

VALSTYBĖS PAGALBA — AIRIJA

Valstybės pagalba C 31/07 (ex NN 17/07) — Valstybės pagalba *Córas Iompair Éireann* autobusų bendrovės (*Dublin Bus* ir *Irish Bus*)

Kvietimas teikti pastabas pagal EB sutarties 88 straipsnio 2 dalį

(Tekstas svarbus EEE)

(2007/C 217/10)

Siųsdama 2007 m. liepos 18 d. raštą, pateikiamą originalo kalba po šios apžvalgos, Komisija Airijai pranešė apie savo sprendimą pradėti EB sutarties 88 straipsnio 2 dalyje numatytas procedūras dėl pirmiau minėtos valstybės pagalbos arba priemonių.

Suinteresuotosios šalys savo pastabas dėl valstybės pagalbos, kurios atžvilgiu Komisija pradeda procedūrą, gali pateikti per vieną mėnesį nuo šios santraukos ir toliau pateikiamo rašto paskelbimo dienos adresu:

Commission européenne
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Šios pastabos bus perduotos Airijai. Pastabas teikianti suinteresuotoji šalis gali reikalausti laikyti jos tapatybę paslapyje ir raštu nurodo tokio reikalavimo priežastis.

SANTRAUKOS TEKSTAS

PAGALBOS ĮVERTINIMAS

Nagrinėjamas laikotarpis

PROCEDŪRA

Irish Coach Tourism and Transport Council (Airijos autobusų transporto ir turizmo taryba) pateikė skundą dėl galbūt neteisėtos valstybės pagalbos, kurią Airijos vyriausybė suteikė *Córas Iompair Éireann* (toliau — CIÉ, Airijos Transporto valdyba) autobusų bendrovėms *Irish Bus* ir *Dublin Bus* dotacijomis pagal valstybinį plėtros planą ir metinėmis dotacijomis veiklai remti.

PAGALBOS APRAŠYMAS

Įtariamoms neteisėtoms pagalbos gavėjai yra *Irish Bus* ir *Dublin Bus*. Abi autobusų bendrovės yra ribotos atsakomybės. Jos visiškai priklauso CIÉ ir Airijoje teikia tarpmiestinio, miesto, priemiestinio ir rajoninio autobusų transporto paslaugas. *Irish Bus* taip pat teikia mokyklinio transporto paslaugas.

Airijos valdžios institucijos remia *Irish Bus* ir *Dublin Bus* vykdomą viešojo autobusų transporto veiklą metinėmis dotacijomis, finansuoja naujų autobusų įsigijimą ir teikia dotacijas investicijoms į susijusią infrastruktūrą, kuria negali naudotis visi vežėjai vienodomis ir nediskriminuojančiomis sąlygomis. Dotacijos investicijoms buvo panaudotos gerinti keleiviams skirtą infrastruktūrą, pavyzdžiui, *Irish Bus* autobusų stotis bei autobusų stoteles ir *Dublin Bus* garažus bei autobusų parką.

Nagrinėdama kompensacines išmokas už su viešąja paslauga susijusius išpareigojimus, kurios iš pradžių buvo grindžiamos tik 1950 ir 1986 m. Transporto įstatymais, Komisija pažymi, kad 2003 m. buvo smarkiai pakeista kompensavimo sistema, įvedant kasmetinius susitarimo memorandumus, kuriuose nurodoma teiktinų paslaugų kokybė ir jų kiekis, o taip pat tikslus mokėtinos kompensacijos dydis. Todėl Komisija mano, kad išmokos už su viešąja paslauga susijusius išpareigojimus pagal Tarybos reglamento (EB) Nr. 659/1999/EB 1c straipsnį nuo 2003 m. skiriamos kaip nauja pagalba, nes susitarimo memorandumai iš esmės keičia ankstesnį kompensavimo būdą.

Apie išmokas, mokamas pagal valstybinį plėtros planą, Komisija mano, kad 2000–2006 m. ir 2007–2017 m. valstybiniai plėtros planai iš esmės pakeitė 1993–1999 m. valstybinį plėtros planą, todėl pagal Reglamento (EB) Nr. 659/1999/EB 1c straipsnį jos laikytinos nauja pagalba.

Esama pagalba

Komisija mano, kad Airijos valdžios institucijos dar nėra pateikusias pakankamai informacijos, pagal kurią būtų galima daryti išvadą, kad visi *Altmark* sprendimu⁽¹⁾ nustatyti kriterijai yra įgyvendinti. Remdamasi Airijos valdžios institucijų pateikta informacija, Komisija negali atmesti galimybių, kad pagal EB sutarties 87 straipsnio 1 dalį ši priemonė laikytina valstybės pagalba.

⁽¹⁾ Byla C-280/00 *Altmark TransGmbH* ir *Regierungspräsidium Magdeburg* [2003 m.] Rink. I-7747.

Pagalbos suderinamumas

- a) *Kompensacijos už autobusų paslaugas, teikiamas pagal „su viešąja paslauga susijusius išpareigojimus“ ir mokyklinio transporto programą.*

Kadangi *Irish Bus* ir *Dublin Bus* teikia paslaugas pagal grafiką bei kitokias autobusų paslaugas, jos yra įmonės, kurios teikia kelių transporto paslaugas. Todėl *Irish Bus* ir *Dublin Bus* taikomas Tarybos reglamentas (EEB) Nr. 1191/69.

Airijos valdžios institucijų teigimu, su viešąja paslauga susiję išpareigojimai CIĖ ir jos dukterinėms įmonėms buvo skirti Transporto įstatymais, o konkrečiai 1950 m. Transporto įstatymu bei 1986 m. Transporto (CIĖ reorganizavimo) įstatymu. Nuo 2003 m. Airijos valdžios institucijų *Dublin Bus* ir *Irish Bus* įmonėms skiriamų metinių kompensacijų dydžiui ir jų skyrimo sąlygoms taikomi susitarimo memorandumai. Airijos valdžios institucijos pareiškė, kad susitarimo su *Dublin Bus* ir *Irish Bus* memorandumų nelaiko viešųjų paslaugų sutartimis. Remdamasi šiuo metu turima informacija, Komisija negali atmesti prielaidos, kad susitarimo memorandumai turėtų būti laikomi viešųjų paslaugų sutartimis. Todėl neaišku, ar valstybės pagalbą, skirtą siekiant kompensuoti su viešąja paslauga susijusius išpareigojimus reiktų įvertinti pagal to reglamento II, III ir IV skirsnius, kuriuose yra 3–13 straipsniai, ar pagal V skirsnį, kuriame yra 14 straipsnis.

Pagal Reglamento (EEB) 1191/69 10 straipsnį kompensacijų dydis neturi viršyti išpareigojimo vykdymo sąnaudų ir dėl išpareigojimo vykdymo gautų pajamų skirtumo. Todėl Komisija turi patikrinti, ar Airijos valdžios institucijų mokamos kompensacijos neviršija su viešąja paslauga susijusių išpareigojimų vykdymo sąnaudų ir pajamų, gautų parduodant autobuso bilietus skirtumo. Pagal šiuo metu turimą informaciją, Komisijai kilo įtarimų, kad *Irish Bus* ir *Dublin Bus* galėjo būti sumokėta per didelės kompensacijos. Abi CIĖ dukterinės įmonės teikia ir paslaugas, kurių neįmanoma pavadinti su viešąja paslauga susijusiais išpareigojimais (kitais – „komercinės paslaugos“), ir kurių teikimui gali naudoti valstybės finansuojamus autobusus. Todėl Komisija negali daryti išvados, kad kompensacijos teikiamos tik už su viešąja paslauga susijusių išpareigojimų vykdymą. Šiuo metu Komisija neturi pakankamai informacijos, kad galėtų nustatyti, ar Airijos valdžios institucijos apskaičiavo kompensaciją už tarifinių išpareigojimų vykdymą pagal 11–13 straipsnių nuostatas.

Komisijai kyla abejonių, ar dabartinės priemonės atitinka Reglamento (EEB) 1191/69 nuostatas, jeigu jos būtų laikomos kompensacija už su viešąja paslauga susijusių išpareigojimų vykdymą.

- b) *Infrastruktūros finansavimas*

Airijos valdžios institucijos teigia, kad „pagal Ekonominės ir socialinės infrastruktūros veiklos programos transporto prioritetą CIĖ

įmonėms suteikta finansinei pagalbai taikoma EB sutarties 73 straipsnio (buvęs 77 straipsnis) bendroji išimtis, susijusi su poreikiu koordinuoti transportą ir su viešąja paslauga susijusius išpareigojimus. Taigi Dublino viešojo transporto ir valstybinio viešojo transporto priemonės atitinka valstybės pagalbos taisykles.“ Šiuo atveju Komisijai kyla abejonių, ar autobusų stotys, autobusų stotelės, garažai ir aptarnavimo statiniai yra su viešąja paslauga susiję išpareigojimais ar šioms priemonėms reikalinga sudaryti viešojo paslaugų pirkimo sutartis.

Komisija galėjo įvertinti dotacijų, skirtų investicijoms infrastruktūrai gerinti *Irish Bus* ir *Dublin Bus* atitiktį pagal teisinį pagrindą, nurodytą EB sutarties 87 straipsnio 3 dalies c punkte, kuriame teigiama, kad: „pagalba, skirta tam tikros ekonominės veiklos rūšių arba tam tikrų ekonomikos sričių plėtrai skatinti, jei ji netrikdo prekybos sąlygų taip, kad prieštarautų bendram interesui“, todėl jas galima laikyti suderinamomis su bendrąja rinka. Tačiau Komisijai kyla abejonių, ar minėtos priemonės neprieštarauja viešajam interesui ir kad šiuo atveju, minėti kriterijai buvo įgyvendinti.

- c) *Mokymų, skirtų informuotumui apie negalią gerinti, finansavimas*

Airijos valdžios institucijos nepateikė pakankamai informacijos apie šios priemonės metodiką, trukmę, biudžetą, intensyvumą ir kitas sąlygas, kad Komisija galėtų pareikšti savo nuomonę. Remdamasi turima informacija, Komisija šiuo metu negali daryti išvados, kad yra įvykdytos visos Komisijos reglamento (EB) Nr. 68/2001 nuostatos, ir todėl taiko EB sutarties 88 straipsnio 3 dalies nuostatas apie reikalavimo informuoti išimtis.

IŠVADOS

Atsižvelgdama į tai, kas pirmiau išdėstyta, Komisija abejoja, ar Airijos valdžios institucijų priemonės *Irish Bus* ir *Dublin Bus* naudai atitinka Reglamentą (EEB) Nr. 1191/69. Mokymų, skirtų informuotumui apie negalią gerinti, finansavimo atveju, Komisija negali patikrinti, ar atskira pagalba ar pagalbos programa atitinka visas Reglamento (EB) Nr. 68/2001 nuostatas, ir todėl taiko EB sutarties 88 straipsnio 3 dalies nuostatas apie reikalavimo informuoti išimtis. Todėl pagal Reglamento (EB) Nr. 659/1999 4 straipsnio 4 dalį Komisija nusprendė pradėti oficialią tyrimo procedūrą. Komisija procedūrą baigs priimdama galutinį sprendimą.

