

## II

(Information)

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## EUROPEAN COMMISSION

## COMMISSION NOTICE

**Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the  
Council — Public Service Obligations (PSO)**

(2017/C 194/01)

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## 1. INTRODUCTION

1. The role of Public Service Obligations (hereinafter 'PSOs') under 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 <sup>(1)</sup> (hereinafter 'Regulation No 1008/2008' or 'the Regulation') is to set fixed standards of continuity, regularity, pricing or minimum capacity to ensure access to isolated or developing regions when a Member State finds that objectives of regional development policy will not be met adequately if only left to a free play of market forces as the market itself will not deliver an acceptable level of air services to these regions. Thus PSOs are an exception to the general principle of the freedom to provide air services within the EU, guaranteed under Article 15(1) of the Regulation.
2. In its Communication on 'Aviation strategy for Europe' <sup>(2)</sup> the Commission identified different needs of EU citizens and businesses, such as access to high quality air transport services, and considered that if the market itself does not deliver an acceptable level of air transport services to given regions within Europe, Member States may consider PSOs as an instrument to ensure service to and from under-served regions, i.e. to ensure connectivity where needed. PSOs can play a significant positive role in terms of connectivity while some studies show that connectivity is vital for EU regions: a 10 % increase of connectivity, as measured in those studies, stimulates the GDP (per capita) by an additional 0,5 %, the GDP growth rate by 1 % and leads to an overall increase of labour productivity <sup>(3)</sup>. Connectivity is key for growth, jobs and social cohesion.
3. There are currently 179 PSO routes established under Regulation No 1008/2008 in the EU, all located in thirteen Member States (Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Ireland, Italy, Portugal, Spain, Sweden and the UK) <sup>(4)</sup>. France has the largest number (40), with some 5,7 million passengers annually, meaning every fifth domestic passenger is travelling on a PSO route. In Ireland the share of PSOs in the domestic traffic is approximately 70 %. In practice PSO routes are mostly domestic routes with only seven routes linking airports located in two different Member States. 136 of the current PSO routes are subsidized by the public authorities and the amount of subsidies spent yearly to operate them is estimated – based on the information at the disposal of the Commission – to be at least EUR 300 million.

<sup>(1)</sup> OJ L 293, 31.10.2008, p. 3.

<sup>(2)</sup> COM(2015) 598 final of 7.12.2015.

<sup>(3)</sup> InterVISTAS, 2015, Economic Impact of European Airports – A Critical Catalyst to Economic Growth; PwC, 2013, Econometric analysis to develop evidence on the links between aviation and the economy; IATA, 2007, Aviation Economic Benefits - Measuring the economic rate of return on investment in the aviation industry.

<sup>(4)</sup> Also some other Member States have shown interest towards imposing a PSO. For example Germany has had three PSOs in the past. Hungary has been close to imposing a PSO, but an air carrier announced its intention to start operations at the route concerned just before. Slovenia has approached the Commission with questions on PSOs. Latvia and Malta have representatives in the PSO interest group in CIRCABC (Communication and Information Resource Centre for Administrations, Businesses and Citizens. Access to the interest group can be granted to the relevant national authorities). Link to the website <https://circabc.europa.eu>

4. A fitness check of Regulation No 1008/2008 conducted by the Commission in 2011-2013 found that the PSOs rules laid down therein are fit for purpose, i.e. for ensuring connectivity when the market does not deliver it. Recommendations were made by stakeholders and Member States to enhance cooperation between national authorities and the Commission and to ensure a good articulation between the EU State aid rules and the PSO rules of the Regulation, including by possibly issuing guidance <sup>(5)</sup>.
5. Practical steps were taken to follow up on these recommendations. The Commission created an up-to-date network of PSO contacts; it also organised meetings of the Market Access Committee <sup>(6)</sup> under Regulation No 1008/2008 where Commission's services made a consolidated presentation on PSOs and where Member States exchanged their own practical experience. A simple questionnaire allowing national authorities to easily submit any intentions on their part to introduce PSOs was prepared, and is now systematically used by those authorities. Commission's services alert Member States ex-ante when they see problems. A new database allows the Commission services to retrieve consolidated data on PSOs across Europe.

## 2. THE CASE FOR GUIDELINES

### 2.1. The legal framework

6. The conditions and the requirements for PSOs are set out in Articles 16–18 of Regulation No 1008/2008 (see extract in Annex II to these guidelines). Article 16 sets out the general principles for PSOs. It contains criteria for PSO imposition and continuity requirements, assessment criteria for Member States, rules on the procedure for publication and on commencing operations on PSO routes, conditions and procedure for limiting the access to a route and also the procedure to be applied in case of emergencies. Article 17 stipulates how the public tender procedure shall be conducted. It includes rules on the content of the invitation to tender and the subsequent contract, on the publication procedure and information to be provided to tenderers, on selection criteria for tenders, on compensation and the information to be provided to the Commission at the end of the tender procedure. Finally, Article 18 contains the rules for examination and review of decisions taken under preceding articles.

### 2.2. The need for clarification of the rules

7. The EU legal framework established by Regulation No 1008/2008 guarantees the openness, publicity and transparency of the procedure of imposing PSOs. Monitoring of the correct application of the PSO rules is important in order to avoid any possible abuse of the system due to disproportionate competition restrictions vis-à-vis the social and economic objectives pursued. The Commission's objective is to give advice and to address as many potential issues as possible already before the publication of the information notice concerning the PSO.
8. In this context, it is considered useful to widely share assessments made in past, individual cases, which are so far typically only known to the respective Member State concerned and the Commission.
9. Another reason for adopting these guidelines is the lack, to date, of case law of the Court of Justice concerning PSOs established under Regulation No 1008/2008.
10. At a meeting of the Advisory Committee on application of the legislation on access for Community air carriers to intra-Community air routes with national experts held in September 2015 <sup>(7)</sup>, the Commission's services mentioned the possibility of issuing guidance on PSOs. Member States welcomed this idea and agreed that such guidance could bring transparency, consistency and clarity to EU airlines, Member States and regional authorities and administrations. This position corresponded to opinions voiced during prior bilateral exchanges with national and local authorities. Therefore, in its Communication on Aviation strategy the Commission committed to publishing guidelines clarifying the interpretation and the application by the Commission services of the rules and procedures governing PSOs laid down in Regulation No 1008/2008. These guidelines follow from that commitment. As a preparatory step for these guidelines, an informal targeted consultation was organised in summer 2016 to gather views from the main stakeholders.

<sup>(5)</sup> Commission Staff Working Document SWD(2013) 208 final of 6.6.2013, section 5.1.1.3. [http://ec.europa.eu/transport/modes/air/internal\\_market/fitness\\_check\\_en.htm](http://ec.europa.eu/transport/modes/air/internal_market/fitness_check_en.htm)

<sup>(6)</sup> Advisory committee on application of the legislation on access for Community air carriers to intra-Community air routes.

<sup>(7)</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail&groupDetailID=3118>

11. These guidelines intend to explain the Commission's interpretation of the criteria used in the Regulation and describe the applicable procedures to be followed. In addition replies are given throughout the text to the most frequently asked questions for which the Regulation does not provide an explicit answer. It is clear that among various Members States some are very familiar with the rules and their application, while others have only very limited or no experience at all with the application of the PSO rules. The clarification of the rules and their interpretation should make it easier, in particular for those using PSOs the first time, to comply with the applicable rules.
12. In addition to the experience gained by the Commission in the application of the rules on PSOs as laid down in the Regulation, these guidelines also take account of the State aid rules provided for in EU law (in particular Articles 107-109 TFEU) <sup>(8)</sup>. While the Commission receives many questions concerning the PSOs in general, almost on a daily basis and mainly from the Member States, the number of formal complaints – all lodged by airlines and airports – has been very limited. These guidelines are intended to tackle the issues most frequently raised by the national authorities, airlines and airports. They do not intend to cover all provisions in an exhaustive manner.
13. These guidelines provide indications relevant to most cases, but it should be emphasised that each case must be assessed on its own merits, in light of all its specific circumstances.
14. In any event, the present guidelines are not intended to create any new legal obligations and they are without prejudice to the interpretation that could be provided in the future by the Court of Justice concerning PSOs.

### 3. THE IMPOSITION OF PSO

#### 3.1. General principles

15. It follows from Article 16(1) and (4) of Regulation No 1008/2008 that Member States need to inform the Commission about any intention on their part to impose PSOs. The publication of information notices does not convey legal certainty about a given outcome; its objective is informing the market about the Member State's intentions regarding a new PSO <sup>(9)</sup>. The Commission services have developed a questionnaire for notification and description of the PSO which also covers the most important issues under both Regulation No 1008/2008 and the State aid rules that form an integral but independent part of the assessment of any PSO (see Annex I) <sup>(10)</sup>. While the Commission does not take a formal decision on the PSO as such, it is still very important to clear any issues that might be detected before a PSO is put into place or modified and raise concerns in the future. The Commission advises Member States to take contact with its services as early as possible when they start considering imposing a new PSO or modifying an existing PSO. That ensures that the Commission services are aware of the plans and can provide assistance from the beginning and thereby also make the whole process run smoother.
16. An important particularity of PSOs in the air transport sector is the clear distinction between the PSO regime that sets out the conditions to operate on a particular route and the contract that gives an exclusive right (with or without compensation) to an operator. The imposition of a PSO in the air transport sector does not necessarily and automatically create the right for the Member State concerned to restrict the access to the air route to a single operator or to grant compensations for the fulfilment of the PSO (so-called 'restricted PSO'). If an air carrier demonstrates its willingness to operate the route without exclusivity and compensation, then the access to the route must remain free to any air carrier respecting the conditions of the PSO (so-called 'open PSO').

<sup>(8)</sup> The State aid rules, both substantive and procedural, remain applicable to the PSO routes. The PSO procedure under the Regulation does not substitute a State aid procedure.

<sup>(9)</sup> The Commission can ask for more information at any moment before or after the publication, either at a request of a Member State or at its own initiative (e.g. following a complaint).

<sup>(10)</sup> As indicated in the questionnaire, the rules concerning state aid notifications are applied fully to the compensation paid under PSOs. As the case may be, the state aid notification should be made once the amount of compensation is known, i.e. fixed in the award decision and/or the contract. Member States also have the possibility to pre-notify PSO compensation to the Commission. The pre-notification is a useful informal stage before a notification where the Commission services can give informal feedback and guidance to the Member State. It is for the Member State to ask for Commission ex-ante guidance if it considers this necessary.

