



EUROPEAN COMMISSION

Brussels, 21.10.2016  
C(2016)6689 final

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| <p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p> |  | <p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p> |
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## COMMISSION DECISION

of 21.10.2016

**concerning SA.36798 (2016/NN) – Germany - Alleged unlawful State aid for  
Klinikum Osnabrück GmbH**

**(only the German text is authentic)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108 thereof,

Whereas:

### 1. PROCEDURE

- (1) On 16 May 2013, the Commission received a complaint pursuant to Article 24(2) of Regulation (EU) 2015/1589 concerning the alleged granting by the City of Osnabrück of a 100% guarantee for an amount of EUR 28 million and a capital increase of EUR 1 million to Klinikum Osnabrück GmbH ("Klinikum Osnabrück"). The complainant, who wishes to remain anonymous, provided a non-confidential version of the complaint on 17 July 2013.

- (2) The Commission forwarded the non-confidential version of the complaint alongside with some further questions to the German authorities on 29 July 2013. The German authorities replied on 30 September 2013 providing substantial reasoning why, in their view, the alleged measures do not involve unlawful aid. In particular, the German authorities argued that the capital increase respected the market economy investor principle and that both measures fully complied with the Commission's Decision 2012/21/EU<sup>1</sup> (hereinafter the "2012 SGEI Decision") regarding services of general economic interest ("SGEI").
- (3) On 17 January 2014, the Commission's services informed the complainant's lawyer via phone that *prima facie* to the extent they would constitute aid the measures did not appear problematic. On 18 February 2014, the complainant's lawyer informed the Commission's services that his client chose to uphold his complaint.
- (4) On 25 June 2014 the Commission's services sent a preliminary assessment letter to the complainant, informing him that the measures taken in favour of Klinikum Osnabrück, insofar as they would be classified as State aid, were fully compliant with the 2012 SGEI Decision and would hence be *a priori* compatible with the internal market and exempt from notification to the Commission.
- (5) By letter dated 22 August 2014, the complainant replied that he did not agree with the Commission's preliminary assessment and that he wanted to uphold his complaint. In this letter, the complainant also made mention of further alleged aid measures for Klinikum Osnabrück. In particular, the complainant referred to (i) an increase in the existing guarantee from EUR 28 million (see recital (1)) to EUR 36 million, (ii) the granting of another guarantee of EUR 5 million, and (iii) an additional capital increase of EUR 10 million.<sup>2</sup> At the request of the Commission's services a non-confidential version of this letter was sent on 27 October 2014.
- (6) The Commission forwarded the non-confidential version of the complainant's letter of 22 August 2014 and some questions to the German authorities on 11 November 2014. The German authorities replied on 16 January 2015. In this reply the German authorities reaffirmed their position that the measures either do not qualify as State aid or are compatible SGEI compensation in line with the 2012 SGEI Decision.
- (7) By letter dated 4 February 2015, the complainant informed the Commission of plans to allegedly grant further aid for Klinikum Osnabrück and repeated his main arguments for why the alleged aid measures could not be declared compatible. More specifically, the complainant referred to a planned additional capital increase of EUR 20 million to be paid out in four instalments of EUR 5 million.

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<sup>1</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI, OJ L 7, 11.1.2012, p. 3-10.

<sup>2</sup> The complaint covers also the cash-pool of the City of Osnabrück, which is the subject of a preliminary examination and a decision on the basis of Article 4 of Regulation (EU) 2015/1589, adopted on the same day as the present decision.

- (8) On 13 May 2015, the Commission's services met the complainant and his lawyer in Brussels. During this meeting the complainant's lawyer summarized the grounds for the complaint and argued that the alleged aid measures were incompatible with the internal market. The Commission's services first replied that it appeared doubtful whether the measures constituted State aid. Then, the Commission's services explained that even if the measures constituted State aid, they would in any case be compliant with the provisions of the 2012 SGEI Decision. Finally, the Commission's services pointed out that a hospital's efficiency was not a relevant criterion to establish compatibility with SGEI rules<sup>3</sup> and that, contrary to the complainant's reasoning, the measures did not have to be assessed under the Commission's Rescue and Restructuring Guidelines<sup>4</sup>. The Commission noted that the 2012 SGEI Decision also fully applies to firms in difficulty.
- (9) On 6 July 2015, the complainant's lawyer informed the Commission that his client did not wish to withdraw his complaint. On 22 August 2015 and 6 October 2015 the complainant provided further information on his complaint. In particular, reference was made to the granting of a further guarantee for an amount of EUR 3 million to Klinikum Osnabrück.
- (10) On 28 September 2015, the Commission requested additional information from the German authorities, which was provided by them on 19 November 2015. On 4 May 2016, the Commission asked the German authorities to update some figures and to clarify a few elements of their reply of 19 November 2015. The German authorities submitted this limited additional information on 19 May 2016.

## **2. DESCRIPTION OF THE MEASURES**

### **2.1. Beneficiary**

- (11) Klinikum Osnabrück is a publicly-owned hospital, organised under private law, located in and wholly owned by the city of Osnabrück. The hospital has been owned by the local government for over 200 years. The city of Osnabrück which is situated in the German regional state of Lower Saxony ("*Land Niedersachsen*") has around 160 000 inhabitants. Klinikum Osnabrück has seventeen departments (including accident and emergency care/surgery) and a capacity of 660 beds<sup>5</sup>. Klinikum Osnabrück ensures that comprehensive hospital and emergency care are provided to the local population under a service guarantee (see recitals (35)-(38)). Klinikum Osnabrück employs around 2 200 employees and serves as a teaching hospital of the nearby University of Münster. Klinikum Osnabrück provides both commercial services and services of general economic interest (see below).

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<sup>3</sup> In this context, the Commission referred to the General Court's conclusion in paragraph 300 of its judgment of 7 November 2012 (T-137/10 *CBI v Commission*, ECLI:EU:T:2012:584) that economic efficiency of an undertaking in supplying the SGEI is not a criterion for the assessment under Article 106(2) TFEU of the State aid compatibility of the public funding which this undertaking receives.

<sup>4</sup> Guidelines of 09 July 2014 on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.07.2014, p.1-28.

