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**Subject: State Aid SA.38469 (2017/E) – Sweden
Sheltered employment in Sweden**

Madam,

- (1) The Commission wishes to inform Sweden that, having examined the information supplied by the Swedish authorities in relation to the public funding granted by Sweden to Samhall Aktiebolag ('Samhall') for the integration of people with disabilities via labour market insertion, it has decided to propose appropriate measures, pursuant to the procedure laid down in Article 108(1) of the Treaty on the Functioning of the European Union ('TFEU'), read in conjunction with Article 22 of Regulation (EU) 2015/1589¹.
- (2) The Commission invites the Swedish authorities to inform the Commission in writing that Sweden accepts and endorses unconditionally and unequivocally this proposal for appropriate measures in its entirety, in accordance with Article 23(1) of that Regulation.

1. PROCEDURE

- (3) On 10 March 2014 the services of the Commission received a complaint submitted by a private operator in the cleaning services market concerning the granting of alleged State aid to Samhall, a State-owned company whose

¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU. OJ L 248, 24.9.2015, p.9.

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assignment is to create work that furthers the development of people with functional impairment.

- (4) Several exchanges took place between the Commission and the Swedish authorities to collect information on the measure. More specifically, a request for information was sent on 19 May 2014 to which the Swedish authorities replied on 18 June 2014. The Commission met the Swedish authorities on 4 November 2014 to discuss their replies.
- (5) On 3 July 2015 the Commission informed the Swedish authorities of its preliminary view on the public funding granted to Samhall with reference to Article 17(2) of Council Regulation No 659/1999 laying down detailed rules for the application of Article 108 TFEU². The Commission came to the conclusion that the measure constitutes existing aid but does not fulfil all requirements laid down in the Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State aid in form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest³ ('2012 SGEI Decision') and therefore invited the Swedish authorities to present their observations.
- (6) The Swedish authorities submitted their commitments regarding the envisaged changes to make the measure compliant with the 2012 SGEI Decision on 25 September and 9 November 2015.
- (7) The complainant gained access to the Commission's preliminary view under Swedish freedom of information laws, and submitted comments thereon on 11 September 2015. The complainant also had access to the commitments of the Swedish authorities to which the complainant reacted on 20 October 2015, 18 April, 26 April and 7 December 2016.
- (8) Following these submissions, the Commission had further exchanges with the Swedish authorities on 2 June and 10 November 2016. The Swedish authorities submitted further information and commitments on 22 December 2016. The complainant also got access to that submission.
- (9) On 10 February 2017 the services of DG Competition sent to the complainant their preliminary view on the measure.
- (10) The complainant disagreed with the assessment of DG Competition and replied to the preliminary assessment letter on 10 March 2017.⁴
- (11) On 8 June 2017 the complainant's reply was forwarded to the Swedish authorities together with a request for information to which the Swedish authorities

² OJ L 83, 27.3.1999, p. 1; in the meantime repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules of the application of Article 108 TFEU, OJ L 248, 24.9.2015, p. 9, Article 21(2).

³ Commission Decision on the application of Article 106(2) on 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, OJ L 7, 11.1.2012, p. 3.

⁴ For details see below point 21.

submitted their answer on 14 July 2017. The Swedish authorities submitted further information on 11 September 2017.

- (12) The complainant got access to the submission by the Swedish authorities and submitted further comments on 6 October 2017. The complainant's submission was forwarded to the Swedish authorities together with a request for information to which the Swedish authorities answered on 20 November 2017.

2. DETAILED DESCRIPTION OF THE MEASURE AND THE BENEFICIARY

2.1. Samhall

- (13) According to the information received from the Swedish authorities, Samhall is a limited liability company wholly owned by the Swedish State. As of 1980, Samhall had carried out its activity in the form of a foundation. In 1992, in line with Government Proposal 1991/92:91 (agreed upon by the Swedish Parliament⁵), Samhall was reformed into a limited liability company. The Government Proposal sets out that the purpose of Samhall shall be regulated in the Articles of Association of the company rather than by law⁶.

- (14) In line with this, Article 3 of Samhall's Articles of Association of 1992 set out the following:

"3 § Purpose of the company's activities, etc.

The company has the task of organizing, leading and coordinating activities conducted within the Group in order to provide meaningful and developing work for handicapped workers where the needs are.

The purpose is fulfilled by the company, subsidiaries or partners engaging in business activities that are adapted to the handicapped workers' conditions. Otherwise, this business is undertaken according to commercial principles and at market conditions, taking into account that other business should not be exposed to unfair competition.

As the business is not primarily profit driven, the shares do not entitle to dividends. Any profit arising in the company must be carried forward to a new account for the company's future business activities.

At the company's liquidation, the company's assets must be allocated to the shareholder (the state)."

- (15) Since 1992 the quoted assignment has not changed on substance⁷: Samhall is thus still, according to Article 3 of its Articles of Association of 2014⁸, entrusted with offering sheltered employment to persons with functional impairment⁹.

