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COMMISSION DECISION (EU) .../...

of XXX

on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest

DRAFT

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Whereas:

- (1) Article 14 of the Treaty on the Functioning of the European Union (the Treaty) requires the Union, without prejudice to Articles 93, 106 and 107 of the Treaty, to use its powers in such a way as to make sure that services of general economic interest ('SGEI') operate on the basis of principles and conditions which enable them to fulfil their missions.
- (2) For certain SGEI to operate on the basis of principles and under conditions which enable them to fulfil their missions, financial support from the State may prove necessary to cover some or all of the specific costs resulting from the public service obligations. In accordance with Article 345 of the Treaty, it is irrelevant whether such SGEI are operated by public or private undertakings.
- (3) Article 106(2) of the Treaty sets out that undertakings entrusted with the operation of SGEI or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of those rules does not obstruct, in law or in fact, the performance of the tasks entrusted. This should however not affect the development of trade to such an extent as would be contrary to the interests of the Union.
- (4) In its judgment in *Altmark*¹, the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided

¹ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft*, EU:C:2003:415.

that four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Fourth, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

- (5) Where those four criteria are not fulfilled and the general conditions for the applicability of Article 107(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 of the Treaty.
- (6) In addition to this Decision, three instruments are relevant for the application of the State aid rules to compensation granted for the provision of SGEI:
 - (a) the Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of SGEI² clarifies the application of Article 107 of the Treaty and the four criteria set by the *Altmark* ruling to such compensation;
 - (b) Commission Regulation (EU) 2023/2832 on the application of Articles 107 and 108 of the Treaty to *de minimis* aid for the provision of SGEI³ lays down certain conditions – including the amount of the compensation – under which public service compensations shall be deemed not to meet all the criteria of Article 107(1);
 - (c) a framework for State aid in the form of public service compensation⁴ which specifies how the Commission will analyse cases that are not covered by this Decision and therefore is to be notified to the Commission.
- (7) Commission Decision 2012/21/EU⁵ specifies the meaning and extent of the exception pursuant to Article 106(2) of the Treaty and sets out rules intended to enable effective monitoring of the fulfilment of the criteria set out in that provision. In light of the experience gained from the application of Decision 2012/21/EU, the changes in

² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4.

³ Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L, 2023/2832, 15.12.2023, ELI: <http://data.europa.eu/eli/reg/2023/2832/oj>).

⁴ Communication from the Commission, European Union framework for State aid in the form of public service compensation, OJ C8, 11.01.2012, p. 15.

⁵ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) 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 (OJ L 7, 11.1.2012, p. 3, ELI: [http://data.europa.eu/eli/dec/2012/21\(1\)/oj](http://data.europa.eu/eli/dec/2012/21(1)/oj)).

economic conditions, notably in relation to the housing crisis, as well as market developments, it is necessary to review the rules provided for in Decision 2012/21/EU.

- (8) This Decision replaces Decision 2012/21/EU and lays down the conditions under which State aid in the form of compensation for a SGEI is exempt from the prior notification requirement pursuant to Article 108(3) of the Treaty where it can be deemed compatible with Article 106(2) of the Treaty.
- (9) State aid in the form of compensation for a SGEI may be deemed compatible only if it is granted in order to ensure the provision of SGEI as referred to in Article 106(2) of the Treaty. It is clear from the case-law⁶ that, in the absence of sectoral Union rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being SGEI. Thus, the Commission's task is to ensure that there is no manifest error as regards the definition of SGEI.
- (10) Provided certain conditions are met, limited amounts of compensation granted to undertakings entrusted with the provision of SGEI do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore, provided certain conditions are met, not be required for compensation which is less than a specified annual amount of compensation. It is also appropriate to increase that general compensation threshold to reflect the inflation since the adoption of Decision 2012/21/EU.
- (11) An undertaking can be entrusted with the operation of multiple SGEI and receive a compensation up to the general compensation threshold for each SGEI entrusted to it. The same applies where an undertaking is jointly or individually entrusted with the operation of a SGEI by multiple Member States. Therefore, that entrusted undertaking should be able to receive compensation up to the general threshold from each entrusting Member State where the service is provided.
- (12) Hospitals and undertakings in charge of social services, which are entrusted with tasks of general economic interest, have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that, in the current economic conditions, social services may require an amount of aid that goes beyond the general compensation threshold set out in this Decision to compensate for the public service costs while a larger amount of compensation for social services does not necessarily produce a greater risk of distortions of competition. Accordingly, undertakings in charge of social services should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold. The same should apply to hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to their main activities, in particular in the field of medical research. In order to benefit from the exemption from notification, social services should be clearly defined and address social needs as regards health and long-term care, childcare, access to and reintegration into the labour market and the care and social inclusion of vulnerable groups. These includes services supporting the independent living and community inclusion of persons with disabilities, for example personal assistance, centres for independent living, assistive technology services, rehabilitation and habilitation services.

