J. SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)
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

(Text with EEA relevance)

(2012/C 8/02)

1. PURPOSE AND SCOPE OF THE COMMUNICATION

1. Services of general economic interest (SGEIs) are not only rooted in the shared values of the Union but also play a central role in promoting social and territorial cohesion. The Union and the Member States, each within their respective powers, must take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

2. Certain SGEIs can be provided by public or private undertakings (4) without specific financial support from Member States' authorities. Other services can only be provided if the authority concerned offers financial compensation to the provider. In the absence of specific Union rules, Member States are generally free to determine how their SGEIs should be organised and financed.

3. The purpose of this Communication is to clarify the key concepts underlying the application of the State aid rules to public service compensation (7). It will therefore focus on those State aid requirements that are most relevant for public service compensation.

4. In parallel with this Communication, the Commission envisages adopting an SGEI-specific de minimis Regulation clarifying that certain compensation measures do not constitute State aid within the meaning of Article 107 of the Treaty (9), and is issuing a Decision (4), which declares certain types of SGEI compensation constituting State aid to be compatible with the Treaty pursuant to Article 106(2) of the Treaty and exempts them from the notification obligation under Article 108(3) of the Treaty, and a Framework (7), which sets out the conditions under which State aid for SGEIs not covered by the Decision can be declared compatible under Article 106(2) of the Treaty.

5. This Communication is without prejudice to the application of other provisions of Union law, in particular those relating to public procurement and requirements flowing from the Treaty and from sectoral Union legislation. Where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with Union law governing public procurement, stemming from Articles 49 to 56 of the Treaty, the Union Directives on public procurement (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 (6) 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 (7)) and sectoral rules (8). Also in cases where the Directives on public procurement are wholly or partially inapplicable (for example, for service concessions and service contracts listed in Annex IIB to Directive 2004/18/EC, including different types of social services), the award may nevertheless have to meet Treaty requirements of transparency, equality of treatment, proportionality and mutual recognition (9).

6. In addition to the issues addressed in this Communication, the Decision 2012/21/EU and the Communication from the Commission on EU Framework for State aid for SGEIs. It will do so inter alia through its Interactive Information Service on Services of General Interest, which is accessible on the Commission's website (10).

(1) In accordance with Article 345 of the Treaty, the Treaties in no way prejudice the rules in Member States governing the system of property ownership. Consequently, the competition rules do not discriminate against companies based on whether they are in public or private ownership.

(2) Further guidance is contained in the Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SEC(2010) 1545 final, 7 December 2010.

(3) See page 23 of this Official Journal.


(5) See page 15 of this Official Journal.


(9) Case C-324/08 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG [2000] ECR I-10745, paragraph 60 and Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2).

(10) http://ec.europa.eu/services_general_interest/registration/form_en.html
7. This Communication is without prejudice to the relevant case-law of the Court of Justice of the European Union.

2. GENERAL PROVISIONS RELATING TO THE CONCEPT OF STATE AID

2.1. Concepts of undertaking and economic activity

8. Based on Article 107(1) of the Treaty, the State aid rules generally only apply where the recipient is an ‘undertaking’. Whether or not the provider of a service of general interest is to be regarded as an undertaking is therefore fundamental for the application of the State aid rules.

2.1.1. General principles

9. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed (1). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too (2). Where this is not the case, non-profit providers remain of course entirely outside of State aid control.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

10. Two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice looks at the existence of a controlling share or functional, economic and organic links (3). On the other hand, an entity that in itself does not provide goods or services on a market is not an undertaking for the simple fact of holding shares, even a majority shareholding, when the shareholding gives rise only to the exercise of the rights attached to the status of shareholder or member as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset (4).

11. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity (5).

12. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned (6). The State aid rules only apply where a certain activity is provided in a market environment. The economic nature of certain services can therefore differ from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa.

13. The decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other

operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house (1) has no relevance for the economic nature of the activity (2).

14. Since the distinction between economic and non-economic services depends on political and economic specificities in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. The following paragraphs instead seek to clarify the distinction with respect to a number of important areas.

15. In the absence of a definition of economic activity in the Treaties, the case-law appears to offer different criteria for the application of internal market rules and for the application of competition law (3).

2.1.2. Exercise of public powers

16. It follows from the Court of Justice case-law that Article 107 of the Treaty does not apply where the State acts 'by exercising public power' (4) or where authorities emanating from the State act 'in their capacity as public authorities' (5). An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject (6). Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to:

(a) the army or the police;

(b) air navigation safety and control (7);

(c) maritime traffic control and safety (8);

(d) anti-pollution surveillance (9); and

(e) the organisation, financing and enforcement of prison sentences (10).

2.1.3. Social security

17. Whether schemes in the area of social security are to be classified as involving an economic activity depends on the way they are set up and structured. In essence, the Court of Justice and the General Court distinguish between schemes based on the principle of solidarity and economic schemes.

18. The Court of Justice and the General Court use a range of criteria to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity. A bundle of factors can be relevant in this respect:

(a) whether affiliation with the scheme is compulsory (11);

(b) whether the scheme pursues an exclusively social purpose (12);

(c) whether the scheme is non-profit (13);


(2) Neither has it any relevance for the question whether the service can be defined as SGEI; see section 3.2.


(4) Case C-118/85 Commission v Italy, paragraphs 7 and 8.


(10) Commission Decision in Case N 140/06 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006.


whether the benefits are independent of the contributions made (1);

(e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured (2); and

(f) whether the scheme is supervised by the State (3).

19. Such solidarity-based schemes must be distinguished from economic schemes (4). In contrast with solidarity-based schemes, economic schemes are regularly characterised by:

(a) optional membership (5);

(b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme) (6);

(c) their profit-making nature (7); and

(d) the provision of entitlements which are supplementary to those under a basic scheme (8).

20. Some schemes combine features of both categories. In such cases, the classification of the scheme depends on an analysis of different elements and their respective importance (9).

2.1.4. Health care

21. In the Union, the health care systems differ significantly between Member States. The degree to which different

health care providers compete with each other in a market environment largely depends on these national specificities.

22. In some Member States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity (10). Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge to affiliated persons on the basis of universal coverage (11). The Court of Justice and the General Court have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings (12).

23. Where that structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another non-economic service, are not of an economic nature. An organisation that purchases goods — even in large quantities — for the purpose of offering a non-economic service does not act as an undertaking simply because it is a purchaser in a given market (13).

24. In many other Member States, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance (14). In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic.

25. The Court of Justice and the General Court have also clarified that health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity (15). The same principles would apply as regards independent pharmacies.

(1) Joined Cases C-159/91 and C-160/91 Poucet and Pistre, paragraphs 15 to 18.

(2) Case C-218/00 Cisal and INAIL, paragraph 40.

(3) Joined Cases C-159/91 and C-160/91 Poucet and Pistre, paragraph 14; Case C-218/00 Cisal and INAIL, paragraphs 43 to 48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband, paragraphs 51 to 55.

(4) See, in particular, Case C-244/94 FFSA and Others, paragraph 19.


(6) Case C-244/94 FFSA and Others, paragraphs 9 and 17 to 20; Case C-67/96 Albany, paragraphs 81 to 83; see also Joined Cases C-115/97 to C-117/97 Brentjens [1999] ECR I-6025, paragraphs 81 to 85, Case C-219/97 Drijvende Bokken [1999] ECR I-6121, paragraphs 71 to 75, and Joined Cases C-180/98 to C-184/98 Pavlov and Others, paragraphs 114 and 115.

(7) Joined Cases C-115/97 to C-117/97 Brentjens.

(8) Joined Cases C-180/98 to C-184/98 Pavlov and Others.

(9) See, for example, Case C-244/94 FFSA, Case C-67/96 Albany, Joined Cases C-115/97, C-116/97 and C-117/97 Brentjens, and Case C-219/97 Drijvende Bokken.

(10) Based on the case-law of the European Courts, a prominent example is the Spanish National Health System (see Case T-319/99 FENIN [2003] ECR II-357).

(11) Depending on the overall characteristics of the system, charges which only cover a small fraction of the true cost of the service may not affect its classification as non-economic.


(13) Case T-319/99 FENIN, paragraph 46.

(14) See, for example, Case C-244/94 FFSA, Case C-67/96 Albany, Joined Cases C-115/97, C-116/97 and C-117/97 Brentjens, and Case C-219/97 Drijvende Bokken.

(15) See Joined Cases C-180 to C-184/98 Pavlov and Others, paragraphs 75 and 77.
2.1.5. Education

26. Case-law of the Union has established that public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. In this regard, the Court of Justice has indicated that the State:

'by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents ... does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas' (1).

27. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse (2). These principles can cover public educational services such as vocational training (3), private and public primary schools (4) and kindergartens (5), secondary teaching activities in universities (6) and the provision of education in universities (7).

28. Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.

29. In the Community Framework for State aid for research and development and innovation (8), the Commission has clarified that certain activities of universities and research organisations fall outside the ambit of the State aid rules. This concerns the primary activities of research organisations, namely:

(a) education for more and better skilled human resources;

(b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; and

(c) the dissemination of research results.

