treaty (5). In addition, it should be recalled that public service compensation which does not respect provisions stemming from Article 73 of the Treaty cannot be declared compatible with the common market on the basis of Article 86(2) or any other provision of the Treaty (6).

19. Regulation (EC) No 1370/2007 ('the PSO Regulation'), which will enter into force on 3 December 2009 and which repeals Regulations (EEC) No 1191/69 and (EEC) No 1107/70, will put in place a new legal framework. The aspects relating to public service compensation are therefore not covered by these guidelines.

20. After the entry into force of Regulation (EC) No 1370/2007, Article 73 of the Treaty will be directly applicable as a legal basis for establishing the compatibility of aid not covered by the PSO Regulation, and in particular aid for the coordination of freight transport. A general interpretation therefore needs to be developed for considering the compatibility of aid for coordination purposes with Article 73 of the Treaty. The aim of these guidelines is in particular to establish criteria for this examination and intensity thresholds. In view of the wording of Article 73, the Commission must nevertheless make it possible for Member States to show, where appropriate, the need for and proportionality of any measures which exceed the thresholds established.

21. These guidelines concern the application of Articles 73 and 87 of the Treaty and their implementation with regard to public funding for railway undertakings within the meaning of Directive 91/440/EEC. They deal with the following aspects: public financing of railway undertakings by means of infrastructure funding (Chapter 2), aid for the purchase and renewal of rolling stock (Chapter 3),

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(5) Judgment in Altmark, paragraph 107.
(6) See, in that regard, recital 17 of Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67, point 17).
debt cancellation by States with a view to the financial rejuvenation of railway undertakings (Chapter 4), aid for restructuring railway undertakings (Chapter 5), aid for the needs of transport coordination (Chapter 6), and State guarantees for railway undertakings (Chapter 7). However, these guidelines do not deal with the rules for the application of the PSO Regulation, for which the Commission has not yet developed any decision-making practice (1).

2. PUBLIC FINANCING OF RAILWAY UNDERTAKINGS BY MEANS OF RAILWAY INFRASTRUCTURE FUNDING

22. Railway infrastructure is of major importance for the development of the railway sector in Europe. Whether for interoperability, safety or the development of high-speed rail, considerable investments will have to be made in this infrastructure (2).

23. These guidelines apply only to railway undertakings. Their aim is therefore not to define, in the light of State aid rules, the legal framework which applies to the public financing of infrastructure. This Chapter only examines the effects of public financing of infrastructure on railway undertakings.

24. Moreover, public financing of infrastructure development can grant an advantage to railway undertakings indirectly and thereby constitute aid. According to the case-law of the Court of Justice, it should be evaluated whether the infrastructure measure has the economic effect of lightening the burden of charges normally encumbering railway undertakings' budgets (3). For that to be the case, a selective advantage would have to be granted to the undertakings concerned, that advantage originating in the financing of the infrastructure in question (4).

25. Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation (Directive 2001/14/EC), the Commission normally considers that public financing of the infrastructure does not constitute State aid to railway undertakings (5).

26. The Commission also points out that, where public financing of railway infrastructure constitutes aid to one or more railway undertakings, it may be authorised, for example on the basis of Article 73 of the Treaty; if the infrastructure in question meets the needs of transport coordination. In this regard, Chapter 6 of these guidelines is a pertinent reference point for assessing compatibility.

3. AID FOR THE PURCHASE AND RENEWAL OF ROLLING STOCK

3.1. Objective

27. The fleet of locomotives and carriages used for passenger transport is ageing and in some cases worn out, especially in the new Member States. In 2005, 70 % of the locomotives (diesel and electric) and 65 % of the wagons of the EU-25 were more than 20 years old (6). Taking only the Member States

(1) Nor do they concern the application of Regulation (EEC) No 1192/69.
(2) Communication from the Commission ‘Keep Europe moving — Sustainable mobility for our continent — Mid-term review of the Transport White Paper’.
which joined the European Union in 2004. 82% of locomotives and 62% of wagons were more than 20 years old in 2005 (1). According to the information at its disposal, the Commission estimates that the annual rate of renewal of the fleet is around 1%.

28. This trend of course reflects the difficulties of the railway industry in general, which reduce the incentives for railway undertakings and their capacity to invest in an effort to modernise and/or renew their rolling stock. Such investment is indispensable to keeping rail transport competitive with other modes of transport which cause more pollution or entail higher external costs. It is also necessary to limit the impact of rail transport on the environment, particularly by reducing the noise pollution it causes, and to improve its safety. Finally, improving interoperability between the national networks means it is necessary to adapt the existing rolling stock in order to be able to maintain a coherent system.

29. In the light of the above it seems that under certain circumstances aid for the purchase and renewal of rolling stock can contribute to several types of objectives of common interest and therefore be considered compatible with the common market.

30. This Chapter seeks to define the conditions in which the Commission is to carry out such a compatibility assessment.

3.2. Compatibility

31. The compatibility assessment has to be made according to the common-interest objective to which the aid is contributing.

32. The Commission considers that in principle the need to modernise rolling stock can be sufficiently taken into account either in implementing the general State aid rules or by applying Article 73 of the Treaty where such aid is intended for transport coordination (see Chapter 6).

33. In assessing the compatibility of aid for rolling stock the Commission therefore generally applies the criteria defined for each of the following aid categories in these guidelines or in any other relevant document:

- (a) aid for coordination of transport (†);
- (b) aid for restructuring railway undertakings (†);
- (c) aid for small and medium-sized enterprises (§);
- (d) aid for environmental protection (‡);
- (e) aid to offset costs relating to public service obligations and in the framework of public service contracts (§);
- (f) regional aid (§).

34. In the case of regional aid for initial investment, the Guidelines on national regional aid, ‘the regional aid guidelines’, provide that ‘in the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for aid for initial investment’ (point 50, footnote 48). The Commission considers that a derogation should be made from this rule with regard to rail passenger transport. This is due to the specific characteristics of this mode of transport, and in particular to the

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(†) See Chapter 6.
(‡) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), and Chapter 5.
(‘) Regulation (EEC) No 1191/69 cited above; PSO Regulation of the European Parliament and of the Council, cited above, in which attention should be drawn in particular to Article 3(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’.
fact that it is possible that the rolling stock in this sector may be permanently assigned to specific
lines or services. Subject to certain conditions, defined below, the costs of acquisition of rolling stock
in the rail passenger transport sector (or for other modes such as light rail, underground or tram) are
deemed to be admissible expenditure within the meaning of the guidelines in question (1). However,
the costs of acquisition of rolling stock for exclusive use in freight transport are not admissible.

35. In view of the situation described in points 28 and 29, this derogation applies to any kind of invest-
ment in rolling stock, whether initial or for replacement purposes, so long as it is assigned to lines
regularly serving a region eligible for aid under Article 87(3)(a) of the Treaty, an outermost region or
a region of low population density within the meaning of points 80 and 81 of the regional aid guide-
lines (2). In the other regions, the derogation applies only to aid for initial investment. For aid for
investment for replacement purposes, the derogation applies only when all the rolling stock that the
aid is used to modernise is more than 15 years old.

36. In order to avoid distortions of competition which would be contrary to the common interest, the
Commission does, however, consider that such a derogation has to be made subject to four condi-
tions, which have to be met cumulatively:

(a) the rolling stock concerned must be exclusively assigned to urban, suburban or regional passenger
transport services in a specific region or for a specific line serving several different regions; For
the purposes of these guidelines ‘urban and suburban transport services’ is to be understood as
transport services serving an urban centre or conurbation as well as those services between that
centre or conurbation and its suburbs. ‘Regional transport services’ is to be understood as trans-
port services intended to meet the transport needs of one or more regions. Transport services
serving several different regions, in one or more Member States, may therefore be covered by the
scope of this point if it can be shown that there is an impact on the regional development of the
regions served, in particular by the regular nature of the service. In this case, the Commission
verifies that the aid does not compromise the effective opening of the international passenger
transport market and cabotage following the entry into force of the third railway package;

(b) the rolling stock must remain exclusively assigned to the specific region or the specific line
passing through several different regions for which it has received aid for at least ten years;

(c) the replacement rolling stock must meet the latest interoperability, safety and environmental stan-
dards (3) applicable to the network concerned;

(d) the Member State must prove that the project contributes to a coherent regional development
strategy.

37. The Commission will take care to avoid undue distortions of competition, notably by taking account
of the additional revenue that the replaced rolling stock on the line in question could procure for the
enterprise aided, for example, through sales to a third party or use on other markets. To this end, the
granting of the aid may be made subject to the obligation on the recipient undertaking to sell under
normal market conditions all or part of the rolling stock it is no longer using, so as to allow its
further use by other operators; in this case the proceeds from the sale of the old rolling stock will be
deducted from the eligible costs.

(1) The Commission notes that, depending on the specific circumstances of the case in point, this reasoning may be applied
mutatis mutandis to vehicles used for the public transport of passengers by road, where such vehicles meet the latest Com-
munity standards applicable to new vehicles. Where that is the case, in the interests of equal treatment the Commission
will, in such situations, apply the approach described here for railway rolling stock. The Commission encourages the
Member State to support the least polluting technologies when awarding this type of aid and will study the extent to which
specific financial aid leading to higher aid intensities for such technologies is appropriate.

(2) The least populated regions represent or belong to regions at NUTS-II level with a population density of no more than
8 inhabitants per km² and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

(3) Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of
environmental protection in the absence of Community standards is possible within the Guidelines on State aid for envir-
onmental protection.
38. More generally, the Commission will ensure that no improper use is made of the aid. The other conditions provided for in the regional aid guidelines, notably as regards the intensity ceilings and the regional aid maps and the rules on the cumulation of aid, apply. The Commission notes that the specific lines concerned may in certain cases pass through regions where there are different intensity ceilings in accordance with the regional aid maps. In this case the Commission will apply the highest rate of intensity of the regions regularly served by the line concerned in proportion to the regularity of such service (1).

39. With regard to investment projects with eligible expenditure in excess of EUR 50 million, the Commission considers it appropriate, due to the specificities of the rail passenger transport sector, to derogate from points 60 to 70 of the regional aid guidelines. However, points 64 and 67 of those guidelines remain applicable when the investment project concerns rolling stock assigned to a specific line serving several regions.

40. If the recipient undertaking is entrusted with providing services of general economic interest that necessitate buying and/or renewing rolling stock and it already receives compensation for this, that compensation should be taken into account in the amount of regional aid that may be awarded to this undertaking, in order to avoid overcompensation.

4. DEBT CANCELLATION

41. As mentioned in Section 1.1, railway undertakings have in the past experienced a state of imbalance between their revenues and their costs, especially their investment costs. This has led to major indebtedness, the financial servicing of which represents a very heavy burden on railway undertakings and limits their capacity to make the necessary investments in both infrastructure and renewal of rolling stock.

42. Directive 91/440/EEC explicitly took this situation into account. It is stated in the seventh recital thereto that Member States ‘should ensure in particular that existing publicly owned or controlled railway transport undertakings are given a sound financial structure’ and envisages that a ‘financial rearrangement’ might be necessary for this purpose. Article 9 of the Directive provides: ‘In conjunction with the existing publicly owned or controlled railway undertakings, Member States shall set up appropriate mechanisms to help reduce the indebtedness of such undertakings to a level which does not impede sound financial management and to improve their financial situation’. Article 9(3) envisages the granting of State aid ‘to cancel the debts referred to in this Article’, and provides that such aid must be granted in accordance with Articles 73, 87 and 88 of the Treaty.

43. At the beginning of the 1990s, following the entry into force of Directive 91/440/EEC, the Member States considerably reduced the debts of railway undertakings. The debt restructuring took different forms:

(a) transfer of all or part of the debt to the body responsible for managing the infrastructure, thus enabling the railway undertaking to operate on a sounder financial footing. It was possible to make this transfer when transport service activities were separated from infrastructure management;

(b) the creation of separate entities for the financing of infrastructure projects (for example, high-speed lines), making it possible to relieve railway undertakings of the future financial burden which the financing of this new infrastructure would have meant;

(c) financial restructuring of railway undertakings, notably by the cancellation of all or part of their debts.

(1) Where the line or specific service systematically (that is to say, on every journey) serves the region to which the highest rate applies, this rate is applied to all admissible expenditure. Where the region to which the highest rate applies is only occasionally served, this rate is applied only to the part of the admissible expenditure allocated to serving that region.
44. These three types of action have helped to improve the financial situation of railway undertakings in the short term. Their indebtedness has been reduced compared with total liabilities, as has the share of interest repayments in the operating costs. In general the debt reduction has allowed railway undertakings to improve their financial situation through a reduction in their capital and interest repayments. Such reductions have also helped to lower the rates of interest, which has a substantial impact on the financial servicing of the debt.

45. However, the Commission notes that the level of indebtedness of many railway undertakings continues to give cause for concern. Several of these undertakings have a level of indebtedness higher than is acceptable for a commercial company, are still not capable of self-financing, and/or cannot finance their investment needs from the revenue from present and future transport operations. Also, in the Member States which joined the Community after 1 May 2004 the level of indebtedness of the companies in the sector is considerably higher than in the rest of the Community.

46. This fact is reflected in the Community legislator's choice not to amend the provisions of Directive 91/440/EEC when Directives 2001/12/EC and 2004/51/EC were adopted. These provisions therefore fall within the general framework formed by the successive railway packages.

47. This Chapter seeks to define how, in the light of this requirement of secondary legislation, the Commission intends to apply the Treaty rules on State aid to the mechanisms for reducing the indebtedness of railway undertakings.

4.2. Presence of State aid

48. The Commission notes first of all that the principle of incompatibility laid down in Article 87(1) of the Treaty applies only to aid ‘which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’ and only ‘insofar as it affects trade between Member States’. Under established case-law, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, these undertakings must be regarded as affected by that aid (1).

49. Any measure attributable to the State which leads to the complete or partial cancellation of debts specifically in favour of one or more railway undertakings and through State resources therefore falls within the scope of Article 87(1) of the Treaty, if the railway undertaking in question is active in markets open to competition and if this debt cancellation strengthens its position in at least one of those markets.

50. The Commission notes that Directive 2001/12/EC opened up the international rail freight services market to competition over the whole trans-European rail freight network from 15 March 2003. It therefore considers that, generally, the market was opened up to competition at the latest on 15 March 2003.

4.3. Compatibility

51. When the cancellation of a railway undertaking's debt constitutes State aid covered by Article 87(1) of the Treaty it must be notified to the Commission in accordance with Article 88 of the Treaty.

52. Aid of this kind must generally be examined on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 2004 (the 2004 guidelines on State aid for restructuring), subject to Chapter 5 of these Guidelines.

53. In specific cases where the debts cancelled exclusively concern transport coordination, compensation of public service obligations or the setting of accounting standards, the compatibility of this aid will be examined on the basis of Article 73 of the Treaty, the regulations adopted for the implementation thereof and the rules for the normalisation of the accounts (3).

(2) Regulation (EEC) No 1192/69.
54. In the light of Article 9 of Directive 91/440/EEC, the Commission also considers that, under certain circumstances, it should be possible to authorise this aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.

55. The Commission takes the view that this type of aid may be compatible in so far as it seeks to ease the transition to an open rail market, as provided for by Article 9 of Directive 91/440/EEC (1). Thus it considers that such aid may be regarded as compatible with Article 87(3)(c) of the Treaty (2), provided that the following conditions are met.

56. Firstly, the aid must serve to offset clearly determined and individualised debts incurred prior to 15 March 2001, the date on which Directive 2001/12/EC entered into force. Under no circumstances may the aid exceed the amount of these debts. In cases where the Member States joined the Community after 15 March 2001, the relevant date is that of accession to the Community. The logic of Article 9 of Directive 91/440/EEC, repeated in subsequent Directives, was to address a level of debt accumulated at a time when a decision to open the market at Community level had yet to be taken.

57. Secondly, the debts concerned must be directly linked to the activity of rail transport or the activities of management, construction or use of railway infrastructure. Debts incurred for the purpose of investment not directly linked to transport and/or rail infrastructure are not eligible.

58. Thirdly, the cancellation of debts must be in favour of undertakings facing an excessive level of indebtedness which is hindering their sound financial management. The aid must be necessary to remedy this situation, insofar as the likely development of competition on the market would not allow them to rectify their financial situation within a foreseeable future. Assessment of this criterion has to take into account any productivity improvements which the undertaking can reasonably be expected to achieve.

59. Fourthly, the aid must not go beyond what is necessary for the purpose. In this regard, account must also be taken of future developments in competition. It should not, at any rate, place the undertaking in a situation more favourable than that of an average well-managed undertaking with the same activity profile.

60. Fifthly, cancellation of its debts must not give an undertaking a competitive advantage such that it prevents the development of effective competition on the market, for example by deterring outside undertakings or new players from entering certain national or regional markets. In particular, aid intended for cancelling debts cannot be financed from levies imposed on other rail operators (3).

61. Where these conditions are met, the debt cancellation measures are contributing to the objective set in Article 9 of Directive 91/440/EEC, without unduly distorting competition and trade between Member States. They can thus be considered compatible with the common market.

5. AID FOR RESTRUCTURING RAILWAY UNDERTAKINGS — RESTRUCTURING A ‘FREIGHT’ DIVISION

5.1. Objective

62. Save where specifically provided otherwise, the Commission assesses the compatibility of State aid for restructuring firms in difficulty in the railway industry on the basis of the 2004 guidelines on State aid for restructuring. Those guidelines do not provide for any derogation for railway undertakings.

(2) Without prejudice to the application of Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70.
(3) Without prejudice to the application of Directive 2001/14/EC.
63. Generally speaking, a division of an undertaking, namely an economic entity without legal personality, is not eligible for restructuring aid. The 2004 guidelines on State aid for restructuring apply only to ‘firms in difficulty’. They also state, at point 13, that a firm ‘belonging to or being taken over by a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm’s difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. It should be avoided, a fortiori, that artificial subdivision allows a loss-making activity within a given company to receive public funds.

64. However, the Commission considers that the European rail freight sector currently finds itself in a very specific situation making it necessary, in the common interest, to envisage that aid granted to a railway undertaking allowing it to overcome difficulties in the freight operations of that undertaking might, under certain circumstances, be considered compatible with the common market.

65. In today’s railway industry, the competitive situation of freight transport operations is quite different from that which applies to passenger transport. The national freight markets are open to competition whereas the rail passenger transport markets are not going to be opened up before 1 January 2010.

66. This situation has a financial impact in so far as freight is in principle governed solely by the business relations between shippers and carriers. The financial equilibrium of passenger transport, on the other hand, may also depend on the public authorities taking action by way of public service compensation.

67. However, several European railway undertakings have not legally separated their passenger and freight transport activities, or have only just done so. Moreover, current Community legislation does not provide for the obligation to make this legal separation.

68. Furthermore, one of the central priorities of European transport policy has, for many years, been to breathe new life into the railway freight industry. The reasons for this are set out in Chapter 1 of these guidelines.

69. This specific characteristic of rail freight activities necessitates an adapted approach, as has been recognised in the Commission’s decision-making practice (1) on the basis of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty of 1999 (2).

70. This Chapter is intended to show, in the light of the Commission’s decision-making practice and taking account of the amendments made by the 2004 guidelines on State aid for restructuring to the corresponding 1999 guidelines, the way in which the Commission intends to implement this approach in future.

71. In view of the risks highlighted above, this approach is justified and will be maintained only for the freight divisions of railway undertakings, and for a transitional period, namely for restructurings notified before 1 January 2010, the date on which the rail passenger transport market will be opened up to competition.

72. Furthermore, the Commission wishes to take account of the fact that, in a growing number of Member States, railway undertakings have adapted their organisation to specific developments in rail freight and passenger transport activities by taking steps to legally separate their freight transport activities. The Commission will therefore require, as part of the restructuring efforts and before awarding any aid, the legal separation of the freight division in question by transforming it into a commercial company under common commercial law. The Commission is of the view that this separation will, with other appropriate measures, help considerably to achieve two goals, namely to exclude all cross-subsidisation between the restructured division and the rest of the undertaking and to ensure that all financial relations between these two activities are carried out in a sustainable manner and on a commercial basis.

73. In order to avoid any doubt, the 2004 guidelines on State aid for restructuring will continue to apply in their entirety when examining the aid dealt with in this Chapter, except with regard to the express derogations set out below.

5.2. Eligibility

74. The eligibility criteria must be adapted to include the situation in which a freight division of a railway undertaking constitutes a coherent and permanent economic unit, which will be legally separated from the rest of the undertaking through the restructuring process before aid is granted, and faces difficulties such that, if it had been separated from the railway undertaking, it would be a ‘firm in difficulty’ within the meaning of the 2004 restructuring guidelines.

75. This means, in particular, that that division of the undertaking would be facing serious difficulties of its own, which are not the result of an arbitrary allocation of costs within the railway undertaking.

76. In order for the division to be restructured to constitute a coherent and permanent economic unit it must comprise all the freight transport activities of the railway undertaking, whether industrial, commercial, accounting or financial. It must be possible to attribute to it a level of losses, as well as a level of own funds or capital, which sufficiently reflects the economic reality of the situation which the division faces in order to evaluate in a coherent manner the criteria fixed in point 10 of the 2004 guidelines on State aid for restructuring (1).

77. When assessing whether a division is in difficulty as described above, the Commission will also take into account the ability of the rest of the railway undertaking to ensure the recovery of the division to be restructured.

78. The Commission is of the view that, although the situation described is not directly covered by the 2004 guidelines on State aid for restructuring, point 12 of which excludes newly created firms from the scope of the guidelines, restructuring aid may be granted in this context to enable the firm created by this legal separation to operate in viable market conditions. This is intended to apply only in situations where the firm to be created as a result of legal separation includes the entire freight division, as described by the separate accounting established in accordance with Article 9 of Directive 91/440/EEC, and includes all the division’s assets, liabilities, capital, off-balance sheet commitments and workforce.

79. The Commission considers that, for the same reasons, when a railway undertaking has recently legally separated its freight division, where this division fulfilled the above criteria, the firm in question must not be considered a newly created firm within the meaning of point 12 of the 2004 guidelines on State aid for restructuring, and is therefore not excluded from the scope of these guidelines.

5.3. Return to long-term viability

80. The Commission will make sure not only that the criteria for a return to long-term viability as set out in the 2004 guidelines on State aid for restructuring are fulfilled (2), but also that restructuring will ensure the freight activity is transformed from a protected activity enjoying exclusive rights into one which is competitive on the open market. This restructuring should therefore concern all aspects of

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(1) Point 10 of the guidelines on State aid for restructuring states: ‘In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these guidelines in the following circumstances:
— in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or
— in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or
— whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings’.

(2) See in particular points 34 to 37 of the guidelines on State aid for restructuring.
the freight activity, whether industrial, commercial, or financial. The restructuring plan required by
the restructuring guidelines (1) must make it possible to ensure a standard of quality, reliability and
service which meets customers' requirements.

5.4. Prevention of any excessive distortion of competition

81. In analysing the prevention of any excessive distortion of competition, as provided for by the guide-
lines on State aid for restructuring, the Commission will also base itself on:

(a) the difference between the economic models for rail and the other modes of transport;
(b) the Community objective of shifting the balance between modes of transport;
(c) the competitive situation on the market at the time of restructuring (degree of integration, growth
potential, presence of competitors, likely trends).

5.5. Aid limited to a minimum

82. The provisions of the 2004 guidelines on State aid for restructuring apply when verifying this
criterion. To this end the firm's own contribution will include that of the freight division which will
be legally separated from the railway undertaking. However, in the Commission's view, the very
specific situation of the European rail freight industry, which is described above, may constitute an
exceptional circumstance within the meaning of paragraph 44 of those guidelines. It may therefore
accept lower own contributions than those provided for in the 2004 guidelines on State aid for
restructuring provided that the freight division's own contribution is as high as possible without
jeopardising the viability of the operation.

5.6. 'One time, last time' principle

83. The 'one time, last time' principle applies to the legally separated firm, by taking account of the
restructuring aid notified as initial restructuring aid received by the undertaking. However, restruc-
turing aid authorised under the conditions set out in this Chapter does not affect application of the
'one time, last time' principle with regard to the rest of the railway undertaking.

84. To avoid any doubt, if the railway undertaking as a whole has already received restructuring aid, the
'one time, last time' principle means that aid as provided for in this Chapter may not be granted to
restructure the freight division of the undertaking.

6. AID FOR COORDINATION OF TRANSPORT

6.1. Objective

85. As already stated, Article 73 of the Treaty was implemented by Regulations (EEC) No 1191/69 and
(EEC) No 1107/70, which will be repealed by the PSO Regulation. The PSO Regulation will, however,
apply only to land passenger transport. It will not cover rail freight transport, for which aid for coordi-
nation of transport will continue to be subject only to Article 73 of the Treaty.

86. In addition to this, Article 9 of the PSO Regulation concerning aid for coordination of transport and
aid for research and development applies explicitly without prejudice to Article 73 of the Treaty, so it
will be possible to use Article 73 directly for justifying the compatibility of aid for coordination of
rail passenger transport.

87. The objective of this Chapter is therefore to establish criteria which will allow the Commission to
assess the compatibility, on the basis of Article 73 of the Treaty, of aid for the coordination of trans-
port, both generally (Section 6.2) and as regards certain specific forms of aid (Section 6.3). The
Commission notes that, although the general implementing principles of Article 73 of the Treaty are
relevant when assessing State aid under the PSO Regulation, these guidelines do not cover the detailed
rules for the implementation of the Regulation in question.

(1) See in particular Section 3.2 of the restructuring guidelines.
6.2. General considerations

88. Article 73 of the Treaty provides for compatibility of aid which meets the needs of coordination of transport. The Court of Justice has ruled that this Article ‘acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community’ (1).

89. The concept of ‘coordination of transport’ used in Article 73 of the Treaty has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest.

90. The progress made with liberalising the land transport sector has in some respects considerably reduced the need for coordination. In an efficient liberalised sector, coordination can in principle result from the action of market forces. As indicated above, however, the fact remains that investment in infrastructure development continues to be carried out by the public authorities. Moreover, even after the liberalisation of the sector, there may still be various market failures. These in particular are the failures which justify the intervention of the public authorities in this field.

91. Firstly, the transport sector entails major negative externalities, for example between users (congestion), or in respect of society as a whole (pollution). These externalities are difficult to take into account, notably due to the inherent limits to the possibility of including external costs, or even simply direct usage costs, in the pricing systems for access to transport infrastructure. As a result there may be disparities between the different modes of transport, which ought to be corrected by public authority support for those modes of transport which give rise to the lowest external costs.

92. Secondly, the transport sector may experience ‘coordination’ difficulties in the economic sense of the term, for example in the adoption of a common interoperability standard for rail, or in the connections between different transport networks.

93. Thirdly, the railway undertakings may not be able to reap the full rewards of their research, development and innovation efforts (positive externalities), which also amounts to a failure of the market.

94. The presence of a specific provision in the Treaty making it possible to authorise aid which meets the needs of transport coordination shows how important these risks of market failures are and the negative impact they have on the development of the Community.

95. In principle, aid which meets the needs of transport coordination has to be considered compatible with the Treaty.

96. Nevertheless, for a given aid measure to be considered to ‘meet the needs’ of transport coordination, it has to be necessary and proportionate to the intended objective. Furthermore, the distortion of competition which is inherent in aid must not jeopardise the general interests of the Community. By way of illustration, aid likely to shift traffic flows from short sea shipping to rail would fail to meet these criteria.

97. Finally, in view of the rapid development of the transport sector, and hence the need for coordinating it, any aid notified to the Commission for the purpose of obtaining a decision, on the basis of Article 73 of the Treaty, that the aid is compatible with the Treaty has to be limited (2) to a maximum of 5 years, in order to allow the Commission to re-examine it in the light of the results obtained and, where necessary, to authorise its renewal (3).