⁶ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft*, EU:C:2003:415

- (13) For the same reasons, compensation for the provision of social housing SGEI for disadvantaged citizens or socially less advantaged groups, including people experiencing homelessness, who due to solvency constraints are unable to access housing at market conditions, can be exempted from the notification requirement even if it exceeds the general compensation threshold. It should be possible for the compensation for social housing services to cover, amongst others, investment costs for the construction of new buildings, including land acquisition, the transformation or the renovation of existing buildings (or individual building elements⁷ thereof), the costs of ensuring compliance with accessibility standards for older persons or persons with disabilities, the costs of adaptation for climate resilience, as well as operating costs, where necessary for the operation of the service.
- (14) Since the adoption of Decision 2012/21/EU, housing affordability has become a significant issue in many Member States, not only affecting disadvantaged citizens or socially less advantaged groups but also the middle-income groups, with an increasing number of persons facing difficulties in securing quality housing at an affordable price. It is therefore necessary to take measures to increase housing availability, through rental housing or homeownership, at affordable prices to alleviate pressure in local housing markets. To facilitate public initiatives supporting affordable housing, it is appropriate to establish specific conditions for affordable housing SGEI to be exempted from the notification requirement under Article 108(3) of the Treaty.
- (15) Member States should delineate between the households that should benefit from affordable housing and those that should benefit from social housing. Disadvantaged citizens or socially less advantaged groups, including people experiencing homelessness should benefit from social housing SGEI. Households that cannot access housing at affordable prices because of the conditions in the relevant markets should benefit from affordable housing SGEI. The beneficiaries of affordable housing SGEI should be determined by taking into account primarily household income compared to housing market prices combined, if necessary, with other factors. For example, the need for affordable housing could be reduced where members of certain households own or co-own residential property. Member States should also be able to give priority to affordable housing to persons likely to have difficulties accessing the housing markets, including persons fulfilling an essential societal role, persons with disabilities, older persons or students, or single parents.
- (16) To address effectively the housing crisis, affordable housing SGEI may often require an amount of aid beyond the general compensation threshold in this Decision to compensate for the public service costs. Accordingly, compensation for the provision of affordable housing SGEI for households, that are unable to access affordable housing, should be exempted from the notification requirement even if it exceeds the

⁷ In accordance with Article 2(17) of Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast), individual ‘building element’ means a technical building system or an element of the building envelope. In accordance with Article 2(6) of Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast), ‘Technical building system’ means technical equipment of a building or building unit for space heating, space cooling, ventilation, domestic hot water, built-in lighting, building automation and control, on-site renewable energy generation and energy storage, or a combination thereof, including those systems using energy from renewable sources. In accordance with Article 2(15) of Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast), ‘Building envelope’ means the integrated elements of a building which separate its interior from the outdoor environment.

general compensation threshold provided that sufficient safeguards are put in place to limit competition distortion. Member States should be able to measure housing affordability through various indicators, in particular the housing cost overburden rate⁸, a rent-to-income ratio⁹, a mortgage payment to income ratio¹⁰, a price to income ratio¹¹, or years of income to buy a home¹². The benchmark values of these indicators, which identify situations of inability to access affordable housing, at national, regional or local level, should be set by Member States. Energy costs should be taken into account when determining affordability, at least for buildings with low energy performance.