17. Under the Regulation PSOs may in particular be used to ensure the access to remote and isolated regions or under certain conditions, where market forces alone do not allow a minimum provision of air transport services satisfying certain standards.
18. As PSOs are an exception to the general principle of the freedom to provide air services <sup>(11)</sup>, PSOs are subject to strict requirements and limitations. The PSOs should respect the principles of transparency, non-discrimination and proportionality: in particular, they cannot introduce any discrimination based on the nationality or the identity of the air carriers and they cannot go beyond what is needed to attain the policy objectives <sup>(12)</sup>.

### 3.2. Eligible services and routes

#### 3.2.1. Type of services

19. PSOs may only be imposed on scheduled air services <sup>(13)</sup>. Non-scheduled services remain unaffected by the PSOs. When an air carrier offers seat-only sales <sup>(14)</sup> on a route in accordance with the requirements of the PSO imposed on that route, this air service is also considered a scheduled air service <sup>(15)</sup>.

#### 3.2.2. Types of routes

20. Regulation No 1008/2008 allows the imposition of PSOs on two types of routes <sup>(16)</sup>:

##### (a) Routes to an airport serving a peripheral or development region

A peripheral region is typically a remote region or a region accessible with difficulty from the capital and other main cities in the Member State. The remoteness and isolation should be assessed with regard to the territory of the Member State, its administrative, business, education and medical centres, but also with regard to the territory and such centres of other Member States with which it shares a border. A development region is lagging behind economically <sup>(17)</sup>, as measured for example by GDP per capita or by unemployment rate.

##### (b) Thin routes to any airport

The Regulation does not define a quantified criterion to assess the 'thinness' of a route, given the various situations that may prevail in different Member States. However, based on the Commission's experience in a large number of PSO cases, it appears safe to say that a route with traffic of more than 100 000 passengers per year cannot normally be considered as a thin route within the meaning of the Regulation <sup>(18)</sup>.

21. Regulation No 1008/2008 does not limit PSOs to routes within one and the same Member State. They may very well be applied to any intra-EU route that fulfils the conditions of the Regulation. PSO routes to third countries are not covered by the Regulation, as its scope is confined to intra-EU air services <sup>(19)</sup>.

<sup>(11)</sup> As defined in Article 15 of Regulation No 1008/2008.

<sup>(12)</sup> See Article 16(1) of Regulation No 1008/2008.

<sup>(13)</sup> Article 16(1) of Regulation No 1008/2008.

<sup>(14)</sup> Article 2(15): 'Seat-only sales means the sale of seats, without any other service bundled, such as accommodation, directly to the public by the air carrier or its authorised agent or a charterer'.

<sup>(15)</sup> Article 16(7) of Regulation No 1008/2008.

<sup>(16)</sup> Article 16(1) of Regulation No 1008/2008.

<sup>(17)</sup> For example, less developed regions in the context of the EU regional policy (where GDP per inhabitant is less than 75 % of the EU average) would normally fulfil this condition. Since also the respective situations of regions belonging to the same Member State may differ to an important extent, the qualification as a development region could also follow from a comparison with the national GDP or unemployment level of the Member State concerned.

<sup>(18)</sup> This does not imply, however, that any route with a traffic less than 100 000 passengers per year is necessarily a thin route. Generally speaking, the higher the number of passengers on a particular route the more difficult it becomes to argue that such route would be eligible for a PSO, i.e. that without a PSO no carrier would assume certain standards as referred to in Article 16(1) solely considering its commercial interest.

<sup>(19)</sup> See in particular Art. 1(1) and 15(1) of Regulation No 1008/2008. However, the Regulation does not in principle prevent Member States from agreeing similar arrangements with third countries based on bilateral or multilateral agreements, subject in particular to applicable EU competition law. For example one Member State has concluded Memoranda of Understanding with third countries so as to allow for flights between the two territories under conditions similar to PSO routes in the EU. The tender was carried out in accordance with the Union provisions regarding public tenders.

22. It follows from Article 16(1) of the Regulation that the PSO route is always to be defined from one airport to another, and not with reference to two cities or regions. The selection of the airport for the purpose of PSO should be properly justified. Onward connectivity – i.e. the destinations and frequencies offered by the airports of the destination city – is one element in this assessment, but it cannot be the only justification for the choice of a specific airport over another. Alternatively, if a public authority considers that several destination airports would serve one region's needs equally, it could impose a PSO from an airport in that region to these several destination airports, thereby imposing a PSO on these separate routes. If an air carrier starts operating on one of these routes or if an air carrier is selected for one route after a public tender including all these routes, the other PSOs must then be repealed, so that the market is not unnecessarily closed<sup>(20)</sup>. Even though this configuration is not explicitly contemplated in Article 16(1), the terms of the provision do not oppose it, and it is also in line with the objectives of the provision. In order to avoid unequal treatment and distortions of competition, it is important though to make the authority's intentions transparent from the beginning, notably through the communication referred to in Article 16(4) of the Regulation.
23. Defining a PSO on the routes from a region to/from several airports serving one and the same city would generally be disproportionate to the objectives of ensuring mobility and territorial cohesion. The effect of the measure would be to exclude occasional air carriers, since they could not fly from the region to any of the airports of the destination city, and therefore to contribute to a definitive closure of the market to new operators on competitive routes. Therefore, other airports than the one selected but serving the same city should in principle remain unaffected by the PSOs.
24. PSOs may in general apply to routes with one or more stopovers<sup>(21)</sup>. However, the assessment of the adequacy of the PSO needs to be made for each flight segment individually. The PSO should not apply to flight segments which do not qualify for it. For example, if a PSO is imposed on the route A to C with a stopover in B, then the eligibility of the routes A–C, A–B and B–C should each be assessed individually. If, for example, the segment B–C would not qualify for a PSO on its own merits, then no PSO obligations should apply to air carriers carrying passengers and/or cargo on that segment. Any obligations on the route A–C should not hamper the free provision of air services on the segment B–C.

### 3.2.3. *The vital character of the route*

25. PSOs may only be imposed on routes that are 'considered vital for the economic and social development of the region which the airport serves'<sup>(22)</sup>. This is a necessary condition for any of the above-mentioned type of routes, and the assessment is always to be performed taking into account the specific circumstances of the case. Member States enjoy a certain margin of discretion when it comes to judging the vital character of a route. However, this discretion has to be exercised on the basis of objective factors regarding connectivity needs in accordance with the Regulation, as well as EU law more generally.
26. An indispensable route for a region, such as a small island or a remote region, presents clearly this vital character. However, air services linking small and medium-sized cities to important economic or administrative centres could also be regarded as vital for the economic and social development of the regions in question under certain circumstances. For example, a PSO regime has been imposed on a route linking the capital of an island Member State to Brussels, as the city where various EU institutions and bodies have their offices.
27. However, Article 16(1) of the Regulation poses limits to the margin of discretion of the Member States. For example, while PSOs could be designed to lift hurdles to the economic and social development of regions or cities, they cannot be established with the aim, directly or indirectly, to promote or support a particular air carrier or to develop a particular airport.

<sup>(20)</sup> This means that competitors can provide air services on the other routes. In this case, if the competing air services correspond to the PSO requirements, the PSO should be revoked. If the competing air services fulfil those requirements only in part, then the latter should be adjusted. As an example, the UK imposed in 2014 PSOs for six routes (Dundee – six London airports). The winning tender was for the route Dundee-London Stansted and consequently the other five PSOs were repealed.

<sup>(21)</sup> The possibility of stopovers should be indicated in the PSO and tender specifications.

<sup>(22)</sup> Article 16(1) of Regulation No 1008/2008. 'The airport' here refers to the airport serving a peripheral or development region in the territory of the Member State.

### 3.2.4. *The bundling of routes*

28. Member States may not make the access to one particular route dependent upon the service of other routes. Such bundling would be incompatible with the Regulation No 1008/2008<sup>(23)</sup>. The eligibility and adequacy criteria provided for in Article 16(1), (2) and (3) of the Regulation refer to 'the route', to which bundles of routes cannot be equated. Therefore each of these criteria should be assessed separately with regard to each individual route. To treat bundles of routes as a single route could be considered as an excessive restriction to the access of the routes, as only air carriers with regional bases are likely to be able to provide services on all those routes.
29. This ban on bundling of routes at the phase of the imposition of the PSO should not be confused with the possibility to tender the right of access to a group of routes as provided for in Article 16(10) of the Regulation. This possibility is further explained in paragraph 6.6 of these guidelines; it only applies to those routes for which no air carrier has commenced or is about to commence scheduled air services in accordance with the PSOs.

### 3.2.5. *Link with the slots regulation*

30. Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports<sup>(24)</sup> (hereinafter 'Regulation 95/93') allows for the reservation of slots for PSOs. Its Article 9(1) specifies that 'a Member State may reserve at a coordinated airport the slots required for the operations on that route. If the reserved slots on the route are not used, they shall be made available to any other air carrier interested in operating the route in accordance with the public service obligations -- --. If no other air carrier is interested in operating the route and the Member State concerned does not issue a call for tenders [under Article 16(10) of Regulation (EC) No 1008/2008]- -, the slots shall either be reserved for another route subject to public service obligations or returned to the pool.' These obligations set in at the latest at the moment referred to in Article 16(11) of Regulation No 1008/2008, whereby a PSO shall be deemed to have expired if no scheduled air service has been operated during a period of 12 months on the route subject to such obligation. Reserving slots for the same route again would then require a new imposition of a PSO.
31. Article 9(2) of Regulation No 95/93 clarifies that the PSO tender procedure should be applied 'if more than one [EU] air carrier is interested in serving the route and has not been able to obtain slots within one hour before or after the times requested from the coordinator'.
32. The provisions of Regulation No 1008/2008 regarding PSOs do not affect the allocation of competences between Member States for the application of Article 9 of Regulation No 95/93<sup>(25)</sup>.
33. This slot reservation is without prejudice of grandfathering rights granted under Regulation No 95/93. It is therefore only possible from the slot pool of non-allocated slots established by Article 10 of Regulation No 95/93, which includes slots returned in accordance with Article 9(1) of that Regulation.
34. It must be stressed that slots should not be reserved for purposes other than the PSO. This issue is particularly relevant in case of stopovers. For example, on a route A-B-C on which B and C are slot-congested airports, slots could only be reserved for flights between B and C if this segment itself forms the object of a PSO. Notably, a PSO regarding the route between A and C (i.e. concerning transport between these two points) does not as such justify a reservation of slots in point B.
35. Therefore, on PSO routes with slot reservation:
  - (1) stopovers on congested airports should be avoided, wherever possible;
  - (2) there should be no change of aircraft during stopovers, unless the second segment (B-C) also qualifies for a PSO with the (other) aircraft type to be used. Otherwise, slots could be reserved for large aircraft operating traffic over and above what is justified by the PSO.

<sup>(23)</sup> This means that the creation of so called 'hub-PSOs' covering all or most of the routes from a particular airport is not in accordance with the Regulation No 1008/2008.