(1) Ibidem.
98. As regards the railway industry more specifically, aid for the needs of transport coordination can take several forms:

(a) aid for infrastructure use, that is to say, aid granted to railway undertakings which have to pay charges for the infrastructure they use, while other undertakings providing transport services based on other modes of transport do not have to pay such charges;

(b) aid for reducing external costs, designed to encourage a modal shift to rail because it generates lower external costs than other modes such as road transport;

(c) aid for promoting interoperability, and, to the extent to which it meets the needs of transport coordination, aid for promoting greater safety, the removal of technical barriers and the reduction of noise pollution in the rail transport sector, hereinafter referred to as ‘interoperability aid’;

(d) aid for research and development in response to the needs of transport coordination.

99. In the following Sections the Commission will specify the conditions which, from the point of view of its decision-making practice, make it possible to ensure, for these different types of aid for coordination of transport, that the aid concerned meets the conditions of compatibility mentioned in Article 73 of the Treaty. In view of the specific nature of research and development aid, the criteria applicable to this type of measure are dealt with separately.

6.3. Criteria for aid for rail infrastructure use, reducing external costs and interoperability

100. The assessment of the compatibility of aid for infrastructure use, reducing external costs and interoperability with respect to Article 73 of the Treaty is in keeping with the Commission’s decision-making practice pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70. In the light of this practice the conditions which follow appear sufficient for determining whether the aid is compatible.

6.3.1. Eligible costs

101. The eligible costs are determined on the basis of the following.

102. As regards aid for rail infrastructure use, the eligible costs are the additional costs for infrastructure use paid by rail transport but not by a more polluting competing transport mode.

103. As regards aid for reducing external costs, the eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.

104. In that regard, it should be recalled that Article 10 of Directive 2001/14/EC explicitly allows Member States to put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent costs of rail. If there is not yet any Community legislation which harmonises methods for calculating infrastructure access charges within or across land transport modes, the Commission will take account of the development of the rules governing the allocation of infrastructure costs and external costs when applying these guidelines (1).

(1) In this connection the third paragraph of Article 11 of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ L 187, 20.7.1999, p. 42), as amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344), provides that ‘No later than 10 June 2008, the Commission shall present, after examining all options including environment, noise, congestion and health-related costs, a generally applicable, transparent and comprehensive model for the assessment of all external costs to serve as the basis for future calculations of infrastructure charges. This model shall be accompanied by an impact analysis of the internalisation of external costs for all modes of transport and a strategy for a stepwise implementation of the model for all modes of transport’. During the preparation of a communication on the internalisation of external costs to comply with this objective, on 16 January 2008 the Commission published a handbook on the studies carried out so far on external costs in the transport sector (http://ec.europa.eu/transport/costs/handbook/index_en.htm). This handbook, which was compiled jointly by several transport research institutes, can be used, amongst other factors, to determine eligible costs. Furthermore, the Commission has published a White Paper COM(1998) 466, Fair payment for infrastructure use — A phased approach to a common transport infrastructure charging framework in the European Union (Bulletin of the EU — Supplement No 3/98).
105. Both for aid for rail infrastructure use and for aid for reducing external costs, the Member State has to provide a transparent, reasoned and quantified comparative cost analysis between rail transport and the alternative options based on other modes of transport (1). The methodology used and calculations performed must be made publicly available (2).

106. As regards interoperability aid, the eligible costs cover, to the extent to which they contribute to the objective of coordinating transport, all investments relating to the installation of safety systems and interoperability (3), or noise reduction both in rail infrastructure and in rolling stock. In particular they cover investment associated with the deployment of ERTMS (European Rail Traffic Management System) and any like measure which can help to remove the technical barriers in the European rail services market (4).

6.3.2. Necessity and proportionality of the aid

107. The Commission considers that there is a presumption of necessity and proportionality of the aid when the intensity of the aid stays below the following values:

(a) for aid for rail infrastructure use, 30 % of the total cost of rail transport, up to 100 % of the eligible costs (5);

(b) for aid for reducing external costs, 30 % (6) of the total cost of rail transport, up to 50 % of the eligible costs (7);

(c) for interoperability aid, 50 % of the eligible costs.

108. For aid above these thresholds, Member States must demonstrate the need and proportionality of the measures in question (8).

109. For both aid for rail infrastructure use and aid for reducing external costs, the aid has to be strictly limited to compensation for opportunity costs connected with the use of rail transport rather than with the use of a more polluting mode of transport. Where there are several competing options which cause higher levels of pollution than rail transport, the limit chosen corresponds to the highest cost differential among the various options. Where the intensity thresholds referred to in point 108 are adhered to, it may be presumed that the 'no overcompensation' criterion is met.


(2) Article 10 of Directive 2001/14/EC.


(4) Calculation of the eligible costs will take account of any changes made to charges for infrastructure use based on rolling stock performance (especially sound performance).


(6) Annex I to Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (OJ L 328, 24.11.2006, p. 1) provides that Community financial assistance for modal shift actions is limited to a maximum of 35 % of the total expenditure necessary to achieve the objectives of the action and incurred as a result of the action. In these guidelines, as regards State aid for transport coordination the criterion is 30 % of the total cost of rail transport.


110. At any rate, where the aid recipient is a railway undertaking it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle this will mean that the aid has to be reflected in the price demanded from the passenger or from the shipper, since it is they who make the choice between rail and the more polluting transport modes such as road (1).

111. Finally, specifically as regards aid for rail infrastructure use and aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

6.3.3. Conclusion

112. Aid for rail infrastructure use, for reducing external costs or for interoperability that is necessary and proportionate and so does not distort competition contrary to the common interest must be considered compatible under Article 73 of the Treaty.

6.4. Compatibility of aid for research and development

113. In the area of land transport, Article 3(1)(c) of Regulation (EEC) No 1107/70, adopted on the basis of Article 73 of the Treaty, provides for the possibility of granting aid to research and development. The Commission has recently developed a body of practice in the application of this provision (2).

114. Article 9(2)(b) of the PSO Regulation adopts the text of Article 3(1)(c) of Regulation (EEC) No 1107/70. Under that provision, aid which has the purpose of promoting research into or development of rail passenger transport systems and technologies which are more economic for the community in general, which is restricted to the research and development stage and which does not cover the commercial exploitation of such transport systems and technologies, has to be regarded as meeting the needs of transport coordination.

115. Article 9(2)(b) of the PSO Regulation applies without prejudice to Article 87 of the Treaty. Thus, aid for research, development and innovation in the field of passenger transport, if not covered by Article 9 of the PSO Regulation, and aid which only concerns freight, may be considered compatible on the basis of Article 87(3)(c) of the Treaty.

116. In this regard the Commission has defined, in the Community framework for State aid for research and development and innovation (3) (hereinafter the ‘Community framework’), the conditions under which it will declare aid of that type compatible with the common market on the basis of Article 87(3)(c) of the Treaty. That framework applies to aid to support research and development and innovation in all sectors governed by the Treaty. It also applies to those sectors which are subject to specific Community rules on State aid, unless such rules provide otherwise (4). The framework therefore applies to aid for research, development and innovation in the railway transport sector which does not fall within the scope of Article 3(1)(c) of Regulation (EEC) No 1107/70 or Article 9 of the PSO Regulation (following the entry into force of that Regulation).

117. It is not excluded that the compatibility of aid for research and development may be analysed directly on the basis of Article 73 of the Treaty, if it is aimed at meeting the needs of transport coordination. In this case the abovementioned conditions should be checked, in particular the fact that the aid must


(4) Ibidem, point 2.1.
be necessary and proportionate to the intended objective, and must not jeopardise the general interests of the Community. The Commission considers that the general principles set out in the Community framework are relevant in analysing these various criteria.

7. STATE GUARANTEES FOR RAILWAY UNDERTAKINGS

118. The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (1) sets out the legal requirements applicable to State guarantees, including in the rail transport field.

119. This notice states, in point 2.1.3, that the Commission ‘regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State’.

120. The Commission’s consistent practice has been to consider unlimited guarantees in a sector open to competition to be incompatible with the Treaty. In accordance with the proportionality principle they cannot in particular be justified by tasks of general interest. With an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service (2).

121. When the State guarantees are granted to undertakings with a presence on both competitive and non-competitive markets, the Commission’s practice is to require the complete removal of the unlimited guarantee granted to the undertaking as a whole (3).

122. Several railway undertakings are enjoying unlimited guarantees. These guarantees are generally a legacy of special cases of historic monopolies set up for railway undertakings before the Treaty entered into force or before the rail transport services market was opened up to competition.

123. According to the information available to the Commission, these guarantees do, to a large extent, constitute existing aid. The Member States concerned are invited to inform the Commission of the conditions for implementing the schemes for existing aid as well as of the measures envisaged for removing them, in accordance with the procedure defined in Section 8.3.

8. FINAL PROVISIONS

8.1. Rules on the cumulation of aid

124. The aid ceilings stipulated in these guidelines are applicable irrespective of whether the aid in question is financed wholly or in part from State resources or from Community resources. Aid authorised under these guidelines may not be combined with other forms of State aid within the meaning of Article 87(1) of the Treaty or with other forms of Community financing if such combination produces a level of aid higher than that laid down in these guidelines.

125. In the case of aid serving different purposes and involving the same eligible costs, the most favourable aid ceiling will apply.

8.2. Date of application

126. The Commission will apply these guidelines from the date of their publication in the Official Journal of the European Union.

The Commission will apply these guidelines to all aid, whether or not notified, in respect of which it is called upon to take a decision after the date of their publication.

(3) Ibidem.
8.3. **Appropriate measures**

127. In accordance with Article 88(1) of the Treaty, the Commission proposes that the Member States amend their existing aid schemes relating to State aid covered by these guidelines so as to comply with them at the latest two years after their publication in the *Official Journal of the European Union*, subject to the specific provisions in the Chapter on State guarantees. The Member States are invited to confirm that they accept these proposals for appropriate measures in writing at the latest one year after the date of publication in the *Official Journal of the European Union*.

128. Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1) and, if necessary, initiate the proceedings referred to in that provision.

8.4. **Period of validity and reporting**

129. The Commission reserves the right to amend these guidelines. It will present a report on their application before any amendment and at the latest five years after the date of their publication.

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Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport

(2004/C 13/03)

1. INTRODUCTION

The White Paper 'European transport policy for 2010: time to decide' stresses the vital importance of maritime transport services for the Community economy. 90 % of all trade between the Community and the rest of the world is transported by sea. Short sea shipping accounts for 69 % of the volume of goods transported between the Member States (this percentage is 41 % if domestic transport is included). Community maritime transport and its related activities remains one of the most important in the world.

Since the 1970s the European fleet has been faced with competition from vessels registered in third countries which do not take much care to observe social and safety rules in force at international level.

The lack of competitiveness of Community-flagged vessels was recognised at the end of the 1980s and, in the absence of harmonised European measures, several Member States adopted different arrangements for aiding maritime transport. The strategies adopted and the budgets allocated to support measures differ from one Member State to the other in reflection of the attitude of those States to public aid or the importance they attach to the maritime sector.

In addition, to encourage the re-registering of vessels, Member States have relaxed rules concerning crews, notably through the creation of second registers.

Second registers comprise, firstly, 'offshore registers' belonging to territories which have a greater or lesser autonomy in relation to the Member State, and secondly, 'international registers', attached directly to the State which created them.

In spite of the efforts made, a large part of the Community fleet continues to be registered under the flags of third countries. This is because the registers of third countries which apply open registration policies — some of which are called 'flags of convenience' — have continued and are still continuing to enjoy a significant competitive edge over the registers of Member States.

Aid to the shipping industry since 1989

In the light of the differences between the aid systems adopted by Member States faced with more intense competition from non-Community flagged vessels, in 1989 the Commission defined its first guidelines on this subject to ensure a certain convergence between the actions of the Member States. This method nevertheless proved to be ineffective and the decline of Community fleets continued. The guidelines were accordingly reviewed, leading to a 1997 communication defining new Guidelines on State aid to maritime transport (2).

The major development in recent years concerning support measures from the Member States for maritime transport is the widespread extension in Europe of flat rate tonnage taxation systems ('tonnage tax'). Tonnage tax entered into force very early in Greece and was progressively extended to the Netherlands (1996), to Norway (1996), to Germany (1999), to the United Kingdom (2000), to Denmark, to Spain and to Finland (2002) and to Ireland (2002). Belgium and France also decided to adopt it in 2002, while the Italian Government is envisaging this possibility.

Results of measures proposed by Member States and approved by the Commission compared with the general objectives of the 1997 revised Guidelines

(a) Trends of the Community-flagged fleet (competitiveness of the fleet)

According to the replies provided by the Member States mid-2002 to the Commission's questionnaire and to the most recent statistical data (3), Member States which have introduced aid measures, particularly in the form of tax relief, have obtained re-registration under the national flag of a significant volume of tonnage in all the registers taken together. In percentage terms, the fleet as entered in the registers of the Member States increased as follows: the number of vessels by 0,4 % on average per year, tonnage by 1,5 % and container ships by 12,4 %. Even if, in the case of the first registers, the number of units entered declined practically everywhere in the period 1989 to 2001, these figures can be viewed as a reversal of the trend, observed up to 1997, of abandoning Community flags.


(3) The sixth and the fifth world registers of ships in terms of tonnage respectively (vessels of more than 300 gt. Source: ISL 2001).
During the same period, however, the share of Member State registers in total world tonnage fell slightly. While world shipping increased, the growth of the Community-managed fleet registered under third-country flags was faster than that of the fleet registered under the flags of the Member States.

(b) Employment trends

According to the most recent estimates, the number of seafarers on board Community-flagged vessels fell from 188,000 in 1996 to approximately 180,000 in 2001 (1). The total number of Community nationals employed on board vessels flying Community flags is currently about 120,000, a figure which is 40% lower than that of 1985, while the number of nationals of third countries employed on board Community vessels has gone up from 29,000 in 1983 to approximately 60,000 today. When assessing the drop in the total number of seafarers, the following factors must be taken into account:

— first, productivity per vessel has continued to increase. Accordingly, a smaller crew makes it possible to transport an equal if not higher volume than that carried in the past,

— secondly, the Community-flagged fleet was renewed in the period 1997 to 2001. The average age of vessels went down from 22.9 years to 17.2 years. 35% of the fleet in service on 1 January 2001 had been built in the period 1996 to 2000. New vessels, of more advanced technology, need better trained but smaller crews.

Notable differences between the Member States in the employment rate of Community seafarers are nevertheless apparent. However, nothing in these figures indicates a reversal of the trend whereby the Community-flagged fleet depends more and more on third-country seafarers. This trend was pointed out by the Commission in 2001 in its Communication on the training and recruitment of seafarers (2).

(c) Contribution to economic activity as a whole

Maritime industries are inextricably linked with maritime transport. This association is a strong argument in favour of positive measures whose aim is to maintain a fleet dependent on Community shipping. Since maritime transport is one of the links in the chain of transport in general and in the chain of the maritime industries in particular, measures seeking to maintain the competitiveness of the European fleet also have repercussions on investments on land in maritime-related industries (3) and on the contribution of maritime transport to the economy of the Community as a whole and to jobs in general.

The significance of shipping and the whole maritime cluster varies considerably with the countries under consideration. However, the importance of the European maritime cluster and its direct economic impact can be clearly illustrated by the following figures: 1.530 million direct employees, a turnover of EUR 160 billion in 1997 (about 2% of GDP in the Community) (4). Data on Denmark (3% of the GDP generated by the maritime cluster), Greece (2.3%) and the Netherlands (2%) can be taken as a valid example.

In this context, therefore, it is not insignificant to note that the fleet managed by European operators based in the Community has stayed at a level of around 34% of world tonnage, while the latter increased by 10% during the period. Given the mobility of the maritime industry and the facilities offered by third countries, one may conclude that support measures for maritime transport may contribute to avoiding widespread displacement of allied industries.

To sum up, it can be affirmed that, where measures in line with the 1997 Guidelines have been adopted, the structural decline of the Community registers and the Community's fleet has been halted and the objectives set by the Commission have been attained, at least in part.

The share of open registers in world tonnage continued, however, to increase during the period, rising from 43% in 1996 to 54% in 2001, and nothing indicates any significant reversal of the trend whereby the fleet had, and is continuing to have, increasing recourse to seafarers from third countries. The campaign undertaken in recent years must be pursued but it must be better targeted. Measures to promote Community seafarers must in particular be the subject of more active monitoring.

The results of the measures taken by the Member States and authorised by the Commission will have to be systematically analysed.

As a consequence, and even though as a matter of principle operating aid should be exceptional, temporary, and degressive, the Commission estimates that State aid to the European shipping industry is still justified and that the approach followed by the 1997 Guidelines was correct. This communication is therefore based on the same basic approach.

(1) Total combined number of Community and non-Community seafarers.
(3) These activities include port services, logistics, the construction, repair, maintenance, inspection and classification of vessels, ship management and brokerage, banking activities and international financial services, insurance, advice and professional services.
(4) Study undertaken by the European Commission, DG Enterprise (published in the Europa internet site).
2. SCOPE AND GENERAL OBJECTIVES OF THE REVISED STATE AID GUIDELINES

This communication — replacing the 1997 Guidelines — aims at setting the parameters within which State aid to maritime transport will be approved, pursuant to Community State aid rules and procedures, by the Commission under Article 87(3)(c) and/or Article 86(2) of the Treaty.

Aid schemes should not be conducted at the expense of other Member States' economies and must be shown not to risk distortion of competition between Member States to an extent contrary to the common interest. State aid must always be restricted to what is necessary to achieve its purpose and be granted in a transparent manner. The cumulative effect of all aid granted by State authorities (including national, regional and local levels) must always be taken into account.

These Guidelines are applicable to 'maritime transport' activities as defined in Regulation (EEC) No 4055/86 (1) and in Regulation (EEC) No 3577/92 (2), that is to say, to the 'transport of goods and persons by sea'. They also, in specific parts, relate to towage and dredging.

2.1. Scope of revised State aid guidelines

These Guidelines cover any aid granted by Member States or through State resources in favour of maritime transport. This includes any financial advantage, conferred in any form whatsoever, funded by public authorities (whether at national, regional, provincial, departmental or local level). For these purposes, 'public authorities' may include public undertakings and State-controlled banks. Arrangements whereby the State guarantees loans or other funding by commercial banks may also fall within the definition of aid. The Guidelines draw no distinction between types of beneficiary in terms of their legal structure (whether companies, partnerships or individuals), nor between public or private ownership, and any reference to companies shall be taken to include all other types of legal entity.

These guidelines do not cover aid to shipbuilding (within the meaning of Council Regulation (EC) No 1540/98 (3) or any subsequent instrument). Investments in infrastructure are not normally considered to involve State aid within the meaning of Article 87(1) of the Treaty if the State provides free and equal access to the infrastructure for the benefit of all operators concerned. However, the Commission may examine such investments if they could directly or indirectly benefit particular shipowners. Finally, the Commission has established the principle that no State aid is involved where public authorities contribute to a company on a basis that would be acceptable to a private investor operating under normal market-economy conditions.

2.2. General objectives of revised State aid guidelines

The Commission has stressed that increased transparency of State aid is necessary so that not only national authorities in the broad sense but also companies and individuals are aware of their rights and obligations. These Guidelines are intended to contribute to this and to clarify what State aid schemes may be introduced in order to support the Community maritime interest, with the aim of:

— improving a safe, efficient, secure and environment friendly maritime transport,

— encouraging the flagging or re-flagging to Member States' registers,

— contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets,

— maintaining and improving maritime know-how and protecting and promoting employment for European seafarers, and

— contributing to the promotion of new services in the field of short sea shipping following the White Paper on Community transport policy.

State aid may generally be granted only in respect of ships entered in Member States' registers. In certain exceptional cases, however, aid may be granted in respect of ships entered in registers under point (3) of the Annex, provided that:

— they comply with the international standards and Community law, including those relating to security, safety, environmental performance and on-board working conditions,

— they are operated from the Community.

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— their shipowner is established in the Community and the Member State concerned demonstrates that the register contributes directly to the objectives mentioned above.

Additionally, flag-neutral aid measures may be approved in certain exceptional cases where a benefit to the Community is clearly demonstrated.

### 3. FISCAL AND SOCIAL MEASURES TO IMPROVE COMPETITIVENESS

#### 3.1. Fiscal treatment of shipowning companies

Many third countries have developed significant shipping registers, sometimes supported by an efficient international services infrastructure, attracting shipowners through a fiscal climate which is considerably milder than within Member States. The low-tax environment has resulted in there being an incentive for companies not only to flag out their vessels but also to consider corporate relocation. It should be emphasised that there are no effective international rules at present to curb such tax competition and few administrative, legal or technical barriers to moving a ship’s registration from a Member State’s register. In this context, the creation of conditions allowing fairer competition with flags of convenience seems the best way forward.

The question of fiscal competition between Member States should be addressed. At this stage, there is no evidence of schemes distorting competition in trade between Member States to an extent contrary to the common interest. In fact, there appears to be an increasing degree of convergence in Member States’ approaches to shipping aid. Flagging out between Member States is a rare phenomenon. Fiscal competition is mainly an issue between Member States on the one hand and third countries on the other, since the cost savings available to shipowners through third country registers are considerable in comparison to the options available within the Community.

For this reason, many Member States have taken special measures to improve the fiscal climate for shipowning companies, including for instance, accelerated depreciation on investment in ships or the right to reserve profits made on the sale of ships for a number of years on a tax-free basis, provided that these profits are reinvested in ships.

These tax relief measures which apply in a special way to shipping are considered to be State aid. Equally, the system of replacing the normal corporate tax system by a tonnage tax is a State aid. ‘Tonnage tax’ means that the shipowner pays an amount of tax linked directly to the tonnage operated. The tonnage tax will be payable irrespective of the company’s actual profits or losses.

Such measures have been shown to safeguard high quality employment in the on-shore maritime sector, such as management directly related to shipping and also in associated activities (insurance, brokerage and finance). In view of the importance of such activities to the economy of the Community and in support of the objectives stated earlier, these types of fiscal incentive can generally be endorsed. Further, safeguarding quality employment and stimulating a competitive shipping industry established in a Member State through fiscal incentives, taken together with other initiatives on training and enhancement of safety, will facilitate the development of Community shipping in the global market.

The Commission is aware that the income of shipowners today is often obtained from the operation of ships under different flags — for instance, when making use of chartered vessels under foreign flags or by making use of partner vessels within alliances. It is also recognised that the incentive for expatriation of management and ancillary activities would continue if the shipowner obtained a significant financial benefit from maintaining different establishments and accounting separately for Community flag earnings and other earnings. This would be the case, for example, if the non-Community flag earnings were liable either to the full rate of corporate taxation in a Member State or to a low rate of tax overseas if overseas management could be demonstrated.

The objective of State aid within the common maritime transport policy is to promote the competitiveness of the Community fleets in the global shipping market. Consequently, tax relief schemes should, as a rule, require a link with a Community flag. However, they may also, exceptionally, be approved where they apply to the entire fleet operated by a shipowner established within a Member State’s territory liable to corporate tax, provided that it is demonstrated that the strategic and commercial management of all ships concerned is actually carried out from within the territory and that this activity contributes substantially to economic activity and employment within the Community. The evidence furnished by the Member State concerned to demonstrate this economic link should include details of vessels owned and operated under Community registers, Community nationals employed on ships and in land-based activities and investments in fixed assets. It must be stressed that the aid must be necessary to promote the repatriation of the strategic and commercial management of all ships concerned in the Community and, in addition, that the beneficiaries of the schemes must be liable to corporate tax in the Community. In addition, the Commission would request any available evidence to show that all vessels operated by companies benefitting from these schemes comply with the relevant national and Community safety standards, including those relating to onboard working conditions.
As was argued in the above paragraph, it should not be forgotten that, as a matter of principle, tax relief schemes require a link with the flag of one of the Member States. Before aid is exceptionally granted (or confirmed) to fleets which also comprise vessels flying other flags, Member States should ensure that beneficiary companies commit themselves to increasing or at least maintaining under the flag of one of the Member States the share of tonnage that they will be operating under such flags when this Communication becomes applicable. Whenever a company controls ship operating companies within the meaning of the Seventh Council Directive 83/349/EEC (1), the abovementioned tonnage share requirement will have to apply to the parent company and subsidiary companies taken together on a consolidated basis. Should a company (or group) fail to respect that requirement, the relevant Member State should not grant further tax relief with respect to additional non-Community flagged vessels operated by that company, unless the Community-flagged share of the global tonnage eligible for tax relief in that Member State has not decreased on average during the reporting period referred to in the next paragraph. The Member State must inform the Commission of the application of the derogation. The Community-tonnage share requirement set out in this paragraph does not apply to undertakings operating at least 60 % of their tonnage under a Community flag.

In all cases, where fiscal schemes have been approved on the above exceptional basis and in order to allow the Member State concerned to prepare, every three years, the report required under Chapter 12 (‘Final Remarks’), recipients must provide the Member State concerned with proof that all the conditions for the derogation from the flag link have been fulfilled during the period. Furthermore, evidence must be provided that, in the case of the beneficiary fleet, the tonnage share requirement laid down in the previous paragraph has been observed and that each vessel of that fleet complies with the relevant international and Community standards, including those relating to security, safety, environmental performance and on-board working conditions. Should recipients fail to provide such evidence, they will not be allowed to continue to benefit from the tax scheme.

Ship management companies may qualify for aid only in respect of vessels for which they have been assigned the entire crew and technical management. In particular, in order to be eligible, ship managers have to assume from the owner the full responsibility for the vessel’s operation, as well as take over from the owner all the duties and responsibilities imposed by the ISM Code (2). Should ship managers also provide other specialised services, even related to vessel operation, separate accounting for such activities, which do not qualify for the tax relief schemes, should be ensured. The requirement regarding Member States’ flag share described above also applies to ship management companies (3).

These guidelines apply only to maritime transport. The Commission can accept that the towing at sea of other vessels, oil platforms, etc. falls under that definition.

The Commission has, however, become aware that in certain cases Member States allow tugboats which are designed for work at sea to benefit from aid even though they are not active at sea, or rarely so. Thus it is useful to state in these guidelines which line the Commission has taken and will take on this point.

‘Towage’ is covered by the scope of the Guidelines only if more than 50 % of the towage activity effectively carried out by a tug during a given year constitutes ‘maritime transport’. Waiting time may be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes ‘maritime transport’. It should be emphasised that towage activities which are carried out inter alia in ports, or which consist in assisting a self-propelled vessel to reach port do not constitute ‘maritime transport’ for the purposes of this communication. No derogation from the flag link is possible in the case of towage.

Similarly in the case of dredging, the experience gained during the recent years suggests that some points should be made.

‘Dredging’ activities are, in principle, not eligible for aid to maritime transport. However, fiscal arrangements for companies (such as tonnage tax) may be applied to those dredgers whose activity consists in ‘maritime transport’ — that is, the transport at deep sea of extracted materials — for more than 50 % of their annual operational time and only in respect of such transport activities. Eligible dredgers are only those registered in a Member State (no derogation from the flag link is possible). In such cases, separate accounting for maritime transport activities is required (4).

(3) The Commission will examine the effects of these provisions on ship management after three years of implementation of this communication.
(4) The ships used by these operators also extract or dredge materials which they carry afterwards. Extraction or dredging as such do not qualify for State aid to maritime transport.

F.8.3
Finally, the method of assessing tonnage tax systems notified up to now has consisted of the following steps: a virtual profit for shipowners has been calculated by applying a notional profit rate to their tonnage; national corporate tax has been applied to the amount so determined. The resulting amount is the ‘tonnage tax’ to be paid.