⁵ The Government Proposal was agreed upon by the Swedish Parliament (Parliament protocol 1991/92:107 of 7 May 1992).

⁶ See pages 20-21 and 25-27 of the Government Proposal.

⁷ The only modifications in Article 3 of Samhall's Articles of Association over the time relate to changes in the company's organisational structure and linguistic adjustments.

⁸ Replacing Article 3 of Samhall's Articles of Association of 2011, which replaced Article 3 of Samhall's Articles of Association of 1995, which in its turn replaced Article 3 of Samhall's Articles of Association of 1992.

⁹ Article 3 of Samhall's Articles of Association of 2014 reads as follows:

- (16) It follows from the quoted Article 3 of Samhall's Articles of Association, as well as from the Government Proposal¹⁰, that Samhall aims at promoting the integration of disabled people in the labour market by offering them tailored-made employment in the company. As a means for achieving this purpose, Samhall offers goods and services in several markets (e.g. the cleaning services market, workplace and property services market, retail industry and manufacturing markets) in accordance with business-like principles and at market conditions. Shares in Samhall do not confer any right to a dividend and any profit arising in the company must be carried forward to a new account for the company's future business activities.
- (17) As of 1994, in order to safeguard the influence of the Parliament (and the control by the Government) on Samhall's activity, Samhall's Articles of Association stipulate that Article 3 of the same Articles of Association cannot be modified without prior Government and Parliament approvals.¹¹
- (18) Samhall employs more than 21 500 employees of which 89 % are people with disabilities (as of 31 December 2016).
- (19) As a complement, Samhall's role in Swedish labour market policy is set out by law. In accordance with §§ 37-39 of Ordinance (2017:462) on special initiatives for people with disabilities resulting in a reduced capacity for work¹² (hereafter "the Ordinance"), sheltered employment with Samhall is only available for people who are deemed to be unable to find other work and whose need cannot be met through other initiatives. The Employment Office is the competent authority to decide who obtains sheltered employment with Samhall. When the Employment Office assigns a disabled person to a job in Samhall the authority has determined that the person in question is unable to get work with the support and initiatives otherwise available under the named Ordinance. Without the possibility to be assigned to Samhall, the people who are eligible for employment at Samhall would be excluded from the labour market and would consequently be dependent on other forms of subsidy for their subsistence. Since its introduction the above described requirements have – but for linguistic adjustments- not been modified.

"3 § Purpose of the company's activities, etc.

The company's objective is producing goods and services in demand and, by doing this, creating meaningful and developing work for people with disabilities that result in a reduced work ability where the needs are.

The activity should be adjusted to the conditions that people with disabilities that result in a reduced work ability have and should be carried out in accordance with business-like principles and at the market's conditions, by which it should be taken into consideration that other parts of the industry should not be exposed to unsound competition.

Shares do not entitle to dividends. Any profit arising in the company must be carried forward to a new account for the company's future business activities. At the company's liquidation, the company's assets must be allocated to the shareholder (the state)."

¹⁰ See e.g. Chapter 4 (Considerations and proposal), in particular section 4.5 (Samhall's assignment), pages 25-28.

¹¹ See Article 15 of the 1994 Articles of Association and Article 11 of the Articles of Associations of 2011 and 2014.

¹² Replacing §§ 32-34 of Ordinance (2000:630) on special initiatives for people with disabilities resulting in a reduced capacity for work; replacing § 9 of Ordinance (1987:405) on employment policies.

- (20) More detailed instructions for Samhall are provided by the State in Samhall's owner's guidelines of 2017.¹³ With respect to the purpose of Samhall's assignment, the guidelines refer to Article 3 of the Articles of Association and specify in more detail the extent of the core assignment and its obligations under the Ordinance, the fact that Samhall shall ensure that 1 100 employees per year transfer from a job at Samhall to the ordinary labour market, etc.¹⁴ According to the Swedish authorities the transfer requirement guarantees that there is an outflow of 1 100 persons who, thanks to their employment at Samhall, have improved their skills in a way that with or without other initiatives they are able to obtain work on the regular employment market.

2.2. Public funding of Samhall

- (21) Samhall's revenues obtained from offering goods and services in the market do not cover its total costs due to the additional costs for employing workers with disabilities. Therefore, Samhall receives public funding from the Swedish State as compensation for the additional costs of employing workers with disabilities.
- (22) The amount of public funds granted to Samhall each year is since 1992 a fixed sum linked to the number of working hours for employees with disabilities (Government Proposal 1991/92:91).¹⁵ According to the Swedish authorities, the fixed amount is calculated proportionally to the total number of wage hours for workers with disabilities that Samhall is obliged to provide each year.
- (23) The purpose of this compensation is to cover the additional costs incurred by Samhall and, therefore, ensure that Samhall is in a position to meet the target number of working hours for people with disabilities set by the Swedish authorities. The public support amounts to several million SEK per year (e.g. 4 405 million SEK in 2016 (approximately EUR 500 million)).¹⁶

3. THE COMPLAINT

- (24) The complainant – a private operator in the cleaning services market – argues that the grant of public funds to Samhall allows it to (1) charge lower prices and (2) pay higher salaries to its (non-impaired) employees than its competitors in the cleaning services market. Further, the complainant claims that the amount of public funds granted to Samhall is a fixed sum and that the method used to calculate this amount is not related to the additional costs incurred by Samhall for the employment of disabled workers.
- (25) Furthermore, the complainant holds the view that (1) even though the level of compensation has not been substantially altered over the years, Samhall's

¹³ Replacing Samhall's owner guidelines of 2014; replacing Agreement between the State and Samhall of 2013; replacing Agreement between the State and Samhall of 2000; replacing Regulation letter in form of government decision of 1993.

