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C(2020) 5333 final

<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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**Subject: State Aid SA.56832 (2020/N) – Croatia
Sixth amendment to the concession agreement relating to the Istrian Y Motorway (sub-phase 2B2-1: section Vranja Interchange to the Učka tunnel/Kvarner portal)**

Excellency,

1. PROCEDURE

- (1) By letter dated 26 March 2020, Croatia pre-notified to the Commission the State aid measures contained in the sixth amendment to the concession agreement concluded on 25 September 1995¹, as last amended in 2018², between the Government of the Republic of Croatia and the company Bina-Istra d.d. relating to the financing, construction, operation and maintenance of the “Istrian Y Motorway”: sub-phase 2B2-1: Vranja Interchange to the Učka tunnel/Kvarner portal (“the measure”).

¹ The ‘1995 concession agreement’.

² Resolution of the Croatian government of 5 October 2018 further to the approval of the “fifth amendment” to the concession agreement by Commission Decision of 14 June 2018 (C(2018) 3729 final) in case State Aid SA.48472 (2018/N) – Croatia – Amended concession agreement relating to Istrian Y motorway (OJ C 424, 23.11.2018, p. 2) (hereinafter “the 2018 Commission Decision”).

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- (2) The Commission held a pre-notification telephone conference with the Croatian authorities on 12 May 2020. By letter of 15 May and by e-mail of 12 June 2020, the Commission asked for supplementary information. By submissions dated 3 and 24 June 2020, Croatia submitted its replies.
- (3) By electronic notification dated 30 June 2020, registered by the Commission on the same day (2020/080133), Croatia notified the measure pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”).
- (4) Croatia exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation No 1/1958³, in order to allow the Commission to adopt and notify a decision in English.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Istrian Y motorway: factual and regulatory context

2.1.1. The Istrian Y motorway

- (5) The Istrian Y motorway is a 145 km long motorway linking the Istrian region with the rest of Croatia (the “motorway”). The motorway runs from Umag in the north-west of the Istrian region, to Pula in the south⁴, and to Matulji in the north-east of the Istrian region⁵. The motorway is part of the Trans-European Transport Network (“TEN-T”)⁶.

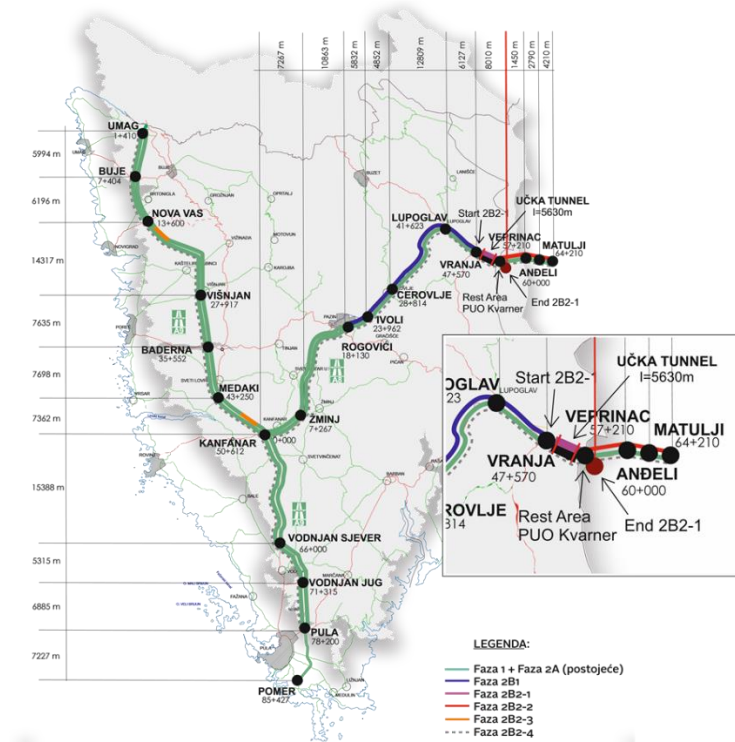
³ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

⁴ Motorway A9, Slovenian border-Kanfanar Interchange in the south central Istria-Pula.

⁵ Motorway A8, Kanfanar Interchange in the south-central Istria to Matulji Interchange.

⁶ A leg of the Motorway in Istria, i.e. the A8 (Kanfanar Interchange to Matulji Interchange) and a part of A9 (section Kanfanar Interchange to Pula Interchange) is part of the comprehensive Trans-European Transport Network (“TEN-T”).

Figure 1: Map setting out the path of the motorway and the various phases and sub-phases (including are covered by sub-phase 2B2-1)



2.1.2. The existing concession agreement

- (6) Croatia underlined that the State decided as the most appropriate solution to improve traffic conditions through the development of motorways in Istria, to tender out the works and subsequent provision and management of services by means of a concession (the “concession” or the “project”). As a consequence, the Croatian government awarded in 1995 the construction and operation of the Istrian Y motorway to the company Bina-Istra d.d. (“Bina-Istra” or the “concessionaire”).
- (7) The provisions of the 1995 concession agreement relating to the financing, construction, operation and maintenance of the motorway provide and organise the continuity of the service in time, by obliging the concessionaire to ensure freedom of movement throughout the year without interruption and by limiting the inconvenience to users resulting from any traffic interruption or restriction linked to the performance of the operation and maintenance services⁷. The concession agreement provides for a public compensation for the construction and operation services.
- (8) Equal treatment of users in view of the public service is ensured by imposing different tariffs according to vehicle category, user category and/or time of day and by charging different tariffs for two-wheeled vehicles, private cars, utility vehicles, heavy good vehicles and buses⁸.
- (9) The concession was awarded by the Government of the Republic of Croatia (“the Grantor”) to Bina-Istra pursuant to a concession agreement concluded on 25

⁷ Article 21 of the 1995 concession agreement.

⁸ Articles 26.1 and 28 of the 1995 concession agreement.

September 1995 and an ordinance passed on 21 September 1995 (“the 1995 Ordinance”)⁹. The award of the concession contract was the culmination of a tender process commenced in February 1991 through the publication of a call for tenders for the investment in the construction and operation of motorways in Croatia.

- (10) The Croatian authorities explained that the 1995 concession agreement (“initial concession”) has been amended five times since inception¹⁰ relating to the duration of the concession, the public contribution to its financing and the investments/works included in the concession. The 1995 concession agreement, as lastly amended in 2018, is currently applicable between both parties (“the existing concession agreement”).
- (11) Through the 1st amendment (1997), the duration of the concession was reduced from a possible end-date of 35 years after the beginning into service of phase 1, which would have been 2041¹¹ to the end-date of 25 September 2027¹². The amendment subdivided phase 1 of the 1995 concession agreement (which referred to phase 1 and phase 2) into phase 1A and 1B. Phase 2 was not split up.
- (12) Through the 2nd amendment to the concession agreement (1999), the financial contribution mechanism (described in recital (19)) was introduced¹³. As from this amendment, the toll policy is subject to the approval of the Government. The duration of the concession remained unchanged.
- (13) Through the 3rd amendment (2003), the financial contribution mechanism was simplified. Up until that point, the compensation was calculated on a *per* vehicle basis, i.e. the grantor paid the concessionaire every month a different amount

⁹ The 1995 Ordinance is an instrument enabling the Government to entrust Bina-Istra with the concession. It was adopted by resolution of the Croatian government pursuant to Article 1 of the Law authorizing the Government of the Republic of Croatia to regulate through ordinances certain issues covered by the Representative Chamber of the Parliament (Official Gazette of the Republic of Croatia No. 79/94), Article 5(1) of the Law on Concessions (Official Gazette No 89/92) and Article 8(1) of the Law on Roads (Official Gazette No. 56/91 – revised text, Official Gazette No. 61/91, 26/93, 109/93 and 52/93).

¹⁰ On 18 September 1997, on 27 August 1999, on 25 February 2003, on 25 August 2008 and on 5 October 2018. The first four amendments were adopted prior to the accession of Croatia to the European Union on 1 July 2013 (Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the EU, OJ EU, L 112, 24.4.2012, p.6). The latter amendment was adopted further to the Commission decision of 14 June 2018 (“2018 Commission Decision”), see footnote 2 above.

¹¹ Article 36 of the 1995 concession agreement, which states that “*The Concession shall end on the date falling 28 years after the bringing into service of the phase 1 and/or after 14 years have elapsed since the bringing into service of the phase 2, but not later than 35 years after the bringing into service of the phase 1.*” As the phase 1 ultimately was brought into service on 28 December 2006, this would have meant an end-date of 28 December 2041.

¹² In 1996, Croatian legislation was passed limiting the length of concessions over public roads granted by the Government to up to 33 years (i.e. a maximum of 32 years – only Parliament could grant concessions of 33 years and over), see Article 36 of the “Zakon o javnim cestama” (Public Roads Act 1996), Official Gazette No 100/96 available at https://narodne-novine.nn.hr/clanci/sluzbeni/1996_11_100_1962.html.

¹³ The financial contribution mechanism replaced the compensation mechanism under Article 26.3 of the 1995 concession agreement, under which, where the Croatian government opposes the tolls proposed by the concessionaire, the Government would be required to pay the concessionaire the difference between the tolls applied and those that had been proposed by the concessionaire.

based on the projected number of vehicles every month multiplied by a compensation per vehicle. Furthermore, the amendment included changes relating to the implementation of phase 1B and changes to the possible duration of the concession, establishing the end-date of 3 December 2027 as the latest possible date on which the concession could end.

- (14) Through the 4th amendment (2008), phase 1B was split up into sub-phases 1B1, 1B2 and 1B3. In addition, phase 2 was subdivided in phase 2A¹⁴ and 2B¹⁵. As part of this amendment, a closed toll system¹⁶ was applied to the section covered by the phase 2A works. No changes were made to the duration of the concession (recital (11))¹⁷.
- (15) Though the 5th amendment (2018), phase 2B was subdivided into sub-phases 2B1 and 2B2 and the latter was further divided up into sub-phase 2B2-1 (the notified measure) and sub-phases 2B2-2, 2B2-3 and 2B2-4 (the “remaining sub-phases”)¹⁸. The phase 2B1 concerned the construction of a second carriageway

¹⁴ Phase 2A was split up into sub-phases 2A1, 2A2, 2A3, 2A4 and 2A5 subject to the provisions of Article 8.1.A of the existing concession agreement. Changes relating to the implementation of phase 2A, comprising the construction of a second lane and emergency lane for the Rogovici to Pula and Medaki to Umag sections and their operation. Elasticity mechanisms for the return on phase 1B Equity were also introduced, further accentuating the level of risk for the equity investors.

¹⁵ Phase 2B was defined as “*the construction of a second lane in both directions between Matulji and Rogovici, including the doubling of Učka tunnel; the doubling of Mirna and Limski viaducts and the construction of emergency lanes for those sections of Phase 1A and 1B which have not been completed under Phase 2A*”, see section on “Definitions” of the amendment dated 23 August 2008.

¹⁶ The Istrian motorways network initially operated as an ‘open’ toll system, with vehicles of the same category charged the same toll irrespective of the distance travelled on the road. Tolling was at two ‘mainline’ plazas, Mima viaduct and Učka tunnel. With the transition to the phase 2, tolling has changed to a ‘closed’ system, where tolls vary according to the distance travelled between the entry and exit intersections, and with each entry and exit ramp having a toll plaza.

¹⁷ The Act on Amendments to Public Roads Act 2009 (“Zakon o izmjenama Zakona o javnim cestama”), which entered into force on 24 October 2009, set the limit on the possible duration of concessions over public roads to 40 years: Article 1, Official Gazette No 124/09 available at https://narodne-novine.nn.hr/clanci/sluzbeni/2009_10_124_3048.html. This act amended the Public Roads Act 2004 (“Zakon o javnim cestama”), which entered into force on 28 December 2004 and under which the duration of concessions granted by the Government over public roads had remained limited to up to 33 years (see footnote 12 above): Article 50, Official Gazette No 180/04 available at https://narodne-novine.nn.hr/clanci/sluzbeni/2004_12_180_3130.html. In 2013, the Act on Amendments to Roads Act 2013 (“Zakon o izmjenama i dopunama Zakona o cestama”), which entered into force on 15 May 2013 (and remains in force) set the limit on the possible duration of concessions over public roads to 60 years: Article 35, Official Gazette No 54/13 available at https://narodne-novine.nn.hr/clanci/sluzbeni/2013_05_54_1083.html. This act amended the Roads Act 2011 (“Zakon o cestama”), which entered into force on 28 July 2011 and under which the possible maximum duration of concessions over public roads was 40 years: Article 75, Official Gazette No 84/11, available at https://narodne-novine.nn.hr/clanci/sluzbeni/2011_07_84_1790.html.