<sup>5</sup> This number only concerns beds in the city of Osnabrück and does not include the 80 beds at Klinikum Osnabrück's hospital site in Georgsmarienhütte (a municipality that is part of the Osnabrück region).

- (12) The services of general economic interest of Klinikum Osnabrück have not been cost-covering in recent years (in particular since 2012). For this reason, the services of general economic interest of Klinikum Osnabrück are currently undergoing a restructuring aimed at restoring their profitability and ensuring their long-term viability. Klinikum Osnabrück has also made important investments into infrastructure for its services of general economic interest and will continue to do so in order to be able to continue to fulfil the public service obligations it is entrusted with (see also recitals (39)-(40)).
- (13) Under the applicable German law, 60% to 66.66% of investments in the hospital sector are paid for by the state of Lower Saxony. For the rest, municipal hospitals such as Klinikum Osnabrück have to either finance the costs themselves, or rely on their public-sector owner. It is against this background that the City of Osnabrück has granted the below-mentioned (see section 2.2) measures to Klinikum Osnabrück.

## **2.2. Form of the measures**

- (14) According to the information submitted by the complainant and the replies from the German authorities, the following measures have been granted by the City of Osnabrück to Klinikum Osnabrück:

### *a) Capital increases*

- (15) The City of Osnabrück has decided to increase Klinikum Osnabrück's capital three times since 2013 for a total amount of EUR 31 million by the end of 2018. The German authorities consider that these capital increases do not amount to State aid as they would comply with the market economy investor principle.
- (16) By City Council decision of 16 April 2013, the City of Osnabrück decided to increase the capital of Klinikum Osnabrück by EUR 1 million in three tranches. This capital increase was however subject to approval by the Lower Saxony supervisory authorities and was not finally granted until that approval was given.<sup>6</sup> The first two tranches of EUR 200 000 and EUR 400 000 were only disbursed on 11 July 2014. The last tranche of EUR 400 000 was paid on 3 July 2015.
- (17) By City Council decision of 1 April 2014, the City of Osnabrück decided to increase the capital of Klinikum Osnabrück by another EUR 10 million in one tranche that was disbursed on 11 July 2014.
- (18) By City Council decision adopted on 22 September 2015, the City of Osnabrück decided to further increase the capital of Klinikum Osnabrück by EUR 20 million in four tranches of EUR 5 million over four years (2015-2018). The first tranche was disbursed on 11 December 2015.

### *b) Guarantees*

- (19) Since 2013, the City of Osnabrück has granted the following five guarantees to Klinikum Osnabrück which, as described below (see recitals (20)-(25)), have only been used to secure actual loans partially. These guarantees have been granted to

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<sup>6</sup> At the moment of the German authorities' first reply (see recital (2)) this approval had not yet been given which means that the granting date of the capital increase was after 30 September 2013.

allow Klinikum Osnabrück to obtain loans to (re-)finance infrastructure investments needed for the performance of its public service obligations. The German authorities consider that these guarantees have been granted on normal market conditions.

- (20) By City Council decision of 7 May 2013, the City of Osnabrück granted a guarantee for an amount of EUR 2 239 526.58 to secure an interest adjustment on an existing long-term loan of Klinikum Osnabrück from [...][\*]. A one-off guarantee commission of [0.5-1.5] % and annual guarantee commission of [0.5-1.0]%<sup>7</sup> is charged by the City of Osnabrück.
- (21) By City Council decision of 12 November 2013, the City of Osnabrück increased an existing guarantee from EUR 28 million to EUR 36 million to allow Klinikum Osnabrück to secure working capital loans from external lenders. A one-off guarantee commission of [0.5-1.5]% and annual guarantee commission of [0.5-1.0]% was foreseen to be charged by the City of Osnabrück. Until now, this guarantee has however never been used to secure loans.
- (22) By City Council decision of 12 November 2013, the City of Osnabrück also increased an existing guarantee from EUR 12 million to EUR 17 million to secure a loan of EUR 5 million from [...]<sup>8</sup>, which was used to finance part of the construction of the new Geriatrics and Early Rehabilitation Centre. A one-off guarantee commission of [0.5-1.5]% and annual guarantee commission of [0.5-1.0]% is charged by the City of Osnabrück. The initial EUR 12 million of the guarantee amount has until now not been used to secure loans.
- (23) By City Council decision of 4 March 2014, the City of Osnabrück granted a guarantee for an amount of EUR 4 650 812.95 to secure an interest adjustment on an existing long-term loan of Klinikum Osnabrück from [...]. A one-off guarantee commission of [0.5-1.5]% and an annual guarantee commission of [1.0-2.0]% is charged by the City of Osnabrück.
- (24) By City Council decision of 10 February 2015 the City of Osnabrück granted a guarantee for an amount of EUR 3 million to secure a loan from [...]. This loan is used to finance new parking spaces for the new Geriatrics and Early Rehabilitation Centre (EUR 0.7 million), new building technology (EUR 0.1 million) and new hospital equipment (EUR 2.2 million). A one-off guarantee commission of [0.5-1.5]% and annual guarantee commission of [3.0-3.5]% is charged by the City of Osnabrück.
- (25) In total, the City of Osnabrück technically has granted guarantees for an amount of EUR 62 890 339.53. Of this amount, the City of Osnabrück effectively guarantees loans for Klinikum Osnabrück for an aggregate amount of EUR 14

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\* Confidential information. Precise figures are replaced by ranges.

<sup>7</sup> The commission percentage was set on the basis of the guarantee guideline of Lower Saxony in force at the time and according to the German authorities reflects market conditions.

<sup>8</sup> The guarantee was only implemented on 24 April 2014 when the City of Osnabrück and [...] signed an agreement confirming that the former would guarantee this amount.

890 339.53. The remaining EUR 48 million of technically granted guarantees have until now not been used to secure loans.