¹⁴ The requirement of a certain number of transfers from Samhall to work in the regular labour market applies since 1993 unchanged but for linguistic adjustments in its wording.

¹⁵ Initially (since 1980), the compensation model was structured on the basis of existing wage costs and stated that the compensation would amount to a certain percentage of wage costs for employees with disabilities.

¹⁶ See for an overview on the yearly support amounts below footnote 10.

economic activities, strategies and direction have undergone material changes during the last 10-20 years as Samhall has sold parts of the company's assets used in its industrial activities and is focusing more on the market for cleaning and other services with the implication the measure would not qualify as existing aid, (2) the measure does not comply with the criteria of the 2012 SGEI Decision, in particular as regards the time limitation of an entrustment act to 10 years, a clear definition of the public service obligation and the costs which are compensated and an actual control of overcompensation, and (3) Samhall allegedly employs workers without functional impairment.

- (26) The complainant also considers that the commitments proposed by Sweden do not address the alleged competition concerns, in essence because (1) there would be no genuine SGEI, i.e. Samhall does not exist due to a market failure and is not an employer of last resort, (2) the pricing routines applied by Samhall do not exclude that Samhall engages in predatory pricing strategies and that Samhall does not set its prices for services at market rate, (3) the provisions under the Swedish Competition Act with regard to sale activities by public entities are insufficient, and (4) the changes envisaged by the Swedish authorities are insufficient to make the measure compliant with the 2012 SGEI Decision.

4. VIEW OF THE SWEDISH AUTHORITIES

- (27) The Swedish authorities put forward the argumentation that the measure does not constitute State aid pursuant to Article 107(1) TFEU as the measure neither constitutes an advantage in favour of Samhall due to the fulfilment of the four Altmark criteria nor distorts competition. Moreover, the Swedish authorities argue that if the measure would be considered to be aid it would constitute existing aid as the compensation model applies without substantive changes since 1992. In addition, the Swedish authorities argue that the measure could be compatible under the 2012 SGEI Decision.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of aid

- (28) According to Article 107(1) TFEU, State aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States. The conditions laid down by that provision for a finding of State aid are cumulative. Only insofar as all of those conditions are met can the alleged measure constitute State aid within the meaning of Article 107(1) TFEU.
- (29) The Commission considers that the measure at hand constitutes State aid within the meaning of Article 107(1) TFEU for the following reasons. Firstly, the measure is financed from State resources since Samhall receives public funding directly from the Swedish State. Secondly, the measure is selective as it concerns only Samhall. It follows from the above named ordinances that to all other companies which employ persons with functional impairment other measures apply. Thirdly, the measure is granted to an undertaking since Samhall, although its main purpose is to offer sheltered employment to persons with functional impairment, offers goods and services on the market in competition with other providers. Fourthly, the measure can affect intra-EU trade and distort competition

as other international companies operate on the same markets as Samhall (e.g. in the Swedish cleaning services market). Finally, the Commission considers that the measure grants Samhall an economic advantage as it finances labour costs which are normally borne by the companies.

- (30) Contrary to the argumentation of the Swedish authorities in their submissions, the Commission considers that the measure does not fulfil all the cumulative Altmark¹⁷ criteria and also therefore grants Samhall an economic advantage. The fulfilment of the four Altmark criteria requires the following:
- i. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
 - ii. 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.
 - iii. 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.
 - iv. 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.
- (31) After carefully analysing the Swedish authorities' submissions, the Commission is of the opinion that the measure does not fulfil all the Altmark criteria. More specifically, the Commission considers the second, the third and the fourth Altmark criteria not to be fulfilled for the following reasons:
- (32) First of all, concerning the second Altmark criterion, the Swedish authorities recognize that, currently, the compensation mechanism in place does not calculate the amount of public support on the basis of the net cost of the SGEI obligation entrusted to Samhall. As explained in paragraph (22) above, the compensation is a fixed amount calculated proportionally to the total number of wage hours for workers with disabilities and hence is not calculated in proportion to the actual net cost of the public service obligation entrusted to Samhall.
- (33) Second, concerning the third Altmark criterion, as there is no mechanism in place to estimate the net cost of the SGEI obligation, the Swedish authorities cannot ensure that the compensation granted to Samhall does not exceed the costs for fulfilling the public service obligation.

¹⁷ Judgment of the Court of Justice of 24 July 2003 in case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, ECLI:EU:C:2003:415.

