

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 23 February 2011

on State aid C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr*(notified under document C(2011) 632)***(Only the German text is authentic)****(Text with EEA relevance)**

(2011/501/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2) thereof ⁽¹⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the above Articles ⁽²⁾, and having regard to these comments,

Whereas:

Bahnen der Stadt Monheim GmbH ('BSM') receive compensation payments for public service obligations, and requested Germany to submit its comments. At Germany's request, a meeting took place on 1 February 2007. Germany transmitted its comments on 18 April and 4 May 2007.

(2) The Commission's decision to open the formal investigation procedure was published in the *Official Journal of the European Union* on 31 March 2007 ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measures in question within 1 month of the publication date.

(3) The Commission received comments from one interested party. It transmitted the comments to Germany by letter dated 29 May 2007. Germany was given the opportunity to respond to them within 1 month. The Commission received Germany's observations by letter dated 29 June 2007.

(4) At Germany's request, an additional meeting took place on 31 January 2008. This meeting was followed by the dispatch of additional information by Germany, as requested by the Commission, on 5 May and 3 July 2008.

(5) By letters dated 2 October 2007, 30 January 2008 and 4 April 2008, the interested party provided further clarifications with regard to its initial observations.

1. PROCEDURE

(1) By letter dated 21 December 2006, the Commission informed Germany of its decision to consider that the 'old financing system' of the Verkehrsverbund Rhein-Ruhr (Rhine-Ruhr Transport Network – 'VRR') constituted existing aid and to open the procedure provided for in Article 108(2) TFEU in respect of the 'new financing system' ⁽³⁾ of VRR, on the basis of which Rheinische Bahngesellschaft AG ('RBG') and

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate.

⁽²⁾ OJ C 74, 31.3.2007, p. 18.

⁽³⁾ See Section 4.2.

⁽⁴⁾ See footnote 2.

- (6) By letter dated 10 July 2008 the Commission requested further clarifications from Germany with regard to the submitted information; Germany was also given the opportunity to respond to the additional clarifications provided by the interested party within 1 month. Germany responded by letters dated 5 August and 30 September 2008.
- (7) By letter dated 16 December 2009 the Commission requested Germany and the interested party to provide by 10 January 2010 their observations on the compatibility of the measures in question with Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70⁽⁵⁾. Germany and the interested party requested prolongation of the deadline. The Commission prolonged the deadline for both parties until 12 January 2010. By letter dated 12 January 2010 the Commission received the observations from Germany. The interested party did not provide any observations within the deadline. By letter dated 13 January 2010 the interested party informed the Commission that it was no longer interested in participating in the procedure.
- (8) In its letter of 12 January 2010, Germany informed the Commission as well that it had amended the acts of entrustment for RBG and BSM and the new financing system of VRR, with a view to complying with Regulation (EC) No 1370/2007.

2. THE PARTIES

- (9) VRR was established by various cities and districts in the Rhine-Ruhr area as a vehicle to fulfil the cities' and districts' task to plan and organise local public passenger transport within their respective territories, and to disburse public service compensation payments for the provision of public transport services. VRR consists of two legally distinct bodies governed by public law, namely the Zweckverband Verkehrsverbund Rhein-Ruhr ('ZV VRR')⁽⁶⁾ and the Verkehrsverbund Rhein-Ruhr AöR ('VRR AöR')⁽⁷⁾.
- (10) ZV VRR is entitled to levy contributions from the cities and districts which are its members in order to finance

the compensation of public service obligations. The legal basis for the levies are paragraphs 19 to 20 of the ordinance of ZV VRR (*Zweckverbandssatzung für den Zweckverband Verkehrsverbund Rhein-Ruhr*) of 21 June 2006, as amended on 10 December 2008 ('the ZV VRR ordinance')⁽⁸⁾.

- (11) RBG⁽⁹⁾ and BSM⁽¹⁰⁾, the alleged beneficiaries of the measures at issue, are both public transport undertakings (bus, tram and railway) in the Düsseldorf area. The routes they operate form part of the public transport network of VRR.
- (12) RBG and BSM operate their public passenger transport routes on the basis of licences which they have been granted by the competent regional government of Düsseldorf on the basis of the Passenger Transportation Act (*Personenbeförderungsgesetz* – 'PBefG'), and more specifically paragraph 13 of the PBefG. The licences grant an exclusive operating right to the holder; in return, the undertaking which holds a licence has to provide a public transport service in accordance with the conditions set out in the licence, which indicates in particular the frequency, kilometres operated and other quality parameters.

3. DETAILED DESCRIPTION OF THE MEASURE

3.1. TITLE, BUDGET, DURATION

- (13) Title: Financial support for BSM and RBG.
- (14) The budget is annually between [...] (*) and [...] million euros for BSM and between [...] and [...] million euros for RBG. The budget for compensation payments under financing guidelines and control and profit/loss transfer agreements stems from public resources. The financing guidelines and the control and profit/loss transfer agreements are of unlimited duration.