<sup>(24)</sup> Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

<sup>(25)</sup> This means that a Member State can only reserve slots on its own territory, not on the territory of another Member State in case of PSO between two Member States.

### 3.3. Necessity and adequacy of the obligations

36. The necessity and the adequacy of the envisaged PSO is to be determined on the basis of the four criteria<sup>(26)</sup> discussed in the following paragraphs. While the Commission has no power to require a Member State to impose a specific PSO on any route, it assesses the criteria on the basis of which the (envisaged) PSO is imposed in order to verify if a PSO is established in accordance with the Regulation. Where relevant, the Commission services contact the Member State concerned and seeks clarifications. Experience shows that PSO routes to islands may in most cases be necessary and justified when there is not enough touristic demand to support a commercial operation all year round. Such routes exist for example in Estonia, Ireland, Italy, Greece, Portugal and the UK. In less densely populated Member States like Finland and Sweden, in cases where distances between regions are particularly long and no transport alternatives tend to exist, routes can generally also be eligible for the use of PSOs.

#### 3.3.1. Proportionality to the economic and social development needs<sup>(27)</sup>

37. This criterion is a direct expression of the general proportionality principle. It bears a close relationship with the proviso of Article 16(1), according to which PSOs may be imposed only on routes which are vital for the economic and social development of the region which the airport serves<sup>(28)</sup>. It follows from Article 16(3)(a) that the obligations themselves should be in proportion to the economic development needs of the region concerned. The PSOs cannot impose restrictions on the provision of air services that go beyond what is necessary to fulfil the needs in question.

#### 3.3.2. Inadequacy of alternative transport modes<sup>(29)</sup>

38. PSOs should only be imposed insofar as other transport modes cannot meet the transport needs of the region concerned. Account should be taken mainly of services offered by train, ferry and coach operators. The adequacy of the services should be assessed, in particular, with regard to their frequency, journey times, departure times and to possible connections to other important destinations, in particular long-haul<sup>(30)</sup> travel options. The possibilities of individual (car) transport should also be explored, having regard in particular to the journey times by road.
39. Particular consideration should be given to train services that serve the envisaged route with a travel time of less than three hours<sup>(31)</sup>. This refers to both high-speed train services and other train services. Where such train services provide sufficient frequencies for the mobility needs of the concerned region, PSOs should in principle not be imposed on air services. Exceptionally, such PSOs could be considered however, in particular if the train services do not allow adequate connections to medium- and long-haul air services (e.g. inadequate connection between the train station in the region concerned and the airport offering medium- and long-haul services or absence of alternative travel options to connect to the long-haul destinations, including indirect flight options). The assessment needs to be carried out on a case-by case basis.

#### 3.3.3. Existing air fares and conditions<sup>(32)</sup>

40. The necessity and the adequacy of PSOs as required by the Regulation should also be assessed with regard to the air fares and the conditions quoted to users. PSOs can include requirements on maximum tariffs if this is deemed necessary, because otherwise the tariffs would be excessive in the context of the economic needs of the region concerned. A PSO limited to setting a maximum price could be envisaged in specific cases. A steep rise in prices and decrease in passenger numbers over a short period of time may, according to the case, be an indication that a price ceiling is necessary.

<sup>(26)</sup> Article 16(3) of Regulation No 1008/2008.

<sup>(27)</sup> Article 16(3)(a) of Regulation No 1008/2008.

<sup>(28)</sup> 'The airport' here refers to the airport serving a peripheral or development region in the territory of the Member State.

<sup>(29)</sup> Article 16(3)(b) of Regulation No 1008/2008.

<sup>(30)</sup> Article 6(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, establishes the following categories for the length of the flight: up to 1 500 km, 1 500-3 500 km and other flights (more than 3 500 km). These distances are often used for defining short-, medium- and long-haul flights.

<sup>(31)</sup> Article 16(3)(b) of Regulation No 1008/2008.

<sup>(32)</sup> Article 16(3)(c) of Regulation No 1008/2008.



### 3.3.4. *The combined effect of existing air transport supply* <sup>(33)</sup>

41. Whether PSOs are needed will ultimately depend on the combined effect of all air carriers operating or intending to operate the route. If the existing provision of air services already satisfies the mobility needs of the concerned region, then there is no 'market failure' that would deserve to be addressed, and a PSO would not be necessary. The Commission takes the view that a PSO regarding the transport of passengers could normally not be considered justified on routes where there are a critical number of passengers (based on experience, such critical number would normally appear to materialise as from 100 000 passengers per year) and on which several air carriers are operating all year round. As a matter of general principle, in cases where air carriers are already operating on the route concerned, the assessment of the impact of the obligations should be carried out with particular care: excessive obligations (e.g. imposing price caps, schedules or number of frequencies) may have the counterproductive effect of reducing the offer of air services. It should be noted that imposing a PSO only for the purpose of ensuring the transportation of cargo and mail is also possible. In each case, it has to be assessed how the above factors play out, in their combination where applicable.
42. The assessment of the existing air transport supply should also take account of indirect air services and of other nearby airports. Imposing PSOs on a route to a particular airport if an indirect connection with a reasonable transfer time already exists (e.g. one hour or less) or if adequate services to a nearby airport are already available (e.g. airports serving a same city or region, including also airports in neighbouring Member State) would require a particularly robust justification. The way the domestic and international traffic is distributed between those airports may play a role in this respect. If an another airport that is farther away than 100 km and/or the travelling time is more than one hour by public transport, it is generally reasonable to question whether the two airports can be seen as alternatives. However, this analysis always needs to be conducted case-by-case, taking into account the specific circumstances. Generally speaking, a PSO is more likely to be justified in cases where there are no existing services to other airports in the close vicinity of the airport being considered.

### 3.4. **Type of obligations**

43. PSOs aim to ensure the fulfilment of fixed standards of continuity, regularity, pricing or minimum capacity <sup>(34)</sup>.
44. Under certain conditions, the continuity of the air service may be ensured by imposing continuity obligations <sup>(35)</sup> (see further paragraph 3.5 below).
45. Regularity and capacity obligations mainly include the fixing of minimum capacities in terms of seats offered or of minimum frequencies to be offered in a given time period. These obligations may vary according to departure times, week days, seasons, etc. For example, one or two daily frequencies can be considered normal in most cases, but there are PSOs that require as little as only one frequency per week. A margin of discretion exists for the Member States to decide on these elements, but the obligations must be non-discriminatory and proportional and fulfil the requirements of necessity and adequacy established in Article 16(3) (cf. paragraph 3.3 above).
46. It may also be possible to impose requirements as to the aircraft to be used, but these should be objectively justified and respect the principle of proportionality, i.e. avoid unnecessary restrictions in this respect and therefore remain as general as possible under the circumstances (e.g. turboprop or jet engines depending on the distance flown, aptitude of the aircraft to land under specific conditions, etc.). In particular, these requirements should not lead to a situation in which specific air carriers are, de facto, arbitrarily excluded from the operation on the concerned routes. In this sense, a requirement in the form of minimum seat capacities of aircraft should only be imposed in exceptional cases and should be duly justified by the circumstances of the operations and in relation to the mobility objectives pursued <sup>(36)</sup>.
47. Imposing PSOs is about fixing minimum requirements. Maximum seat capacity could only be considered where this is clearly objectively justified by the operational restrictions at one of the airports included in the PSO route. A condition requiring at least part of the crew members being able to speak the language of the Member State concerned is normally acceptable.

<sup>(33)</sup> Article 16(3)(d) of Regulation No 1008/2008.

<sup>(34)</sup> Article 16(1) of Regulation No 1008/2008.

<sup>(35)</sup> Article 16(2) of Regulation No 1008/2008.

<sup>(36)</sup> A minimum daily capacity could also be achieved by performing more flights with a smaller aircraft.

48. It is also possible to require a certain type of aircraft – aeroplane or helicopter – to be used for the operating the PSO route, depending on particular circumstances of the case. Specific requirements may be set in respect of the type of aircraft (e.g. type of engine, maximum take-off weight, landing systems equipment) when this is objectively justified for operational reasons (e.g. requirement to resort to a helicopter when no runway is available). Moreover, any such requirements must be non-discriminatory.
49. In terms of pricing, the obligations could mainly include the setting of maximum prices or of tariff grids for a part or for all the offered services. These grids may define tariff categories or preferential prices for certain categories of passengers (e.g. residents and students). In respect of residents, such preferential treatment must be objectively justifiable by the need to allow this category of persons to participate in cultural, economic and social life of their Member State. Other obligations with regard to prices are possible as long as they also are non-discriminatory and proportional and they fulfil the requirements referred to in paragraph 3.3 above <sup>(37)</sup>.
50. Sometimes in PSOs a meal or one piece of luggage is required to be included in the maximum price to be paid by the passenger. The justification for and proportionality of such a requirement has to be assessed on a case-by-case basis, but in principle such conditions are not necessary components of a PSO. An exception could be accepted in case of medium and long-haul flights, i.e. of more than 3 hours. In such cases, it would normally appear justified to include a meal into the maximum price, but also the transport of luggage, given that such flights normally give rise to a longer stay at destination. However, it is to be noted that if the (maximum) price in such a case does not include a piece of luggage then it could be fixed at a lower level and then a provision allowing the air carrier to charge a specified extra fee for it could be added.

### 3.5. Continuity obligations

51. A PSO may require the air carriers to guarantee that they will operate the route concerned for a certain period. This is more relevant for open (i.e. non-exclusive) PSOs, because for restricted PSOs there is normally a contractual commitment of this type in exchange for exclusivity (and possibly financial compensation). Such continuity obligations may only be imposed in instances where other modes of transport cannot ensure an uninterrupted service with at least two daily frequencies <sup>(38)</sup>. This means a service that is available all year round. Continuity obligations may be imposed in the following two possible ways.
52. First, the PSO may require the air carriers serving the route to give notice a certain period in advance if they intend to cease the services. However, in conformity with the proportionality principle, the duration of the notice should generally not exceed six months, which is sufficient to implement the PSO tender procedure.
53. Second, when the operations on the concerned route reveal a strong seasonal pattern, it may be useful to ensure a minimum service during those periods of the year when the supply of air services tends to be very low. On certain routes the air carriers are inclined to concentrate the capacities offered during periods of high demand and to significantly reduce the capacities in other periods in order to increase the profitability of the service. This could lead to situations where the supply of air services is unstable and during the low-demand periods insufficient to meet the mobility needs of the concerned region. In conformity with the proportionality principle, the periods on which continuity obligations are imposed should normally not exceed one year <sup>(39)</sup>.
54. The operational periods imposed in the context of continuity obligations should not be confused with the maximum period of four or five years during which the access to the route may be restricted to a single air carrier <sup>(40)</sup>.