30. The Commission has also clarified that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organisation) are non-economic where those activities are of an internal nature (9) and all income is reinvested in the primary activities of the research organisations concerned (10).

2.2. State resources

31. Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107 of the Treaty (11). Advantages financed from private resources may have the effect of strengthening the position of certain undertakings but do not fall within the scope of Article 107 of the Treaty.

32. This transfer of State resources may take many forms such as direct grants, tax credits and benefits in kind. In particular, the fact that the State does not charge market prices for certain services constitutes a waiver of State

(1) See, among others, Case C-318/05 Commission v Germany [2007] ECR I-6957, paragraph 68. See also Decision of the Commission of 25 April 2001, N 118/00 Subvention publiques aux clubs sportifs professionnels and decision of the EFTA Surveillance Authority in Case 68123 Norway Nasjonal digital laeringsarena, 12.10.2011, p. 9.
(2) Judgment of the EFTA Court of 21 February 2008 in Case E-5/07.
(9) According to footnote 25 of the Community Framework for State aid for research and development and innovation, 'internal nature' means a situation where the management of the knowledge of the research organisation is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.
(10) See paragraphs 3.1.1 and 3.1.2 of the Community Framework for State aid for research and development and innovation.
resources. In its judgment in Case C-482/99 France v Commission (1), the Court of Justice also confirmed that the resources of a public undertaking constitute State resources within the meaning of Article 107 of the Treaty because the public authorities are capable of controlling these resources. In cases where an undertaking entrusted with the operation of an SGEI is financed by resources provided by a public undertaking and this financing is imputable to the State, such financing is thus capable of constituting State aid.

33. The granting, without tendering, of licences to occupy or use public domain, or of other special or exclusive rights having an economic value, may imply a waiver of State resources and create an advantage for the beneficiaries (2).

34. Member States may, in some instances, finance an SGEI from charges or contributions paid by certain undertakings or users, the revenue from which is transferred to the undertakings entrusted with the operation of that SGEI. This type of financing arrangement has been examined by the Court of Justice, in particular in its judgment in Case 173/73 Italy v Commission (3), in which it held that:

‘As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 107 of the Treaty, even if they are administered by institutions distinct from the public authorities.’

35. Similarly, in its judgment in Joined Cases C-78/90 to C-83/90 Compagnie Commerciale de l’Ouest (4), the Court of Justice confirmed that measures financed through parafiscal charges constitute measures financed through State resources.

36. Accordingly, compensatory payments for the operation of SGEIs which are financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation are compensatory payments made through State resources.

2.3. Effect on trade

37. In order to be caught by Article 107 of the Treaty, public service compensation must affect or threaten to affect trade between Member States. Such an effect generally presupposes the existence of a market open to competition. Therefore, where markets have been opened up to competition either by Union or national legislation or de facto by economic development, State aid rules apply. In such situations Member States retain their discretion as to how to define, organise and finance SGEIs, subject to State aid control where compensation is granted to the SGEI provider, be it private or public (including in-house). Where the market has been reserved for a single undertaking (including an in-house provider), the compensation granted to that undertaking is equally subject to State aid control. In fact, where economic activity has been opened up to competition, the decision to provide the SGEI by methods other than through a public procurement procedure that ensures the least cost to the community may lead to distortions in the form of preventing entry by competitors or making easier the expansion of the beneficiary in other markets. Distortions may also occur in the input markets. Aid granted to an undertaking operating on a non-liberalised market may affect trade if the recipient undertaking is also active on liberalised markets (5).

38. Aid measures can also have an effect on trade where the recipient undertaking does not itself participate in cross-border activities. In such cases, domestic supply may be maintained or increased, with the consequence that the opportunities for undertakings established in other Member States to offer their services in that Member State are reduced (6).

39. According to the case-law of the Court of Justice, there is no threshold or percentage below which trade between Member States can be regarded as not having been affected (7). The relatively small amount of aid or the relatively small size of the recipient undertaking does not a priori mean that trade between Member States may not be affected.

(1) [2002] ECR I-4397.
On the other hand, the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Member States. Examples are:

(a) swimming pools to be used predominantly by the local population (1);

(b) local hospitals aimed exclusively at the local population (2);

(c) local museums unlikely to attract cross-border visitors (3); and

(d) local cultural events, whose potential audience is restricted locally (4).

Finally, the Commission does not have to examine all financial support granted by Member States. Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (5) stipulates that aid amounting to less than EUR 200 000 per undertaking over any period of three years is not caught by Article 107(1) of the Treaty. Specific de minimis thresholds apply in the transport, fisheries and agricultural sectors (6) and the Commission envisages adopting a Regulation with a specific de minimis threshold for local services of general economic interest.

3. CONDITIONS UNDER WHICH PUBLIC SERVICE COMPENSATION DOES NOT CONSTITUTE STATE AID

3.1. The criteria established by the Court of Justice

The Court of Justice, in its Altmark judgment (7), provided further clarification regarding the conditions under which public service compensation does not constitute State aid owing to the absence of any advantage.

43. According to the Court of Justice,

‘Where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article (107(1) of the Treaty). However, for such compensation to escape qualification as State aid in a particular case, a number of conditions must be satisfied.

— ... First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. ...' (8)

— ... Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. ... Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article (107(1) of the Treaty).

— ... Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit ...

— ... Fourth, 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 tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations’ (9).


(7) Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, paragraphs 87 to 93.

(8) Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, paragraphs 87 to 93.
44. Sections 3.2 to 3.6 will address the different requirements established in the Altmark case-law, namely the concept of a service of general economic interest for the purposes of Article 106 of the Treaty (1), the need for an entrustment act (2), the obligation to define the parameters of compensation (3), the principles concerning the avoidance of over-compensation (4) and the principles concerning the selection of the provider (5).

45. The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned. The Court of Justice has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities (6).

46. In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI (7) and to assessing any State aid involved in the compensation. Where specific Union rules exist, the Member States’ discretion is further bound by those rules, without prejudice to the Commission’s duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.

47. The first Altmark criterion requires the definition of an SGEI task. This requirement coincides with that of Article 106(2) of the Treaty (8). It transpires from Article 106(2) of the Treaty that undertakings entrusted with the operation of SGEIs are undertakings entrusted with ‘a particular task’ (9). Generally speaking, the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions (10). Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.

48. The Commission thus considers that it would not be appropriate to attach specific public service obligations to an activity which is 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 (11). As for the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error.

49. An important example of this principle is the broadband sector, for which the Commission has already given clear indications as to the types of activities that can be regarded as SGEIs. Most importantly, the Commission considers that in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as an SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions (12).

50. The Commission also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole.

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(1) See section 3.2.
(2) See section 3.3.
(3) See section 3.4.
(4) See section 3.5.
(5) See section 3.6.
(8) Case T-289/03 British United Provident Association Ltd (BUPA) v Commission [2008], ECR II-81, paragraphs 171 and 224.
(9) See section 3.2.
3.3. Entrustment act

51. For Article 106(2) of the Treaty to apply, the operation of an SGEI must be entrusted to one or more undertakings. The undertakings in question must therefore have been entrusted with a special task by the State (1). Also the first Altmark criterion requires that the undertaking has a public service obligation to discharge. Accordingly, in order to comply with the Altmark case-law, a public service assignment is necessary that defines the obligations of the undertakings in question and of the authority.

52. The public service task must be assigned by way of an act that, depending on the legislation in Member States, may take the form of a legislative or regulatory instrument or a contract. It may also be laid down in several acts. Based on the approach taken by the Commission in such cases, the act or series of acts must at least specify:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking by the authority in question;

(d) the parameters for calculating, controlling and reviewing the compensation; and

(e) the arrangements for avoiding and recovering any over-compensation.

53. The involvement of the service provider in the process by which it is entrusted with a public service task does not mean that that task does not derive from an act of public authority, even if the entrustment is issued at the request of the service provider (2). In some Member States, it is not uncommon for authorities to finance services which were developed and proposed by the provider itself. However, the authority has to decide whether it approves the provider's proposal before it may grant any compensation. It is irrelevant whether the necessary elements of the entrustment act are inserted directly into the decision to accept the provider's proposal or whether a separate legal act, for example, a contract with the provider, is put in place.

3.4. Parameters of compensation

54. The parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings.

55. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula (for example, a certain price per day, per meal, per passenger or per number of users). What matters is only that it is clear from the outset how the compensation is to be determined.

56. Where the authority decides to compensate all cost items of the provider, it must determine at the outset how those costs will be determined and calculated. Only the costs directly associated with the provision of the SGEI can be taken into account in that context. All the revenue accruing to the undertaking from the provision of the SGEI must be deducted.

57. Where the undertaking is offered a reasonable profit as part of its compensation, the entrustment act must also establish the criteria for calculating that profit.

58. Where a review of the amount of compensation during the entrustment period is provided for, the entrustment act must specify the arrangements for the review and any impact it may have on the total amount of compensation.

59. If the SGEI is assigned under a tendering procedure, the method for calculating the compensation must be included in the information provided to all the undertakings wishing to take part in the procedure.

3.5. Avoidance of overcompensation

60. According to the third Altmark criterion, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit. Therefore any mechanism concerning the selection of the service provider must be decided in such a way that the level of compensation is determined on the basis of these elements.