- (34) Third, concerning the fourth Altmark criterion, and taking into consideration that there was no tender procedure organized for the attribution of the public service obligation, the Swedish authorities could not provide convincing arguments to demonstrate that the compensation granted to Samhall was determined on the basis of an analysis of the costs incurred by a typical well-run undertaking. Indeed, in their submissions the Swedish authorities argue that a public company is the most efficient solution to provide the SGEI of creating employment for impaired workers. However, the argumentation of the Swedish authorities does not prove that the compensations granted to Samhall were calculated on the basis of an analysis of the costs that an average well-run company would have incurred in discharging the SGEI obligations entrusted to it, including a reasonable profit.
- (35) In light of the above, the Commission concludes that the measure under assessment does not fulfil all the cumulative Altmark criteria and therefore grants Samhall an economic advantage. Therefore, as all the other cumulative criteria of Article 107(1) TFEU are fulfilled the measure is to be classified as State aid in the meaning of that Article.

5.2. Existing aid

- (36) According to Article 1(b)(i) of Regulation (EU) 2015/1589, all aid which existed prior to the entry into force of the TFEU in the respective Member State, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member State, constitute existing aid, *inter alia* without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden. In this respect, the Act of Accession of Austria, Finland and Sweden¹⁸ provides that aid which existed prior to the entry into force of the EEA Agreement on 1 January 1994 constitutes existing aid. As Samhall has been receiving the above mentioned aid from the Swedish authorities since 1980 and as the compensation method has not changed since 1992 (Government Proposal 1991/92:91), the measure qualifies as existing aid within the meaning of Article 108(1) TFEU.
- (37) According to the jurisprudence of the Union Courts, where the Member State alters an existing aid scheme and the alteration affects the substance of the original scheme, the latter is transformed into new aid subject to the notification principle of Article 108 TFEU.¹⁹ However, in accordance with Article 4 of Regulation 794/2004²⁰, modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market as well as an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.
- (38) As set out in the Government Proposal 1991/92:91, the Swedish State has entrusted Samhall with its assignment through Government Proposal 1991/92:91 (agreed upon by the Swedish Parliament), Article 3 of Samhall's Articles of

¹⁸ OJ C 241, 29.8.1994.

¹⁹ Judgment of the Court of First Instance of 30 April 2002, T-195/01 and T-207/01, *Gibraltar*, EU:T:2002:111, paragraphs 109-111.

²⁰ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1, as amended.

Association, the Ordinance and the more detailed owner's guidelines. As described in sections 2.1 and 2.2, based on the information submitted by the Swedish authorities, since 1992 no significant change has occurred in Samhall's main activity or in the compensation scheme, as set out in these entrustment acts. Therefore, since the time prior to the accession of Sweden to the EU and prior to the entry into force of the EEA agreement, the entrustment has not been amended and any modification of the measure was of a purely formal or administrative nature as these changes relate to the company's organisational structure and to linguistic adjustments (see in detail section 2.1). Moreover, the method for calculating the amounts of the compensation and the amount of compensation²¹ have not substantively changed.

- (39) The fact that the goods and the services offered by Samhall have changed over time does not constitute a substantive change of the measure and therefore does not alter the assessment above. Samhall's mission as established in the entrustment has always been the creation of employment opportunities for disabled people with reduced working capacity and has not changed over time but for linguistic adjustments. The mission as established in the entrustment is not restricted to the production of certain goods or the provision of certain goods and services. The production of goods and the offering of goods and services are only means to provide these employment opportunities. The evolution of the activities over the past years from more production to more service-oriented areas is due to changes in the labour market but does not change the mission of Samhall as foreseen in the entrustment. On the contrary, Samhall's adjustment to the changes in the labour market is essential with regard to Samhall's obligation to prepare its employees for the regular employment market and to transfer to it yearly 1 100 employees.
- (40) Therefore, the Commission comes to the view that the measure constitutes existing aid in the meaning of Article 1(b)(i) of Regulation (EU) 2015/1589.

5.3. Compatibility

- (41) The Swedish authorities have initially argued that if the measure in favour of Samhall is considered to be State aid it could be compatible under the 2012 SGEI Decision, which sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) TFEU.

²¹

Year	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	
Compensation (in million SEK)	4 960	4 739	4 735	4 424	4 456	4 262	4 262	4 262	4 262	4 137	4 276	
Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Compensation (in million SEK)	4 246	4 226	4 315	4 356	4 475	4 513	4 553	4 640	4 815	4 405	4 405	4 405