### 3.6. Consequences of the imposition of PSOs

55. A PSO imposed on a given route is applicable to all EU air carriers from the date of publication of an information notice in the *Official Journal of the European Union* at the earliest, or from a later date specified therein <sup>(41)</sup>. It is in principle for the Member State concerned to determine in its national law how non-compliance is sanctioned. Any sanctions provided for and imposed in this context must comply with the principles of EU law which apply in this regard, i.e. they must be effective, proportionate and dissuasive.

<sup>(37)</sup> For example, setting preferential fares for persons born but no longer living in a certain region would appear disproportionate.

<sup>(38)</sup> Article 16(2) of Regulation No 1008/2008.

<sup>(39)</sup> The continuity obligation could be associated with a penalty, but also that should respect the principle of proportionality and too high a penalty could function as a deterrent for starting operations.

<sup>(40)</sup> Article 16(9) of Regulation No 1008/2008.

<sup>(41)</sup> Article 16(6) of Regulation No 1008/2008.

56. A PSO should not limit the possibility for air carriers to provide a higher level of service in terms of capacity and frequency than required under the PSO <sup>(42)</sup> While the national authorities may of course monitor the correct fulfilment of the PSOs and compliance with the applicable legislation, they should not interfere with the way the market fulfils the PSO obligations. For example, in case where more than one carrier is interested in operating an (open) PSO route, national authorities should not distribute frequencies or capacities between the air carriers concerned.
57. When a PSO has been imposed, any EU air carrier shall at any time be allowed to commence scheduled air services meeting the requirements of the PSO <sup>(43)</sup>, except where exclusivity has been granted to one carrier (see further chapter 6 below).
58. Two types of obligations can be distinguished:
  - (1) Obligations that apply by definition to each air carrier individually. Examples include obligations regarding maximum fares, or continuity of operations. Obligations of the kind must be respected by all air carriers individually, at all times.
  - (2) Obligations concerning an objective to be achieved by a number of air carriers jointly, where each air carrier contributes to the attainment of that (overall) objective on the route. This is typically the case for obligations with regard to minimum frequencies or seat capacities. The Commission has confirmed this in its decision of 23 April 2007 on Sardinia <sup>(44)</sup> (§51): '(...) carriers are not obliged to undertake to individually ensuring the level of frequency or capacity but all operators together may ensure that a minimum service is provided.' It goes without saying that this applies without prejudice to the applicable rules of competition law (in particular Articles 101 and 102 TFEU). Situations where the PSOs are fulfilled by the contributions from several air carriers typically call for a corresponding adaptation of the obligations (see chapter 5 below).
59. Since Article 15(4) of the Regulation allows operation under code-share agreements and does not exclude the case of PSOs, such agreements are in this case in principle admissible. As in all other cases, this is subject to compliance with the competition rules. The same applies to frequent flyer programmes.
60. Unless otherwise specified and without prejudice to the need for regular re-assessment discussed in chapter 5 below, PSOs need not have a limit in time. However, if no scheduled air service has been operated during a period of twelve months, the PSO shall be deemed to have expired <sup>(45)</sup>.

#### 4. PROCEDURES TO BE FOLLOWED FOR IMPOSING PSOS

61. Before imposing a PSO, the Member State should consult the other Member States concerned (notably in the case of a PSO on a route to another Member State or when another Member State has an airport in the border region close to the airport which is foreseen to be included in the PSO route). It should inform the Commission <sup>(46)</sup>, the airports concerned and the air carriers currently operating the route in question. To this end, the Member State should communicate the text of the draft legal act concerning the envisaged PSO to these parties and leave sufficient time for possible responses. The contact with the Commission should be established via the Directorate-General for Mobility and Transport (hereinafter: 'DG MOVE'). This can be done in the most efficient way by email to the specific mailbox for PSO issues: MOVE-PSO@ec.europa.eu. Where a regional or local authority intends to impose a PSO, the Commission encourages the involvement of the Permanent Representation or the central government of the Member State concerned in the process of communication described here, in accordance with the applicable requirements of national law, so as to ensure adequate coordination.

<sup>(42)</sup> This is without prejudice to the requirement according to which any PSO must be necessary in view of the objectives set out in Article 16(1) of Regulation No 1008/2008. While a higher level of service provided may sometimes cast doubts on this necessity, a judgment on this issue will depend on the circumstances of each case. In particular, where the increase, compared to the PSO imposed, of the level of service materializes for short phases only or is otherwise unsystematic, it may not be a decisive indicator.

<sup>(43)</sup> Article 16(8) of Regulation No 1008/2008. This also clearly applies to carriers that had operated the route before.

<sup>(44)</sup> C(2007) 1712 final of 23.4.2007. The decision concerns a scheme implemented under Regulation No 2408/92, which preceded Regulation No 1008/2008.

<sup>(45)</sup> Article 16(11) of Regulation No 1008/2008.

<sup>(46)</sup> Article 16(1) of Regulation No 1008/2008.

62. Commission services stand ready to give advice informally and should be contacted preferably at a very early stage of the preparations of the PSO. Discussions may concern the interpretation of the Regulation, procedures and possible solutions in specific situations. Early contacts also allow speeding up the procedures as potential concerns will have been dealt with beforehand. Informal contacts may also help avoiding certain issues from arising at a later stage, for example possible complaints from interested parties.

#### 4.1. The publication of information notices in the Official Journal

63. According to the first subparagraph of Article 16(4) of Regulation No 1008/2008, the Member State concerned, intending to impose a PSO, shall communicate the text of the envisaged imposition to the Commission<sup>(47)</sup>. It is then up to the Commission to publish the information notice referred to in the second subparagraph of that provision. In the interest of efficient and speedy handling, it is advisable that Member States prepare a corresponding draft information notice and communicate it to the Commission (in any EU official language). It should be addressed by email to the functional mailbox mentioned above<sup>(48)</sup> (in electronic format, having recourse to one of the usual processing systems). The draft should contain the information described in Article 16(4)(a)-(c) of the Regulation<sup>(49)</sup>. The aim of the publication is to make all interested parties aware of the envisaged PSO in question and to allow them to obtain further information, notably the precise terms. The Commission has prepared templates that are available on the CIRCABC internet website open to the relevant national administrations. Copies of the template may also be directly requested from the Commission.
64. To ensure full transparency, DG MOVE will publish the transmitted notices on its Internet website<sup>(50)</sup>, in its newsletter and on the dedicated CIRCABC newsgroup.
65. With respect to routes where the total number of passengers expected to use the air service is less than 10 000 per year, the Regulation gives the Member State the choice between asking the Commission to publish an information notice in the *Official Journal of the European Union* and publishing it itself in its own national official journal<sup>(51)</sup>. It is to be noted that Article 16(5) of the Regulation constitutes an exception to paragraph 4 on publication requirements only. All the other requirements of Article 16, in particular the requirement of consultation and information of the Commission, of other Member States and of concerned airports and air carriers, also apply to routes with less than 10 000 expected passengers per year.
66. The date of entry into force of a PSO cannot be earlier than the date of publication of the information notice<sup>(52)</sup>. The publication of such a notice in the national official journal in accordance with Article 16(5) should not happen earlier than the publication in *Official Journal of the European Union* if the Member State wishes to have the notice published in both.
67. In order to inform the market of the intended modifications of the conditions of the PSOs imposed, the Commission considers that the same procedures should apply for modifications of existing PSOs, for fundamentally the same reasons as those relevant to the initial publication directly referred to in Article 16(4) and (5). For transparency reasons, this means all modifications of the conditions imposed by the PSO should be mentioned. In cases where a Member State comes to the conclusion that the PSO is no longer necessary, it can ask the Commission to publish an information notice in the *Official Journal of the European Union* on the repeal of the PSO, so as to inform the market of the route becoming free again. Alternatively, it may publish such a notice itself in its national official journal in case the notification concerning the PSO has been published only therein.

#### 5. THE NEED FOR REGULAR RE-ASSESSMENT OF PSOS

68. The assessment of the necessity and proportionality of PSOs (see paragraph 3.3 above) should not be made only once. Instead, PSOs should be reassessed regularly and at least whenever one of the relevant assessment factors,

<sup>(47)</sup> As well as to the other Member States concerned, to the airports concerned and to the air carriers operating the route in question.

<sup>(48)</sup> DG MOVE requests the publication via Secretariat-General of the Commission. Member States should not contact directly the Publications Office of the European Union.

<sup>(49)</sup> The draft information notice can cover PSOs imposed on several routes.

<sup>(50)</sup> [http://ec.europa.eu/transport/modes/air/internal\\_market/psa\\_en.htm](http://ec.europa.eu/transport/modes/air/internal_market/psa_en.htm)

<sup>(51)</sup> Article 16(5) of Regulation No 1008/2008. For routes with over 10 000 passengers, the notification needs to be published at least in the *Official Journal of the European Union*, but Member States can still use their own national Official Journals as well in order to attract maximum publicity for their tender.

<sup>(52)</sup> Article 16(6) of Regulation No 1008/2008.

such as the number of service providers, undergoes a significant change. PSOs are a response to a specific market failure and should therefore evolve with the market. A reassessment may lead to modification or even repeal of the PSO concerned. In order to ensure that the obligations are respected at all times by air carriers operating PSO routes, a review of their performance at least on an annual basis is preferred as good practice.

69. In order to ensure that situations arising from the application of the situations described in point (2) of point 58 above do not lead to a discrimination between air carriers, each time a new operator commences or is about to commence operating a route, the level of capacity and frequency imposed by the PSO on each operator should be adjusted, so that the total frequency and capacity offered on each route does not exceed that what is strictly necessary to provide an adequate service.

## 6. EXCLUSIVE SERVICE CONCESSIONS

70. In accordance with internal market principles, Regulation No 1008/2008 seeks to ensure that competition in the context of a PSO takes place to the widest possible extent and that any exception to this principle is limited to what is necessary to achieve the justified connectivity objective. This regime also tends to allow substantial savings of public money for the Member State or local/regional authorities concerned, while still ensuring adequate connectivity.
71. Concretely, Article 16(9) of the Regulation permits that access to the scheduled services on the PSO route be limited to only one EU carrier only if no such air carrier has commenced or can demonstrate that it is about to commence sustainable scheduled air services on that route. In this context, the demonstration that the air carrier is about to commence sustainable services corresponding to the PSO should be firm and credible, meaning that the air carrier would need to commit to the provision of such services for a certain period specified in the PSO conditions within a clear and limited time frame and accept the possibility of penalties being imposed on it if it fails to honour this commitment. The limitation of the PSO regime to one air carrier may or may not be combined with a financial compensation, as specified in the Regulation <sup>(53)</sup>.