*c) Shareholder loans*

- (26) By City Council decision of 12 November 2013, the City of Osnabrück authorised the granting of shareholder loans to Klinikum Osnabrück. Through this mechanism, the City of Osnabrück obtains loans and then passes them on to the hospital in the form of shareholders' loans which the German authorities argue are concluded on market terms. A first long-term loan agreement for an amount of EUR 10.5 million at a fixed interest rate of [4.0-4.5]% was concluded on 14 November 2014. This loan is used to help finance the new Geriatrics and Early Rehabilitation Centre.
- (27) On 28 July 2015, a second short-term revolving loan agreement was concluded for an amount of EUR 7.5 million at a variable interest rate (i.e. the EURIBOR 3 month rate plus a margin of [2.0-3.0]%). The purpose of this second loan was to provide Klinikum Osnabrück with additional liquidity.
- (28) Until now, Klinikum Osnabrück has hence received a total of EUR 18 million in shareholder loans. According to the German authorities, further shareholder loans may be granted whenever this is necessary to ensure that Klinikum Osnabrück can continue to fulfil its public service obligations, on the basis of the entrustment acts (see following section 3 for details). The German authorities also noted that the City of Osnabrück would continue to ensure that such loans are granted on market terms.

### **3. APPLICABILITY OF A BLOCK-EXEMPTION**

- (29) As will be shown in the following, the abovementioned public funding (see section 2.2) granted to Klinikum Osnabrück falls under Article 3 of the 2012 SGEI Decision, respectively Article 3 of the 2005 SGEI Decision<sup>9</sup> for the period before the entry into force of the 2012 SGEI Decision on 31 January 2012. In light of this, the Commission does not analyse whether the cumulative conditions of State aid within the meaning of Article 107(1) TFEU are fulfilled.
- (30) The Commission's 2012 SGEI 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 a service of general economic interest is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) TFEU. The 2012 SGEI Decision replaces the Commission's 2005 SGEI Decision which had set out similar conditions for compatibility and exemption from notification for SGEI compensation.
- (31) The German authorities have explained that since 2010 the Osnabrück City Council has adopted three decisions on the basis of which the City of Osnabrück has entrusted Klinikum Osnabrück with public service obligations and for which it has been granted the measures under assessment. In particular, this concerns the

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<sup>9</sup> Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67-73.

City Council decision of 9 March 2010 ("the first entrustment act"), as revised by City Council decision of 28 June 2011 ("the second entrustment act"), and superseded by City Council decision of 10 September 2013 ("the third entrustment act"). These City Council decisions constitute binding entrustment acts<sup>10</sup> on Klinikum Osnabrück which is controlled by the City of Osnabrück<sup>11</sup>. All but one of the measures under assessment (see section 2.2) have been granted on the basis of the third entrustment act. Only the guarantee of 7 May 2013 (see recital (20)) has been granted on the basis of the second entrustment act.

(32) The Commission has analysed these three entrustment acts and found that they are fully compliant with the requirements of the 2012 SGEI Decision (i.e. the third entrustment act) respectively of the 2005 SGEI Decision (i.e. the first and second entrustment act). The Commission comes to this conclusion since:

i. The measures fall within the scope of the 2012 and 2005 SGEI Decisions:

(33) The 2012 SGEI Decision applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of SGEI as referred to in Article 106(2) TFEU which falls within one of the different categories included in Article 2(1) of the 2012 SGEI Decision. According to Article 2(1)(b) of the 2012 SGEI Decision, one of these categories includes "*compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services*". Since the services provided by Klinikum Osnabrück fall within this scope, it is clear that the measures at issue comply with the requirements of Article 2(1) of the 2012 SGEI Decision. Likewise, the measures granted to Klinikum Osnabrück fall within the scope of the 2005 SGEI Decision as Article 2(1)(b) of that Decision refers to "*public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned*".

ii. The time limitation requirement of the 2012 SGEI Decision is respected:

(34) Article 5(1) of the third entrustment act limits the entrustment period to 10 years, and, therefore, does not exceed the maximum entrustment period of 10 years established in Article 2(2) of the 2012 SGEI Decision. This limitation was made within the two-year transition period (i.e. until 31 January 2014) foreseen by Article 10(a) of the 2012 SGEI Decision. The 2005 SGEI Decision did not require the duration of the entrustment to be limited in time so this condition is not applicable to the first and second entrustment act.

iii. The measures are compensation for a genuine SGEI:

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<sup>10</sup> The City Council decisions have been notified in writing to Klinikum Osnabrück so that their contents acquired external effects and thus the quality of an administrative act.

<sup>11</sup> The City of Osnabrück is the full owner of Klinikum Osnabrück and appoints eight of the twelve members of that hospital's supervisory board. As a result, the City can directly safeguard the implementation of the requirements of the entrustment acts at all times by giving the hospital management the necessary specific instructions where needed. In the hypothetical situation where the hospital management would not comply, the City could simply replace the management.

- (35) According to the German authorities, German public hospitals provide hospital and emergency care SGEI that are covered by a service guarantee ("*Sicherstellungsauftrag*") of the regional states. Such a service guarantee also applies to the municipalities of Lower Saxony and therefore also to the City of Osnabrück. In particular, §1 of the Lower Saxony Hospital Act ("*Niedersächsisches Krankenhausgesetz*", NKHG) requires cities to provide their local population with hospital care under the hospital plan mechanism<sup>12</sup>. Cities have to establish and maintain their own hospital insofar hospital care is not guaranteed by other providers. This implies that public owners, such as the City of Osnabrück, have the obligation to ensure the provision of comprehensive healthcare even if it is discharged at a loss.
- (36) The Stuttgart Higher Regional Court (*Oberlandesgericht*) recently expressly confirmed<sup>13</sup> in connection with comparable rules in the Baden-Württemberg Hospital Act that municipalities can entrust hospitals to provide SGEI in the form of general hospital services covered by a service guarantee. The German Federal Court of Justice (*Bundesgerichtshof*) confirmed this reasoning.<sup>14</sup> Privately-owned hospitals are not covered by the service guarantee and are able to reconfigure their areas of activity at any time, join a group of companies or even consider and implement a market exit. In that sense, a private hospital, unlike a hospital owned by a local authority, has the possibility to focus on profitable forms of treatment and associated specialisms and their potential for action is not limited by regional hospital planning. Although most private hospitals are also bound by the rules of the hospital plan in terms of providing care for national health patients and in terms of investment financing by the federal states, hospital planning cannot prevent them from cutting back on their services or closing altogether.
- (37) Klinikum Osnabrück, the only public hospital in the City of Osnabrück that is listed in the Lower Saxony hospital plan is covered by the abovementioned service guarantee. As a result, the City of Osnabrück and Klinikum Osnabrück are unable to close the hospital or arbitrarily limit its services. The service guarantee is however subject to a subsidiarity rule since §1 of the NKHG specifies that cities must only maintain their hospitals insofar hospital care is not guaranteed by other providers. In this context, it must be noted that the complainant alleges that there is overcapacity in the hospitals located in the Osnabrück area and that several private hospitals in that region provide or can provide the same services as Klinikum Osnabrück. The German authorities point out however that comprehensive full provision of hospital and emergency care is not safeguarded by the private hospitals in the City of Osnabrück. The private hospitals, which are not covered by the service guarantee, for instance offer certain services, such as emergency care, only to a very limited degree. With respect to the alleged overcapacity, the German authorities note that Klinikum Osnabrück is operating

