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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, /07/.2005

Draft

COMMISSION DECISION

of [...]

**on the application of Article 86(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**

[...]

Draft

COMMISSION DECISION

of [...]

on the application of Article 86(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

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 requires the Community, without prejudice to Articles 73, 86 and 87, to use its powers in such a way as to make sure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.
- (2) For certain services of general economic interest to operate on the basis of principles and under conditions that enable them to fulfil 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, as interpreted by the case law of the Court of Justice and Court of First Instance of the European Communities, it is irrelevant from the viewpoint of Community law whether such services of general economic interest 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 are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 86(2) allows an exception from the rules contained in the Treaty, providing that a number of criteria are met. Firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking. Secondly, the entrustment must relate to a service of general economic interest. Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end (“hereinafter “the necessity requirement”). Finally, 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 GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*¹, the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 87 of the EC Treaty provided 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 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. Finally, 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, would have incurred.
- (5) Where those 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 those 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. This Decision should therefore only apply to public service compensation insofar as it constitutes State aid.
- (6) Article 86(3) of the Treaty allows the Commission to specify the meaning and extent of the exception under Article 86(2) of the Treaty, and to set out rules intended to enable effective monitoring of the fulfilment of the criteria set out in Article 86(2), where necessary. 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 should therefore be specified.
- (7) Such aid may be declared compatible only if it is granted in order to ensure the provision of services that are services of general economic interest as referred to in Article 86 of the Treaty. It is clear from the case law that, with the exception of the sectors where there is Community legislation governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus, with the exception of the sectors where there is Community legislation governing the matter, the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest
- (8) In order for Article 86(2) of the Treaty to apply, the undertaking beneficiary of the aid must have been specifically entrusted by the Member State with the operation of a

¹ [2003] ECR I-7747.

particular service of general economic interest. According to the case law on the interpretation of Article 86(2) of the Treaty such act or acts of entrustment must specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of undertakings concerned..

- (9) In order to ensure that the criteria set out in Article 86(2) are met, it is necessary to lay down more precise conditions which must be fulfilled in respect of the entrustment of the operation of services of general economic interest. Indeed 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 formal act of the competent public authorities within the Member State concerned. The form of the instrument may vary from one Member State to another but it should specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of undertakings concerned, and the costs to be borne by the undertaking concerned.
- (10) When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are invited to consult widely, with particular emphasis on users.
- (11) Moreover, in order to avoid unjustified distortions of competition, Article 86(2) requires that compensation does not exceed what is necessary to cover the costs incurred by the undertaking in discharging the public service obligations, account being taken of the relevant receipts and a reasonable profit. This should be understood as referring to the actual costs incurred by the undertaking at stake.
- (12) Compensation in excess of what is necessary to cover the costs incurred by the undertaking concerned is not necessary for the operation of the service of general economic interest, and consequently constitutes incompatible State aid that should be repaid to the State. Compensation granted for the functioning of a service of general economic interest but actually used by the undertaking concerned to operate on another market is also not necessary for the operation of the service of general economic interest, and consequently also constitutes incompatible State aid that should be repaid.
- (13) In order to ensure the compliance with the necessity requirement set out in Article 86(2) it is necessary to lay down provisions relating to the calculation and monitoring of the amount of compensation granted. Member States should check regularly that the compensation granted does not lead to over-compensation. Nevertheless, in order to allow a minimum of flexibility for undertakings and Member States, where the amount of over-compensation does not exceed 10% of the amount of annual compensation, such over-compensation may be carried forward to the next period and deducted from the amount of compensation which would otherwise have been payable. The revenue of undertakings entrusted with the operation of services of general economic interest in the field of social housing may vary dramatically, due in particular to the risk of insolvency of leaseholders. Consequently, where such undertakings only operate services of general economic interest, it should be possible for any over-compensation during one period to be carried forward to the next period, up to 20% of the annual compensation.