### 6.1. Obligation to undertake a public tender

72. The exclusive right to operate the route must be offered by public tender in accordance with the procedures of Regulation No 1008/2008. Transparency of the tender is again ensured by the publication in the *Official Journal of the European Union* <sup>(54)</sup>.
73. If before or during the tender procedure, an air carrier commences scheduled air services according to the PSO, or demonstrates that it is about to commence sustainable services of the kind <sup>(55)</sup> (but without requiring an exclusive right or compensation), the tender procedure must be cancelled and access to the route should remain open for competition <sup>(56)</sup>. The exact cut-off date for an air carrier to commence or to demonstrate the intention to commence operations should not be earlier than the date of the conclusion of the contract with the selected air carrier. This conclusion of the contract implies concrete mutual obligations of the parties, which constitute the 'limitation of access' within the meaning of Article 16(9) of the Regulation. However, the Member can also further postpone this cut-off date, for example until the start of the operations by the air carrier selected in the tender.
74. In case the tender concerns a route to which the access had already been limited to one air carrier in accordance with Article 16(9), Article 17(4) of the Regulation provides for a publication of the information notice six months before the new contract period starts. The key objective of this prior notice is to give the air carriers interested in operating the route without compensation the chance to pre-empt, in accordance with the criteria of Article 16(9), a fresh limitation to a single air carrier selected in accordance with Article 16(9) to (12) and Article 17 of the Regulation (cf. previous point).

<sup>(53)</sup> Article 17(8) of Regulation No 1008/2008. See further chapter 8 below. In practice all restricted PSOs in the EU have been operating with financial compensation to this day.

<sup>(54)</sup> Article 17(4) of Regulation No 1008/2008.

<sup>(55)</sup> Cf. Article 16(9) of Regulation No 1008/2008.

<sup>(56)</sup> Cf. also point 71 above.

## 6.2. Eligibility to submit a tender

75. In accordance with Article 16(9) of the Regulation, only EU air carriers, or air carriers assimilated to them under EU law, can obtain an exclusive right to operate a PSO route. Hence, entitled are air carriers holding a valid operating licence issued by the competent authorities of a Member State or of a third country to which the regime set out in Regulation No 1008/2008 applies (e.g. Norway, Iceland) <sup>(57)</sup>. In the following, reference will be made to 'air carriers' or 'EU air carriers' only, for ease of presentation.
76. The Regulation does not prevent a group of air carriers to present a common tender, but in its tender the EU air carrier must spell out the identity of the air carrier(s) (consortium) which would operate the PSO services according to the conditions fixed in the tender specifications, so that the national authorities can control the fulfilment of the formal requirements by all the air carriers involved. While subcontracting is not forbidden in the Regulation, it is in principle up to the Member State to specify whether it allows sub-contracting or not and under what conditions, provided the Regulation and EU law generally is respected. In any event, the sub-contractor must also be an EU air carrier.
77. A given PSO can only be operated where the operating license and the air operator certificate (hereinafter 'AOC') are commensurate with the requirements of that PSO. Notably, an air carrier with a so-called B-licence, governed by Article 5(3) of the Regulation, cannot operate aircraft other than of the kind covered by such licence (and covered by the AOC granted to him). These requirements apply to the air carrier(s) which will provide the PSO services.

## 6.3. Selection criteria

78. The selection among the submissions shall be made as soon as possible taking into consideration the adequacy of the service, including the prices and conditions which can be quoted to users, and the cost of the compensation required from the Member State(s) concerned, if any <sup>(58)</sup>. Member States are in principle free to determine the weighing of the criteria used in the selection (award), for example attributing 70 % for the level of compensation and 30 % for quality <sup>(59)</sup>. In the view of the Commission there is normally nothing to preclude them from setting a maximum limit for the total amount of compensation to be paid. It is particularly important however that all such criteria are set out in advance in the tender documents in a clear, objective and transparent manner.

## 6.4. Consequences of granting the exclusive right to operate the route

79. During the period of exclusivity, access to the concerned route will be refused to any air carrier other than the air carrier selected by the tender. The duration of the exclusive right to operate the route cannot exceed four years; however, this period may be up to five years if the PSO is imposed on a route to an airport serving an outermost region, as defined today in Articles 349 and 355(1) TFEU <sup>(60)</sup>. If the original contract is concluded for less than the maximum period fixed in Regulation No 1008/2008 (i.e. 4 or 5 years) <sup>(61)</sup>, then the contract can be renewed up to the applicable maximum, provided that this option has been clearly and transparently mentioned in the tender documents and contract. If the contract is for the maximum period from the start, then a new tender needs to be organised, should the Member State consider that the conditions justifying this still exist, as according to Article 16(9) of the Regulation it is necessary to review the situation. In accordance with Article 17(4) of the Regulation, in case the tender concerns a route to which the access had already been limited to one air carrier in accordance with Article 16(9) of the Regulation, the invitation to tender will be published at least six months before the start of the new concession in order to assess the continued necessity of the restricted access. No renewal beyond the maximum periods mentioned is possible, as a regular review is due and this would close the market for new entrants for an excessively long period.

<sup>(57)</sup> See Art. 2(11) of Regulation No 1008/2008.

<sup>(58)</sup> Article 17(7) of Regulation No 1008/2008.

<sup>(59)</sup> Quality aspects taken into account could include experience in PSO operations; aircraft maintenance and back-up arrangements; suitability of schedules and length of stay in destination during a day trip; interlining options offered; average fares offered; sales operation & advertising; promotion of services and financial robustness of the carrier. For example marketing of a route could be very important for ensuring a route's initial success and long-term viability to develop a route with the eventual aim of reducing and ultimately eliminating subsidies.

<sup>(60)</sup> Article 16(9) of Regulation No 1008/2008 – the concerned regions are Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands.

<sup>(61)</sup> Article 17(9) of Regulation No 1008/2008.

80. The requirement of proportionality implies that the exclusive right should be limited to those services concerned by the PSOs. For example, if the PSO only concerns the winter season, access to the route should be free during the summer season. The PSO and the invitation to tender should clearly mention to which periods and which services they apply. Indeed, this information is crucial for the air carriers responding to the invitation to tenders as the extent of the exclusive right has normally a considerable impact on the conditions of their offer.
81. The restriction to one single air carrier should not hinder this air carrier from agreeing on code-share agreements with other air carriers, subject to compliance with competition rules. As recalled above <sup>(62)</sup> the permission contained in Article 15(4) of the Regulation to operate under code-share agreements also extends to PSO routes, and the Regulation contains no exclusion either where access to such route is limited under paragraphs 9 et seq. of Article 16 of the Regulation.
82. Unless otherwise stated in the tender documents, nothing in the Regulation would prevent the EU air carrier enjoying the exclusive right to sub-contract part or all of the air services to another EU air carrier. But the responsibility for the carrying out of the contract remains with the air carrier selected through the tender procedure.
83. Article 16(9) is an exception to the principle, laid down in its paragraph 8, that any air carrier may at any time start providing services as defined in a PSO. If exclusivity has been awarded to one air carrier in a definitive manner in accordance with the national legislation and tender specifications, this principle does not apply anymore.

#### **6.5. Re-examination of the PSOs and of the exclusivity at the end of each concession period**

84. As described earlier, Member States should regularly assess the necessity and adequacy of the PSO. In particular, in case of restricted (exclusive) PSOs the situation shall be reviewed at the end of the concession period <sup>(63)</sup> and the continued necessity of the restricted access shall be assessed before the start of new concession <sup>(64)</sup>. The objective is generally speaking to assess during the period of six months before the start of the new concession whether the circumstances under which the previous tender was issued are unchanged. The assessment will typically include the experience with the last concession period, especially in respect to the observed demand, and whether an adequate provision of air services could be provided without exclusivity and/or with changed, less restrictive or even no PSO anymore.
85. The period of six months is not the maximum time period for the Commission to give a 'clearance' on the intended PSO. The Regulation does not provide for such clearance and this period is intended for other purposes. In particular, it is needed in order to allow for other air carriers to come forward with proposals to operate on the PSO route without exclusivity or compensation, in which case this could prove that there is no longer a need for restricted access. If this does not happen, this could be an indication that there is a continued need for restricted access. In any case, it is for the Member States to first make an assessment of the need for restricted access, subject to review by the Commission in accordance with EU law.

#### **6.6. Special case: grouping of routes to be tendered**

86. In principle, Member States should proceed to public tenders for each individual route. However, the Regulation allows Member States to issue a public tender for a group of PSO routes, but only where justified for reasons of operational efficiency <sup>(65)</sup>. In practice this means granting exclusivity to one air carrier for a group of PSO routes.
87. Such grouping of PSO routes can be justified, in particular, where several routes with thin traffic present important operational complementarities (e.g. routes to/within an isolated archipelago or remote and sparsely populated area).

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<sup>(62)</sup> Point 59.

<sup>(63)</sup> Article 16(9) of Regulation No 1008/2008.

<sup>(64)</sup> Article 17(4) of Regulation No 1008/2008. The start of the new concession is at the earliest the date following the date when the existing concession expires, but it could also be a later date.

<sup>(65)</sup> Article 16(10) of Regulation No 1008/2008. Examples of routes grouped in the tender phase include 14 PSO routes in the Azores archipelago, 4 PSO routes on Shetland Islands, 6 PSO routes on Orkney Islands, 4 PSOs on Canary Islands and 4 PSO routes connecting the Italian islands of Lampedusa and Pantelleria to 3 cities in Sicily.

88. The reasons for the grouping have to be of an operational nature (e.g. necessity of an operational base in a remote area). The grouping may not have as its main objective to reduce the budgetary impact on the Member State. In this sense, the grouping of profitable and unprofitable routes without operational commonalities is not possible.
89. Grouping of routes for tendering, as described here, should not be confused with the bundling of routes when imposing PSOs. As explained in point 28 above, the access to one particular route may not be made dependent upon the operation on other routes. Likewise, it may be that certain routes are not eligible for being grouped for tendering, in which case they may nonetheless be covered jointly in a single invitation to tender, if this is justified for reasons of administrative efficiency <sup>(66)</sup>.