61. Reasonable profit should be taken to mean the rate of return on capital (3) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts under competitive conditions (for

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(1) See, in particular, Case C-127/73 BRT v SABAM [1974] ECR-313.
(2) Case T-17/02 Fred Olsen, paragraph 188.

(3) The rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract.
example, contracts awarded under a tender). In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, reference can be made to comparable undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains cannot be achieved at the expense of the quality of the service provided.

### 3.6. Selection of provider

62. In accordance with the fourth Altmark criterion, the compensation offered must either be the result of a public procurement procedure which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means.

#### 3.6.1. Amount of compensation where the SGEI is assigned under an appropriate tendering procedure

63. The simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with 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), as specified below (3). As indicated in paragraph 5, the conduct of such a public procurement procedure is often a mandatory requirement under existing Union rules.

64. Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid.

65. Based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at 'the least cost to the community'.

66. Concerning the characteristics of the tender, an open (4) procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted (5) procedure can satisfy the fourth Altmark criterion, unless interested operators are prevented from tender without valid reasons. On the other hand, a competitive dialogue (6) or a negotiated procedure with prior publication (7) confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases. The negotiated procedure without publication of a contract notice (8) cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the least cost to the community.

67. As to the award criteria, the 'lowest price' (9) obviously satisfies the fourth Altmark criterion. Also the 'most economically advantageous tender' (10) is deemed sufficient, provided that the award criteria, including environmental (11) or social ones, are closely related to the subject-matter of the service provided and allow for the most economically advantageous offer to match the value of the market (12). Where such circumstances occur, a clawback mechanism may be appropriate to minimise the risk of overcompensation ex ante. 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.

68. Finally, there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition. This could be the case, for example, due to

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(3) The Commission intends to amend this Communication once new Union rules on public procurement have been adopted in order to clarify the relevance for State aid purposes of the use of the procedures foreseen in those new rules.
(6) Article 29 of Directive 2004/18/EC.
(8) Article 31 of Directive 2004/18/EC. See also Article 40(3) of Directive 2004/17/EC.
(13) In other words, the criteria should be defined in such a way as to allow for an effective competition that minimises the advantage for the successful bidder.
the particularities of the service in question, existing intellectual property rights or necessary infrastructure owned by a particular service provider. Similarly, in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community.

3.6.2. Amount of compensation where the SGEI is not assigned under a tendering procedure

69. Where a 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 (1).

70. Where no such market remuneration exists, the amount of compensation must be determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately provided with material means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. The aim is to ensure that the high costs of an inefficient undertaking are not taken as the benchmark.

71. As regards the concept of ‘well run undertaking’ and in the absence of any official definition, the Member States should apply objective criteria that are economically recognised as being representative of satisfactory management. The Commission considers that simply generating a profit is not a sufficient criterion for deeming an undertaking to be ‘well run’. Account should also be taken of the fact that the financial results of undertakings, particularly in the sectors most often concerned by SGEIs, may be strongly influenced by their market power or by sectoral rules.

72. The Commission takes the view that the concept of ‘well run undertaking’ entails compliance with the national, Union or international accounting standards in force. The Member States may base their analysis, among other things, on analytical ratios representative of productivity (such as turnover to capital employed, total cost to turnover, turnover per employee, value added per employee or staff costs to value added). Member States can also use analytical ratios relating to the quality of supply as compared with user expectations. An undertaking entrusted with the operation of an SGEI that does not meet the qualitative criteria laid down by the Member State concerned does not constitute a well run undertaking even if its costs are low.

73. Undertakings with such analytical ratios representative of efficient management may be regarded as representative typical undertakings. However, the analysis and comparison of the cost structures must take into account the size of the undertaking in question and the fact that in certain sectors undertakings with very different cost structures may exist side by side.

74. The reference to the costs of a ‘typical’ undertaking in the sector under consideration implies that there are a sufficient number of undertakings whose costs may be taken into account. Those undertakings may be located in the same Member State or in other Member States. However, the Commission takes the view that reference cannot be made to the costs of an undertaking that enjoys a monopoly position or receives public service compensation granted on conditions that do not comply with Union law, as in both cases the cost level may be higher than normal. The costs to be taken into consideration are all the costs relating to the SGEI, that is to say, the direct costs necessary to discharge the SGEI and an appropriate contribution to the indirect costs common to both the SGEI and other activities.

75. If the Member State can show that the cost structure of the undertaking entrusted with the operation of the SGEI corresponds to the average cost structure of efficient and comparable undertakings in the sector under consideration, the amount of compensation that will allow the undertaking to cover its costs, including a reasonable profit, is deemed to comply with the fourth Altmark criterion.

76. The expression ‘undertaking adequately provided with material means’ should be taken to mean an undertaking which has the resources necessary for it to discharge immediately the public service obligations incumbent on the undertaking to be entrusted with the operation of the SGEI.

77. ‘Reasonable profit’ should be taken to mean the rate of return on capital (2) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk, as provided in section 3.5.

(1) See for example Commission Decision in Case C 49/06 — Italy — State aid scheme implemented by Italy to remunerate Poste Italiane for distributing postal savings certificates (OJ L 189, 21.7.2009, p. 3).

(2) The rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract.
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
(notified under document C(2011) 9380)
(Text with EEA relevance)
(2012/21/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 106(3) thereof,

Whereas:

(1) Article 14 of the Treaty requires the Union, without prejudice to Articles 93, 106 and 107 of the Treaty, to use its powers in such a way as to make sure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.

(2) For certain services of general economic interest to operate on the basis of principles and under conditions which enable them to fulfil their missions, financial support from the State may prove necessary to cover some or all of the specific costs resulting from the public service obligations. In accordance with Article 345 of the Treaty, as interpreted by the Court of Justice of the European Union, it is irrelevant whether such services of general economic interest are operated by public or private undertakings.

(3) Article 106(2) of the Treaty states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of these rules does not obstruct, in law or in fact, the performance of the tasks entrusted. This should however not affect the development of trade to such an extent as would be contrary to the interests of the Union.

(4) In its judgment in Altmark (1), the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided that four cumulative criteria 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 must not 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 that 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 tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

(5) Where those criteria are not fulfilled and the general conditions for the applicability of Article 107(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 of the Treaty.

(6) In addition to this Decision, three instruments are relevant for the application of the State aid rules to compensation granted for the provision of services of general economic interest:

(a) a new Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest:


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economics interest (1) clarifies the application of Article 107 of the Treaty and the criteria set by the Altmark ruling to such compensation:

(b) a new Regulation, which the Commission intends to adopt, on the application of Articles 107 and 108 of the Treaty to de minimis aid for the provision of SGEI lays down certain conditions – including the amount of the compensation – under which public service compensations shall be deemed not to meet all the criteria of Article 107(1):

(c) a revised framework for State aid in the form of public service compensation (2) specifies how the Commission will analyse cases that are not covered by this Decision and therefore have to be notified to the Commission.

(7) Commission Decision 2005/842/EC 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 (3) specifies the meaning and extent of the exception pursuant to Article 106(2) of the Treaty and sets out rules intended to enable effective monitoring of the fulfillment of the criteria set out in that provision. This Decision replaces Decision 2005/842/EC and lays down the conditions under which State aid in the form of compensation for a service of general economic interest is not subject to the prior notification requirement of Article 108(3) of the Treaty as it can be deemed compatible with Article 106(2) of the Treaty.

(8) Such aid may be deemed compatible only if it is granted in order to ensure the provision of services of general economic interest as referred to in Article 106(2) of the Treaty. It is clear from the case-law that, in the absence of sectoral Union rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus the Commission’s task is to ensure that there is no manifest error as regards the definition of services of general economic interest.

(9) Provided a number of conditions are met, limited amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below a specified annual amount of compensation provided the requirements of this Decision are met.

(10) Given the development of intra-Union trade in the provision of services of general economic interest, demonstrated for instance by the strong development of multi-national providers in a number of sectors which are of great importance for the development of the internal market, it is appropriate to set a lower limit for the amount of compensation which can be exempted from the notification requirement in accordance with this Decision than what was set by Decision 2005/842/EC, while allowing for that amount to be computed as an annual average over the entrustment period.

(11) Hospitals and undertakings in charge of social services, which are entrusted with tasks of general economic interest, have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that, in the present economic conditions and at the current stage of development of the internal market, social services may require an amount of aid beyond the threshold in this Decision to compensate for the public service costs. A larger amount of compensation for social services does thus not necessarily produce a greater risk of distortions of competition. Accordingly, undertakings in charge of social services, including the provision of social housing for disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision. The same should apply to hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to their main activities, in particular in the field of research. In order to benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision, the same should apply to hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to their main activities, in particular in the field of research.

(12) The extent to which a particular compensation measure affects trade and competition depends not only on the average amount of compensation received per year and the sector concerned, but also on the overall duration of the period of entrustment. Unless a longer period is justified due to the need for a significant investment, for example in the area of social housing, the application of this Decision should therefore be limited to periods of entrustment not exceeding 10 years.

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(2) OJ C 8, 11.1.2012, p. 15.
(13) In order for Article 106(2) of the Treaty to apply, the undertaking in question must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest.