Atsižvelgdama į pirmiau išdėstytus svarstymus, Komisija, veikdama EB sutarties 88 straipsnio 2 dalyje nustatyta tvarka, prašo Airijos pateikti savo pastabas ir suteikti visą informaciją, kuri gali būti naudinga pagalbai įvertinti. Komisija taip pat prašo Airijos pateikti konkrečią su tuo susijusią informaciją.

Taigi Komisija mano, kad visas suinteresuotąsias šalis, susijusias su oficialia tyrimo procedūra, būtina paprašyti pateikti savo pastabas pagal EB sutarties 88 straipsnio 2 dalį.

Remiantis Reglamento (EB) Nr. 659/1999 14 straipsniu, bet kuri neteisėtai suteikta pagalba gali būti išieškota iš gavėjo.

RAŠTO TEKSTAS

„(1) The Commission wishes to inform Ireland that, having examined the information supplied by the complainant and by your authorities on the measures referred to above, it has decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty.

A. PROCEDURE

- (2) The *Irish Coach Tourism and Transport Council* (hereinafter: „the complainant“) has by letter of 8 December 2005, registered by the Commission on 19 January 2006 (under the reference A/11401) submitted a complaint concerning alleged unlawful State aid granted to the *Córas Iompair Éireann* (hereinafter: „CIÉ“, Irish Transport Board) bus companies *Irish Bus* and *Dublin Bus* by the Irish government in the form of grants under the National Development Plan and in the form of annual operating grants. This complaint has been registered under the number CP 23/2006.
- (3) The complainant provided additional information by e-mails of 7 March 2006 (registered by the Commission on the same date under reference A/15845), 13 March 2006 (registered by the Commission on the same date under reference A/16333 and A/16337) and 27 March 2006 (registered by the Commission on the same date under reference A/17594).
- (4) By letter of 19 April 2006 (under the reference D(2006) 208349) the Commission informed the Irish authorities about the subject of the complaint and requested information on the issues raised by this complaint.
- (5) By letter of 1 May 2006, registered by the Commission on 11 May 2006 (under the reference A/21583) the complainant sent additional information.
- (6) The Irish authorities requested by fax of 12 May 2006 the prolongation of the deadline for the response to the request for sufficient information of 19 April 2006. By letter of 29 May 2006 (reference D(2006) 211124) the Commission granted the prolongation of the deadline for the response until 27 June 2006.
- (7) The complainant provided by e-mail of 24 July 2006 (registered by the Commission on the same date under the reference A/28165) additional information concerning this case.
- (8) As the Commission had not received any answer or a further request for the extension of the deadline by 20 July 2006, the Commission reminded the Irish authorities by letter of 25 July 2006 (reference D(2006) 216266) of the provisions of the Article 5(2) of Council Regulation (EC) No 659/1999 to provide sufficient information on the issues raised by the complainant.

(9) The Irish authorities by letter of 27 July 2006 (registered by the Commission on 1 August 2006 under the reference A/28824) and e-mail of 31 July 2006 (registered by the Commission on 1 August 2006 under the reference A/28913) provided their observations on the issues raised by the complainant.

- (10) The European Commission requested by letter of 3 August 2006 (reference 216944) additional information on the subject matter. The Irish authorities asked by e-mail of 5 September 2006, registered by the Commission on 11 September 2006 (under the reference A/31749), for a prolongation of the deadline for the response to the letter of 3 August 2006. By letter of 13 September 2006 the Commission extended the deadline for the response to the request for additional information until 27 October 2006.
- (11) By e-mail of 2 October 2006, registered by the Commission on 4 October 2006 (under the reference A/33979) the complainant sent additional information on the subject matter.
- (12) The Irish authorities provided additional information by letter of 30 October 2006, registered by the Commission on 6 November 2006 (under the reference A/36329). On 18 April 2007 a meeting took place between the Irish authorities and the Commission concerning the issue in question.
- (13) The complainant provided by letter of 18 May 2007 additional information concerning this case. By letter of 21 May 2007, registered by the Commission on 30 May 2007 (under the reference A/33201) the Irish authorities provided additional information.

B. DESCRIPTION OF THE FACTS

B.1. Complainant

- (14) The complainant, *Coach Tourism and Transport Council*, is the representative body for independent private transport companies that operate transport services (including long distance national and international scheduled services, commuter, rural and urban transport services, school transport services, incoming tourism, out bond tourism and general hire) in Ireland on a commercial basis.

B.2. The allegations made by the complainant

- (15) The complaint by *Coach Tourism and Transport Council* concerns the financing of the public bus transport services (annual operating compensation payments, upgrading and replacement of buses), and furthermore, the financing of the transport infrastructure (passenger facilities and bus garage at Harristown) and disability awareness training in Ireland for the period 2000 to 2006. The complainant alleges that the financing of the above mentioned measures by the Irish authorities may involve unlawful State aid.

- (16) In particular, the complainant allege that the financing of the public bus transport services operated by *Dublin Bus* and *Irish Bus* does not comply with the provisions of Council Regulation (EEC) No 1191/69, as regards the absence of the clearly defined public service obligation and the lack of transparency in the method used to provide the annual operating compensation payments.
- (17) In addition, the complainant allege that the following aspects confer a competitive advantage to *Dublin Bus* and *Irish Bus*:
- (a) financing of the expansion and upgrade of the bus fleet as it appears that the use of the buses is not limited to the public transport services;
 - (b) financing of the infrastructure not open to private operators;
 - (c) financing of Disability awareness training not open to private operators.

B.3. Beneficiaries

- (18) The companies under consideration as recipients of alleged unlawful State aid are *Irish Bus* (also called „*Bus Éireann*“) and *Dublin Bus* (also called „*Bus Átha Cliath*“). These *Irish bus* operators are limited companies, 100 % owned by CIÉ ⁽²⁾ (Córás Iompair Éireann, the Irish Transport Board).

Irish Bus

- (19) *Irish Bus* as a subsidiary of CIÉ provides bus services throughout Ireland with the exception of Dublin City using its own and sub-contractor resources. The provided bus services include long distance bus services (including Expressway and Eurolines bus services to Britain and Europe), urban, suburban, regional city and town bus services (including e.g. town services in Athlone, Balgriggan, Drogheda, Dundalk, Navan and Sligo, commuter bus services in and radiating from Dublin, Cork, Limerick, Galway and Waterford), school transport services and ancillary services, such as coach and bus hire, vehicle testing, contract maintenance, parcels delivery, etc.
- (20) The school transport services are operated under contract with the *Department of Education and Science* on a cost recovery basis and amounted to approximately 47 % of the total customer journeys ⁽³⁾ of *Irish Bus* in year 2005. During 2004 *Irish Bus* introduced new school transport services, mainly in the area of transport for children with special needs. Hence, the school transport fleet has been upgraded by accessible vehicles for mobility-impaired children in recent years.

Dublin Bus

- (21) The prime activity of *Dublin Bus* is providing urban and suburban bus services for the Dublin Metropolitan Area (including Dublin city and county as well as contiguous areas). In addition, *Dublin Bus* operates connections within Ireland and places outside (including a network of

bus routes in Ireland, Airport Services, Nitelink and sight-seeing tours).

B.4. Legal framework describing the public service tasks

B.4.1. Transport Acts

- (22) Article 15(1) of the *Transport Act, 1950* has imposed on the CIÉ as a general duty „to provide or secure or promote the provision of an efficient, economical, convenient and properly integrated system of public transport“ for passengers by road taking into account the safety of operation and the encouragement of national economic development.
- (23) Furthermore, the *Transport (Re-organisation of CIÉ) Act, 1986* defines the principal objectives and duties of *Irish Bus* and *Dublin Bus*. Accordingly, Article 8(2) of the *Transport (Re-organisation of CIÉ) Act, 1986* stipulates, that „the principal object of the Irish bus company shall be stated in its memorandum of association to be to provide, within the State and between the State and places outside the State, a passenger service by road, except in so far as such a service is provided by the Dublin bus company, and to provide ancillary services and for those purposes to exercise functions in that behalf conferred on the Board by the Act of 1950 or any other enactment“.
- (24) Respectively, Article 8(3) of the above mentioned *Transport Act* specifies, that „The principal object of the Dublin bus company shall be stated in its memorandum of association to be to provide a passenger service by road for the city and county of Dublin and contiguous areas and to provide ancillary services, within the State and between the State and places outside the State, and for those purposes to exercise functions in that behalf conferred on the Board by the Act of 1950 or any other enactment“.
- (25) In addition, according to Article 8(10) of the *Transport (Re-organisation of CIÉ) Act, 1986*, CIÉ and its bus companies shall take into account the social role of this transport board and the need to maintain public transport services to the maximum extent possible within the available financial resources.
- (26) Furthermore, the Irish authorities explained, that the standard journey fares (including the adult standard journey fares on all categories of services and also school child fares on city services) ⁽⁴⁾ charged by *Dublin Bus* and *Irish Bus* are subject to the control of the *Minister of Transport* in terms of the maximum fares that could be charged. Furthermore, both bus operators are not permitted to increase these fares without the prior consent of the *Department of Transport*. Fares charged by private operators are not subject to any notification or control procedures.
- (27) Since 10 January 2001 both CIÉ bus operators are required by a Ministerial direction ⁽⁵⁾ to notify to the *Department of Transport* proposed new services or proposed changes to existing services at least four weeks prior to their introduction. Such notification by CIÉ bus operators must be supported by full details of the

⁽²⁾ CIÉ is a State owned statutory corporation, which had been set up by the *Transport Act, 1950*. The *Transport Act, 1950* and *Transport Act, 1958* set out the general duties of CIÉ and the obligations required. Under the terms of the *Transport (Re-organisation of CIÉ) Act, 1986* CIÉ had been requested to form for operational purposes three limited liability companies: *Irish Rail*, *Irish Bus* and *Dublin Bus*.

⁽³⁾ Annual Report and Financial Statement for year 2005, http://www.buseireann.ie/site/about_us/annual_reports.asp

⁽⁴⁾ Irish Competition Authority — Report on bus and rail passenger transport sector pursuant to section 11 of the Competition act 1991.

⁽⁵⁾ According to the Article 26(1) of the *Transport (Re-organisation of Córás Iompair Éireann) Act, 1986*, the Minister may give the Board a direction in writing to the policy in relation to the functions of the Board and the companies.

services proposed. Where the *Department of Transport* determines that proposed services would conflict with an existing licensed passenger road service, CIÉ companies are requested to formally seek the consent of the Minister of Transport under Article 25 of the *Transport Act, 1958*.

B.4.2. Memoranda of Understanding

(28) Since 2003, the payment of compensation to CIÉ has been the subject of *Memoranda of Understanding* with each of the CIÉ companies. The Irish authorities explained that the *Memoranda of Understanding* identify the quality (incl. customer service quality, cleanliness, bus age, accessibility, etc.) and quantity (incl. number of buses, operated kilometres, customers carried, etc.) of services to be provided by each of the companies in return for the Exchequer payments. Furthermore, the financial and operational requirements and monitoring and also reporting arrangements are regulated by the *Memoranda of Understanding*. Since 2005, payment of a fixed portion of the subvention for each of the operating companies is conditional on meeting certain performance criteria laid down in the agreed *Memoranda of Understanding*.

(29) Furthermore, according to the *Irish Competition Authority Report* ⁽⁶⁾, the *Department of Social Community and Family Affairs* operates free travel schemes for various segments of the population by contractual arrangement with CIÉ. The Commission has no further information concerning the terms of this contract.