⁽⁵⁾ OJ L 315, 3.12.2007, p. 1.

⁽⁶⁾ ZV VRR was established by the cities and districts concerned under the terms of the Law on Communal Cooperation of North Rhine-Westphalia (*Gesetz über kommunale Gemeinschaftsarbeit*).

⁽⁷⁾ VRR AöR was founded by ZV VRR in September 2004. Since June 2007, VRR AöR is the common institution for the common exercise of functions in local public transport by the cities not only in the territory of the ZV VRR, but also of the neighbouring territory of the 'Nahverkehrs-Zweckverband Niederrhein'. As ZV VRR has delegated its management and its tasks, including most notably the financing of public service obligations to VRR AöR, no difference will be made between ZV VRR and VRR AöR in what follows; they will be referred to jointly hereinafter as 'VRR'.

⁽⁸⁾ The latest version of the ZV VRR ordinance is available online at http://www.vrr.de/imperia/md/content/vrrstartseite/satzung_zv.pdf.

⁽⁹⁾ RBG, which was renamed 'Rheinbahn AG' as from 29 April 2005, is held by the city of Düsseldorf (5 %) and by 'Holding der Landeshauptstadt Düsseldorf GmbH' (95 %), which is in turn wholly owned by the city of Düsseldorf and was named 'Düsseldorfer Stadtwerke Gesellschaft für Beteiligungen mbH' until 18 June 2007. According to the website of the city of Düsseldorf (http://www.duesseldorf.de/finanzen/beteiligungsberichte/2006_pdf/anlagen/orga.pdf), Holding der Landeshauptstadt Düsseldorf GmbH also holds a share of 25,05 % in 'Stadtwerke Düsseldorf AG', 100 % of the shares in 'Bädergesellschaft Düsseldorf mbH' and a share of 50 % in 'Flughafen Düsseldorf GmbH' (all figures as of 31 December 2006).

⁽¹⁰⁾ BSM is wholly owned by 'Monheimer Versorgungs- und Verkehrs-GmbH', itself wholly owned by the city of Monheim. Besides BSM, Monheimer Versorgungs- und Verkehrs-GmbH also holds 49,9 % of the shares in 'MEGA Monheimer Elektrizitäts- und Gasversorgungs GmbH', 99 % of the shares in 'Allwetterbad der Stadt Monheim am Rhein GmbH' and 100 % of the shares in 'Stadtentwicklungsgesellschaft Monheim am Rhein mbH'.

(*) Covered by the obligation of professional secrecy.

3.2. RECIPIENTS AND OBJECTIVE

- (15) The recipients of the compensation payments at issue are the two companies RBG and BSM.
- (16) The objective of the measures is to provide the population with proportionate public passenger transport. The cooperation between the *Land* of North Rhine-Westphalia, VRR and the transport providers aims, through coordinated planning and a coordinated transport system, by uniform and user-friendly tariffs, through coordinated information of passengers – also taking into account the needs of handicapped persons – and through uniform quality standards, to increase the attractiveness of public passenger transport, as set out in paragraph 4 of the ZV VRR ordinance.

4. GROUNDS FOR OPENING THE PROCEDURE

4.1. SCOPE OF THE PROCEDURE

- (17) The decision to open the procedure concerns only compensation payments to RBG and BSM based on the new financing system put in place by Decision of VRR of 28 June 2005 and related to public service obligations in the bus and tram transport services. Therefore, the scope of this final Decision is also limited to those compensation payments for RBG and BSM.

4.2. THE NEW FINANCING SYSTEM

- (18) The Commission identified the following two sets of financing measures in respect of RBG and BSM in its decision to open the formal investigation procedure:
- the financing of transport undertakings in the Rhine-Ruhr area, such as RBG and BSM, by VRR, and,
 - the cross subsidisation of RBG and BSM by the municipal holding companies of the city of Düsseldorf and the city of Monheim.
- (19) The legal basis for both sets of measures is the Financing Guidelines for public transport in the VRR (*Richtlinie zur Finanzierung des ÖSPV im Verkehrsverbund Rhein-Ruhr* – ‘the Financing Guidelines’), adopted on 28 June 2005, and the annexes thereto ⁽¹¹⁾.
- (20) For the second set of financing measures, the legal basis is to be found in addition in bilateral contracts between

RBG and BSM and the municipal holding companies of the cities of Düsseldorf and Monheim.