¹⁸ Sub-phase 2B2-2: construction of two additional lanes (“doubling”) between Matulji and Učka tunnel. This sub-phase comprises the doubling of the remaining circa 10 km of the eastern section of the Motorway, after the Učka tunnel; sub-phase 2B2-3: doubling of the Mirna and Limski viaducts. This sub-phase comprises the doubling of the existing Mirna Bridge and Limski viaduct (Limska Draga) on the A9 (Dragonja-Pula) branch of the motorway and sub-phase 2B2-4: construction of emergency lanes for those sections of phase 1A and 1B which have not been completed under phase 2A. That sub-phase comprises the construction of emergency lanes along both the A8 (Matulji – Pazin-Kanfanar) and A9 (Dragonja-Pula) branches of the motorway. According to the Croatian authorities, the works in relation to the three remaining sub-phases are not a priority. Should those further works be taken forward, it is the Croatian government’s view that it should be possible to undertake them without any additional extension to the duration of the concession.

(one more lane in each direction and one emergency lane) from the Rogovici Interchange to Vranja, a 28km stretch on the North Eastern side of the motorway. In connection with the development of phase 2B1, four main categories of changes were made:

- (i) extension of the duration of the concession from the then-current end-date of 3 December 2027, formally to 15 June 2034, but effectively to 15 March 2033¹⁹;
 - (ii) addition of the gain/pain share mechanism to the financial contribution mechanism, which rebalances risk in favour of the Government (recital 19);
 - (iii) various other changes to the financial contribution mechanism, again to the advantage of the Government; and
 - (iv) other miscellaneous changes to the concession agreement, again to rebalance the allocation of risks in the concession in favour of the Government and to reflect market practice²⁰.
- (16) According to the Croatian authorities, the effect of the developments relating to the duration of the concession and to the introduction in 1999 of the financial contribution mechanism negatively impacted the financial capacity of the concession and affected Bina-Istra's ability to obtain financing at sustainable costs. As a result, the works have been tranced in several phases and sub-phases, as mentioned in recitals (11), (14) and (15).
- (17) Croatia further indicates that, proceeding more gradually allowed the different phases and sub-phases to benefit from the lower financing costs available at later stages of the concession period²¹, allowed re-financing existing debt as the phases and sub-phases progressed, and allowed using the additional toll revenues for each newly built section to finance construction debt service payments²².

¹⁹ The end-date is reduced to 15 March 2033 if Bina-Istra has repaid the phase 2B1 debt by the maturing date of 15 December 2032, i.e. a tail period of up to 18 months applies for the phase 2B1 Lenders in the event that Bina-Istra has not repaid the phase 2B1 debt by the maturity date. The two end-dates of 15 March 2032 and 15 June 2034 are not effectively binary – if Bina-Istra repays the phase 2B1 debt after the maturity date, but somewhat before 15 June 2034, then the concession end-date will be the date of the repayment, plus a 90 days transition period in order to facilitate the continuity of the operation and maintenance services for the motorway. See recital (28) of the 2018 Commission Decision and Article 37 of the fifth amendment to the concession agreement of 5 October 2018.

²⁰ These changes are described in recitals (27) to (38) of the 2018 Commission Decision.

²¹ The interest rates available for the financing of the project in Croatia decreased from circa [10-14]% on average in 1997 (phase 1A) to [6-10]% in 2003 (phase 1B), [3-6]-% in 2007 (phase 2A) and [2.5-5.5]% and [2.5-5.5]% (the two tranches of the phase 2B1 debt).

(*) [...] business secret

²² According to the Croatian authorities, the concession has diverged from the financial plan in Annex 10 of the 1995 concession agreement – while the scope of phase 1 and phase 2 has not changed, the sub-phases have been built, opened and tolled only progressively, with some delay as compared to the financial plan in the 1995 concession agreement.

2.1.3. *The financial contribution mechanism and the gain/pain share mechanism*

- (18) As referred in recital (12), the financial contribution mechanism was added to the 1995 concession agreement by the 2nd amendment of 27 August 1999. The financial contribution mechanism replaced the initial compensation mechanism under Article 26.3 of the 1995 concession agreement, under which, in case the Government opposes the tolls proposed by Bina-Istra, the Government would be required to pay Bina-Istra the difference between the tolls applied and those that had been proposed by Bina-Istra.
- (19) The actual features of the financial contribution mechanism were approved by the 2018 Commission Decision²³. Therefore, under the existing concession agreement, in return for Bina-Istra's undertaking of the concession, the Government makes certain payments to Bina-Istra in accordance with the financial contribution mechanism, essentially as follows:

If Target costs > Projected revenues, then,

Annual Base Financial Contribution (“BFC”) = Target costs – Projected revenues – Concessionaire Contribution (if due) or + Surplus Bonus Amount (if due) (this potential adjustment being the “gain/pain share”), where

Target costs = Projected Operating and Maintenance Expenses (“O&M Expenses”)²⁴ + Projected debt service²⁵ (i.e. together with the O&M Expenses, Bina-Istra's projected costs) + DSRA Adjustment amount) to credit the account as its minimum balance);

Projected revenues = Projected toll revenues and projected secondary revenues²⁶;

Concessionaire Contribution: Where Toll Revenues < than the New Base Case Expected Toll Revenues (“NBCETR”) i.e. the base case level during a year, Bina-Istra is required to contribute 50% of the difference, subject to a cap of EUR [...] million during the lifetime of the concession (the “shareholder contribution cap”);

Surplus Bonus Amount: Where Toll Revenues > than the Upside Case Expected Toll Revenues (“UCETR”) i.e. the “best-case” level during a year, Bina-Istra is paid 50% of the difference, essentially subject to an annual cap of the aggregate of the sums sufficient to service the debt under the concessionaire facility agreement and EUR [...] indexed for inflation (the “surplus bonus amount cap”).

²³ The gain/pain share mechanisms as well as the changes to the 1999 financial contribution mechanism and the rebalance risk changes are described in recitals (34) to (39) and assessed in recitals (132) to (155) of the 2018 Commission Decision.

²⁴ These expenses include routine operating and maintenance expenses, extraordinary maintenance expenses, as well as Bina-Istra's standard concessionaire expenses, see Appendix 19, Annex 1 of the existing concession agreement.

²⁵ “Debt service” payments are those payments by Bina-Istra relating to debt financing for the different phases and sub-phases of the project, which covers the construction costs.

²⁶ “Secondary revenues” means the revenues from items and structures related to the motorway, including shops, premises, buildings, petrol stations, restaurants, car parks, advertising displays, recreational parks and other facilities.

- (20) According to the Croatian authorities, the existing concession agreement comprises the payment to Bina-Istra by the Government of a financial contribution only to the extent that Bina-Istra's projected revenues from the tolls and secondary developments are less than Bina-Istra's projected costs for the year in question, subject to any concessionaire contribution or surplus bonus amount (reflecting the traffic risk borne by Bina-Istra through the gain/pain share mechanism). The financial contribution is paid by the Government to Bina-Istra monthly in arrears²⁷.
- (21) The financial contribution mechanism is also subject to an available cash and concession fee mechanism, which serves as a correction mechanism taking into account the actual revenues achieved and costs incurred by Bina-Istra:
- Essentially, where the balance between all revenues and income received by Bina-Istra (including the financial contribution) and the aggregate of all costs incurred during the same year is positive (“Available Cash”), the Available Cash generated during year “n” shall be used to reduce any payment that would otherwise have been made by the Government as a financial contribution during year “n+1”. This allows the financial contribution to be reduced to reflect, inter alia, any savings on costs, unused budgeted amounts or greater than expected revenues.
 - If no financial contribution is made during year “n+1”, then the available cash generated during year “n” shall be apportioned between Bina-Istra and the Government. Essentially, the whole amount is paid to the Government as the “concession fee”, except for 30% of that available cash, capped at EUR [...] (indexed for inflation) (the “Distributable Available Cash”).

2.2. The objective of the measure

- (22) The notified measure comprises the proposed sixth amendment to the existing concession agreement and a draft Ministerial decision approving that proposed amendment (“Proposed Amendment”). By the notified measure, the Croatian government entrusts Bina-Istra with the financing, construction, operation and maintenance of sub-phase 2B2-1 of the Istrian Y motorway and the ensuing prolongation of the concession.
- (23) Croatia considers the financing, construction, maintenance and operation of the sub-phase 2B2-1 of the Istrian Y motorway as a service of general economic interest (“SGEI”)/public service obligation²⁸. Croatia further considers that the notified measure might constitute State aid²⁹ and should be approved under Article 106(2) TFEU.

²⁷ Article 26.2 and Appendix 19, section 6 of the existing concession agreement. The financial contribution is paid in eleven instalments from January to November. The instalment paid in January represents 1/11 of the Base Financial Contribution (“BFC”) for year “n”, while each instalment paid during the months of February to November represents 1/10 of the Adjusted Base Financial Contribution for that year “n”, from which the financial contribution amount in January is deducted.

²⁸ Recital (H) of the Proposed Amendment.

²⁹ The Croatian authorities considered that the Proposed Amendment could be assessed as non-aid on the basis that it fulfils the criteria set out in the Court of Justice judgment of 24 July 2003, case C-

The sub-phase 2B2-1: envisaged works and costs

- (24) The sub-phase 2B2-1 consists principally in (i) the construction of a second carriageway (one more lane in each direction) from the Vranja Interchange to the Učka tunnel/Kvarner portal, an approximately 8km stretch on the North Eastern side of the motorway, which includes a 5.63 km-long second tube to the Učka tunnel (sub-phase 2B2-1 Part A) and (ii) the extension of Kvarner Rest Area (sub-phase 2B2-1 Part B)³⁰.
- (25) The envisaged works entail the construction of:
- a) a new Vranja interchange (including underpass and on/of ramps for both directions of the motorway; connection to local road network near Vranja and toll station for vehicles entering and exiting the motorway at Vranja);
 - b) a new 1.9 km-long carriageway from Vranja to the Učka tunnel/Istrian Portal and 0.45 km-long carriageway on the Kvarner side;
 - c) a new 268.6 m long Zrinščak viaduct;
 - d) a 5.63 km-long second tube of the Učka tunnel with the required mechanical and electrical equipment;
 - e) one new underpass (Podvožnjak PUO Učka);
 - f) two new overpasses 38.2 m and 32 m long (Nadvožnjak Porinja and Nadvožnjak Vranja respectively);
 - g) a connecting road over the portals of both tunnel tubes on the Istrian side;
 - h) three new toll plazas (one at new Vranja interchange, a new carriageway cross-lane toll plaza at the Kvarner portal, and a new auxiliary toll plaza near the Istrian portal (for closure of the existing tunnel tube for maintenance works). These works include the demolition of one toll plaza on the current Vranja Interchange sliproad;
 - i) a new building for the firefighting unit on the existing Istrian platform (items (a) to (i) together, “sub-phase 2B2-1, Part A”), and
 - j) a new Kvarner rest area with a small interchange to access the area from both directions (“sub-phase 2B2-1, Part B”)³¹.

280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (“Altmark Trans”), ECLI:EU:C:2003:415. However, given that this position was rejected in the 2018 Commission Decision (recital (61)), the Croatian authorities did not provide argumentation in line with the Altmark judgment for the purposes of the notified measure and agreed that the Commission only considers Article 106(2) TFEU as the appropriate compatibility basis.

³⁰ Article 1 (Definitions) of the Proposed Amendment. See map of the area covered by sub-phase 2B2-1, Parts A and B in figure 1 in recital (5).