B.4.3. Agreements concerning the school transport scheme

(30) *Irish Bus* operates a school transport scheme on the basis of a contract with the *Department of Education and Science* on a cost recovery basis as mentioned above. Some of these services are sub-contracted by *Irish Bus* to other bus operators. The Commission has no further information concerning the terms of contract, the revenues and the costs of the provided school transport services.

B.4.4. National Development Plan

(31) Operational development programmes for the recipient companies are based on the *National Development Plan* (thereinafter „NDP“), which runs over a period of seven years ⁽⁷⁾. The Irish NDP covers all sectors of the economy and has as its main objectives the improvement of the Irish economic and social infrastructure. The activities of the NDP are financed through public, private and EU-funds ⁽⁸⁾.

⁽⁶⁾ Irish Competition Authority — Report on bus and rail passenger transport sector pursuant to section 11 of the Competition Act 1991.

⁽⁷⁾ The NDPs in questions are the NDP for the period of years 1993-1999, 2000-2006 and the recently published NDP 2007-2013; see: <http://www.ndp.ie>

⁽⁸⁾ The European Commission approved by the decision of 7 December 2000 (SG (2000) D/109196) the operational programme for Economic and Social Infrastructure forming part of the Community Support Framework for Community structural assistance in the Border, Midland and Western region under Objective 1 and the Southern and Eastern region qualifying for transitional support under Objective 1 in Ireland. The total assistance from the Structural Funds granted under this operational programme amounts to EUR 854,8 million. The required national participation (from the public sector) amounts to EUR 624,7 million. This Commission Decision is without prejudice to the Commission's position on aid schemes falling within Article 87(1) of the EC Treaty that are included in the assistance package.

(32) The related operational programmes are Operational programme for Transport 1993-1999 and *Economic and Social infrastructure operational programme 2000-2006* ⁽⁹⁾ (thereinafter: „ESIOP“).

B.5. Detailed description of the measures

(33) It appears therefore from the information the Commission has at its disposal that the support granted to *Irish Bus* and *Dublin Bus* takes several forms, which can be categorised as following:

- Annual operating compensation for urban, suburban and regional bus services — School transport scheme
- Grants under the National Development Plan
 - Financing of new buses
 - Infrastructure
 - Financing of Disability Awareness Training.

B.5.1. Annual operating compensation for urban, suburban and regional bus services

(34) The Irish government supports CIÉ in the pursuit of its duties set up in the further above mentioned Transport Acts through the payments of compensation.

(35) The amount of compensation is determined annually in advance and is subject to the further above mentioned *Memoranda of Understanding*. The compensation is paid on a monthly basis to CIÉ which allocates the funds between its bus and rail companies for loss making services.

(36) Since 1996, the Irish authorities have provided the following annual compensation payments to the CIÉ for its bus operators. The Commission does not have any information available with regard to the years 2006 and 2007:

Annual subvention payments in Million EUR

Year	Dublin Bus	Irish Bus
1996	4 635	4 317
1997	8 888	6 984
1998	11 294	7 111
1999	16 816	7 377
2000	41 189	15 757
2001	54 316	24 157
2002	56 063	21 766
2003	53 867	22 856
2004	61 810	23 998
2005	64 900	25 199

⁽⁹⁾ The ESIOP provides for infrastructural investment in six priority areas: national roads, public transport, environmental infrastructure, sustainable energy, housing and health facilities.

- (37) The annual compensation payments received during the year in respect of urban, suburban and regional bus services are dealt with in the profit and loss accounts ⁽¹⁰⁾ as follows. The Commission does not have detailed information regarding the years 2006-2007:

Irish Bus: Net Surplus/deficit analysis for public services (*)

in 000 EUR

	2003	2004	2005
Revenue	59 778	63 388	64 724
Costs	(88 780)	(90 406)	(94 055)
Surplus/deficit before State grant	(29 002)	(27 018)	(29 331)
Annual State grant	22 856	23 999	25 200
Surplus/deficit for year	(6 146)	(3 019)	(4 131)
Surplus from Commercial and School transport sector	7 693	8 795	7 656
Surplus/deficit	1 547	5 776	3 525

(*) Including regional and city Services.

Source: Annual Reports and Financial Statements 2003-2005, http://www.buseireann.ie/site/about_us/annual_reports.asp

Dublin Bus: Net Surplus/deficit analysis for public services (*)

in 000 EUR

	2003	2004	2005
Revenue	162 405	165 313	168 359
Costs	(212 049)	(228 469)	(235 804)
Surplus/deficit before State grant	(49 644)	(63 156)	(67 445)
Annual State grant	53 867	61 810	64 900
Surplus/deficit for year	4 223	(1 346)	(2 545)
Surplus from Commercial activities	3 171	3 385	4 541
Surplus/deficit	7 394	2 039	1 996

(*) Including City and suburban services.

Source: Annual Reports and Financial Statements 2003-2005, http://www.dublinbus.ie/about_us/annual_reports.asp

- (38) The Irish authorities clarified that according to the Transport Acts the urban, suburban and regional services (so-called „Stage Carriage and City services“) of *Irish Bus* fall under a Public Service Obligation. The long distance bus services (so called „Expressway services“) and other so called „commercial services“ (e.g. *Dublin Bus* tours and international services) operated by *Irish Bus* and *Dublin*

Bus, do not receive any State support. Hence, profits generated by those services are used to cross-subsidise loss making services.

- (39) The Irish authorities stated that, for instance in the case of *Irish Bus*, the real operating costs for urban, suburban, regional and long distance services are allocated on the basis of metrics derived from prior period real costs, independent studies of *Irish Bus* operations, number of buses and mileage. The operating costs in the financial statements consist of:

- (a) payroll and related costs;
- (b) materials and services (including fuel and lubricants, materials, road tax and licences, rent, rates and operating lease rentals, auditors' remuneration, other contractors, third party and employer's liability claims etc.);
- (c) depreciation (the investment grant amortisation is subtracted from the calculated depreciation of tangible fixed assets in order to avoid a double-subsidisation).

B.5.2. School transport scheme

- (40) As regards the school transport scheme, at the current stage the Commission does not have any information concerning the conditions and the amount of the compensation paid by Irish authorities.

B.5.3. Grants under the National Development Plan

- (41) As described previously, among the areas benefiting from State intervention through ESIOP investments are public transport services and infrastructure. From the information at the disposal of the Commission, it appears that the Exchequer has funded the expansion and upgrade of passengers facilities (e.g. bus stations) and rolling stock over the period 1999 to date and 2000 for *Dublin Bus* and *Irish Bus*, respectively, as follows (the Commission does not have information concerning the years 2006-2007):

Grants in Million EUR

Year	Dublin Bus		Irish bus	
	Exchequer	EU-Funds	Exchequer	EU-Funds
2000	22 535	14 862	6 478	
2001	22 065	1 461	19 900	
2002	28 014		2 816	0,635
2003	12 691		15 062	1 356
2004	7 262		3 332	
2005	9 611		1 509	
	102 178	16 323	49 097	1 991
Total	118 501		51 088	

⁽¹⁰⁾ In the annual report and financial statements for the years 2000 and 2001 for both bus operators are the revenues and costs for the public services not declared.

- (42) In the financial statements the **investment grants** under the NDP scheme are credited to the balance sheet position as *deferred income* as they **become receivable**. They are amortised to the profit and loss account on the same basis as the related assets are depreciated.
- (43) According to the published financial statements for 2000-2005 (the Commission does not have information concerning the years 2006-2007), *Irish Bus* has since year 2000 received grants of approximately EUR 41,8 million. Furthermore, approximately EUR 5,0 million has been transferred to its current liabilities accounts.

Irish Bus — Grants (*)

in EUR 000

	2000	2001	2002	2003	2004	2005
Balance at 1 January	0	6 162	22 252	21 877	27 268	26 103
Received and receivable	6 478	17 270	2 616	8 646	2 984	3 824
Transfer to profit and loss account	(316)	(1 180)	(2 991)	(3 255)	(4 149)	(3 955)
Balance carried forward	6 162	22 252	21 877	27 268	26 103	25 972
Transfer to current liabilities	0	(1 180)	(3 113)	(4 150)	(4 850)	(4 962)
Balance at 31 December	6 162	21 072	18 764	23 118	21 253	21 010

(*) Deferred income account.

Source: Annual Reports and Financial Statements 2000-2005,
http://www.buseireann.ie/site/about_us/annual_reports.asp

- (44) *Dublin Bus* has since 2000 received, according to the published financial statements, approximately EUR 79,7 million. An amount of approximately EUR 11,1 million has been transferred to its current liabilities. The Commission does not have information concerning the years 2006-2007.

Dublin Bus — Grants (*)

in EUR 000

	2000	2001	2002	2003	2004	2005
Balance at 1 January	37 235	57 265	66 300	72 868	66 589	55 358
Received and receivable	24 728	17 059	17 753	6 172	3 037	10 923
Transfer to profit and loss account (**)	(4 698)	(8 024)	(11 185)	(12 451)	(14 268)	(11 238)
Balance carried forward	57 265	66 300	72 868	66 589	55 358	55 043
Transfer to current liabilities	(8 024)	(9 517)	(11 795)	(12 013)	(10 671)	(11 140)
Balance at 31 December	49 241	56 783	61 073	54 576	44 687	43 903

(*) Deferred income account.

(**) Transfer to profit and loss account include amortisation of capital grants and revenue grants.

Source: Annual Reports and Financial Statements 1999-2005,
http://www.dublinbus.ie/about_us/annual_reports.asp

B.5.3.1. Financing of new buses

- (45) In order to increase the attractiveness of the public transport services, to meet the increasing demand and to improve the accessibility of the buses for people with mobility and sensory impairments the Exchequer has funded the expansion and upgrade of rolling stock for *Irish Bus* and *Dublin Bus* as follows (no information is available for the years 2006-2007):

Year	Dublin Bus			Irish Bus	
	Exchequer Funded	Part Ex Funded	Own resources	Exchequer Funded	Own resources
2000	81	37	107	54	94
2001	45	0	11	70	27
2002	53	0	0	10	0
2003	0	32	58	38	30
2004	0	0	36	0	68
2005	20	0	50	0	30
Total Σ	199	69	262	172	249
in %	38 %	13 %	49 %	41 %	59 %
Total number of new vehicles	530			421	

The Irish authorities note, that the buses funded by the Exchequer are used for all services except on routes which are operated as „commercial services“, e.g. *Irish Bus's* Expressway services and *Dublin Bus's* tour buses and private hire. The Commission has no information at this stage as to whether the Exchequer also finances buses which are used for school transport services. According to the report ⁽¹⁾ provided by the Irish authorities to the Commission concerning the implementation of Regulation (EC) No 1191/69, in 2006 *Irish Bus* received grants (EUR 19,2 million) for the expansion or upgrade of the school bus fleet. Furthermore, the Irish authorities announced funding of further upgrading and expansion of the bus fleet in the coming years ⁽¹²⁾.