4.2.1. THE FINANCING OF RBG AND BSM BY VRR

- (21) VRR makes payments to the undertakings which operate public transport services within its territory in order to cover part of their costs. By decision of 28 June 2005, the financing system which had applied since 1990 (the ‘old financing system’) was replaced by a new, substantially modified system (the ‘new financing system’).
- (22) The new financing system was last modified on 10 September 2009 in order to adapt it to the entry into force of Regulation (EC) No 1370/2007 on 3 December 2009.
- (23) The reform of VRR’s financing system of 28 June 2005 was brought about by the desire to bring the financing system into line with the *Altmark* ruling of the Court of Justice ⁽¹²⁾. Points 5.4.3 to 5.4.5 of the Financing Guidelines specify how the *Altmark* ruling, in particular the fourth criterion, has to be implemented. Point 5.4.3 provides that the amount of subsidies is defined on the basis of an analysis of the costs of a typical undertaking, well run and adequately provided with means of transport to be able to meet the imposed public service obligations. Point 5.4.4 provides that, on the basis of this analysis, VRR will develop parameters for calculating the compensation payments for each of the four categories described below on a yearly basis; a method for the updating (or indexation) of these parameters is laid down in Annex 9 to the Financing Guidelines. Point 5.4.5 provides that the subsidies for each undertaking are limited to the actual costs incurred by the undertaking in the discharge of its public service obligations taking into account the relevant receipts and that the parameters for the calculation of the compensation payments have to be examined and verified by an auditor at regular intervals.
- (24) The new financing system is described in detail in the Financing Guidelines and the annexes thereto.
- (25) According to point 2.1 of the Financing Guidelines, VRR finances the discharge of public service obligations within its territory. Points 2.2.1 to 2.2.4 define the four different categories of costs which can be the subject of financing by VRR. These categories are then described in more detail in Annex 1 to the Financing Guidelines. The four categories are as follows (the abbreviations used correspond to the numbering of the cost categories in the Financing Guidelines):

⁽¹¹⁾ The latest version of the Financing Guidelines is published on VRR’s website, see <http://www.vrr.de/imperia/md/content/vrrstartseite/finanzierungsrichtlinie.pdf>

⁽¹²⁾ Judgment in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* [2003] ECR I-7747 (*Altmark*).

- (26) (a) Infrastructure provision (hereinafter referred to as 'cost category 1'): This category contains the costs resulting from the construction and maintenance of fixed installations, as well as the safety and navigation systems associated with those fixed installations. 'Infrastructure' includes tram tracks, bus lanes, park and ride stations, bus stops, stations, garages and maintenance stations, and navigation and safety systems. This category also includes the costs of the personnel required for carrying out these tasks.
- (27) (b) Management and marketing tasks imposed by VRR or the competent local authority (hereinafter referred to as 'cost category 2'): This category contains all the additional costs resulting for transport undertakings from their participation in VRR. The additional costs result from centralised planning and coordination, marketing and financial management, product sales and control of operations.
- (28) (c) Vehicle quality standards imposed by VRR or the competent local authority (hereinafter referred to as 'cost category 3'): This category contains all the additional costs due to vehicle and rolling stock requirements. The transport undertakings can apply for reimbursement of additional expenditure resulting from the purchase of vehicles with air conditioning, video surveillance, a low floor, a gas engine, a lift for handicapped persons or a more environmentally friendly engine.
- (29) (d) Additional transport services or other services in connection with the operation imposed by VRR or the competent local authority. This category has three subcategories:
- I. additional costs of unprofitable services in off-peak periods imposed directly by the competent local authority or by VRR (hereinafter referred to as 'cost category 4a');
 - II. social obligations in connection with the activities imposed by the shareholder⁽¹³⁾ (hereinafter referred to as 'cost category 4b'); and
 - III. requirements in connection with the operation or requirements inherent in the system imposed by the competent local authority or VRR which are justified individually and lead to an economic disadvantage (hereinafter referred to as 'cost category 4c').
- (30) According to the Financing Guidelines public transport operators may apply for compensation for discharging public transport services. The application needs to contain the mandatory elements as described in Sections 5, 7 and 8 of the Financing Guidelines such as the underlying calculations for discharging the public service obligation and possible payments from third parties. Transport undertakings need to submit their application for compensation at the latest on 31 October of the year that precedes the year for which they request compensation.
- (31) On the basis of the information submitted by the transport undertakings pursuant to point 5.4.2 of, and Annex 2 to, the Financing Guidelines, VRR calculates the compensation, which must reflect the costs which an average, well-run undertaking would have incurred in discharging the same obligations. VRR then issues a financing notice (*Finanzierungsbescheid*). This legally binding act confirms the entrustment and establishes the compensation payments for each of the four categories of financing. At the end of each year the public service operator has to prove in writing its income and costs for discharging the public service obligations. This is examined by VRR. A second binding administrative decision will be then issued which establishes the precise sum the operator will receive as compensation.
- 4.2.2. THE FINANCING OF RBG AND BSM THROUGH CROSS-SUBSIDISATION
- (32) The ZV VRR ordinance provides for the possibility that cities and districts which own a transport undertaking compensate directly their transport undertaking and deduct the corresponding amount from their levy due to ZV VRR.
- (33) Paragraph 19 of the ZV VRR ordinance envisages five different forms of such direct payments, namely:
- voluntary direct and indirect contributions by the city or district, including dividend payments on shares which the city or district places with the transport undertaking;
 - voluntary contributions by third parties;
 - cross-subsidies in the form of a control and profit/loss transfer agreement, in situations where the transport undertaking forms part of a holding company and its losses are covered by the profits of other undertakings, for instance electricity and gas companies;

⁽¹³⁾ This concerns the obligation to apply the collective agreement concluded by the Municipal Employers Association of North Rhine-Westphalia (see paragraph 52).