³¹ The construction of the Kvarner rest area infrastructure include the following works: (i) access roads for the rest area, (ii) rest area platform, (iii) drainage of the rest area and access roads, (iv) ancillary equipment for the rest area including safety fencing, boundary fencing, signage and road markings,

- (26) In addition, the development of the sub-phase 2B2-1 entails ancillary works to be carried out relating to the existing tube in the Učka tunnel³².
- (27) According to the Croatian authorities, the sub-phase 2B2-1 works are necessary to ensure that the Učka tunnel will be in compliance with the safety requirements for tunnels set out by Directive 2004/54/EC (“the Tunnel Safety Directive”)³³, in particular the requirements relating to the construction of twin tube tunnels and cross-connections between tubes to be used as emergency exits as well as the drainage systems³⁴. In this context, Croatia referred to the ongoing infringement proceedings against Croatia³⁵ and stressed that it is imperative that sub-phase 2B2-1 is undertaken as soon as possible in order to remedy this situation insofar as the Učka tunnel is concerned³⁶.
- (28) Finally, sub-phase 2B2-1 works comprise an adaptation of concrete structures of the existing tunnel at the connection with cross-passages as well as works or equipment necessary for opening the motorway to traffic, except signage and road marking of the existing tunnel tube. It also includes the construction of a motorway fence along the existing carriageway and the re-establishment of existing local roads that are cut off by the motorway construction so that the

power supply and lighting, and communications infrastructure and (v) demolition of existing rest area at Kvarner.

³² Upgrades of the existing Učka tunnel (SOS and signalisation), drainage of flammable and toxic liquids in the existing tunnel tube, new tunnel control room, toll collection equipment, service buildings at the Kvarner side of the Učka tunnel and road equipment, road marking and signage of the existing tunnel tube (Article 1 of the Proposed Amendment, in particular the definition on “Other sub-phase 2B2-1 Construction Works”) p. 19). The costs of these works are estimated at approximately to EUR 8 million and they are included in the total costs of the project. These costs will be financed out of the outstanding Available Cash for the years 2019-2021 and will therefore not require additional debt financing.

³³ Directive 2004/54/EC of 29 April 2004 on minimum safety requirements for tunnels in the trans-European road network (OJ C 167, 30.4.2004, p. 39). The Directive was designed to improve the safety of road users in tunnels. It was intended to: (i) adapt safety requirements to technical progress; (ii) achieve a large degree of harmonisation of practice and protection across the designated road network; and (iii) lead to the adoption of a harmonised risk analysis method. The Directive requires that safety measures are deployed further to a preliminary risk analysis.

³⁴ Paragraph 2.3.5 and paragraph 2.6.1 of the Annex I of the Directive on emergency exits and drainage systems respectively.

³⁵ On 10 October 2019, under Article 258 TFEU the Commission addressed to Croatia a Letter of Formal Notice (2019/2278/C (2019) 7281 final) for failure to comply with the requirements of Directive 2004/54/EC. In this context, Croatia has been recalled on their obligations on the compliance with the minimum safety requirements set out in paragraphs 2.3.5 and 2.6.1 of the Tunnel Safety Directive. Croatia has also been recalled on the conditions laid down in Article 11 of the said Directive for tunnels already in operation on 30 April 2006 and that were not in accordance with the safety requirements of said Directive and had to be modernized by 30 April 2014. For certain tunnels, as it is the case of Učka’s tunnel, that period could be prolonged by five years (i.e. until 30 April 2019).

³⁶ By letter of 20 November 2019, the Croatian authorities replied to the formal notice on the implementation of the Učka tunnel Rehabilitation Plan by explaining that full compliance of the Učka tunnel with paragraph 2.3.5 of the Annex I of the Tunnel Safety Directive “*will be achieved through the construction of a second tube of the Učka tunnel, which will provide for evacuation routes*”. As regards paragraph 2.6.1 of the Annex I of the Tunnel Safety Directive, Croatia further informed that the compliance “*will be achieved after opening for traffic the second tube of the Učka tunnel, which will create conditions for the reconstruction of the drainage system in the actual existing tube (because the existing tunnel tube must be closed for traffic during works and the traffic be carried out in the new tunnel tube)*”, p.3.

access of local people to their property remains ensured and, in certain cases, even improved³⁷.

- (29) According to the Croatian authorities, the cost of the sub-phase 2B2-1 works amounts to EUR 191 million in real terms and EUR 196.9 million in nominal terms³⁸. Furthermore, Croatia explained that the sub-phase 2B2-1 works as described in recitals (25), (26) and (28) cannot be financed merely on the basis of the existing revenues from Bina-Istra. Bina-Istra intends therefore to enter into funding arrangements with different financial institutions, including the UniCredit - Corporate & Investment Banking, Zagrebacka banka, Privredna banka Zagreb and Banca IMI - London branch (hereinafter jointly the “Lenders”)³⁹.

The sub-phase 2B2-1: key benefits for citizens and users

- (30) The Croatian authorities explained that the development of sub-phase 2B2-1 is expected to result in a number of key benefits for citizens and users, including:
- i. Raising the safety level of this section of the motorway by doubling the lanes⁴⁰ and ensuring compliance with Directive 2004/54/EC as explained above;
 - ii. Reducing congestion/shortening journey times⁴¹;
 - iii. Increasing the existing level of environmental protection⁴²; and
 - iv. Upgrading the comprehensive TEN-T, adequately connecting the Istrian region with the rest of Croatia, improving economic and social cohesion and delivering positive impacts on the economy⁴³.

³⁷ The new Vranja Interchange will offer the local inhabitants more comfortable access to the local roads and their homes.

³⁸ The sub-phase 2B2-1 costs have been analysed by an independent technical adviser (“WS Atkins International Ltd”), who acted as Lenders’s Technical Advisor (“LTA”). The cost benchmarking report is based on a review of the design and construction costs detailed in the proposals that Bouygues Travaux Publics submitted to Bina-Istra on 20 December 2019 (for sub-phase 2B2-1 Part A) and on 27 January 2020 (for sub-phase 2B2-1 Part B). Atkins concluded that the costs are reasonable and in line with the normal range it would be expected for such type of project. See “Istrian Motorway sub-phase 2B2-1 Vranja-Učka tunnel – cost benchmarking report”, 18 March 2020, p.37.

³⁹ Letter from Lenders to Bina-Istra of 19 March 2020.

⁴⁰ Doubling the lanes has a significant impact on safety, reducing the number of accidents – in particular, according to the Croatian government’s statistics, accidents are reduced by around 60% per kilometre when sections are doubled compared to the single lane sections. Additionally, non-fatal accidents are reduced by 8.15 per year and fatal accidents are reduced by 1.5 per year.

⁴¹ The Učka tunnel faces high traffic levels of around 10 000 vehicles on average per day, with even higher levels typically experienced during summer, including significant heavy vehicles traffic – this is very problematic for a single-carriageway section, resulting in significant congestion and pollution. The addition of a second tube will also allow the speed limit in the tunnel to be increased safely from 80 km/h to 100km/h.

⁴² The reduction in congestion and journey times further lead to savings in fuel consumption thus reducing CO2 emissions. The alleviation of the current waiting time in front of the entrance of the existing bi-directional tunnel, will bring positive impacts on transport-related air pollution within the Učka Nature Park in which the project is located.

- (31) Directive 2004/54/EC contains technical requirements and operational measures to ensure the safety of tunnels. The Croatian authorities explained that, beyond the more general improvement in the safety level, the sub-phase 2B2-1 works will give rise to further specific important safety benefits. In particular, adding a second tube in the Učka tunnel will lead to the following benefits:
- safe evacuation routes in emergencies by providing cross-connections between tunnels in accordance with point 2.3.5 of Annex I to Directive 2004/54/EC⁴⁴;
 - safer maintenance of the tunnel⁴⁵.
 - improved drainage system for flammable and toxic liquids in accordance with point 2.6 of Annex I to Directive 2004/54/EC⁴⁶; and
 - improved safety, given the accumulation in traffic volumes: traffic volumes in the Učka tunnel currently almost exceed 10 000 vehicles on average per day⁴⁷, while heavy vehicles traffic (i.e. vehicles weighing above 3.5 tonnes) in 2019 comprised around 18.5% of the total traffic⁴⁸, which is materially higher than the normally expected level for single tube tunnels. In light of these figures, the addition of the second tube will significantly improve the tunnel's safety.

The proposed extension of the concession

- (32) The sub-phase 2B2-1 works are crucial to implement a series of important public interest objectives (recitals (30) and (31)), which will be financed by an extension of the duration of the concession by five years (“the Extension”), as provided by the Proposed Amendment. Croatia explained that the expiry date is to be extended from 15 June 2034⁴⁹ to 15 June 2039. Croatia further informed that end-date includes (effectively) a conditional tail period of up to 18 months for the Lenders – that end-date will be ultimately reduced to 15 March 2038 if Bina-Istra has

⁴³ The Učka tunnel is the only possible route for transporting heavy goods vehicles (over 5 tonnes) and is therefore a key axis to the Istrian local economy.

⁴⁴ At present the Učka tunnel does not have sufficient emergency exits giving rise to acute levels of risk for users in the case of fire accidents. At present, certain risk reduction measures are in place as an alternative to the required emergency exits.

⁴⁵ The doubling of the Učka tunnel will result in less disturbance and safety issues in connection with required maintenance works as such works would not require temporary or complete traffic closures, which will also allow for safer work conditions for the staff performing the maintenance.

⁴⁶ The opening of the second tube will create conditions for the reconstruction of the drainage system in the Učka tunnel, by enabling traffic to continue passing through one tube while the other tube is shut down for the necessary works. At present, certain risk reduction measures are in place as an alternative to the required drainage system.

⁴⁷ The traffic volumes in the Učka tunnel were 9 000 vehicles on average per day in 2017, 9 500 in 2018, 9 900 in 2019. It is expected that traffic volumes will exceed the threshold of 10 000 vehicles on average per day during 2020.

⁴⁸ Based on traffic data for the Matulji – Vranja section in 2019.

⁴⁹ Recital (28) of the 2018 Commission Decision.

repaid the long-term debt by the maturity date of 15 December 2037 (i.e. the date of the effective discharge of sub-phase 2B2-1 debt⁵⁰).

The grounds for the proposed extension of the concession

- (33) According to the Croatian authorities, the reasons for the proposed extension of the concession are twofold: (i) allow longer debt amortisation and sufficient financing of the construction works from tolls, thereby avoiding excessive financial contribution from the Government and (ii) align the length of the concession with the maturity of the long-term debt that finances the construction works.
- *Avoiding excessive financial contribution from the Government*
- (34) The Croatian authorities showed on the basis of a Net Present Value (“NPV”) analysis that the NPV of the projected financial contribution from the State would be reduced taking into account sub-phase 2B2-1 through the extension of the concession⁵¹. The annual breakdown of the projected financial contribution is rendered more manageable as a result of the extension, compared to addressing sub-phase 2B2-1 without the benefit of the extension. In addition, despite the extension, the annual amount of the financial contribution is kept at approximately below EUR 30 million, which is what the Croatian government considers as sustainable.
- (35) According to the Croatian authorities, the proposed extension of the concession also allows re-financing all of the existing debt alongside raising new long-term debt for sub-phase 2B2-1 in order to benefit from the improved Croatia’s credit rating⁵², and consequently, to minimise the financial contribution so far as possible.
- (36) Since 2017 Croatia is subject to the preventive arm of the Stability and Growth Pact, following the correction of the excessive deficit in 2016. Croatia is required to maintain a budgetary position at its medium term budgetary objective (or in case of a deviation, ensure a sufficient adjustment towards it), and ensure a sufficient reduction of its debt ratio, in line with the rules of the Stability and Growth Pact. In this context, Croatia considers that the proposed extension is in

⁵⁰ “*Scheduled Discharge of Debt Date*” is the date when the concessionaire must finally discharge all its obligations under the sub-phase 2B2-1 Finance Documents (including any amendment, variation, novation, or replacement of the sub-phase 2B2-1 Finance Documents), Article 1 “Definitions” of the Proposed Amendment. It should be further noted that the two end-dates of 15 March 2038 and 15 June 2039 are not entirely binary – if Bina-Istra repays the long-term debt after the maturity date, but somewhat before 15 June 2039, then the concession end-date would be the date of repayment, plus a ‘90 days’ transition period in order to facilitate the continuity of the operation and maintenance services for the motorway (Article 37.2 (Duration – early term) of the Proposed Amendment). Croatia further argues that the ‘90-day transitional period’ is consistent with market practice.

⁵¹ According to the Croatian authorities, as a result of the proposed extension and the re-financing, the NPV of the financial contribution is also reduced as compared to the existing concession agreement before the notified sixth amendment (i.e. without sub-phase 2B2-1).