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<sup>12</sup> Via this mechanism, the Lower Saxony government determines the number of hospitals and beds needed. The number of beds needed is calculated based on the size of the population in the hospitals' catchment area, the frequency with which the inhabitants visit a hospital, the length of stay in a hospital and the hospital capacity used.

<sup>13</sup> See judgment of 20 November 2014 in case 2 U 11/14 concerning the Calw regional public hospitals.

<sup>14</sup> See judgment of the *Bundesgerichtshof* of 24 March 2016 in case I ZR 263/14 concerning the appeal against the abovementioned judgment of the *Oberlandesgericht* Stuttgart of 20 November 2014.

at near full capacity (e.g. 93% in 2014)<sup>15</sup> which indicates that there is no structural excess capacity in the Osnabrück area. In addition, according to Germany, decisions on the supply of hospital services or lack thereof are taken solely by the competent regional government under §4(1) of the Lower Saxony Hospitals Act when the hospital plan is prepared and updated. Its inclusion in the list of subsidised hospitals needed has put Klinikum Osnabrück under what is now an unavoidable obligation to operate the hospital. This obligation will continue to apply until such time as the list is amended in the hospital plan which is updated every year in accordance with §4(6) of the Lower Saxony Hospitals Act. The City of Osnabrück can hence not decide at its discretion which hospital(s) it wants to run and to what extent.

- (38) The Commission would first like to recall that under Article 168(7) TFEU, Member States have a wide discretion for the definition of their health policy and for the organisation and delivery of health services and medical care, as well as for the allocation of resources for healthcare services. A service guarantee applicable only to public hospitals fits within that discretion. Second, the Commission notes that Member States also have a wide margin of discretion in defining a given service as an SGEI. 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.<sup>16</sup> In this respect, it cannot be put into doubt that the comprehensive hospital care and emergency services offered by Klinikum Osnabrück are provided in the public interest, in particular for the citizens of the area of Osnabrück. The complainant however considers that private hospitals in the Osnabrück region provide or can provide the same services as Klinikum Osnabrück. This would put into doubt whether Klinikum Osnabrück performs a genuine SGEI. The Commission notes however that private hospitals are not required to continue to provide all services and that they can choose to stop the provision of loss-making services at any time (if they even provide such services at all). Klinikum Osnabrück on the contrary must continue to provide a full range of care and emergency services even at a loss. Its inclusion in the Lower Saxony hospital plan combined with §1 of the NKHG means that Klinikum Osnabrück must continue to operate in all circumstances until that hospital plan is changed. The presence of private hospitals that may provide to some extent similar services is insufficient to ensure that care is provided at all times since the owners of these hospitals are not obliged to continue their operation even if they are included in the Lower Saxony hospital plan. The complainant argues that private hospitals are confronted with significant financial and legal barriers to exit the hospital market. In particular, reference is made to the cost of closing the hospital, possible recovery of previously received State financing for investments and possibly even litigation by the State for not providing public services (where applicable). However, the potential presence of such barriers cannot change the fact that private hospitals can nevertheless close or reduce their services while public hospitals covered by the service guarantee cannot. Finally, German national courts (see recital (36)) have accepted that

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<sup>15</sup> In comparison, in 2011, the bed occupancy rate for Lower Saxony stood at 80.2% and for Germany it was 77.3%. In that same year, the bed occupancy rate of Klinikum Osnabrück was 94%.

<sup>16</sup> Case T-289/03 BUPA and Others v Commission ECLI:EU:T:2008:29, paragraphs 166-169 and 172; and Case T-17/02 Fred Olsen ECLI:EU:T:2005:218, paragraph 216.

public hospitals receive SGEI compensation because they are covered by a service guarantee while private hospitals are not covered by that guarantee. For these reasons, the Commission considers that the provision of comprehensive hospital and emergency care by Klinikum Osnabrück under a service guarantee qualifies as a genuine SGEI and hence that Germany did not make a manifest error in defining this activity as an SGEI.

iv. The entrustment acts meet the conditions of the 2012 and 2005 SGEI Decisions:

*a) Content and duration of the public service obligations:*

- (39) Article 1(1) of the third entrustment act refers to §1 of the NKHG and the Lower Saxony hospital plan which specifies the types of hospital and emergency care provided by Klinikum Osnabrück in 'service area 404' (i.e. the City of Osnabrück). Article 1(2) of the third entrustment act specifies that this imposes a legal obligation on the City of Osnabrück to finance Klinikum Osnabrück insofar as this is necessary to ensure the hospital's public service obligations. Article 2 of the third entrustment act details that according to the Lower Saxony hospital plan, Klinikum Osnabrück is entrusted with the medical, care-related technical and economic management of the hospital. That article continues that as a municipal hospital, Klinikum Osnabrück, is active in areas where there is no commercial interest in providing public services. Klinikum Osnabrück's SGEI in particular consist of the provision of medical services (including the treatment of 'high-cost patients') and comprehensive emergency services (including assistance in responding to disasters, pandemics and events causing large-scale damage), and ancillary services directly linked thereto. Article 2 of the third entrustment lists these services in detail and also indicates which services do not qualify as SGEI<sup>17</sup>. Article 5 of the third entrustment act specifies that the SGEI are entrusted for a period of 10 years. The Commission therefore considers that the third entrustment act clearly defines the content and duration of the comprehensive hospital and emergency care services that Klinikum Osnabrück has to provide under a service guarantee. Article 4(a) of the 2012 SGEI Decision is thus fulfilled.
- (40) Both the first and second entrustment act contain similar references to §1 of the NKHG<sup>18</sup> and the Lower Saxony hospital plan<sup>19</sup>. These entrustment acts also clearly list the medical and emergency services<sup>20</sup> that Klinikum Osnabrück has to provide, explicitly mentioning among others the obligation to provide assistance in responding to disasters, pandemics and events causing large-scale damage and the handling of situations in which extreme costs are incurred. Furthermore, both