The notional profit rates provided for by Member States have been homogeneous up to now. However, since corporate tax rates may vary significantly across the Community, the tonnage taxes to be paid for the same tonnage might be very uneven in the different Member States. In order to keep the present equitable balance, the Commission will only approve schemes giving rise to a tax-load for the same tonnage fairly in line with the schemes already approved.

In all cases, the benefits of schemes must facilitate the development of the shipping sector and employment in the Community interest. Consequently, the fiscal advantages mentioned above must be restricted to shipping activities; hence, in cases where a shipowning company is also engaged in other commercial activities, transparent accounting will be required in order to prevent ‘spill-over’ into non-shipping activities. This approach would help Community shipping to be competitive, with tax liabilities comparable to levels applying elsewhere in the world, but would preserve a Member State’s normal tax levels for other activities and personal remuneration of shareholders and directors.

3.2. Labour-related costs

As was mentioned earlier, maritime transport is a sector experiencing fierce international competition. Support measures for the maritime sector should, therefore, aim primarily at reducing fiscal and other costs and burdens borne by Community shipowners and Community seafarers towards levels in line with world norms. They should directly stimulate the development of the sector and employment, rather than provide general financial assistance.

In keeping with these objectives, the following action on employment costs should be allowed for Community shipping:

— reduced rates of contributions for the social protection of Community seafarers employed on board ships registered in a Member State,

— reduced rates of income tax for Community seafarers on board ships registered in a Member State.

For the purposes of this point, ‘Community seafarers’ is defined as:

— Community/EEA citizens, in the case of seafarers working on board vessels (including ro-ro ferries (1)) providing scheduled passenger services between ports of the Community,

— all seafarers liable to taxation and/or social security contributions in a Member State, in all other cases.

The previous 1997 Guidelines allowed such reductions for all seafarers working on board vessels registered in a Member State and subject to tax and or social security contributions in a Member State. However, since then it has become clear that pressure by international competition on European shipowners is very strong in the case of international freight transport, while it is lighter in the case of intra-Community scheduled passenger transport. Boosting the competitiveness of European shipping industry is therefore a prior objective of aid in the former case. Preventing Member States from granting tax relief to all seafarers in this case would have very negative effects on the competitiveness of European shipowners, which could be encouraged to flag-out. At the same time it has been noticed that employment of European citizens is significant, in percentage terms and in numbers, in intra-Community scheduled passenger transport. Protection of employment in the Community is therefore a priority for aid in this case. For internal fiscal reasons some Member States prefer not to apply reduced rates as mentioned above, but instead may reimburse shipowners — partially or wholly — for the costs arising from these levies. Such an approach may generally be considered equivalent to the reduced-rate system as described above, provided that there is a clear link to these levies, no element of overcompensation, and that the system is transparent and not open to abuse.

For the maritime part of towage and dredging activities (maritime transport of materials), aid in favour of the employment of Community seafarers may be granted by analogy to the rules contained in this point, but only if the aid relates to Community seafarers working on board seagoing, self-propelled tugs and dredgers, registered in a Member State, carrying out maritime transport at sea for at least 50 % of their operational time (2).

Finally, it should be recalled that aid to employment is covered by the block exemption provided for by Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (3), which also applies to maritime transport.


(2) Thus dredging activities carried out, inter alia, mainly in ports will not qualify for aid in favour of employment of Community seafarers.

4. CREW RELIEF

Aid for crew relief tends to reduce the costs of employing Community seafarers, especially those on ships operating in distant waters. Aid, which is subject to the ceiling (as set out in Chapter 11), may, therefore, be granted in the form of payment or reimbursement of the costs of repatriation of Community seafarers working on board ships entered in Member States' registers.

5. INVESTMENT AID

Subsidies for fleet renewal are not common in other transport modes such as road haulage and aviation. Since they tend to distort competition, the Commission has been reluctant to approve such schemes, except where they form part of a structural reform leading to reductions in overall fleet capacity.

Investment must comply with Regulation (EC) No 1540/98 or any other Community legislation that may replace it.

Within the framework of these guidelines, other investment aid may, however, be permitted, in line with the Community safe seas policy, in certain restricted circumstances to improve equipment on board vessels entered in a Member State's registers or to promote the use of safe and clean ships. Thus aid may be permitted which provides incentives to upgrade Community-registered ships to standards which exceed the mandatory safety and environmental standards laid down in international conventions and anticipating agreed higher standards, thereby enhancing safety and environmental controls. Such aid must comply with the applicable Community provisions on shipbuilding.

Since shipping is essentially very mobile, regional aid for maritime companies in disadvantaged regions, which often take the form of investment aid to companies investing in the regions, may only be permitted where it is clear that the benefits will accrue to the region over a reasonable time period. This would, for example, be the case of investment related to the construction of dedicated warehouses or to the purchase of fixed transhipment equipment. Investment aid for maritime companies in disadvantaged regions may then only be permitted where it also complies with the regional aid rules (see Chapter 6).

6. REGIONAL AID ON THE BASIS OF ARTICLE 87(3)(a) AND (c)

In the context of regional aid schemes, the Commission will apply the general rules set out in its communications or other provisions on national regional aid or future amendments thereto.

7. TRAINING

It should be recalled, firstly, that aid to training is covered by the block exemption provided for by Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (1), which also applies to maritime transport.

Moreover, many training schemes followed by seafarers and supported by the State are not considered to be State aid because they are of a general nature (whether vocational or academic). These are, therefore, not subject to notification and examination by the Commission.

If a scheme is to be regarded as including State aid, notification is, however, required. This may be the case if, for example, a particular scheme is specifically related to on-board training and the benefit of State financial support is received by the training organisation, the cadet, seafarer or shipowner. The Commission takes a favourable attitude towards aid, granted on a non-discriminatory basis, to training carried out on board ships registered in a Member State. Exceptionally, training on board other vessels may be supported where justified by objective criteria, such as the lack of available places on vessels in a Member State's register.

Where financial contributions are paid for on-board training, the trainee may not, in principle, be an active member of the crew but must be supernumerary. This provision is to ensure that net wage subsidies cannot be paid for seafarers occupied in normal crewing activities.

Similarly, to safeguard and develop maritime expertise in the Community and the competitive edge of the Community maritime industries, further extensive research and development efforts are necessary, with a focus on quality, productivity, safety and environmental protection. For such projects, State support may also be authorised within the limits set by the Treaty.

Aid aimed at enhancing and updating Community officers' skills may be allowed during their whole career. The aid may consist of a contribution to the cost of the training and/or compensation for the wage paid to the officer during the training period. The schemes must, however, be designed in a way which prevents the aid for training from being directly or indirectly diverted into a subsidy to officers' wages.

Aid aimed at professional retraining of high-sea fishermen willing to work as seafarers may also be allowed.

8. RESTRUCTURING AID

Although the Community guidelines on restructuring and rescuing firms in difficulty (1) apply to transport only to the extent that the specific nature of the sector is taken into account, the Commission will apply those guidelines or any other Community instrument replacing them in considering restructuring aid for maritime companies.

9. PUBLIC SERVICE OBLIGATIONS AND CONTRACTS

In the field of maritime cabotage, public service obligations (PSOs) may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92. For those services, PSOs and PSCs as well as their compensation must fulfil the conditions of that provision and the Treaty rules and procedures governing State aid, as interpreted by the Court of Justice.

The Commission accepts that if an international transport service is necessary to meet imperative public transport needs, PSOs may be imposed or PSCs may be concluded, provided that any compensation is subject to the above-mentioned Treaty rules and procedures.

The duration of public service contracts should be limited to a reasonable and not overlong period, normally in the order of six years, since contracts for significantly longer periods could entail the danger of creating a (private) monopoly.

10. AID TO SHORT SEA SHIPPING

There is no legal definition of 'Short Sea Shipping'. However, the communication from the Commission on the development of Short Sea Shipping in Europe of 29 June 1999 (2) has provided a working definition of Short Sea Shipping, to be understood as 'the movement of cargo and passenger by sea between ports situated in geographical Europe or between those ports and ports situated in non European countries having a coastline on the enclosed seas bordering Europe' (3).

In this communication the Commission underscored the role of this transport mode to promote sustainable and safe mobility, to strengthen cohesion within the Community and to improve transport efficiency as part of an intermodal approach. The Commission also recognises that the promotion of short-sea shipping must be carried out at all levels, whether Community, national or regional.

Since aid to Short Sea Shipping aims to improve the intermodal chain and to decongest roads in the Member States, the definition of Short Sea Shipping such as provided by the 1999 communication should, for the purposes of this communication, be restricted to transport between ports in the territory of the Member States.

The Commission recognises that launching short-sea shipping services may be accompanied by substantial financial difficulties which the Member States may wish to attenuate in order to ensure the promotion of such services.

When such is the case, the Commission will be able to approve aid of this kind, on condition that it is intended for shipowners within the meaning of Article 1 of Regulation (EEC) No 4055/86 in respect of ships flying the flag of one of the Member States. Aid of this kind will have to be notified and to fulfil the following conditions:

— the aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member States,

— the service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest,

— the aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several shipowners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question,

— the purpose of the aid must be to cover, either up to 30 % of the operational costs of the service in question (4), or to finance the purchase of trans-shipment equipment to supply the planned service, up to a level of 10 % in such investment,

— the aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way to shipowners established in the Community. The aid should normally be granted for a project selected by the authorities of the Member State through a tender procedure in compliance with applicable Community rules,

— the service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding.

(3) Communication, p. 2.
(4) In case of Community financing or eligibility under different aid schemes, the ceiling of 30 % applies to the combined total of aid/financial support. It should be noticed that the aid intensity is the same as that provided for modal shift actions within the Marco Polo Community initiative: cf. Article 5(2) of Regulation (EC) No 1382/2003 (OJ L 196, 2.8.2003, p. 1).
Such aid must not be cumulated with public service compensation (obligations or contracts).

11. CEILING

As was explained above, certain Member States support their maritime sectors through tax reduction whilst other Member States prefer to make direct payments — for instance, by providing reimbursement of seafarers’ income tax. In view of the current lack of harmonisation between the fiscal systems of the Member States, it is felt that the two alternatives should remain possible. Obviously, those two approaches may, in some instances, be combined. However, this risks causing a cumulation of aid to levels which are disproportionate to the objectives of the Community common interest and could lead to a subsidy race between Member States.

A reduction to zero of taxation and social charges for seafarers and a reduction of corporate taxation of shipping activities such as is described in point 3.1 (penultimate paragraph) is the maximum level of aid which may be permitted. To avoid distortion of competition, other systems of aid may not provide any greater benefit than this. Moreover, although each aid scheme notified by a Member State will be examined on its own merits, it is considered that the total amount of aid granted under Chapters 3 to 6 should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers.

12. FINAL REMARKS

The Commission will continue to monitor regularly and closely the market conditions for shipping. Should the latter change, and should consequently the need for State aid be reduced or overcome, the Commission will take the necessary measures in good time.

All new proposals for measures notified to the Commission must include a calendar indicating, for the next six years, the expected quantified effects for each objective of point 2.2. In particular, the expected macro-economic return on the corresponding maritime cluster, together with an estimation of the number of jobs saved or created, is to be presented in such proposals.

For all the aid schemes — whether existing or new — falling within the scope of this Communication, Member States are to communicate to the Commission an assessment of their effects during their sixth year of implementation.

When aid has been approved and granted to a beneficiary, under the derogation from the flag link referred to in point 3.1, the relevant Member State must report to the Commission every three years starting from the date when the grant was granted. In its report, the Member State will quantify the effects produced and compare the results with the expected effects. The reporting requirements set out in this communication will enter into force upon its publication.

Furthermore, should it prove necessary, for example following a justified complaint, the Member State concerned must provide the Commission with evidence that the assistance granted to the respective beneficiary under an agreed scheme has been limited to the strict definition therein and has also produced the effects expected.

13. APPROPRIATE MEASURES

These guidelines will apply from the date of their publication in the **Official Journal of the European Union**. In accordance with Article 88(1) of the Treaty, the Commission proposes that Member States amend their existing aid schemes relating to State aid covered by these guidelines so as to comply with them by 30 June 2005 at the latest. Member States are invited to confirm that they accept these proposals for appropriate measures in writing by 30 June 2004 at the latest.

Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings referred to in that provision.

These guidelines will be reviewed within seven years of their date of application.
ANNEX

DEFINITION OF MEMBER STATES’ REGISTERS

'Member States' registers' should be understood as meaning registers governed by the law of a Member State applying to their territories forming part of the European Community.

1. All the first registers of Member States are Member States’ registers.

2. In addition, the following registers, located in Member States and subject to their laws, are Member States’ registers:
   - the Danish International Register of Shipping (DIS),
   - the German International Shipping Register (ISR),
   - the Italian International Shipping Register,
   - the Madeira International Ship Register (MAR),
   - the Canary Islands register.

3. Other registers are not considered to be Member States’ registers even if they serve in practice as a first alternative for shipowners based in that Member State. This is because they are located in and subject to the law of territories where the Treaty does not, in whole or in substantial part, apply. Hence, the following registers are not Member States’ registers:
   - the Kerguelen register (the Treaty does not apply to this territory),
   - the Dutch Antilles’ register (this territory is associated with the Community; and only Part IV of the Treaty applies to it; it is responsible for its own fiscal regime),
   - the registers of:
     - Isle of Man (only specific parts of the Treaty apply to the Isle — see Article 299(6)(c) of the Treaty; the Isle of Man parliament has sole right to legislate on fiscal matters),
     - Bermuda and Cayman (they are part of the territories associated to the Community, and only Part IV of the Treaty applies to them; they enjoy a fiscal autonomy).

4. In the case of Gibraltar, the Treaty applies fully and the Gibraltar register is, for the purposes of these Guidelines, considered to be a Member State’s register.
Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea

(Text with EEA relevance)

(2008/C 317/08)

INTRODUCTION

1. The White Paper ‘European transport policy for 2010: time to decide’ of 2001 (1) introduced the concept of ‘motorways of the sea’ as high quality transport services based on short sea shipping. Motorways of the sea are composed of infrastructure, facilities and services spanning at least two Member States. The motorways of the sea aim to shift significant shares of freight transport from road to sea. Their successful implementation will help achieving two main objectives of the European transport policy, that is, reduction of congestion on the roads and a reduced environmental impact of freight transport. The mid-term review of the White Paper (2) points to the increasing problem of road congestion, costing the Community about 1 % of GDP, and to the threat of greenhouse gases emissions from transport with respect to Kyoto targets and reconfirms the importance of the motorways of the sea.

COMPLEMENTARY STATE AID FOR MARCO POLO II ‘MOTORWAYS OF THE SEA’ PROJECTS

2. Chapter 10 of the Community Guidelines on State aid to maritime transport (3) allow, under certain conditions, for start-up aid to new or improved short sea shipping services with a maximum duration of three years and a maximum intensity of 30 % of operational cost and 10 % of investments costs.

3. The second ‘Marco Polo’ programme (further referred to as Marco Polo II) established by Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second ‘Marco Polo’ programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003 (4) is one of the two Community funding instruments directly and explicitly supporting the motorways of the sea, as one out of the five actions that are supported for avoiding traffic or shifting traffic away from road. Marco Polo II provides support mainly to the services part of the motorways of the sea. That support is attributed through yearly calls for proposals directed to the industry players. The allocated financial support is constrained by the grants available under the Marco Polo programme. Funding to the motorways of the sea can also be provided through the Regional Policy.

4. Under Article 5(1)(b) of Regulation (EC) No 1692/2006, in the framework of Marco Polo II programme ‘Motorways of the Sea Actions’ are, under certain conditions, eligible to Community financial assistance with a maximum intensity of 35 % of the total cost for establishing and operating the transport service and a maximum duration of 60 months, as fixed by Annex I, points 1(a) and 2(a) of column B.

5. Article 7 of Regulation (EC) No 1692/2006 reads: Community financial assistance for the actions covered by the Programme shall not prevent those actions from being granted State aid at national, regional or local level, insofar as such aid is compatible with the State-aid arrangements laid down in the Treaty and within the cumulative limits established for each type of action set out in Annex I.

6. According to Article 7 of Regulation (EC) No 1692/2006, therefore, Member States’ authorities may complement Community financing by allocating their own financial resources to projects selected according to the criteria and procedures laid down in that Regulation, within the ceilings set out in the Regulation. The objective of Article 7 of Regulation (EC) No 1692/2006 is to make it possible for undertakings interested in a project to count on a predetermined amount of public funding irrespective

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of its origin. As a matter of fact, it may be the case that the Community financial resources allocated by
the Regulation (EC) No 1692/2006 are not sufficient to provide all the selected projects with the
maximum possible support. Actually, if a large number of valid projects are presented in a given year,
some projects may be granted limited amounts of Community funding. While the fact of having a large
number of selected projects would be a sign of success for Marco Polo II, it may be the case that the Community financial resources allocated by
the Regulation (EC) No 1692/2006 are not sufficient to provide all the selected projects with the
maximum possible support. Actually, if a large number of valid projects are presented in a given year,
some projects may be granted limited amounts of Community funding. While the fact of having a large
number of selected projects would be a sign of success for Marco Polo II, this success would be jeopar-
dised if the involved undertakings were to withdraw their submission or were discouraged from future
submissions because of the lack of public funding, necessary for the start-up of the relevant services.
Moreover, fixing a pre-determined amount of public funding that can be relied on is essential for poten-
tial bidders.

7. Against this background, the Commission has noticed that amongst stakeholders and Member States’
authorities there are doubts about the possibility for the latter to grant complementary State aid to
Marco Polo II projects going beyond what is allowed for short sea shipping under Chapter 10 of the
Community Guidelines on State aid to maritime transport. Actually, the eligibility conditions for
schemes under the Guidelines on State aid to maritime transport are slightly different from those of
Marco Polo II. The Guidelines provide for a maximum intensity of 30 % of operational costs (35 %
of the total expenditure in Marco Polo II) and a maximum duration of three years (in comparison to five
years under Marco Polo II). Such differences have probably confused potential bidders for motorways of
the sea actions.

8. For the above reasons, the Commission considers that maximum duration and intensity of State aid and
Community funding for projects which have been selected under the Regulation should be the same.
Therefore, on the basis of Article 87(3)(c) of the Treaty, in the absence of Community funding, or to
the extent not covered by Community funding, the Commission will authorise State aid to the start-up
of Marco Polo II ‘Motorways of the Sea’ projects with a maximum intensity of 35 % of operational
costs and a maximum duration of five years (1). The same will apply to projects selected under Marco
Polo II but for which funding is finally provided through the European Regional Development Fund
(ERDF) (2) or the Cohesion Fund (3).

9. Start-up aid to operational costs may not exceed the above-mentioned duration and intensity, irrespec-
tive of the source of funding. Aid can not be cumulated with public service compensation. The
Commission also recalls that the same eligible costs cannot benefit from two Community financial
instruments.

10. Member States will have to notify to the Commission State aid that they intend to grant on the basis of
the present communication to projects selected under Regulation (EC) No 1692/2006.

COMPLEMENTARY STATE AID FOR TEN-T ‘MOTORWAYS OF THE SEA’ PROJECTS

1996 on Community guidelines for the development of the trans-European transport network (4)
provides for the setting up of ‘Motorways of the Sea’ concentrating flows of freight on sea-based logistical
routes in such a way as to improve existing maritime links or to establish new viable regular and frequent maritime
links for the transport of goods between Member States so as to reduce road congestion and/or to improve access
to peripheral and islands regions and State. The trans-European network of motorways of the sea must
consist of facilities and infrastructure concerning at least two ports in two different Member States.

12. The Community guidelines for the development of the trans-European transport network concern Com-
munity support for the development of infrastructure, including in the case of the motorways of the
sea. However, second indent of Article 12a(3) of Decision No 1692/96/EC, includes a possibility of

(1) It should be noticed that the clause contained in Annex I(2)(b) of the Marco Polo II Regulation (about the limits to funding
based on freight actually shifted from road) applies to Community funding, but not to complementary State aid addressed
in the present communication.
granting Community support for start-up aid to a project, without prejudice to Articles 87 and 88 of the Treaty. This support may be granted to the extent it is deemed necessary for the financial viability of the project. In fact, the case may arise that the proposing consortium of ports and operators incurs start-up losses within the launching period of the motorways of the sea services.

13. Start-up support under the Community guidelines for the development of the trans-European transport network is limited to ‘duly justified capital costs’, to be understood as investment support. This may include the depreciation of ships allocated to the service (1). Under the Community guidelines for the development of the trans-European transport network, start-up support is limited to two years with a maximum intensity of 30 %.

14. In the framework of TEN-T projects, financial resources may be provided by Member States to the extent that Community funding is not available. In the case of start-up aid to shipping services, however, the second indent of Article 12a(5) of Decision No 1692/96/EC makes a reference to the provisions on State aid of the Treaty. Therefore, Member States may provide complementary aid to the extent that Community funding is not available, but they have to respect the rules on State aid while doing so. Since in the matter of aid to short sea shipping guidance on the application of State aid rules has been provided by Chapter 10 of the Guidelines on State aid to maritime transport, the latter applies to complementary State aid. The Community Guidelines on State aid to maritime transport, however, allow for aid to investment with a maximum intensity of 10 % during three years. As a result, if a motorway of the sea project is selected as a TEN-T project, but it is not granted the maximum Community support to investment, i.e. 30 % during two years, it may happen that public support will not achieve the maximum possible amount, if national State aid may not go beyond the 10 % over three years authorised by the Community Guidelines on State aid to maritime transport. Furthermore, the difference in the maximum duration of the two schemes (two years under Decision No 1692/96/EC and three years under the Community Guidelines on State aid to maritime transport) is capable of generating uncertainty and confusion. For the sake of clarity and in order to allow for a pre-determined public support to undertakings taking part in a motorway of the sea TEN-T project, the maximum intensity and duration of complementary State aid to be provided by Member States should be the same as the maximum intensity and duration of Community funding.

15. For the above reasons, on the basis of Article 87(3)(c) of the Treaty, in the absence of Community funding for start-up aid or for the part not covered by Community funding, the Commission will authorise State aid to investment with a maximum intensity of 30 % and a maximum duration of two years to projects corresponding to Article 12a of Decision 1692/96/EC and selected in accordance with the procedure laid down in Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks (2). The same will apply where the Member States decide to fund the project through the European regional development Fund or the Cohesion Fund.

16. Start-up aid to investment may not exceed the duration and intensity referred to in this point, irrespective of the source of funding. It can not be cumulated with public service compensation. Also for this case, the Commission recalls that the same eligible costs cannot benefit from two Community financial instruments.

17. Member States will have to notify to the Commission State aid that they intend to grant on the basis of the present communication to projects selected under Regulation (EC) No 680/2007.

APPLICATION

18. The Commission will apply the guidance provided for in this communication from the day following that of its publication in the Official Journal.

(1) Vademecum of 28 February 2005 issued in conjunction with the call for proposals for the TEN-T 2005; paragraph 4.3 (Start-up aid related to capital costs).
Communication from the Commission providing guidance on State aid to shipmanagement companies  
(Text with EEA relevance)  
(2009/C 132/06)

1. SCOPE
This Communication deals with the eligibility of crew and technical managers of ships for the reduction of corporate tax or the application of the tonnage tax under Section 3.1 of Commission Communication C(2004) 43 — Community guidelines on State aid to maritime transport (1) ('the Guidelines'). It does not deal with State aid to commercial managers of ships. This Communication applies to crew and technical management irrespectively of whether they are individually provided or jointly provided to the same ship.

2. INTRODUCTION
2.1. General context
The Guidelines provide for the possibility that ship management companies qualify for the tonnage tax or other tax arrangements for shipping companies (Section 3.1). However, eligibility is limited to the joint provision of both technical and crew management for a same vessel ('full management'), while those activities are not eligible to the tonnage tax or other tax arrangements when provided individually.

The Guidelines stipulate that the Commission will examine the effects of the Guidelines on ship management after three years (2). This Communication sets out the results of that fresh assessment and draws conclusions on the eligibility of ship management companies for State aid.

2.2. Ship management
Ship management companies are entities providing different services to shipowners, such as technical survey, crew recruiting and training, crew management and vessel operation. There are three main categories of ship management services: crew management, technical management and commercial management.

Crew management consists, in particular, in dealing with all the matters relating to crew, such as selecting and engaging suitably qualified seafarers, issuing payrolls, ensuring the appropriateness of the manning level of ships, checking the certifications of seafarers, providing for seafarers’ accident and disability insurance coverage, taking care of travel and visa arrangements, handling medical claims, assessing the performance of the seafarers and, in some cases, training them. Crew management represents by far the largest part of the ship management industry worldwide.

Technical management consists in ensuring the seaworthiness of the vessel and its full compliance with technical, safety and security requirements. In particular, the technical manager is responsible for making decisions on the repair and maintenance of a ship. Technical management represents a significant part of the ship management industry, although much smaller than crew management.

Commercial management consists in promoting and ensuring the sale of ships’ capacity, by means of chartering the ships, taking bookings for cargo or passengers, ensuring marketing and appointing agents. Commercial management represents a very small part of the ship management industry. To date the Commission does not have complete information about commercial management at its disposal. Commercial management is therefore not addressed by this Communication.

Like any maritime activity, ship management is a global business by nature. In the absence of international law regulating third party ship management, the standards in this field have been settled within the framework of private law agreements (3).

(1) OJ C 13, 17.1.2004, p. 3.
(3) An example is the ‘BIMCO’s Standard Ship Management Agreement SHIPMAN 98’ which is frequently used in relations between ship management companies and shipowners.
In the Community, ship management is mainly carried out in Cyprus. There are, however, ship management companies in the United Kingdom, Germany, Denmark, Belgium and the Netherlands. Outside the Community, ship management companies are mainly established in Hong Kong, Singapore, India, United Arab Emirates and the USA.

2.3. Review of the eligibility conditions for ship management companies

Since the publication of the Guidelines in January 2004, several maritime countries have entered the Community, amongst them Cyprus, which features the largest ship management industry in the world.

The accession of Cyprus and its preliminary work for complying with the Guidelines, as well as a study realised by a consortium for the administration of that Member State (1), allowed for a more complete understanding of this activity and of its evolution. More awareness has been acquired in particular in respect of the link between technical and crew management on the one hand, and shipping on the other, as well as the possibility that crew and/or technical managers can help achieving the objectives of the Guidelines.

3. ASSESSMENT OF ELIGIBILITY OF SHIP MANAGEMENT COMPANIES

Unlike other maritime-related services, ship management is a standard core-activity of maritime carriers, normally provided in-house. Ship management is one of the most characteristic activities of ship operators. Nowadays, however, it is outsourced to third-party ship management companies in some cases. It is because of this link between ship management and shipping that third-party ship management companies are professional operators with the same background as shipowners, although segmented according to their specialisation, operating in their same business environment. Shipowners are the only customers of ship management companies.

Against this background the Commission considers that outsourcing of ship management should not be fiscally penalised with respect to in-house ship management, provided that the ship management companies meet the same requirements as are applicable to shipowners and that the provision of the aid to the former contributes to the achievement of the objectives of the Guidelines in the same way as the provision of aid to shipowners.

In particular the Commission considers that, precisely because of their specialisation and the nature of their core-business, ship management companies may substantially contribute to the achievement of the objectives of the Guidelines, in particular the achievement of an ‘efficient, secure and environment friendly maritime transport’ and of the ‘consolidation of the maritime cluster established in the Member States’ (2).

4. EXTENSION TO SHIP MANAGEMENT COMPANIES OF ELIGIBILITY TO STATE AID

On the basis of what has been explained in Section 3 above, the Commission will authorise under Article 87(3)(c) of the Treaty establishing the European Community, tax relief for ship management companies, as referred to in Section 3.1 of the Guidelines, with respect to joint or separate crew and technical management of ships, provided that the conditions set out in Sections 5 and 6 of this Communication are fulfilled.