- (14) To the extent that compensation is granted to undertakings entrusted with the operation of services of general economic interest, the amount of the compensation does not go beyond the costs of the services, and the thresholds laid down in this Decision are respected, the Commission considers that the development of trade is not affected to such an extent as would be contrary to the interests of the Community. In such circumstances, the Commission considers that the compensation should be deemed to constitute State aid compatible with Article 86(2) of the Treaty.
- (15) Small amounts of compensation granted to undertakings providing services of general economic interest whose turnover is limited, do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Community. When the conditions set out in this Decision are fulfilled, prior notification should therefore not be required. 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.
- (16) Hospitals and undertakings in charge of social housing, entrusted with tasks involving services of general economic interest have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that at the current stage of development of the internal market, the intensity of distortion of competition in those sectors is not necessarily proportionate to the level of turnover and compensation. Accordingly, hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to the main activities, notably in the field of research, and undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions, should benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the thresholds laid down in this Decision, if the services performed are qualified as services of general economic interest by the Member States.
- (17) 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. That 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 waterway², which lays down general conditions for public service obligations in the land transport sector and imposes methods for calculating compensation. Regulation (EEC) No 1191/69 exempts all compensation in the land transport sector 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 that 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

² OJ L156, 28.6.1969, p.1. Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L169, 29.6.1991, p.1).

rail, road and inland waterway³. 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 not covered by this Decision.

- (18) Contrary to land transport, the maritime and air transport sectors are subject to Article 86(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport 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^[3] 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)^[4]. However, contrary to Council Regulation (EEC) No 1191/69 applicable to land transport, these Regulations concerning air and maritime transport do not refer to the compatibility of the possible State aid elements nor contain an exemption from the obligation to notify under article 88(2) of the Treaty. It seems therefore appropriate to apply this decision to public service compensation in the air and maritime transport sectors provided that, apart of fulfilling the conditions of the present decision, such compensations also respect the sectoral rules contained in Council Regulation (EEC) No 2408/92 and Council Regulation (EEC) No 3577/92 when applicable.

The thresholds applying to public service compensation in the air and maritime transport sectors should normally be the same as those applicable in general. However, in the specific cases of public service compensation for air or maritime links to islands and for airports and ports that are services of general economic interest as referred to in Article 86(2) of the Treaty it seems more appropriate also to provide thresholds based on average annual number of passengers as this is more in line with the economic reality of these activities.

- (19) This Decision is to a large extent a specification of the meaning and extent of the exception under Article 86(2) of the Treaty as it has been consistently applied in the past by the Court of Justice and the Court of First Instance and by the Commission. To the extent that it does not modify the material law applicable in this area it should apply immediately. However, certain provisions of this Decision go beyond the *status quo* by setting out additional requirements aimed at enabling effective monitoring of the criteria set out in Article 86(2). In order to allow Member States to take the necessary measures in this respect, it is appropriate to foresee a period of one year of before those specific provisions apply.
- (20) Exemption from the requirement of prior notification for certain services of general economic interest does not rule out the possibility for Member States of notifying a specific aid project. Such notification will be assessed in accordance with the principles of the Community framework for State aid in the form of public service compensation⁴.

³ OJ L130, 15.6.1970, p.1. Regulation as last amended by Regulation (EC) No 543/97 (OJ L84, 26.3.1997, p.6).

⁴ OJ ...

- (21) This Decision applies without prejudice to the provisions of the Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings⁵.
- (22) This Decision applies without prejudice to the Community provisions in force in the fields of public procurement and of competition, in particular Articles 81 and 82 of the Treaty.
- (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

Purpose

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 is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) of the Treaty.

Article 2

Scope

1. This Decision applies to the following State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty:

:

- (a) public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned which receive annual compensation for the service in question of less than EUR 30 million.

• ⁵ . OJ L 195, 29.7.1980,p.35. Directive as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p.75).

- (b) public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned
- (c) Public service compensation for air or maritime links to islands on which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers.
- (d) public service compensation for airports and ports for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1 000 000 passengers as regards airports and 300 000 passengers as regards ports.

The threshold of EUR 30 million in point (a) of the first subparagraph may be determined by taking an annual average representing the value of compensation granted during the contract period or over a period of five years. For credit institutions, the threshold of EUR 100 million of turnover shall be replaced by a threshold of EUR 800 million in terms of balance-sheet total.