- (46) The Commission notes that the Irish authorities did not provide any information concerning the amount and the aid intensity of investment grants used for financing the expansion and the upgrade of the rolling stock of *Irish Bus* and *Dublin Bus*.
- (47) According to their financial statements, *Irish Bus* and *Dublin Bus* undertook the following investments in rolling stock to be used in all operated services (no information is available for the years 2006-2007):

Irish Bus: Road Passenger Vehicles

in EUR 000

	2000	2001	2002	2003	2004	2005	Total Σ
Additions/Investments	34 346	22 590	3 804	15 517	17 498	12 466	106 221

Source: Annual Reports and Financial Statements 2000-2005,
http://www.buseireann.ie/site/about_us/annual_reports.asp

Dublin Bus: Road Passenger Vehicles

in EUR 000

	2000	2001	2002	2003	2004	2005	Total Σ
Additions/Investments	55 565	18 964	14 991	22 678	10 432	20 369	142 999

Source: Annual Reports and Financial Statements 1999-2005,
http://www.dublinbus.ie/about_us/annual_reports.asp

⁽¹¹⁾ Letter of 5 April 2007 registered on 16 April 2007 under reference A/29414.

⁽¹²⁾ See: <http://www.transport.ie/press/pressrel/?lang=ENG&loc=2126>

B.5.3.2. Financing of infrastructure

- (48) The investment grants provided by the Exchequer and EU-Funds for the building of infrastructure have been used for the upgrading of passenger facilities such as bus stations and bus stops of *Irish Bus* and garages for the parking and maintenance of bus fleets of *Dublin Bus*. The physical access to these infrastructure facilities is limited to *Irish Bus* and *Dublin Bus*.

Bus station and bus stops upgrades and improvement of accessibility for mobility impaired people

- (49) The Irish *Department of Transport* has in 2004 started, on the basis of the *Disability Bill 2004 — Outline Sectoral Plan for Accessible Transport*, an operational programme in order to improve the accessibility of public transport (upgrading of passengers' facilities including bus stations and bus stops).
- (50) *Irish Bus* is owner of nine bus stations located around the country. These bus stations have been financed by *Irish Bus* (apart from the investment aid grant outlined below). As these are exclusively CIÉ facilities, the company has not opened them to other bus operators.
- (51) In the *Dublin Bus* area there are about 4 500 bus stops and in the urban areas, where *Irish Bus* operates, there are about 700 bus stops with further 800 bus stops in rural areas. The Commission has no further information whether these bus stops are open to all competitors.
- (52) The Irish government has provided *Irish Bus* with NDP capital funding in order to upgrade station facilities as part of an overall effort to increase the attractiveness of public transport and to provide better facilities for mobility impaired people. The total State funding (EUR 7,2 million) provided for these purposes in the last five years to *Irish Bus* was as follows:
- | | |
|--------------------------------------|-----------------|
| (a) for upgrading station facilities | EUR 2,5 million |
| (b) for improving accessibility | EUR 4,7 million |
- (53) According to the information published in the Annual report and financial statements⁽¹³⁾ of *Irish Bus* in order to improve the accessibility of the bus stations for mobility-impaired passengers EUR 4,9 million was spent for the refurbishment of the bus stations in Sligo, Ballina, Letterkenny, Galway, Cork, Monaghan, Tralee and Dublin. Further refurbishment work was carried out in 2005 in order to improve the accessibility of Cavan Bus Station. The costs of this project was EUR 0,37 million⁽¹⁴⁾.
- (54) Furthermore, in January 2005 the EUR 4 million re-development of the Parnell Bus Station in Cork was completed. The completion of a new Tralee Bus/Rail Station was scheduled for the year end 2006. This project amount to EUR 1,8 million and is funded by the NDP⁽¹⁵⁾.

Bus garage facilities

- (55) The bus garage at Harristown for *Dublin Bus* fleet was brought into service in 2004. The Irish authorities clarified that this bus garage was necessary in order to provide accommodation for the additional fleet.

fied that this bus garage was necessary in order to provide accommodation for the additional fleet.

- (56) Furthermore, the Irish authorities stated that *Dublin Bus* has financed its garage and maintenance facilities by itself over the years.
- (57) Nevertheless, the Irish authorities clarified that this bus garage (Harristown) was financed by State resources through the EISOP during 2001 and 2004 as part of an integrated effort to improve public transport services in the Greater Dublin Area. The Commission has no further information about the total amount of State grants and total costs of the bus garage at Harristown.

B.5.3.3. Financing of Disability Awareness Training

- (58) The Department of Transport is committed to develop accessible public transport services for the greater number of people with mobility and sensory impairments. Accordingly, the Department of Transport have been supporting *Disability Awareness Training* as a key element for the proper delivery of services by public and private transport operators. The bus operators are using this aid for Disability Awareness training especially aimed at front line staff (such as drivers and ticketing staff) and it should also be a feature of an on-the-job training for supervisors and managers.
- (59) The following bus operators have a disability awareness training programmes in place: *Irish Bus*, *Dublin Bus* and *Veolia Transport*. Disability awareness training for Railway Procurement Agency staff is scheduled during 2006 with some critical staff having already received training.
- (60) The Commission notes that it has no information concerning either the budget of the measure or the conditions.
- (61) The Irish authorities stated that under the Sectoral Plan „Transport Access for All“ the Department of Transport is now actively considering the question of providing support for disability awareness training for the private bus and coach operator sector and is awaiting a formal application from the *Coach Tourism and Transport Council* in that regard.

C. LEGAL ASSESMENT

- (62) According to the Article 87(1) of the EC Treaty „any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market“.
- (63) Therefore, it has to be examined whether, first, the measures the Irish government has in place to support bus transport services constitute State aid in the sense of Article 87(1) of the EC Treaty, and, second, should these measures constitute State aid, whether such an aid is compatible with the common market.

⁽¹³⁾ Annual Report and Financial Statement for year 2004, http://www.buseireann.ie/site/about_us/annual_reports.asp

⁽¹⁴⁾ Annual Report and Financial Statement for year 2005, http://www.buseireann.ie/site/about_us/annual_reports.asp

⁽¹⁵⁾ Annual Report and Financial Statement for year 2005, http://www.buseireann.ie/site/about_us/annual_reports.asp

- (64) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.
- (65) Further, the measures can only constitute State aid if the beneficiary performs an activity which is to be considered as an economic activity, and thus, the beneficiary performing it can be regarded as an undertaking within the meaning of Article 87(1) of the EC Treaty. The Court of Justice (thereinafter „ECJ“) considers as an economic activity „any activity consisting in offering goods and services on a given market“⁽¹⁶⁾.
- (66) On this latter regard, the Commission notices that *Dublin Bus* and *Irish Bus* operate bus services and receive fares, thus, they perform an activity which has to be considered as an economic activity.

C.1. Period under examination

- (67) The Commission notes, that at the time the Transport acts (in 1950 and 1986) and the first National Development Plan (in 1993) described previously have been put into effect, the market for the public transport services (including urban, suburban and regional transport markets) had been closed for the competition throughout the Community.
- (68) At the point in time these potential aid measures were put into place, they hence did not constitute State aid, as they did not have the potential to distort competition, the relevant markets being closed to competition.
- (69) Subsequently, in the Case *Altmark Trans* the Commission argued that „... since 1995 eight Member States have voluntarily opened certain urban, suburban or regional transport markets to competition from undertakings from other Member States and that there are a number of examples of transport undertakings from one Member State pursuing activities in another Member State. That opening up of the market in certain Member States shows that intra-Community trade is not only a possibility but already a reality“⁽¹⁷⁾. The Court accepted this reasoning. Hence, the Commission in its subsequent decision practice takes 1995 as the year at which the market for public transport services has been *de facto* opened to competition in parts of the common market. As of 1995, the measures mentioned in the previous paragraph might therefore constitute State aid.
- (70) The Commission observes, as pointed out in *Altmark Trans*, that the market for the transport services had not been opened following a liberalisation of an activity by Community law, but rather a result of independent and spontaneous decisions of some Member States. Accordingly, the Commission concludes that all measures which were already in force in 1995 have to be considered as constituting existing State aid in the sense of

Article 1(b)(v) of Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the Treaty⁽¹⁸⁾ (thereinafter: „Regulation (EC) No 659/1999“).

- (71) With respect to the compensation payments for public service obligations, initially based solely on the 1950 and the 1986 Transport acts, the Commission notes a substantial modification of the compensation system has taken place in 2003, with the introduction of yearly Memoranda of Understanding, detailing the quality and the quantity of the services to be provided as well as the precise amount of compensation to be paid. Hence, the Commission considers that payments for public service compensations as of 2003 constitute new aid in the sense of Article 1(c) of Regulation (EC) No 659/1999, as the Memoranda of Understanding substantially alter the previous compensation mechanism.
- (72) With respect to the payments based on the National Development Plan, the Commission considers that the National Development Plans 2000-2006 and 2007-2013 have substantially altered the National Development Plan 1993-1999, and hence are to be considered as new aid in the sense of Article 1(c) of Regulation (EC) No 659/1999.

C.2. Compensation for public bus transport services: operating compensation for urban, suburban and regional bus services, financing of new buses and the school transport scheme

C.2.1. Existence of State aid

C.2.1.1. State resources

- (73) Pursuant to the information provided by the Irish authorities *Dublin Bus* and *Irish Bus* receive a financial contribution, directly by the Irish authorities or channelled through CIÉ which comprises State resources, for costs arising from the operation of public bus transport services (urban, suburban and regional connections; and the purchase of rolling stocks) and the operation of the school transport services. Therefore, the Commission considers that the condition of granting aid by a Member State or through State resources is therefore satisfied.
- (74) The Commission invites the Irish authorities to provide further clarifications concerning the procedure used for financing the purchase of rolling stocks, in particular whether the grants are paid directly to *Dublin Bus* and *Irish Bus* or channelled through CIÉ.

C.2.1.2. Economic advantage

- (75) Furthermore, the measure must confer an economic advantage which the recipient undertaking would not have obtained under normal market conditions.

⁽¹⁶⁾ ECJ Case C-180-184/98, *Pavel Pavlov*, No 75 ; Case C-35/96 *Commission v Italy*, No 36; Case 118/85, *Commission v Italy*, No 7.

⁽¹⁷⁾ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, paragraph 69.