(14) In order to ensure that the criteria set out in Article 106(2) of the Treaty are met, it is necessary to lay down more precise conditions that must be fulfilled in respect of the entrustment of the operation of services of general economic interest. The amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in one or more acts of the competent public authorities in the Member State concerned. The form of the instrument may vary from one Member State to another but it should specify, at least, the undertakings concerned, the precise content and duration of and, where appropriate, the territory concerned by the public service obligations imposed, the granting of any exclusive or special rights, and describe the compensation mechanism and the parameters for determining the compensation and avoiding and recovering any possible overcompensation. In order to ensure transparency in relation to the application of this Decision, the act of entrustment should also include a reference to it.

(15) In order to avoid unjustified distortions of competition, the compensation should not exceed what is necessary to cover the net costs incurred by the undertaking in operating the service, including a reasonable profit.

(16) Compensation in excess of what is necessary to cover the net costs incurred by the undertaking concerned in operating the service is not necessary for the operation of the service of general economic interest, and consequently constitutes incompatible State aid that should be repaid to the State. Compensation granted for the operation of a service of general economic interest but actually used by the undertaking concerned to operate on another market for purposes other than those specified in the act of entrustment is not necessary for the operation of the service of general economic interest, and may consequently also constitute incompatible State aid that should be repaid.

(17) The net cost to be taken into account should be calculated as the difference between the cost incurred in operating the service of general economic interest and the revenue earned from the service of general economic interest or, alternatively, as the difference between the net cost of operating with the public service obligation and the net cost or profit operating without the public service obligation. In particular, if the public service obligation leads to a reduction of the revenue, for instance due to regulated tariffs, but does not affect the costs, it should be possible to determine the net cost incurred in discharging the public service obligation on the basis of the foregone revenue. In order to avoid unjustified distortions of competition, all revenues earned from the service of general economic interest, that is to say, any revenues that the provider would not have obtained had it not been entrusted with the obligation should be taken into account for the purposes of calculating the amount of compensation. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these should be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty.

(18) Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. The rate of return on capital should be defined as the internal rate of return that the undertaking obtains on its invested capital over the duration of the period of entrustment.

(19) Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a risk-free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the provision of capital which is committed for the operation of the service during the period of entrustment.

(20) In cases where the undertaking entrusted with a service of general economic interest does not bear a substantial degree of commercial risk, for instance because the costs it incurs in the operation of the service are compensated in full, profits exceeding the benchmark of the relevant swap rate plus 100 basis points should not be viewed as reasonable.

(21) Where, by reason of specific circumstances, it is not appropriate to use the rate of return on capital, Member States should be able to rely on other profit level indicators to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales.

(22) In determining what constitutes a reasonable profit, the Member States should be able to introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains should not reduce the quality of the service provided. For instance, Member States should be able to define productive efficiency targets in the entrustment act whereby the level of compensation is made...
dependent upon the extent to which the targets have been met. The entrustment act may provide that if the undertaking does not meet the objectives, the compensation is to be reduced by applying a calculation method specified in the entrustment act, whereas if the undertaking exceeds the objectives, the compensation may be increased by applying a method specified in the entrustment act. Any rewards linked to productive efficiency gains should be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

(23) Article 93 of the Treaty constitutes a lex specialis with regard to Article 106(2) of the Treaty. It lays down the rules applicable to public service compensation in the land transport sector. Article 93 has been interpreted by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (4), which lays down the rules applicable to the compensation of public service obligations in public passenger traffic. Its application to inland waterway passenger traffic is at the discretion of the Member States. Regulation (EC) No 1370/2007 exempts from notification pursuant to Article 108(3) of the Treaty all compensation in the land transport sector that fulfils the conditions of that Regulation. In accordance with the judgment in Altmark, compensation in the land transport sector that does not comply with the provisions of Article 93 of the Treaty cannot be declared compatible with the Treaty on the basis of Article 106(2) of the Treaty, or on the basis of any other Treaty provision. Consequently, this Decision does not apply to the land transport sector.

(24) Unlike land transport, the maritime and air transport sectors are subject to Article 106(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport sectors are to be found in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (1) and in 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) (2). However, unlike Regulation (EC) No 1370/2007, those Regulations do not refer to the compatibility of the possible State aid elements, nor do they provide for an exemption from the obligation to notify pursuant to Article 108(3) of the Treaty. This Decision should therefore apply to public service compensation in the air and maritime transport sectors provided that, in addition to fulfilling the conditions set out in this Decision, such compensation also complies with the sectoral rules contained in Regulations (EC) No 1008/2008 and (EEC) No 3577/92 where applicable.

(25) In the specific cases of public service compensation for air or maritime links to islands and for airports and ports which constitute services of general economic interest as referred to in Article 106(2) of the Treaty, it is appropriate to provide thresholds based on the average annual number of passengers as this more accurately reflects the economic reality of these activities and their character of services of general economic interest.

(26) Exemption from the requirement of prior notification for certain services of general economic interest does not rule out the possibility for Member States to notify a specific aid project. In the event of such a notification, or if the Commission assesses the compatibility of a specific aid measure following a complaint or ex officio, the Commission will assess whether the conditions of this Decision are met. If that is not the case, the measure will be assessed in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation.

(27) This Decision should apply without prejudice to the provisions of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (4).

(28) This Decision should apply without prejudice to the Union provisions in the field of competition, in particular Articles 101 and 102 of the Treaty.

(29) This Decision should apply without prejudice to the Union provisions in the field of public procurement.

(30) This Decision should apply without prejudice to stricter provisions relating to public service obligations that are contained in sectoral Union legislation.

(31) Transitional provisions should be laid down for individual aid that was granted before the entry into force of this Decision. Aid schemes put into effect in accordance with Decision 2005/842/EC before the entry into force of this Decision should continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years. Aid put into effect before the entry into force of this Decision that was not awarded in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision should be compatible with the internal market and exempt from the notification requirement.

(2) OJ L 293, 31.10.2008, p. 3.
The Commission intends to carry out a review of this Decision 5 years after its entry into force.

HAS ADOPTED THIS DECISION:

Article 1
Subject matter
This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) of the Treaty.

Article 2
Scope
1. This Decision applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which falls within one of the following categories:

(a) compensation not exceeding an annual amount of EUR 15 million for the provision of services of general economic interest in areas other than transport and transport infrastructure;

where the amount of compensation varies over the duration of the entrustment, the annual amount shall be calculated as average of the annual amounts of compensation expected to be made over the entrustment period;

(b) compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services; the pursuit of ancillary activities directly related to the main activities, notably in the field of research, does not, however, prevent the application of this paragraph;

(c) compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups;

(d) compensation for the provision of services of general economic interest as regards air or maritime links to islands on which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers;

(e) compensation for the provision of services of general economic interest as regards airports and ports for which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 200 000 passengers, in the case of airports, and 300 000 passengers, in the case of ports.

2. This Decision only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years. Where the period of entrustment exceeds 10 years, this Decision only applies to the extent that a significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles.

3. If during the duration of the entrustment the conditions for the application of this Decision cease to be met, the aid shall be notified in accordance with Article 108(3) of the Treaty.

4. In the field of air and maritime transport, this Decision only applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which complies with Regulation (EC) No 1008/2008 and, respectively, Regulation (EEC) No 3577/92 where applicable.

5. This Decision does not apply to State aid in the form of public service compensation granted to undertakings in the field of land transport.

Article 3
Compatibility and exemption from notification
State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) of the Treaty provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation.

Article 4
Entrustment
Operation of the service of general economic interest shall be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The act or acts shall include, in particular:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;
(c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;

(d) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;

(e) the arrangements for avoiding and recovering any overcompensation; and

(f) a reference to this Decision.

Article 5
Compensation

1. The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.

2. The net cost may be calculated as the difference between costs as defined in paragraph 3 and revenues as defined in paragraph 4. Alternatively, it may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation.

3. The costs to be taken into consideration shall comprise all the costs incurred in operating the service of general economic interest. They shall be calculated on the basis of generally accepted cost accounting principles, as follows:

(a) where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration;

(b) where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs related to the service of general economic interest shall be taken into consideration;

(c) the costs allocated to the service of general economic interest may cover all the direct costs incurred in operating the service of general economic interest and an appropriate contribution to costs common to both the service of general economic interest and other activities;

(d) the costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the operation of the service of general economic interest.

4. The revenue to be taken into consideration shall include at least the entire revenue earned from the service of general economic interest, regardless of whether the revenue is classified as State aid within the meaning of Article 107 of the Treaty. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty. The Member State concerned may decide that the profits accruing from other activities outside the scope of the service of general economic interest in question are to be assigned in whole or in part to the financing of the service of general economic interest.

5. For the purposes of this Decision, ‘reasonable profit’ means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. The ‘rate of return on capital’ means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.