- (42) The Commission takes note of the commitment of the Swedish authorities to undertake the necessary amendments in order to make the entrustment acts compatible with the conditions set out in the 2012 SGEI Decision for the future. The Commission, however, takes the view for the reasons below that the aid measure in favour of Samhall – as currently implemented – does not comply with all requirements of the 2012 SGEI Decision and is therefore not compatible with the internal market. The Commission notes that an existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility.²²
- (43) **Genuine SGEI:** The Swedish authorities consider that Samhall is entrusted with the provision of a service of general economic interest (SGEI) within the meaning of Article 2(1)(c) of the 2012 SGEI Decision, namely the creation of sheltered employment, as described above.
- (44) The Commission acknowledges the qualification of the creation of sheltered employment for disabled workers as a genuine SGEI falling within the scope of Article 2(1)(c) of the 2012 SGEI Decision²³.
- (45) The complainant alleges that Samhall does not act in line with its assignment to help persons with disabilities to get integrated in the labour market but also employs people without disabilities. However, according to the information received by the Swedish authorities, it is the Employment Office who recommends persons for an employment at Samhall. These persons have been deemed by the Swedish authorities to have a disability affecting their ability to work. Moreover, when the Employment Office assigns a disabled person to a job at Samhall, the authority has determined that the person in question is both unable to find another job and unable to get work with the support and initiatives otherwise provided and available. The facts that the educational level among people with disabilities has over time gradually increased and that the work capacity of those assigned to Samhall has overall increased over time does not alter the fact that those being assigned to Samhall have been assessed by the Employment Office as persons being unable to find another job and unable to get with other support measures. Furthermore, according to the information received, e.g. for the year 2016, 89 % of the employees of Samhall have an assessed disability which means it is impossible for them to get work with the support and initiatives otherwise available. The remaining 11 % have supervisory tasks and are in this respect indispensable for the fulfilment of the SGEI entrusted to Samhall. Finally, the Commission takes note that the Swedish authorities are monitoring closely that work in Samhall is offered to the right target group.
- (46) **Entrustment act:** The Swedish authorities have provided the Commission with the relevant entrustment acts on the basis of which the Swedish authorities grant the compensation to Samhall, namely (1) Government Proposal 1991/92:91, (2) the Ordinance, (3) Samhall's Articles of Association and (4) Samhall's owner's guidelines.

²² Judgment of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, Judgment of 15 March 1994, *Banco Exterior de España v Ayuntamiento de Valencia*, C-387/92, EU: C:1994:100, paragraphs 19-21.

²³ Compensation for the provision of SGEI meeting social needs as regards (...) access to and reintegration into the labour market (...) and care and social inclusion of vulnerable groups.

- (47) However, the Commission considers that several of the requirements of the 2012 SGEI Decision related in particular to the duration of the entrustment, the compensation mechanism and the verification of the absence of overcompensation are not fulfilled.
- (48) **Time limitation:** The entrustment acts do not limit the duration of the entrustment to Samhall. Therefore, the measure does not fulfil the requirement of Article 2(2) of the 2012 SGEI Decision.
- (49) **Content of the acts of entrustment:** The entrustment acts do not include a reference to the 2012 SGEI Decision. Therefore, the entrustment acts are not in line with the requirement of Article 4(f) of the 2012 SGEI Decision.
- (50) **Compensation:** Article 5 of the 2012 SGEI Decision states that "*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*". However, the Commission notes that the compensation paid to Samhall is not limited to the net costs of the SGEI. It is set as a fixed sum linked to the number of working hours for employees with disabilities. Therefore it cannot be excluded that the compensations could potentially be higher than what is necessary to cover the net cost of the SGEI obligation including a reasonable profit. Consequently, the compensation mechanism is not in compliance with Article 5 of the 2012 SGEI Decision.
- (51) **Control of overcompensation:** The entrustment acts do not include a control of overcompensation. Therefore, the requirement of Article 6 of the 2012 SGEI Decision, which states that "*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*", is not fulfilled.
- (52) **Separation of accounts and transparency:** Concerning the requirements of separation of accounts of Article 5(9) and of transparency of Article 7 of the 2012 SGEI Decision, the Swedish authorities argue that all of Samhall activities are carried out for the provision of the SGEI obligation. In such a context, those requirements would not apply. However, as Samhall is active in a wide range of market activities and occurring normal costs unrelated to the SGEI obligation shall not be compensated, the Commission concludes that both requirements need to be complied with which is currently not the case.
- (53) Therefore, the Commission considers that the measure does not comply with all the compatibility requirements of the 2012 SGEI Decision.
- (54) The Commission takes also the view that the measure does not comply with all the compatibility requirements of the 2012 SGEI Framework.²⁴ In particular, the entrustment act does not contain (1) a duration as required in 2.4 of the 2012 SGEI Framework, (2) does not comply with Directive 2006/111/EC as required in 2.5 of the 2012 SGEI Framework, (3) does not comply with public procurement

²⁴ Communication from the Commission on European Union framework for State aid in the form of public service compensation (2011), OJ C 3, 11.1.2012, p. 15.

rules as required in 2.6 of the 2012 SGEI Framework and (4) does not comply with the requirements of 2.8 of the 2012 SGEI Framework. Therefore, the Commission considers that the measure does not comply with all the compatibility requirements of the 2012 SGEI Framework.

- (55) Following the above, the Commission considers that the measure does not comply with all the compatibility requirements of the 2012 SGEI Decision and of the 2012 SGEI Framework and is consequently incompatible with the internal market.