⁽¹⁸⁾ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

- (76) However, the European Court of Justice (ECJ), in the *Altmark* judgment⁽¹⁹⁾, has considered that „where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations (...) such a measure is not caught by Article 87(1) of the Treaty“ provided that the following criteria are fulfilled:
- „(a) First, the recipient undertaking is actually required to discharge public service obligations, and those obligations have been clearly defined.
 - (b) Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
 - (c) Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
 - (d) Fourth, where the undertaking which is to discharge public service obligations, is not chosen in a public procurement procedure, the level of compensation needed has been 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.“⁽²⁰⁾.
- (77) At the current stage, the Commission has no information on whether and how the Irish authorities apply the *Altmark* criteria.
- (78) As regard the first criterion at the current stage the Commission has doubts if the public service obligations have been clearly defined (see below).
- (79) As regards the second criterion, the compensation for *Irish Bus* and *Dublin Bus* is subject to the terms of the Memoranda of Understanding. As the Memoranda of Understanding refer only to an overall amount that will be paid in the corresponding year, at the current stage the Commission does not have sufficient information at its disposal to be able to determine whether the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner. Also in case of the school transport scheme, the Commission is not able to determine whether the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
- (80) As regard the third criterion, in case of *Dublin Bus* the compensation exceeds the difference between revenues and losses in the period 2002 to 2003 (see table in point 34). The difference amounts to 0,8 % in 2002 and 8,51 % in 2003. As the third criterion requires taking also into account a reasonable profit, the above mentioned differences could be considered as a reasonable profit. However, at the current stage the Commission has not sufficient information at its disposal to determine whether the profit margin in 2003 amounting to 8,51 % can be considered as reasonable. Furthermore, according to the information currently at the disposal of the Commission there are doubts on whether *Dublin Bus* and *Irish Bus* have not been overcompensated for the purchase of rolling stocks (see further below). Also in case of school transport scheme, the Commission at the current stage on basis of information at its disposal cannot exclude overcompensation for these services.
- (81) With regard to the fourth *Altmark* criterion, the Irish authorities have submitted that the imposition of public service obligations on the CIÉ bus operators and the compensation for these obligations were contained in the Transport Act, 1950 and Transport (Re-organisation of CIÉ) Act, 1986.
- (82) As explained further above in the description of the measure, since 2003 the payment of compensation to CIÉ bus operators has been the subject of Memoranda of Understanding. On the basis of the information at its disposal it is not clear to the Commission, if the Memoranda of Understanding between the Irish authorities and both bus operators has been preceded by a public tendering procedure. Also in case of the school transport scheme, the Irish Department of Education and Science has concluded a contract on the cost recovery basis. On the basis of the information at disposal of the Commission it is not clear, if this contract has been preceded by a public tendering procedure. In the event the Memoranda of Understanding and contract concerning the school transport scheme have not been preceded by a public tendering procedure, the Commission invites the Irish authorities to provide a justification.
- (83) Accordingly, if *Dublin Bus* and *Irish Bus* have not been chosen through a public procurement procedure, in order to fulfil the fourth *Altmark* criterion, the Irish government has to prove that the level of compensation needed has been 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 public obligations.
- (84) The Commission considers that the Irish authorities have not yet provided enough information to be able to reach such a conclusion. Therefore, the Commission invites Irish authorities to provide further information supporting all four criteria set out in the *Altmark* judgement.
- (85) As the Commission has doubts that the *Altmark* criteria have been fulfilled in the present case, the measures at issue could confer to *Dublin Bus* and *Irish Bus* with an advantage in the sense of Article 87(1) of the EC Treaty.

C.2.1.3. Distortion of Competition and affect of trade between Member States

- (86) It furthermore needs to be verified whether the economic advantage granted from State resources is liable to distort competition and to thereby affect trade between Member States.

⁽¹⁹⁾ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

⁽²⁰⁾ *Ibidem*, paragraph 95.

(87) In this respect, as the *Altmark* judgment ⁽²¹⁾ points out:

„It is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States“ ⁽²²⁾.

Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (see, to that effect, Case 102/87 *France v Commission* [1988] ECR 4067, paragraph 19; Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26; and *Spain v Commission*, paragraph 40).

In the present case, that finding is not merely hypothetical, since, as appears in particular from the observations of the Commission, several Member States have since 1995 started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin.

Finally, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see *Tubemeuse*, paragraph 43, and *Spain v Commission*, paragraph 42).

The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

(88) The Commission thus considers the public financing at issue in the current case might affect inter-state trade and distort or threaten to distort competition inside this market.

C.2.1.4. Conclusion: Possible existence of State aid

(89) Accordingly, the Commission can not exclude at this stage that the measure constitutes State aid in the sense of Article 87(1) of the EC Treaty.

(90) Therefore, the Commission invites the Irish authorities to provide detailed information concerning the terms and conditions of contracts for the operation of public transport and school transport services including the procedures under which such contracts are concluded.

C.2.2. Compatibility of the measure

(91) The Irish authorities stated that „the capital aid granted to the CIÉ companies under the transport priority of the Economic and Social Infrastructure Operational Programme is covered by the block exemption in Article 73 [ex Article 77] of the Treaty relating to the needs of co-ordination of transport and obligations of public services. The Dublin Public Transport and National Public Transport measures accordingly comply with State Aid rules.“

(92) Article 73 of the EC Treaty contains rules for the compatibility of State aid in the area of coordination of transport and public service obligation in transport. The Commission considers in its constant practice that Article 73 constitutes *lex specialis* with respect to Article 87(2) and Article 87(3), as it contains special rules for the compatibility of State aid.

(93) Article 73 can not be applied directly, but only through the three Council Regulations which have been adopted under it (Council Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70) ⁽²³⁾.

C.2.2.1. Relevant Council Regulation: Regulation (EEC) No 1191/69

(94) The beneficiaries in question — *Irish Bus* and *Dublin Bus* — operate scheduled and other bus services, and therefore, they are undertakings which operate services in transport by road.

(95) Regulation (EEC) No 1191/69 ⁽²⁴⁾ can be applied only if the beneficiary constitutes an undertaking which operates services in transport by rail, road or inland waterway according to Article 1(1) subparagraph 1 of the Regulation.

(96) The Irish authorities declared that they have not exempted *Dublin Bus* and *Irish Bus* from the scope of the Regulation (EEC) No 1191/69 according to Article 1(1) subparagraph 2 of the Regulation (EEC) No 1191/69.

(97) As *Irish Bus* and *Dublin Bus* operate road transport services within the scope of the Regulation and are not exempted from its application, the relevant legal basis is Regulation (EEC) No 1191/69.

C.2.2.2. The choice of the option for compensation according to Regulation (EEC) No 1191/69

(98) Article 1(3) of Regulation (EEC) No 1191/69 stipulates the termination of all obligations inherent in the concept of the public services by the competent authorities. However, according to Article 1(4) of the Regulation the competent authorities of the Member States may conclude public service contracts (Section V of the Regulation) or according to Article 1(5) they may decide to maintain or to impose public service obligations for urban, suburban and regional passenger transport services (Section II, III and IV of the Regulation).

⁽²¹⁾ Case C-280/00, *Altmark*, cited above, paragraph 82.

⁽²²⁾ Case C-280/00, *Altmark*, cited above, paragraph 77 and following.

⁽²³⁾ Case C-280/00, *Altmark*, cited above, paragraphs 101, 105, 106, 107.

⁽²⁴⁾ Of 26 June 1969 on action by Member States concerning the obligation inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1), as modified by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

(99) Therefore, it is necessary to verify whether the Irish authorities concluded public service contracts with *Dublin Bus* and *Irish Bus* or decided to maintain the imposed public service obligation.

C.2.2.2.1. Doubts concerning the qualification of public service contracts within the meaning of Regulation (EEC) No 1191/69

(100) As described previously (see sub-section Memoranda of Understanding) as from the year 2003 the conditions and the amount of the annual compensation by the Irish authorities to *Dublin Bus* and *Irish Bus* have been subject of Memoranda of Understanding. The Irish authorities have declared that they do not consider the Memoranda of Understanding with *Dublin Bus* and *Irish Bus* as public service contracts.

(101) Article 14(1) subparagraph 1 specifies the definition of the „public service contract“ within the meaning of Regulation (EEC) No 1191/69 as follows: „A public service contract“ shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services“. Furthermore, Article 14(1) subparagraph 2 and (2) identifies the terms and conditions which have to be included in the „public service contract“.

(102) The Irish authorities have explained that they do not consider the *Memoranda of Understanding with Dublin Bus and Irish Bus* to be public services contracts.

(103) However, according to the *Irish Competition Authority Report* ⁽²⁵⁾ the concept of public service obligation concerning public bus transport services has been withdrawn in order to be replaced by public service contracts, which specify the specific service levels and performance standards.

(104) As described previously, the *Memoranda of Understanding* contains quality (incl. customer service quality, cleanliness, bus age, accessibility, etc.) and quantity (incl. number of buses, operated kilometres, customers carried, etc.) requirements as well as duration of services to be provided by each of the companies in return for the Exchequer payments. These are also conditions, which should be covered by public service contracts. Therefore, although the Irish authorities have provided the Commission with the *Memoranda of Understanding* concluded for the year 2007 with *Dublin Bus* and *Irish Bus*, on the basis of the information currently at its disposal, the Commission cannot exclude that the *Memoranda of Understanding* should be considered as public service contracts within the meaning of the Regulation.

(105) Similarly, as regards school transport scheme, on the basis of the information currently at its disposal, the Commission is not able to qualify the Agreements between Irish authorities with *Dublin Bus* and *Irish Bus*.

⁽²⁵⁾ Irish Competition Authority — Report on bus and rail passenger transport sector pursuant to section 11 of the Competition Act 1991.

(106) Thus, the Commission invites Irish authorities to provide the copies of the concluded Memoranda of Understanding since the year 2003 and all other contracts concerning public transport services and school transport scheme, an explanation of the procedure used for the conclusion of the Memoranda of Understanding, other contracts and further details concerning the free travel schemes for various segments of the population.

C.2.2.2.2. Doubts concerning the qualification of public service obligations within the meaning of the Regulation (EEC) No 1191/69

(107) According to Article 1(5) the Irish authorities have the possibility to maintain public service obligations. However, for the application of Article 1(5), it remains to be verified whether *Dublin Bus* and *Irish Bus* provide urban, suburban and regional passenger transport services as defined in Article 1(2) of the Regulation. According to the Irish authorities, as explained above in the description of the facts, both CIÉ operators provide urban, suburban and regional services within the meaning of Article 1(2) of Regulation (EEC) No 1191/69, meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas as well as the need of a region.

(108) Section II of Regulation (EEC) No 1191/69 contains the common principles for the maintenance of public service obligations. The Irish authorities have noted that they have decided to maintain public service obligations. Nevertheless, it needs to be verified whether they did so in conformity with the Regulation.

(109) The Irish authorities have informed the Commission by letter of 2 January 1975 about the arrangements concerning the implementation of Regulation (EEC) No 1191/69 in order to provide procedures for the introduction of request for the termination of public service obligations, compensation and the normalization of accounts ⁽²⁶⁾.

(110) From this information, it would appear that the Irish authorities have decided at that stage to maintain their various public service obligations.

(111) However, it has to be verified whether the substantial requirements of public service obligations as set out in Article 2 of the Regulation are present in this case.

(112) Article 2(1) defines a „public service obligation“ as an „obligation which the transport undertaking in question, if it were considering its own commercial interest, would not assume or would not assume to the same extent or under the same conditions“.

(113) According to the Irish authorities, they have imposed public service obligations upon CIÉ and its subsidiaries *Irish Bus* and *Dublin Bus* by the Transport Acts, namely through the Transport Act, 1950 and the Transport (Re-organisation of CIÉ) Act, 1986.

⁽²⁶⁾ Commission Opinion 75/300/EEC of 18 April 1975 concerning the implementation of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in concept of a public service in transport by rail, road and inland waterway, and Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalization of accounts of railway undertakings (OJ L 137, 28.5.1975, p. 24).

- (114) The public service obligation within the meaning of the Regulation is further clarified in Article 2(2) as „obligation to operate, the obligation to carry and tariff obligations“.