6. In determining what constitutes a reasonable profit, Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains shall not reduce the quality of the service provided. Any rewards linked to productive efficiency gains shall be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

7. For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event. The relevant swap rate shall be the swap rate the maturity and currency of which correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.
8. Where, by reasons of specific circumstances, it is not appropriate to use the rate of return on capital, Member States may rely on profit level indicators other than the rate of return on capital to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales. The ‘return’ means the earnings before interests and taxes in that year. The average return is computed using the discount factor over the life of the contract as specified by the Communication from the Commission on the revision of the method for setting the reference and discount rates (1). Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical undertaking considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

9. Where an undertaking carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues. The costs linked to any activities outside the scope of the service of general economic interest shall cover all the direct costs, an appropriate contribution to the common costs and an adequate return on capital. No compensation shall be granted in respect of those costs.

10. Member States shall require the undertaking concerned to repay any overcompensation received.

Article 6
Control of overcompensation

1. Member States shall ensure that the compensation granted for the operation of the service of general economic interest meets the requirements set out in this Decision and in particular that the undertaking does not receive compensation in excess of the amount determined in accordance with Article 5. They shall provide evidence upon request from the Commission. They shall carry out regular checks, or ensure that such checks are carried out, at least every 3 years during the period of entrustment and at the end of that period.

2. Where an undertaking has received compensation in excess of the amount determined in accordance with Article 5, the Member State shall require the undertaking concerned to repay any overcompensation received. The parameters for the calculation of the compensation shall be updated for the future. Where the amount of overcompensation does not exceed 10% of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

Article 7
Transparency

For compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the service of general economic interest, the Member State concerned shall publish the following information on the Internet or by other appropriate means:

(a) the entrustment act or a summary which includes the elements listed in Article 4;

(b) the amounts of aid granted to the undertaking on a yearly basis.

Article 8
Availability of information

The Member States shall keep available, during the period of entrustment and for at least 10 years from the end of the period of entrustment, all the information necessary to determine whether the compensation granted is compatible with this Decision.

On written request by the Commission, Member States shall provide the Commission with all the information that the latter considers necessary to determine whether the compensation measures in force are compatible with this Decision.

Article 9
Reports

Each Member State shall submit a report on the implementation of this Decision to the Commission every 2 years. The reports shall provide a detailed overview of the application of this Decision for the different categories of services referred to in Article 2(1), including:

(a) a description of the application of this Decision to the services falling within its scope, including in-house activities;

(b) the total amount of aid granted in accordance with this Decision, with a breakdown by the economic sector of the beneficiaries;

(c) an indication of whether, for a particular type of service, the application of this Decision has given rise to difficulties or complaints by third parties;

and

(d) any other information concerning the application of this Decision required by the Commission and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.

**Article 10**

**Transitional provisions**

This Decision shall apply to individual aid and aid schemes as follows:

(a) any aid scheme put into effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2005/842/EC shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years;

(b) any aid put into effect before the entry into force of this Decision that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempt from the requirement of prior notification.

**Article 11**

**Repeal**

Decision 2005/842/EC is hereby repealed.

**Article 12**

**Entry into force**

This Decision shall enter into force on 31 January 2012.

**Article 13**

**Addressees**

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2011.

For the Commission

Joaquin ALMUNIA

Vice-President
COMMUNICATION FROM THE COMMISSION

European Union framework for State aid in the form of public service compensation (2011)

(Text with EEA relevance)

(2012/C 8/03)

1. PURPOSE AND SCOPE

1. For certain services of general economic interest (SGEIs) to operate on the basis of principles and under conditions that enable them to fulfil their missions, financial support from the public authorities may prove necessary where revenues accruing from the provision of the service do not allow the costs resulting from the public service obligation to be covered.

2. It follows from the case-law of the Court of Justice of the European Union (1) that public service compensation does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union if it fulfils a certain number of conditions (2). Where those conditions are met, Article 108 of the Treaty does not apply.

3. Where public service compensation does not meet those conditions, and to the extent the general criteria for the applicability of Article 107(1) of the Treaty are satisfied, such compensation constitutes State aid and is subject to Articles 106, 107 and 108 of the Treaty.

4. In its Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (3), the Commission has clarified the conditions under which public service compensation is to be regarded as State aid. Furthermore, in its Commission Regulation 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 (4), the Commission will set out the conditions under which small amounts of public service compensation should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition. In those circumstances, compensation is not caught by Article 107(1) of the Treaty and consequently does not fall under the notification procedure provided for in Article 108(3) of the Treaty.

5. Article 106(2) of the Treaty provides the legal basis for assessing the compatibility of State aid for SGEIs. It states that undertakings entrusted with the operation of SGEIs or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 106(2) of the Treaty provides for an exception from the rules contained in the Treaty insofar as the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. This exception only applies where the development of trade is not affected to such an extent as would be contrary to the interests of the Union.

6. Commission Decision 2012/21/EU (5) 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 (6) lays down the conditions under which certain types of public service compensation are to be regarded as compatible with the internal market rules on competition.

7. The principles set out in this Communication apply to public service compensation only in so far as it constitutes State aid not covered by Decision 2012/21/EU. Such compensation is subject to the prior notification requirement under Article 108(3) of the Treaty. This Communication spells out the conditions under which such State aid can be found compatible with the internal market rules.


(2) In its judgment in Altmark, the Court of Justice held that public service compensation does not constitute State aid if four cumulative criteria 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 tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the relevant means, would have incurred.

(3) See page 23 of this Official Journal.


(5) See page 4 of this Official Journal.

market pursuant to Article 106(2) of the Treaty. It replaces the Community framework for State aid in the form of public service compensation (1).

8. The principles set out in this Communication apply to public service compensation in the field of air and maritime transport, without prejudice to stricter specific provisions contained in sectoral Union legislation. They apply neither to the land transport sector, nor to the public service broadcasting sector, which is covered by the Communication from the Commission on the application of State aid rules to public service broadcasting (2).

9. Aid for providers of SGEIs in difficulty will be assessed under the Community guidelines on State aid for rescuing and restructuring firms in difficulty (3).

10. The principles set out in this Communication apply without prejudice to:

(a) requirements imposed by Union law in the field of competition (in particular Articles 101 and 102 of the Treaty);

(b) requirements imposed by Union law in the field of public procurement;

(c) the provisions of the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (4);

(d) additional requirements flowing from the Treaty or from sectoral Union legislation.

2. CONDITIONS GOVERNING THE COMPATIBILITY OF PUBLIC SERVICE COMPENSATION THAT CONSTITUTES STATE AID

2.1. General provisions

11. At the current stage of development of the internal market, State aid falling outside the scope of Decision 2012/21/EU may be declared compatible with Article 106(2) of the Treaty if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. The conditions set out in sections 2.2 to 2.10 must be met in order to achieve that balance.

2.2. Genuine service of general economic interest as referred to in Article 106 of the Treaty

12. The aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty. In its Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, the Commission has provided guidance on the requirements concerning the definition of a service of general economic interest. In particular, 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. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard.

13. For the scope of application of the principles set out in this Communication, Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account. This does not apply where it is clear that a new consultation will not bring any significant added value to a recent consultation.

2.3. Need for an entrustment act specifying the public service obligations and the methods of calculating compensation

14. Responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The term 'Member State' covers the central, regional and local authorities.

15. The act or acts must include, in particular:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;

(d) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and

16. The act or acts must include, in particular:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;

(d) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and

(3) OJ C 244, 1.10.2004, p. 2.

(e) the arrangements for avoiding and recovering any over-compensation.

2.4. Duration of the period of entrustment

17. The duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.

2.5. Compliance with the Directive 2006/111/EC

18. Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC (1). Aid that does not comply with that Directive is considered to affect the development of trade to an extent that would be contrary to the interest of the Union within the meaning of Article 106(2) of the Treaty.

2.6. Compliance with Union public procurement rules

19. Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.

2.7. Absence of discrimination

20. Where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking.

2.8. Amount of compensation

21. The amount of compensation must not exceed what is necessary to cover the net cost (2) of discharging the public service obligations, including a reasonable profit.

22. The amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset, in accordance with paragraphs 40 and 41.

23. Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided. They must rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. Member States must indicate the sources on which these expectations are based (3). The cost estimation must reflect the expectations of efficiency gains achieved by the SGEI provider over the lifetime of the entrustment.

Net cost necessary to discharge the public service obligations

24. The net cost necessary, or expected to be necessary, to discharge the public service obligations should be calculated using the net avoided cost methodology where this is required by Union or national legislation and in other cases where this is possible.

Net avoided cost methodology

25. Under the net avoided cost methodology, the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation. Due attention must be given to correctly assessing the costs that the service provider is expected to avoid and the revenues it is expected not to receive, in the absence of the public service obligation. The net cost calculation should assess the benefits, including intangible benefits as far as possible, to the SGEI provider.


(1) Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

(2) Public sources of information, cost levels incurred by the SGEI provider in the past, cost levels of competitors, business plans, industry reports, etc.

postal services and the improvement of quality of service, contain more detailed guidance on how to apply the net avoided cost methodology.

27. Although the Commission regards the net avoided cost methodology as the most accurate method for determining the cost of a public service obligation, there may be cases where the use of that methodology is not feasible or appropriate. In such cases, where duly justified, the Commission can accept alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost allocation.

**Methodology based on cost allocation**

28. Under the cost allocation methodology, the net cost necessary to discharge the public service obligations can be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act.