- (17) Compensation for affordable housing SGEI should in principle focus on investment costs for the construction of new buildings, including land acquisition, transformation or the renovation of existing buildings (or individual building elements thereof), compliance with accessibility standards for older persons or persons with disabilities and adaptation for climate resilience. Where necessary for the operation of the service, it may also include operating costs.
- (18) Compensation for the provision of affordable housing SGEI should not lead to undue interference in the normal market conditions, which could crowd out private investment and distort significantly competition. At the same time, it is important that the most vulnerable citizens continue benefiting from social housing SGEI. Therefore, when designing SGEI for social and affordable housing, Member States should comply with a specific set of requirements.
- (19) Given that the situation of households could evolve over time, Member States should verify, at regular intervals, the eligibility of the beneficiaries of affordable housing. To avoid misuse of affordable housing, for example for short term rentals, Member States should also verify at regular intervals that the relevant housing unit is the actual and only residence of the beneficiary.
- (20) Prices for social housing SGEI need to be sufficiently below market prices to allow disadvantaged citizens or socially disadvantaged groups to access housing. On the other hand, prices for affordable housing SGEI need to be in a range that ensures housing affordability while not going beyond that objective to avoid undue distortion of competition. Member States may also take energy costs and other housing-related expenses into account when determining prices for social and affordable housing to reflect the total financial burden on households.
- (21) In order to ensure that social and affordable housing SGEI are adapted to the needs of the households, Member States should apply minimum quality criteria for such services, for example in terms of accessibility for persons with disabilities and older persons, climate resilience, minimum surface area, heating and cooling, ventilation, energy performance, sanitary facilities and water supply, stability of the building constructions and fire safety, and broadband readiness of the building. Member States can also consider the accessibility, including for persons with disabilities, of

⁸ The percentage of the population living in households where the total housing costs ('net' of housing allowances) represent more than 40 % of disposable income ('net' of housing allowances).

⁹ The proportion of a household's gross monthly income that goes toward rent payments.

¹⁰ The share of a household's gross monthly income required to cover average monthly mortgage payments.

¹¹ The ratio of median house prices to median annual household income in a given area.

¹² The number of years of gross household income needed to purchase a typical home at current market prices.

affordable transport to essential services such as healthcare, education and financial services when determining the locations for the social and affordable housing projects. Furthermore, Member States should be able to promote inclusive neighbourhoods through mixed housing models that combine diverse housing types and tenures, including social and affordable housing, as well as through making the housing environment and neighbourhoods accessible for the inclusion of persons with disabilities, to serve diverse income groups and household needs, thereby preventing spatial concentrations of poverty.

- (22) In order to preserve competition in the affordable housing market segment, affordable housing SGEI should be open to all market participants able to provide such services at the lowest price for the same quality of service.
- (23) Social or affordable housing buildings subsidised within SGEI should remain designated for the purposes of the provision of social or affordable housing for a sufficiently long period to prevent speculation.
- (24) A critical medicine is a medicinal product for which insufficient supply results in serious harm or risk of serious harm to patients. There can be risks and weaknesses in the supply chain of certain critical medicines, which may compromise the continuous supply of critical medicines to patients in the Union, in particular in crisis situations, such as a pandemic. Such risks and weaknesses potentially warrant targeted public intervention, including funding, in manufacturing capacities for critical medicines, their active substances and other key inputs. When a market failure regarding the security of supply of a specific critical medicine is identified at Union level or at the level of one or several Member States by means of a vulnerability assessment, all or some of the Member States concerned should be able to choose to entrust specific public service obligations to operators to enhance the security of supply for such critical medicines. Compensation for critical medicines SGEI below the general compensation threshold should therefore be exempted from the notification requirement pursuant Article 108 (3) of the Treaty.
- (25) Article 93 of the Treaty constitutes a *lex specialis* with regard to Article 106(2) of the Treaty. It lays down the rules applicable to public service compensation in the land transport sector. As regards passenger transport, Article 93 is implemented by Regulation (EC) No 1370/2007 of the European Parliament and of the Council¹³, which lays down the rules applicable to the compensation of public service obligations in public passenger traffic. The application of Regulation (EC) No 1370/2007 to inland waterway passenger traffic is at the discretion of the Member States. Regulation (EC) No 1370/2007 exempts from notification pursuant to Article 108(3) of the Treaty all compensation in the land transport sector that fulfils the conditions of that Regulation. As regards freight transport, the Communication from the Commission, *Guidelines on State aid for land and multimodal transport*¹⁴, which lays down the conditions under which State aid that represents reimbursement for the discharge of certain obligations inherent in the concept of a public service in the rail freight transport sector can be found compatible with the internal market pursuant to Article 93 of the Treaty, provides an interpretation of that Article. In accordance with

¹³ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1, ELI: <http://data.europa.eu/eli/reg/2007/1370/oj>).