6. CONCLUSIONS

- (56) The Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU.
- (57) Moreover, considering that the measure is in place since 1980 and has not been altered since 1992 the measure in question constitutes existing aid within the meaning of Article 1(b)(i) of Regulation (EU) 2015/1589.
- (58) Finally, the measure does not comply with all requirements of the 2012 SGEI Decision and is also not compatible with Article 106(2) TFEU in the light of the provisions of the SGEI Framework. The measure is therefore incompatible with the internal market.
- (59) Where an existing aid is found to be incompatible with the internal market, such aid should be subject to appropriate measure pursuant to Article 108(1) TFEU to abolish or amend the measure. In this respect and in compliance with the principle of legal certainty, *'the Commission is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine'*²⁵.

6.1. Description of the commitments of Sweden

- (60) As a result of the dialogue initiated following the Commission's Article 17(2) letter of 2015²⁶ (see point (5) above), the Swedish authorities informed the Commission that, should the Commission confirm that they consider the measure incompatible with the 2012 SGEI Decision, Sweden would undertake the necessary amendments in order to make the entrustment acts compatible with the conditions set out in the 2012 SGEI Decision for the future. Sweden committed to implement the following changes in the entrustment acts:
- (61) **Time limitation and reference in the entrustment acts:** The Swedish authorities have committed to limit the entrustment of Samhall in time pursuant to Article 2(2) of the 2012 SGEI Decision to ten years and to refer to the 2012 SGEI Decision in the entrustment acts according to Article 4(f) thereof.
- (62) **Compensation mechanism:** The Swedish authorities have committed to include a compensation mechanism in the entrustment acts which is in line with Article 5

²⁵ Judgement of the Court of First Instance of 15 June 2000, T-298/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta v Commission*, ECLI:EU:T:2000:151, paragraph 148.

²⁶ Meanwhile Article 21(2) of Council Regulation (EU) 2015/1589.

of the 2012 SGEI Decision. Article 5(1) of the 2012 SGEI Decision requires that the amount of compensation shall not exceed what is necessary to cover the net costs incurred in discharging the public service obligations, including a reasonable profit.

- (63) The Swedish authorities have decided to compensate Samhall for the additional costs incurred from its obligation to provide work for people with disabilities that reduce their capacity for work, compared with the net costs the company would have had if it were not under this obligation. The total sum of the additional costs constitutes the ceiling for the compensation. However the Swedish authorities may decide to actually compensate less due to budgetary constraints.
- (64) The Swedish authorities have determined three categories of additional costs linked to differences in productivity: additional staff costs (additional salary costs linked to the difference in productivity between disabled and non-disabled staff), additional staff-related costs (additional non-salary costs linked to the difference in productivity between disabled and non-disabled staff, e.g. additional costs for work clothes due to higher number of staff for the same activity) and costs for technical adaptations (e.g. adjustments to equipment, machinery, vehicles, premises etc., more in particular jib cranes, air-controlled back support, spectacles, abdominal support chairs, special equipment for PCs ("mousetrappers"), foot rests, orthopaedic footwear, special chairs and adapted shoes, etc.).
- (65) In order to calculate the additional staff and staff-related costs, Samhall uses its accounting data and divides up its operations according to the various SNI codes (Swedish Standard Industrial Classification) at two-digit level. SNI is part of an international system of classification and is based on the EU economic classification standard NACE. SNI and NACE are completely identical to the first four digits, representing section, division, group and class. SNI has in addition a fifth, Swedish level. The ratios of Samhall's costs to turnover within the respective SNI codes are then compared with similar ratios calculated with data from Statistics Sweden for average turnover and staff costs in these SNI codes. Based on these figures it is possible to calculate what Samhall's staff and staff-related costs would have been if it were an average company without the obligation to provide employment for people with disabilities ("computed costs").
- Additional staff costs: Samhall's staff costs minus Samhall's computed staff costs.
 - Additional staff-related costs (other than staff costs): Samhall's staff-related costs minus Samhall's computed staff-related costs. As Samhall's mission is to provide employment for people with disabilities that reduce their working capacity, Samhall requires more employees to perform the same work than a company that is not under the same obligation. Therefore, Samhall has higher staff-related costs than other companies. The calculation of Samhall's additional staff-related costs is based on the assumption that the ratio of its computed staff-related costs to the firm's actual staff-related costs is the same as that between its computed staff costs to the firm's actual staff costs.
 - Costs for technical adaptations: include all costs of the adjustments to equipment, machinery, vehicles, premises etc. that are needed because the

tasks are to be performed by staff with disabilities that reduce their capacity for work. The full amount of these costs is included in the compensation as Samhall would not have these costs if it did not have the mission of providing employment for people with disabilities that reduce their capacity for work.