29. The costs to be taken into consideration include all the costs necessary to operate the SGEI.

30. Where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration.

31. Where the undertaking also carries out activities falling outside the scope of the SGEI, the costs to be taken into consideration may cover all the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities. The costs linked to any activities outside the scope of the SGEI must include all the direct costs and an appropriate contribution to the common costs. To determine the appropriate contribution to the common costs, market prices for the use of the resources, where available, can be taken as a benchmark. In the absence of such market prices, the appropriate contribution to the common costs can be determined by reference to the level of reasonable profit (\(^{1}\)) the undertaking is expected to make on the activities falling outside the scope of the SGEI or by other methodologies where more appropriate.

**Revenue**

32. The revenue to be taken into account must include at least the entire revenue earned from the SGEI, as specified in the entrustment act, and the excessive profits generated from special or exclusive rights even if linked to other activities as provided in paragraph 45, regardless of whether those excessive profits are classified as State aid within the meaning of Article 107(1) of the Treaty.

**Reasonable profit**

33. Reasonable profit should be taken to mean the rate of return on capital (\(^{2}\)) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the entrustment act, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.

34. Where duly justified, profit level indicators other than the rate of return on capital can be used to determine what the reasonable profit should be, such as the average return on equity (\(^{3}\)) over the entrustment period, the return on capital employed, the return on assets or the return on sales.

35. Whatever indicator is chosen, the Member State must provide the Commission with evidence that the projected profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.


\(^{2}\) In Chronopost (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P Chronopost SA [2003] ECR I-6993), the European Court of Justice referred to 'normal market conditions': 'In the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available'.

\(^{3}\) The reasonable profit will be assessed from an ex ante perspective (based on expected profits rather than on realised profits) in order not to remove the incentives for the undertaking to make efficiency gains when operating activities outside the SGEI. The rate of return on capital is defined here as 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. In any given year the accounting measure return on equity (ROE) is defined as the ratio between earnings before interests and taxes (EBIT) and equity capital in that year. The average annual return should be computed over the lifetime of the entrustment by applying as discount factor either the company's cost of capital or the rate set by the Commission Reference rate Communication, whatever more appropriate.
36. A rate of return on capital that does not exceed the relevant swap rate (1) plus a premium of 100 basis points (2) is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act.

37. Where the provision of the SGEI is connected with a substantial commercial or contractual risk, for instance because the compensation takes the form of a fixed lump sum payment covering expected net costs and a reasonable profit and the undertaking operates in a competitive environment, the reasonable profit may not exceed the level that corresponds to a rate of return on capital that is commensurate with the level of risk. That rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts awarded under competitive conditions (for example, contracts awarded under a tender). Where it is not possible to apply that method, other methods for establishing a return on capital may also be used, upon justification (3).

38. Where the provision of the SGEI is not connected with a substantial commercial or contractual risk, for instance because the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36. Such a compensation mechanism provides no efficiency incentives for the public service provider. Hence its use is strictly limited to cases where the Member State is able to justify that it is not feasible or appropriate to take into account productive efficiency and to have a contract design which gives incentives to achieve efficiency gains.

Efficiency incentives

39. In devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.

40. Efficiency incentives can be designed in different ways to best suit the specificity of each case or sector. For instance, Member States can define upfront a fixed compensation level which anticipates and incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act.

41. Alternatively, Member States can define productive efficiency targets in the entrustment act whereby the level of compensation is made dependent upon the extent to which the targets have been met. If the undertaking does not meet the objectives, the compensation should be reduced following a calculation method specified in the entrustment act. In contrast, if the undertaking exceeds the objectives, the compensation should be increased following a method specified in the entrustment act. Rewards linked to productive efficiency gains are to be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

42. Any such mechanism for incentivising efficiency improvements must be based on objective and measurable criteria set out in the entrustment act and subject to transparent ex post assessment carried out by an entity independent from the SGEI provider.

43. Efficiency gains should be achieved without prejudice to the quality of the service provided and should meet the standards laid down in Union legislation.

Provisions applicable to undertakings also carrying out activities outside the scope of the SGEI or providing several SGEIs

44. Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31. Where an undertaking is entrusted with the operation of several SGEIs because the granting authority or the nature of the SGEI is different, the undertaking's internal accounts must make it possible to verify whether there has been any over-compensation at the level of each SGEI.

45. If the undertaking in question holds special or exclusive rights linked to activities, other than the SGEI for which aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 107(1) of the Treaty, and added to the undertaking's revenue. The reasonable profit on the activities for which the undertaking holds special or exclusive rights has to be assessed from an ex ante perspective, in the light of the risk, or the absence

(1) The swap rate is the longer maturity equivalent to the Inter-Bank Offered Rate (IBOR rate). It is used in the financial markets as a benchmark rate for establishing the funding rate.

(2) The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the fact that an SGEI provider that invests capital in an SGEI contract commits that capital for the duration of the entrustment act and will be unable to sell its stake as rapidly and at as low a cost as is the case with a widely held and liquid risk-free asset.

(3) For instance, by comparing the return with the weighted average cost of capital (WACC) of the company in relation to the activity in question, or with the average return on capital for the sector in recent years, taking into account whether historical data can be appropriate for forward-looking purposes.
of risk, incurred by the undertaking in question. That assessment also has to take into account the efficiency incentives that the Member State has introduced in relation to the provision of the services in question.

46. The Member State may decide that the profits accruing from other activities outside the scope of the SGEI, in particular those activities which rely on the infrastructure necessary to provide the SGEI, must be allocated in whole or in part to the financing of the SGEI.

Overcompensation

47. Overcompensation should be understood as compensation that the undertaking receives in excess of the amount of aid as defined in paragraph 21 for the whole duration of the contract. As stated in paragraphs 39 to 42, a surplus that results from higher than expected efficiency gains may be retained by the undertaking as additional reasonable profit as specified in the entrustment act (1).

48. Since overcompensation is not necessary for the operation of the SGEI, it constitutes incompatible State aid.

49. Member States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with this the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication (2), checks should normally be made at least every two years.

50. Where the Member State has defined upfront a fixed compensation level which adequately anticipates and incorporates the efficiency gains that the public service provider can be expected to make over the period of entrustment, on the basis of a correct allocation of costs and revenues and of reasonable expectations as described in this section, the overcompensation check is in principle confined to verifying that the level of profit to which the provider is entitled in accordance with the entrustment act is indeed reasonable from an ex ante perspective.

2.9. Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union

51. The requirements set out in sections 2.1 to 2.8 are usually sufficient to ensure that aid does not distort competition in a way that is contrary to the interests of the Union.

52. It is conceivable, however, that in some exceptional circumstances, serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union.

53. In such a case, the Commission will examine whether such distortions can be mitigated by requiring conditions or requesting commitments from the Member State.

54. Serious competition distortions such as to be contrary to the interests of the Union are only expected to occur in exceptional circumstances. The Commission will restrict its attention to those distortions where the aid has significant adverse effects on other Member States and the functioning of the internal market, for example, because they deny undertakings in important sectors of the economy the possibility to achieve the scale of operations necessary to operate efficiently.

55. Such distortions may arise, for instance, where the entrustment either has a duration which cannot be justified by reference to objective criteria (such as the need to amortise non-transferable fixed assets) or bundles a series of tasks (typically subject to separate entrustments with no loss of social benefit and no additional costs in terms of efficiency and effectiveness in the provision of the services). In such a case, the Commission would examine whether the same public service could equally well be provided in a less distortive manner, for instance by way of a more limited entrustment in terms of duration or scope or through separate entrustments.

56. Another situation in which a more detailed assessment may be necessary is where the Member State entrusts a public service provider, without a competitive selection procedure, with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI. Those adverse effects on the development of trade may be more pronounced where the SGEI is to be offered at a tariff below the costs of any actual or potential provider, so as to cause market foreclosure. The Commission, while fully respecting

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(1) Similarly, a deficit which results from efficiency gains lower than expected should be partially borne by the undertaking when stipulated in the entrustment act.

(2) Such as aid granted in relation to in-house contracts, concessions with no competitive allocation, public procurement procedures with no prior publication.
the Member State’s wide margin of discretion to define the SGEI, may therefore require amendments, for instance in the allocation of the aid, where it can reasonably show that it would be possible to provide the same SGEI at equivalent conditions for the users, in a less distortive manner and at lower cost for the State.

57. Closer scrutiny is also warranted where the entrustment of the service obligation is connected with special or exclusive rights that seriously restrict competition in the internal market to an extent contrary to the interest of the Union. While the primary route for apprehending such a case remains Article 106(1) of the Treaty, the State aid may not be deemed compatible where the exclusive right provides for advantages that could not be properly assessed, quantified or apprehended according to the methodologies to calculate the net costs of the SGEI described in section 2.8.

58. The Commission will also pay attention to situations where the aid allows the undertaking to finance the creation or use of an infrastructure that is not replicable and enables it to foreclose the market where the SGEI is provided or related relevant markets. Where this is the case, it may be appropriate to require that competitors are given fair and non-discriminatory access to the infrastructure under appropriate conditions.

59. If distortions of competition are a consequence of the entrustment hindering effective implementation or enforcement of Union legislation aimed at safeguarding the proper functioning of the internal market, the Commission will examine whether the public service could equally well be provided in a less distortive manner, for instance by fully implementing the sectoral Union legislation.