5. CONDITIONS FOR ELIGIBILITY APPLICABLE TO BOTH TECHNICAL AND CREW MANAGERS

In order to qualify for aid ship management companies should present a clear link with the Community and its economy, in line with Section 3.1 of the Guidelines. Moreover, they should contribute to the objectives of the Guidelines, such as those laid down in Section 2.2 of the Guidelines. Technical and crew managers are eligible to State aid, provided that the ships they manage comply with all the requirements set out in Sections 5.1 to 5.4 of this Communication. Eligible activities must be entirely carried out from the territory of the Community.

(1) Study on Ship Management in Cyprus and in the European Union of 31 May 2008, carried out for the Cypriot government by a consortium under the direction of the Vienna University of Economics and Business Administration.

(2) Section 2.2 of the Guidelines.
5.1. Contribution to the economy and employment within the Community

The economic link with the Community is proven by the fact that ship management is carried out in the territory of one or more Member States and that mainly Community nationals are employed in land-based activities or on ships.

5.2. Economic link between the managed ships and the Community

Ship management companies may benefit from State aid with respect to ships entirely managed from the territory of the Community, irrespective of whether management is provided in-house or whether it is partially or totally outsourced to one or more ship management companies.

However, since ship management companies do not have full control of their customers, the above requirement is deemed to be fulfilled if at least two thirds of the tonnage of the managed ships is managed from the territory of the Community. Tonnage in excess of that percentage which is not entirely managed from the Community is not eligible (1).

5.3. Compliance with international and Community standards

Ship management companies are eligible if all the ships and crews they manage comply with international standards and Community law requirements are fulfilled, in particular those relating to security, safety, training and certification of seafarers, environmental performance and on-board working conditions.

5.4. Flag-share requirement (flag link)

The flag-share requirement, as laid down in the eighth paragraph of Section 3.1 of the Guidelines applies to ship management companies. The share of Community flags to be considered as the benchmark is that of the day on which this Communication is published in the Official Journal of the European Union. For new companies the benchmark is to be calculated one year after the date on which they started activity.

6. ADDITIONAL REQUIREMENTS FOR CREW MANAGERS

6.1. Training of seafarers

Crew managers are eligible for State aid as long as all seafarers working onboard managed ships are educated, trained and hold a certificate of competency in accordance with the Convention of the International Maritime Organisation on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW), and have successfully completed training for personal safety on board ship. Moreover, crew managers are eligible if they fulfil the STCW and Community law requirements regarding responsibilities of companies.

6.2. Social conditions

In order to be eligible for State aid, crew managers must ensure that on all managed ships the provisions of the Maritime Labour Convention, 2006, of the International Labour Organisation ('MLC') (2), are fully implemented by the seafarer's employer, be it the shipowner or the ship management companies. The ship management companies must ensure, in particular, that the provisions of the MLC concerning the seafarer's employment agreement (3), ship's loss or foundering (4) medical care (5), shipowner's liability including payment of wages in case of accident or sickness (6), and repatriation (7) are properly applied.

(1) While the fact of not complying with the 2/3 rule does not affect the eligibility of the ship management company as such.
(3) Regulation 2.1 and Standard A2.1 (Seafarers’ employment agreement) of Title 2 of MLC.
(4) Ibid. Regulation 2.6 and Standard A2.6 (Seafarer compensation for the ship’s loss or foundering) of Title 2.
(5) Ibid. Regulation 4.1 and Standard A4.1 (Medical care on board ship and ashore Shipowners’ liability); Regulation 4.3 and A4.3 (Health and safety protection and accident prevention); Regulation 4.4 (Access to shore-based welfare facilities) of Title 4.
(6) Ibid. Regulation 4.2 and Standard A4.2 (Shipowners’ liability) of Title 4.
(7) Ibid. Regulation 2.5 and Standard A2.5 (Repatriation) of Title 2.
Crew managers must also ensure that the international standards regarding hours of work and hours of rest provided for by the MLC are fully complied with.

Finally, in order to be eligible, crew managers must also provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard.

7. **CALCULATION OF TAX**

Also in the case of ship management companies the Commission will apply the principle contained in the Guidelines, according to which, in order to avoid distortion, it will only authorise schemes giving rise to a homogeneous tax-load across the Member States for the same activity or the same tonnage. This means that total exemption or equivalent schemes will not be authorised (1).

The tax base to be used for ship management companies can obviously not be the same as that applied to shipowners since, with respect to a given ship, the turnover of the ship management companies is much lower than that of the shipowner. According to the study mentioned in Section 2.3, as well as to notifications received in the past, the tax-base to be applied to ship management companies should be approximately 25 % (in terms or tonnage or notional profit) of that which would apply to the shipowner for the same ship or tonnage. The Commission, therefore, requires that a percentage of no less than 25 % is applied under ship management tonnage tax schemes (2).

If ship management companies engage in activities which are not eligible for State aid under the present Communication, they must keep separate accounts for those activities.

In case ship management companies subcontract part of their activity to third parties, the latter are not eligible to State aid.

8. **APPLICATION AND REVIEW**

The Commission will apply the guidance provided for in this Communication from the day following that of its publication in the *Official Journal of the European Union*.

State aid to ship management companies will be included in the general revision of the Guidelines such as foreseen in Section 13 of the latter.

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(1) The Commission takes this opportunity within the present Communication to emphasise that the mechanism used to calculate the tax to be paid by both ship management companies and ship owners is irrelevant as such; in particular, it is irrelevant whether or not a system based on notional profit is applied.

(2) The shipowner, if eligible, remains liable for the whole tonnage tax.
1. INTRODUCTION: STATE AID POLICY IN THE AVIATION SECTOR

1. Linking people and regions, air transport plays a vital role in the integration and the competitiveness of the European Union, as well as its interaction with the world. Air transport contributes significantly to the Union’s economy, with more than 15 million annual commercial movements, 822 million passengers transported to and from Union airports in 2011, 150 scheduled airlines, a network of over 460 airports and 60 air navigation service providers (1). The Union benefits from its position as a global aviation hub,

(1) Sources: Eurostat, Association of European Airlines, International Air Transport Association.
with airlines and airports alone contributing more than EUR 140 thousand million to the Union’s Gross Domestic Product each year. The aviation sector employs some 2.3 million people in the Union.

2. The Europe 2020 Strategy (EU 2020) underlines the importance of transport infrastructure as part of the Union’s sustainable growth strategy for the coming decade. In particular, the Commission has emphasised in its White Paper ‘Roadmap to a Single Transport Area’ (Roadmap) that the internalisation of externalities, the elimination of unjustified subsidies and free and undistorted competition are an essential part of the effort to align market choices with sustainability needs. The ‘Roadmap to a Single Transport Area’ also emphasises the importance of an efficient use of resources. In practice, transport has to use less and cleaner energy, better exploit a modern infrastructure and reduce its negative impact on the climate and the environment and, in particular, on key natural assets like water, land and ecosystems.

3. The gradual completion of the internal market has led to the removal of all commercial restrictions for airlines flying within the Union, such as restrictions on routes or number of flights and the setting of fares. Since the liberalisation of air transport in 1997 (Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408 /92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15)), the industry has expanded as never before, and this has contributed to economic growth and job creation. This has also paved the way for the emergence of low-cost carriers, operating a new business model based on quick turn-around times and very efficient fleet use. This development has generated a tremendous increase in traffic, with low-cost carriers’ traffic growing at a fast pace since 2005. In 2012, for the first time, low-cost airlines (44.8 %) exceeded the market share of incumbent air carriers (42.4 %), a trend which continued in 2013 (45.94 % for low-cost and 40.42 % for incumbent).


5. Smaller airports display the greatest proportion of public ownership (According to Airport Council International Europe, 77 % of airports were fully publicly owned in 2010, while 9 % were fully privately owned) and most often rely on public support to finance their operations. The prices of these airports tend not to be determined with regard to market considerations and in particular sound ex ante profitability prospects, but essentially having regard to local or regional considerations. Under the current market conditions the profitability prospects of commercially run airports also remain highly dependent (As shown in 2002 by the ‘Study on competition between airports and the application of State aid rules’ - Cranfield University, June 2002) on the level of throughput, with airports that have fewer than 1 million passengers per annum typically struggling to cover their operating costs. Consequently the vast majority of regional airports are subsidised by public authorities on a regular basis.

(1) Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010. Steer Davies Gleave for the European Commission, DG MOVE. Final report of August 2012.
(3) Roadmap to a Single Transport Area – Towards a competitive and resource efficient transport system, COM(2011) 144.
(5) According to Airport Council International Europe, 77 % of airports were fully publicly owned in 2010, while 9 % were fully privately owned, see Airport Council International Europe: The Ownership of Europe’s Airports 2010.
(6) This is exemplified by the fact that, although in 2010 their share of the overall number of airports amounted to 77 %, publicly owned airports accounted for only 52 % of total passenger traffic.
(7) As shown in 2002 by the ‘Study on competition between airports and the application of State aid rules’ - Cranfield University, June 2002 , and subsequently confirmed by industry reports.
6. Certain regions are still hampered by poor accessibility from the rest of the Union, and major hubs are facing increasing levels of congestion (9). At the same time, the density of regional airports in certain regions of the Union has led to substantial overcapacity of airport infrastructure relative to passenger demand and airline needs.

7. The pricing system in most Union airports has traditionally been designed as a published scheme of airport charges based on passenger numbers and aircraft weight (10). However, the evolution of the market and the close cooperation between airports and airlines have gradually paved the way for a wide variety of commercial practices, including long-term contracts with differentiated tariffs and sometimes substantial amounts of incentives and marketing support paid by airports and/or local authorities to airlines. In particular, public funds earmarked for supporting airport operations may be channelled to airlines in order to attract more commercial traffic, thereby distorting air transport markets (11).

8. In its Communication on State Aid Modernisation (SAM) (12), the Commission points out that State aid policy should focus on facilitating well-designed aid targeted at market failures and objectives of common interest of the Union, and avoiding waste of public resources. State aid measures can indeed, under certain conditions, correct market failures, thereby contributing to the efficient functioning of markets and enhancing competitiveness. Furthermore, where markets provide efficient outcomes but these are deemed unsatisfactory from a cohesion policy point of view, State aid may be used to obtain a more desirable, equitable market outcome. However, State aid may have negative effects, such as distorting competition between undertakings and affecting trade between Member States to an extent contrary to the common interests of the Union. State aid control in the airport and air transport sectors should therefore promote sound use of public resources for growth-oriented policies, while limiting competition distortions that would undermine a level playing field in the internal market, in particular by avoiding duplication of unprofitable airports in the same catchment area and creation of overcapacities.

9. The application of State aid rules to the airport and air transport sectors constitutes part of the Commission's efforts aimed at improving the competitiveness and growth potential of the Union airport and airline industries (13). A level-playing field among airlines and airports in the Union is of paramount importance for those objectives, as well as for the entire internal market. At the same time, regional airports can prove important both for local development and for the accessibility of certain regions, in particular against the backdrop of positive traffic forecasts for air transport in the Union.

10. As part of the general plan to create a single airspace of the Union and taking account of market developments, in 2005 the Commission adopted guidelines on financing of airports and start-up aid to airlines departing from regional airports (14) (the '2005 Aviation guidelines'). Those guidelines specified the conditions under which certain categories of State aid to airports and airlines could be declared compatible with the internal market. They supplemented the 1994 Aviation guidelines (15), which mainly contained provisions with regard to the restructuring of flag carriers and social aid for the benefit of Union citizens.

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(9) 13 airports in the Union are forecasted to be operating at full capacity eight hours a day every day of the year in 2030, compared to 2007 when only 5 airports were operating at or near capacity 100 % of the time (see Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility of 1 December 2011, COM(2011) 823) (the Communication on Airport policy in the European Union).

(10) As evidenced by the International Civil Aviation Organization’s policies on charges for airports and navigations services (Document 9082), last revised in April 2012.

(11) In particular where aid is determined on the basis of ex post calculations (making good for any deficits as they arise), airports may not have much incentive to contain costs and charge airport charges that are sufficient to cover costs.

(12) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation (SAM), COM(2012) 209 final.

(13) See the Communication on Airport policy in the European Union.


11. These guidelines take stock of the new legal and economic situation concerning the public financing of airports and airlines and specify the conditions under which such public financing may constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union and, when it does constitute State aid, the conditions under which it can be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty. The Commission’s assessment is based on its experience and decision-making practice, as well as on its analysis of current market conditions in the airport and air transport sectors. It is therefore without prejudice to its approach in respect of other infrastructures or sectors. In particular, the Commission considers that the mere fact that an airport operator receives or has received State aid does not automatically imply that its customer airlines are also aid beneficiaries. If the conditions offered to an airline at a given airport would have been offered by a profit-driven airport operator, the airline cannot be deemed to receive an advantage for the purposes of State aid rules.

12. Where public support constitutes State aid, the Commission considers that under certain conditions, certain categories of aid to regional airports and airlines using those airports can be justified, in particular to develop new services and contribute to local accessibility and economic development. Nevertheless, distortions of competition on all markets concerned should be taken into consideration and only State aid which is proportional and necessary to contribute to an objective of common interest can be acceptable.

13. In this context, it should be pointed out that operating aid constitutes, in principle, a very distortive form of aid and can only be authorised under exceptional circumstances. The Commission considers that airports and airlines should normally bear their own operating costs. Nevertheless, the gradual shift to a new market reality, as described in points 3 to 7, explains the fact that regional airports have received widespread operating support from public authorities prior to the adoption of these guidelines. Against this backdrop, for a transitional period, and to enable the aviation industry to adapt to the new market situation, certain categories of operating aid to airports might still be justified under certain conditions. As explained in point 5, under the current market conditions the available data and industry consensus point to a link between an airport’s financial situation and its traffic levels, with financing needs normally being proportionately greater for smaller airports. In the light of their contribution to economic development and territorial cohesion in the Union, managers of smaller regional airports should therefore be given time to adjust to the new market environment, for example, by gradually increasing airport charges to airlines, by introducing rationalisation measures, by differentiating their business models or by attracting new airlines and customers to fill their idle capacity.

14. At the end of the transitional period, airports should no longer be granted operating aid and they should finance their operations from their own resources. Whilst the provision of compensation for uncovered operating costs of services of general economic interest should remain possible for small airports or to allow for connectivity of all regions with particular requirements, the market changes stimulated by these guidelines should allow airports to cover their costs as in any other industry.

15. Development of new air traffic should, in principle, be based on a sound business case. However, without appropriate incentives, airlines are not always prepared to run the risk of opening new routes from unknown and untested small airports. Therefore, under certain conditions, airlines may be granted start-up aid during and even after the transitional period, if this provides them with the necessary incentive to create new routes from regional airports, increases the mobility of the citizens of the Union by establishing access points for intra-Union flights and stimulates regional development. As remote regions are penalised by their poor accessibility, start-up aid for routes from those regions is subject to more flexible compatibility criteria.

16. The allocation of airport capacity to airlines should therefore gradually become more efficient (that is to say demand-oriented), and there should be less need for public funding of airports as private investment becomes more widespread. If a genuine transport need and positive externalities for a region can be established, investment aid to airports should nevertheless continue to be accepted after the transitional period, with maximum aid intensities ensuring a level-playing field across the Union.
17. Against this backdrop these guidelines introduce a new approach to the assessment of compatibility of aid to airports:

(a) whereas the 2005 Aviation guidelines left open the issue of investment aid, these revised guidelines define maximum permissible aid intensities depending on the size of the airport;

(b) however, for large airports with a passenger volume of over 5 million per annum, investment aid should in principle not be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, except in very exceptional circumstances, such as relocation of an existing airport, where the need for State intervention is characterised by a clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited competition distortions;

(c) the maximum permissible aid intensities for investment aid are increased by up to 20% for airports located in remote regions;

(d) for a transitional period of 10 years, operating aid to regional airports can be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty; however, with regard to airports with passenger traffic of less than 700,000 per annum the Commission will, after a period of four years, reassess the profitability prospects of this category of airport in order to evaluate whether special rules should be devised to assess the compatibility with the internal market of operating aid in favour of those airports.

18. In addition, the compatibility conditions for start-up aid to airlines have been streamlined and adapted to recent market developments.

19. The Commission will apply a balanced approach which is neutral vis-à-vis the various business models of airports and airlines, and takes into account the growth prospects of air traffic, the need for regional development and accessibility and the positive contribution of the low-cost carriers' business model to the development of some regional airports. But at the same time, a gradual move towards a market-oriented approach is undoubtedly warranted; except in duly justified and limited cases, airports should be able to cover their operating costs and any public investment should be used to finance the construction of viable airports meeting the demand of airlines and passengers; distortions of competition between airports and between airlines, as well as duplication of unprofitable airports should be avoided. This balanced approach should be transparent, easily understood and straightforward to apply.

20. These guidelines are without prejudice to Member States duty to comply with Union law. In particular, to avoid that the investment would lead to environmental harm, Member States must also ensure compliance with Union environmental legislation, including the need to carry out an environmental impact assessment where appropriate and ensure all relevant permits.

2. SCOPE AND DEFINITIONS

2.1. Scope

21. The principles set out in these guidelines apply to State aid to airports and airlines (16). They will be applied in accordance with the Treaty and secondary legislation adopted pursuant to the Treaty as well as other Union guidelines on State aid (17).

(16) The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless of whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules. Pursuant to Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports (OJ L 272, 25.10.1996, p. 36), or any subsequent legislation on access to the ground handling market at Union’s airports, airports that carry out ground handling are required to keep separate accounts of their ground handling activities and other activities. Moreover, an airport may not subsidise its ground handling activities from the revenue it derives from its airport activities. These guidelines also do not apply to undertakings which, though active at an airport, are engaged in non-aeronautical activities.

22. Some airports and airlines are specialised in freight transport. The Commission does not yet have sufficient experience in assessing the compatibility of aid to airports and airlines specialised in freight transport to summarise its practice in the form of specific compatibility criteria. For those categories of undertakings, the Commission will apply the common principles of compatibility as set out in section 5 through a case-by-case analysis.


24. These guidelines replace the 1994 and 2005 Aviation guidelines.

2.2. Definitions

25. For the purpose of these guidelines:

(1) ‘aid’ means any measure fulfilling all the criteria laid down in Article 107(1) of the Treaty;

(2) ‘aid intensity’ means the total aid amount expressed as a percentage of eligible costs, both figures expressed in net present value terms at the moment the aid is granted and before any deduction of tax or other charges;

(3) ‘airline’ means any airline with a valid operating licence issued by a Member State or a Member of the Common European Aviation Area pursuant to Regulation (EC) No 1008/2008 of the European Parliament and of the Council (20);

(4) ‘airport charge’ means a price or a levy collected for the benefit of the airport and paid by the airport users for the use of facilities and services which are exclusively provided by the airport and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight, including charges or fees paid for ground handling services and fees for centralised ground handling infrastructure;

(5) ‘airport infrastructure’ means infrastructure and equipment for the provision of airport services by the airport to airlines and the various service providers, including runways, terminals, aprons, taxiways, centralised ground handling infrastructure and any other facilities that directly support the airport services, excluding infrastructure and equipment which is primarily necessary for pursuing non-aeronautical activities, such as car parks, shops and restaurants;

(6) ‘airport’ means an entity or group of entities performing the economic activity of providing airport services to airlines;

(7) ‘airport revenue’ means the revenue from airport charges net of marketing support or any incentives provided by the airport to the airlines, taking into account revenue stemming from non-aeronautical activities (free of any public support), excluding any public support and compensation for tasks falling within public policy remit, or services of general economic interest;

(8) ‘airport services’ means services provided to airlines by an airport or any of its subsidiaries, to ensure the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services, including the provision of ground handling services and the provision of centralised ground handling infrastructure;

(9) ‘average annual passenger traffic’ means a figure determined on the basis of the inbound and outbound passenger traffic during the two financial years preceding that in which the aid is notified or granted in the case of non-notified aid;

(10) ‘capital costs’ means the depreciation of the eligible investment costs into airport infrastructure and equipment, including the underlying costs of financing;

(11) ‘capital costs funding gap’ means the net present value of the difference between the positive and negative cash flows, including investment costs, over the lifetime of the investment in fixed capital assets;

(12) ‘catchment area of an airport’ means a geographic market boundary that is normally set at around 100 kilometres or around 60 minutes travelling time by car, bus, train or high-speed train; however, the catchment area of a given airport may be different and needs to take into account the specificities of each particular airport. The size and shape of the catchment area varies from airport to airport, and depends on various characteristics of the airport, including its business model, location and the destinations it serves;

(13) ‘costs of financing’ means the costs related to debt and equity financing of the eligible costs of the investment; in other words, the costs of financing take into account the proportion of total interest and own capital remuneration that corresponds to the financing of eligible costs of the investment, excluding the financing of working capital, investments in non-aeronautical activities or other investment projects;

(14) ‘date of grant of the aid’ means the date when the Member State took a legally binding commitment to award the aid that can be invoked before a national court;

(15) ‘eligible investment costs’ means the costs relating to investments in airport infrastructure, including planning costs, but excluding investment costs for non-aeronautical activities, investment costs in relation to equipment for ground handling services, ordinary maintenance costs and costs for tasks falling within the public policy remit;

(16) ‘ground handling services’ means services provided to airport users at airports as described in the Annex to Directive 96/67/EC, and any subsequent legislation on access to the ground handling market at airports;

(17) ‘high-speed train’ means a train capable of reaching speeds of over 200 km/h;

(18) ‘investment aid’ means aid to finance fixed capital assets, specifically, to cover the capital costs funding gap;

(19) ‘net present value’ means the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value using the cost of capital, that is to say, the normal required rate of return applied by the company in other investment projects of a similar kind or, where not available, the cost of capital of the company as a whole, or expected returns commonly observed in the airport sector;

(20) ‘non-aeronautical activities’ means commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers, renting out of offices and shops, car parking and hotels;

(21) ‘operating aid’ means aid to cover the ‘operating funding gap’, either in the form of an upfront payment or in the form of periodic instalments to cover expected operating costs (periodic lump sum payments);

(22) ‘operating costs’ means the underlying costs of an airport in respect of the provision of airport services, including cost categories such as cost of personnel, contracted services, communications, waste, energy, maintenance, rent and administration, but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit;

(23) ‘operating funding gap’ means the operating losses of an airport over the relevant period, discounted to their current value using the cost of capital, that is to say the shortfall (in Net Present Value terms) between airport revenues and operating costs of the airport;

(24) ‘outermost regions’ means the regions referred to in Article 349 of the Treaty (21);

(25) ‘reasonable profit margin’ means a rate of return on capital, for example, measured as an Internal Rate of Return (IRR), that the undertaking is normally expected to make on investments with a similar degree of risk:

(26) ‘regional airport’ means an airport with an annual passenger traffic volume of up to 3 million;

(27) ‘remote regions’ mean outermost regions, Malta, Cyprus, Ceuta, Mellila, islands which are part of the territory of a Member State, and sparsely populated areas;

(28) ‘sparsely populated areas’ mean NUTS 2 regions with less than 8 inhabitants per km² or NUTS 3 regions with less than 12.5 inhabitants per km² (based on Eurostat data on population density);

(29) ‘start of works’ means either the start of construction works on the investment, or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever comes first, and does not include preparatory works, such as obtaining permits and conducting preliminary feasibility studies.

3. PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

3.1. Notion of undertaking and economic activity

26. In accordance with Article 107(1) of the Treaty, State aid rules apply only where the recipient is an ‘undertaking’. The Court of Justice of the European Union has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed (27). Any activity consisting in offering goods and services on a market is an economic activity (28). The economic nature of an activity as such does not depend on whether the activity generates profits (29).

27. It is now clear that the activity of airlines which consists in providing transport services to passengers or undertakings constitutes an economic activity. The 1994 Aviation guidelines, however, still reflected the view that ‘the construction for enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids.’ In ‘Aéroports de Paris’ (29), the Union Courts ruled against this view and held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity. In its judgment in the ‘Leipzig-Halle airport’ case (29), the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.

28. As far as past financing measures are concerned, the gradual development of market forces in the airport sector (29) does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered as an economic activity. However, the Union Courts have recognised the evolution in the nature of airport activities. In ‘Leipzig/Halle airport’, the General Court held that, from 2000, the application of State aid rules to the financing of airport infrastructure could no longer be excluded (29). Consequently, from the date of the judgment in ‘Aéroports de Paris’ (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.


(32) See point 3, and Leipzig-Halle airport judgment, paragraph 105.

(33) See Leipzig-Halle airport judgment, paragraph 106.
29. Conversely, due to the uncertainty that existed prior to the judgment in ‘Aéroports de Paris’, public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted (29) before the ‘Aéroports de Paris’ judgment (30).

30. In any event, measures that were granted before any competition developed in the airport sector did not constitute State aid when granted, but could be considered as existing aid pursuant to Article 1 (b) (v) of Council Regulation (EC) No 659/1999 (31) if the conditions of Article 107(1) of the Treaty are met.

31. The entity or group of entities performing the economic activity of providing airport services to airlines, that is to say, the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services (32), will be referred to as the ‘airport’ (33). An airport provides a range of services (‘airport services’) to airlines, in exchange for payment (‘airport charges’). While the exact extent of the services provided by airports, as well as the labelling of charges as ‘fees’ or ‘taxes’ varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all Member States.

32. The legal and regulatory framework within which individual airports are owned and operated varies from airport to airport across the Union. In particular, regional airports are often managed in close cooperation with public authorities. In this respect, the Court has ruled that several entities can be deemed to perform an economic activity together, thereby constituting an economic unit, under specific conditions (34). In the field of aviation, the Commission considers that significant involvement in an airport’s commercial strategy, such as through the direct conclusion of agreements with airlines or the setting of airport charges, would constitute a strong indication that, alone or jointly, the relevant entity performs the economic activity of operating the airport (35).

33. In addition to airport services, an airport may also provide other commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers (for example, through the rental of premises to shop and restaurant managers, parking operators, etc.). These economic activities will be collectively referred to as ‘non-aeronautical activities’.

34. However, not all the activities of an airport are necessarily of an economic nature (36). Since the classification of an entity as an undertaking is always in relation to a specific activity, it is necessary to distinguish between the activities of a given airport and to establish to what extent those activities are of an economic nature. If an airport carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.


(33) The airport may or may not be the same entity that owns the airport.


(36) Leipzig-Halle airport judgment, paragraph 98.
35. The Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid (35). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature (36).

36. The public funding of such non-economic activities does not constitute State aid, but should be strictly limited to compensating the costs to which they give rise and may not be used to finance other activities (37). Any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid. Moreover, if an airport is engaged in non-economic activities, alongside its economic activities, separated cost accounting is required in order to avoid any transfer of public funds between the non-economic and economic activities.

37. Public financing of non-economic activities must not lead to undue discrimination between airports. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities (38). Therefore, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature.

3.2. Use of State resources and imputability to the State

38. The transfer of State resources may take many forms such as direct grants, tax rebates (39), soft loans or other types of preferential financing conditions. State resources will also be involved if the State provides a benefit in kind or in the form of subsidised services (40), such as airport services. State resources can be used (41) at national, regional or local level. Funding from Union funds will likewise constitute State resources, when those funds are allocated at a Member State’s discretion (42).

39. The Court has also ruled that even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed (43). Therefore, it needs to be assessed whether measures granted by public undertakings are imputable to the State. The Court has indicated that the imputability to the State of a measure granted by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (44).