- (66) **Control of overcompensation and recovery in case of overcompensation:** The Swedish authorities have committed to add provisions to the entrustment acts in order to ensure control of overcompensation and recovery in case of overcompensation pursuant to Article 6 of the 2012 SGEI Decision. In particular, the Swedish authorities will introduce yearly checks of overcompensation based on Samhall's annual accounts and will appoint an authority to carry out these annual checks and recover any eventual overcompensation received by Samhall.
- (67) **Separation of accounts and transparency:** The Swedish authorities have committed to ensure separation of accounts pursuant to Article 5(9) of the 2012 SGEI Decision and transparency pursuant to Article 7 of the 2012 SGEI Decision.
- (68) **Provision of goods and services at market price:** The Swedish authorities have committed to ensure that Samhall will not receive more than necessary to cover its additional costs. They have taken note that in this respect it is important in the calculations above that the turnover of Samhall is not artificially reduced by too low prices and that the pricing policy of Samhall is therefore an essential point for the reliability of the compensation calculation. In this respect, the Swedish authorities have argued that the pricing policy is in line with market standards as explained below (see (76) to (80)).

6.2. Commission's assessment of the commitments of Sweden

- (69) **Time limitation and reference in the entrustment acts:** Limiting the entrustment of Samhall in time pursuant to Article 2(2) of the 2012 SGEI Decision to ten years and the introduction of the reference to the 2012 SGEI Decision in the entrustment acts according to Article 4(f) thereof make the entrustments compliant with Article 2(2) and Article 4(f) of the 2012 SGEI Decision.
- (70) The Commission moreover notes that contrary to the complainant's allegation, the 2012 SGEI Decision does not prevent the Swedish authorities to newly entrust Samhall after the expiry of the ten-year time period provided in particular that the need for the SGEI remains justified.
- (71) **Compensation mechanism:** Article 5(1) of the 2012 SGEI Decision requires that the amount of compensation shall not exceed what is necessary to cover the net costs incurred in discharging the public service obligations, including a reasonable profit. In the case at hand that means that the net costs to be taken into account for the assessment should be limited to the additional costs that are related to the employment of the disabled workers compared to the costs of employing workers who are not disabled. In particular, it must be avoided that costs unrelated to the specific burden of hiring disabled employees are financed by the State. Given that Samhall is, as described, active in a wide range of market activities, the compensation mechanism should avoid that normal costs incurred by all companies in the relevant sectors and that are unrelated to the SGEI are financed. The additional burden of employing disabled workers needs to be

estimated, and can relate for instance to additional categories of costs (e.g. specific trainings, specific machines or equipment, additional personnel hired to support specifically these employees) or to an additional burden on normal costs (e.g. increased labour costs due to lower productivity which could justify a wage subsidy).

- (72) The compensation mechanism described above is in line with these principles and therefore compliant with Article 5 of the 2012 SGEI Decision and its inclusion into the entrustment acts pursuant to Article 4(d) of the 2012 SGEI Decision make the entrustment acts compliant with Article 4(d) and 5 of the 2012 SGEI Decision.
- (73) The complainant alleges that aggregated turnover and costs under a certain SNI code is not a proper instrument to use as a comparison with Samhall's turnover and costs as the SNI codes may also include turnover and cost data with regard to products and services not offered by Samhall. Furthermore, the complainant considers that comparison data generated at five-digit-level would be more appropriate than the one generated at two-digit-level. The Commission, however, takes into consideration that SNI and its basis NACE are generally recognised systems of economic classifications which group certain activities under the same code with the objective of enabling comparative economic analysis and statistics. It is not required in this respect that only companies carrying the full range of activities falling within a certain code are covered by that same SNI code. Moreover, according to the Swedish authorities the two-digit-level is the appropriate level taking into account the quality of the comparison data generate, the administrative burden and including transparency in Samhall's annual reports. Following the above, the Commission considers that the method envisaged by Swedish authorities does not seem to entail any manifest error and constitutes a reasonable approach to determine the additional burden related to the SGEI obligation of Samhall.
- (74) **Separation of accounts and transparency:** The insertion of provisions which ensure the separation of accounts and transparency into the entrustment acts make the entrustment acts compliant with Article 5(9) and Article 7 of the 2012 SGEI Decision.
- (75) **Control of overcompensation and recovery in case of overcompensation:** The insertion of provisions to the entrustment acts in order to ensure control of overcompensation and recovery in case of overcompensation ensure compliance of the entrustment acts with Article 4(e) and Article 6 of the 2012 SGEI Decision.
- (76) **Provision of goods and services at market price:** The Swedish authorities need to ensure that Samhall will not receive more than necessary to cover its additional costs. In this respect it is important in the calculations above that the turnover of Samhall is not artificially reduced by too low prices. The pricing policy of Samhall is therefore an essential point for the reliability of the compensation calculation.
- (77) The Commission is of the opinion that Samhall sets its prices for goods and services at market rate which follows from the following observations:
- (78) First, according to Section 3 of its articles of association, Samhall's activities must be conducted according to commercial principles and under market conditions.

Therefore, Samhall has established procedures in order to ensure that its operation does not expose other companies to unfair competition in such a way as to distort or threaten to distort competition in the market. Accordingly, within the company prices are calculated by a central department consisting of specially trained staff, using established calculation tools and in accordance with accepted market principles. Prices are set by analysing a standard calculation based on normal costs at competing companies. Major transactions are managed by a special Business Council consisting of the company's senior management team.