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<sup>17</sup> These services are listed in Article 2 (4) of the third entrustment act. It concerns among others services provided under the lease signed with a private company for the cafeteria and kiosk, services relating to staff exchanges, goods and services involving the Klinikum Osnabrücker Land GmbH, and cosmetic surgery not included in the treatment covered by medical insurance schemes.

<sup>18</sup> In particular in recital 3 of the first entrustment act and in article 1 of the second entrustment act.

<sup>19</sup> For instance in recital 2 of the first entrustment act and in article 1 of the second entrustment act.

<sup>20</sup> These services are listed in Section I points 1 and 2 of the first entrustment act and in Article 2(1) of the second entrustment act.

entrustment acts indicate which services are not considered to be SGEI.<sup>21</sup> The first entrustment act indicated that the necessity and appropriateness of the public service obligations would be evaluated after a period of 5 years<sup>22</sup>. The second entrustment act specified that Klinikum Osnabrück was entrusted with the SGEI on an indefinite basis.<sup>23</sup> The Commission considers that Article 4(a) of the 2005 SGEI Decision is therefore also complied with.

*b) The undertaking, and, where applicable, the territory concerned:*

- (41) All three entrustment acts clearly refer to Klinikum Osnabrück as the entity entrusted with SGEI and the City of Osnabrück as the territory concerned, thus complying with respectively Article 4(b) of the 2005 SGEI Decision and Article 4(b) of the 2012 SGEI Decision.

*c) The nature of any exclusive or special rights assigned to the undertaking by the granting authority:*

- (42) Section I point 2 e of the first entrustment act and Article 2(5) of the third entrustment act specify that no exclusive or special rights were granted to Klinikum Osnabrück. The second entrustment act does not mention exclusive rights. In conclusion, Article 4(c) of the 2012 SGEI Decision respectively of the 2005 SGEI Decision hence is fulfilled in the case at hand.

*d) A description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation:*

- (43) According to Article 3 of the third entrustment act, the City of Osnabrück can pay compensation to ensure that Klinikum Osnabrück is able to provide the SGEI it is entrusted with. That act further specifies that the maximum amount of such compensation is based on the business plan of Klinikum Osnabrück and the City's budget for the relevant year<sup>24</sup>. The third entrustment act adds that the compensation may not exceed the net cost incurred<sup>25</sup> in discharging the public service obligations and specifies that an appropriate return on the equity used by Klinikum Osnabrück in the performance of these obligations is allowed. According to the third entrustment act, compensation can be granted in the form of (a) direct grants, (b) guarantees, (c) shareholder loans, and (d) capital increases.

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<sup>21</sup> The non-SGEI activities are listed in Section I point 3 of the first entrustment act and in Article 2(2) of the second entrustment act and among others include services provided under the lease signed with a private company for the cafeteria and cosmetic surgery not included in the treatment covered by medical insurance schemes.

<sup>22</sup> This provision became obsolete following the repeal of the first entrustment act and its replacement by the second and later the third entrustment act.

<sup>23</sup> As mentioned above (see recital (34)), the 2005 SGEI Decision, unlike the 2012 SGEI Decision, did not require the duration of the entrustment to be limited in time.

<sup>24</sup> The entrustment act adds that if the amount of compensation is not directly based on that business plan or City budget, it must be explained in other documents.

<sup>25</sup> The entrustment act specifies that this net cost is to be determined based on actual data on the basis of the separation of accounts between the SGEI activities and other activities.

With respect to guarantees, the third entrustment act also specifies that the City of Osnabrück can provide 100% guarantees to support Klinikum Osnabrück in obtaining funding for the investment costs in hospital infrastructure provided that Klinikum Osnabrück has a bed occupancy rate of over 80% and that the investments tie in with the tasks set up in the Lower Saxony hospital plan. On this basis, such guarantees have been granted (see recitals (19)-(25)) to support the (re-)financing of infrastructure investments necessary for the performance by Klinikum Osnabrück of its SGEI (e.g. the Geriatrics and Early Rehabilitation Centre) in line with the hospital plan and in light of its bed occupancy rate of over 90% (see recital (37)). Finally, the entrustment act explicitly prohibits that compensation is paid for the other (i.e. non-SGEI) activities performed by Klinikum Osnabrück. The Commission considers that the third entrustment act therefore complies with Article 4(d) of the 2012 SGEI Decision.

- (44) The first entrustment act specified that the City of Osnabrück can grant compensation in the form of direct grants and/or debt servicing or via guarantees for investments<sup>26</sup>. That entrustment act adds that the amount of compensation is to be based on the costs of the public service obligations in the hospital's annual business plan, should only cover the remaining financial shortfall (i.e. costs that have not been compensated via other means) and can never exceed EUR 30 million per year. Furthermore, the first entrustment act mentions that the compensation payments must not exceed the level required to cover the costs incurred by the discharge of the public service obligations, taking into consideration the revenue generated thereby and an appropriate return on the equity capital used for the purpose of discharging those obligations. The first entrustment act therefore complies with Article 4(d) of the 2005 SGEI Decision.
- (45) The second entrustment act specifies that the City of Osnabrück can provide 100% guarantees to support Klinikum Osnabrück in obtaining funding for the investment costs in hospital infrastructure provided that Klinikum Osnabrück has a bed occupancy rate of over 80% and that the investment is directly connected to increasing the top 10 diagnoses and thus to improving quality. That act also indicates that the City of Osnabrück can award compensation for net losses incurred by Klinikum Osnabrück in the provision of its SGEI. The second entrustment act adds that the compensation shall not exceed the level required to cover the costs incurred by discharging the public service obligation, taking into consideration the revenue generated thereby and an appropriate return on the equity capital used for the purpose of discharging those obligations. The second entrustment act therefore also complies with Article 4(d) of the 2005 SGEI Decision.