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(38) See among others Case C-172/03 Wolfgang Heiser v Finanzamt Innsbruck, [2005] ECR I-01627, paragraph 36, and case-law cited in that judgment.
(41) Resources of a public undertaking constitute State resources within the meaning of Article 107(1) of the Treaty because the public authorities control these resources. See Case C-482/99 France v Commission, [2002] ECR I-4397 (‘Stardust Marine’ judgment).
(42) The Court has confirmed that once financial means remain constantly under public control and are therefore available to the competent national authorities, this is sufficient for them to be categorized as State aid, see Case C-83/98 P France v Ladbroke Racing Ltd and Commission, [2000] ECR I-3271, paragraph 50.
(43) See Stardust Marine judgment, paragraph 52.
(44) See Stardust Marine judgement, paragraphs 55 and 56.
40. Against this background, the resources of a public airport constitute public resources. Consequently, a public airport may grant aid to an airline using the airport if the decision to grant the measure is imputable to the State and the other conditions of Article 107(1) of the Treaty are met. The Court has also ruled that whether a measure is granted directly by the State or by public or private bodies established or appointed by it to administer the measure is irrelevant to whether it is considered to be State aid (45).

3.3. Distortion of competition and effect on trade

41. According to the case law of the Court, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings (46).

42. In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union market, trade between Member States must be regarded as being affected by that advantage (47).

43. Competition between airports can be assessed in the light of airlines’ criteria of choice, and in particular by comparing factors such as the type of airport services provided and the clients concerned, population or economic activity, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition.

44. The Commission further notes that airports are in competition for the management of airport infrastructure, including at local and regional airports. The public funding of an airport may therefore distort competition in the markets for airport infrastructure operation. Moreover, public funding to both airports and airlines can distort competition and have an effect on trade in air transport markets across the Union. Finally, intermodal competition may also be affected by public funding to airports or airlines.

45. The Court held in the Altmark judgment (48) that even public funding granted to an undertaking which provides only local or regional transport services may have an effect on trade between Member States, as the supply of transport services by that undertaking may thereby be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services. Even the fact that the amount of aid is small or the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected. Consequently, the public financing of airports or airlines operating services from those airports might affect trade between Member States.

3.4. Public funding of airports and the application of the Market Economy Operator principle

46. Article 345 of the Treaty states that the Treaty in no way prejudices the rules in Member States governing the system of property ownership. Member States can accordingly own and manage undertakings, and can purchase shares or other interests in public or private undertakings.

47. Consequently, these guidelines make no distinction between the different types of beneficiaries in terms of their legal structure or whether they belong to the public or private sector, and all references to airlines and airports or the companies which manage them encompass all types of legal entity.

48. In order to assess whether an undertaking has benefited from an economic advantage, the so-called Market Economy Operator (‘MEO’) test is applied. This test should be based on available information and foreseeable developments at the time when the public funding was granted and it should not rely on any analysis based on a later situation (49).

(48) See Altmark judgment, paragraphs 77 to 82.
(49) Stardust Marine judgment, paragraph 71. Case C-124/10P European Commission v EDF, [2012], not yet reported, paragraphs 84, 85 and 105.
49. Consequently, when an airport benefits from public funding, the Commission will assess whether such funding constitutes aid by considering whether in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations (52), would have granted the same funding. Public funding granted in circumstances which correspond to normal market conditions is not regarded as State aid (53).

50. The Court has also ruled that the conduct of a public investor may be compared with that of a private investor guided by prospects of profitability in the longer term (54), over the lifetime of the investment. These considerations are particularly pertinent to investment in infrastructure, which often involve large amounts of financial resources and can produce a positive return only after many years. Any assessment of the profitability of an airport must take into account airport revenues.

51. Consequently, as regards public financing to airports, the analysis of conformity with the MEO test should be based on sound ex ante profitability prospects for the entity granting the financing (55). Any traffic forecasts used for that purpose should be realistic and subject to a reasonable sensitivity analysis. The absence of a business plan constitutes an indication that the MEO test may not be met (56). In the absence of a business plan, Member States can provide analysis or internal documents from the public authorities or from the airport concerned showing clearly that an analysis conducted before the granting of the public financing demonstrates that the MEO test is satisfied.

52. Airports can play an important role in fostering local development or accessibility. Nevertheless regional or policy considerations cannot be taken into account for the purposes of the MEO test (57). Such considerations can, however, under certain conditions, be taken into account when assessing the compatibility of aid.

3.5. Financial relationships between airports and airlines

53. Where an airport has public resources at its disposal, aid to an airline using the airport can, in principle, be excluded where the relationship between the airport and that airline satisfies the MEO test. This is normally the case if:

(a) the price charged for the airport services corresponds to the market price (see section 3.5.1); or

(b) it can be demonstrated through an ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport (see section 3.5.2).

3.5.1. Comparison with the market price

54. One approach to the assessment of the presence of aid to airlines involves establishing whether the price charged by an airport to a particular airline corresponds to the market price. On the basis of available and relevant market prices, an appropriate benchmark can be identified, taking into account the elements set out in point 60.

55. The identification of a benchmark requires, first, that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.

56. In this respect the Commission notes that for the moment, a large majority of Union airports benefit from public funding to cover investment and operating costs. Most of those airports can only remain on the market with public support.

(53) Stardust Marine judgment, paragraph 69. See also Case C-303/88 Italy v Commission, [1991] ECR I-1433, paragraph 20.
(56) Case C-124/10 P Commission v EDF [2012], not yet reported, paragraphs 84, 85 and 105.
57. Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound ex ante profitability prospects, but essentially having regard to social or regional considerations.

58. Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

59. In those circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future, in particular once the State aid rules apply in full to public financing of airports.

60. In any event, the Commission considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts or any other incentive), across a sufficient number of suitable ‘comparator airports’, whose managers behave as market economy operators. In particular, the following indicators should be used:

(a) traffic volume;

(b) type of traffic (business or leisure or outbound destination), the relative importance of freight and the relative importance of revenue stemming from the non-aeronautical activities of the airport;

(c) type and level of airport services provided;

(d) proximity of the airport to a large city;

(e) number of inhabitants in the catchment area of the airport;

(f) prosperity of the surrounding area (GDP per capita);

(g) different geographical areas from which passengers could be attracted.

3.5.2. Ex ante profitability analysis

61. At present the Commission considers ex ante incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines.

62. In this respect, the Commission considers that price differentiation is a standard business practice, as long as it complies with all relevant competition and sectoral legislation (58). Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the MEO test (59).

63. The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an ex ante standpoint, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin (60) on the basis of sound medium-term prospects (61).

(58) Relevant provisions include Articles 101 and 102 of the Treaty, and Directive 2009/12/EC.


(60) A reasonable profit margin is a ‘normal’ rate of return on capital, that is to say, a rate of return that would be required by a typical company for an investment of similar risk. The return is measured as an Internal Rate of Return (IRR) over the envisaged cash flows induced by the arrangement with the airline.

(61) This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.
64. In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes (65). Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport should be taken into account (65). Such incremental costs could encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.

65. Where an airport operator benefits from compatible aid, the advantage resulting from such aid is not passed on to a specific airline (65) if the following conditions are met: the infrastructure is open to all airlines (65) (this includes infrastructure which is more likely to be used by certain categories, like low cost operators or charters) and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental costs as defined in point 64. Furthermore, the Commission considers that under such conditions, even if there would have been State aid to the airlines, such aid would in any event have been compatible with the internal market for the same reasons that justify the compatibility of the aid at the level of the airport. Where an airport operator benefits from incompatible investment aid, the advantage resulting from such aid is not passed on to a specific airline if the following conditions are met: the infrastructure is open to all airlines and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental cost as defined in point 64. The Commission considers that under such conditions a sectorial advantage to the airline industry or other users cannot be excluded but should not lead to recovery from specific airlines or other users.

66. When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.

4. PUBLIC FUNDING OF SERVICES OF GENERAL ECONOMIC INTEREST

67. In some cases, public authorities may define certain economic activities carried out by airports or airlines as services of general economic interest (SGEI) within the meaning of Article 106(2) of the Treaty and the Altmark case-law (66), and provide compensation for discharging such services.

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(65) Any public support, such as for example marketing agreements directly concluded between public authorities and the airline, designed to offset part of the normal costs incurred by the airport in relation to the airport/airline arrangement will likewise be taken into account. This is irrespective of whether such support is directly granted to the airline concerned, or channelled through the airport or another entity.

(66) Charleroi judgment, paragraph 59.

(65) What is said in the paragraph about airlines applies in the same way to other users of the airport.


(66) See Altmark judgment, paragraphs 86 to 93. Public funding for the provision of an SGEI does not entail a selective advantage within the meaning of Article 107(1) of the Treaty if the following four conditions are met: (a) the beneficiary of a State funding mechanism for an SGEI must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined (b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner; (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, that allows for the provision of the service at the least cost to the community, the level of compensation granted must be determined on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.
68. In such cases, the SGEI Communication and Commission Regulation (EU) No 360/2012 provide guidance on the conditions under which the public financing of an SGEI constitutes State aid within the meaning of Article 107(1) of the Treaty. Aid in the form of public service compensation will be assessed under Commission Decision 2012/21/EU and the SGEI Framework. Together those four documents form the 'SGEI package', which also applies to compensation granted to airports and airlines. What follows illustrates the application of some of the principles set out in the SGEI package in the light of certain sectoral specificities.

4.1. Definition of a service of general economic interest in the airport and air transport sectors

69. The first Altmark criterion requires a clear definition of the tasks which constitute a service of general economic interest. This requirement coincides with that of Article 106(2) of the Treaty. According to case law, undertakings entrusted with the operation of an SGEI must have received that task by an act of a public authority. The Commission has also clarified that, for an activity to be considered as an SGEI, it should exhibit special characteristics as compared with ordinary economic activities, and that the general interest objective pursued by public authorities cannot simply be that of the development of certain economic activities or economic areas provided for in Article 107(3)(c) of the Treaty.

70. As regards air transport services, public service obligations can only be imposed in accordance with Regulation (EC) No 1008/2008. In particular, such obligations can only be imposed with regard to a specific route or group of routes, and not with regard to any generic route originating from a given airport, city or region. Moreover, public service obligations can only be imposed with regard to a route to fulfill transport needs which cannot be adequately met by an existing air route or by other means of transport.

71. In this respect, it should be stressed that compliance with the substantive and procedural requirements of Regulation (EC) No 1008/2008 does not eliminate the need for the Member State(s) concerned to assess compliance with Article 107(1) of the Treaty.

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

[67] See footnote 22.
[71] Case T-289/03 British United Provident Association Ltd (BUPA) v Commission [2008], ECR II-81, paragraphs 171 and 224.
[73] See SGEI Communication, paragraph 45.
[75] Articles 16, 17 and 18.
[76] Both origin and destination airports must be clearly identified see Article 16(1) of Regulation (EC) No 1008/2008.
[77] In particular, the Commission considers that it would be difficult to justify PSOs on a route to a given airport if there are already similar services notably in terms of transport time, frequencies, level and quality of service, to another airport serving the same catchment area.
73. In the light of the specific requirements attached to public service obligations for air transport services (78), and in view of the complete liberalisation of air transport markets, the Commission considers that the scope of public service obligations imposed on airports should not encompass the development of commercial air transport services.

4.2. Compatibility of aid in the form of public service compensation

74. If one of the cumulative criteria of the Altmark judgment is not fulfilled, public service compensation provides an economic advantage to its beneficiary, and might constitute State aid within the meaning of Article 107(1) of the Treaty. Such State aid may be regarded as compatible with the internal market pursuant to Article 106(2) of the Treaty, if all the compatibility criteria developed for the application of that paragraph met.

75. State aid in the form of public service compensation is exempt from the notification requirement of Article 108(3) of the Treaty if the requirements set out in Decision 2012/21/EU are met. The scope of Decision 2012/21/EU covers public service compensation granted to:

(a) airports where the average annual traffic does not exceed 200,000 passengers (79) over the duration of the SGEI entrustment; and

(b) airlines, as regards air links to islands where the average annual traffic does not exceed 300,000 passengers (80).

76. State aid not covered by Decision 2012/21/EU can be declared compatible pursuant to Article 106(2) of the Treaty, if the conditions of the SGEI Framework are met. However, it should be noted that for assessment under both Decision 2012/21/EU and the SGEI Framework, the considerations on the definition of public service obligations imposed on airports or airlines in points 69 to 73 of these guidelines will apply.

5. COMPATIBILITY OF AID UNDER ARTICLE 107(3)(C) OF THE TREATY

77. If public funding granted to airports and/or airlines constitutes aid, that aid can be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty provided that it complies with the compatibility criteria for airports in section 5.1 of these guidelines and for airlines in section 5.2. State aid granted to airlines which incrementally decreases the profitability of the airport (see points 63 and 64 of these guidelines) will be deemed incompatible with the internal market pursuant to Article 107(1) of the Treaty, unless the compatibility conditions for start-up aid set out in section 5.2 of these guidelines are met.

78. To assess whether a State aid measure can be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, the Commission generally analyses whether the design of the aid measure ensures that the positive impact towards an objective of common interest exceeds its potential negative effects on trade and competition.

79. The Communication on State Aid Modernisation (SAM) called for the identification and definition of common principles applicable to the assessment of compatibility of all aid measures carried out by the Commission. An aid measure will be considered compatible with the internal market pursuant to Article 107(3) of the Treaty provided that the following cumulative conditions are met:

(a) contribution to a well-defined objective of common interest: a State aid measure must have an objective of common interest in accordance with Article 107(3) Treaty;

(b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;

(c) appropriateness of the aid measure: the aid measure must be an appropriate policy instrument to address the objective of common interest;

(78) See point 70 and Regulation (EC) No 1008/2008, recital 12 and articles 16 to 18.

(79) This threshold refers to a one-way count, that is to say, a passenger flying from the airport and back to the airport would be counted twice. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

(80) This threshold refers to a one-way count, that is to say, a passenger flying to the island and back would be counted twice. It applies to individual routes between an airport on the island and an airport on the mainland.
(d) incentive effect: the aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or they would carry out in a restricted or different manner or location;

(e) proportionality of the aid (aid limited to the minimum): the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned;

(f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive;

(g) transparency of aid: Member States, the Commission, economic operators, and the interested public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder as outlined in section 8.2.

80. As regards State aid in the aviation sector, the Commission considers that those common principles are respected when State aid granted to airports or airlines meets all the conditions outlined respectively in sections 5.1 and 5.2. Therefore, compliance with those conditions implies compatibility of the aid with the internal market pursuant to Article 107(3)(c) of the Treaty.

81. However, if an inseparable aspect of a State aid measure and the conditions attached to it (including its financing method when the financing method forms an integral part of the State aid measure) entail a violation of Union law, the aid cannot be declared compatible with the internal market (81).

82. Moreover, in assessing the compatibility of any State aid with the internal market, the Commission will take account of any proceedings concerning infringements of Article 101 or 102 of the Treaty which may concern the beneficiary of the aid and which may be relevant for its assessment under Article 107(3) of the Treaty (82).

5.1. Aid to airports

5.1.1. Investment aid to airports

83. Investment aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty provided that the cumulative conditions in point 79 are fulfilled as set out in points 84 to 108.

(a) Contribution to a well-defined objective of common interest

84. Investment aid to airports will be considered to contribute to the achievement of an objective of common interest, if it:

(a) increases the mobility of Union citizens and the connectivity of the regions by establishing access points for intra-Union flights; or

(b) combats air traffic congestion at major Union hub airports; or

(c) facilitates regional development.

85. Nevertheless, the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. If an investment project is primarily aimed at creating new airport capacity, the new infrastructure must, in the medium-term, meet the forecasted demand of the airlines, passengers and freight forwarders in the catchment area of the airport. Any investment which does not have satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area, cannot be considered to serve an objective of common interest.


Accordingly, the Commission will have doubts as to the medium-term prospects for use of airport infrastructure at an airport located in the catchment area of an existing airport where the existing airport is not operating at or near full capacity. The medium-term prospects for use must be demonstrated on the basis of sound passenger and freight traffic forecasts incorporated in an ex ante business plan and must identify the likely effect of the investment on the use of existing infrastructure, such as another airport or other modes of transport, in particular high-speed train connections.

(b) Need for State intervention

In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.

The conditions that smaller airports face when developing their services and in attracting private financing of their infrastructure investments are often less favourable than those faced by the major airports in the Union. For those reasons, under present market conditions, smaller airports may have difficulties in ensuring the financing of their investments without public funding.

The need for public funding to finance infrastructure investments will, due to high fixed costs (83), vary according to the size of an airport and will normally be greater for smaller airports. The Commission considers that, under current market conditions, the following categories of airports (84), and their relative financial viabilities, can be identified:

(a) airports with up to 200 000 passengers per annum may not be able to cover their capital costs to a large extent;

(b) airports with annual passenger traffic of between 200 000 and 1 million are usually not able to cover their capital costs to a large extent;

(c) airports with annual passenger traffic of 1–3 million should, on average, be able to cover their capital costs to a greater extent;

(d) airports with annual passenger traffic of above 3 and up to 5 million should, in principle, be able to cover, to a large extent, all their costs (including operating costs and capital costs) but, under certain case-specific circumstances, public support might be necessary to finance some of their capital costs;

(e) airports with annual passenger traffic above 5 million are usually profitable and are able to cover all of their costs, except in very exceptional circumstances.

(c) Appropriateness of State aid as a policy instrument

The Member States must demonstrate that the aid measure is an appropriate policy instrument to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the internal market if other less distortive policy instruments or aid instruments allow the same objective to be reached.

The Member States can make different choices with regard to the use of different policy instruments and forms of aid. In general, where a Member State has considered other policy options and the use of a selective instrument, such as State aid in the form of a direct grant, has been compared with less distortive forms of aid (such as loans, guarantees or repayable advances), the measures concerned are considered to constitute an appropriate instrument.

Wherever possible, Member States are encouraged to design national schemes that reflect the main principles underlying public financing and indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce the administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Further, Member States are encouraged to give clear guidance for the implementation of State aid financing for regional airports.

(83) Between 70 % and 90 % of the airport’s costs are fixed.
(84) The categories of airports for the purposes of these guidelines are based on the available industry data.
(d) Existence of incentive effect

93. Works on an individual investment can start only after an application has been submitted to the granting authority. If works start before an application is submitted to the granting authority, any aid awarded in respect of that individual investment will not be considered compatible with the internal market.

94. An investment project at an airport may be economically attractive in its own right. Therefore, it needs to be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any State aid. If this is confirmed, the Commission will consider that the aid measure has an incentive effect.

95. The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid.

96. Where no specific counterfactual is known, the incentive effect can be assumed when there is a capital cost funding gap, that is to say, when on the basis of an ex ante business plan, it can be shown that there is a difference between the positive and negative cash flows (including investment costs into fixed capital assets) over the lifetime of the investment in net present value terms (85).

(e) Proportionality of the aid amount (aid limited to the minimum)

97. The maximum permissible amount of State aid is expressed as a percentage of eligible costs (the maximum aid intensity). Eligible costs are the costs relating to the investments in airport infrastructure, including planning costs, ground handling infrastructure (such as baggage belts, etc.) and airport equipment. Investment costs relating to non-aeronautical activities (in particular parking, hotels, restaurants, and offices) are ineligible (86).

98. The investment costs relating to the provision of ground handling services (such as buses, vehicles, etc.) are ineligible, insofar as they are not part of ground handling infrastructure (87).

99. In order to be proportionate, investment aid to airports must be limited to the extra costs (net of extra revenues) which result from undertaking the aided project/activity rather than the alternative project/activity that the beneficiary would have undertaken in the counterfactual scenario, that is to say, if it had not received the aid. Where no specific counterfactual is known, in order to be proportionate, the amount of the aid should not exceed the funding gap of the investment project (so-called 'capital cost funding gap'), which is determined on the basis of an ex ante business plan as the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment. For investment aid the business plan should cover the period of the economic utilisation of the asset.

100. As the funding gap will vary according to the size of the airport and is normally wider for smaller airports, the Commission will use a range of permissible maximum aid intensities to ensure overall proportionality. The aid intensity must not exceed the maximum permissible investment aid intensity and should, in any case, not go beyond the actual funding gap of the investment project.

101. The following table summarises the maximum permissible aid intensity depending on the size of the airport as measured by the number of passengers per annum (88).

<table>
<thead>
<tr>
<th>Size of airport based on average passenger traffic (passengers per annum)</th>
<th>Maximum investment aid intensity</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt;3-5 million</td>
<td>up to 25 %</td>
</tr>
<tr>
<td>1-3 million</td>
<td>up to 50 %</td>
</tr>
<tr>
<td>&lt;1 million</td>
<td>up to 75 %</td>
</tr>
</tbody>
</table>

(85) This does not preclude foreseeing that future benefits may offset initial losses.

(86) Financing of such activities is not covered by these guidelines, as they are of a non-transport character, and will thus be assessed on the basis of the relevant sectoral and general rules.

(87) The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules.

(88) Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying, for example, to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.
102. The maximum aid intensities for investment aid to finance airport infrastructure may be increased by up to 20% for airports located in remote regions irrespective of their size.

103. Airports with average traffic below 1 million passengers per annum should contribute at least 25% to the financing of the total eligible investment costs. However, investment projects at certain airports with average traffic below 1 million passengers per annum located in peripheral regions of the Union may result in a funding gap which is higher than the maximum permissible aid intensities. Subject to a case-by-case assessment and depending on the particular characteristics of each airport, investment project and the region served, intensity exceeding 75% may be justified in exceptional circumstances for airports with traffic volume below 1 million passengers per annum.

104. In order to take account of the specific circumstances regarding the relocation of an existing airport and cessation of airport activities at an existing site, the Commission will assess, in particular, the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis or the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.

105. Additionally, under very exceptional circumstances, characterised by a clear market failure and taking into account the magnitude of the investment, the impossibility to finance the investment on capital markets, a very high level of positive externalities and the competition distortions, airports with average traffic over 5 million passengers per annum may receive aid to finance airport infrastructure. However, in such cases, the Commission will always carry out an in-depth assessment, in particular on the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis and the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.

(f) Avoidance of undue negative effects on competition and trade

106. In particular, the duplication of unprofitable airports or the creation of additional unused capacity in the catchment area of existing infrastructure might have distortive effects. Accordingly, the Commission will, in principle, have doubts as to the compatibility of investment into airport infrastructure at an airport located in the catchment area of an existing airport (9) where the existing airport is not operating at or near full capacity.

107. Further, in order to avoid the negative effects of aid that may arise where airports face soft budget constraints (9), investment aid to airports with traffic of up to 5 million passengers can be granted either as an upfront fixed amount to cover eligible investment costs or in annual instalments to compensate for the capital cost funding gap resulting from the business plan of the airport.

108. In order to further limit any distortions, the airport, including any investment for which aid is granted, must be open to all potential users and must not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

Notification requirements for aid schemes and individual aid measures:

109. Member States are encouraged to notify State aid schemes for investment aid for airports with average annual traffic below 3 million passengers.

110. When assessing an aid scheme, the conditions relating to the necessity of the aid, the incentive effect and the proportionality of the aid will be considered to be satisfied if the Member State has committed itself to granting individual aid under the approved aid scheme only after it has verified that the cumulative conditions in this section are met.

111. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:

(a) investment aid to airports with average annual traffic above 3 million passengers;

(b) investment aid with an aid intensity exceeding 75% to an airport with average annual traffic below 1 million passengers, with the exception of airports located in remote regions;

(c) investment aid granted for the relocation of airports;

(9) See Section 5.1.1. (a).
(9) If the aid were to be determined on the basis of ex post calculations (making good for any deficits as they arise), airports might not have much incentive to contain costs and charge airport charges that are adequate to cover costs.
(d) investment aid financing a mixed passenger/freight airport handling more than 200,000 tonnes of freight during the two financial years preceding that in which the aid is notified;

(e) investment aid aimed at the creation of a new passenger airport (including the conversion of an existing airfield into a passenger airport);

(f) investment aid aimed at the creation or development of an airport located within 100 kilometres distance or 60 minutes travelling time by car, bus, train or high-speed train from an existing airport.

5.1.2. Operating aid to airports

112. Operating aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty for a transitional period of 10 years starting from 4 April 2014 provided that the cumulative conditions in point 79 are fulfilled as set out in points 113 to 134.

(a) Contribution to a well-defined objective of common interest

113. As stated in point 13, in order to give airports time to adjust to new market realities and to avoid any disruptions in the air traffic and connectivity of the regions, operating aid to airports will be considered to contribute to the achievement of an objective of common interest for a transitional period of 10 years, if it:

(a) increases the mobility of Union citizens and the connectivity of the regions by establishing access points for intra-Union flights; or

(b) combats air traffic congestion at major Union hub airports; or

(c) facilitates regional development.

114. Nevertheless, the duplication of unprofitable airports does not contribute to an objective of common interest. Where an airport is located in the same catchment area as another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airport located in that catchment area.

115. Accordingly, the Commission will have doubts as to the prospects for an unprofitable airport to achieve full operating cost coverage at the end of the transitional period, if another airport is located in the same catchment area.

(b) Need for State intervention

116. In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.

117. The conditions that smaller airports face when developing their services and in attracting private financing are often less favourable than those faced by the major airports in the Union. Therefore, under present market conditions, smaller airports may have difficulties in ensuring the financing of their operation without public funding.

118. Under current market conditions, the need for public funding to finance operating costs will, due to high fixed costs, vary according to the size of an airport and will normally be proportionately greater for smaller airports. The Commission considers that, under current market conditions, the following categories of airports, and their relative financial viabilities, can be identified:

(a) airports with up to 200,000 passengers per annum may not be able to cover their operating costs to a large extent;

(b) airports with annual passenger traffic between 200,000 and 700,000 passengers may not be able to cover their operating costs to a substantial extent;

(c) airports with annual passenger traffic of 700,000 to 1 million should in general be able to cover their operating costs to a greater extent;
(d) airports with annual passenger traffic of 1–3 million should, on average, be able to cover the majority of their operating costs;

(e) airports with annual passenger traffic above 3 million are usually profitable at operating level and should be able to cover their operating costs.

119. Therefore, the Commission considers that in order to be eligible for operating aid, the annual traffic of the airport must not exceed 3 million passengers (91)

(c) Appropriateness of State aid as a policy instrument

120. The Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the internal market if other less distortive policy instruments or aid instruments allow the same objective to be reached (92).

121. In order to provide proper incentives for efficient management of an airport, the aid amount is, in principle, to be established ex ante as a fixed sum covering the expected operating funding gap (determined on the basis of an ex ante business plan) during a transitional period of 10 years. For these reasons no ex post increase of the aid amount should, in principle, be considered compatible with the internal market. The Member State may pay the ex-ante fixed amount as an up-front lump sum or in instalments, for instance on an annual basis.

122. In exceptional circumstances, where future costs and revenue developments are surrounded by a particularly high degree of uncertainty and the public authority faces important information asymmetries, the public authority may calculate the maximum amount of compatible operating aid according to a model based on the initial operating funding gap at the beginning of the transitional period. The initial operating funding gap is the average of the operating funding gaps (that is to say the amount of operating costs not covered by revenues) during the five years preceding the beginning of the transitional period (2009 to 2013).

123. Wherever possible, Member States are encouraged to design national schemes that reflect the main principles underlying public financing and indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce the administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Furthermore, Member States are encouraged to give clear guidance for the implementation of State aid financing for regional airports and airlines using those airports.

(d) Existence of incentive effect

124. Operating aid has an incentive effect if it is likely that, in the absence of the operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced.

(e) Proportionality of the aid amount (aid limited to the minimum necessary):

125. In order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.

126. The business plan of the airport must pave the way towards full operating cost coverage at the end of the transitional period. The key parameters of this business plan form an integral part of the Commission's compatibility assessment.

127. The path towards full operating cost coverage will be different for every airport and will depend on the initial operating funding gap of the airport at the beginning of the transitional period. The transitional period will start from 4 April 2014.