- dividend payments from undertakings in which the transport undertaking holds participations or shares;
 - the difference between the levy and the total losses of the transport undertaking.
- (34) The sums paid under the provisions of paragraph 19 of the ZV VRR ordinance are taken into account in the calculation of the compensation that VRR pays to the transport undertakings. Point 8 of the Financing Guidelines provides that an application by a transport undertaking for financing by VRR must be rejected where the (municipal) shareholder has made use of one or more of the options provided for by paragraph 19 of the ZV VRR ordinance. This sum will be deducted from the payments to which the transport undertaking is entitled under the Financing Guidelines.
- (35) Both the city of Düsseldorf and the city of Monheim have made use of the possibilities offered by paragraph 19 of the ZV VRR ordinance, concluding agreements with RBG and BSM respectively. These are described in the following recitals.
- (36) The alleged cross-subsidisation of RBG by Düsseldorf Stadtwerke Gesellschaft für Beteiligungen mbH: According to the information provided by the initial complainant, it appeared that on the basis of profit and loss transfer agreements Düsseldorf Stadtwerke Gesellschaft für Beteiligungen mbH transfers the profits made by its profitable holdings – Stadtwerke Düsseldorf AG and Umschlagsgesellschaft für Kraftwerkbrennstoffe mbH – to its loss-making subsidiaries RBG and Bädergesellschaft Düsseldorf.
- (37) *The alleged cross-subsidisation of RBG by the City of Düsseldorf:* In addition, according to the information provided by the initial complainant, the Commission also made reference to directly granted subsidies from the city of Düsseldorf to RBG. It appeared that these subsidies were granted from the dividends which Düsseldorf received from its 1,1 % shareholdings in RWE AG.
- (38) *Yearly payments from Düsseldorf to RBG:* Germany stated in its reply to the opening decision that there has never been a control and profit/loss transfer agreement between Stadtwerke Düsseldorf AG and Düsseldorf Stadtwerke Gesellschaft für Beteiligungen mbH (as of 18 June 2007: Holding der Landeshauptstadt Düsseldorf GmbH – ‘the holding company’). However, yearly payments to RBG were made by the holding company for the provision of the public service obligation, and such payments are taken into account for the calculation of compensation for the public service obligation by VRR. The German authorities further stated that the dividends from the shareholdings in RWE are paid to the budget of the city and not transferred to RBG.
- (39) *The cross-subsidisation of BSM:* According to the information provided by the initial complainant, on the basis of a contract between Monheimer Versorgungs- und Verkehrs-GmbH and Elektrizitätswerke der Stadt Monheim GmbH the profits of the latter are used to finance BSM’s annual losses. BSM is a wholly-owned subsidiary of Monheimer Versorgungs- und Verkehrs-GmbH ⁽¹⁴⁾.
- (40) In its reply to the opening decision, Germany stated that a control and profit/loss transfer agreement was concluded between BSM and Monheimer Versorgungs- und Verkehrs-GmbH on 27 October 1987 and entered into force on 1 January 1988. Under the terms of paragraph 4(1) of this agreement, all profits made by BSM are to be transferred to Monheimer Versorgungs- und Verkehrs-GmbH and, conversely, the latter is to compensate all losses incurred by BSM.
- 4.3. DOUBTS EXPRESSED BY THE COMMISSION AS REGARDS COMPENSATION PAYMENTS TO RBG AND BSM BASED ON THE NEW FINANCING SYSTEM
- 4.3.1. EXISTENCE OF AID
- (41) With regard to the existence of State aid, the Commission concluded in opening the formal investigation procedure that both of the measures in question involved state resources and were imputable to the State.
- (42) In the decision opening the investigation, the Commission explained that Germany was of the opinion that the financing measures in question did not confer a selective economic advantage as they met all four *Altmark* criteria and as they were not likely to distort competition and affect trade between Member States. However, on the basis of the information provided by Germany in the course of the preliminary examination, the Commission expressed the following doubts in this regard:
- (43) With regard to the first *Altmark* criterion, the Commission came to the preliminary conclusion that undertakings operating in VRR did have a public service obligation imposed by the means of licences for operating bus and tram routes, which were granted to them by the relevant regional authority.
- ⁽¹⁴⁾ Germany provided the following details of the various shareholdings of Monheimer Versorgungs- und Verkehrs-GmbH (wholly-owned by the city of Monheim):
- 100 % Bahnen der Stadt Monheim GmbH (BSM),
 - 100 % Allwetterbad der Stadt Monheim GmbH,
 - 100 % Stadtentwicklungs GmbH,
 - 50,1 % MEGA Monheimer Elektrizitäts und Gas GmbH,
 - 36 % Wasser GmbH.