C.2.2.2.2.1. The public service „obligation to operate“

- (115) Article 2(3) defines the obligation to operate for the purposes of the Regulation (EEC) No 1191/69 as follows:

„[...] „the obligation to operate“ means any obligation imposed upon a transport undertaking to take, in respect of any route or installations which it is authorised to work by licence or equivalent authorisation, all necessary measures to ensure the provision of a transport service satisfying fixed standards of continuity, regularity and capacity. It also includes any obligation to operate additional services and any obligation to maintain in good condition routes, equipment — in so far as this is surplus to the requirements of the network as whole — and installations after services have been withdrawn.“

- (116) The obligation to operate bus services (see above) imposed on Dublin Bus and Irish Bus includes besides the urban, suburban and regional services also services „between the State and places outside the State“. The standards of regularity and capacity are fixed by means of Memoranda of Understanding on a yearly basis.

- (117) Therefore, the definition of the imposed public service „obligation to operate“ can be considered in line with the definition established under Article 2(3), if the Memoranda of Understanding do not constitute public service contracts.

C.2.2.2.2.2. „Tariff obligations“

- (118) Article 2(5) of the Regulation specifies the „tariff obligations“ as follows:

„[...] any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions.“

- (119) The standard journey fares (including the adult standard journey fares on all categories of services and also school child fares on city services), as explained above in the description of the facts, are subject to the control of the Department of Transport in terms of maximum fares that can be charged and, since 2003, are subject to the Memoranda of Understanding. Neither operator is allowed to increase these fares without the prior consent of the Department of Transport.

- (120) Therefore, the tariff obligation imposed for standard journey fares can be considered in line with the definition in Article 2(5), if the Memoranda of Understanding do not constitute public service contracts.

- (121) However, according to the information currently at the disposal of the Commission, it is not clear whether the Irish authorities impose tariff obligations (e.g. concerning free travel schemes) for certain passenger groups as indi-

cated in the description or have concluded public service contracts for these purposes. Nor is it apparent how this is done.

C.2.2.2.2.3. The public service „obligation to carry“

- (122) According to Article 2(4) the „obligation to carry“ is specified as an obligation „imposed upon transport undertakings to accept and carry passengers or goods at specified rates and subject to specified conditions“.

- (123) The Commission has doubts if the Irish authorities have imposed a public service obligation on Dublin Bus and/or Irish Bus to carry mobility impaired people as a subject to specified conditions (e.g. better accessibility of the operated bus services for mobility impaired passengers) and to take actions in order to establish those specified conditions.

C.2.2.2.3. Conclusion

- (124) In the light of the above, the Commission has doubts if the Irish authorities have opted for the possibility foreseen in Article 1(5) of the Regulation, which is to maintain imposed public service obligations within the meaning of the Regulation upon these transport undertakings or concluded public service contracts within the meaning of the Regulation.

- (125) Accordingly, it is not clear, if the State aid granted in order to compensate these undertakings needs to be assessed on the basis of Section IV of the Regulation (concerning public service obligations), which comprises Articles 3 to 13, or of Section V of the Regulation (concerning public service contracts), which comprises Article 14.

C.2.2.2.4. Compensation for public service obligation „to operate“ and „to carry“ according to Section IV of Regulation (EEC) No 1191/69

- (126) According to Article 10 of Regulation (EEC) No 1191/69, the amount of the compensation needs to be limited to the difference between the costs for discharging the obligation and the revenues generated through the obligation.

- (127) The Commission thus has to verify whether the compensation paid by the Irish authorities is limited to the difference between the costs incurred for discharging these public service obligations and the revenues generated through the sale of bus tickets.

Irish Bus

- (128) The revenues generated by Irish Bus can be seen from the table in point 37.

- (129) The real annual operating costs of Irish Bus can also be seen from the table in point 37.

- (130) The compensation paid for annual operating losses is detailed in the tables in points 36 and 37 and thus corresponded to the difference between the attributed costs for discharging the possible public service obligations and the revenues derived from it.

- (131) At the current stage, the Commission is not in a position to assess if the calculation and the allocation of costs and revenues are strictly limited to the costs and revenues for the discharge of public service obligations. Accordingly, the Commission has doubts if the method used for calculation of the compensation for discharging the possible public service obligation could be considered as being in compliance with the provisions of Article 10 of Regulation (EEC) No 1191/69.
- (132) The costs incurred for upgrading and replacing buses (used in all operated services) is detailed in the table in point 48. According to the *Irish Bus* financial statement report for the periods 2000-2005 *Irish Bus* has in the reporting period purchased new buses to be operated in all provided services for a total amount of EUR 106,2 million.
- (133) According to the information provided by the Irish authorities, detailed in the table in point 45, the Exchequer has funded 172 buses (41 % of the total number of purchased buses in 2000-2005) used for operation of services under the public service obligation.
- (134) Compensation for upgrading and replacement of buses: the Commission has no information concerning the amount of compensation paid by Irish authorities to *Irish Bus* for upgrading and replacing its buses (for urban, suburban and regional services).
- (135) The Commission, by comparing the received or receivable grants (including grants for investments in infrastructure) as described in the published financial statements (account deferred income) and the information provided by the Irish authorities (including also grants for investments in infrastructure), discovered the following differences in the amounts:

Irish Bus — Received grants (including investments in infrastructure)

in EUR 000

	2000	2001	2002	2003	2004	2005
Received and receivable grants according financial statements	6 478	17 270	2 616	8 646	2 984	3 824
Grants paid according information provided by Irish authorities (*)	6 478	19 900	3 451	16 418	3 332	1 509
Difference	0	(2 630)	(835)	(7 772)	(348)	2 315

(*) Including EU Funds

The Commission invites the Irish authorities to explain these differences.

- (136) The Commission notes that according to the financial statements of *Irish Bus* the following amounts have been transferred from the position „deferred income“ (investment grants from the Irish authorities are credited to this position) to the account „current liabilities“.

in EUR 000

	2000	2001	2002	2003	2004	2005
Transfer to current liabilities	0	(1 180)	(3 113)	(4 150)	(4 850)	(4 962)

The Commission asks the Irish authorities to provide explanation for this transaction.

- (137) According to the following calculation, *Irish Bus* may have used the available grants of EUR 43,9 million to finance 61 % of the total investment costs for upgrading and replacing its bus fleet (including buses used for activities other than services under the possible public service obligation).

Irish Bus

	<i>in million EUR</i>
Received grants 2000-2005	51 088
— Investment grants for upgrading station facilities	2 500
— Investment grants for improving the accessibility	4 700
Available grants	43 888
Total investments in upgrading the bus fleet 2000-2005	71 875
Available investments in % of total investments in upgrading the bus fleet 2000-2005	61 %

As noted in the description of the measure, the Irish authorities informed the Commission that they have financed only 33 % of the new purchased buses (see table in point 45).

- (138) Accordingly, the Commission doubts whether *Irish Bus* has not been overcompensated for the upgrading and replacement of its bus fleet.

Limitation of the compensation to expenditure for discharging public service obligations of Irish Bus

- (139) As explained further above in the description of the measure, both CIÉ subsidiaries also operate services that do not fall under what could be interpreted as a public service obligation (so-called „commercial services“) and may use publicly funded buses to operate those bus services.
- (140) The Irish authorities stated that the publicly funded buses are not used for so-called „commercial services“. According to what appears in the financial reports of *Irish Bus*, the school transport services are considered as „commercial services“ but this is not clearly stated. Therefore, the Commission is not able to conclude that the compensation is limited to expenditures for discharging public service obligations.

Dublin Bus

- (141) The revenues generated by *Dublin Bus* are set out in the table in point 37.
- (142) The annual operating costs incurred by *Dublin Bus* are also set out in the table in point 37.
- (143) Compensation for annual operating losses: the compensation paid is detailed in the tables in points 36 and 37 is stated as being the difference between the attributed costs for discharging the public service obligations and the revenues derived there from. However, in case of *Dublin Bus* the compensation clearly exceeds the difference between revenues and losses in the year 2003. The difference amounts to 8,51 % in 2003. As a reasonable profit should also be taken into account, the above mentioned differences may be considered as a reasonable profit. However, at the current stage the Commission does not have sufficient information to be able to determine if profit margin for 2003 ranging as it do at 8,51 % can be considered as reasonable.
- (144) Furthermore, on the basis of the information currently at the disposal of the Commission, it is not clear if the calculation of costs and revenues of *Dublin Bus* is strictly limited to the costs and revenues for discharging the possible public service obligations. Accordingly, the Commission is not able to conclude that the method used in calculating the compensation can be considered as being in compliance with the provisions of Article 10 of Regulation (EEC) No 1191/69.
- (145) The costs incurred for upgrading and replacing buses (used in all operated services) are detailed in the table in point 48. According to the *Dublin Bus* financial statement report in the period 2000 to 2005, *Dublin Bus* has purchased new buses operated in all provided services for a total amount of EUR 143,0 million. The Commission has no information concerning the amount of investment related to buses used to discharge the possible public service obligation.
- (146) Pursuant to the information provided by the Irish authorities, which is detailed in the table in point 45, the Exchequer has funded the total investment costs for 199 buses (38 % of the total number of purchased buses) and partial investment costs for 69 buses (13 % of the total number of purchased buses) used for operation of services under the possible public service obligation.

- (147) Compensation for upgrading and replacement of buses: as in the case of *Irish Bus*, apart from the global figures previously cited the Commission has no information concerning the amount of public financing paid to *Dublin Bus* for upgrading and replacing its fleet. Therefore the following calculations should be considered only as an approximation under the assumption of same costs for all purchased buses.
- (148) The Commission, by comparing the received or receivable grants (including grants for investments in infrastructure) according to the published financial statements (account „deferred income“) and the information (also including grants for investments in infrastructure) provided by the Irish authorities noted the following differences between both amounts (showed in the table below). The Commission invites the Irish authorities to explain these differences.

Dublin Bus — Received grants (including investments in infrastructure)

in EUR 000

	2000	2001	2002	2003	2004	2005
Received and receivable grants according financial statements	24 728	17 059	17 753	6 172	3 037	10 923
Grants paid according information provided by Irish authorities (*)	37 397	23 526	28 014	12 691	7 262	9 611
Difference	(12 669)	(6 467)	(10 261)	(6 519)	(4 225)	1 312

(*) Including EU Funds

- (149) The Commission notes, that according to the financial statements of *Dublin Bus* the following amounts have been transferred from the position „deferred income“ (investment grants from Irish authorities are credited to this position) to the account „current liabilities“.

in EUR 000

	2000	2001	2002	2003	2004	2005
Transfer to current liabilities	(8 024)	(9 517)	(11 795)	(12 013)	(10 671)	(11 140)

The Commission asks the Irish authorities to provide explanation for this transaction.

- (150) The Commission has currently at its disposal only the information concerning the total amount of the paid out grants (excluding the annual compensation for operating costs) for the period 2000 to 2005 of EUR 118,5 million. The Commission has no further detailed information about the breakdown of this compensation, how much was used for operational purposes and how much for investments. Nevertheless, taking into account that it would appear that approximately 50 % (38 % full and 13 % partially) of the purchased buses have been funded by Exchequer, this would mean that *Dublin Bus* used EUR 71,5 million for financing the purchase of new buses and EUR 47,0 million in order to finance its bus garage facilities (see table below). However, according to the published financial statements *Dublin Bus* has spent only EUR 22,8 million in total for investments in „Plant and Machinery“.

Dublin Bus

in million EUR

Received grants 2000-2005	118 501
— Investment grants in infrastructure	47 001
Available Investment grants	71 500
Total investments in upgrading the bus fleet 2000-2005	142 999
Available investments grants in % of total investments in upgrading the bus fleet 2000-2005	~ 50 %

- (151) Accordingly, the Commission has doubts whether *Irish Bus* has not been overcompensated for the upgrading and replacement of its bus fleet.