⁵² Standard & Poor’s raised its sovereign credit rating for Croatia from ‘BB+/B’ ‘BBB-/A-3’ (March 2019); Moody’s Investors Service changed Croatia’s outlook from stable to positive and affirmed the country’s long-term local and foreign currency issuer and senior unsecured debt credit rating at Ba2 (April 2019) and Fitch Ratings raised Croatia’s credit rating to investment-grade level from ‘BB+’ to ‘BBB-’ (June 2019).

line with its commitments to comply with the rules of the Pact and the most appropriate way to ensure that the Government's financial expenditure relating to the "Istrian Y motorway" is reduced to more sustainable levels.

- *Aligning the concession length with the financing*

(37) The formal duration of the concession matches the tenor of the long-term debt as mentioned in recital (32). In addition, the Croatian authorities explained that such matching of the duration of the concession and the tenor of the long-term debt is a standard requirement of lenders in relevant infrastructure projects such as the Istrian Y motorway. Furthermore, the conditional, up to 18 months, tail period, reflects what the Lenders consider as necessary (though being well towards the lower end of what would be necessary for them to participate in current market conditions⁵³).

- *Risk/rate of return comparison*

(38) The terms of the concession were modified in the amendment to the concession agreement approved by the 2018 Commission Decision in order to significantly rebalance the risk in favour of the Croatian government and to reflect the market price⁵⁴. The gain/pain share mechanism that supplements since 2018 the financial contribution mechanism (recital (19)) imposes traffic risk on Bina-Istra by assessing the realised toll revenues against specified revenue growth rates. The expected toll revenues of the base and upside case were contractually agreed by the parties, taking into account the projections in the official Traffic and Revenue Report produced by the Independent Traffic Advisor in October 2017⁵⁵ and though the annual growth assumptions were slightly revised downwards according to the 2020 report⁵⁶ they do not negatively impact the levels for the expected toll revenues of the base and upside case, which remain therefore applicable under the Proposed Amendment, increasing the risk level for Bina-Istra.

(39) Moreover, Croatia explained that, notwithstanding the fact that Bina-Istra bears increased risk under the Proposed Amendment, its rate of return is reduced compared to the existing concession agreement. According to the estimates of Internal Rate of Return (IRR) analysis provided by the Croatian authorities, the project IRR including the Proposed Amendment is estimated at [4-7]% to [4-7]% while the project IRR for the existing concession agreement is estimated at [5-8]% to [5.5-8.5]% (without the sub-phase 2B2-1). Similarly, the equity IRR under the existing concession would be between [9.5-12.15]% and [10-13]% while under the Proposed Amendment it would be between [9.5-12.5]% and [10-13]%. .

⁵³ Letter from the Lenders of 19 March 2020, p. 1.

⁵⁴ Recitals (36) to (39) of the 2018 Commission Decision.

⁵⁵ LeighFisher phase 2B1 Traffic and Revenue Forecasts, Final Report, 26 October 2017, p. 52.

⁵⁶ Jacobs Istrian motorways "Sub-phase 2B2-1 Traffic and Revenue Forecasts", Final Report, February 2020, p.24 and 31.

- (40) Although the traffic on the motorway and therefore the toll revenues are forecasted to increase going forward⁵⁷, that projected increase in toll revenues operates to the advantage of the Government as opposed to the advantage of Bina-Istra:
- a) under the financial contribution mechanism, the increased toll revenues will allow for the greater self-financing of debt service, reducing the financial contribution required.
 - b) under the gain/pain share mechanism, the possibility to retain 30% of Available Cash where no financial contribution is required during year "n+1" is capped at EUR [...] per year, meaning that increased toll revenues will not materially benefit Bina-Istra, but the Government, which will retain the remainder of the Available Cash as concession fee.
 - c) Bina-Istra continues to bear a degree of traffic risk through the concessionaire contribution payable by it if the level of toll revenues is below expectations under the gain/pain share mechanism. The annual toll revenues have to increase at least [0.5-1.5]% (plus inflation) per year and every year until the end of concession period, and if not, the concessionaire contribution will apply.

The consistency with EU public procurement rules

- (41) The Croatian authorities consider that the envisaged additional sub-phase 2B2-1 works have become necessary for the proper performance of the concession in a technical and economic context where a change of concessionaire is impossible. In their view, the Proposed Amendment does not give rise to a requirement to hold a new concession award procedure pursuant to the Directive 2014/23/EU of 26 February 2014 on the award of concession contracts ("the Concessions Directive")⁵⁸, as the derogation provided for by Article 43(1)(b) is applicable to the additional sub-phase 2B2-1 works themselves and also to the proposed extension, which is inextricably and exclusively linked to these additional works.

2.3. Legal basis

- (42) The activity entrusted to Bina-Istra represents an activity of general interest of the Republic of Croatia, because it concerns the construction and maintenance of an infrastructure which is the property of the Croatian State. Acting within its public authority, Croatia, by way of a concession, transferred to Bina-Istra the provision of a part of its obligations related to the construction and maintenance of public roads.
- (43) The obligation on financing, construction, maintenance and operation of the Istrian Y Motorway has been entrusted to Bina-Istra by the Government through an entrustment act as described in recital (9) above.

⁵⁷ See Jacobs report, p. 46. It should be noted that toll tariffs are determined by Bina-Istra on an annual basis taking into account the need to ensure that tolls remain affordable for users, see Article 27.1.1 of the Proposed Amendment.

⁵⁸ OJ L 94, 28.3.2014, p.1.

- (44) The Croatian authorities consider that the Proposed Amendment specifies the public service obligation⁵⁹ and the methods of calculating the compensation, in particular:
- i. the content and duration of the public service obligations,
 - ii. the undertaking to which the public service is entrusted and where applicable the territory concerned,
 - iii. the nature of any exclusive or special rights assigned,
 - iv. the parameters for calculating, controlling and reviewing the compensation, and
 - v. the arrangements for avoiding and recovering any overcompensation.

2.4. The beneficiary

- (45) The recipient of the measure is Bina-Istra. Bina-Istra is a joint-stock company founded in 1995 to facilitate construction and subsequent management of the Istrian Y Motorway, which is the only economic activity carried on by the company.
- (46) Bina-Istra's shareholders are Bina-Finacom d.d. (67% shareholding), Bouygues Travaux Publics S.A. (16%), Hrvatske Autoceste d.o.o. (14.8%)⁶⁰ and Istarska Autocesta d.o.o. (2.2%)⁶¹.
- (47) Bina-Finacom's shareholders are Bouygues Travaux Publics S.A. (50.7%), Hrvatske Autoceste d.o.o. Zagreb (44%), Ina Industrija Nafte d.d. (5%)⁶² and Grenobleise d'Electronique et d'Automatismes (0.3%).

2.5. Reporting and monitoring

- (48) Croatia agreed to submit a yearly report to the Commission on the application of the notified individual aid as provided for by paragraph 63 of the revised framework for State aid in the form of public service compensation ("SGEI Framework")⁶³ and in accordance to Article 26 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 Union⁶⁴.
- (49) Croatia further agreed to maintain, for a period of at least ten years from the date on which aid under the measure was granted, detailed records containing the

⁵⁹ See recital (23) above.

⁶⁰ Hrvatske Autoceste d.o.o. ("the Croatian Roads") is a limited liability company which operates, builds, reconstructs and maintains motorways. It is a 100% state-owned company.

⁶¹ Istarska Autocesta ("the Istrian motorway") is owned by Istrian cities and local companies.

⁶² Ina Industrija Nafte d.d. is around 49% owned by the Croatian Government, but was fully owned by the Government when the concession was awarded in 1995.

⁶³ Communication from the Commission, European Union Framework for State aid in the form of public service compensation (2011), 2012/C 8/03, OJ C 8, 11.1.2012, p. 15.

⁶⁴ OJ L 248, 24.9.2015, p. 9.

information and supporting documentation necessary to establish that all the conditions for compatibility with the internal market have been met and provide them, upon written request, to the Commission within a period of 20 working days or such longer period as may be determined in the request⁶⁵.

2.6. Transparency

- (50) Croatia committed to publish the information set out in paragraph 60 of the SGEI Framework, in particular:
- (a) the results of the public consultation or other appropriate instruments referred to in paragraph 14 of the SGEI framework⁶⁶;
 - (b) the content and duration of the public service obligations⁶⁷;
 - (c) the undertaking and the territory concerned⁶⁸;
 - (d) the amounts of aid granted to the undertaking concerned on a yearly basis⁶⁹.
- (51) Furthermore, Croatia committed to publish, within six months of the granting act, on a comprehensive State aid website at national level⁷⁰, the following information, which will be kept for at least ten years and will be available to the general public without restrictions:
- (a) the full text of the individual aid granting decisions and its implementing provisions, or a link to it;

⁶⁵ Section 9 of Annex 1 of Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 of 21 April 2004 as regards the notification forms and information sheets, OJ L 325, 10.12.2015, p. 14.

⁶⁶ Public consultations were held in relation to sub-phase 2B2-1 carried out under (i) the Croatian Environmental Protection Act and the Regulation on the Environmental Impact Assessment of Planned Interventions in relation to Rogovići to Matulji section of the motorway (which includes the section covered by sub-phase 2B2-1) and in relation to (ii) the location permit procedure for the Vranja to Učka tunnel section. As a result, in a number of instances the design of the motorway was amended in order to address the comments raised, including the addition of further pedestrian overpasses in particular areas and another lane in a particular area to deal with the problem of vehicle accumulation.

⁶⁷ Bina-Istra publishes its toll tariffs and general conditions for users (see Article 28 of the Proposed Amended). Furthermore, Bina-Istra publishes regularly on its website information on the company's profile such as: (i) information on the establishment of the company, (ii) on the concession agreement and its annexes, (iii) on the loan amount for the development of the motorway, (iv) on the Bina-Istra's P&L and balance sheet, (v) on the sustainable development reports, and (vi) information on sponsorship and donations (<https://bina-istra.com/o-nama/istarski-ipsilon>).

⁶⁸ Financial and project information including the concession agreement inputs may be accessed at the following web pages: <https://bina-istra.com/o-nama/pravo-na-pristup-informacijama>; <https://bina-istra.com/cestarina/cjenik-dionica-na-karti> and <https://bina-istra.com/o-nama>. Any other information that could be made publicly available under the freedom of information is subject to proportionality and public interest tests.

⁶⁹ The estimated financial contribution budgeted to Bina-Istra is made publicly available as part of the Republic of Croatia's annual budget.

⁷⁰ <http://www.mfin.hr/hr/transparentnost-potpورا>

- (b) the identity of the aid granting authority/authorities;
- (c) the identity of the beneficiary, the form and the amount of aid granted, the date of granting, the type of undertaking (SME/large undertaking).

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (52) According to Article 107(1) TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”.
- (53) The Commission recalls that the Court of Justice has consistently held that the categorisation as ‘State aid’ within the meaning of Article 107(1) TFEU requires all conditions set out in that provision to be satisfied⁷¹. It follows that in order for a measure to constitute State aid within the meaning of that provision, the following four cumulative conditions have to be met: i) the measure has to be imputable to the State and granted out of State resources; ii) it has to confer an economic advantage on undertakings; iii) the advantage has to be selective and, iv) the measure has to distort or threaten to distort competition and affect trade between Member States.

3.1.1. State resources and imputability to the State

- (54) With regards to the requirement that the measure must be granted through State resources and be imputable to the State, this criterion is clearly fulfilled in the present case.
- (55) According to settled case-law⁷², the granting without tendering of licences to occupy or use public domain, or of other special or exclusive rights having an economic value, may imply a waiver of State resources and create an advantage for the beneficiaries. Similarly, any amendment, like for instance a prolongation of a concession, can only be provided by the State and should therefore be considered as imputable to it.
- (56) In the present case, the prolongation of the concession duration implies the attribution of an extended exclusive right to Bina-Istra to collect toll tariffs revenues in principle for an additional five years. As a consequence, the Member State, owner of the infrastructure, renounces to directly collect the toll revenues during said prolongation period during which it could keep the assets concerned

⁷¹ See judgment of 21 December 2016, C-524/14 P, Commission v Hansestad Lübeck, ECLI:EU:C:2016:971, paragraph 40 and the case-law cited, and judgment of 21 December 2016, cases C-20/15 P and C-21/15 P Commission v World Duty Free Group and Others, ECLI:EU:C:2016:981, paragraph 53 and the case-law cited.