¹⁴ Reference to be added once published.

the judgment in *Altmark*, compensation in the land transport sector that does not comply with the provisions of Article 93 of the Treaty cannot be declared compatible with the Treaty on the basis of Article 106(2) of the Treaty, or on the basis of any other Treaty provision. Consequently, this Decision should not apply to the land transport sector.

- (26) Unlike land transport, the maritime and air transport sectors are subject to Article 106(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport sectors are found in Regulation (EC) No 1008/2008 of the European Parliament and of the Council¹⁵ and in Council Regulation (EEC) No 3577/92¹⁶. However, unlike Regulation (EC) No 1370/2007, those Regulations do not refer to the compatibility of the possible State aid elements, nor do they provide for an exemption from the obligation to notify pursuant to Article 108(3) of the Treaty. This Decision should therefore apply to public service compensation in the air and maritime transport sectors provided that, in addition to fulfilling the conditions set out in this Decision, such compensation also complies with the sectoral rules set out in Regulation (EC) No 1008/2008 and Regulation (EEC) No 3577/92, where applicable.
- (27) In the specific cases of public service compensation for air links or maritime links to islands and for airports and ports which constitute SGEI as referred to in Article 106(2) of the Treaty, it is appropriate to provide thresholds based on the average annual number of passengers. In addition, when the maritime links to islands include freight traffic, it is appropriate to provide thresholds based on an average annual volume of freight to be established on the basis of the typical ratio between passenger capacity and vehicle capacity. Such thresholds reflect the economic reality of such activities and their character of SGEI. Moreover, based on the experience gained under the 2014 Aviation Guidelines¹⁷, even airports with an annual passenger traffic of more than 200 000 passengers are still often not profitable. To reflect that economic reality, it is appropriate to increase the passenger threshold set by Decision 2012/21/EU from 200 000 passengers to 500 000 passengers¹⁸. Finally, taking into account the role of ports for insular and outermost regions, as highlighted in the EU Ports Strategy¹⁹, the current threshold should be increased from 300 000 to 400 000 passengers. Ports in outermost regions, due to their crucial role for connectivity because of their geographic distance from the Member State's mainland should benefit from the exemption from the notification requirement irrespective of the annual passengers or freight traffic.
- (28) The extent to which a particular compensation measure affects trade and competition depends not only on the average amount of compensation received per year and the sector concerned, but also on the overall duration of the period of entrustment of the SGEI. Unless a longer period is justified by the need for a significant investment, for

¹⁵ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ L 293, 31.10.2008, p. 3, ELI: <http://data.europa.eu/eli/reg/2008/1008/oj>).

¹⁶ 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) (OJ L 364, 12.12.1992, p. 7, ELI: <http://data.europa.eu/eli/reg/1992/3577/oj>).

¹⁷ Communication from the Commission - Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3.

¹⁸ A recent study on the aviation sector shows that airports handling less than 500 000 passengers cannot be profitable. Reference to be added once available.

¹⁹ Reference to be added once published.

example in the area of social or affordable housing, the application of this Decision should be limited to periods of entrustment not exceeding 10 years.