Conclusions

(152) The Commission invites the Irish authorities to provide further information for the period 2000 up to date for payments under the National Development Plan and for the period 2003 up to date for the payments under the Memoranda of Understanding, relating in particular to:

- (a) total annual amount of grants paid by the Irish authorities to *Irish Bus and Dublin Bus* for the purchase of new buses;
- (b) total annual amount used for financing new rolling stock used for the operation of a possible public service obligation;
- (c) information concerning quality requirements for buses taking into account that these buses are used for different services under a possible public service obligation, explanation of the development of these quality requirements, average investment costs for the new buses meeting these quality requirements, a calculation of the resulting additional financial burden meeting these quality requirements imposed by the Irish authorities, number of buses per different services in total, number of buses whose have already been meeting the quality requirements and number of buses whose have to be replaced because of lack in meeting the quality requirements in the corresponding periods and in the future;
- (d) information about the increase in demand and the changes in the frequency, timetables, routes etc., which made necessary the increase in the bus fleet of both operators, the number of additional buses in order to meet this quantity obligation, the average investment costs per bus;
- (e) explanation how the Irish authorities assure that the buses used for services under the possible public service obligation will not be used for other activities.

C.2.2.2.5. **Compensation for tariff obligations according to Regulation (EEC) No 1191/69**

(153) Article 9 of the Regulation indicates that *„the amount of compensation in respect of financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person shall be determined in accordance with the common procedures laid down in Articles 11 to 13“*.

(154) At this stage the Commission does not have sufficient information at its disposal to determine whether the Irish authorities have calculated the compensation for discharging the tariff obligations in compliance with the provisions of Article 11 to 13. The Commission invites therefore the Irish authorities to provide additional information concerning the calculation of the compensation for discharging the tariff obligations.

C.2.2.2.6. **Compensation for public service contract according to Section V of the Regulation (EEC) No 1191/69**

(155) In the event that the Memoranda of Understanding and the contracts concerning the school transport scheme

constitute public service contracts, the compensation payments might be State aid compatible with the common market based on Article 14 of Regulation (EEC) No 1191/69.

(156) The Commission notes that both the objective (to provide sufficient transport services) and the content of public service contracts (standards for continuity, regularity, capacity and quality; setting of tariffs and conditions of service for certain routes and/or certain categories of passengers; adaptation of service level to real needs) are not different from those which can be imposed upon transport operators by the means of unilaterally imposed public service obligations. The Commission furthermore notes that it cannot be excluded that the price set in a public service contract does not correspond to the market price, and hence that it might encompass State aid.

(157) With respect to State aid implications of public service contracts, the Commission first of all notes that the goal of the legislator, when adopting Regulation (EEC) No 1191/69, was to define under which conditions *„the aid [...] which corresponds to the reimbursement of certain obligations inherent in the notion of public services“* mentioned in Article 73 EC Treaty are compatible with the common market. Both the application of Article 73 EC Treaty and the application of Regulation (EEC) No 1191/69 presuppose the existence of an aid in the sense of Article 87(1) EC Treaty. If the content of the contracts can be covered by the notion of Article 73 *„obligations inherent in the notion of public services“*, the form of the instrument, that is contract or unilaterally imposed obligation, should not be, in itself, an obstacle for declaring potential State aid inherent in the contract price compatible with the common market. Indeed, the decisive element for qualifying a service, be it imposed by a Member State or agreed in a contract, as a public service obligation is the substance of the service, and not the form in which it is organised⁽²⁷⁾. In the light of these considerations, the Commission concludes that from a legal point of view, there is no reason why State aid inherent in the price paid for a public service contract could not be declared compatible with the common market by the Commission.

(158) As Article 14 of Regulation (EEC) No 1191/69 does not contain any precise conditions for declaring State aid inherent in the price paid for a public service contract compatible with the common market, the Commission considers that the general principles derived from the EC Treaty, the jurisprudence of the Community courts and the Commission's decision practice in other areas than public transport shall be applied for deciding whether such State aid can be declared compatible with the common market.

⁽²⁷⁾ Cf. in this regard, the judgment of the Court of 24 July 2003, C-280/00, *Altmark Trans*, which concerned a German public service contract, a fact which did not bar the Court from making an analysis State aid — non State aid based on the content, and not on matters of form; Article 4 of the Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public compensation granted to certain undertakings entrusted with the operation of services of general economic interest (JO L 312, 29.11.2005, p. 67), also disregarding the formal means.

- (159) These general principles have been summarized by the Commission in a general manner in the Community framework for State aid in the form of public service obligations ⁽²⁸⁾. With respect to the compatibility of State aid inherent in the price paid for a public service contract, this Community framework foresees the following:

The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.

- (160) Hence, the compensation payments foreseen by the Memoranda of Understanding, under the condition that these Memoranda of Understanding are to be qualified as public service contracts, could be declared compatible with the common market, if they do not „not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations“.
- (161) Based on the information provided by the Irish authorities, the Commission cannot determine whether this condition is met. The doubts of the Commission in this regard are identical to the doubts explained above in Section C.2.2.2.4.

C.2.2.3. Conclusion

- (162) The Commission doubts that the present measures are in compliance with the provisions of Regulation (EEC) No 1191/69 in case they were to be considered compensation for discharging public service obligations.

C.3. Financing of dedicated infrastructure

C.3.1. Existence of State aid

- (163) As previously described, the financing of the dedicated infrastructure covers the following measures: bus stations, bus stops, garages and maintenance facilities.
- (164) In the present case, the State has financed assets that are dedicated to *Irish Bus* and *Dublin Bus* and used for the economic activity of these bus operators and that are not available to other operators on an equal and non-discriminatory basis.

C.3.1.1. State resources

- (165) On the basis of the information currently at the disposal of the Commission, *Irish Bus* and *Dublin Bus* received a contribution directly by the Irish authorities through State resources for a part of costs arising from the provision of passenger and garage facilities. Thus the Commission considers that the condition of granting aid by a Member State or through State resources is satisfied.

C.3.1.2 Economic advantage

- (166) The measure must confer an economic advantage which the recipient undertaking would not have obtained under normal market conditions.
- (167) The Commission has developed a constant practice with regards to the assessment of State financing of infrastructure. The financing and supervision of the building of transport infrastructure constitutes a measure of economic policy and land planning deriving out of the State's sovereignty ⁽²⁹⁾. Member States are free to choose the mode as well as the geographical or economical configurations for the realisation of such a project.
- (168) Nevertheless, the question arises as to whether the way a State finances or builds an infrastructure in the framework of its public policy may amount to State aid for some companies. This question may arise at three different levels: the level of the users, the level of the builder of the infrastructure and the level of the manager of the infrastructure ⁽³⁰⁾.
- (169) In the present case, the user and the manager of the infrastructure appear to be identical, as the infrastructure in question is managed and used exclusively by *Irish Bus* and *Dublin Bus*. As *Irish Bus* and *Dublin Bus* do not raise any income out of the managing of the infrastructure, for the purpose of this case they can therefore only be considered as users of the infrastructure.

Economic advantage for the builder of the infrastructure

- (170) In the present case, the Commission has no indication that the construction companies involved in the construction of the different infrastructure elements under assessment might have received an advantage.

Economic advantage for the user of the infrastructure

- (171) As regards the user of the infrastructure, the Commission notes that the infrastructure in question is managed by *Irish Bus* and *Dublin Bus*, and that use seems to be exclusively confined to these undertakings.
- (172) The Commission considers in general that the financing of infrastructure through State resources does not amount to States aid to users provided that infrastructure is a public good and is open without discrimination to all users in accordance with Community legislation, and does not favour one user in particular ⁽³¹⁾. In the present case, this condition seems not to be fulfilled, as the infrastructure in question, which is financed through State resources, exclusively benefits *Irish bus* and *Dublin bus*.

⁽²⁹⁾ See e.g. Decision in State aid case 713/97 *Rion Antirion motorway bridge*, point 37 and Decision in State aid case N 478/04 *Irish Rail*, point 30; Decision N 597/07 *Thessaloniki submerged tunnel project*.

⁽³⁰⁾ See e.g. Decision in State aid case 713/97 *Rion Antirion motorway bridge*, point 39, Decision in State aid case N 60/06, *Project Main Port Development Rotterdam*, point 39; Decision N 597/07 *Thessaloniki submerged tunnel project*; Decision in State aid case N 478/04, *Irish Rail*, point 26 with further references.

⁽³¹⁾ See e.g. Decision in State aid case 713/97 *Rion Antirion motorway bridge*, point 38, Decision in State aid case N 60/06, *Project Main Port Development Rotterdam*, point 40; Decision in State aid case N 478/04, *Irish Rail*, point 26 with further references.

⁽²⁸⁾ JO C 297, 29.11.2005, p. 4.

(173) The Commission concludes that the measure at issue could confer to *Dublin Bus* and *Irish Bus* an advantage in the sense of Article 87(1) of the EC Treaty.

C.3.1.3. Distortion of Competition and affect of trade between Member States

(174) It furthermore needs to be verified whether the economic advantage granted from State resources is liable to distort competition and to affect trade between Member States.

(175) As pointed out further above the Commission considers the measure might affect inter-state trade and distort or threaten to distort competition inside this market.

C.3.1.4. Conclusion: Possible existence of State aid

(176) Accordingly, the Commission cannot exclude that the measure constitutes State aid in the sense of Article 87(1) of the EC Treaty.

C.3.2. Compatibility of the measure

Position of the Irish authorities:

(177) The Irish authorities stated that „*The capital aid granted to the CIÉ companies under the transport priority of the Economic and Social Infrastructure Operational Programme is covered by the block exemption in Article 73 (ex Article 77) of the Treaty relating to the needs of co-ordination of transport and obligations of public service. The Dublin Public Transport and National Public Transport measures accordingly comply with State Aid rules.*“

Position of the European Commission:

(178) As already discussed further above, Article 73 contains special rules for the compatibility of State aid in the area of coordination of transport and public service obligations in transport and constitutes a *lex specialis* with respect to Article 87(2) and (3), as well as Article 86(2), as it contains special rules for the compatibility of State aid. Article 73 cannot be applied directly, but only by means of the three Council Regulations which have been adopted on its basis (Council Regulations (EEC) No 1191/69, (EEC) No 1192/69 and (EEC) No 1107/70)⁽³²⁾. As discussed further above Regulation (EEC) No 1191/69 can be applied to *Irish Bus* and *Dublin Bus*.

(179) However, in the present case the Commission has doubts, whether the State aids concerning the dedicated infrastructure can be considered as aid for the provision of certain transport services within the meaning of Article 73 EC and the implementing Regulations.

(180) At present the Commission has difficulties to see how the construction of bus stations, bus stops, garages and of maintenance facilities could form part of an imposed public service obligation or a public service contract with respect to transport services.

(181) Therefore, the Commission invites the Irish authorities to provide further clarifications concerning the definition of the public service obligation for the infrastructure dedicated to *Irish Bus* and *Dublin Bus* and detailed information concerning the paid compensation.