*e) The arrangements for avoiding and recovering any overcompensation:*

- (46) In order to ensure that no overcompensation is granted, Article 4 of the third entrustment act requires Klinikum Osnabrück to provide proof of how it spent the funds it received each year after the end of the financial year when preparing its annual accounts. Furthermore, that same article entitles the City of Osnabrück to

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<sup>26</sup> The entrustment act notes that the City can guarantee 80% of the loan amount with due account taken of the conditions laid down in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.06.2008, p. 10-22.

carry out interim audits<sup>27</sup> of accounts and other business documents at any time. If the City of Osnabrück finds that there has been overcompensation which exceeded 10% of the annual compensation for the respective year, it shall require Klinikum Osnabrück to repay that amount. In cases where the overcompensation does not exceed 10% of the annual compensation for the respective year, the third entrustment act specifies that it can be carried forward to the next payment period and deducted from the compensation to be paid for that period. The third entrustment act thus complies with Article 4(e) of the 2012 SGEI Decision.

- (47) The first entrustment act requires that, at the end of each financial year, Klinikum Osnabrück furnishes proof of the use of the compensation granted on the basis of the audited annual financial statements<sup>28</sup>. This entrustment act contains no explicit requirement for Klinikum Osnabrück to repay overcompensation but only a mention that overcompensation not exceeding 10% can be carried over to the next year. It is therefore implicit that Klinikum Osnabrück would have had to repay any overcompensation exceeding 10% of the annual compensation for the respective year. The Commission therefore considers that Article 4(e) of the 2005 SGEI Decision is complied with.
- (48) According to the second entrustment act Klinikum Osnabrück must provide proof of its use of the compensation it received. That act specifies that this proof should take the form of the annual financial statements. In addition, the City of Osnabrück is obliged by that act to require Klinikum Osnabrück to repay any compensation that has given rise to overcompensation. Furthermore, the City of Osnabrück has the right to examine the proof of use throughout the course of the year.<sup>29</sup> Article 4(e) of the 2005 SGEI Decision is therefore complied with.

*f) A reference to the 2012 SGEI Decision:*

- (49) The preamble of the third entrustment act refers to the 2012 SGEI Decision as the basis for the entrustment. The requirement of Article 4(f) of the 2012 SGEI

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<sup>27</sup> The entrustment act specifies that these audits are to be carried out in compliance with the rules on public expenditure in the *Act reforming municipal budgetary law and amending rules on public service activities* of 15 November 2005, which came into force on 1 January 2006 (Lower Saxony Official Journal, p. 342), the *Municipal Budget and Funds Regulation* of 22 December 2005 (Lower Saxony Official Journal, p. 458) and the *Regulation amending the Municipal Budget and Funds Regulation* of 18 December 2009 (Lower Saxony Official Journal, p. 490), which was drawn up in conjunction with the *Circular on municipal budgetary law* of the Lower Saxony Interior and Sports Ministry of 4 December 2006, which is regarded as the binding model for budgets and depreciation tables (Lower Saxony Official Journal, p. 42 f.).

<sup>28</sup> The first entrustment act adds that Klinikum Osnabrück must take into account the requirements laid down in the Law implementing Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.

<sup>29</sup> In this context, reference is made to the provisions of the *Act reforming municipal budgetary law and amending rules on public service activities* of 15 November 2005, the *Municipal Budget and Funds Regulation* of 22 December 2005, and the *Regulation amending the Municipal Budget and Funds Regulation* of 18 December 2009, which was drawn up in conjunction with the *Circular on municipal budgetary law* of the Lower Saxony Interior and Sports Ministry of 4 December 2006, which is regarded as the binding model for budgets and depreciation tables.

Decision is hence fulfilled. Since no such requirement applied under the 2005 SGEI Decision the first and second entrustment act do not contain this reference.

v. Compensations are determined in line with the 2012 and 2005 SGEI Decisions:

- (50) According to Article 5(1) of the 2012 SGEI Decision, “*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*”. Article 5(1) of the 2005 SGEI Decision contains the same principle. As described above (see recitals (43)-(45)), the three entrustment acts each clearly reflect this principle by stipulating that compensation should amount to no more than the net cost incurred in delivering the public service obligations including an appropriate return on the equity capital used. Each of the three entrustment acts also explicitly prohibits that compensation is paid for the other (i.e. non-SGEI) activities performed by Klinikum Osnabrück. The acts mainly refer to Klinikum Osnabrück's business plan for the determination of the exact compensation amount subject to the aforementioned constraints. The fact that the description of the compensation mechanism in the entrustment act is kept general has to be seen in the context of the difficulty to foresee the exact financing needs of Klinikum Osnabrück over the entrustment period. The overarching compensation principle is however clear: where the net cost to fulfil its public service obligations is not or only partially covered from other sources, the City of Osnabrück can grant Klinikum Osnabrück compensation in various forms as long as this does not lead to any overcompensation. This gives the City of Osnabrück sufficient flexibility to deal in the most appropriate way with the financing needs of Klinikum Osnabrück during the period of entrustment. The Commission also notes that the 2005 and 2012 SGEI Decisions do not prescribe a specific compensation method and that the City of Osnabrück can hence freely choose which type of compensation to grant. The Commission therefore considers that the requirement concerning the amount of compensation, as laid down in Article 5(1) of the 2012 SGEI Decision and Article 5(1) of the 2005 SGEI Decision, is complied with.

vi. Klinikum Osnabrück has separated accounts in place:

- (51) According to Article 5(9) of the 2012 SGEI Decision, “*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*”. Article 4(2) of the third entrustment act requires Klinikum Osnabrück to record the revenues and costs related to the performance of their SGEI respectively of their other activities separately in line with the Transparency Directive (Directive 2006/111/EC<sup>30</sup>) and Article 5(9) of the 2012 SGEI Decision. The third entrustment act also clearly lists which services qualify as SGEI and which are considered as other activities. Furthermore, the German authorities have provided written confirmations by the hospital's independent auditors that the account separation has been implemented correctly by Klinikum Osnabrück, and have also provided the separate accounting results of respectively the SGEI

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<sup>30</sup> Commission Directive 2006/111/EC of 16 November 2006, Official Journal L318, 17.11.2006, p. 17.

and non-SGEI activities since 2010. The Commission therefore considers that Article 5(9) of the 2012 SGEI Decision is complied with.