(44) In relation to the second *Altmark* criterion, the Commission expressed doubts as to whether all four cost categories themselves indeed constituted a public service obligation, and whether the public service obligations had been clearly defined. It was also unclear as to whether at least a part of the costs of the measures in question should be paid by the undertakings in their own commercial interest, and therefore should be covered solely by ticket revenue. The Commission also noted that Germany had not transmitted detailed information on the parameters and method of calculating the compensation.

(45) In the opening decision the Commission was not in a position to exclude the possibility that the compensation might exceed what was necessary to cover all or part of the costs incurred in discharging public service obligations (third *Altmark* criterion).

(46) As the licences for transport undertakings in VRR were awarded directly without a public tendering procedure, the Commission expressed doubts as to whether the fourth *Altmark* criterion had been complied with. It did not have sufficient information to be able to evaluate whether the calculation of the compensation established on the basis of average costs of all undertakings subject to financing by VRR corresponded to the level of costs of a typical well-run undertaking providing means of transport.

(47) In the opening decision the Commission considered that the financing of the measures in question might affect inter-State trade and distort or threaten to distort competition within the internal market.

4.3.2. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

(48) Having concluded that it could not exclude the existence of State aid, the Commission examined its possible compatibility with the internal market on the basis of Article 93 TFEU.

(49) According to the *Altmark* judgment, Article 93 TFEU could not be applied directly but only through the three Council Regulations adopted on the basis thereof⁽¹⁵⁾. Accordingly, Council Regulation (EEC) No 1191/69 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⁽¹⁶⁾ and Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway⁽¹⁷⁾

were considered to form the legal framework applicable for the assessment of the compatibility of the public service obligations.

(50) The Commission considered in the decision opening the procedure that Germany had excluded the relevant transport services from the scope of application of Regulation (EEC) No 1191/69, and that therefore only Regulation (EEC) No 1107/70 was the applicable legal framework.

(51) In relation to the compatibility of the aid on the basis of Article 3(2) of Regulation (EEC) No 1107/70, the Commission expressed doubts as to whether the obligations for which BSM and RBG received compensation constituted public service obligations and whether the amounts paid corresponded to the costs incurred in discharging those obligations.

5. COMMENTS FROM GERMANY⁽¹⁸⁾

5.1. SCOPE OF THE PROCEDURE

(52) Germany began its observations by providing background information on the implementation of the new financing system. It indicated in particular that the old financing system had remained in force until the end of 2005 (31 December 2005). The new financing system, which had been decided on 28 June 2005, had been put into effect as from 1 January 2006.

(53) Germany emphasised that the complaint lodged at the beginning of the current procedure had been made by the city of Langenfeld by letter dated 27 January 1999 and that it had been renewed on 21 January 2004. Therefore, in Germany's view, the Commission's procedure should relate only to the old financing system which was in force until the end of 2005. Germany disputed the Commission's decision to open the formal investigation procedure regarding the new financing system. It argued that, in the absence of a complaint specifically pertaining to the new financing system applying from 2006 onwards, the Commission had not carried out a sufficiently detailed preliminary assessment and that, consequently, Germany had not had the opportunity to clarify the questions that were still open.

5.2. THE NEW FINANCING SYSTEM APPLYING FROM 2006 ONWARDS

(54) Germany explained that the new financing system was designed to ensure that the four *Altmark* criteria were respected. In order to do this, all financial flows – be they direct payments or cross-subsidies – were taken into account in the calculation of the public service compensation payments to the transport undertakings made by VRR.

⁽¹⁵⁾ Case C-280/00, cited above, paragraphs 101 and 105-107.

⁽¹⁶⁾ OJ L 156, 28.6.1969, p. 1.

⁽¹⁷⁾ OJ L 130, 15.6.1970, p. 1.

⁽¹⁸⁾ Germany submitted comments it had received from VRR, RBG and BSM and made extensive reference to them in its comments.

5.3. DEFINITION OF THE PUBLIC SERVICE OBLIGATIONS (FIRST ALTMARK CRITERION)

- (55) Germany replied to the Commission's doubts with regard to the definition of the public service obligations and the act of entrustment (recital 61 of the opening decision), and with regard to cost categories 1, 2, 3, and 4 (recitals 62 to 71 of the opening decision).