2.10. Transparency

60. For each SGEI compensation falling within the scope of this Communication, the Member State concerned must publish the following information on the internet or by other appropriate means:

(a) the results of the public consultation or other appropriate instruments referred to in paragraph 14;

(b) the content and duration of the public service obligations;

(c) the undertaking and, where applicable, the territory concerned;

(d) the amounts of aid granted to the undertaking on a yearly basis.

2.11. Aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU

61. The principles set out in paragraphs 14, 19, 20, 24, 39, 51 to 59 and 60(a) do not apply to aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU.

3. REPORTING AND EVALUATION

62. Member States shall report to the Commission on the compliance with this Communication every two years. The reports must provide an overview of the application of this Communication to the different sectors of service providers, including:

(a) a description of the application of the principles set out in this Communication to the services falling within its scope, including in-house activities;

(b) the total amount of aid granted to undertakings falling within the scope of this Communication with a breakdown by the economic sector of the beneficiaries;

(c) an indication of whether, for a particular type of service, the application of the principles set out in this Communication has given rise to difficulties or complaints by third parties; and

(d) any other information concerning the application of the principles set out in this Communication required by the Commission and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.


64. The reports will be published on the internet site of the Commission.

65. The Commission intends to carry out a review of this Communication by 31 January 2017.

4. CONDITIONS AND OBLIGATIONS ATTACHED TO COMMISSION DECISIONS

66. Pursuant to Article 7(4) of Regulation (EC) No 659/1999, the Commission may attach to a positive decision conditions subject to which aid may be considered compatible with the internal market, and lay down obligations to enable compliance with the decision to be monitored. In the field of SGEI, conditions and obligations may be necessary in particular to ensure that aid granted to the undertakings concerned does not lead to undue distortions of competition and trade in the internal

market. In this context, periodic reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

5. APPLICATION

67. The Commission will apply the provisions of this Communication from 31 January 2012.

68. The Commission will apply the principles set out in this Communication to all aid projects notified to it and will take a decision on those projects in accordance with those principles, even if the projects were notified prior to 31 January 2012.

69. The Commission will apply the principles set out in this Communication to unlawful aid on which it takes a decision after 31 January 2012 even if the aid was granted before this date. However, where the aid was granted before 31 January 2012, the principles set out in paragraphs 14, 19, 20, 24, 39 and 60 do not apply.

6. APPROPRIATE MEASURES

70. The Commission proposes as appropriate measures for the purposes of Article 108(1) of the Treaty that Member States publish the list of existing aid schemes regarding public service compensation which have to be brought into line with this Communication by 31 January 2013, and that they bring those aid schemes into line with this Communication by 31 January 2014.

71. Member States should confirm to the Commission by 29 February 2012 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.
COMMISSION REGULATION (EU) No 360/2012
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

(TEXT with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (1), and in particular Article 2(1) thereof,

Having published a draft of this Regulation (2),

After consulting the Advisory Committee on State Aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold below which aid measures are considered not to meet all the criteria laid down in Article 107(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 108(3) of the Treaty.

(2) On the basis of that Regulation, the Commission has adopted, in particular, Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (3), which sets a general de minimis ceiling of EUR 200 000 per beneficiary over a period of three fiscal years.

(3) The Commission’s experience in applying the State aid rules to undertakings providing services of general economic interest within the meaning of Article 106(2) of the Treaty has shown that the ceiling below which advantages granted to such undertakings may be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition can, in some cases, differ from the general de minimis ceiling established in Regulation (EC) No 1998/2006. Indeed, at least some of those advantages are likely to constitute compensation for additional costs linked to the provision of services of general economic interest. Moreover, many activities qualifying as the provision of services of general economic interest have a limited territorial scope. It is therefore appropriate to introduce, alongside Regulation (EC) No 1998/2006, a Regulation containing specific de minimis rules for undertakings providing services of general economic interest. A ceiling should be established for the amount of de minimis aid each undertaking may receive over a specific period of time.

(4) In the light of the Commission’s experience, aid granted to undertakings providing a service of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that the total amount of aid granted for the provision of services of general economic interest received by the beneficiary undertaking does not exceed EUR 500 000 over any period of three fiscal years. In view of the development of the road passenger transport sector and of the mostly local nature of services of general economic interest in this field, it is not appropriate to apply a lower ceiling to this sector and the ceiling of EUR 500 000 should apply.

(5) The years to be taken into account for the purpose of determining whether that ceiling is met should be the fiscal years as used for fiscal purposes by the undertaking in the Member State concerned. The relevant period of three years should be assessed on a rolling basis so that, for each new grant of de minimis aid, the total amount of de minimis aid granted in the fiscal year concerned, as well as during the previous two fiscal years, needs to be determined. Aid granted by a Member State should be taken into account for this purpose even when financed entirely or partly by resources of Union origin. It should not be possible for aid measures exceeding the de minimis ceiling to be broken down into a number of smaller parts in order to bring such parts within the scope of this Regulation.

(6) This Regulation should apply only to aid granted for the provision of a service of general economic interest. The beneficiary undertaking should therefore be entrusted in writing with the service of general economic interest in respect of which the aid is granted. While the entrustment act should inform the undertaking of the service of general economic interest in respect of which it is granted, it must not necessarily contain all the detailed information as set out in Commission Decision 2012/21/EU of 20 December 2011 on the application

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(2) OJ C 8, 11.1.2012, p. 23.
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 (7).

(7) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries, aquaculture and road freight transport, of the fact that undertakings in those sectors are rarely entrusted with services of general economic interest, and of the risk that amounts of aid below the ceiling set out in this Regulation could fulfil the criteria of Article 107(1) of the Treaty in those sectors, this Regulation should not apply to those sectors. However, if undertakings are active in the sectors of primary production of agricultural products, fisheries, aquaculture or road freight transport as well as in other sectors or activities, this Regulation should apply to those other sectors or activities (such as for example collection of litter at sea) provided that Member States ensure that the activities in the excluded sectors do not benefit from the de minimis aid under this Regulation, by appropriate means such as separation of activities or distinction of costs. Member States can fulfill this obligation, in particular, by limiting the amount of de minimis aid to the compensation of the costs of the provision of the service, including a reasonable profit. This Regulation should not apply to the coal sector, in view of its special characteristics and of fact that undertakings in those sectors are rarely entrusted with services of general economic interest.

(8) Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, or packing of eggs, nor the first sale to resellers or processors should be considered as processing or marketing in this respect.

(9) The Court of Justice has established (8) that, once the Union has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. For this reason, this Regulation should not apply to de minimis support which is linked to an obligation to share the aid with primary producers.

(10) This Regulation should not apply to de minimis export aid or de minimis aid favouring domestic over imported products.

(11) This Regulation should not apply to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (9) since it is not appropriate to grant operating aid to firms in difficulty outside of a restructuring concept and there are difficulties linked to determining the gross grant equivalent of aid granted to undertakings of this type.

(12) In accordance with the principles governing aid falling within Article 107(1) of the Treaty, de minimis aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.

(13) In order to avoid circumvention of maximum aid intensities laid down in different Union instruments, de minimis aid should not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that specified in the particular circumstances of each case by a block exemption regulation or decision adopted by the Commission.

(14) This Regulation should not restrict the application of Regulation (EC) No 1998/2006 to undertakings providing services of general economic interest. Member States should remain free to rely either on this Regulation or on Regulation (EC) No 1998/2006 as regards aid granted for the provision of services of general economic interest.

(15) The Court of Justice, in its Altmark judgment (10), has identified a number of conditions which must be fulfilled in order for compensation for the provision of a service of general economic interest not to constitute State aid. Those conditions ensure that compensation limited to the net costs incurred by efficient undertakings for the provision of a service of general economic interest does not constitute State aid within the meaning of Article 107(1) of the Treaty. Compensation

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(8) Case C-456/00 French Republic v Commission of the European Communities [2002] I-11949.
(9) OJ C 244, 1.10.2004, p. 2.
in excess of those net costs constitutes State aid which may be declared compatible on the basis of the applicable Union rules. In order to avoid this Regulation being applied to circumvent the conditions identified in the Altmark judgment, and in order to avoid de minimis aid granted under this Regulation affecting trade due to its cumulation with other compensation for the same service of general economic interest, de minimis aid under this Regulation should not be cumulated with any other compensation in respect of the same service, regardless of whether or not it constitutes State aid under the Altmark judgment or compatible State aid under Decision 2012/21/EU or under the Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011) (1). Therefore, this Regulation should not apply to compensation received for the provision of a service of general economic interest in respect of which other types of compensation are also being granted, except where that other compensation constitutes de minimis aid according to other de minimis regulations and the cumulation rules set out in this Regulation are complied with.

(16) For the purposes of transparency, equal treatment and correct application of the de minimis ceiling, all Member States should apply the same method of calculation. In order to facilitate such calculation and in accordance with present practice in applying the de minimis rule, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the grant equivalent of transparent types of aid other than grants and of aid payable in several instalments requires the use of market rates prevailing at the time of granting such aid. With a view to uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates, as currently set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates (2).