- (52) Article 5(5) of the 2005 SGEI Decision also requires beneficiaries of SGEI compensation to separate the costs and revenues of the SGEI from those of the other activities they perform. The first entrustment act requires that Klinikum Osnabrück's annual financial statements comply with the Law implementing Commission Directive 2000/52/EC of 26 July 2000<sup>31</sup> amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings. This Directive required undertakings entrusted with an SGEI to separate the costs and revenues of their SGEI from their other activities. The first entrustment act hence required Klinikum Osnabrück to maintain separate accounts. The second entrustment act does not explicitly mention the account separation.<sup>32</sup> However, that entrustment act does require that compensation is only granted for the residual costs of the SGEI activities which is only possible on the basis of account separation. Furthermore, the German authorities have confirmed that in practice the accounts were separated and they have provided the Commission with the separate accounting results of respectively the SGEI and the non-SGEI activities since 2010. Therefore, the Commission considers that Article 5(5) of the 2005 SGEI Decision is complied with.

vii. The requirements concerning control of overcompensation and possible recovery of overcompensation are fulfilled:

- (53) According to Article 6(1) of the 2012 SGEI Decision, “*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*”. Furthermore, according to Article 6(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*”. Article 6 of the 2005 SGEI Decision requires that “*Member States [...] carry out regular checks, or ensure that such checks are carried out, to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5.*” That Article continues “*Member States shall require the undertaking concerned to repay any overcompensation paid [...]*.” Each of the entrustment acts specifies that Klinikum Osnabrück has to provide proof of how it spent the funds it received each year on the basis of its annual accounts. In this respect, the annual reports for the years 2013 and 2014 submitted by the German authorities mention the various measures and their use. In addition, the second and third entrustment act give the City of Osnabrück the possibility to carry out interim audits of that proof at any time during the year. As an illustration of this principle, the German authorities provided a written confirmation by Klinikum Osnabrück's external auditors that they had found no overcompensation for the years 2013 and 2014. Those two entrustment acts also specify that the City of

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<sup>31</sup> Official Journal L193, 29.07.2000, p. 75-78.

<sup>32</sup> The Commission notes that the 2005 SGEI Decision does not require that the account separation is mentioned in the entrustment act. It is simply required to have account separation in place.

Osnabrück must recover overcompensation from Klinikum Osnabrück (unless that overcompensation meets the conditions to be carried over to the next year). Likewise, it is implicit in the first entrustment act that overcompensation exceeding 10% of the annual compensation for the respective year should be recovered (see recital (47)).

- (54) Against this background, the Commission has verified whether the prohibition of overcompensation has been respected in practice. On the one hand, Klinikum Osnabrück incurred significant losses in the delivery of its SGEI activities since 2012 (i.e. at least EUR 25 million for the period 2012-2015<sup>33</sup>) and may incur further losses in the following years. On the other hand, Klinikum Osnabrück is making significant investments in SGEI infrastructure, among others in a new Geriatrics and Early Rehabilitation Centre. The complainant's argument that such investments are not necessary given the alleged overcapacity in the hospitals in the Osnabrück region must be rejected. In particular, the Commission notes that Klinikum Osnabrück makes these investments in the context of the Lower Saxony hospital plan and that any resulting capacity increases require prior approval of the Lower Saxony government. Furthermore, as indicated above, Klinikum Osnabrück operates at near full capacity (see recital (37)). It can therefore not be disputed that these investments are made to allow Klinikum Osnabrück to perform a genuine SGEI as explained above (see recital (38)).
- (55) On the basis of Klinikum Osnabrück's separate accounts (see recitals (51)-(52)), the Commission also observes that for the period since 2010, the non-SGEI activities of Klinikum Osnabrück have been self-financing. Therefore, there is no risk of cross-subsidization of the non-SGEI activities via the measures granted for the SGEI activities. Finally, all compensations granted for the SGEI activities have been determined based on Klinikum Osnabrück's real needs (i.e. the part of the net cost not covered via other financing sources). In particular:
- a. The capital increases granted by the City of Osnabrück since 2013 cannot have led to overcompensation since the capital increases paid out until now do not exceed the SGEI losses incurred by Klinikum Osnabrück since 2013. The remaining capital payments (for the years 2016-2018) can be used to cover further SGEI losses (provided these losses are not compensated from other sources<sup>34</sup>), to further restore the hospital's capital base and/or to help (co-)finance investments in SGEI infrastructure. In addition, these future capital payments are in any event also subject to the requirement that compensation cannot exceed the net cost of the SGEI (including a reasonable profit) as set out in the entrustment acts (see recital (50)).
  - b. The guarantees have been granted to allow Klinikum Osnabrück to obtain several bank loans to (re-)finance infrastructure investments needed for the performance of its genuine SGEI as explained above (see recital (54)). Among others this includes investments in a new Geriatrics and Early Rehabilitation Centre, new building technology and new hospital equipment. The Commission recalls that Klinikum Osnabrück pays fees to the City

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<sup>33</sup> These SGEI losses nearly completely wiped out Klinikum Osnabrück's equity capital.