(91) Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

(92) See also point 91.
128. In any event, the maximum permissible aid amount during the whole transitional period will be limited to 50% of the initial funding gap for a period of 10 years (\(^{(*)}\)). For instance, if the annual average funding gap of a given airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an ex-ante established fixed sum would be EUR 5 million over ten years (50% x 1 million x 10). No further operating aid will be considered compatible for that airport.

129. By 10 years after the beginning of the transitional period at the latest, all airports must have reached full coverage of their operating costs and no operating aid to airports will be considered compatible with the internal market after that date, with the exception of operating aid granted in accordance with horizontal State aid rules, such as rules applicable to the financing of SGEIs.

130. Under the current market conditions, airports with annual passenger traffic of up to 700,000 may face increased difficulties in achieving the full cost coverage during the 10-year transitional period. For this reason, the maximum permissible aid amount for airports with up to 700,000 passengers per annum will be 80% of the initial operating funding gap for a period of five years after the beginning of the transitional period. For instance, if the annual average funding gap of a small airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an ex-ante established fixed sum would be EUR 4 million over five years (80% x 1 million x 5). The Commission will reassess the need for continued specific treatment and the future prospects for full operating cost coverage for this category of airport, in particular with regard to the change of market conditions and profitability prospects.

(f) Avoidance of undue negative effects on competition and trade

131. When assessing the compatibility of operating aid the Commission will take account of the distortions of competition and the effects on trade. Where an airport is located in the same catchment area as another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airports located in that catchment area.

132. Operating aid for an airport located in the same catchment area will be considered compatible with the internal market only when the Member State demonstrates that all airports in the same catchment area will be able to achieve full operating cost coverage at the end of the transitional period.

133. In order to limit further the distortions of competition, the airport must be open to all potential users and not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

134. Further, in order to limit the negative effects on competition and trade, the Commission will approve operating aid to airports for a transitional period of 10 years beginning from 4 April 2014. The Commission will reassess the situation of airports with annual passenger traffic of up to 700,000 four years after the beginning of the transitional period.

Notification requirements for aid schemes and individual aid measures

135. Member States are strongly encouraged to notify national schemes for operating aid for the financing of airports, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the Member States' authorities and for the Commission.

136. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:

(a) operating aid financing a mixed passenger/freight airport handling more than 200,000 tonnes of freight during the two financial years preceding that in which the aid is notified;

(b) operating aid to an airport, if other airports are located within 100 kilometres or 60 minutes travelling time by car, bus, train or high-speed train.

Aid granted before the beginning of the transitional period

\(^{(*)}\) The 50% intensity corresponds to the funding gap over 10 years for an airport which, starting from the initial operating cost coverage at the beginning of the transition period, achieves full operating cost coverage after 10 years.
137. Operating aid granted before the beginning of the transitional period (including aid paid before 4 April 2014) may be declared compatible to the full extent of uncovered operating costs provided that the conditions in section 3.1.2 are met, with the exception of points 113, 119, 121, 122, 123, 126 to 130, 132, 133 and 134. In particular, when assessing the compatibility of operating aid granted before 4 April 2014, the Commission will take account of the distortions of competition.

5.2. Start-up aid to airlines

138. As mentioned in point 15, State aid granted to airlines for launching a new route with the aim of increasing the connectivity of a region will be considered compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, if the cumulative conditions in point 79 are fulfilled as set out in points 139 to 153.

(a) Contribution to a well-defined objective of common interest

139. Start-up aid to airlines will be considered to contribute to the achievement of an objective of common interest, if it:

(a) increases the mobility of Union citizens and the connectivity of the regions by opening new routes; or

(b) facilitates regional development of remote regions.

140. When a connection which will be operated by the new air route is already operated by a high-speed rail service or from another airport in the same catchment area under comparable conditions, in particular in terms of length of journey, it cannot be considered to contribute to a well-defined objective of common interest.

(b) Need for State intervention

141. The conditions that smaller airports face when developing their services are often less favourable than those faced by the major airports in the Union. Also, airlines are not always prepared to run the risk of opening new routes from unknown and untested airports, and may not have appropriate incentives to do so.

142. On this basis, start-up aid will only be considered compatible for routes linking an airport with less than 3 million passengers per annum (94) to another airport within the Common European Aviation Area (95).

143. Start-up aid for routes linking an airport located in a remote region to another airport (within or outside the Common European Aviation Area) will be compatible irrespective of the size of the airports concerned.

144. Start-up aid for routes linking an airport with more than 3 million passengers per annum (94) and less than 5 million passengers per annum not located in remote regions can be considered compatible with the internal market only in duly substantiated exceptional cases.

145. Start-up aid for routes linking an airport with more than 5 million passengers per annum not located in remote regions cannot be considered compatible with the internal market.

(c) Appropriateness of State aid as policy instrument

146. The Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the internal market if other less distortive policy instruments or aid instruments allow the same objective to be reached (97).

(94) Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes.

(95) Decision 2006/682/EC of the Council and of the Representatives of the Member States meeting within the Council on the signature and provisional application of the Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area (ECAA) (OJ L 285, 16.10.2006, p. 1).

(97) See also footnote 94.

(99) See also point 91.
An ex ante business plan prepared by the airline should establish that the route receiving the aid has prospects of becoming profitable for the airline without public funding after 3 years. In the absence of a business plan for a route, the airlines must provide an irrevocable commitment to the airport to operate the route for a period at least equal to the period during which it received start-up aid.

(d) Existence of incentive effect

Start-up aid to airlines has an incentive effect if it is likely that, in the absence of the aid, the level of economic activity of the airline at the airport concerned would not be expanded. For example the new route would not have been launched.

The new route must start only after the application for aid has been submitted to the granting authority. If the new route begins before the application for aid is submitted to the granting authority, any aid awarded in respect of that individual route will not be considered compatible with the internal market.

(e) Proportionality of the aid amount (aid limited to the minimum necessary)

Start-up aid may cover up to 50% of airport charges in respect of a route for a maximum period of three years. The eligible costs are the airport charges in respect of the route.

(f) Avoidance of undue negative effects on competition and trade

In order to avoid undue negative effects on competition and trade, where a connection (for example, city-pair) which will be operated by the new air route is already operated by a high-speed rail service or by another airport in the same catchment area under comparable conditions, notably in terms of length of journey, such air route will not be eligible for start-up aid.

Any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services.

Start-up aid cannot be combined with any other type of State aid granted for the operation of a route.

Notification requirements for aid schemes and individual aid measures:

Member States are strongly encouraged to notify national schemes for start-up aid to airlines, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the Member States' authorities and for the Commission.

Due to the higher risk of distortion of competition, start-up aid to airports not located in remote regions with average annual traffic above 3 million passengers should always be notified individually.

6. AID OF A SOCIAL CHARACTER UNDER ARTICLE 107(2)(A) OF THE TREATY

Aid of a social character for air transport services will be considered compatible with the internal market pursuant to Article 107(2)(a) of the Treaty, provided that the following cumulative conditions are met:

(a) the aid must effectively be for the benefit of final consumers;

(b) the aid must have a social character, that is, it must, in principle, only cover certain categories of passengers travelling on a route (for instance passengers with particular needs like children, people with disabilities, people on low incomes, students, elderly people, etc.); however, where the route concerned links remote regions, such as outermost regions, islands, and sparsely populated areas, the aid could cover the entire population of that region;

(c) the aid must be granted without discrimination as to the origin of the services, meaning irrespective of the airline which is operating the services.

157. Member States are strongly encouraged to notify national schemes for aid of a social character, rather than individual aid measures.

7. CUMULATION

158. The maximum aid intensities applicable under these guidelines apply regardless of whether the aid is financed entirely from State resources or is partly financed by the Union.

159. Aid authorised under these guidelines may not be combined with other State aid, de minimis aid or other forms of Union financing, if such a combination results in an aid intensity higher than that laid down in these guidelines.

8. FINAL PROVISIONS

8.1. Annual reporting


8.2. Transparency

161. The Commission considers that further measures are necessary to improve the transparency of State aid in the Union. In particular, steps must be taken to ensure that the Member States, economic operators, the interested public and the Commission have easy access to the full text of all applicable aid schemes in the aviation sector and to pertinent information about individual aid measures.

162. Member States should publish the following information on a comprehensive State aid website, at national or regional level:

(a) the full text of each approved aid scheme or individual aid granting decision and their implementing provisions;

(b) the identity of the granting authority;

(c) the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME / large company), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level); such a requirement can be waived with respect to individual aid grants below EUR 200 000.

163. The information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the interested public without restrictions (100).

8.3. Monitoring

164. Member States must ensure that detailed records are kept regarding all measures involving the granting of State aid in accordance with these guidelines. Such records must contain all information necessary to establish that the compatibility conditions have been observed, in particular, those regarding eligible costs and maximum allowable aid intensity, where applicable. Those records must be maintained for 10 years from the date on which the aid is granted and be provided to the Commission upon request.

165. In order to allow the Commission to monitor the progress of the phasing out of operating aid to airports and its impact on competition, Member States must submit a regular report (on a yearly basis) on the progress in terms of reduction of operating aid for each airport benefiting from such aid. In certain cases, a monitoring trustee may be appointed to ensure compliance with any conditions and obligations underpinning the authorisation of the aid.


(100) This information should be regularly updated (e.g. every 6 months) and should be available in non-proprietary formats.
8.4. Evaluation

166. To further ensure that distortions of competition and trade are limited, the Commission may require that certain schemes be subject to a limited duration and to an evaluation. Evaluations should, in particular, be carried out for schemes where the potential distortions are particularly high, that is to say schemes that may risk significantly restricting competition if their implementation is not reviewed in due time.

167. Given its objectives and in order not to put a disproportionate burden on Member States and on smaller aid measures, this requirement applies only in respect of aid schemes with large aid budgets, containing novel characteristics or where significant market, technology or regulatory changes are foreseen. The evaluation must be carried out by an expert independent from the aid granting authority on the basis of a common methodology\(^{(101)}\) and must be made public.

168. The evaluation must be submitted to the Commission in due time to allow for the assessment of the possible prolongation of the aid scheme and in any case upon expiry of the scheme. The precise scope and methodology of the evaluation that is to be carried out will be defined in the decision approving the aid scheme. Any subsequent aid measure with a similar objective must take into account the results of that evaluation.

8.5. Appropriate measures

169. Member States should, where necessary, amend their existing schemes in order to bring them into line with these guidelines by 12 months at the latest after 4 April 2014.

170. Member States are invited to give their explicit unconditional agreement to these guidelines within two months following 4 April 2014. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

8.6. Application

171. The principles in these guidelines will be applied from 4 April 2014. These guidelines replace the 1994 Aviation Guidelines and the 2005 Aviation Guidelines from that date.

172. In the light of the development of the aviation sector, and in particular its liberalisation, the Commission considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State Aid\(^{(102)}\) should not apply to pending cases of illegal operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period.

173. As regards investment aid to airports, the Commission will apply the principles set out in these guidelines to all notified investment aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the projects were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful investment aid to airports the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful investment aid to airports granted before 4 April 2014.

174. As regards start-up aid to airlines, the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014.

\(^{(101)}\) Such a common methodology may be provided by the Commission.
8.7. **Review**

175. The Commission may undertake an evaluation of these guidelines at any time and will do so at the latest six years after 4 April 2014. That evaluation will be based on factual information and the results of wide-ranging consultations conducted by the Commission on the basis of data provided by Member States and stakeholders. The Commission will reassess the situation of airports with annual passenger traffic up to 700,000 in order to determine the need for continued specific compatibility rules on operating aid in favour of this category of airport in the light of the future prospects for full operating cost coverage, in particular with regard to the change of market conditions and profitability prospects.

176. After consulting Member States, the Commission may replace or supplement these guidelines on the basis of important competition policy or transport policy considerations.
### ANNEX

**Summary of the compatibility conditions**

#### Table 1

Overview of compatibility conditions for aid to airports

<table>
<thead>
<tr>
<th>Compatibility conditions</th>
<th>Investment aid to the airport</th>
<th>Operating aid to the airport</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a) Contribution to a well-defined objective of common interest</strong></td>
<td>— Increasing mobility by establishing access points for intra-EU flights</td>
<td></td>
</tr>
<tr>
<td></td>
<td>— Combating congestion at major hubs</td>
<td></td>
</tr>
<tr>
<td></td>
<td>— Facilitating regional development</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Duplication of airports and unused capacity in absence of satisfactory medium-term prospects for use does not contribute to a well defined objective of common interest.</td>
<td></td>
</tr>
<tr>
<td><strong>b) Need for State intervention</strong></td>
<td>&lt; 3 million passengers</td>
<td>&lt; 3 million passengers</td>
</tr>
<tr>
<td></td>
<td>&gt; 3–5 million passengers under certain case-specific circumstances</td>
<td></td>
</tr>
<tr>
<td></td>
<td>&gt; 5 million passengers only in very exceptional circumstances</td>
<td></td>
</tr>
<tr>
<td><strong>c) Appropriateness of the aid measure</strong></td>
<td>The aid measure must be an appropriate policy instrument to address the objective of common interest</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Consideration of less distortive aid instruments (guarantees, soft loans etc.)</td>
<td>Ex ante as a fixed sum covering the expected funding gap of operating costs (determined on the basis of an ex ante business plan) during a 10 year transitional period.</td>
</tr>
<tr>
<td><strong>d) Incentive effect</strong></td>
<td>Present, if the investment would not have been undertaken or to a different extent (counterfactual or funding gap analysis based on ex ante business plan)</td>
<td>Present, if the level of economic activity of the airport would be significantly reduced in its absence</td>
</tr>
<tr>
<td><strong>e) Proportionality of the aid (aid limited to the minimum)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eligible costs:</td>
<td>Costs relating to investments in airport infrastructure and equipment, except investment costs for non-aeronautical activities</td>
<td>Operating funding gap of the airport</td>
</tr>
<tr>
<td>Maximum permissible aid intensities:</td>
<td>&gt; 3–5 million up to 25 %</td>
<td>During the transitional period: 50 % of the initial average operating funding gap calculated as average of 5 years preceding the transitional period (2009-2013)</td>
</tr>
<tr>
<td></td>
<td>1–3 million up to 50 %</td>
<td><strong>After transitional period of 10 years:</strong> no operating aid allowed (except if granted under horizontal rules)</td>
</tr>
<tr>
<td></td>
<td>&lt; 1 million up to 75 %</td>
<td></td>
</tr>
<tr>
<td>Compatibility conditions</td>
<td>Investment aid to the airport</td>
<td>Operating aid to the airport</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-----------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td><strong>Exceptions:</strong></td>
<td></td>
<td>For airports &lt; 700,000 passengers per annum: 80% of the initial average operating funding gap for 5 years after the beginning of the transitional period</td>
</tr>
</tbody>
</table>

For airports located in remote regions (irrespective of their size) the maximum aid intensities for investment aid to finance airport infrastructure may be increased by up to 20%.

For airports < 1 million passengers per annum located in a peripheral region: intensity may exceed 75% in exceptional circumstances subject to case-by-case assessment.

In case of relocation: proportionality, necessity and maximum aid intensity will be assessed regardless of average traffic.

For airports over 5 million passengers per annum: only under very exceptional circumstances, characterised by a clear market failure and taking into account the magnitude of the investment and the competition distortions.

f) **Avoidance of undue negative effects on competition and trade between Member States**

Open to all potential users and not dedicated to one specific user.

Airports < 5 million passengers per annum: upfront fixed amount or annual instalments to compensate for capital cost funding gap resulting from airport business plan.

Assessment of distortion of competition and effect on trade.

Open to all potential users and not dedicated to one specific user.

Airports < 700,000 passengers per annum: reassessed four years after the beginning of the transitional period.

**Notification requirements for aid schemes and individual aid measures**

Aid schemes:
- airports < 3 million passengers per annum

Individual notifications:
- airports > 3 million passengers per annum
- investment aid to an airport < 1 million passengers per annum exceeding 75% aid intensity
- investment aid granted for the relocation of airports
- mixed passenger/freight airports > 200,000 tonnes of freight during two financial years preceding the notification year
- creation of a new passenger airport (including conversion of existing airfield)
- creation or development of an airport located within 100 kilometres or 60 minutes travelling time from an existing airport

Aid schemes:
- airports < 3 million passengers per annum

Individual notifications:
- mixed passenger/freight airports > 200,000 tonnes of freight during two financial years preceding the notification year
- operating aid to an airport within 100 kilometres or 60 minutes travelling time from other airports
### Table 2
Overview of compatibility conditions for start-up aid to airlines

<table>
<thead>
<tr>
<th>Compatibility conditions</th>
<th>Start-up aid to airlines</th>
</tr>
</thead>
</table>
| a) Contribution to a well-defined objective of common interest | — Increasing mobility by establishing access points for intra-EU flights  
— Facilitating regional development  
No duplication of existing comparable connection operated by a high-speed rail service or by another airport in the same catchment area under comparable conditions |
| b) Need for State intervention                                | — Airports < 3 million passengers per annum  
— Airports located in remote regions irrespective of their size  
— Airports between > 3–5 million passengers per annum only in exceptional circumstances  
— No start-up aid for air links from airports above 5 million passengers per annum |
| c) Appropriateness of the aid measure                         | — Not eligible if the route is already operated by a high-speed rail service or another airport in the same catchment area under the same conditions  
— Ex ante business plan showing profitability of the route at least after 3 years or irrevocable commitment from the airline to operate the route least for a period as long as the period during which it received start-up aid |
| d) Incentive effect                                           | Present, if in the absence of the aid, the level of economic activity of the airline at the airport concerned would be significantly reduced (for example the new route would not have been launched).  
The new route or the new schedule can start only after submitting the application form for aid from the granting authority. |
| e) Proportionality of the aid (aid limited to the minimum)     | — Eligible costs: Airport charges in respect of a route  
— Maximum permissible aid intensities: 50% for a maximum period of 3 years |
| f) Avoidance of undue negative effects on competition and trade between Member States | — Public authorities must make plans public in good time to enable all interested airlines to offer services  
— No cumulation with other types of State aid for operation of a route |
| Notification requirements for aid schemes and individual aid measures | Aid schemes:  
— Airports < 3 million passengers per annum and airports located in remote regions  
Individual notifications:  
— Airports > 3 million passengers per annum, except airports located in remote regions |
Table 3

Social aid

Compatibility conditions

a) Effectively for the benefit of final consumers

b) Of a social character:
   Only covering certain categories of passengers (e.g. with particular needs like children, people with disabilities, people on low incomes, students, elderly people etc.)

   Except: where the route links remote regions (e.g. outermost regions, islands, sparsely populated areas), the aid can cover the entire population of a region

c) Without discrimination as to the origin of the airline operating the services

Table 4

Compatibility of aid in the form of public service compensation

<table>
<thead>
<tr>
<th>Size of airport based on average traffic (passengers per annum)</th>
<th>Applicable legal framework</th>
<th>Notification requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airport managers at airports &lt; 200 000 passengers per annum over the duration of the SGEI entrustment</td>
<td>Article 106(2) of the Treaty Decision 2012/21/EU</td>
<td>Exempt from the notification requirement</td>
</tr>
<tr>
<td>Airlines as regards air links to islands were traffic &lt; 300 000 passengers per annum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Airports above 200 000 passengers per annum over the duration of the SGEI entrustment</td>
<td>Article 106(2) of the Treaty SGEI Framework</td>
<td>Notification required</td>
</tr>
</tbody>
</table>
APPLICATION OF ARTICLES 92 AND 93 OF THE EC TREATY AND ARTICLE 61 OF THE EEA AGREEMENT TO STATE AIDS IN THE AVIATION SECTOR

(94/C 350/07)

(Text within EEA relevance)

I. INTRODUCTION

1. Liberalization of the Community's air transport

1. Community air transport has been characterized by a high level of State intervention and bilateralism. Although a certain measure of competition between air carriers was not excluded, the potentially distorting effects of State aids were, in the past, outweighed by the economically more important rules on control of fares, market access and in particular capacity sharing which were enshrined in restrictive bilateral agreements between Member States.

The Council has, however, now completed its liberalization programme for Community air transport (1). Therefore, in a situation of increased competition within the Community there is a clear need for a stricter application of State aid rules.

2. The measures on market liberalization and competition, which are now in force, have fundamentally changed the economic environment of air transport. They are stimulating competition and have, to some degree, reduced the discretionary powers of national authorities as well as extended the possibilities for air carriers to decide, on the basis of their own economic and financial considerations, fares, new routes and capacities to be put on the market.

(1) The so-called 'first package', adopted in December 1987, introduced new rules on air fares, capacity sharing and market access for intra-Community scheduled services between main airports. The 'second package', adopted in July 1990, allowed access to third and fourth freedom services between virtually all Community airports and significantly extended fifth freedom rights. It also contained important provisions on capacity sharing. Air cargo services were liberalized by regulation in February 1991. In July 1992 the Council adopted the third, and final, package of liberalization measures which allows free exercise of the freedoms of the air within the Community as of 1 January 1993; remaining restrictions on domestic air transport will be eliminated as of 1 April 1997. The package also abolishes passenger capacity sharing and allows the airlines freedom to set fares. In addition, the competition rules have been implemented in the air transport sector to keep pace with these developments and the relevant regulations (Regulations (EEC) No 3975/87 and (EEC) No 3976/87) have been amended in order to include competition within a Member State.

All these factors combined with increasingly aggressive competition on extra-Community markets have led several air carriers to undertake major structural changes which, in some instances, have involved State intervention.

In some cases, these changes have resulted in concentrations and strategic agreements with other airlines. In this respect it should be recalled that Articles 85 and 86 of the Treaty and Articles 53 and 54 of the EEA Agreement are fully enforceable in the aviation sector by virtue of Council Regulations (EEC) No 3975/87 and (EEC) No 3976/87 of 14 December 1987. Moreover, since 1990 the Commission has had at its disposal Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings to scrutinize such operations.

In the more competitive environment State aids might be of substantially increased strategic importance for governments looking for measures to protect the economic interest of their 'own' airlines. This could lead to a subsidy race which would jeopardize both the common interest and the basic objectives of the liberalization process.

I.2. The 1992 State aids report

3. In order to have an accurate view of the situation, the Commission undertook an inquiry in 1991 to 1992 which resulted in an inventory of existing State aids (2) in the air transport sector. This report was published in March 1992.

The report revealed that several airlines were benefiting from State intervention, often direct operating aids or aids aimed at improving the airline's financial structure. Several potential State aids in the form of exclusive rights concessions were also revealed.

It is the Commission's opinion that transparency requirements are not being satisfactorily implemented. In the course of the enquiry the Commission criticized in several cases the gaps in the information communicated. This situation has necessitated the Commission to request additional information in some cases to arrive at definite conclusions.


4. In summer 1993, the Commission set up a committee of experts in the air transport sector ('Comité des Sages') for the purpose of analysing the situation of Community civil aviation and making recommendations for future policy initiatives. The final report was published on 1 February 1994. On State aids the recommendations of the Comité des Sages are as follows:

'Recommendations:

— In the interest of consumers and of the industry itself, financial injections to air carriers (or to airport handling services) in whatever form, should as a rule, be disapproved if they are incompatible with normal commercial practices.

— The European Commission is urged to strictly enforce 'Treaty provisions concerning State aids and to elaborate clear guidelines for evaluating any exceptional application of State aid.

— For a brief period, however, approval of State aids may be considered when this aid serves the Community's interest in a restructuring that leads to competitiveness in this context, support for the transition of an air carrier (or airport handling services) to commercial viability may be in the Community's interest if the position of competitors is safeguarded.

The conditions of such approvals should include, though not necessarily be limited to the following:

(a) a clear and genuine "one time, last time" condition;

(b) the submission of a restructuring plan leading to economic and commercial viability within a specified time frame, proven by access to commercial capital markets. The plan must attract significant interest from the private sector and ultimately lead to privatization;

(c) the validity of such a plan and its chances of success being assessed by independent professionals hired by the European Commission to take part in the Commission's assessment procedure. Results of this assessment should be made public in conjunction with any eventual Commission decision;

(d) the undertaking on the part of the government concerned to refrain from interfering financially or otherwise, in commercial decision making by the carriers concerned;

(e) the prohibition of the airline using public money to buy or to extend its own capacities beyond overall market development. Instead, reduction of capacity should be envisaged;

(f) acceptable proof that the competitive interests of other airlines are not negatively affected;

(g) careful monitoring, assisted by independent professional experts, of the implementation of such a restructuring plan.'

5. In general the Commission welcomes the Comité's assessment which in fact confirms in many issues its current policy. On some other issues the Commission is ready to follow the Comité's recommendations as described in the present guidelines. The Commission, for example, may decide in difficult cases whether it is necessary to seek expert advice and has published a call for tender to draw up a list of suitable aviation experts. The Commission has referred as much as possible to the Comité's recommendations in the individual chapters of these guidelines.

The Commission in executing its responsibilities pursuant to Article 92 and 93 of the Treaty already applies some of the principles recommended by the Comité des Sages. The Commission has for example always examined the impact of the aid on competition within the Community and has also followed the idea that State aids might only be acceptable if they are linked to a comprehensive restructuring programme. The Commission has in recent cases imposed conditions aimed at restraining
the Government's interference in the management of the airline (\(^1\)), and has forbidden the use of the State aid for buying shareholdings in other Community carriers (\(^2\)). Some ideas of the Comité, however, cannot be accepted by the Commission. It is not possible for the Commission to change or disregard the EC Treaty. This means, in particular, that the conditions that the aid is the last one has, of course, to be interpreted in conformity with Community law. This implies that such a condition does not prevent a Member State from notifying a further aid to a company which has already been granted aid. According to the Court of Justice case law, in such a case the Commission will take all the relevant elements into account (\(^3\)). An important element in the Commission's judgement will be the fact that the company has already been granted State aid (see Chapter V). Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company. Moreover, given the fact that Article 222 of the Treaty is neutral with regard to property ownership, the Commission cannot impose the privatization of the airline as a condition of the State aid. However, the participation of private risk sharing capital will be taken into account in the Commission's analysis.

I.4. Objectives of the present guidelines

6. In 1984, the Commission, when outlining its liberalization programme for the air transport sector in the Civil Aviation Memorandum No 2, established a set of guidelines and criteria for the evaluation of State aids in favour of air carriers on the basis of Article 92 and 93 of the EC Treaty (Annex IV of Memorandum No 2) (\(^4\)).

The assessment of the State aids described in the 1992 report (see Chapter I.2) was based on the State aid rules of the Treaty and on the evaluation criteria of Annex IV of Memorandum No 2. One of the purposes of the report was to provide the Commission with updated data that can be used for establishing revised guidelines adapted to the new situation of the European air transport sector.

7. The present new guidelines, which replace the guidelines set out in Memorandum No 2, respond to two main concerns:

— to reflect the completion of the internal market for air transport,

— to increase transparency, at different levels, of the evaluation process, in relation to, first, the data to be provided in the notification by the Member States and, second, to the criteria and procedures applied by the Commission.

8. In order to increase the competitiveness of European airlines, which remains the final goal of the Community (\(^5\)), the Commission stresses that more commercial management is the only way to achieve better financial performance, taking fully into account in this context the employment dimension. State aids should be the exception rather than the rule as they are in principle excluded by Article 92 (1). The Commission is well aware that the Community air carriers are, for structural and other reasons, for the time being, in a difficult situation, and will take these factors into account. However, the present crisis requires serious efforts from carriers who need to adapt to a changing market. The Commission cannot know with certainty what the futures 'aviation landscape' will look like, nor does it have the intention to determine what should essentially be left to the market. The Commission wishes to establish a level playing field on which the Community air carriers can effectively compete. With these objectives in mind, the present guidelines should help to clarify the Commission's position on State aids to air carriers.