(17) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to de minimis aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent ex ante without a need to undertake a risk assessment. Such a precise calculation can, for instance, be made for grants, interest rate subsidies and capped tax exemptions. Aid comprised in capital injections should not be considered as transparent de minimis aid, unless the total amount of the public injection is lower than the de minimis ceiling. Aid comprised in risk capital measures as referred to in the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (3) should not be considered as transparent de minimis aid, unless the risk capital scheme concerned provides capital only up to the de minimis ceiling to each target undertaking. Aid comprised in loans should be treated as transparent de minimis aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of grant.

(18) Legal certainty needs to be provided for guarantee schemes which do not have the potential to affect trade and distort competition and in respect of which sufficient data are available to assess any potential effects reliably. This Regulation should therefore transpose the de minimis ceiling of EUR 500 000 into a guarantee-specific ceiling based on the guaranteed amount of the individual loan underlying such guarantee. This specific ceiling should be calculated using a methodology assessing the State aid amount included in guarantee schemes covering loans in favour of viable undertakings. The methodology and the data used to calculate the guarantee-specific ceiling should exclude undertakings in difficulty as referred to in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. This specific ceiling should therefore not apply to individual aid granted outside the scope of a guarantee scheme, to aid granted to undertakings in difficulty, or to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. The specific ceiling should be determined on the basis of the fact that taking account of a cap rate (net default rate) of 13 %, representing a worst case scenario for guarantee schemes in the Union, a guarantee amounting to EUR 3 750 000 can be considered as having a gross grant equivalent identical to the EUR 500 000 de minimis ceiling. Only guarantees covering up to 80 % of the underlying loan should be covered by these specific ceilings. A methodology accepted by the Commission following notification of such methodology on the basis of a Commission regulation in the State aid area may also be used by Member States for the purpose of assessing the gross grant equivalent contained in a guarantee, if the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

(19) Upon notification by a Member State, the Commission may examine whether an aid measure which does not consist in a grant, loan, guarantee, capital injection, risk capital measure or capped tax exemption leads to a

(1) OJ C 8, 11.1.2012, p. 15.
gross grant equivalent that does not exceed the de minimis ceiling and could therefore be covered by the provisions of this Regulation.

(20) The Commission has a duty to ensure that State aid rules are compiled with and in particular that aid granted under the de minimis rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 4(3) of the Treaty on European Union, Member States should facilitate the fulfilment of this task by establishing the necessary tools in order to ensure that the total amount of de minimis aid granted to the same undertaking for the provision of services of general economic interest does not exceed the overall permissible ceiling. To that end and to ensure compliance with the provisions on cumulation with de minimis aid under other de minimis regulations, when granting de minimis aid under this Regulation, Member States should inform the undertaking concerned of the amount of the aid and of its de minimis character by referring to this Regulation. Moreover, prior to granting such aid the Member State concerned should obtain from the undertaking a declaration about other de minimis aid covered by this Regulation or by other de minimis regulations received during the fiscal year concerned and the two previous fiscal years. Alternatively, the Member State should have the possibility to ensure that the ceiling is observed by means of a central register.

(21) This Regulation should apply without prejudice to the requirements of Union law in the area of public procurement or of additional requirements flowing from the Treaty or from sectoral Union legislation.

(22) This Regulation should apply to aid granted before its entry into force to undertakings providing services of general economic interest.

(23) The Commission intends to carry out a review of this Regulation five years after its entry into force,

HAS ADOPTED THIS REGULATION:

Article 1
Scope and definitions

1. This Regulation applies to aid granted to undertakings providing a service of general economic interest within the meaning of Article 106(2) of the Treaty.

2. This Regulation does not apply to:

(a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000 (1);

(b) aid granted to undertakings active in the primary production of agricultural products;

(c) aid granted to undertakings active in the processing and marketing of agricultural products, in the following cases:

(i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned,

(ii) when the aid is conditional on being partly or entirely passed on to primary producers;

(d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(e) aid contingent upon the use of domestic over imported goods;

(f) aid granted to undertakings active in the coal sector, as defined in Council Decision 2010/787/EU (2);

(g) aid granted to undertakings performing road freight transport for hire or reward;

(h) aid granted to undertakings in difficulty.

If undertakings are active in the sectors referred to in points (a), (b), (c) or (g) of the first subparagraph as well as in sectors not excluded from the scope of application of this Regulation, this Regulation applies only to aid granted in respect of those other sectors or activities, provided that Member States ensure that the activities in the excluded sectors do not benefit from the de minimis aid under this Regulation, by appropriate means such as separation of activities or distinction of costs.

3. For the purposes of this Regulation:

(a) ‘agricultural products’ means products listed in Annex I to the Treaty, with the exception of fishery products;

(b) ‘processing of agricultural products’ means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;

(c) ‘marketing of agricultural products’ means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.


Article 2

De minimis aid

1. Aid granted to undertakings for the provision of a service of general economic interest shall be deemed not to meet all the criteria of Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty if it fulfills the conditions laid down in paragraphs 2 to 8 of this Article.

2. The total amount of de minimis aid granted to any one undertaking providing services of general economic interest shall not exceed EUR 500 000 over any period of three fiscal years.

This ceiling shall apply irrespective of the form of the de minimis aid and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Union origin. The period shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

3. The ceiling laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charges. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment of it being granted. The interest rate to be used for discounting purposes shall be the discount rate applicable at the time of the grant.

4. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without need to undertake a risk assessment (transparent aid). In particular:

(a) aid comprised in loans shall be considered as transparent de minimis aid when the gross grant equivalent has been calculated on the basis of the reference rate applicable at the time of the grant;

(b) aid comprised in capital injections shall not be considered as transparent de minimis aid, unless the total amount of the public injection does not exceed the de minimis ceiling;

(c) aid comprised in risk capital measures shall not be considered as transparent de minimis aid, unless the risk capital scheme concerned provides capital only up to the de minimis ceiling to each target undertaking;

(d) individual aid provided under a guarantee scheme to undertakings which are not undertakings in difficulty shall be treated as transparent de minimis aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 3 750 000 per undertaking. If the guaranteed part of the underlying loan only accounts for a given proportion of this ceiling, the gross grant equivalent of that guarantee shall be deemed to correspond to the same proportion of the ceiling laid down in paragraph 2. The guarantee shall not exceed 80 % of the underlying loan. Guarantee schemes shall also be considered as transparent if:

(i) before the implementation of the scheme, the methodology to calculate the gross grant equivalent of the guarantees has been accepted following notification of this methodology to the Commission under a regulation adopted by the Commission in the State aid area, and

(ii) the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

5. Where the overall amount of de minimis aid under this Regulation granted to an undertaking for the provision of services of general economic interest exceeds the ceiling laid down in paragraph 2, that amount may not benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation may not be claimed for this aid measure.

6. De minimis aid under this Regulation shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that stipulated in the specific circumstances of each case by a block exemption regulation or decision adopted by the Commission.

7. De minimis aid under this Regulation may be cumulated with de minimis aid under other de minimis regulations up to the ceiling laid down in paragraph 2.

8. De minimis aid under this Regulation shall not be cumulated with any compensation in respect of the same service of general economic interest, regardless of whether or not it constitutes State aid.

Article 3

Monitoring

1. Where a Member State intends to grant de minimis aid under this Regulation to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid expressed as gross grant equivalent, of the service of general economic interest in respect of which it is granted and of the de minimis character of the aid, making express reference to this Regulation and citing its title and publication reference in the Official Journal of the European Union. Where de minimis aid under this Regulation is granted to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under that scheme, the Member State concerned may choose to fulfil that obligation by informing
the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under that scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 2(2) is met. Prior to granting the aid, the Member State shall also obtain a declaration from the undertaking providing the service of general economic interest, in written or electronic form, about any other de minimis aid received under this Regulation or under other de minimis regulations during the previous two fiscal years and the current fiscal year.

The Member State shall grant the new de minimis aid under this Regulation only after having checked that this will not raise the total amount of de minimis aid granted to the undertaking concerned to a level above the ceiling laid down in Article 2(2) and that the cumulation rules in Article 2(6), (7) and (8) are complied with.

2. Where a Member State has set up a central register of de minimis aid containing complete information on all de minimis aid granted to undertakings providing services of general economic interest by any authority within that Member State, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.

3. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual de minimis aid shall be maintained for 10 fiscal years from the date on which the aid was granted. Records regarding a de minimis aid scheme shall be maintained for 10 years from the date on which the last individual aid was granted under such a scheme. On written request, the Member State concerned shall 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 for assessing whether the conditions of this Regulation have been complied with, and in particular the total amount of de minimis aid under this Regulation and under other de minimis regulations received by any undertaking.

Article 4

Transitional provisions

This Regulation shall apply to de minimis aid granted for the provision of services of general economic interest before its entry into force, provided that such aid fulfils the conditions laid down in Articles 1 and 2. Any aid for the provision of services of general economic interest which does not fulfil those conditions shall be assessed in accordance with the relevant decisions, frameworks, guidelines, communications and notices.

At the end of the period of validity of this Regulation, any de minimis aid which fulfils the conditions of this Regulation may be validly implemented for a further period of six months.

Article 5

Entry into force and period of validity

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Union.

It shall apply until 31 December 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 25 April 2012.

For the Commission

The President

José Manuel BARROSO