## 7. PROCEDURES TO BE FOLLOWED FOR PUBLIC TENDERS

90. As regards the phase prior to the publication referred to in Article 17(4) <sup>(67)</sup>, the Regulation provides that the Member State concerned shall communicate the entire text of the invitation to tender to the Commission, except where, in accordance with Article 16(5), it has made the public service obligation known through the publication of a notice in its national official journal. In such case the tender shall also be published in the national official journal <sup>(68)</sup>. In the interest of efficient and speedy handling, the Member State should also communicate (in any EU official language) to the Commission (by email to the functional mailbox mentioned earlier) <sup>(69)</sup> a draft information notice concerning the invitation to tender (in electronic format, having recourse to one of the usual processing systems) to be published in the *Official Journal of the European Union* in all EU languages. This draft information notice should contain the information listed in Article 17(5) of the Regulation. The Commission has prepared templates that are available on CIRCABC and at request from the Commission. Member States are also encouraged to transmit the terms of the contract envisaged and any other document relating to the points mentioned in Article 17(3) of Regulation No 1008/2008.
91. According to Article 17(6) of Regulation No 1008/2008, the Member State concerned shall make available without delay and free of charge any relevant information and documents requested by a party interested in the public tender. Although no obligation exists to provide the tender documents to interested parties in languages other than of the Member State concerned, doing so might attract more potential bidders.
92. The invitation to tender, and the subsequent contract, should cover at least the points mentioned in Article 17(3) of the Regulation. The exact format and content of these documents is for the competent authorities of the Member States to decide and the Commission does not have templates for those.
93. Member State may issue a single invitation to tender covering different routes for reasons of administrative efficiency <sup>(70)</sup>. This can lead to several air carriers operating the different routes concerned, as it does not mean that bids can only be made for all routes concerned.
94. The deadline for the submission of tenders shall not be earlier than two months after the day of publication of the information notice <sup>(71)</sup>. The date of commencement of the period of exclusivity must be mentioned in the invitation to tender. This date will usually also correspond to the start date of the contract with the selected air carrier, but the contract can also start later. The contract and the operations under it cannot start before the indicated start date of exclusivity.
95. According to Article 17(4) of the Regulation, in case the tender concerns a route to which the access had already been limited to one air carrier, the invitation to tender will be published at least six months before the start of the new concession. As emerges from the provision, this minimum period is intended to ensure that the continued necessity of the restricted access be properly assessed <sup>(72)</sup>. It is also possible to publish an information notice announcing the re-opening of the route when a contract with exclusive carrier comes to end and the route becomes an open PSO route again. However, a new invitation to tender in accordance with the Regulation also makes it possible for air carriers to be informed and to announce their willingness to operate without exclusivity and compensation.

<sup>(66)</sup> Article 16(10) of Regulation No 1008/2008. See paragraph 94 below.

<sup>(67)</sup> Cf. point 72 above.

<sup>(68)</sup> Article 17(2) of Regulation No 1008/2008.

<sup>(69)</sup> DG MOVE requests the publication via Secretariat-General of the Commission. Member States should not contact directly the Publications Office of the European Union. Also these information notices will be published on the DG MOVE website, in its newsletter and on the dedicated CIRCABC-newsgroup.

<sup>(70)</sup> Article 16(1) of Regulation No 1008/2008.

<sup>(71)</sup> Article 17(4) of Regulation No 1008/2008.

<sup>(72)</sup> Article 17(4) of Regulation No 1008/2008.



96. The Member State must inform the Commission without delay about the results of the public tender <sup>(73)</sup>. There is no template available for this purpose at the moment. The Commission may request the Member State to communicate, within one month, all relevant documents relating to the selection of an air carrier for the PSO <sup>(74)</sup>.

## 8. COMPENSATION AND RELATION TO THE STATE AID RULES

### 8.1. Possibility and amount of compensation

97. The tender procedure aims to award the exclusive right to operate the PSO route to a single air carrier. According to Article 17(8) of the Regulation, the Member State concerned may compensate the air carrier selected by the tender, for satisfying the standards required by the PSO. Even when an air carrier offers to operate the route without compensation, the exclusive right can only be conferred by public tender <sup>(75)</sup>.
98. The compensation may not exceed the amount required to cover the net costs incurred in discharging each PSO, taking account of revenue relating thereto kept by the air carrier and a reasonable profit <sup>(76)</sup>. The term 'reasonable profit' has not been defined in Regulation No 1008/2008. In the context of services of general economic interest, this term is defined in Article 5(5) of Commission Decision 2012/21/EU <sup>(77)</sup> (hereinafter 'SGEI Decision') as the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. According to Article 5(7) of that Decision, '(w)here the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.' <sup>(78)</sup> It seems reasonable to apply these principles by analogy in the context of air transport PSOs under the Regulation. If the profit would exceed the reasonable level, the compensation may also raise issues as regards compliance with State aid law.
99. The amount of compensation paid to the air carrier should be calculated on the basis of effective, actual costs and revenues from operating the route as recorded by the air carrier. In order for these to be transparent and verifiable, the air carrier needs to maintain a sufficiently detailed accounting system to permit the calculation of costs and revenues corresponding to this specific PSO route. In any event, the compensation is limited to the amount displayed in the air carrier's tender.

### 8.2. Relation to State aid rules

100. First, it must be recalled that the State aid assessment takes place independently from the assessment under the provisions of Regulation No 1008/2008. However, if the requirements of Regulation No 1008/2008 are not fulfilled, for example in respect of the definition of the PSO, and where a financial compensation is attached to such a PSO, the requirements of the State aid rules cannot be fulfilled either. While the Commission services concerned work closely together in assessing the PSO schemes, it is important to emphasise that the State aid notifications, where these are required <sup>(79)</sup>, are separate from notification of the PSO scheme to the Commission; at administrative level, the latter is dealt with by DG MOVE whereas any necessary State aid notifications are dealt with by the Commission's Directorate General for Competition (known as 'DG COMP'). Both sets of rules and procedures need to be respected, and complaints to the Commission are possible under both of them.

<sup>(73)</sup> Article 17(9) of Regulation No 1008/2008.

<sup>(74)</sup> Article 17(10) of Regulation No 1008/2008.

<sup>(75)</sup> Article 16(10) of Regulation No 1008/2008.

<sup>(76)</sup> Article 17(8) of Regulation No 1008/2008.

<sup>(77)</sup> Commission Decision of 20 December 2011 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 (OJ L 7, 11.1.2012, p. 3).

<sup>(78)</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/swap\\_rates\\_en.html](http://ec.europa.eu/competition/state_aid/legislation/swap_rates_en.html)

<sup>(79)</sup> It should be recalled that if the Altmark criteria (see footnote 83) or the provisions of SGEI Decision (see footnote 85) are complied with, no such notification is necessary.

### 8.2.1. *Public subsidies granted to compensate for public service obligations*

101. The Regulation applies in the same way whether compensation is granted or not. However, when compensation for PSOs is granted, this must be done in compliance with the Treaty State aid rules (Art. 107-109 TFEU), as interpreted by the Court of Justice, and with the rules contained in the Commission instruments governing State aid for the provision of Services of General Economic Interest (SGEI). Those Commission instruments are:

- (a) a Communication <sup>(80)</sup> that clarifies the key concepts underlying the application of the State aid rules to public service compensation, as well as the conditions (so called 'Altmark <sup>(81)</sup>' criteria'; see below in next point) under which public service compensation does not constitute State aid;
- (b) Commission Regulation (EU) No 360/2012 on 'de minimis' aid for the provision of SGEI (hereinafter: 'Regulation No 360/2012') <sup>(82)</sup>, providing that public service compensation in an amount not exceeding EUR 500 000 over any period of three fiscal years is deemed not to constitute aid, provided that the conditions set out in that Regulation are fulfilled;
- (c) The SGEI Decision that sets out the conditions under which State aid in the form of public service compensation is compatible with the internal market and exempt from the requirement of notification. The scope this Decision covers PSO compensation that is granted to air carriers as regards air links to islands where the average annual traffic does not exceed 300 000 passengers and that complies with Regulation No 1008/2008;
- (d) a Communication on the Framework for State aid in the form of public service compensation <sup>(83)</sup> (hereinafter 'SGEI Framework') that sets out the conditions under which compensation subject to the notification requirement <sup>(84)</sup> may be declared by the Commission compatible with Article 106(2) TFEU;
- (e) a Commission Guide on the application of the EU rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest <sup>(85)</sup>, providing further guidance on the application of the SGEI rules.

### 8.2.2. *The Altmark criteria*

102. In its judgment in the case of *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (Altmark), the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 TFEU, provided that four cumulative criteria are met:

- (1) the recipient undertaking must actually have PSOs to discharge, and those PSOs must be clearly defined;
- (2) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
- (3) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the PSOs, taking into account the relevant receipts and a reasonable profit;
- (4) where the undertaking which is to discharge the PSOs, in a specific case, is not chosen pursuant to a public tender 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.

<sup>(80)</sup> 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).

<sup>(81)</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*.

<sup>(82)</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 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 114, 26.4.2012, p. 8).

<sup>(83)</sup> Communication from the Commission on European Union framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

<sup>(84)</sup> That is when the public service compensation does not meet the Altmark criteria, is not covered by the SGEI de minimis regulation and is not block exempted under the Decision.

<sup>(85)</sup> SWD(2013) 53 final/2, available at: [http://ec.europa.eu/competition/state\\_aid/overview/new\\_guide\\_eu\\_rules\\_procurement\\_en.pdf](http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf)

103. Where those four criteria are met, compensation for PSOs does not constitute State aid and a notification of State aid to the Commission is not needed in this case (however, as mentioned earlier, the notification and publication requirements of Regulation No 1008/2008 remain applicable)<sup>(86)</sup>. It is primarily for the national authorities concerned to assess whether these four criteria are fulfilled by any compensation granted pursuant to Article 17(8) of Regulation No 1008/2008.
104. The provisions of Regulation No 1008/2008 have been modelled on the criteria mentioned above: Article 17(3)(a) covers the first Altmark criterion, Article 17(3)(e) the second, Article 17(8) the third and, with regard to the fourth Altmark criterion, Article 16(10) provides for the use of a tender procedure. While Article 16(10) does not further qualify the tender procedure, according to the ruling in *Altmark*, the procedure chosen should lead to the provision of the service at the least cost to the community. Therefore, when applying the fourth Altmark criterion, if there is only one bid submitted in the tender procedure, it cannot normally be presumed that this criterion has been fulfilled, unless (i) there are particularly strong safeguards in the design of the procedure ensuring the provision of the service at the least cost to the community or (ii) the Member State concerned verifies through additional means that the outcome corresponds to the least cost to the community. This means that if the conditions of Regulation No 1008/2008 are complied with, in light of the explanations given above, it can in principle be considered that there is no State aid.
105. In case it cannot be excluded that, in view of the criteria established in *Altmark*, there may be State aid, the Member State concerned should ensure in another manner that the State aid rules are complied with. This case may for example arise where, under the emergency conditions of Article 16(12) of the Regulation, the air carrier is selected without an open tender procedure, by mutual agreement between Member State authorities and the air carrier. In such cases the Member State should check if the amount of compensation does not imply the provision of State aid on the basis of the Altmark criteria or Regulation No 360/2012. In the opposite case, it is also possible that the aid is compatible with the internal market under the SGEI Decision, in which case no notification is required, or that it needs to be notified, but can be declared compatible by the Commission pursuant to Article 106(2) TFEU if the conditions of the SGEI Framework are met.