⁷² See judgment of 22 May 2003, case C-462/99, Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG, ECLI:EU:C:2003:297, para. 92 and 93; judgment of 4 July 2007, case T-475/04, Bouygues and Bouygues Télécom SA v Commission, ECLI:EU:T:2007:196, para. 101, 104, 105 and 111.

in State hands and exploit them commercially. Such prolongation therefore amounts to a waiving of State resources to the benefit of an economic operator.

3.1.2. *Economic advantage to undertakings*

- (57) As mentioned in recital (45) above, Bina-Istra is engaged in the provision of services of construction, operation and maintenance of roads and motorways and, as such, carries out economic activities. Therefore, it constitutes an undertaking within the meaning of Article 107(1) TFEU.
- (58) The measure gives the concessionaire the right to operate the Istrian Y Motorway for a longer period than was originally agreed in the concession agreement, and thus to perceive the economic benefit deriving from operating the motorway for an additional number of years. This constitutes an advantage for the concessionaire⁷³.
- (59) As already highlighted in recital (33) above, the prolongation of the existing concession agreement is granted to allow the concessionaire to perform the agreed investments while being subject to a tariffication system determined by the Croatian government in which is ensured the access to the infrastructure by maintaining motorway toll tariffs at a socially sustainable level for users⁷⁴, whilst performing investments on the network as described in recital (25) above.
- (60) As alleged by the Croatian authorities, the imposition of such public service obligations in line with Altmark judgment would dispel the advantage element⁷⁵. Therefore, to assess the existence of an advantage in the entrustment of the concessionaire with the operation of the motorway for a longer period compared to what was originally foreseen, it shall be assessed whether the measure complies with the Altmark judgment, in which the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertaking do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) of the TFEU.

⁷³ See in this respect Commission Decision of 28 October 2014 on SA. 38271 (2014/N) concerning the French “Plan de Relance Autoroutier” (hereinafter “Plan de Relance”), recitals (46) to (48), (OJ C 63, 20.02.2015), p.1; Commission Decision of 11 December 2015 on SA. 42783 (2015/N) concerning the French “Fusion de la concession du tunnel Maurice-Lemaire et de la concession autoroutière de la société des Autoroutes Paris-Rhin-Rhône” (hereinafter “Tunnel Maurice-Lemaire”), recitals (34) to (36), (OJ C 104, 18.3.2016, p.4); Commission Decision of 27 April 2018 on cases State Aid SA.49335 (2017/N) and SA.49336 (2017/N) – Italy Italian Motorways investment plan (hereinafter “Italian Motorways”), recital (64), (OJ C 379, 19.10.2018, p.3); Commission Decision of 14 June 2018 on the Croatian case SA.48472 (2018/N) fifth amendment to the concession agreement relating to the Istrian Y motorway (hereinafter “phase 2B1 section of the Istrian Y motorway”), recitals (56) and (63), (OJ C 424, 23.11.2018, p.2) and Commission Decision of 21 November 2019 on case SA.51533 (2019) concerning the French case “Projet Schloesing – Extension du tunnel routier Prado-Carénage à Marseille (hereinafter “Projet Schloesing”), recital (32), (OJ C 43, 20.2.2020, p.7).

⁷⁴ See footnote 57 above.

⁷⁵ See footnote 29 above.

- (61) Without at this stage prejudging the issue of the compatibility of the notified measure with the SGEI Framework which will be addressed in recital (72) and following, it needs to be mentioned that the Court of Justice made clear that, for a public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria (the ‘Altmark-criteria’) summarized below must be satisfied:
1. The recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined (the “*First Altmark Criterion*”).
 2. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (the “*Second Altmark Criterion*”).
 3. The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit (the “*Third Altmark Criterion*”).
 4. 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 to meet the public service obligations, would have incurred, taking into account the relevant receipts and a reasonable profit for discharging the obligations (the “*Fourth Altmark Criterion*”).
- (62) In this respect, the concessionaire upon which an obligation is imposed has not been chosen by way of a public tendering procedure for the purpose of providing the service described under the present measure which is the provision of motorway services according to the conditions set in the proposed sixth amendment to the existing concession agreement. Therefore, the Fourth Altmark Criterion is decisive for the assessment.
- (63) Nevertheless, nor during the pre-notification phase neither in the notification did Croatia provide a comprehensive costs analysis as the one required under the Fourth Altmark Criterion, notably on the costs of a typical, well-run undertaking. As mentioned in footnote 29 above, Croatia has chosen not to develop argumentation in line with the Altmark judgment for the purposes of the notified measure. In absence of this element, the Commission concludes that the Croatian authorities have not demonstrated that the Fourth Altmark Criterion is fulfilled⁷⁶. As the conditions set out in the Altmark judgment are cumulative, failure to comply with any one of the four conditions necessarily leads to the conclusion that the aid measure under review grants an economic advantage to the concessionaire concerned within the meaning of Article 107(1) TFEU.

⁷⁶ It is for the Member State to prove that the fourth Altmark condition is fulfilled (see judgment of the Court of Justice of 16 February 2016, *Germany v Commission*, C-446/14 P, ECLI:EU:C:2016:97, para. 38.

- (64) In view of the above, the Commission considers therefore that the measure at stake provides an advantage to Bina-Istra without the Croatian authorities having demonstrated to a sufficient degree that the *Altmark* conditions were fulfilled.

3.1.3. *Selectivity*

- (65) The aid measure under assessment implies the prolongation of an exclusive right to Bina-Istra which is entrusted with the service of financing, construction, operation and maintenance of the Istrian Y Motorway by way of a concession initially awarded in 1995. As a result, the Commission considers that the measure at stake is selective since it favours a given economic operator active in the relevant sector, and substantially affects the ability of other economic operators to carry out this specific economic activity.

3.1.4. *Distortion of competition and effect on trade between Member States*

- (66) The Commission recalls that the Court of Justice has repeatedly said that in principle aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition⁷⁷. It has been indeed ruled that any grant of aid to an undertaking exercising its activities in the internal market is liable to cause distortion of competition and affect trade between Member States⁷⁸.
- (67) In the case at stake, taking into account the nature and international dimension of the sector concerned, which is the construction, maintenance and operation of motorways against tolls, as well as the number of operators active in the sector, the Commission considers that the measure may affect EU trade⁷⁹.
- (68) Furthermore, since the sector is characterized by competition for the market, i.e. competition to obtain the exclusive right to build and/or operate a motorway, any aid granted in this context, especially when implying the postponement of the next tendering procedure, reinforces the position of the current concessionaire to the detriment of their competitors, also with respect to the related downstream market of the attribution of the construction works.
- (69) This is the case of the measure under review, which is capable of affecting trade between Member States because the position of the beneficiary will be reinforced - its presence in the market being assured until the end of the prolonged concession on 15 June 2039 - as compared to other operators in the sector.

⁷⁷ See judgment of 19 September 2000, case C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, para. 30 (and the case-law cited) and judgment of 3 March 2005, case C-172/03, *Wolfgang Heiser v Finanzamt Innsbruck*, ECLI:EU:C:2005:130, para. 55.

⁷⁸ See judgment of 17 September 1980, case C-730/79, *Philip Morris Holland v Commission*, ECLI:EU:C:1980:209, para. 11 and 12; and judgment of 30 April 1998, case T-214/95, *Vlaams Gewest (Flemish Region) v Commission*, ECLI:EU:T:1998:77, para. 48-50.

⁷⁹ See in this sense, Commission Decision on *Plan de Relance*, recital (50), Commission Decision on the *Tunnel Maurice-Lemaire*, recitals (38) and (39), Commission Decision on the *Italian motorways*, recitals (70) to (73), Commission Decision on the *Phase 2B1 section of the Istrian Y motorway*, recital (65) and Commission Decision on the *Projet Schloesing*, recital (37).

Conclusion on the existence of an aid

- (70) For the reasons set out above, the Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU, which Croatia does not contest in its notification⁸⁰.

3.2. Legality of the aid measure

- (71) The Commission notes that Croatia has not implemented the prolongation of the concession at stake nor any other element of the Proposed Amendment pending approval by the Commission. Croatia has thus fulfilled the obligation under Article 108(3) TFEU by notifying the measure prior to its implementation and making it subject to Commission approval.

3.3. Compatibility of the aid

- (72) In light of the foregoing, the measure must be assessed on compatibility grounds. Croatia considers to the extent the measure might constitute State aid, it should be assessed under Article 106(2) TFEU (recital (23)). In view of this qualification, Croatia further claims that the Proposed Amendment clearly fulfils the criteria set out in the the SGEI Framework, and the Commission considers that it should assess whether the conditions for that compatibility basis are fulfilled.
- (73) Article 106(2) TFEU provides the legal basis for assessing the compatibility of State aid granted in the framework of the provision of an SGEI. Accordingly, “[U]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition. In so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union”.
- (74) On the basis of the elements brought forward by the Croatian authorities on the qualification as an SGEI, the compatibility of the measure under article 106(2) TFEU must be assessed on the basis of SGEI Framework⁸¹.
- (75) The SGEI Framework sets a series of conditions that a measure has to fulfil in order to be deemed “*necessary for the operation of the service of general economic interest concerned and [...] not affect[ing] the development of trade to such an extent as to be contrary to the interests of the Union*”. The Commission will therefore assess below whether the conditions set out in sections 2.2 to 2.10 of the SGEI Framework are fulfilled.

⁸⁰ See footnote 29 above.

⁸¹ See also Commission Decision on *Plan de Relance*, recital (56), Commission Decision on the *Tunnel Maurice-Lemaire*, recital (43), Commission Decision on the *Italian motorways*, recital (78), Commission Decision on the *Phase 2B1 section of the Istrian Y motorway*, recital (70) and Commission Decision on the *Projet Schloesing*, recital (39).

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

- (76) Paragraph 12 of the SGEI Framework requires that “[T]he aid must be granted for a genuine and correctly defined service of general economic interest”.
- (77) Paragraph 13 of the SGEI Framework provides that “[M]ember States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily under the same conditions by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission assessment is limited to checking whether the Member States did not make a manifest error, unless provisions of Union law provide a stricter standard”⁸².
- (78) The Commission considers that Croatia has not made any manifest error in defining the SGEI as mentioned in recital (23) above and has presented sufficient credible justifications showing that realizing investments on the Istrian Y Motorway could not be done without public support as referred to in recital (29); moreover the IRR in the absence of the financial contribution mechanism would be highly negative, therefore insufficient for an operator to undertake the investment.
- (79) As regards the existence of a genuine and correctly defined service of general economic interest, the Commission recalls that for the said public service to be classified as SGEI it must address citizens' needs or be in the interest of society as a whole.
- (80) Croatia argues, in a credible manner, that the investment at stake is necessary in order to implement a series of important public interest objectives ranging from improving the safety requirements for the Učka tunnel (and address, by so doing, the ongoing Commission’s infringement proceedings under Article 258 TFEU for failure to comply with the Tunnel Safety Directive requirements), raising the safety level on this section of the motorway, up-grading the comprehensive TEN-T, and shortening the duration of travelling on a key route on the Croatian road network, limiting structural traffic congestion and improving environmental protection (recitals (30) and (31)). The Commission takes note of the fact that the concerned investment will constitute a key component integrated into the TEN-T⁸³, thereby also contributing at European, regional and local level to economic, social and territorial cohesion. Also, positive impacts on the economy are expected, mainly in terms of good transport activities and increased tourism flows⁸⁴.
- (81) Paragraph 14 of the SGEI Framework further requires that “[M]ember States should show that they have given proper consideration to the public service needs

⁸² See also paragraph 48 of the Commission SGEI Communication.

⁸³ See, amongst others, Commission White Paper, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' COM(2011) 144 final (March 2011), paragraph 10.

⁸⁴ The project is of vital importance to the Istrian local economy insofar as the Učka tunnel is the only possible route for transporting heavy good vehicles (over 5 tonnes from Croatia). Also, the project plays a major role in the Croatian tourism sector, as more than 90% of tourists visiting Istria use the Istrian Y Motorway.

to be supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account”.

- (82) As regards transparency and public consultations, the Commission notes that Croatia has given proper consideration to the public service needs by holding various public consultations provided for under Croatian planning laws and regulations in relation to the Istrian Y Motorway, and specifically to phase 2B2-1, as well as by taking into account the results of public consultations carried out under the environmental law and location permit procedure (recital (50)(a) and footnote 66). Furthermore, the Proposed Amendment provides for a technical inspection allowing the State to control the realisation of the required works⁸⁵, which can be considered as “*other appropriate measures*”, within the meaning of paragraph 14 of the SGEI Framework.
- (83) In the light of the above, the Commission concludes that the service of general economic interest is in line with paragraphs 12, 13 and 14 of the SGEI Framework.

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

- (84) Pursuant to paragraphs 15 and 16 of the SGEI Framework, responsibility for the operation of an SGEI must be entrusted by way of one or several acts, the form of which may be determined by the Member State. The act or series of acts must specify at least: (i) the content and duration of the public service obligations; (ii) the undertaking and, where applicable, the territory concerned; (iii) the nature of any exclusive or special rights assigned to the undertaking by the granting authority; (iii) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and (iv) the arrangements for avoiding and recovering any overcompensation.
- (85) The Commission notes that the SGEI is entrusted to Bina-Istra in the form of the proposed amended concession agreement and draft ordinance on the sixth amendment to the existing concession agreement as referred to in recitals (22) and (23) above. These acts state the content and the duration of the public service obligation. They also specify explicitly that the SGEI is entrusted by reason of, and pursuant to conditions set up in the SGEI Framework.
- (86) In particular, the Commission notes that the conditions of the entrustment act – outside the scope (additional works) and the duration of the public service obligations (extension of the concession) - remain unchanged under the notified measure compared to the conditions approved by the 2018 Commission Decision. The entrustment act establishes therefore the parameters on the basis of which the SGEI compensation is calculated: these parameters are established in advance under the financial contribution mechanism in an objective and transparent manner (recital (19)). Furthermore, the Commission notes from the Proposed Amendment that the SGEI compensation does not exceed the costs related to the discharge of the SGEI, taking into account relevant receipts and a reasonable profit because the financial contribution mechanism ensures that Bina-Istra only receives financial contribution to the extent that its projected revenues are less

⁸⁵ See in this sense, Commission Decision on the *Plan de Relance*, recital (66) and Commission Decision on the *Phase 2B1 section of the Istrian Y motorway*, recital (80).

than its projected costs for the year in question. It further notes that the available cash mechanism ensures the correspondence between costs and compensation. Finally, the Commission notes from the entrustment act that the concession fee mechanism, which caps the 30% of available cash that can be returned to Bina-Istra, where no financial contribution is required during year ‘n+1’, serves to further limit the potential for any overcompensation (recital (21)).

- (87) Furthermore, the Commission notes that the gain/pain share mechanism as set out in the entrustment act imposes an increased traffic risk on Bina-Istra, bolstering the proportionality of the compensation (recitals (38) and (40)). Finally, the Commission notes that the IRR analysis submitted by Croatia shows that the Proposed Amendment reduces the project IRR compared to that in the existing concession agreement (i.e. without phase 2B2-1).
- (88) In the light of the above, the Commission concludes that the entrustment acts are in line with the conditions set out in paragraph 16 of the SGEI Framework.

3.3.3. *Duration of the period of entrustment*

- (89) Paragraph 17 of the SGEI Framework requires that “[T]he duration of the period of entrustment should be justified by reference to objective criteria”.
- (90) Croatia argues that the prolongation of the concession up to five years is necessary to cover the costs of the additional investments, while avoiding an excessive financial contribution from the Government and aligning the length of the concession with the maturity of the long-term phase 2B2-1 debt (recital (33)).
- (91) Croatia maintains that the duration of the period of entrustment is objectively justified since the concession duration, as prolonged, will allow to realize the sub-phase 2B2-1 investment and to remunerate the concessionaire within the agreed remuneration limits further described in section 3.3.7 of this decision.
- (92) The Commission observes that the duration of the entrustment corresponding to the extended concession duration is the result of a detailed method of calculation. It enables to guarantee a strict financial equilibrium between the expected revenues deriving from the prolongation and the cost of the sub-phase 2B2-1 investment.
- (93) In particular the calculation of the prolongation periods can be considered as reasonable and proportionate for the reasons explained in section 3.3.7.
- (94) In view of the above, the Commission concludes that the condition outlined at paragraph 17 of the SGEI Framework is fulfilled.

3.3.4 *Compliance with the Directive 2006/111/EC*

- (95) Paragraph 18 of the SGEI Framework requires that the undertaking complies, “[W]here applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings” (the so-called “Transparency Directive”)⁸⁶. In addition, “[A]id that does not comply with that Directive is

⁸⁶ OJ L 318, 17.11.2006, p. 17.

considered to affect the development of trade to an extent that would be contrary to the interest of the Union within the meaning of article 106(2) of the TFEU”.

- (96) The Commission notes that according to Article 5(2)(c) of Directive 2006/111/EC, this Directive does not apply to undertakings which have been entrusted with the operation of services of general economic interest pursuant to Article 106(2) TFEU, if the compensation they receive, in any form whatsoever, was fixed for an appropriate period following an open, transparent and non-discriminating procedure.
- (97) Croatia informed the Commission that Bina-Istra's activities comprise exclusively SGEI activities (recital (45)) and therefore there is no need for accounting separation between SGEI activities and non-SGEI activities within the meaning of Directive 2006/111/EC. Thus, the Commission concludes that paragraph 18 of the SGEI Framework is not applicable in this case.

3.3.5 Compliance with Union public procurement rules

- (98) Pursuant to paragraph 19 of the SGEI Framework, “[A]id will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law.” Consequently, as stated in the same paragraph of the SGEI Framework, “[A]id that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the TFEU”.
- (99) In this regard, Croatia put forward in its notification that the changes to the existing concession contract resulting from the notified sixth amendment to the concession agreement do not give rise to a requirement to hold a new concession award procedure pursuant to the EU public procurement rules, as a derogation under Article 43 of the Concessions Directive is applicable, namely Article 43(1)(b) in relation to necessary additional works or services that were not included in the initial concession (recital (41))⁸⁷.
- (100) As the derogation under Article 43(1)(b) of the Concessions Directive applies to all of the changes envisaged under the Proposed Amendment (i.e. the additional works and the five years extension), Croatia considers that there is no need to consider any of the further possible derogations under Article 43(1) of the Concessions Directive⁸⁸.

⁸⁷ The Concessions Directive was transposed into Croatian law by the Croatian Concessions Act (“Zakon o koncesijama”) which entered into force on 22 July 2017 (official publication: Narodne Novine; Number: 69/17, available at https://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_69_1603.html).

⁸⁸ While the Commission also considered the derogation under Article 43(1)(e) of the Concessions Directive in the 2018 Commission Decision, the Croatian authorities claim that such an analysis was only due with respect to the addition of the Gain/Pain Share to the Financial Contribution Mechanism and to other various Financial Contribution Mechanism changes made as part of the phase 2B1 amendment to the concession agreement (see recitals (120) to (122) of the 2018 Commission

(101) The Commission considers that the assessment of whether the concession agreement resulting from the notified measure complies with EU law in the area of public procurement must be carried out pursuant to Article 43(1)(b) of the Concessions Directive⁸⁹.

(102) The relevant provision of Article 43 of the Concessions Directive is the following:

“1. Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

(...)

(b) for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire:

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity.

However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value shall not exceed 50 % of the value of the original concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive.”.

(103) Article 43(1)(b) of the Concessions Directive sets out the following requirements for a derogation to apply in the case of necessary additional works or services:

Additional works or services by the original concessionaire that have become necessary, and that were not included in the initial concession (Article 43(1)(b)); where

- i. a change of concessionaire cannot be made for economic or technical reasons (Article 43(1)(b)(i));
- ii. a change of concessionaire would cause significant inconvenience or substantial duplication of costs for the contracting authority (Article 43(1)(b)(ii)), and

Decision). As no further changes to the Financial Contribution Mechanism are envisaged as part of the Proposed Amendment, there is no need to consider any of further possible derogations under Article 43 of the Concessions Directive.

⁸⁹ See also in this sense Commission Decision on *Plan de Relance*, recital (88), Commission Decision on the *Tunnel Maurice-Lemaire*, recital (69), Commission Decision on the *Italian motorways*, recital (104), Commission Decision on the *Phase 2B1 section of the Istrian Y motorway*, recitals (112) and (119) and Commission Decision on the *Projet Schloesing*, recital (65).

- iii. Any increase in value does not exceed 50% of the value of the original concession (Article 43(1)(b), last subparagraph).

(104) Against this legal background, Croatia considers that all requirements referred to above are fulfilled for the following reasons:

- i. Additional works or services by the original concessionaire that have become necessary, and that were not included in the initial concession: While the sub-phase 2B2-1 works were envisaged, they were not “included in the initial concession” for the purposes of this derogation. The 1995 concession agreement is clear in that the Government and Bina-Istra will have no obligations in relation to sub-phase 2B2-1 unless and until there is agreement between the parties in relation to the funding and expenditure requirements relating to sub-phase 2B2-1⁹⁰. The development of sub-phase 2B2-1 has become necessary in order to raise the safety level of the section of the motorway to which it relates, to reduce traffic congestions (by adding one more lane in each direction), to shorten journey times, to increase the existing level of environmental protection and to upgrade the comprehensive TEN-T (recital (30)). The development of sub-phase 2B2-1 has become crucially necessary in order to ensure that the Učka tunnel will be in compliance with Directive 2004/54/EC on minimum safety requirements for tunnels in the trans-European road network and in particular, the requirements relating to the construction of twin tube tunnels and cross-connections between tubes to be used as emergency exits, as well as drainage (recital (31)). This factor was not applicable in the case of the phase 2B1 amendment approved by the 2018 Commission Decision (which did not concern the Učka tunnel) and therefore represents an additional and fundamental source of necessity.
- ii. A change of concessionaire cannot be made for economic or technical reasons: a “change of concessionaire” could potentially encompass two different *scenarios*: (i) terminating the existing concession agreement and reprocurring a new concession covering the extended concession that is the subject of the amended concession agreement; or (ii) appointing a second concessionaire to undertake the concession with respect to the subject matter of sub-phase 2B2-1 only and operate concurrently with Bina Istra. Neither scenario can be seriously contemplated by the Government due to economic or technical considerations.
 - Scenario (i) would require the Government to terminate the existing concession agreement; yet under the existing concession agreement, the Croatian Government is only able to terminate for force majeure and for material breach⁹¹, neither of which would be applicable in the current circumstances. Should the Croatian government terminate the existing concession agreement, it would risk facing a claim from Bina-Istra for significant compensation in respect of the remaining duration of the concession and therefore this scenario would not be viable for economic reasons.

⁹⁰ See Article 16 of the 1995 concession agreement.

⁹¹ See Articles 38.1 and 38.2 of the existing concession agreement.

- Scenario (ii) would not be viable given technical and economic reasons. It would not be possible to operate a concession relating solely to the subject matter of sub-phase 2B2-1, a second carriageway running alongside the existing motorway – tolls could not be charged in relation to a single carriageway of the part of the motorway to which sub-phase 2B2-1 applies. The funding of the project as it stands is made possible through (i) the collection of tolls paid by users on other portions of the motorway, and (ii) the payment of the financial contribution. The second concessionaire would not have the benefit of the tolls collected by Bina-Istra elsewhere on the network, meaning that the only source of finance remaining available would be the payment by the Government of 100% of the construction and Operation and Maintenance costs (“O&M costs”) of the new section to the new concessionaire. This situation would in itself be incompatible with that of a concessionaire which by definition must be collecting part of its revenues directly from the users of the works it is responsible for. From a technical standpoint, sharing the liabilities and tasks of the operation and maintenance of the section to which sub-phase 2B2-1 relates would not be practically achievable. The allocation of responsibility for maintenance would raise difficulties and the allocation of O&M costs for the section would inevitably be made in a non-economic manner⁹².

In addition, O&M costs for certain lanes and a second tube of the Učka tunnel covering a single 8km stretch of road only would invariably be extremely high, as the O&M costs, such as the procuring of significant maintenance equipment, would only be spread over a very small area.

With respect to both scenarios, a change of concessionaire may require additional applications to be made with respect to construction and operating permits, resulting in significant additional delay (potentially around 18 to 24 months) as well as additional costs.

- iii. A change of concessionaire would cause significant inconvenience or substantial duplication of costs for the contracting authority: the scenario (i) above would lead to substantial inconvenience and costs, taking into account the possibility of a protracted legal dispute with Bina-Istra and the technical issues associated with scenario (ii) above would lead to the same.
- iv. Any increase in value does not exceed 50% of the value of the original concession: according to the Croatian authorities, the estimated increase in the value of the concession under the Proposed Amendment compared to the existing concession agreement is limited to 2.9%⁹³. In their view,

⁹² The Croatian authorities explained that, as an illustration, these kinds of issues would arise with respect to the drainage, as the drainage systems for sub-phase 2B2-1 will be connected to the drainage system of the entire motorway and water will be treated by common water treatment plants, as well as significant roadside equipment including barriers, signage, the variable message system, public lighting and cameras, which will need to be operated and maintained. Ensuring adequate traffic management would also be jeopardised seeing that neither concessionaire would have complete availability of a motorway section and therefore could not react swiftly to redirect traffic in case of an incident.

⁹³ The comparison of the estimated value of the concession (present value) under the Proposed Amendment (EUR 1 189.8 million) compared to the existing concession agreement

where several successive modifications are made, the 50% limitation of Article 43(1) of the Concessions Directive shall apply to the value of each modification, and as such, only the increase in value relating to sub-phase 2B2-1 is relevant⁹⁴.

- (105) As described in recitals (22) and (24) above, the measure notified by Croatia, i.e. the Proposed Amendment, concerns sub-phase 2B2-1 additional works of the Istrian Y motorway and the related prolongation of the existing concession. The value of the construction works amounts to EUR 196.9 million (recital (29)).
- (106) As regards the envisaged additional works as described in recital (25) above, the Commission observes that, since these works were not included in the initial concession agreement, as recalled in recital (104)(i) above, it is necessary to assess whether their inclusion in the amended concession complies with the first and second paragraphs of Article 43(1)(b) of Directive 2014/23/EU.
- (107) The Commission notes that these additional works must be carried out in the framework of the current concession. In fact, these works have become necessary to operate the Istrian Y Motorway concession, insofar as they are aimed at facing an increase in traffic (one more lane in each direction), at solving safety problems, at reducing the environmental impact of the motorway sections concerned in line with EU law⁹⁵ or to remedy the non-compliance with the Tunnel Safety Directive requirements (which concerns the Učka tunnel). In this respect, the notification specifies in the technical annexes the reasons underlying the intervention and justifying its necessity.
- (108) The fulfilment of the requirements of Article 43(1)(b)(i) and (ii), namely that a change of concessionaire cannot be made for economic or technical reasons and that a change of concessionaire would cause significant inconvenience or substantial duplication of costs for the contracting authority is argued by the Croatian authorities in recital (104), by invoking two distinct scenarios (“scenario (i)” and “scenario (ii)”) which must be examined by the Commission.

(EUR 1 156.2 million) is calculated for the period 2013 to 2038 in accordance with the methodology in Article 8 of the Concessions Directive. The difference between the estimated value under the existing concession agreement and the concession under the Proposed Amendment is 2.9% (i.e. EUR 1 189.8 million/EUR 1 156.2 million in present value). According to the Croatian authorities, the low percentage increase is attributable to the fact that only limited additional tolls will be generated from sub-phase 2B2-1 as the Učka Tunnel section is already tolled and it is intended that these tolls will not be increased with the addition of the second tube, leaving only a relatively small remaining section covered by sub-phase 2B2-1 that will generate additional tolls. Moreover, due to the favourable financing terms and to the extended tenor of the long-term debt there are lower amounts of financial contribution payable in earlier years which reduces the overall NPV (recitals (19), (34) and (37)).

⁹⁴ However, even if the comparison were to be against the concession agreement prior to the 2018 amendment Phase 2B1 amendment (i.e. the value of the initial concession), the difference will be expressed in percentage between (i) the value of the concession after the notified measure (sub-phase 2B2-1 project) calculated for the period from 2013 to 2038 (EUR 1 189.8 million) in present value and (ii) the value of the concession before the 2018 amendment (i.e. before the phase 2B1 works approved by the 2018 Commission Decision) calculated for the period from 2013 to 2027 (EUR 888.5 million), then the increase in value would be 33.9% and therefore still within the 50% limit.

⁹⁵ The Commission considers that Directive 2002/49/EC (“the Environmental Noise Directive”) must be respected in this regard.

- (109) As a starting point, it must be observed that the additional works would be carried out in the framework of the current concession and relate to existing motorway sections, falling into the same perimeter which is already operated by the incumbent concessionaire. The additional works do not consist in building new motorways or new motorway sections.
- (110) As regards scenario (i), termination and reprourement of the concession, the Commission observes that such a change cannot be made for economic and technical reasons and would lead to both a significant inconvenience and a substantial duplication of costs. A termination of the concession would likely be contested by the current concessionaire. Only after a final judgement is reached, would the contracting authority have the necessary legal certainty and clarity needed to re-procure the concession. Until a final judgment is reached, and the new procurement procedure is finalized, a period of legal uncertainty would exist that could amount to several years. During this period, it is reasonable to assume that the incumbent concessionaire would minimize its own exposure to risks by reducing any construction, maintenance and management activities to the minimum legally required. Therefore, terminating and reprocurring the concession would lead to disruptions and delays in the accomplishment of the existing and future maintenance and management services and additional construction works and thus the objectives of the concession, and the fulfilment of the requirements of applicable Union and national environmental law, safety and traffic regulations. It would also lead to a deterioration (instead of the legally required improvement) of technical conditions regarding traffic, even without further increases in traffic, and especially if traffic indeed does increase, as the projections indicate. Finally, as the new concession could only be put in place at a later moment in time, it would also lead to an unjustified prolongation of the duration of the concession, an increase of the costs of the contracting authority, and an extended foreclosure of the market of several years.
- (111) With regards to scenario (ii) as referred to in recital (103(ii)) above which consists in the appointment of second concessionaire to run a separate concession for the additional works concurrently with the existing one, it should be examined under Article 43(1)(b). The Commission accepts the arguments of the Croatian authorities indicating that such a second concession cannot be made for technical reasons and would both lead to a significant inconvenience and a substantial duplication of costs. As described in recitals (24) and (25) above, the additional works consist mainly in the construction of an additional lane in both directions and related works (including a second tube to the Učka Tunnel) and extension of Kvarner Rest Area. Additional lanes and rest areas to an existing motorway cannot be operated separately from the motorway to which they are added: a separate concession for just the additional lanes and the Kvarner Rest Area and accompanying structures would cause considerable legal, administrative and practical difficulties for both the contracting authority and the two concessionaires operating different lanes of the same motorway. In addition, the additional concessionaire would indeed not have the opportunity to finance the works from tolls collected elsewhere on the motorways system, and it is highly dubious how the two concurrent concessionaires would come to an agreement to share the tolls collected on the limited portion pertaining to sub-phase 2B2-1 once it is constructed. The low capacity to finance the works from tolls in the context of a likelihood of increased costs due to diminished economies of scale, is likely to significantly increase the financial burden on the contracting authority via the

financial contribution mechanism, in comparison to entrusting the additional works to the incumbent concessionaire.

- (112) In addition, the Commission observes that the new/additional concessionaire would need to be selected in a procurement procedure, and only thereafter commence negotiations with lending institutions, it is certain that the overall duration of the foreclosure of the market would be longer, and the total economic cost for the contracting authority therefore higher, with a reprocedured concession as indicated in recital (110), or with a concurrent concession as indicated in recital (111), than with an extension however for exactly the same results as regards the accomplishment of additional works and the objectives of the concession.
- (113) Therefore, the Commission concludes that including the additional works in the scope of the amended concession agreement complies with Article 43(1)(b), first subparagraph, of Directive 2014/23/EU.
- (114) According to Article 43(1)(b), second subparagraph, of Directive 2014/23/EU, in the case of concessions for certain activities such as the construction and operation of motorways, any increase in the value of a concession, due to contract modifications consisting in additional works or services not included in the initial concession, must fulfil two requirements: (i) under the first requirement, the value of each one of those modifications shall not exceed 50% of the value of the original concession; (ii) under the second requirement, consecutive modifications shall not be aimed at circumventing the Directive.
- (115) As regards the first requirement set out in Article 43(1)(b), second subparagraph, of Directive 2014/23/EU, in the specific circumstances of the present case, where the prolongation of the concession is inextricably and exclusively linked to the additional works of sub-phase 2B2-1 and where the tolls on the motorway in question cannot be increased by the concessionaire unilaterally, it is appropriate to assess the increase in the value of the concession by considering the value of the additional works (essentially investments to be undertaken by the concessionaire) and the length of the extension of the concession.
- (116) The Commission observes that the proposed approach of the Croatian authorities as indicated in recital (104(iv)) is to accept the value of the original concession as the value of the Istrian Y motorway concession on 1 July 2013, which is the date of accession of Croatia to the European Union, and the first date of the obligatory applicability of the relevant rules on works concessions, as set out in Directive 2004/18/EC⁹⁶. Furthermore, the Commission observes that the Croatian authorities, based on Article 43(1) of the Concessions Directive, consider that only the increase in value relating to sub-phase 2B2-1 is relevant, which means that the estimated increase in value of the concession under the Proposed Amendment and the existing concession agreement is limited to 2.9% (recital (99(iv))). However, the Commission considers that, contrary to the proposed approach of the Croatian authorities as indicated in recital (104(iv)), the comparison has to be against the value of the original concession (i.e. the value of the Istrian Y motorway concession on 1 July 2013, which is the date of accession of Croatia to the European Union) and the first date of the obligatory applicability

⁹⁶ OJ L 134, 30.04.2004, p.114.

of the relevant rules on works concessions)⁹⁷ and therefore taking into the phase 2B1 amendment approved by the 2018 Commission Decision, i.e. taking into account the 2018 amendment as well. Then the increase in the value of the concession following the Proposed Amendment, amounts to 33.9%⁹⁸ of the value of the Istrian Y concession in 2013, which is still below the 50% threshold.

- (117) The modification (proposed five-years extension directly linked to the scope and value of the additional works) thus represents an increase in value for the concessionaire of 33.9% (see above). Consequently, the modification remains under the 50% threshold set by Article 43(1)(b) of the Directive.
- (118) Furthermore, the extension does not change the economic balance of the concession in favour of the concessionaire. The additional revenues obtained by the concessionaire as a result of the prolongation directly mirror the additional investments by the concessionaire to finance the additional works of sub-phase 2B2-1. As a result of the latter, the total remaining duration of the concession also does not exceed the time that the concessionaire could reasonably be expected to need to recoup the investments required and to achieve the specific contractual objectives together with a return on investment capital.
- (119) As regards the second requirement set out in Article 43(1)(b), second subparagraph, of Directive 2014/23/EU, it must be observed that, as shown above, the parties to the concession contract approached the Commission from the earliest stage by duly referring to the rules of the Directive and the compliance of the modification with the rules and that therefore the contract modifications notified by Croatia under the amended concession agreement are not aimed to circumventing the Directive 2014/23/EU. Therefore, all conditions of Article 43(1)(b) are fulfilled.
- (120) In view of the above, the Commission concludes that awarding the planned additional works to the incumbent concessionaire also fully complies with Article 43(1)(b), second subparagraph, of the Directive 2014/23/EU.
- (121) In the light of all the above, the Commission concludes that the conditions set out in paragraph 19 of the SGEI Framework are fulfilled.

3.3.6 *Absence of discrimination*

- (122) Paragraph 20 of the SGEI Framework requires that, “[W]here an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking”.
- (123) The Commission notes that since the SGEI was entrusted to one undertaking, paragraph 20 of the SGEI Framework is not applicable in this case.

⁹⁷ See recital (115) of the 2018 Commission Decision.

⁹⁸ The calculation model is slightly different from the one approved under the 2018 Commission Decision (see recital (115)) because of the lower discount rate and slightly updated traffic figures.

3.3.7 Amount of compensation

- (124) Pursuant to paragraph 21 of the SGEI Framework “[T]he amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.” Paragraph 22 further clarifies that “[T]he amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset, in accordance with paragraphs 40 and 41.”