II. SCOPE OF THESE GUIDELINES

II.1. State aid for air carriers

9. On 1 January 1994 the Agreement on the European Economic Area (hereinafter the Agreement), concluded by EC and EFTA States, entered into force. The Agreement contains provisions on State aids (Articles 61) which essentially reproduce Article 92 of the Treaty. According to Article 62 of the Agreement the task of applying the State aid rules in the participating EFTA countries is attributed to the EFTA Surveillance Authority (ESA), while the Commission is competent to apply State aid rules in the EC Member States. In this communication the Commission will refer to the European Economic


\(^5\) Commission of the European Communities, 'Memorandum No 2 on civil aviation: progress towards the development of a Community air transport policy', Doc. COM(84) 72 final, 15 March 1994.

Area as to the EEA and to airlines established in the EC and EFTA States as to the European airlines or European competitors.

10. These guidelines cover aid granted by EC Member States in favour of air carriers.

These may include any activities accessory to air transport, direct or indirect subsidisation of which could benefit airlines such as flight schools (\(^{(*)}\)), duty free shops, airport facilities, franchises, airport charges, within the limits which will be defined in the following chapters.

However, this communication does not intend to deal with subsidization of aircraft production (\(^{(*)}\)). On the other hand, aids granted to airlines in order to promote acquisition or operation of certain aircraft are included in the scope of these guidelines.

Whether and on what conditions exclusive rights should be treated pursuant to Article 92 of the Treaty and 61 of the Agreement is discussed in some detail in Chapter VII.

II.2. Relations with third countries

11. The present communication applies to State aids granted by the Member States in the aviation sector. The Commission is aware that State aids granted by third countries to non-Community airlines may affect the Community carriers' competitive position on the routes upon which they compete. However, the fact that non-Community carriers may benefit from State aids cannot be brought forward as a reason for not applying the binding provisions of the Treaty on State aids. These provisions apply irrespective of whether third countries grant aid or not.

Moreover, the conditions for market access and limitation of competition as laid down in most bilateral agreements with third countries appear to be economically far more important than possible State aids.

Therefore, it is not the intention of the Commission to deal with State aids to third country airlines in this communication. If very low tariffs are made possible through State aid by third countries, such cases of tariff dumping must be addressed in the context of the Community's external policy towards third countries in the aviation sector.

II.3. State infrastructure investments

12. The construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids (\(^{(*)}\)). Infrastructure development decisions fall outside the scope of application of this communication in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.

This general principle is only valid for the construction of infrastructures by Member States, and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure. The Commission, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines.

II.4. Fiscal privileges and social aids

13. Article 92 of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims, but defines them in relation to their effects. Consequently, the alleged fiscal or social aim of a particular measure cannot shield it from the application of Article 92 (\(^{(*)}\)) of the Treaty and Article 61 of the Agreement.

In principle, the reduction or the deferral of fiscal or social contributions does not constitute State aid within the meaning of Article 92 (1) of the Treaty and Article 61 (1) of the Agreement but a general measure, unless it confers a competitive advantage to specific undertakings to avoid having to bear costs which would normally have had to be met out of the undertakings' own financial resources, and thereby prevent market forces from having their normal effect (\(^{(*)}\)).

The Commission has a positive approach towards social aid, for it brings economic benefits above and beyond the interest of the firm concerned, facilitating structural changes and reducing hardship and often only even out differences in the obligations placed on companies by national legislations.

\(^{(*)}\) Commission decision opening the Article 92 (2) procedure with regard to the acquisition by KLM of a pilot school, Case C-31/93, OJ No C 293, 29. 10. 1993.

\(^{(*)}\) In this context, it should be mentioned that in the recent past, aircraft manufacturers have taken over from reluctant banks, the financing of a considerable part of aircraft investments. This source of financing has been of great value in particular for some new entrants who had particular problems to obtain access to financing through the banking system. In case aircraft manufacturers had received State aid, one might conclude that this aid has indirectly been of benefit to the aviation industry. The possible effects of State aid to the manufacturing sector on other sectors is, however, outside the scope of these guidelines and will be taken into account while examining these specific aids.


\(^{(*)}\) Court of Justice, Case 173/73, Italy v. Commission, [1974] ECR, p. 709, ground 27 and 28 at 718 to 719.

\(^{(*)}\) Court of Justice, Case 301/87, France v. Commission, [1990] ECR, p. 367 (Boussac case), ground 41 at 362.
III. OPERATIONAL SUBSIDIZATION OF AIR ROUTES

III.1. Operating aids

14. The report on State aids in the aviation sector prepared by the Commission in 1991 to 1992 (**), revealed several direct aids aimed at supporting air services, mostly domestic, by covering their operating losses.

The introduction of consecutive cabotage from 1 January 1993 and the authorization of unrestricted cabotage from 1 April 1997 (*) has led the Council to clarify its position on subsidization of domestic routes. Such subsidization could be detrimental to the implementation of cabotage traffic rights as defined above. Direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption. However, the Commission must also take into account the concern of Member States to promote regional links with disadvantaged areas.

With regard to regional aids, the main concern of the Commission is to preclude that the compensation received could allow the beneficiary companies to cross-subsidize between the subsidized regional routes and the other routes in which they are in competition with EEA air carriers. That is why the Commission considers that direct operational subsidization of air routes can, in principle, only be accepted in the following two cases.

III.2. Public service obligations

15. In the context of air transportation, 'public service obligation' is defined in Council Regulation (EEC) No 2408/92 on access for air carriers to intra-Community air routes (**) as 'any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its economic interest'.

Council Regulation (EEC) No 2408/92 provides that such public service obligations may be imposed on scheduled air services to an airport serving peripheral or development regions in its territory or on a thin route to any regional airport in its territory provided that any such route is considered vital for the economic development of the region in which the airport is located. The Regulation also describes the procedure to be followed when a Member State decides to impose a public service obligation.

16. If no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the public service obligations which have been imposed on that route, the Member State may limit access to that route to only one carrier for a period of up to three years after which the situation must be reviewed (**). The right to operate shall be offered to any Community air carrier entitled to operate such air services by the public tender procedure described in Article 4 of Regulation (EEC) No 2408/92 (**). When the capacity offered exceeds 30,000 seats per year it has to be noted that access to a route may be restricted to one carrier only if other forms of transport are unable to ensure an adequate and uninterrupted service (Article 4 (2)). The objective of this provision is to guarantee that adequate transport links to certain regions can be maintained particularly if the traffic volume is small and other transport modes cannot provide that service.

A Member State may thus reimburse the air carrier selected for carrying out the imposed public service obligation, according to Article 4 (1) (h) of the Regulation. Such reimbursement shall take into account the costs and revenue (that is the deficit) generated by the service. The development and the implementation of these schemes must be transparent. In this respect the Commission would expect the selected company to have an analytical

(*) See Doc. SEC(92) 431 final.
(**) Article 2 (o) of Regulation (EEC) No 2408/92.

(**) Article 4 (1) (d) of Regulation (EEC) No 2408/92.
(**) Community rules on public procurement contracts do not apply to the awarding by law or contract of exclusive concessions, which are exclusively ruled by the procedure provided for pursuant to Article 4 (1) of Regulation (EEC) No 2408/92.
accounting system sophisticated enough to apportion the relevant costs (including fixed costs) and revenues.

17. Article 77 of the Treaty and Article 49 of the Agreement, which provide that aids shall be compatible with the Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service, do not apply to air transport. Article 84 of the Treaty expressly excludes the application of these provisions to air transport and Article 47 of the Agreement provides that Article 49 applies to transport by rail, road and inland waterway. Therefore, the reimbursement of airlines’ losses for fulfilling public service obligation requirements must be assessed on the basis of the general rules of the Treaty which apply to air transport (\(^ \star \)). The acceptability of the reimbursement shall be considered in the light of the State aid principles as interpreted in the Court of Justice’s case law.

18. In this context it is important that the airline which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender.

This bidding procedure enables the Member State to value the offer for that route, and make its choice by taking into consideration both the users’ interest and cost of the compensation. In Regulation (EEC) No 2408/92 the Council has set out uniform and non-discriminatory rules for the distribution of air traffic rights on routes upon which public service obligations have been imposed. Furthermore, the criteria for calculation of the compensation have been clearly established. A reimbursement which is calculated pursuant to Article 4 (1) (h) of the Regulation, on the basis of the operating deficit incurred on a route, cannot involve any overcompensation of the air carrier. The new system set up by the third package, if correctly applied, excludes that reimbursement for public service obligations include aid elements. A compensation of the mere deficit incurred on a specific route (including a reasonable remuneration for capital employed) by an airline which has been fairly selected following an open bidding procedure, is a neutral commercial operation between the relevant State and the selected airline which cannot be considered as aid. The essence of an aid lies in the benefit for the recipient (\(^ \star \)); a reimbursement limited solely to losses sustained because of the operation of a specific route does not bring about any special benefit for the company, which has been selected on the basis of the objective criteria provided for pursuant to Article 4 (1) of the Regulation.

Therefore, the Commission considers that compensation for public service obligations does not involve aid provided that: the carrier has been correctly selected through a call for tender, on the basis of the limitation of access to the route to one single carrier, and the maximum level of compensation does not exceed the amount of deficit as laid down in the bid, in conformity with the relevant provisions of Community law and, in particular, with those of the third package.

19. Moreover, Article 4 (1) (i) of Regulation (EEC) No 2408/92 obliges the Member States to take the measures necessary to ensure that any decision pursuant to this Article can be reviewed effectively and speedily for an infringement of Community law or national implementing rules. It follows from this provision, as well as from the general distribution of tasks between the Community and its Member States, that it is in the first instance for the authorities of the Member States and, in particular, the national courts to ensure the proper application of Article 4 of the Regulation in individual cases. This is particularly true for a Member State which chooses, in the framework of a public tender, the carrier to serve the route which is subject to the public service obligation. It must also be stressed that the Commission may carry out an investigation and take a decision in case the development of a route is being unduly restricted (Article 4 (3) of the Regulation).

However, this last power as well as the rights and obligations of the national authority pursuant to the abovementioned Article 4 (1) (i) are without prejudice to the Commission’s exclusive powers under the State aid rules of the Treaty itself (see also paragraph 15), which cannot be changed by provisions established in the Community’s secondary legislation. In case there is clear evidence that the Member State has not selected the best offer, the Commission may request information from the Member State in order to be able to verify whether the award includes State aid elements. In fact, such elements are likely to occur where the Member State


engages itself to pay more financial compensation to the selected carriers than it would have paid to the carrier which submitted the best (not necessarily cheapest) offer.

20. Article 4 (1) (f) of Regulation (EEC) No 2408/92 refers to the compensation required as just one of the criteria to be taken into consideration for the selection of submissions. The Commission considers however, that the level of compensation is the main selection criterion. Indeed, other criteria such as adequacy, prices and standards required are generally already included in the public service obligations themselves. Consequently, it is only in exceptional cases, duly justified, that the selected carrier could be other than the one which requires the lowest financial compensation.

21. It must be stressed that should the Commission receive complaints on alleged lack of fairness of the awarding procedure it would promptly request information from the Member State concerned. If the Commission concludes that the Member State concerned has not selected the best offer it will most likely consider that the chosen carrier has received aid pursuant to Article 92 of the Treaty and Article 61 of the Agreement. Should the Member State not have notified the aid pursuant to Article 93 (3) of the Treaty, the Commission would consider the aid, in the case that compensation has already been paid, as illegally granted and would open the procedure pursuant to Article 93 (2) of the Treaty. The Commission may issue an interim order suspending the payment of the aid until the outcome of the procedure (29). Within the context of the procedure the Commission may hire or may request the Member State concerned to hire an independent consultant to evaluate the different tenders.

22. Article 5 of Regulation (EEC) No 2408/92 allows for exclusive concessions on domestic routes granted by law or contract, to remain in force, under certain conditions, until their expiry or for three years, whichever deadline comes first. Possible reimbursement given to the carriers benefiting from these exclusive concessions may well involve aid elements, particularly as the carriers have not been selected by an open tender (as foreseen in the case of Article 4 (1) of Regulation (EEC) No 2408/92). The Commission stresses that such reimbursements must be notified in order to allow the Commission to examine whether they include State aid elements.

23. Compensation of losses incurred by a carrier which has not been selected according to Article 4 of Regulation (EEC) No 2408/92 will continue to be assessed under the general State aid rules. The same rule applies to compensations which are not calculated on the basis of the criteria of Article 4 (1) (h) of the Regulation.

This means that reimbursements for public services to the Greek islands and the Atlantic islands (Azores) (30) which, for the time being, are excluded from the scope of Regulation (EEC) No 2408/92, are nevertheless subject to Articles 92 and 93 of the Treaty and Article 61 of the Agreement. In its assessment of these compensations, the Commission will verify whether or not the aid diverts significant volumes of traffic or allows carriers to cross-subsidize routes — whether intra-Community, regional or domestic routes — on which they compete with other Community air carriers. This will not be considered to be the case if the reimbursement is based on the costs and the revenues (i.e. the deficit) generated by the service. Again, the Commission underline that such compensation must be notified.

III.3. Aid of a social character

24. Article 92 (2) (a) of the Treaty and 61 (2) (a) of the Agreement exempt aid of a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned. This provision which up to now has only rarely been used, may be of certain relevance in the case of direct operational subsidization of air routes provided the aid is effectively for the benefit of final consumers.

The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.

The aid has to be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operating the services. This also implies the absence of any barrier to entry on the route concerned for all Community air carriers.


IV. DISTINCTION BETWEEN THE STATE'S ROLE AS OWNER OF AN ENTERPRISE AND AS PROVIDER OF
STATE AID TO THAT ENTERPRISE

25. The Treaty establishes both the principle of neutrality with regard to the system of property ownership (\(^{19}\)) and the principle of equality (\(^{20}\)) between public and private undertakings.

There are two stages in the Commission's assessment. To determine whether aid is involved, the Commission, according to the market economy investor principle (see Chapter IV.1), evaluates in the first stage the circumstances of the financial transaction, as the same measure may constitute an aid or a normal commercial transaction. In case the Commission considers that the measure involves aid elements, the Commission will, in a second stage determine whether the aid is compatible with the common market under the derogations of Article 92 (3) of the Treaty and Article 61 (3) of the Agreement (see Chapter V).

The Commission shall come to a reasoned conclusion on the State aid character of the financial transaction. The Commission shall check the validity and coherence of the financial transaction and verify whether it is commercially reasonable.

26. It is not the Commission's task to prove that the programme financed by the State will be profitable beyond all reasonable doubt before accepting it as a normal commercial transaction. The Commission cannot replace the judgement of the investor, but must establish with reasonable certainty that the programme financed by the State would be acceptable to the market economy investor. If there are characteristics of the operation indicating that an owner would not risk his own capital in similar circumstances, such operations shall be considered as State aid.

In deciding whether any public funds to public undertakings constitute aid, the Commission will take into account the factors discussed below for each type of intervention covered by this communication. These factors are given as a guide to Member States on the Commission's attitude in individual cases. In conformity with the principle of neutrality, as a general rule the aid will be assessed as the difference between the terms on which the funds were made available by the State to the airline, and the terms which a private investor operating under normal market conditions would find acceptable in providing funds to a comparable private undertaking (\(^{20}\)).

If the aid is used to write off part losses any tax credits attaching to the losses must be added to the amount of the aid. If those tax credits were retained to offset against future profits or sold or transferred to third parties the firm would be receiving the aid twice.

IV.1. Capital injections

27. Capital injections do not involve State aid when the public holding in a company is to be increased, provided the capital injected is proportionated to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance (\(^{19}\)).

28. The market economy investor principle will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.

The Commission will accordingly analyse the past, present and future commercial and financial situation of the company.

In its assessment, the Commission will normally not limit itself to the short term profitability of the company. The behaviour of a private investor, with which the intervention of the public investor

\(^{19}\) Article 222 of the Treaty: 'This Treaty shall in no way prejudice the rules in Member States governing the systems of property ownership'.


\(^{20}\) 'Commission communication to the Member States' of 17 September 1984, see point 3.2.
has to be compared, is not necessarily that of an investor who is placing his capital with a view to more or less short-term profitability. The correct analogy is a private company pursuing a structural policy and guided by profitability perspectives in the longer term according to its sector of operations (\(^*\)).

A holding company may inject new capital to ensure the survival of a subsidiary temporary difficulties, but which, after a restructuring, if necessary, will become profitable again in the longer term. Such decisions can be motivated not only by the possibility of securing a profit, but also by other concerns such as maintaining the standing of a whole group or redirecting its activities (\(^*\)).

In any case the State, in common with any other market economy investor, should expect within a reasonable time a normal rate of return on capital investments. If the normal return is neither forthcoming in the short term nor likely to be forthcoming in the long term, then it can be assumed that the company is being aided and the State is forgoing the benefit which a market economy investor would expect from a similar investment.

A market economy investor would normally provide equity finance if the present value (\(^*\)) of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay.

29. To assess whether such a normal return on investment may be expected within a reasonable time, the Commission will need to examine the financial projections of the airline concerned. In examining if the financial projections are realistic, the Commission may assess the airline’s situation in the following areas:

(a) Financial performance. Different indicators may be taken into account, for example:

- gearing ratios (debt/equity) and cashflow are important indicators for the standing of an individual company, as they permit an assessment of the company’s ability to finance investments and ongoing operations, from its own resources (\(^*\)),

- operating and net results may be analysed over a period of several years. Profitability ratios may be determined and the trends originated therein may be assessed,

- future capital values and future dividend payments.

(b) Economic and technical efficiency. The indicators which may be considered are, for example:

- operating costs and labour productivity,

- fleet age could be an important element of the assessment. An airline whose fleet age is higher than the European average will certainly be handicapped due to the substantial investment required for fleet renewal. Furthermore, this situation is usually associated with a lack of investment or with previous inopportune investment and would be considered as a negative factor under the market economy investor principle.

(c) Commercial strategy for different markets

The trends of the different markets on which the company competes (the past, present and future situation), the market share held by the company over a sufficient period and the company’s market potential may be evaluated and the projections carefully assessed.

The Commission is aware of the difficulties involved in making such comparisons between undertakings established in different Member States due in particular to different accounting practices or standards or the structure and organization of these

\(^*\) Court of Justice Case 305/89, Alfa Romeo, see ground 20; Case 303/88, ENI-Lanerossi, see ground 22; ‘Report on the evaluation of aid schemes established in favour of Community air carriers’, Doc. SEC(92) 431 final, see Annex 2 at 50.

\(^*\) Court of Justice Case 303/88, ENI-Lanerossi, see ground 21; judgement of 14 September 1994, Joined Cases C-278/92, C-279/92 and C-280/92, Spain v. Commission (Imerpil), ground 25, not yet published.

\(^*\) Future cash flows discounted at the company’s marginal cost of borrowing or cost of capital.

\(^*\) Case 301/87, Boussac, see ground 40 at 361.
undertakings (e.g. importance of the freight transport). It will bear this in mind when choosing the appropriate reference points to be used as a comparison with the public undertakings receiving funds.

30. In applying the market economy investor principle, the Commission will take into account the general economic environment of the airline industry.

Following a short-term crisis, operating results of a company may deteriorate considerably. However, during normal periods with macroeconomic stability, the air transport industry has, like many other service sectors, always shown considerable growth. Consequently, despite short-term problems, a company whose structure is basically sound may have good prospects for the future despite a general down-turn in the performance of the industry.

31. In the case of loss-making undertakings, necessary improvements and restructuring measures are fundamental in the Commission's assessment. These measures must form a coherent restructuring programme. The Commission particularly appreciates situations where restructuring plans are established by external and independent financial advisers after a study. Following the Comité des Sages' recommendation (see Chapter I.3) the Commission may if necessary, seek the advice of an independent expert on the validity of the plan.

IV.2. Loan financing

32. The Commission will apply the market economy investor principle to assess whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission will take into account in particular both the interest rate charged and the security sought to cover the loan. The Commission will examine whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time the loan is made.

The aid element will amount to the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such.

IV.3. Guarantees

33. As regards guarantees, these guidelines fully reflect the general Commission position. The Commission has communicated to the Member States its position vis-à-vis loan guarantees (14). According to this letter, all guarantees given by the State directly or by way of delegation through financial institutions, fall within the scope of Article 92 (1) of the EC Treaty. It is only if the guarantees are assessed at the granting stage that all the distortions or potential distortions of competition may be detected. The Commission will accept the guarantees only if they are contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting undertaking or any similar procedure. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation (see Chapter IV.1). The aid element of this guarantee would be the difference between the rate which the borrower would pay in a free market and that actually obtained because of the guarantee net of any premium paid. If no financial institution, taking into consideration the airline's poor financial situation, would lend money without a State guarantee, the entire amount of the borrowing will be considered aid (15).

34. Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee, when such status allows the enterprise in question to obtain credit on terms more favourable than would otherwise be available (16).

In the same context, the Commission considers that when a public authority takes a holding in an ailing company as a consequence of which, according to national law, it is exposed to unlimited liability instead of the normal limited liability, this is equivalent to giving an open-ended guarantee which artificially keeps the undertaking in operation. Such a situation has therefore to be regarded as an aid (17).

(17) 'Commission communication to the Member States on the application of Article 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector', see point 38.2.
V. EXEMPTIONS UNDER ARTICLE 92 (3) (a) AND (c) OF THE TREATY AND ARTICLE 61 (3) (a) AND (c) OF THE AGREEMENT

35. As mentioned under Chapter II.1 above, in cases where the Commission considers that the measures involve aid elements, the Commission shall determine if any of the exceptions provided by Article 92 (3) of the Treaty could apply in order to exempt the aid.

V.1. Regional aids on the basis of Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement

36. The Commission has set out its guidelines for the evaluation of regional aids mainly in its communication of 1988 which applies to air transport (*). Regional aid for companies established in a disadvantaged region is the normal case which the above-mentioned communications refer to. Pursuant to Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement an exemption may be granted for investment aid to companies investing in certain disadvantaged areas, (e.g. the building of an hangar in an assisted region). Article 92 (3) (c) of the Treaty and Article 61 (3) (c) of the Agreement cannot be invoked to exempt any kind of operating aids, while subparagraph (a) may be used to grant exemptions in favour of companies established or having invested in the eligible regions in order to counterbalance particular difficulties. However, it should be noted that, in principle, Article 92 (3) (a) of the Treaty and Article 61 (3) (a) of the Agreement cannot be invoked to exempt operating aids in the transport sector (in exceptional cases, such as for example the reimbursement for public service obligations to the Portuguese islands which are for the time being not covered by the Third Package, the Commission may use these Articles to exempt operating regional aid; other forms of operating subsidization are also covered in Chapter III above).

The eligibility of regions for regional aid is made following the method and the principles which have been clearly established by the Commission. In its communication of 1988, the Commission has selected the eligible geographic areas according to the level of income per inhabitant and the level of unemployment. In function of this classification, a ceiling between 0 and 75 % applies to the net grant equivalent of the investment aid.

V.2. Exemptions for the development of certain economic activities under Article 92 (3) (c)

37. If, in assessing recapitalization programmes under the market economy investor principle, the Commission reaches the conclusion that aid is involved, it will, in particular, assess whether the aid may be considered as compatible with the common market under Article 92 (3) (c).

Article 92 (3) (c) which provides that aid may be considered compatible with the common market if it facilitates the development of certain economic activities is of particular interest in the evaluation of the relevant aids. Under this provision, the Commission may consider some restructuring aid as compatible with the common market if they meet the requirement that the aid does not adversely affect trading conditions to an extent contrary to the common interest (**). It is in the light of this latter requirement, to be interpreted in the context of the air transport industry, that the Commission has to determine the conditions (***) which will usually need to be met in order to be able to grant an exception.

38. The Commission, in line with the recommendations of the Comité des Sages, (see Chapter I.3 above), will continue with its policy to allow, in exceptional cases, State aid given in connection with a restructuring programme; and in particular, if the aid is given, at least partly, for social purposes facilitating the adaptation of the work force to a higher level of productivity, (e.g. early retirement schemes). However, the Commission’s approval is subject to a number of conditions:

(1) aid must form part of a comprehensive restructuring programme (**), to be approved by the


(**) Case 730/79, Philip Morris Holland, [1980] ECR 2671, at 2691 to 2692, grounds 22 to 26; Case 323/82, Intermills, see ground 39 at 3832; Case 301/87, Boussac, see ground 50 at 364.

(***) Eighth report on Competition policy, point 176.

(***') Cases 296 and 318/82, Leeuwarder, see ground 26 at 825; Case 305/89, Alfa Romeo, see ground 22; Case 303/88, ENI-Lanerossi, see ground 21; Case 323/82, Intermills, see ground 39 at 3832; Commission decision, Case C-21/91, Sabena.
Commission, to restore the airline’s health, so that it can, within a reasonable period, be expected to operate viably, normally without further aid. Thus the aid must be of limited duration;

When evaluating the programme the Commission will be particularly attentive to market analysis and projection for developments in the different market segments, planned cost reductions, closing down of unprofitable routes, efficiency and productivity improvements, expected financial development of the company, expected rates of return, profits, dividends, etc.;

(2) the programme must be self-contained in the sense that no further aid will be necessary for the duration of the programme and that, given the objectives of the programme to return to profitability, no aid is envisaged or likely to be required in the future. The Commission normally requests the written assurance from the Government that the present aid will be the last cash injection from public funds or any other aid, in whatever form, in conformity with Community law (*). Therefore, restructuring aid should normally need only to be granted once;

The Commission is obliged, also in the future, to assess any possible aid and its compatibility with the common market. As stated above, in evaluating a second application for State aid, the Commission has to take into account all relevant elements, including the fact that the company has already received State aid (**). Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company.

Furthermore, the full completion of the common aviation market in 1997 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid unless under very stringent conditions;

(3) if restoration to financial viability and/or the situation of the market require capacity reductions (*), this must be included in the programme;

(4) Aid granted in the aviation sector affects trading conditions between Member States. In order to avoid that the aid affects competition to an unacceptable extent, the difficulties of the airline receiving the aid must not be transferred to its competitors. Therefore, the programme to be financed by the State aid can only be considered not contrary to the common interest (Article 92 (3) (c)) if it is not expansive; that means that its objective must not be to increase the capacity and the offer of the airline concerned, to the detriment of its direct European competitors. In any case, the programme must not lead to an increase beyond market growth, in the number of aeroplanes, or the capacity (seats) offered in the relevant markets. In this context the geographic market to be considered may be the EEA as a whole, or specific regional markets particularly characterized by competition (**);

(5) the Government must not interfere in the management of the company for reasons other than those stemming from its ownership rights and must allow the company to be run according to commercial principles. The Commission may in specific cases require that the company’s statute must be based on private commercial law (**);

(6) the aid must only be used for the purposes of the restructuring programme and must not be disproportionate to its needs. The company must for the period of the restructuring refrain from acquiring shareholdings in other air carriers (**);

(7) the modalities of an aid which conflict with specific provision of the Treaty, other than Articles 92 to 93, may be incontrovertibly linked

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(**) See Court of Justice, Case C-261/89, Comsal, grounds 20 to 21.

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(* ) See Case 305/89, Alfa Romeo, see ground 22; Case 323/82, Intermills, see ground 36 at 3832; Joined Cases C-296/82 and 318/82, Leeuwarder, see ground 26 at 825.

(** ) See Commission decision, Case C-34/93, Aer Lingus.

(** ) See Commission decision, Case C-21/91, ex N 204/91, Sabena.

to the object of the aid such that it would not be possible to consider them in isolation (**). The aid must neither be used for anti-competitive behaviour or purposes, (e.g. violation of rules of the Treaty), nor be detrimental to the implementation of the Community liberalization rules in the air transport sector. A restrictive application of the freedoms guaranteed through the Third Package could create or increase substantial distortions of competition which might further reinforce the anti-competitive effects of the State aid;

(8) any such aids must be structured so that they are transparent and can be controlled.