## 9. THE EMERGENCY PROCEDURE

106. During the course of an exclusive concession, the EU air carrier that was selected through the public tender may be forced to terminate the provision of the services at short notice, for example because of financial insolvency. Under these circumstances, where necessary, Article 16(12) of the Regulation allows for an emergency procedure to avoid an interruption of air the services concerned. The procedure only applies to the sudden and unexpected interruption of air services on a PSO route where the services were already being carried out by an air carrier selected through a public tender. It does not apply where national procedures for modifying PSOs or renewing tenders have taken an unexpectedly long time<sup>(87)</sup>.
107. The emergency procedure cannot be applied *inter alia* in the following situations:
- an airline was operating the route without exclusivity (open PSO);
  - the interruption of air services is due to the end of the contract (as this interruption of services is predictable and therefore not sudden). A new invitation to tender should have been published at least six months before the start of the new concession period;
  - the interruption of air services follows an advance notice of at least six months given by the operating air carrier (the interruption of services is not sudden or unpredictable and there is enough time to launch a new tender without the emergency procedure)<sup>(88)</sup>.
108. In case of sudden interruption of service by the air carrier selected in accordance with the before-mentioned tender procedure, the Member State may select a different EU air carrier to operate the PSO for a period of up to

<sup>(86)</sup> For instance, it should be underlined that the first Altmark criterion, as well as the SGEI Decision and the SGEI Framework all require the existence of a 'genuine' Service of General Economic Interest, which in the context of air transport implies that Art. 16 and 17 of Regulation No 1008/2008 must be complied with.

<sup>(87)</sup> The Commission has noted a more widespread use of the emergency procedures and resorting to national award procedures in cases that may not in fact qualify as emergencies. This is tendency that it intends to monitor and control closely and address it where necessary.

<sup>(88)</sup> Article 17(4) of Regulation No 1008/2008 and point 97 above.

seven months if the amount of compensations remains in line with Article 17(8) of the Regulation<sup>(89)</sup> and if the selection of the new air carrier is made among EU air carriers in compliance with the principles of transparency and non-discrimination. A new invitation to tender for a regular contract period shall also be launched immediately, which is also implied by the interaction of the time limits explained immediately below.

109. The seven-month period is to be counted from the start of the operations by the newly selected air carrier. It cannot be renewed. Indeed, as the invitation to tender aims for the renewal of an already existing exclusive right, the invitation to tender has to be launched at least six months in advance in accordance with Article 17(4) of the Regulation.
110. The principles of transparency and non-discrimination for the selection of the air carrier should be respected, taking into account the particular circumstances. Indeed, the emergency procedure applies when not enough time is available to launch a formal tender because a new air carrier has to be found expeditiously. Still, the authorities should contact as quickly as possible several air carriers likely to be interested in flying the route concerned. This could typically be air carriers already active in the region and/or having participated in the last tender procedure.
111. The Member State concerned shall without delay inform the Commission and other Member States concerned of the emergency procedure and of its reasons<sup>(90)</sup>. It is recommended that the Member State also informs the Commission on any contacts with other air carriers and on the outcome of these contacts. The Commission may also arrange for the publication of a notice in the *Official Journal of the European Union*, although such publication is not required in the case of the emergency procedure.
112. At the request of a Member State, or on its own initiative, the Commission may, in accordance with the relevant advisory procedure suspend the emergency procedure if it considers after its assessment that it does not meet the requirements of the emergency procedure set out in the Regulation or is otherwise contrary to EU law<sup>(91)</sup>.

#### 10. PSO TENDER PROCEDURES AND RELATION TO THE PROCUREMENT RULES

113. Procedures in Regulation No 1008/2008 always need to be applied when organising tenders for procurement of air services. When the competent authority of a Member State concludes a public service contract, it has to respect the applicable procurement rules. On 26 February 2014, the European Parliament and the Council adopted Directives 2014/24/EU and 2014/25/EU<sup>(92)</sup> (hereinafter 'Directive 2014/24' and 'Directive 2014/25'), which lay down the rules concerning public service contracts.
114. On the same date, the European Parliament and the Council adopted a new Directive 2014/23/EU on the award of service concession contracts<sup>(93)</sup> (hereinafter 'Directive 2014/23') and according to the Commission's experience, most of contracts awarded in application of Article 17 of the Regulation No 1008/2008 constitute 'service concessions' within the meaning of this new Directive. In particular, by means of such contract the competent authority entrusts the provision of the air services to one air carrier for a certain period of time. The air carrier is obliged to provide the transport service stipulated in the contract, normally against a financial compensation from the authority<sup>(94)</sup>. The air carrier in principle bears the operating risk (if this is not the case, such a contract qualifies in principle as a public contract within the meaning of Directives 2014/24 or Directive 2014/25), encompassing the risk related to the demand for his transport services, since the competent authorities usually do not guarantee in the contract that the air carrier would recoup all the investments made or the costs incurred in performing his contractual obligations<sup>(95)</sup>. The qualification as a concession is important, as Article 10(3) of Directive 2014/23 on the award of concession contracts states explicitly that it shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation No 1008/2008. In the rare cases where the arrangement could be qualified as a public service contract which is covered by Directive 2014/24 or Directive 2014/25, as the case may be, then the applicable Directive would in principle apply simultaneously with Regulation No 1008/2008, which latter, as *lex specialis*, takes precedence in case of conflict.

<sup>(89)</sup> As always, State aid rules have equally to be complied with.

<sup>(90)</sup> Article 16(12), last subparagraph, first sentence, of Regulation No 1008/2008.

<sup>(91)</sup> *Ibidem*, second sentence.

<sup>(92)</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

<sup>(93)</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

<sup>(94)</sup> See also Case C-205/99, *Análir v Administración General del Estado* [2001] ECR I-1271, paragraphs 63 and 65.

<sup>(95)</sup> The difference in the level of risk would also have an effect on the definition of the reasonable profit.

## 11. INVESTIGATION AND DECISION-MAKING POWERS OF THE COMMISSION

115. Member States must take all necessary measures to ensure that any decision (including award decisions) on PSO can be reviewed effectively and as soon as possible, on the grounds of an infringement of EU law or national rules implementing that law <sup>(96)</sup>.
116. In accordance with Article 18(1) of the Regulation, the Commission can request the Member State to communicate, within two months, a justification document for the PSO and its compliance with the criteria mentioned in Article 16, analysis of the economy of the region, analysis of the proportionality between the envisaged obligations and the economic development objectives and finally an analysis of existing air services, if any, and of the other modes of transport available which could be considered a substitute for the envisaged imposition. The right to receive the documents and analysis referred to in Article 18(1)(a)-(d) allows the Commission to be informed on the PSO and on its justification. These documents produced by the Member State concerned may also clarify the background of the PSO and its adequacy under the Regulation.
117. The Commission shall undertake an investigation at the request of a Member State or on its own initiative under Article 18(2) of the Regulation.
118. According to Article 18(2), the Commission shall take a decision <sup>(97)</sup>, on the basis of all relevant factors, on whether Articles 16 and 17 shall continue to apply in respect of the route concerned. The aim is to ensure the proper application of the rules relevant both to the imposition of the PSO as such and to the limitation of access under Article 16(9) and the amount of any compensation granted.
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<sup>(96)</sup> Article 18(1) of Regulation No 1008/2008. Whether this is done by an administrative body or court, is for the Member States to decide.

<sup>(97)</sup> Applying the relevant advisory procedure in accordance with Article 18(2) of Regulation No 1008/2008.

## ANNEX I

**Questionnaire developed by DG COMP and DG MOVE for notification of PSO to the Commission****Notification of Public Service Obligations (PSO) imposed on the basis of Articles 16 and 17 of Regulation (EC) No 1008/2008 <sup>(1)</sup>**

\* Please attach this form to those that have to be sent to DG MOVE to be published in EU Official Journal.

\* The form should be sent to MOVE-PSO@ec.europa.eu

\* Pages 1 and 2 should be sent together with the notification of the imposition of the PSO.

\* Page 3 should be sent together with the notification of the call for tenders.

Information on the region		
Region served by the PSO <sup>(2)</sup>		
Type of route	Is this region peripheral or is it a development region? Is the route a thin route considered vital for the economic and social development of the region served by the airport?	
Justification relating to the needs of the region <sup>(3)</sup>		
Information on the route(s)		
Since when has the PSO been imposed on the route <sup>(4)</sup> ?		
Total traffic on the route during the last two years (expressed in number of passengers)		
Total traffic <sup>(5)</sup> at the airports served during the last two years	Destination airport (serving the concerned region)	
	Origin airport	
Information on alternative air services		
Alternative airports to the destination/ origin airport <sup>(6)</sup>		

<sup>(1)</sup> 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).

<sup>(2)</sup> Please indicate in particular the cities to be served by the PSO routes.

<sup>(3)</sup> Please indicate the reasons mentioned by the Article 16(1) and (3)(a) of Regulation No 1008/2008 and which justify the need to impose the PSO.

<sup>(4)</sup> Please attach the text of the last imposition or modification of the PSO on the basis of Regulation No 1008/2008 or, if applicable, of Regulation 2408/92.

<sup>(5)</sup> Passengers at departure and arrival.

<sup>(6)</sup> This list should include at least the airports situated within a 150 km radius or a 1h 30 minutes isochrones from the city/cities of the concerned region.

## Information on alternative air services

Description of alternative air services (frequencies, schedules, stopovers, seasonality)	
Comparison of travel times between the air service covered by PSO and alternative services	
Conclusion on the absence of a valid alternative for passengers	

## Information on the alternative modes of transport

Other modes of transport available (please tick)	Maritime?		Rail?		Road?	
Description of the services offered by alternative modes of transport (frequencies, schedules, stopovers, seasonality)						
Comparison of the travel times between the air service covered by PSO and alternative services						
Conclusion on the absence of a valid alternative for passengers						

## Information on the PSO

Brief presentation of the PSO in terms of fares, schedules, frequencies and capacity.	
How have these service aspects been established?	

## Information on the call for tenders

Specify if the call for tenders concerns several routes for reasons of operational efficiency	
Specify if the call for tenders aims to offer exclusivity without financial compensation. If negative, please explain why this option is not appropriate.	
Specify if financial compensation has been offered and the amount	
Specify how the compensation offered through the call for tenders and the terms of reference has been calculated.	