5.3.1. ACT OF ENTRUSTMENT

- (56) With regard to the question whether transport undertakings in VRR are actually required to discharge clearly defined public service obligations, Germany stated that the licences⁽¹⁹⁾ issued for the operation of bus and tram routes under the terms of the Passenger Transportation Act (*Personenbeförderungsgesetz* – PBefG) are not the sole legal basis in this respect. In addition, the respective Local Public Transport Scheme (*Nahverkehrsplan*)⁽²⁰⁾ or, for a transitional period after the entry into force of the new financing system⁽²¹⁾, decisions of the respective city and district councils, and the respective financing notices by VRR based on VRR's Financing Guidelines further clarify the public service obligations. The public service obligations are therefore imposed by way of a threefold act of entrustment (i.e. by means of licences, the Local Public Transport Schemes and the respective financing notice by VRR based on VRR's Financing Guidelines).

- (57) In respect of RBG, the city council of Düsseldorf approved VRR's new financing system by decision of 15 December 2005 in which it also decided to base its Local Public Transport Scheme on the Financing Guidelines which are part of the new financing system. The Local Public Transport Scheme 2002-07 was decided by the city council of Düsseldorf on 20 March 2003. RBG is also subject to the Local Public Transport Schemes of neighbouring cities and districts (the Rhine district in Neuss, the city of Neuss, the district of Mettmann). All of these Local Public Transport

Schemes contain provisions on the network (services and infrastructure) to be provided by RBG. RBG holds licences under the PBefG for the bus and (overground and underground) tram routes operated by it.

- (58) In respect of BSM, the city council of Monheim and the district council of Mettmann approved VRR's new financing system by decisions of 10 November and 19 December 2005, respectively. The latter decision also provides that the Local Public Transport Scheme for the district of Mettmann⁽²²⁾ is to be brought into line with the new financing system. The Local Public Transport Scheme 2004 for the district of Mettmann contains provisions on the network (services and infrastructure) to be provided by BSM. BSM holds licences under the PBefG for the bus routes operated by it.

5.3.2. COST CATEGORY 1: INFRASTRUCTURE PROVISION

- (59) Germany stated that, for the operation of public transport services, an undertaking has to be equipped with vehicles. It emphasised that in Germany and all other Member States the infrastructure used for the provision of public transport services is usually provided by the State. Therefore, Germany is of the opinion that the provision of infrastructure does not confer any economic advantage on the operators in question. In addition, it emphasised that VRR is financing only the maintenance and not the construction of infrastructure. Moreover, VRR does not finance the full maintenance costs, but only the fixed costs (the variable costs of infrastructure utilisation are not compensated). Germany provided an analysis of the additional burden deriving from the public service obligation, taking into account several criteria, in particular the utilisation of the capacity of the infrastructure. Any revenue deriving from the use of the infrastructure (e.g. advertising) was subtracted from the calculation of the additional costs.

- (60) Under the terms of the PBefG and its implementing legislation⁽²³⁾, RBG and BSM are obliged to keep the infrastructure necessary for the operation of the transport services for which they hold licences ready for use according to certain quality standards (most importantly regarding the equipment of stops). They are both subject to additional requirements going beyond these legal requirements, which are contained in VRR's guidelines on the equipment of stops (*Richtlinie Haltestellenausstattung im VRR 08/1991*) and in the respectively applicable Local Public Transport Schemes. For RBG,

⁽¹⁹⁾ A licence granted to a transport undertaking under the Passenger Transportation Act entails the obligations to operate the service in question, to transport any passenger under the terms of the authorised tariff and to respect the authorised timetable.

⁽²⁰⁾ The Local Public Transport Scheme lays down the public transport routes to be operated during the period in question. It lays down frequencies for the transport services, key figures on distances to be travelled, minimum standards for the quality of the transport services and infrastructure (such as connectivity, standards for connections, standards for operations including passenger information, service, security and cleanliness) as well as an action plan (covering e.g. investment/maintenance measures in infrastructure and vehicles). The Local Public Transport Scheme therefore provides the necessary basis for defining future standards and quality benchmarks. Any reduction of the services offered or the closure of routes by the transport operator requires the formal agreement of the regional authority.

⁽²¹⁾ Germany estimates that, due to the necessary consultations, the adoption of a Local Public Transport Scheme takes at least 1 year and that, therefore, there was a need to find a transitional instrument.

⁽²²⁾ The Local Public Transport Scheme for the district of Mettmann also applies to the territory of the city of Monheim, which does not have its own Local Public Transport Scheme.

⁽²³⁾ In particular the Decree on the Operation of Motor Vehicle Undertakings in Passenger Transport (*Verordnung über den Betrieb von Kraftfahrunternehmen im Personenverkehr* – 'BOKraft') and the Decree on the Construction and Operation of Trams (*Verordnung über den Bau und Betrieb der Straßenbahnen* – 'BOStrab').

this concerns for instance a dynamic passenger information system at 192 of the stops and a computerised operations control system. The additional requirements for BSM pertain to safety, information at stops, comfort and cleanliness.