(182) In the case that the infrastructure dedicated to *Irish Bus* and *Dublin Bus* is part of the public service contracts, the Commission invites the Irish authorities to provide further clarifications concerning the terms and the conditions of the compensation set out in these contracts.

C.3.2.1. Compatibility according to Article 87 (3)(c) of the EC Treaty

(183) In case the State aids concerning the dedicated infrastructure can not be considered as aid for the provision of certain transport services within the meaning of Article 73 EC and the implementing Regulations, the Commission could assess the compatibility of the infrastructure investment grants for *Irish Bus* and *Dublin Bus* directly on the legal basis according to Article 87(3)(c) of the EC Treaty, which stipulates that: „*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*“, may be considered to be compatible with the common market.

(184) According to established Commission practise⁽³³⁾, the Commission will in particular examine whether:

(a) the construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.) and the infrastructure is necessary and proportional to the objective which has been set;

(b) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

(c) the development of trade is not affected to an extent contrary to the Community interest.

(a) *The construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.) and the infrastructure is necessary and proportional to the objective which has been set*

(185) As described further above the motivation of the Irish authorities in granting the financial support provided by financing the present infrastructure measures are regional development, increase of the accessibility of certain areas, increase of the mobility of mobility impaired people, environmental protection by the promotion of public transport.

⁽³²⁾ Case C-280/00, *Altmark*, cited above, paragraphs 101, 105, 106, 107.

⁽³³⁾ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1, see paragraph 53; Commission decision: N 149/06 Traffic guarantee for M3 Clonee to North of Kells and N7 Limerick Southern Ring Road Phase II of 16 May 2006 (OJ C 209, 31.8.2006, p. 7).

(186) Therefore, these infrastructure investments, in particular bus stops and bus stations, could be considered as objective of general interest. Accordingly the Commission could conclude that the public funding provided for by the present measures meets the clearly defined objectives of regional policy and of improving the public transport passenger facilities. However, the Commission has doubts, whether the financing of garages and maintenance facilities can be considered as objective of general interest. Furthermore, the Commission invites the Irish authorities to provide further information concerning the definition of the objective of general interest.

(187) As previously described, the Commission has only limited information concerning the contribution of *Irish Bus* and *Dublin Bus* and the aid intensities. Therefore, the Commission invites the Irish authorities to provide further information concerning the necessity and the proportionality of the financed infrastructure to the objectives which have been set.

(b) *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*

(188) As stated by the Irish authorities the infrastructure is not open (in particular physical access) to all potential users, private coach and bus operators. Therefore, the infrastructure seems to have been financed and constructed for the exclusive benefit of one operator and might have a discriminatory impact on the operation of bus services.

(c) *The development of trade is not affected to an extent contrary to the Community interest*

(189) As previously described, in competition terms the infrastructure is not open to all possible competitors of *Irish Bus* or *Dublin Bus* and therefore it might have a discriminatory character for other bus operators from Ireland and other EU Member States.

(190) Therefore, it is the Commission's view that the present measures might have a negative impact on competition and that it might be altered to an extent contrary to the common interest as a consequence of the public financing afforded by the measure in question.

(191) Consequently, the Commission has doubts that the measures in question are not prejudicial to the common interest and that the above mentioned criteria have been satisfied in the present case.

C.4. Financing of Disability Awareness Training

(192) The Irish authorities did not provide to the Commission the necessary information concerning the modalities, duration, budget, intensity and further conditions in order to allow it to be able to take a position on this measure.

Doubts as to the presence of aid

(193) As the Disability Awareness Training is apparently financed by the Irish authorities, it is likely to involve State resources. The Commission however invites the Irish authorities to provide more details on the form and modalities of the measure in order to be able to take final conclusions on this point.

(194) As regards the presence of an advantage, the Commission notes that the public financing of training that should normally be financed by undertakings may give them an advantage. Nevertheless, the Commission notes that this training might have a social character and might improve the mobility of the disabled people.

(195) At the current stage, the Commission does not have enough details as to the form and intensity of the measure, the market significance of the transport of disabled people, the existence of obligations as regards the transport of disabled people, etc. in order to take a position on this issue at this stage.

(196) Hence, the Commission has doubts as to the presence of State aid in this measure within the meaning of Article 87(1) of the EC Treaty.

Compatibility of the aid

(197) If the Commission were to come to the conclusion of the presence of State aid in this measure, it would assess its compatibility according to Article 87(3)(c) of the EC Treaty, which stipulates that: „aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest“, may be considered to be compatible with the common market.

(198) The Commission considers that the appropriate legal framework is the Commission Regulation (EC) No 68/2001⁽³⁴⁾ on the application of Articles 87 and 88 of the EC Treaty to training aid of 12 January 2001 (thereinafter „Regulation (EC) No 68/2001“) amended by the Regulation (EC) No 363/2004⁽³⁵⁾ of 25 February 2004 and Regulation (EC) No 1976/2006⁽³⁶⁾ of 20 December 2006.

(199) Article 3(1) of this Regulation for aid granted to individual beneficiaries outside any scheme and Article 3(2) of the Regulation (EC) No 68/2001 for training aid schemes stipulate, that an individual aid or an aid scheme fulfilling all provisions of the Regulation (EC) No 68/2001 shall be compatible with the common market within the meaning of Article 87(3) of the EC Treaty and shall be exempt from the notification requirements of Article 88(3) of the EC Treaty provided that the individual aid or the scheme contains an express reference to the Regulation (EC) No 68/2001, by citing its title and publication reference in the *Official Journal of the European Communities*.

⁽³⁴⁾ OJ L 10, 13.1.2001, p. 20.

⁽³⁵⁾ OJ L 63, 28.2.2004, p. 20.

⁽³⁶⁾ OJ L 368, 23.12.2006, p. 85.

(200) According to Article 4(1) the exempted training must fulfil conditions laid down in Article 4(2) to (7).

Regulation does not apply, if the „aid granted to one enterprise for a single training project exceeds EUR 1 000 000“.

(201) **Aid intensity:** In order to determine the eligible aid intensities, it is necessary to distinguish between „specific training“ (Article 4, paragraph 2) and „general training“ (Article 4, paragraph 3). The „Disability Awareness Training“ in the present case seems to correspond to the definition of „general training“ set out in Article 2(e) of the Regulation (EC) No 68/2001 as it involves „tuition which is not applicable only or principally to the employee's present or future position in the assisted firm, but which provides qualifications that are largely transferable to other firms or fields of work and thereby substantially improve the employability of the employee“. Therefore, the eligible aid intensity shall not exceed 50 % for large enterprises and 70 % for small and medium-sized enterprises (excluding the regional bonuses and the bonus for training given to disadvantaged workers). However, on the basis of the information currently at its disposal, the Commission is not able to verify whether the aid intensity for the „Disability Awareness Training“ is in compliance with the above mentioned ceilings or not.

(202) **Eligible costs:** At this stage the Commission does not have sufficient information at its disposal to determine if the publicly funded costs for „Disability Awareness Training“ comply with the definition of the eligible costs as set out in Article 4(7) of Regulation (EC) No 68/2001.

(203) **Cumulation rule:** Article 6 stipulates following cumulation requirements:

„1. The aid ceilings fixed in Articles 4 and 5 shall apply regardless of whether the support for the project is financed entirely from State resources or is partly financed by the Community.

2. Aid exempted by this Regulation shall not be cumulated with any other State aid within the meaning of Article 87(1) of the Treaty, or with other Community funding, in relation to the same eligible costs, if such cumulation would result in an aid intensity exceeding that fixed by this Regulation.“

At this stage the Commission does not have sufficient information at its disposal to verify if the provisions set out in Article 6 have been respected.

(204) **Conclusion:** On the basis of the information currently at its disposal the Commission therefore cannot conclude at this stage that all provisions of Regulation (EC) No 68/2001 are being fulfilled. Therefore, the Commission invites the Irish authorities to provide the Commission with further information concerning the Disability Awareness Training.

(205) Furthermore, the Commission reminds the Irish authorities, that according to Article 5 the exemption from the

D. CONTRIBUTION FROM THE EUROPEAN REGIONAL DEVELOPMENT FUND

(206) As concerns contributions from the European Regional Development Fund (hereinafter: „ERDF“) for activities carried out under the NDP for the financing of infrastructure, the Commission wishes to recall that the Structural Funds operate on a decentralized basis whereby the Member State is responsible for selecting and managing individual projects and shall have the responsibility for the implementation and financial control of assistance. To that end the Member State shall, among other things, ensure that assistance is managed in accordance with all the applicable Community rules and that funds are used in accordance with sound financial management ⁽³⁷⁾.

(207) For this purpose, Paragraph 3.4.4 (Public Transport Priority 2000-2006) in Annex II to Decision C(2004) 5741 ⁽³⁸⁾ amending Articles 2 and 3 of Decision C(2000) 3446 states that „no State assistance incompatible with the State aid rules is being provided under this Priority“.

(208) However, in respect of the investment grants used for the financing of public transport services and infrastructure which are eligible for co-financing under the ERDF and the possibility that certain elements of such grants may constitute State aid in the meaning of Article 87(1) of the EC Treaty, the Commission wishes to remind the Irish authorities that Article 4 of Decision C(2000) 3446 of 7 December 2000, as follows, remains of application:

„[Decision C(2000) 3446] is without prejudice to the Commission's positions on aid schemes falling within Article 87(1) of the Treaty that are included in the assistance package and which have not yet been approved by the Commission. Submission of the application for assistance, the Programming Complement or a request for payment by the Member State does not replace the notification required by Article 88(3) of the Treaty.“

„Community financing of State aid falling within Article 87(1) of the Treaty, granted under aid schemes or in individual cases, requires prior approval by the Commission under Article 88 of the Treaty, except where the aid falls within the de minimis rule or is exempted under an exemption regulation adopted by the Commission under Council Regulation (EC) No 994/98 of 7 May on the application of Articles 87 and 88 to certain categories of horizontal aid [footnote 2: OJ L 142, 14.5.1998, p. 1.]. In the absence of such exemption of approval, aid is illegal and subject to the consequences set out in the procedural regulation for State aid, and its co-financing would be treated as an irregularity within the meaning of Articles 38 and 39 of Regulation (EC) No 1260/1999.“

⁽³⁷⁾ Article 8(3) and Article 38 of Regulation (EC) No 1260/1999.

⁽³⁸⁾ Commission Decision C(2004) 5741 of 27 December 2004 amending Decision C(2000) 3446 approving the Economic and Social Infrastructure Operational Programme for Community structural assistance under Objective 1 and under Objective 1 transitional support in Ireland.

„Consequently, the Commission will not accept requests for interim and final payments under Article 32 of the Regulation for measures being cofinanced with new or altered aid, as defined in the procedural regulation for State aid, granted under aid schemes or in individual cases, until such aid has been notified to and formally approved by the Commission.“

E. CONCLUSIONS

- (209) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests Ireland to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter.
- (210) The Commission wishes to remind Ireland that Article 88(3) of the EC Treaty has suspensory effect, and would like to draw attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that in case of negative decisions, the Member State shall take all necessary measures to recover the aid from the beneficiaries unless this would be contrary to a general principle

of Community law. The same article provides that the aid to be recovered pursuant to a recovery decision shall include interest which shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

- (211) The Commission inform Ireland that it will notify interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Communities*. It will also inform interested parties in the EFTA countries, which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Communities* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.“