*Information concerning State aid*

The Commission services wish to draw the attention of national authorities to the fact that compliance with the requirements of Regulation No 1008/2008 is without prejudice to the assessment against State aid rules of a possible financial compensation granted pursuant to Article 17 (8) of Regulation No 1008/2008 (see in particular paragraph 68 of Communication from the Commission of 20 December 2011 on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest <sup>(1)</sup>).

In particular, the compliance of such a compensation with Articles 17 (3), 17(8) and 16(10) of Regulation No 1008/2008 is not sufficient to consider that the four cumulative conditions of the Altmark ruling <sup>(2)</sup> are fulfilled. It is for the national authorities to assess whether these four conditions are fulfilled by any compensation granted pursuant to Article 17 (8) of Regulation No 1008/2008. If this is not the case, the compensation in question constitutes State aid (*de minimis* aid as defined in Regulation 360/2012 is regarded as not fulfilling all the criteria of Article 107 (1) of the TFEU and is thus not subject to the notification obligation laid down in Article 108 (3) of the Treaty <sup>(3)</sup>).

Such State aid may be declared compatible and exempted from the notification obligation if the criteria of the Commission Decision on State aid in the form of public service compensation <sup>(4)</sup> are met. In the opposite case, the notification obligation laid down in Article 108 (3) of the Treaty applies. The compensation may then be declared compatible with the internal market on the basis of the European Union framework for State aid in the form of public service compensation <sup>(5)</sup>. In order to limit the number of notifications, the Member States may notify aid schemes instead of individual aid measures.

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<sup>(1)</sup> OJ C 8, 11.1.2012, p. 4.

<sup>(2)</sup> Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg and Nahverkehrsgesellschaft Altmark GmbH*, paragraphs 87 to 93. The four conditions are the following: 1. the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. 2. 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. 3. 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 for discharging those obligations. 4. where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means 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.

<sup>(3)</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 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 114, 26.4.2012, p. 8).

<sup>(4)</sup> Commission Decision of 20 December 2011 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 (OJ L 7, 11.1.2012, p. 3). It concerns for instance routes to islands on which the annual traffic during the two preceding financial years did not exceed 300 000 passengers.

<sup>(5)</sup> OJ C 8, 11.1.2012, p. 15.



## ANNEX II

**Extract of provisions concerning PSOS in Regulation No 1008/2008****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)**

Recitals 11 – 12 and Articles 16 – 18:

Whereas:

- (11) To take into account the special characteristics and constraints of the outermost regions, in particular their remoteness, insularity and small size, and the need to properly link them with the central regions of the Community, special arrangements may be justified regarding the rules on the period of validity of the contracts for public service obligations covering routes to such regions.
- (12) The conditions under which public service obligations may be imposed should be defined clearly in an unambiguous way, while the associated tender procedures should allow a sufficient number of competitors to take part in the tenders. The Commission should be able to obtain as much information as necessary to be able to assess the economic justifications for public service obligations in individual cases.

*Article 16***General principles for public service obligations**

1. A Member State, following consultations with the other Member States concerned and after having informed the Commission, the airports concerned and air carriers operating on the route, may impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves. That obligation shall be imposed only to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest.

The fixed standards imposed on the route subject to that public service obligation shall be set in a transparent and non-discriminatory way.

2. In instances where other modes of transport cannot ensure an uninterrupted service with at least two daily frequencies, the Member States concerned may include in the public service obligation the requirement that any Community air carrier intending to operate the route gives a guarantee that it will operate the route for a certain period, to be specified, in accordance with the other terms of the public service obligation.

3. The necessity and the adequacy of an envisaged public service obligation shall be assessed by the Member State(s) having regard to:

- (a) the proportionality between the envisaged obligation and the economic development needs of the region concerned;
- (b) the possibility of having recourse to other modes of transport and the ability of such modes to meet the transport needs under consideration, in particular when existing rail services serve the envisaged route with a travel time of less than three hours and with sufficient frequencies, connections and suitable timings;
- (c) the air fares and conditions which can be quoted to users;
- (d) the combined effect of all air carriers operating or intending to operate on the route.

4. When a Member State wishes to impose a public service obligation, it shall communicate the text of the envisaged imposition of the public service obligation to the Commission, to the other Member States concerned, to the airports concerned and to the air carriers operating the route in question.

The Commission shall publish an information notice in the *Official Journal of the European Union*:

- (a) identifying the two airports connected by the route concerned and possible intermediate stop-over point(s);
- (b) mentioning the date of entry into force of the public service obligation; and

(c) indicating the complete address where the text and any relevant information and/or documentation related to the public service obligation shall be made available without delay and free of charge by the Member State concerned.

5. Notwithstanding the provisions of paragraph 4, with respect to routes where the number of passengers expected to use the air service is less than 10 000 per annum, the information notice on a public service obligation shall be published either in the *Official Journal of the European Union* or in the national official journal of the Member State concerned.

6. The date of entry into force of a public service obligation shall not be earlier than the date of publication of the information notice referred to in the second subparagraph of paragraph 4.

7. When a public service obligation has been imposed in accordance with paragraphs 1 and 2 the Community air carrier shall be able to offer seat-only sales provided that the air service in question meets all the requirements of the public service obligation. Consequently that air service shall be considered as a scheduled air service.

8. When a public service obligation has been imposed in accordance with paragraphs 1 and 2, any other Community air carrier shall at any time be allowed to commence scheduled air services meeting all the requirements of the public service obligation, including the period of operation that may be required in accordance with paragraph 2.

9. Notwithstanding paragraph 8, if no Community air carrier has commenced or can demonstrate that it is about to commence sustainable scheduled air services on a route in accordance with the public service obligation which has been imposed on that route, the Member State concerned may limit access to the scheduled air services on that route to only one Community air carrier for a period of up to four years, after which the situation shall be reviewed.

This period may be up to five years if the public service obligation is imposed on a route to an airport serving an outermost region, referred to in Article 299(2) of the Treaty.

10. The right to operate the services referred to in paragraph 9 shall be offered by public tender in accordance with Article 17, either singly or, in cases where justified for reasons of operational efficiency, for a group of such routes to any Community air carrier entitled to operate such air services. For reasons of administrative efficiency, a Member State may issue a single invitation to tender covering different routes.

11. A public service obligation shall be deemed to have expired if no scheduled air service has been operated during a period of 12 months on the route subject to such obligation.

12. In case of sudden interruption of service by the Community air carrier selected in accordance with Article 17, the Member State concerned may, in case of emergency, select by mutual agreement a different Community air carrier to operate the public service obligation for a period up to seven months, not renewable, under the following conditions:

- (a) any compensation paid by the Member State shall be made in compliance with Article 17(8);
- (b) the selection shall be made among Community air carriers in compliance with the principles of transparency and non-discrimination;
- (c) a new call for tender shall be launched.

The Commission and the Member State(s) concerned shall be informed without delay of the emergency procedure and of its reasons. At the request of a Member State, or on its own initiative, the Commission may, in accordance with the procedure referred to in Article 25(2) suspend the procedure if it considers after its assessment that it does not meet the requirements of this paragraph or is otherwise contrary to Community law.

#### Article 17

##### **Public tender procedure for public service obligation**

1. The public tender required in Article 16(10) shall be conducted according to the procedure set out in paragraphs 2 to 10 of this Article.

2. The Member State concerned shall communicate the entire text of the invitation to tender to the Commission except where, in accordance with Article 16(5), it has made the public service obligation known through the publication of a notice in its national official journal. In such case the tender shall also be published in the national official journal.

3. The invitation to tender and the subsequent contract shall cover, inter alia, the following points:

- (a) the standards required by the public service obligation;
- (b) rules concerning amendment and termination of the contract, in particular to take account of unforeseeable changes;
- (c) the period of validity of the contract;

- (d) penalties in the event of failure to comply with the contract;
  - (e) objective and transparent parameters on the basis of which compensation, if any, for the discharging of the public service obligations shall be calculated.
4. The Commission shall make the invitation to tender known through an information notice published in the *Official Journal of the European Union*. The deadline for submission of tenders shall not be earlier than two months after the day of publication of such an information notice. In case the tender concerns a route to which the access had already been limited to one carrier in accordance with Article 16(9), the invitation to tender will be published at least six months before the start of the new concession in order to assess the continued necessity of the restricted access.
5. The information notice shall provide the following information:
- (a) Member State(s) concerned;
  - (b) air route concerned;
  - (c) period of validity of the contract;
  - (d) complete address where the text of the invitation to tender and any relevant information and/or documentation related to the public tender and the public service obligation shall be made available by the Member State concerned;
  - (e) deadline for submission of tenders.
6. The Member State(s) concerned shall communicate without delay and free of charge any relevant information and documents requested by a party interested in the public tender.
7. The selection among the submissions shall be made as soon as possible taking into consideration the adequacy of the service, including the prices and conditions which can be quoted to users, and the cost of the compensation required from the Member State(s) concerned, if any.
8. The Member State concerned may compensate an air carrier, which has been selected under paragraph 7, for adhering to the standards required by a public service obligation imposed under Article 16. Such compensation may not exceed the amount required to cover the net costs incurred in discharging each public service obligation, taking account of revenue relating thereto kept by the air carrier and a reasonable profit.
9. The Commission shall be informed in writing and without delay of the results of the public tender and of the selection by the Member State including the following information:
- (a) numbers, names and corporate information of tenderers;
  - (b) operational elements contained in the offers;
  - (c) compensation requested in the offers;
  - (d) name of the selected tenderer.
10. At a request of a Member State or on its own initiative, the Commission may request Member States to communicate, within one month, all relevant documents relating to the selection of an air carrier for the operation of a public service obligation. In case the requested documents are not communicated within the deadline, the Commission may decide to suspend the invitation to tender in accordance with the procedure referred to in Article 25(2).

#### Article 18

##### **Examination of public service obligations**

1. Member States shall take all necessary measures to ensure that any decision taken under Articles 16 and 17 can be reviewed effectively and, in particular, as soon as possible on the grounds that such decisions have infringed Community law or national rules implementing Community law.

In particular, at a request of a Member State or on its own initiative, the Commission may request Member States to communicate, within two months:

- (a) a document justifying the need for the public service obligation and its compliance with the criteria mentioned in Article 16;
- (b) an analysis of the economy of the region;
- (c) an analysis of the proportionality between the envisaged obligations and the economic development objectives;
- (d) an analysis of the existing air services, if any, and of the other modes of transport available which could be considered a substitute for the envisaged imposition.

2. At the request of a Member State which considers that the development of a route is being unduly restricted by the terms of Articles 16 and 17, or on its own initiative, the Commission shall carry out an investigation and, within six months of receipt of the request and in accordance with the procedure referred to in Article 25(2), shall take a decision on the basis of all relevant factors on whether Articles 16 and 17 shall continue to apply in respect of the route concerned.

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