5.3.3. COST CATEGORY 2: MANAGEMENT AND MARKETING TASKS IMPOSED BY VRR OR THE COMPETENT LOCAL AUTHORITY

- (61) Germany provided additional clarifications with regard to this cost category, which contains in particular costs arising from retailing and marketing activities (e.g. support for ticket subscriptions, provision of facilities for commuters such as park and ride areas and their advertising, support for organisers of major events, call centres), allocation of the revenues and further coordination tasks. In this cost category the revenue attributable is deducted in order to calculate the costs related to the additional burden imposed by the public authorities.
- (62) No legal requirements pertain to this category. RBG and BSM are required to discharge these tasks by virtue of a cooperation agreement and an allocation of revenue agreement which they have with VRR and which are a prerequisite for their participation in VRR's financing system. Guidelines to the cooperation agreement contain details of these tasks. Both RBG and BSM are subject to further tasks in this category under the terms of the Local Public Transport Plan of the district of Mettmann. The respective financing notice by VRR is to be regarded as the last step of the act of entrustment.

5.3.4. COST CATEGORY 3: VEHICLE QUALITY STANDARDS IMPOSED BY VRR OR THE COMPETENT LOCAL AUTHORITY

- (63) According to the clarifications provided by Germany, the additional costs connected with vehicle quality standards derive from requirements set by VRR and/or local authorities. Such quality requirements are, for example, more environmentally friendly vehicles than legally necessary, or the use of air-conditioned or low-floor vehicles. These requirements can be set for the whole VRR area or at a local level by the respective cities or districts. The same principles as in the previous categories apply to the calculation of the additional burden for the public transport undertakings.
- (64) The Local Public Transport Scheme of the city of Düsseldorf obliges RBG to invest in low-floor vehicles and enhanced environmentally friendly vehicles. Furthermore, the city council of Düsseldorf has obliged RBG to install particulate filters in its diesel-engined vehicles. Under the terms of the Local Public Transport Plan of the district of Mettmann, BSM is to invest in low-floor vehicles.

5.3.5. COST CATEGORY 4: ADDITIONAL TRANSPORT SERVICES OR OTHER SERVICES IN CONNECTION WITH OPERATION IMPOSED BY VRR OR THE COMPETENT LOCAL AUTHORITY

- (65) Germany stated that this category consists of three clearly defined subcategories:
- (66) (i) *Cost category 4a: Additional costs of unprofitable services in off-peak periods imposed by the competent local authority or by VRR:* Germany explained that the public transport services provided during off-peak periods⁽²⁴⁾ requested by the public authorities are unprofitable. However, these services are required by the public authorities (VRR or the respective cities and districts) for reasons of accessibility of transport services. The obligations of RBG to provide transport services in off-peak periods are laid down by the Local Public Transport Schemes of the city of Düsseldorf, the Rhine district of Neuss and the district of Mettmann. BSM is obliged to provide off-peak transport services by virtue of the licences granted to it and the Local Public Transport Scheme of the district of Mettmann. The respective financing notice by VRR is to be regarded as the last step of the act of entrustment.
- (67) (ii) *Cost category 4b: Social obligations in connection with operation imposed by the shareholder:* With regard to this category Germany explained that RBG and BSM are obliged to apply the collective agreement concluded by the Municipal Employers Association of North Rhine-Westphalia (*Kommunaler Arbeitgeberverband Nordrhein-Westfalen*), which results in a higher average pay scale. The municipal undertakings are also by virtue of collective agreements, which are not normally concluded by private undertakings in the sector, obliged to operate and/or contribute to company pension schemes. By virtue of its membership of a (public) supplementary pension fund, RBG has to make contributions for its employees to this fund. Equally, BSM is obliged to operate a company pension scheme on the basis of the specific collective agreement. The costs are calculated as the difference between the reference pay scale (the pay scale contained in the collective agreement TV-N, group V, step 2 usually applied by private undertakings) and the actual pay which also includes the actual extra costs of the company pension scheme.

⁽²⁴⁾ The economically less favourable off-peak times (times outside peak hours) are:

Days	Public transport services in city areas	Public transport services outside city areas
Monday–Friday	0:00–6:00 and 19:00–0:00	00:00–6:00 and 18:00–0:00
Saturday	0:00–6:00 and 16:00–0:00	all day
Sunday	all day	all day

- (68) (iii) *Cost category 4c: Other requirements in connection with operation or requirements inherent in the system imposed by the competent local authority or VRR which are justified individually and lead to an economic disadvantage:* Germany explained that this is an open category under which, on the basis of individual proof, compensation can be granted for economic disadvantages stemming from requirements regarding the operations or requirements which pertain to the operation of a public transport system (e.g. special requirements with respect to environmental protection and the offer of additional services for major public events). Germany pointed out that RBG and BSM are not subject to such requirements.