<sup>34</sup> Until now, Klinikum Osnabrück has not benefited from any direct loss compensation measures.

which according to the German authorities would reflect market terms. However, to the extent that these guarantees would grant Klinikum Osnabrück an advantage, they would only lower the financing cost for SGEI infrastructure. In the absence of these guarantees the financing cost would likely be higher which in turn would lead to higher SGEI losses. Eventually, the City of Osnabrück could be required to compensate those losses (e.g. via a capital increase) to ensure that Klinikum Osnabrück can continue to operate in light of the service guarantee (see also recitals (35)-(38)). In this context, the Commission notes that it can in principle accept the full *ex post* coverage of losses incurred in the delivery of SGEI<sup>35</sup> and has already approved an *ex post* deficit compensation mechanism for hospitals' SGEI losses<sup>36</sup>.

- c. The two shareholder loans have been granted to finance respectively part of the investments in SGEI infrastructure (as explained above, see recital (54)) and to fulfil the normal liquidity needs arising from Klinikum Osnabrück's operation of its SGEI. According to the German authorities, both loans have been concluded on market terms and hence do not amount to State aid. However, in case they would confer an advantage on Klinikum Osnabrück, the same logic as for the guarantees applies. In particular, any aid element would lower the financing cost for the SGEI activities and without this aid, the SGEI losses would increase which may then be compensated by the City. As explained above, the City of Osnabrück could in any case compensate those losses so the shareholder loans cannot lead to overcompensation.

- (56) To summarize, the central compensation principle is that the City of Osnabrück can grant Klinikum Osnabrück compensation in various forms where the net cost to fulfil its public service obligations is not or only partially covered from other sources. The compensation amount and method are determined on the basis of the financing needs of Klinikum Osnabrück. The entrustment acts however clearly specify that the compensation can never exceed the net cost of the public service obligations (including a reasonable profit) and cannot be used to cross-subsidize the non-SGEI activities (which *de facto* have been self-financing). To address the significant incurred SGEI losses, the liquidity needs for the operation of the SGEI and the investment needs for SGEI infrastructure, the City of Osnabrück has granted the measures described above. The Commission considers that in the absence of these measures, Klinikum Osnabrück would have incurred even higher SGEI losses which the City of Osnabrück would have had to cover in light of the service guarantee. Since SGEI losses can be compensated, the fact that these losses may have been lowered due to the measures (e.g. by reducing the financing cost) cannot be considered as an overcompensation. Instead, the City of Osnabrück has only compensated costs related to the provision of SGEI and in doing so has used the most efficient method (e.g. by granting guarantees or intra-group loans, Klinikum Osnabrück may pay lower interest rates which also

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<sup>35</sup> See to this extent the Commission's reply to question 122 in its Staff Working Document '*Guide on the application of the EU rules on state aid, public procurement and the internal market to services of general economic interest*' of 29 April 2013 (see: [http://ec.europa.eu/competition/state\\_aid/overview/new\\_guide\\_eu\\_rules\\_procurement\\_en.pdf](http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf)).

<sup>36</sup> See in particular the Commission decision of 5 July 2016 in case SA.19864, *Public financing of Brussels public IRIS hospitals*, not yet published.

benefits the City as the owner of Klinikum Osnabrück). In light of this, the Commission considers that there has been no overcompensation. Indeed, if the measures granted by the City would have compensated more than the net cost of the SGEI activities they should be profitable instead of loss-making. Overall, the Commission therefore considers that the requirements of respectively Article 6(1) and Article 6(2) of the 2012 SGEI Decision and Article 6 of the 2005 SGEI Decision are met.

viii. The transparency requirement of the 2012 SGEI Decision is fulfilled:

- (57) Finally, Article 7 of the 2012 SGEI Decision requires that for compensation above EUR 15 million granted to an undertaking which also performs non-SGEI activities, the Member State must publish the entrustment act and the amounts of aid granted to the undertaking on a yearly basis. The German authorities have argued that the public financing measures for Klinikum Osnabrück under assessment (see section 2.2) do not amount to State aid. Nevertheless, the third entrustment act has been published on the City of Osnabrück's website. Furthermore, the German authorities noted that all financial support granted to Klinikum Osnabrück has been published, irrespective of the amount granted and of the fact that in their view the compensation does not exceed the aid threshold of EUR 15 million. These measures have been published in each individual case via the Osnabrück City Council online information system<sup>37</sup>. The measures are also published in Klinikum Osnabrück's annual accounts and in the preliminary report on the City of Osnabrück's budget. Therefore, the Commission considers that regardless of whether the compensation exceeds EUR 15 million the requirement of Article 7 of the 2012 SGEI Decision is fulfilled. The 2005 SGEI Decision did not contain transparency requirements and therefore the first and second entrustment act have not been published online.
- (58) As a result, the measures meet all the requirements of the 2012 SGEI Decision, respectively of the 2005 SGEI Decision (until the entry into force of the 2012 SGEI Decision). That triggers the legal consequence stipulated in Article 3 of the 2012 SGEI Decision and in Article 3 of the 2005 SGEI Decision. Therefore, the Commission does not assess whether or not the cumulative conditions for the existence of State aid within the meaning of Article 107(1) TFEU are fulfilled.

#### **4. CONCLUSION**

- (59) In light of the foregoing assessment, the Commission has accordingly found that the measures described in the complaint comply with Article 3 of the 2012 SGEI Decision, respectively Article 3 of the 2005 SGEI Decision.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The schemes for the compensation of costs incurred in performing public service obligations instituted by the Decisions of the City Council of Osnabrück of 9 March

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<sup>37</sup> This system can be accessed via <https://ris.osnabrueck.de/bi/allris.net.asp>.

2010, of 28 June 2011 and of 10 September 2013 and the individual financing granted on the basis of those schemes and analysed in the present Decision fall under Article 3 of Commission Decision 2012/21/EU and Article 3 of Commission Decision 2005/842/EC.

The Commission is hence not competent to examine those measures on the basis of the preliminary examination procedure foreseen in Article 4 of Regulation (EU) 2015/1589.

The complaint filed by an anonymous complainant on the basis of Article 24(2) of Regulation (EU) 2015/1589 is rejected as unfounded, in so far as it concerns those schemes and the individual financing granted on their basis.

#### *Article 2*

This Decision is addressed to the Federal Republic of Germany.

If this Decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this Decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Brussels  
Fax: +32 2 296 12 42  
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Done at Brussels, 21.10.2016

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*