2. 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 in connection with services of general economic interest as referred to in Article 86(2) of the Treaty and, when applicable, respecting Council Regulation (EEC) No 2408/92 and Council Regulation (EEC) No 3577/92. This decision does not apply 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 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 application of stricter provisions relating to public service obligations contained in sectoral Community legislation.

Article 4

Entrustment

In order for this Decision to apply, responsibility for operation of the service of general economic interest shall be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. The act or acts shall specify, in particular:

- (a) the nature and the duration of the public service obligations;
- (b) the undertakings and territory concerned;
- (c) the nature of any exclusive or special rights assigned to the undertaking;
- (d) the parameters for calculating, controlling and reviewing the compensation,
- (e) the arrangements for avoiding and repaying any overcompensation. .

Article 5

Compensation

1. The amount of compensation shall 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 on own capital necessary for discharging those obligations. This compensation must be actually used for the functioning of the service of general economic interest concerned, without prejudice to the undertaking's ability to enjoy normally its reasonable profit.

The amount of compensation shall include all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit shall take account of 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.

2. The costs to be taken into consideration shall comprise all the costs incurred in the operation of the service of general economic interest. They shall be calculated, on the basis of generally accepted cost accounting principles, as follows:

- (a) Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration.
 - (b) where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest shall be taken into consideration
 - (c) the costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, a proportionate contribution to fixed costs common to both service of general economic interest and other activities and a return on the capital necessary for fulfilling the service of general economic interest, in line with the normal market return for the sector.
 - (d) the costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the functioning of the service of general economic interest.
3. The revenue to be taken into account shall include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to another service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 87. The Member State concerned may decide that the profits accruing from other activities outside the scope of the service of general economic interest are to be assigned in whole or in part to the financing of the service of general economic interest.
4. For the purposes of this Decision “reasonable profit” means a rate of return on own capital that takes 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 service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency
5. When a company carries out activities falling both inside and outside the scope of services of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues.)

The costs linked to any activities outside the scope of the service of general economic interest shall cover all the variable costs, an appropriate contribution to common fixed

costs and an adequate return on capital. No compensation shall be granted in respect of those costs.

Article 6

Control of over-compensation

Member States shall carry out regular checks, or ensure that such checks are carried out, to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5.

Member States shall require the undertaking concerned to repay any overcompensation paid, and 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 annual compensation, such overcompensation may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period.

In the sector of social housing, Member States shall carry out regular checks, or ensure that such checks are carried out, at the level of each undertaking, to ensure that the undertaking concerned is not receiving compensation in excess of the amount determined in accordance with Article 5. Any overcompensation may be carried forward to the next period up to 20% of the annual compensation, provided that the undertaking concerned only operates services of general economic interest.

Article 7

Availability of information

The Member States shall keep available for a period of at least ten years, all the elements necessary to determine whether the compensation granted is compatible with this Decision.

Upon a written request from the Commission, Member States shall provide the Commission with all the information that the latter considers necessary to determine whether the systems of compensation in force are compatible with this Decision.

Article 8

Reports

Periodic reports shall be submitted to the Commission by each Member State every three years on the implementation of this Decision, comprising a detailed description of the conditions of

application in all sectors, including the social housing and the hospital sectors. The first report shall be submitted by *[three years after the date of entry into force of this Decision – date to be inserted before publication]*.

Article 9

Evaluation

By *[four years after date of entry into force – date to be inserted before publication]* at the latest, the Commission will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Commission on the basis notably of data provided by the Member States in accordance with Article 8.

The results of the impact assessment will be made available to the European Parliament, the Committee of Regions, the European Economic and Social Committee and the Member States.

Article 10

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*.

Article 4, points (c), (d) and (e), and Article 6 shall apply from *[one year after date of publication – date to be completed before publication]*.

Article 11

Addressees

This Decision is addressed to the Member States.

Done at Brussels, [...]

For the Commission

[...]

Member of the Commission