39. As mentioned above (see Chapter I.3), the Commission cannot follow the recommendation of the Comité des Sages that the restructuring has to lead to privatization. This would be contrary to Article 222 of the EC Treaty which is neutral with regard to property ownership. However, the participation of private risk sharing capital will be taken into account (see also Chapter VI below).

40. The Commission will verify how the restructuring programme, which is financed with the help of the State aid, is realized. It will in particular check that the commitments and conditions, which are part of the Commission’s, approval are fulfilled. Their verification is of particular interest if the aid is paid in instalments. The Commission will normally request that a progress report is submitted at regular intervals and, in any case, in sufficient time before the next payments are being made, in order to allow the Commission to make comments. The Commission may request the assistance of external consultants for this verification.

41. With the creation of the common aviation market as of 1 January 1993 the negative effects of State aids may seriously distort competition in the aviation sector of the EEA to a larger extent than in the past. Through the application of the abovementioned criteria, the Commission seeks to limit as far as possible these distortive effects, while acknowledging that there might be a need for State owned carriers, in particular, to become competitive with the help of a State financed restructuring programme. However, phasing out aids for restructuring over time is necessary to create a more level playing field for competition in the aviation sector. The full completion of the common aviation market in 1977 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid, unless in very exceptional cases and under very stringent conditions.

42. As regards rescue aid, these guidelines follows the general Commission policy (**). Rescue aid for airlines may be justified for the development of a comprehensive restructuring programme in so far as this programme is acceptable under the present guidelines.

VI. PRIVATIZATIONS IN ACCORDANCE WITH ARTICLES 92 TO 93 OF THE TREATY AND 61 OF THE EEA AGREEMENT

43. As the EC Treaty is neutral on public or private ownership of companies, Member States are at liberty to sell their shareholdings in public companies. However, if the sales involve State aid elements, the Commission may become involved.

Following a number of decisions in the area of State aid and privatization, the Commission has developed a number of principles to be applied, to identify aid being paid, when the State shareholder disposes of its shareholding. These are set out below:

(1) Aid is excluded, and therefore notification is not required, if, upon privatization, the following conditions are fulfilled:

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(**) See Court of Justice, Case C-225/91, Matra v. Commission, ground 41.

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(***) Community guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to the Member States), of 27 July 1994, not yet published.
the interested parties have a sufficient period in which to prepare their offer and receive all the necessary information to enable them to undertake a proper evaluation.

(2) On the other hand, the following sales are subject to the pre-notification requirements of Article 93 (3) of the EC Treaty because there is a presumption that they contain aid:

— all sales by way of restricted methods or where the sale takes the form of a direct trade sale,

— all sales which are preceded by a cancellation of debts by the State, public undertakings or any other public body,

— all sales preceded by a conversion of debt into capital or by a recapitalization,

— all sales that are realized in conditions that would not be acceptable for a transaction between market economy investors.

Companies that are sold on the basis of the conditions under subparagraph 2 above must be valued by an independent expert who must indicate, under normal circumstances, a going concern value for the company and, if the Commission believes it necessary, a liquidation value. A report specifying the sales value, or values, and the sales proceeds raised must be provided to the Commission to enable it to establish the actual amount of aid.

In any case it should be noted that the sale of shares in companies being privatized must be effected on the basis of a non-discriminatory procedure having regard to the freedom of establishment of physical and legal persons and to the free movement of capital.

The Commission may find compatible an aid arising from a privatization under the criteria developed in Article 92 (3) of the Treaty and Article 61 (3) of the EEA Agreement (*).
46. The Commission is about to develop common rules at Community level in the area of ground handling assistance and airport charges. Any abuse or infringement of competition rules in these areas will be considered under the relevant provisions of the Treaty particularly, Articles 85 to 90.

VIII. TRANSPARENCY OF FINANCIAL TRANSACTIONS

VIII.1. Lack of transparency

47. The Commission's Report on State Aids in the Aviation Sector carried out in 1991 to 1992 (**) clearly demonstrates that there is a need for both increased transparency and scrutiny in the light of State aid rules:

— in many cases, only capital injections and not other forms of public funds or aid schemes have been notified and thus examined under State aid rules,

— several guarantee schemes of different forms have not been notified or have not been reported with the accuracy requested by the Commission. The Commission has been obliged to request additional information particularly on the conditions and modalities of such guarantees and lists of the operations for which such guarantees have already been granted in past years,

— several cases of financial compensation by the Member States for the performance of public service obligations under different forms, including reduction of the fares financed by the State's budget, compensation of the operational losses of companies providing such services and subsidies to airports located in isolated areas, have been reported. However, in several cases, lack of information has prevented the Commission from assessing the situation and additional information has been requested on this subject, for example, a precise breakdown of the subsidized routes including traffic figures and details of existing competitors.

VIII.2. The transparency Directives 80/723/EEC and 85/413/EEC

48. In order to ensure respect for the principle of non-discrimination and neutrality of treatment, the Commission adopted in 1980, on the basis of Article 90 (3) of the Treaty, a Directive on the transparency of financial relations between Member States and public undertakings (*) which was amended by Directive 85/413/EEC (*) in order to include, among other sectors, the transportation sector previously excluded.

The Directive requires Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent.

Although the transparency in question applies to all public funds, the following are particularly mentioned as falling within its scope:

— the setting-off of operational losses,

— the provision of capital,

— non-refundable grants or loans on privileged terms,

— the granting of financial advantages by foregoing profits or the recovery of sums due,

— the foregoing of a normal return on public funds used,

— compensation for financial burdens imposed by the public authorities.

According to Article 1 of the Directive, not only are the flows of funds directly from public authorities to public undertakings deemed to fall within the scope

of the transparency Directive, but also public funds made available by public authorities through the intermediary of public undertakings or financial institutions.

49. Article 5 of the Transparency Directive obliges, inter alia, Member States to supply the information required to ensure transparency where the Commission considers it necessary. The Commission will act accordingly. The Commission may examine the opportunity of extending the scope of Directive 93/84/EEC (**), which amends Directive 80/723/EEC, to air transport.

IX. ACCELERATED CLEARANCE PROCEDURE FOR AIDS OF LIMITED AMOUNT

50. In the interest of administrative simplification the Commission has decided to set out in this communication an accelerated clearance procedure for small aid schemes in the aviation sector (**).

The Commission will apply a more rapid administrative clearance procedure to new or modified existing aid schemes notified pursuant to Article 93 (3) of the EC Treaty if:

— the aid is linked to specific investment objectives. Operating aids are excluded.

The Commission does not intend to limit the scope of this accelerated clearance procedure to small and medium-sized enterprises (**). Air carriers, even if they are relatively small do not meet the criteria established for SMEs.

The ceiling of ECU 1 million takes into account the characteristics of the air transport industry which is capital intensive. The price of an airplane, for example, largely exceeds the threshold of ECU 1 million. The objective of this accelerated clearance is to speed up the approval of the small aids given mainly for regional purposes not covered by public service obligations.

The Commission will decide on complete notifications within 20 working days.

X. APPLICATION AND FUTURE REPORTING

51. These guidelines will be applied by the Commission as from their publication in the Official Journal of the European Communities.

The Commission will publish at regular intervals reports on the application of State aid rules as well as inventories of existing aids. The next report shall be presented in 1993. The Commission will also decide at the appropriate time on an update of these guidelines.


(**) On 2 July 1992, the Commission adopted a communication on the accelerated clearance of aid for SMES (OJ No C 213, 19. 8. 1992, p. 10) which does not apply to aids in the transport sector.

(*** See communication on the accelerated clearance of aid for SMEs.}
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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1407/2002
of 23 July 2002
on State aid to the coal industry

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, in particular Article 87(3)(e) and Article 89 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Consultative Committee set up in accordance with the Treaty establishing the European Coal and Steel Community (3),

Having regard to the opinion of the Economic and Social Committee (4),

Whereas:


(2) The competitive imbalance between Community coal and imported coal has forced the coal industry to embark on substantial restructuring measures involving major cutbacks in activity over the past few decades.

(3) The Community has become increasingly dependent on external supplies of primary energy sources. As stated in the Green Paper on a European strategy for the security of energy supply adopted by the Commission on 29 November 2000, the diversification of energy sources, both by geographical area and in products, will make it possible to create the conditions for greater security of supply. Such a strategy includes the development of indigenous sources of primary energy, more especially sources of energy used in the production of electricity.

(4) In addition, the world political situation brings an entirely new dimension to the assessment of geopolitical risks and security risks in the energy sector and gives a wider meaning to the concept of security of supplies. In this connection a regular assessment must be made of the risks linked to the Union’s energy supply structure.

(5) As indicated in the Green Paper on a European strategy for the security of energy supply, it is therefore necessary, on the basis of the current energy situation, to take measures which will make it possible to guarantee access to coal reserves and hence a potential availability of Community coal.

(6) In this connection, the European Parliament adopted a Resolution on 16 October 2001 on the Commission Green Paper on a European strategy for the security of energy supply which acknowledges the importance of coal as an indigenous source of energy. The European Parliament said that provision should be made for financial support for coal production, whilst recognising the need for more efficiency in this sector and for cutting back subsidies.

(7) Strengthening the Union’s energy security, which underpins the general precautionary principle, therefore justifies the maintenance of coal-producing capability supported by State aid. However implementing this objective does not put into question the need to continue the restructuring process of the coal industry given that, in the future, the bulk of Community coal production is likely to remain uncompetitive vis-à-vis imported coal.

(8) A minimum level of coal production, together with other measures, in particular to promote renewable energy sources, will help to maintain a proportion of indigenous primary energy sources, which will significantly boost the Union’s energy security. Furthermore, a proportion of indigenous primary energy sources will also serve to promote environmental objectives within the framework of sustainable development.

(2) Opinion delivered on 30 May 2002 (not yet published in the Official Journal).
(9) The strategic context of energy security is of an evolving nature which justifies at medium term an evaluation of this Regulation, taking into account the contributions of all indigenous primary energy sources.

(10) This Regulation does not affect the Member States' freedom to choose what energy sources will make up their supply. Aid, and the amount of it, will be granted in accordance with the rules applying to each category of energy source and on the merits of each of the sources.

(11) In accordance with the principle of proportionality, the production of subsidised coal must be limited to what is strictly necessary to make an effective contribution to the objective of energy security. The aid given by Member States will therefore be limited to covering investment costs or current production losses where mining is part of a plan for accessing coal reserves.

(12) State aid to help maintain access to coal reserves to ensure energy security should be earmarked for production units which could contribute to this objective at satisfactory economic conditions. The application of these principles will help to contribute to the digression of aid to the coal industry.

(13) Given risks related to geological uncertainties, aid to cover initial investment cost allow production units which are viable, or close to economic viability, to implement the technical investments necessary to maintain their competitive capacity.

(14) The restructuring of the coal industry has major social and regional repercussions as a result of the reduction in activity. Production units which are not eligible for aid as part of the objective of maintaining access to coal reserves must therefore be able to benefit, temporarily, from aid to alleviate the social and regional consequences of their closure. This aid will in particular enable the Member States to implement adequate measures for the social and economic development of the areas affected by the restructuring.

(15) Undertakings will also be eligible for aid to cover costs which, in accordance with normal accounting practice, do not affect the cost of production. This aid is intended to cover exceptional costs, inherited liabilities in particular.

(16) The degression of aid to the coal industry will enable the Member States, in accordance with their budgetary constraints, to reallocate the aid granted to the energy sector on the basis of the principle of a gradual transfer of aid normally given to conventional forms of energy, in particular the coal sector, to renewable energy sources. Aid for renewable energy sources will be granted in accordance with the rules and criteria set out in the Community guidelines on State aid for environmental protection (1).

(17) In accomplishing its task, the Community must ensure that normal conditions of competition are established, maintained and complied with. With regard more especially to the electricity market, aid to the coal industry must not be such as to affect electricity producers' choice of sources of primary energy supply. Consequently, the prices and quantities of coal must be freely agreed between the contracting parties in the light of prevailing conditions on the world market.

(18) A minimum level of production of subsidised coal will also help to maintain the prominent position of European mining and clean coal technology, enabling it in particular to be transferred to the major coal-producing areas outside the Union. Such a policy will contribute to a significant global reduction in pollutant and greenhouse gas emissions.

(19) The Commission's authorising power must be exercised on the basis of precise and full knowledge of the measures which governments plan to take. Member States should therefore provide the Commission with a consolidated report showing the full details of the direct or indirect aid which they plan to grant to the coal industry, specifying the reasons for and scope of the proposed aid, its relationship with a plan for accessing coal reserves and, where appropriate, any closure plan submitted.

(20) In order to take account of the deadline set in Directive 2001/80/EC (2) on large combustion plants, Member States should have the possibility to notify the Commission of the individual identity of production units forming part of the closure plans or the plans for accessing coal reserves by June 2004 at the latest.

(21) Provided it is compatible with the present scheme, aid for research and development and aid for environmental protection and training may also be granted by Member States to the coal industry. The aid must be granted in compliance with the requirements and criteria laid down by the Commission for these categories of aid.

(22) The implementation of the provisions of this Regulation on the expiry of the ECSC Treaty and Decision No 3632/93/ECSC may give rise to difficulties for undertakings owing to the fact that two aid schemes will apply during the same calendar year. It is therefore necessary to provide for a transitional period up to 31 December 2002.

(1) OJC 37, 3.2.2001, p. 3.
(2) OJL 309, 27.11.2001, p. 1.
The proposed State aid scheme takes account of very diverse factors which characterise the present coal industry and the Community energy market as a whole. These factors, which may change to a lesser or greater extent, some of them unexpectedly, particularly the ability of Community coal to help strengthen the Union's energy security, need to be re-evaluated during the course of the scheme in the context of sustainable development by way of a report. On the basis of this report, taking into account the different categories of fossil fuels available on the territory of the Community, the Commission will present proposals to the Council which will take account of the development and long-term prospects of the scheme, in particular the social and regional aspects of the restructuring of the coal industry.

This Regulation should enter into force as soon as possible after the expiry of the ECSC Treaty and it should be applied retroactively in order to ensure the full benefit of its provisions.

HAS ADOPTED THIS REGULATION:

CHAPTER 1
GENERAL PROVISIONS AND DEFINITIONS

Article 1
Aim

This Regulation lays down rules for the granting of State aid to the coal industry with the aim of contributing to the restructuring of the coal industry. The rules laid down herein take account of:

— the social and regional aspects of the sector's restructuring,
— the need for maintaining, as a precautionary measure, a minimum quantity of indigenous coal production to guarantee access to reserves.

Article 2
Definitions

For the purposes of this Regulation:

(a) 'coal' means high-grade, medium-grade and low-grade category A and B coal within the meaning of the international codification system for coal laid down by the United Nations Economic Commission for Europe (1);

(b) 'plan for accessing coal reserves': plan drawn up by a Member State, providing for the production of the minimum quantity of indigenous coal necessary to guarantee access to coal reserves;

(c) 'closure plan': plan drawn up by a Member State providing for measures culminating in the definitive closure of coal production units;

(d) 'initial investment costs': fixed capital costs directly related to infrastructure work or to the equipment necessary for the mining of coal resources in existing mines;

(e) 'production costs' means costs related to current production, calculated in accordance with Article 9(3). These cover, apart from mining operations, operations for the dressing of coal, in particular washing, sizing and sorting, and the transport to the delivery point;

(f) 'current production losses' means the positive difference between the coal production cost and the delivered selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.

Article 3
Aid

1. Aid to the coal industry may be considered compatible with the proper functioning of the common market only if it complies with the provisions of Chapter 2, without prejudice to State aid schemes concerning research and technological development, the environment and training.

2. Aid shall cover only costs in connection with coal for the production of electricity, the combined production of heat and electricity, the production of coke and the fuelling of blast furnaces in the steel industry, where such use takes place in the Community.

CHAPTER 2
CATEGORIES OF AID

Article 4
Aid for the reduction of activity

Aid to an undertaking intended specifically to cover the current production losses of production units may be considered compatible with the common market only if it satisfies the following conditions:

(a) operation of the production units concerned shall form part of a closure plan whose deadline does not extend beyond 31 December 2007;

(b) the aid notified per tonne coal equivalent shall not exceed the difference between the foreseeable production costs and the foreseeable revenue for a coal year. The aid actually paid shall be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid was granted;

(c) the amount of aid per tonne coal equivalent may not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries;

(d) aid must not lead to any distortion of competition between coal buyers and users in the Community;

(e) aid must not lead to any distortion of competition on the electricity market, the market of combined heat and electricity production, the coke production market and the steel market.

Article 5

Aid for accessing coal reserves

1. Members States may, in accordance with paragraphs 2 and 3, grant aid to an undertaking, intended specifically to production units or to a group of production units, only if the aid contributes to maintaining access to coal reserves. A production unit may receive aid only under one of the categories referred to in paragraphs 2 or 3. No cumulation of aid under paragraph 2 and paragraph 3 shall be possible.

Aid for initial investment

2. Aid intended to cover initial investment costs may be declared to be compatible with the common market only if it satisfies the conditions laid down in Article 4(c), (d) and (e) and the following conditions:

(a) the aid shall be earmarked for existing production units which have not received aid under Article 3 of Decision No 3632/93/ECSC or which have received aid authorised by the Commission under the said Article 3 having demonstrated that they were able to achieve a competitive position vis-à-vis prices for coal of a similar quality from third countries;

(b) production units shall draw up an operating plan and a financing plan showing that the aid granted to the investment project in question will ensure the economic viability of these production units;

(c) the aid notified and actually paid shall not exceed 30% of the total costs of the relevant investment project which will enable a production unit to become competitive in relation to the prices for coal of a similar quality from third countries.

The aid granted in accordance with this paragraph, whether in the form of a single payment or spread over several years, cannot be paid after 31 December 2010.

Current production aid

3. Aid intended to cover current production losses may be declared to be compatible with the common market only if it satisfies the conditions laid down in Article 4(b) to (e) and the following conditions:

(a) operation of the production units concerned or of the group of production units in the same undertaking forms part of a plan for accessing coal reserves;

(b) aid shall be granted to production units which, with particular reference to the level and pattern of production costs, and within the limits of the quantity of indigenous coal to be produced in accordance with the plan referred to in (a), afford the best economic prospects.

Article 6

Degression of aid

1. The overall amount of aid to the coal industry granted in accordance with Article 4 and Article 5(3) shall follow a downward trend so as to result in a significant reduction. No aid for the reduction of activity may be granted under Article 4 beyond 31 December 2007.

2. The overall amount of aid to the coal industry granted in accordance with Articles 4 and 5 shall not exceed, for any year after 2003, the amount of aid authorised by the Commission in accordance with Articles 3 and 4 of Decision No 3632/93/ECSC for the year 2001.

Article 7

Aid to cover exceptional costs

1. State aid granted to undertakings which carry out or have carried out an activity in connection with coal production to enable them to cover the costs arising from or having arisen from the rationalisation and restructuring of the coal industry that are not related to current production (‘inherited liabilities’) may be considered compatible with the common market provided that the amount paid does not exceed such costs. Such aid may be used to cover:

(a) the costs incurred only by undertakings which are carrying out or have carried out restructuring, i.e. costs related to the environmental rehabilitation of former coal mining sites;

(b) the costs incurred by several undertakings.

2. The categories of costs resulting from the rationalisation and restructuring of the coal industry are defined in the Annex.

Article 8

Common provisions

1. The authorised amount of aid granted in accordance with any provision of this Regulation shall be calculated taking account of the aid granted for the same purposes, in whatever form, by virtue of any other national resource.
2. All aid received by undertakings shall be shown in the profit-and-loss accounts as a separate item of revenue distinct from turnover. Where an undertaking receiving aid granted pursuant to this Regulation is engaged not only in mining but also in another economic activity, the funds granted shall be the subject of separate accounts so that financial flows under this Regulation can be clearly identified. The funds shall be managed in such a way that there is no possibility of their being transferred to the other activity concerned.

CHAPTER 3

NOTIFICATION, APPRAISAL AND AUTHORISATION PROCEDURES

Article 9

Notification

1. In addition to the provisions of Article 88 of the Treaty and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1), aid as referred to in this Regulation shall be subject to the special rules laid down in paragraphs 2 to 12.

2. Member States which grant aid to the coal industry shall provide the Commission with all the information needed, against the current energy background, to justify the estimated production capacity forming part of the plan for accessing coal reserves, the minimum production level needed to guarantee such access, as well as, regarding the categories of aid provided for in this Regulation, the appropriate types of aid, taking account of the specificities of the coal industry in each Member State.

3. Production costs are calculated in accordance with the three-monthly outline statements of costs sent to the Commission by the coal undertakings or associations thereof. The coal undertakings include normal depreciation and interest on borrowed capital in their calculation of production costs. Eligible interest costs on borrowed capital shall be based on market-based interest rates and limited to operations (processes) listed in Article 2(e).

4. Member States which intend to grant aid for the reduction of activity as referred to in Article 4 shall submit beforehand to the Commission a closure plan for the production units concerned by 31 October 2002 at the latest. This plan shall provide for the following minimum elements:

(a) identification of the production units;

(b) the real or estimated production costs for each production unit per coal year; these costs are calculated in accordance with paragraph 3;

(c) estimated coal production, per coal year, of production units forming the subject of a closure plan;

(d) the estimated amount of aid for the reduction of activity per coal year.

5. Member States which intend to grant the aid as referred to in Article 5(2) shall, by 31 December 2002 at the latest, submit to the Commission a provisional plan for accessing coal reserves. That plan shall provide, as a minimum, for objective selection criteria, such as economic viability, to be met by the production units in order to receive aid for investment projects.

6. Member States which intend to grant the aid as referred to in Article 5(3) shall, by 31 October 2002 at the latest, submit to the Commission a plan for accessing coal reserves. That plan shall provide for the following minimum elements:

(a) objective selection criteria to be met by the production units in order to be included in the plan;

(b) identification of production units or a group of production units in the same coal undertaking meeting such selection criteria;

(c) the real or estimated production costs for each production unit per coal year; these costs are calculated in accordance with paragraph 3;

(d) an operating plan and a financing plan for each production unit or group of production units in the same undertaking reflecting the budgetary principles of Member States;

(e) estimated coal production, per coal year, of the production units or group of production units in the same undertaking forming part of the plan for accessing coal reserves;

(f) the estimated amount of aid for accessing coal reserves for each coal year;

(g) the respective shares of indigenous coal and renewable energy sources against the amount of indigenous primary energy sources that contribute to the objective of energy security within the framework of sustainable development and their expected upward or downward trend.

7. As part of the notification of the plans referred to in paragraphs 4, 5 and 6, Member States shall provide the Commission with all the information regarding reductions in greenhouse gas emissions. They shall refer in particular to reductions in emissions resulting from efforts made to use clean coal combustion technologies.

8. Member States may, on duly justified grounds, notify the Commission of the individual identity of production units forming part of the plans referred to in paragraphs 4 and 6 by June 2004 at the latest.

9. Member States shall inform the Commission of any amendments to the plan initially submitted to the Commission in accordance with paragraphs 4, 5, 6, 7 and 8.

10. Member States shall send notification of all the financial support which they intend to grant to the coal industry during a coal year, specifying the nature of the support with reference to the forms of aid provided for in Articles 4, 5 and 7. They shall submit to the Commission all details relevant to the calculation of the foreseeable production costs and their relationship to the plans notified to the Commission in accordance with paragraphs 4, 5, 6, 7 and 8.

11. Member States shall send notification of the amount and full information about the calculation of the aid actually paid during a coal year no later than six months after the end of that year. Before the end of the following coal year, they shall also declare any corrections made to the amounts originally paid.

12. When notifying aid as referred to in Articles 4, 5 and 7 and making the statement of aid actually paid, Member States shall supply all the information necessary for verification of the conditions and criteria set out in these provisions.

Article 10

Appraisal and authorisation

1. The Commission shall appraise the plan(s) notified in accordance with Article 9. The Commission shall take a decision on their conformity with the conditions and criteria set out in Articles 4, 5, 6, 7 and 8 and on their compliance with the objectives of this Regulation, in accordance with the rules of procedure laid down in Regulation (EC) No 659/1999.

2. The Commission shall examine the measures notified in accordance with Article 9(10) in the light of the plans submitted in the framework of Article 9(4), (5), (6), (7) and (8). It shall take a decision in accordance with the requirements of Regulation (EC) No 659/1999.

CHAPTER 4

TRANSITIONAL AND FINAL PROVISIONS

Article 11

Commission reports

1. By 31 December 2006, the Commission shall report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, covering in particular its experience and any problems encountered in the application of this Regulation since its entry into force. It shall evaluate in the light of the measures taken by the Member States the results of the restructuring of the coal industry and the effects on the internal market.

2. It shall present a balance of the respective share of the different indigenous sources of primary energy in each Member State, including the different categories of fossil fuels available. It shall, taking into account the development of renewable sources of energy, evaluate the actual contribution of indigenous coal to long-term energy security in the European Union as part of a strategy of sustainable development, and present its assessment of how much coal is needed to that end.

Article 12

Implementing measures

The Commission shall take all necessary measures for the implementation of this Regulation. It shall establish a joint framework for communication of the information which will enable it to evaluate compliance with the conditions and criteria laid down for the granting of aid.

Article 13

Review measures

1. On the basis of the report produced in accordance with Article 11, the Commission shall, if necessary, submit to the Council proposals for the amendment of this Regulation concerning its application to aid for the period from 1 January 2008. In keeping with the principle of aid reduction, the proposals shall establish, inter alia, the principles on the basis of which Member States’ plans are to be implemented as from 1 January 2008.

2. The principles referred to in paragraph 1 shall be established in the light of the objectives referred to in Article 1, with particular reference to the social and regional consequences of the measures to be taken and the energy context.

Article 14

Entry into force

1. This Regulation shall enter into force the day of its publication in the Official Journal of the European Communities.

It shall apply from 24 July 2002.

2. Aid covering costs for the year 2002 may, however, on the basis of a reasoned request by a Member State, continue to be subject to the rules and principles laid down in Decision No 3632/93/ECSC, with the exception of rules regarding deadlines and procedures.

3. This Regulation shall apply until 31 December 2010.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 23 July 2002.

For the Council
The President
P. S. MØLLER
ANNEX

Definition of costs referred to in Article 7

1. Costs incurred and cost provisions made only by undertakings which are carrying out or have carried out restructuring and rationalisation

   Exclusively:
   (a) the cost of paying social welfare benefits resulting from the pensioning-off of workers before they reach statutory retirement age;
   (b) other exceptional expenditure on workers who lose their jobs as a result of restructuring and rationalisation;
   (c) the payment of pensions and allowances outside the statutory system to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such payments before the restructuring;
   (d) the cost covered by the undertakings for the readaptation of workers in order to help them find new jobs outside the coal industry, especially training costs;
   (e) the supply of free coal to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such supply before the restructuring;
   (f) residual costs resulting from administrative, legal or tax provisions;
   (g) additional underground safety work resulting from the closure of production units;
   (h) mining damage provided that it has been caused by production units subject to closure due to restructuring;
   (i) costs related to the rehabilitation of former coal mining sites, notably:
      — residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water,
      — other residual costs resulting from water supplies and the removal of waste water;
   (j) residual costs to cover former miners' health insurance;
   (k) exceptional intrinsic depreciation provided that it results from the closure of production units (without taking account of any revaluation which has occurred since 1 January 1994 and which exceeds the rate of inflation);

2. Costs incurred and cost provisions made by several undertakings

   (a) increase in the contributions, outside the statutory system, to cover social security costs as a result of the drop, following restructuring, in the number of contributors;
   (b) expenditure, resulting from restructuring, on the supply of water and the removal of waste water;
   (c) increase in contributions to bodies responsible for supplying water and removing waste water, provided that this increase is the result of a reduction, following restructuring, in the coal production subject to levy.