- (29) In order for Article 106(2) of the Treaty to apply, the undertaking in question has to be specifically entrusted by the Member State with the operation of a particular SGEI.
- (30) In order to ensure that the criteria set out in Article 106(2) of the Treaty are met, it is necessary to lay down more precise conditions and requirements that should be fulfilled in respect of the entrustment of the operation of SGEI. The amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in one or more acts of the competent public authorities in the Member State concerned. The form of the instrument can vary from one Member State to another but it should specify, at least, the undertakings concerned, the precise content and duration of and, where appropriate, the territory concerned by the public service obligations imposed, the granting of any exclusive or special rights, and describe the compensation mechanism and the parameters for determining the compensation and for avoiding and recovering any possible overcompensation.
- (31) In order to avoid unjustified distortions of competition, the compensation should not exceed what is necessary to cover the net costs incurred by the undertaking in operating the service, including a reasonable profit.
- (32) The net cost to be taken into account should be calculated as the difference between the cost incurred in operating the SGEI and the revenue earned from the SGEI or, alternatively, as the difference between the net cost of operating with the public service obligation and the net cost or profit operating without the public service obligation. In particular, if the public service obligation leads to a reduction of the revenue, for instance due to regulated tariffs, but does not affect the costs, it should be possible to determine the net cost incurred in discharging the public service obligation on the basis of the foregone revenue. In order to avoid unjustified distortions of competition, all revenues earned from the SGEI, that is to say, any revenues that the provider would not have obtained had it not been entrusted with the obligation should be taken into account for the purposes of calculating the amount of compensation. If the undertaking in question holds special or exclusive rights linked to activities, other than the SGEI for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, those profits or benefits should be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty.
- (33) Compensation in excess of what is necessary to cover the net costs incurred by the undertaking concerned in operating the SGEI should constitute incompatible State aid that should be repaid to the State. Compensation granted for the operation of a SGEI but actually used by the undertaking concerned to operate on another market for purposes other than those specified in the act of entrustment is not necessary for the operation of the SGEI and can consequently also constitute incompatible State aid that should be repaid with interest.
- (34) Profit of the service provider not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In that context, the relevant swap rate is viewed as an appropriate rate of return for a risk-free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the provision of capital which is committed for the operation of the service during the period of entrustment.

- (35) In cases where the service provider does not bear a substantial degree of commercial risk, for instance because the costs it incurs in the operation of the service are compensated in full, profits exceeding the benchmark of the relevant swap rate plus 100 basis points should not be considered reasonable.
- (36) Where, by reason of specific circumstances, it is not appropriate to use the rate of return on capital, Member States should be able to rely on other profit level indicators to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales.
- (37) In determining what constitutes a reasonable profit, Member States should be able to introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains should not reduce the quality of the service provided. For instance, Member States should be able to establish productive efficiency targets in the entrustment act whereby the level of compensation depends upon the extent to which these productive efficiency targets have been met. The entrustment act can provide that if the undertaking does not meet the objectives, the compensation is to be reduced by applying a calculation method specified therein, whereas if the undertaking exceeds the objectives, the compensation may be increased by applying a method specified in the entrustment act. Any rewards linked to productive efficiency gains should be set at a level which allows a balanced sharing of those gains between the undertaking and the Member State and/or the users.
- (38) In order to reduce the administrative burden, the reporting obligations imposed by Decision 2012/21/EU should be removed. In the same way, for simplification purposes the obligation to refer to that Decision in the entrustment act should also be removed. On the basis of the experience gained in the application of Decision 2012/21/EU, the obligations to have ex-post controls of overcompensation should also be adjusted to lighten the administrative burden for Member States. Therefore, their frequency should be moderately reduced from once every three years to once every five years and Member States should be exempted from such controls when the compensation is fixed upfront based on a solid business plan or when the service provider provides only the SGEI and can only use its profits to invest in that SGEI. In order to maintain a sufficient level of transparency regarding the compensation granted for SGEI, transparency obligations Decision 2012/21/EU should be adjusted. As regards the publication of information on individual aid awards it is appropriate to set thresholds above which that publication can be considered proportionate taking into account the amount of the aid.
- (39) Exemption from the requirement of prior notification for certain SGEI should not rule out the possibility for Member States to notify a specific aid measure. In the event of such a notification, or if the Commission assesses the compatibility of a specific aid measure following a complaint or *ex officio*, the Commission should assess whether the relevant conditions are met. Where that is not the case, the measure should be assessed in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation²⁰.

²⁰ Communication from the Commission - European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

- (40) This Decision should apply without prejudice to the provisions of Commission Directive 2006/111/EC²¹.
- (41) This Decision should apply without prejudice to the Union provisions in the field of competition, in particular Articles 101 and 102 of the Treaty.
- (42) This Decision should apply without prejudice to the Union provisions in the field of public procurement.
- (43) This Decision should apply without prejudice to stricter provisions relating to public service obligations that are contained in sectoral Union legislation.
- (44) Aid schemes put into effect in accordance with Decision 2012/21/EU before the entry into force of this Decision should continue to be compatible with the internal market and exempt from the notification requirement for a further period of two years. Aid put into effect before the entry into force of this Decision that was not awarded in accordance with Decision 2012/21/EU but fulfils the conditions laid down in this Decision should be considered to be compatible with the internal market and exempt from the notification requirement. In the light that this Decision introduces new conditions, limited in their effect, for social housing SGEI, by way of derogation, and for legal certainty considerations, an aid scheme or individual aid for social housing which has taken effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement should continue to be compatible with the internal market until the end of the duration of the entrustment act.
- (45) Decision 2012/21/EU should therefore be repealed.
- (46) The Commission should review this Decision as necessary taking into consideration the experience acquired in its implementation.

HAS ADOPTED THIS DECISION:

Article 1

Subject matter

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

Article 2

Scope

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

²¹ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17, ELI: <http://data.europa.eu/eli/dir/2006/111/oj>).

- (a) compensation not exceeding an annual amount of EUR 20 million for the provision of SGEI in areas other than transport and transport infrastructure, including social services not referred to in point (c) and critical medicines;
 - (b) compensation for the provision of SGEI by hospitals providing medical care, including, where applicable, emergency services; the pursuit of ancillary activities directly related to the main activities, notably in the field of research, does not, however, prevent the application of this paragraph;
 - (c) compensation for the provision of SGEI meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing, and the care and social inclusion of vulnerable groups, as well as compensation for affordable housing SGEI, where social housing and affordable housing services meet the requirements set out in Annex;
 - (d) compensation for the provision of SGEI as regards air links or maritime links to islands on which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers, and when the maritime links to islands include freight traffic, 75 000 linear meters of freight;
 - (e) compensation for the provision of SGEI as regards airports and ports for which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 500 000 passengers, in the case of airports, and 400 000 passengers in the case of ports, or for ports located in outermost regions regardless of the average annual traffic.
2. Where the amount of compensation referred to in paragraph 1, point (a), varies over the duration of the entrustment, the annual amount shall be calculated as an average of the annual amounts of compensation expected to be made over the entrustment period.
- The annual threshold referred to in paragraph 1, point (a) applies per SGEI entrusted to a provider. In case of a joint or individual entrustment in several Member States, the compensation threshold applies for each Member State where the service is provided.
3. This Decision shall apply where the undertaking is entrusted with the operation of the SGEI for a period that does not exceed 10 years. Where the period of entrustment exceeds 10 years, the provision of this Decision shall only apply to the extent that a significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles. Investment for social and affordable housing are typically amortised over more than twenty years.
4. Where during the period of the entrustment the conditions for the application of this Decision are no longer met, the aid shall be notified in accordance with Article 108(3) of the Treaty.
5. In the field of air and maritime transport, this Decision shall only apply to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of SGEI as referred to in Article 106(2) of the Treaty, which complies with Regulation (EC) No 1008/2008 and, respectively, Regulation (EEC) No 3577/92 where applicable.

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

Article 3

Compatibility and exemption from notification

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

Article 4

Entrustment

Operation of the SGEI shall be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The act or acts shall include, in particular, the following information:

- (a) the content and duration of the public service obligations;
- (b) the undertaking and, where applicable, the territory concerned;
- (c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;
- (d) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;
- (e) the arrangements for avoiding and recovering any overcompensation.

Article 5

Compensation

- 1. The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.
- 2. The net cost may be calculated as the difference between costs as set out in paragraph 3 and revenues as set out in paragraph 4. Alternatively, it may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation.
- 3. The costs to be taken into consideration shall comprise all the costs incurred in operating the SGEI. They shall be calculated on the basis of the following generally accepted cost accounting principles:
 - (a) where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration;
 - (b) where the undertaking also carries out activities falling outside the scope of the SGEI, only the costs related to the SGEI shall be taken into consideration;
 - (c) the costs allocated to the SGEI may cover all the direct costs incurred in operating the SGEI and an appropriate contribution to costs common to both the SGEI and other activities;

- (d) the costs linked with investments, including infrastructure, may be taken into account when necessary for the operation of the SGEI.
4. The revenue to be taken into consideration shall include at least the entire revenue earned from the SGEI, regardless of whether the revenue is classified as State aid within the meaning of Article 107 of the Treaty. Where the undertaking in question holds special or exclusive rights linked to activities, other than the SGEI for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, those profits or benefits shall be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty. The Member State concerned may decide that the profits accruing from other activities outside the scope of the SGEI in question are to be assigned in whole or in part to the financing of the SGEI.
 5. Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts shall show separately the costs and receipts associated with the SGEI and those of other services, as well as the parameters for allocating costs and revenues. The costs linked to any activities outside the scope of the SGEI shall cover all the direct costs, an appropriate contribution to the common costs and an adequate return on capital. No compensation shall be granted in respect of costs linked to any activities outside the scope of the SGEI.
 6. Member States shall require the undertaking concerned to repay any overcompensation received.

Article 6

Reasonable profit

1. For the purposes of this Decision, 'reasonable profit' means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the SGEI for the whole period of entrustment, taking into account the level of risk. The 'rate of return on capital' means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.
2. In determining what constitutes a reasonable profit, Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains shall not reduce the quality of the service provided. Any rewards linked to productive efficiency gains shall be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.
3. For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event. The relevant swap rate shall be the swap rate the maturity and currency of which correspond to the duration and currency of the entrustment act. Where the provision of the SGEI is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the SGEI is essentially compensated ex post in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.
4. Where, in specific circumstances, it is not appropriate to use the rate of return on capital, Member States may rely on profit level indicators other than the rate of

return on capital to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales. The 'return' means the earnings before interests and taxes in that year. The average return is computed using the discount factor over the life of the contract as specified by the Communication from the Commission on the revision of the method for setting the reference and discount rates²². Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical undertaking considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

Article 7

Control of overcompensation

1. Member States shall ensure that the compensation granted for the operation of the SGEI meets the requirements set out in this Decision and in particular that the undertaking does not receive compensation in excess of the amount determined in accordance with Article 5. Member States shall provide evidence of compliance upon request from the Commission. For that purpose Member States shall carry out regular checks, at least every five years during the period of entrustment and at the end of that period.
2. Where the Member State has established a fixed compensation level for a SGEI which adequately anticipates and incorporates the efficiency gains that the service provider can be expected to make over the period of entrustment, on the basis of a correct allocation of costs and revenues and of reasonable expectations, the overcompensation check shall be limited to verifying that the level of profit to which the provider is entitled in accordance with the entrustment act is reasonable from an *ex ante* perspective.
3. Where the activity of the provider of the SGEI is limited to the provision of a SGEI and the provider is legally obliged to reinvest all its profits into that SGEI, *ex post* checks to verify the absence of overcompensation shall not be necessary.
4. Where an undertaking has received compensation in excess of the amount determined in accordance with Article 5, the Member State concerned shall require the undertaking concerned to repay any overcompensation received. The parameters for the calculation of the compensation shall be updated for the future. Where the amount of overcompensation does not exceed 10 % of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

²² Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

Article 8

Transparency

1. Member States shall ensure that, from 1 January 2028, information on aid exceeding EUR 1 million per undertaking and per SGEI, is registered in a central register at national or Union level. The information in the central register shall contain the identification of the beneficiary, the aid amount, the granting date, the granting authority, the aid instrument and the sector involved on the basis of the statistical classification of economic activities in the Union ('NACE classification'). The central register shall be set up in such a way as to enable easy public access to the information whilst ensuring compliance with the Union rules on data protection, including through the pseudonymisation of specific entries where necessary.
2. Member States shall register the information set out in paragraph 1 in the central register on aid granted by any authority within the Member State concerned within 20 working days following the grant of the aid. Member States shall take appropriate measures to ensure the accuracy of the data contained in the central register.
3. Member States shall keep records of the registered information on aid granted for 10 years from the date on which the aid was granted.
4. On written request by the Commission, the Member State concerned shall provide the Commission, within 20 working days or a longer period set out in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Decision have been complied with, and in particular the total amount of aid within the meaning of this Decision received by any undertaking.

Article 9

Transitional provisions

This Decision shall apply to the following individual aid and aid schemes:

- (a) any aid scheme which took effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2012/21/EU shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of two years from the entry into force of this Decision;
- (b) any aid scheme or individual aid for social housing which took effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2012/21/EU shall continue to be compatible with the internal market until the end of the duration of the entrustment act;
- (c) any aid scheme or individual aid which took effect before the entry into force of this Decision that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2012/21/EU but which fulfils the conditions laid down in this Decision shall be deemed compatible with the internal market and exempt from the requirement of prior notification.

Article 10

Repeal

Decision 2012/21/EU is hereby repealed.

Article 11

Entry into force

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Commission

The President