- (79) Secondly, the data provided by the Swedish authorities shows: (1) that Samhall wins about one third of the contracts it tenders for whereas the other two thirds are won by its competitors, (2) that the prices quoted in the tenders in which Samhall participated vary widely, meaning that some are considerably higher than Samhall's and other considerably lower, but the majority of the bids are between 80 and 120 % of the price quoted by Samhall, and (3) that the latter can also be observed for two of Samhall's main competitors (ISS and Sodexo).
- (80) Thirdly, in addition to prohibiting restrictive practices and the abuse of a dominant market position, the Swedish Competition Act (2008:579) contains special provisions on anti-competitive sales activities by public entities. Under these provisions, publicly-owned companies can be prohibited from applying anti-competitive practices such as under-pricing or discrimination. The public company does not have to be in a dominant position in the market for the rules to be applicable. If a company considers that it has been the victim of unfair competition from a publicly-owned company, it can report the matter to the Competition Authority under the provision on anti-competitive sales activities by public entities. The Competition Authority will investigate whether the publicly-owned company is engaging in practices which distort or threaten to distort competition on the market. The Competition Authority can bring an action before the Stockholm District Court to prevent the public company from engaging in the anti-competitive practice. If the Competition Authority decides not to take action, a company affected by the activities of the publicly-owned entity can bring a legal action before the Patent and Market Court. Rulings by the Stockholm District Court in competition cases can be contested before the Swedish Patent and Market Court. In this regard, the complainant alleges that since 2013 eight complaints have been filed against Samhall before the Competition Authority and have been turned down with reference to the authority's priority policy. However, according to the understanding of the Commission, in this scenario – decision of the Competition Authority not to further investigate and to take action – the company concerned may itself initiate proceedings before the Swedish Patent and Market Court as described above. According to the information received by the Swedish authorities, neither the Competition Authority nor any private company has chosen to institute proceedings against Samhall regarding the prohibiting of under-pricing.

7. APPROPRIATE MEASURES

- (81) The Commission, having examined the information supplied by the Swedish authorities, considers that, in the light of the above considerations, the following constitute appropriate measures to make the measure by Sweden in favour of Samhall compliant with the 2012 SGEI Decision.

- (82) Pursuant to Article 22 of Regulation (EU) 2015/1589, the Swedish authorities are hereby invited to amend the entrustment acts so that:
- a) The entrustment period of the SGEI to Samhall is limited in time in line with Article 2(2) of the 2012 SGEI Decision.
 - b) The entrustment acts includes a reference to the 2012 SGEI Decision in line with the requirement under Article 4(f) of the 2012 SGEI Decision.
 - c) The entrustment acts includes a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation in line with the requirement under Article 4(d) of the 2012 SGEI Decision.
 - d) The compensation mechanism in the entrustment act is compliant with Article 5 of the 2012 SGEI Decision. That means that the net costs to be taken into account for the assessment should be limited to the additional costs that are related to the employment of the disabled workers compared to the costs of employing workers who are not disabled. In particular, it must be avoided that costs unrelated to the specific burden of hiring disabled employees are financed by the State. Given that Samhall is, as described, active in a wide range of market activities, the compensation mechanism should avoid that normal costs incurred by all companies in the relevant sector and that are unrelated to the SGEI are financed. The additional burden of employing disabled workers needs to be estimated, and can relate for instance to additional categories of costs (e.g. specific trainings, specific machines or equipment, additional personnel hired to support specifically these employees) or to an additional burden on normal costs (e.g. increased labour costs due to lower productivity which could justify a wage subsidy).
 - e) The entrustment acts include the arrangements for avoiding and recovering any overcompensation in line with the requirement under Article 4(e) of the 2012 SGEI Decision.
 - f) A mechanism to control and recover any potential overcompensation as defined in Article 6 of the 2012 SGEI Decision is introduced.
 - g) The entrustment acts include provisions ensuring separation of accounts pursuant to Article 5(9) of the 2012 SGEI Decision and transparency pursuant to Article 7 of the 2012 SGEI Decision.
- (83) The Swedish authorities have indicated with a letter dated 12.2.2016 that they will need at least 6 month for the full implementation of the changes. In addition, full application of the commitments requires a full financial year. The Swedish authorities should fully implement the appropriate measures by 31 December 2018. The Commission will verify whether Sweden has complied with the commitments.
- (84) The Commission takes note that the Swedish authorities have committed to ensure that Samhall's prices of goods and services are not set below market prices.

- (85) The Swedish authorities are invited to inform the Commission in writing that Sweden accepts, pursuant to Article 23(1) of Regulation (EU) 2015/1589, unconditionally and unequivocally, this proposal for appropriate measures in its entirety within one month from the receipt of this proposal. Should such an acceptance not be forthcoming, the Commission will proceed in accordance with the rules laid down in Article 23(1) of that Regulation.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission