COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

COMMISSION DECISION

on the application of Article 86 of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

1. Article 16 of the Treaty provides that without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union, as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

2. For certain services of general economic interest (SGEIs) to operate under conditions that enable them to fulfill their missions, financial support from the State intended to cover some or all of the specific costs resulting from the public service obligations may prove necessary. In accordance with Article 295 of the Treaty, it is irrelevant from the viewpoint of Community law whether such SGEIs are operated by public or private undertakings.

3. Article 86(2) of the Treaty states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and that the
development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

4. In its judgment in the case of Altmark Trans GmbH¹, the Court of Justice of the European Communities held that public service compensation does not constitute State aid within the meaning of Article 87 of the EC Treaty provided that four criteria are met:

“[…] First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. […]

[…] Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. […] Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.

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

[…] Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

5. Where these four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the Treaty do not apply. If the Member States do not respect these criteria and if the general criteria for the applicability of Article 87(1) of the Treaty are met, public service compensation constitutes State aid that is subject to Articles 73, 86, 87 and 88 of the Treaty.

6. Under Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid\(^2\), financial support amounting to less than EUR 100 000 for any one enterprise over a period of three years is not caught by Article 87 of the Treaty. That Regulation is not applicable to the transport sector or activities linked to the production, processing or marketing of products listed in Annex I to the Treaty.

7. State aid in the form of public service compensation may prove necessary for undertakings entrusted with the operation of SGEIs to operate on the basis of principles and under conditions which enable them to fulfil their missions. Such aid may be compatible with the Treaty under Article 86(2) under certain conditions.

8. Among the types of aid in the form of public service compensation that can be compatible, a distinction should be drawn between, on the one hand, those which, being substantial, could significantly distort competition and, on the other, those that are smaller in amount. In the case of the latter, the risks of competition being distorted are limited where Member States comply with the conditions of compatibility laid down beforehand. With such services, it is also important to guarantee effective application of the rules on State aid while streamlining administrative procedures.

9. Article 86(3) of the Treaty states that the Commission shall ensure the application of the provisions of that Article and shall, where necessary, address appropriate directives or decisions to Member States. The Commission considers that a decision addressed to the Member States should be adopted specifying the conditions under which certain systems of compensation are compatible with Article 86(2) and are not subject to the prior notification requirement of Article 88(3) of the Treaty.

10. Such aid may be declared compatible only if it is granted in order to ensure the provision of services that are services of general interest within the meaning of Article 86 of the Treaty. It is clear from the case law that in the absence of Community legislation governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. Thus, in the absence of Community legislation governing the matter, the Commission’s task is to ensure that these provisions are applied with no manifest error. It transpires from Article 86(2) that undertakings entrusted with the operation of SGEIs are undertakings entrusted with “a particular task”.

11. The amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in a public instrument. The form of this instrument may vary according to the legal systems in the Member States but must include all the information necessary to identify the special costs borne by the undertakings.

\(^2\) OJ L 10, 13.1.2001, p. 30..
12. Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings lays down conditions for ensuring a minimum degree of transparency in financial relations between the State and certain undertakings entrusted with the operation of SGEIs. The conditions under which this directive applies in the field of broadcasting, are specified in points 49 to 56 of the Communication from the Commission on the application of State aid rules to public service broadcasting.

13. In order to avoid unjustified distortions of competition, compensation could not exceed what is necessary to cover some or all of the costs incurred in discharging the public service obligations, account being taken of the relevant receipts and a reasonable profit. It can include, in particular, the specific costs actually borne by the undertakings in the regions referred to in Article 87(3) (a) and (c) of the Treaty.

14. At the current stage of development of the common market, small amounts of compensation granted to undertakings providing SGEI whose turnover is limited, and which meet the abovementioned conditions, do not substantially affect the development of trade and competition. Consequently, the declaration of compatibility of such compensation is in conformity with the interests of the Community as referred to in the last sentence of Article 86 (2).

15. To the extent that such compensation is granted to undertakings entrusted with the operation of SGEI, the amount of the compensation is proportionate to the costs of the services, and the development of trade is not affected to such an extent as would be contrary to the interests of the Community, this compensation constitutes State aid compatible with Article 86(2) of the Treaty.

16. Small amounts of compensation granted to undertakings providing SGEI whose turnover is limited, which comply with the abovementioned conditions, do not substantially affect the development of trade and competition. When the conditions set out in this decision are fulfilled, prior notification is therefore not necessary. For the purpose of defining the scope of the exemption from notification, the turnover of undertakings receiving public service compensation and the level of such compensation should be taken into consideration.

17. Hospitals and social housing undertakings entrusted with tasks involving SGEIs have specific characteristics that need to be taken into consideration. Particular account should be taken of the fact that their turnover and level of compensation may be very high without there being any particularly large risks of competition being distorted. Accordingly, hospitals and social housing undertakings that carry out activities involving services of general economic interest should benefit from the exemption from notification.

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4 OJ C 320, 15.11.2001, p. 5.
18. Article 73 of the Treaty constitutes a *lex specialis* with regard to Article 86(2). It lays down the rules applicable to public service compensation in the land transport sector. This Article has been developed by Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, which lays down general conditions for public service obligations in the land transport sector and imposes methods for calculating compensation. The Regulation exempts all compensation that fulfils the conditions of notification under Article 88(3) of the Treaty. It also allows Member States to derogate from its provisions in the case of undertakings providing exclusively urban, suburban or regional transport. Where this derogation is applied, any compensation for public service obligations is, in so far as it constitutes State aid, governed by Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway. According to the judgment in "Altmark", compensation which does not respect the provisions of Article 73 cannot be declared compatible with the Treaty on the basis of Article 86(2), or on the basis of any other Treaty provision. Consequently, such compensation is excluded from the scope of this decision.

19. In view of the specific objectives of the common transport policy, the Commission also considers it expedient for public service compensation in the air and maritime transport sectors to be excluded from the scope of this Decision. It nonetheless recalls that rules applicable to these sectors are to be found in Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, and Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) which lay down conditions for the provision of public services.

20. The Commission nonetheless considers it expedient to apply this Decision in the maritime transport sector, where the public service concerns islands with very small volumes of traffic, that is to say, less than approximately 100 000 passengers per year.

21. Exemption from the requirement of prior notification for certain SGEIs does not rule out the possibility for Member States of notifying a specific aid project.

22. This Decision applies without prejudice to the Community provisions in force in the public procurement field.

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23. The provisions of this Decision apply without prejudice to stricter specific provisions relating to public service obligations that are contained in sectoral Community legislation,

HAS ADOPTED THIS DECISION:

Article 1

Scope

This Decision applies to public service compensation insofar as it constitutes State aid, granted to undertakings active in all the sectors governed by the EC Treaty, and which satisfies the following conditions:

(i) public service compensation granted to undertakings with an annual turnover before tax, all activities included, of less than […]* during the two financial years preceding that in which the SGEI was assigned ** and with annual compensation for the service in question of less than […]. The latter threshold may be determined by taking an annual average representing the present value of compensation granted during the contract period or over a period of five years. For credit institutions, the threshold of […] is replaced by a threshold of […]*** in terms of balance-sheet total [these figures will be finalised in the light of comments received during the consultation];

(ii) public service compensation granted to hospitals that carry out activities involving services of general economic interest;

(iii) public service compensation granted to social housing undertakings that carry out activities involving services of general economic interest. [The precise scope of services covered by the current decision will be finalised in the light of comments received during the consultation.

* As a reference, Commission Directive of 25 June 1980 on the transparency of financial relations between member States and certain undertakings is applicable to undertakings with an annual turnover above EUR 40 million. This threshold is also applicable for the current definition on SME. As from 1 January 2005, the threshold for the definition of SME will be EUR 50 million.

** As a reference, Commission Regulation No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to SME exempts proposed aid less than EUR 15 million from the notification requirement.

*** Under Commission Directive of the financial relations between Member States and certain undertakings this threshold is EUR 800 million.
(iv) in the field of transport, this decision only applies to public service compensation for maritime links to islands, granted in accordance with sectoral rules, on which annual traffic does not exceed 100,000 passengers.

Article 2

Compatibility and exemption from notification

In so far as it constitutes State aid, public service compensation that meets the conditions laid down by this Decision is compatible with the common market and shall be exempt from the obligation of prior notification provided for in Article 88(3) of the Treaty, without prejudice to the existence of stricter provisions relating to public service obligations contained in sectoral Community legislation.

Article 3

Services of general economic interest

This Decision shall apply only to services that constitute services of general economic interest within the meaning of Article 86(2) of the Treaty.

Article 4

Entrustment

In order to benefit from this Decision, the public service task shall be assigned by way of an official act that, depending on the law in the Member States, may take the form of one or more legislative or regulatory instruments or a contract. The act shall specify, in particular:

(a) the precise nature of the public service obligations;

(b) the undertakings and territory concerned.

Article 5

Compensation

1. The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. The compensation may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without affecting the quality level of the services laid down by the State. The amount of compensation includes all advantages granted by the State with State resources. The parameters for calculating and granting any compensation must be transparent.
2. The costs to be taken into consideration include all the costs associated with the operation of the SGEI. The costs allocated to the SGEI may cover all the variable costs incurred in providing the SGEI, an appropriate contribution to fixed costs and an adequate return on capital insofar as it is assigned to the SGEI. The costs associated with any activities outside the scope of the SGEI shall cover all the variable costs, an appropriate contribution to fixed costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the SGEI. The calculation of costs must be based on generally accepted cost accounting principles.

3. The revenue to be taken into account must include at least the entire revenue earned from the SGEI. If the undertaking in question holds special or exclusive rights linked to another SGEI that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 87, and are added to its revenue. The Member State may also decide that the profits accruing from other activities outside the scope of the SGEI must be assigned in whole or in part to the financing of the SGEI.

4. “Reasonable profit” should be taken to mean a rate of return on capital that must take account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate shall not normally exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the SGEI, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors. In determining reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided.

Article 6

Transparency

Where the undertakings receiving public service compensation also engage in activities outside the scope of the public service, their accounts shall distinguish clearly between the costs and revenue associated with the public service activities and the costs and revenue relating to the other activities.

Article 7

Availability of information

The Member States shall keep available for the Commission all the elements necessary to determine whether the compensation granted is compatible with the Treaty under Article 86(2) of the Treaty. Upon a written request from the Commission, Member States shall provide the Commission, within twenty working days or any longer period specified in
that request, with all the information that the Commission considers necessary to determine whether the systems of compensation in force are compatible with the Treaty.

Article 8

Addressees

This Decision is addressed to the Member States.

Done at Brussels, [...]