Methodology

- (125) The methodology followed by Croatia to set the amount of compensation relies on the financial balancing of the cost for discharging the public service obligation with the revenues that are accrued taking into account the relevant receipts and a reasonable profit.
- (126) The costs considered relate to the expected operating costs of the concession and to the expected additional investment costs incurred for the realization of the sub-phase 2B2-1 works, including the relevant financial charges.
- (127) The revenues considered are all the expected concession related revenues (tolls and side activity), including the additional revenues that are expected to be generated by the sub-phase 2B2-1 investments and by the years of prolongation.
- (128) The envisaged extension of the concession, is then computed as the minimum amount of years that are necessary to cover the costs and the financial charges related to the sub-phase 2B2-1 investment, including a reasonable profit to the concessionaire. Further, the envisaged methodology will be constantly updated during the duration of the concession as to be adapted to the actual costs and revenues keeping nevertheless a cap on the reasonable profits of the concessionaire.
- (129) On the basis of these elements, the Commission considers that the methodology devised by Croatia is in line with paragraphs 28 to 30 of the SGEI Framework.

Reasonable profit

- (130) The compensation of the concessionaire plays a role in the above described methodology.
- (131) The tariff policy is determined by the Croatian government and takes into account the need to ensure that tolls remain affordable for users.
- (132) Furthermore, the Commission acknowledges that the Proposed Amendment does not change the modalities of remuneration of the concessionaire, still covered by the pain/gain mechanism limiting the dividends that Bina-Istra can distribute to its shareholders, in a relevant manner impacting the remuneration of the equity of the concessionaire. With the Proposed Amendment the expected profits of the concessionaire are still closely monitored by the Croatian State which is expected

to draw significant transfers from the concession. On the contrary the dividends payable to the shareholders of the concessionaire are significantly capped.⁹⁹

- (133) The Commission further takes note that the benchmarking analysis provided by Croatia indicates that the project IRR of the amended concession, which ranges between [4-7]% and [4-7]%, is within the range of other European highways IRR and has decreased, with the proposed amendment compared to the existing concession agreement (the project IRR with the fifth amendment was indeed estimated between [5-8]% and [5-8]%).¹⁰⁰
- (134) In view of the above, the Commission considers that the expected profits of the present measure can be considered as reasonable and in line with the SGEI Framework.

Efficiency Incentives

- (135) Paragraph 39 of the SGEI Framework, requires that “[I]n devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.”
- (136) Croatia explained that there is still an appropriate efficiency incentive under the Proposed Amendment in the form of the existing Operation and Maintenance (O&M) savings share as described in recital (40(b)) above. In a nutshell, under the O&M savings share mechanism, Bina Istra retains 60% of ordinary O&M savings and 50% of the extraordinary O&M savings, with the remainder included in the available cash, thereby reducing the amount of the financial contribution. In addition, the O&M savings share is payable to Bina-Istra by way of dividend from Bina Istra's 100%-owned subsidiary BIOM and is subject to profit tax at 18%, meaning that the O&M savings share is close to 50% on overall.
- (137) Paragraph 40 of the SGEI Framework states that “[E]fficiency incentives can be designed in different ways to best suit the specificity of each case or sector”. Paragraph 41 states that “(...) compensation should be increased following a method specified in the entrustment act. Rewards linked to productive efficiency gains are to be set at a level such as to allow balanced sharing of those gains between undertaking and the Member State and/or the users.”. Paragraph 42 requires that “(...) any such mechanism for incentivising efficiency improvements must be based on objective and measurable criteria set out in the entrustment act and subject to transparent ex post assessment carried out by an entity independent from the SGEI provider”. Finally, paragraph 43 states that “[E]fficiency gains should be achieved without prejudice to the quality of the service provided and should meet the standards laid down in Union legislation”.
- (138) In this regard, the Commission notes that these requirements are met by the O&M savings share mechanism. In overall terms the O&M savings share is close to 50%, i.e. there is a 50-50 split of the efficiency gains between the Government and Bina Istra. Furthermore, it is also noted that the ordinary O&M savings are

⁹⁹ The dividends that are payable to the shareholders of the concessionaire shall not exceed EUR 250,000 per year, whereas the concessionaire is exposed to losses amounting to as much as EUR 10 million over the remaining life of the concession.

¹⁰⁰ See recital (141) of the 2018 Commission Decision.

based on savings against the O&M expenses set out at Appendix 19, Annex 1¹⁰¹ to the concession agreement, while the extraordinary O&M savings are based on savings against the costs in the extraordinary maintenance and renewal plan¹⁰². Finally, the Commission notes that each extraordinary maintenance and renewal plan is drawn up on the basis of the legal regulations on road maintenance, technical and safety standards and best practices, as well as regular inspections, including by Government inspectors¹⁰³. Each plan is reviewed by the Croatian State motorway company, Hrvatske Autoceste (HAC) and the Government, and is further subject to annual review as part of the approval process of Bina Istra's budget, by the Government and the Lender's Technical Advisor.

- (139) Finally, Croatia argues that the O&M savings share which is reported by Bina-Istra in the first instance is subject to assessment by an independent auditor as part of the annual audit of the accounts, which is publicly available through the Croatian national public information system¹⁰⁴. The O&M savings share is without prejudice to the quality of O&M services provided by Bina-Istra, the services requirements which are set out in Appendix 12 to the concession agreement.
- (140) In view of the above, the Commission considers that the efficiency incentives devised by Croatia through the 5th amendment of the existing concession and still in place are in line with paragraphs 41, 42 and 43 of the SGEI Framework.

Overcompensation

- (141) Pursuant to paragraph 49 of the SGEI Framework, “[M]ember States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication, checks should normally be made at least every two years”.
- (142) In terms of the specific procedure for calculating the financial contribution Croatia indicated that this mechanism is specifically designed to ensure that there is no overcompensation as it involves independent experts¹⁰⁵ and it gives the Government the ability to review and exercise control on each step of the calculation.

¹⁰¹ The Operating and Maintenance Expenses are based on the actual monthly expense incurred as at January 2020, increased for Croatian inflation on the main O&M costs.

¹⁰² Appendix 19, Annex 2 to the concession agreement (the Extraordinary Maintenance and Renewal Plans are approved by the Government every four years).

¹⁰³ The cost of the works included in the Plan is based on those in the previous Plan (as most works are of the same kind e.g. pavement and structures rehabilitation and slope protection) while non-recurring works are based on specific non-binding offers from contractors.

¹⁰⁴ See <http://rgfi.fina.hr/JavnaObjava-web/jsp/prijavaKorisnika.jsp>

¹⁰⁵ See footnote 38 above.

- (143) The Commission notes that, while there is no "claw-back" mechanism as such under the existing concession amended by the Proposed Amendment, the financial contribution mechanism provides for a correspondence between revenues and costs. In addition, there is a cap (set at EUR [...] per year) applying to the 30% available cash where no financial contribution is required during year "n+1", which ensures that there cannot be overcompensation.
- (144) The Commission further notes that the sub-phase 2B2-1 construction costs, the construction costs for the previous phases of the project (which are covered by the debt service) and Bina-Istra's operating and maintenance costs have been analysed by independent advisors (Atkins) that have concluded that the costs are reasonable and within the market benchmark costs for similar projects (recital (29)).
- (145) Also taking into account the elements provided under recitals (131) to (133) above, the Commission considers that these aspects of the measure are in line with paragraph 49 of the SGEI Framework.
- (146) In the light of all the above, the Commission considers that also with regard to these aspects the measure is in line with the SGEI Framework.

3.3.8 Reporting and Monitoring

- (147) Pursuant to paragraph 63 of the SGEI Framework '(...) [M]ember States must submit annual reports to the Commission on the aid granted following a decision of the Commission based on the SGEI Framework'.
- (148) The Commission takes note of the fact that Croatia agreed to yearly report to the Commission individual aid (recital (48)) as provided for by paragraph 63 of the SGEI Framework and Article 26 of Council Regulation (EU) 2015/1589 (Procedural Regulation)¹⁰⁶ and to keep, for at least ten years (recital (49)) from the date of the award of the aid, detailed records containing the information and supporting documentation necessary to establish that all compatibility conditions are met, and that these records will be provided to the Commission upon request as laid down in section 9 of Annex 1 of Commission Regulation (EU) 2015/2282 amending Regulation (EC) No 794/2004¹⁰⁷.

3.3.9. Transparency

- (149) Pursuant to paragraph 60 of the SGEI Framework '(...) [T]he Member State concerned must publish the following information on the internet or by other appropriate means:
- (a) *the results of the public consultation or other appropriate instruments referred to in paragraph 14;*
 - (b) *the content and duration of the public service obligations;*
 - (c) *the undertaking and, where applicable, the territory concerned;*

¹⁰⁶ OJ L 248, 24.9.2015, p.9.

¹⁰⁷ OJ L 325, 10.12.2015, p. 14.

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

- (150) Croatia confirmed that various public consultations provided for under Croatian planning laws and regulations have been carried out in relation to the motorway as it was developed during the various phases, including specifically in relation to sub-phase 2B2-1 of the concession.
- (151) The results of the public consultations in relation to sub-phase 2B2-1 carried out under (i) the Croatian Environmental Protection Act and the Regulation on the Environmental Impact Assessment of Planned Interventions¹⁰⁸ and (ii) the location permit procedure¹⁰⁹, which took into account the interests of users and providers¹¹⁰ in devising SGEI were made publicly available (recital (50(a)) in line with paragraph 14 by remission of paragraph 60(a) of the SGEI Framework.
- (152) Croatia confirmed that the information set out in paragraph 60(b) and (c) of the SGEI Framework is publicly available at the official website of Bina-Istra¹¹¹. Moreover, Croatia confirmed that Bina-Istra publishes regularly on its web page information on the company profile such as: (i) basic information on the establishment of the company and the concession composed of the concession agreement and its annexes; (ii) the loan amount for the development of the motorway; (iii) Bina-Istra's profits and loss and balance sheet; (iv) the sustainable development reports, and (v) information on sponsorship and donations (see recital (50)(c))¹¹². Also, Bina-Istra makes publicly available the charged toll tariffs and general conditions for users (see recital (50)(b))¹¹³.
- (153) Croatia confirmed that the amounts of aid granted to Bina-Istra on a yearly basis as provided for paragraph 60(d) of the SGEI Framework are published insofar as the estimated financial contribution budgeted to Bina-Istra is made publicly available as part of the Republic of Croatia's annual budget (see recital (50)(d)).
- (154) In view of paragraph II.2 of the Transparency Communication from the Commission¹¹⁴, Member States must ensure the publication on a comprehensive

¹⁰⁸ The environmental impact assessment, the public consultation that led to the final document and the decision on the environmental protection measures for the doubling of the section Rogovići - Matulji (covering sub-phase 2B2-1), including the minutes, consulting and outcomes.

¹⁰⁹ The public consultation in relation to the location permit for the section Vranja to Učka Tunnel was held on 16 May 2012 and did not raise any objections (see minutes of the consultation).

¹¹⁰ In a number of instances the design of the motorway was amended in order to address the comments raised, including the addition in a particular location of further pedestrian overpasses and another lane to deal with the problem of vehicle accumulation.

¹¹¹ <http://bina-istra.com>

¹¹² <https://bina-istra.com/o-nama/istarski-ipsilon>. Financial and project related information, including concession agreement text may be accessed at the following web pages: <https://bina-istra.com/o-nama/pravo-na-pristup-informacijama>; <https://bina-istra.com/cestarina/cjenik-dionica-na-karti>; and <https://bina-istra.com/o-nama>.

¹¹³ See Article 28 of the Proposed Amendment. Information on the different tariffs according to the vehicle category and/or user category and/or section/part of the toll motorway will be displayed at the toll stations.

¹¹⁴ Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audio-

State aid website, at national or regional level, of a full text of the approved aid scheme or the individual aid granting decision and its implementing provisions, or a link to it; the identity of the granting authority or authorities; the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME/large undertaking), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level). Such a requirement can be waived with respect to individual aid awards below EUR 500,000. Such information must be published after the decision to grant the aid has been taken, must be kept for at least ten years and must be available to the general public without restrictions (see recital (51)).

- (155) The Commission takes note of the fact that Croatia confirmed that all requirements concerning transparency set out in paragraph II.2 of the Transparency Communication will be respected.

3.3.10 Conclusions

- (156) In view of the above, the Commission concludes that the prolongation of the existing concession linked to the financing, construction, operation and maintenance of the sub-phase 2B2-1 of the Istrian Y motorway as implemented under the conditions of the Proposed Amendment fulfils the compatibility conditions set out in the SGEI Framework.

4. CONCLUSION

In the light of the commitments undertaken by Croatia, the Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 106(2) of the TFEU.

Finally, the Commission notes that Croatia exceptionally accepts the adoption and the notification of this Decision pursuant to Article 297(2) of the TFEU in the English language.

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
Executive Vice-President