5.4. PARAMETERS ON THE BASIS OF WHICH THE COMPENSATION IS CALCULATED (SECOND ALTMARK CRITERION)

- (69) Germany began its observations by providing information on and describing the process for setting the parameters for the calculation of the compensation.
- (70) In relation to the parameters applied for the calculation of the compensation, Germany made a distinction between the different cost categories.
- (71) Regarding *infrastructure provision (cost category 1)*, Germany stated that VRR uses a certain amount – specific to each local network (*Bedienungsgebiet*) and to each mode of operation (*Betriebszweig*) – per kilometre of track or road used for transport services as parameter for the calculation of the compensation.
- (72) Regarding the *management and marketing tasks imposed by VRR or the competent local authority (cost category 2)*, VRR uses – according to Germany – a certain amount of tariffs in relation to the net receipts of tariff increases which is specific to each local network and to each mode of operation as parameter for the calculation of the compensation.
- (73) Regarding the *vehicle quality standards imposed by VRR or the competent local authority (cost category 3)*, Germany stated that the parameter for the calculation of the compensation consists of a certain amount based on a standard vehicle of minimum quality, the amount being specific to each local network and to each mode of operation.
- (74) Regarding the *additional transport services or other services in connection with operation imposed by VRR or the competent local authority (cost category 4)*, Germany made a distinction between the three subcategories.

- (75) For the first subcategory, namely the additional costs of unprofitable services in off-peak periods imposed by the competent local authority or by VRR (cost category 4a), VRR employs a parameter for the calculation of the compensation which is based on the difference between marginal revenue and marginal costs per kilometre. This is specific to each local network and to each mode of operation.

- (76) Regarding the second subcategory, the parameter consists in an amount which is established by comparing the higher pay with the provisions of a certain collective agreement ('TV-N, group V, step 2') (cost category 4b), which is considered to contain almost the same pay scales, and then determining an amount per driver specific to each local network and each mode of operation.

- (77) Finally, according to Germany, other requirements in connection with the operation or requirements inherent in the system imposed by the competent local authority or VRR which are justified individually and lead to an economic disadvantage (cost category 4c) are always calculated on an individual basis, provided they are duly documented.

5.5. NO OVERCOMPENSATION (THIRD ALTMARK CRITERION)

- (78) Germany explained that all transport undertakings in VRR are required by VRR to submit yearly reports on the expenditure of funds with a view to proving that no overcompensation in respect of the public service obligations occurs.
- (79) These reports must contain the actual costs (expenditure minus earnings) incurred in the discharge of public service obligations and are then checked by a chartered accountant and VRR for accuracy and completeness. Should VRR find out that, on the basis of these reports, there is overcompensation, such overcompensation would, according to Germany, be recovered.
- (80) For recovery, it is necessary to distinguish between compensation paid by VRR on the basis of an administrative decision and compensation paid directly to the transport undertaking based on paragraph 19 of the ZV VRR ordinance.
- (81) In the former case, the administrative decision is called a 'positive financing notice' (*positiver Finanzierungsbescheid*) pursuant to the Financing Guidelines. Pursuant to point 7.4.1 of the Financing Guidelines, VRR itself orders recovery of any overcompensation.

- (82) In the latter case, VRR initially issues a 'negative financing notice' (*ablehnender Finanzierungsbescheid*) pursuant to point 7.4.2 of the Financing Guidelines or a 'binding notice on the amount of permissible compensation'. In such a situation, point 8.3 of the Financing Guidelines stipulates that VRR is to inform the city or district owning the transport undertaking that it is obliged to recover the overcompensation.

5.6. TYPICAL UNDERTAKING, WELL RUN AND ADEQUATELY PROVIDED WITH MEANS OF TRANSPORT (FOURTH ALTMARK CRITERION)

- (83) Germany stated that, contrary to the Commission's observation in the decision to open the formal investigation procedure, the parameters for the calculation of the public service compensation are set out and take into account all available information from public and private transport undertakings within or outside the VRR area. VRR has established the costs (i.e. the target data) which result from activities discharging public service obligations in the first three categories by a typical undertaking which is well run with the collaboration of their own expert/auditor, Industrie- und Verkehrstreuhand GmbH ('IVT' or 'the expert'). IVT has at its disposal comparative data on a large number of transport undertakings established in Germany and Austria stemming from a comparative analysis. The target data were adjusted by VRR taking account of certain (e.g. regional) specificities. The target data for the fourth category are established by reference to certain regional market data.
- (84) At the end of its analysis VRR defines a margin for average market prices of the various cost categories. These target data were established for the year 2003 and they are updated according to an index in accordance with Annex 9 to the Financing Guidelines (provisions concerning the 'evolution of the price level over time') and according to volume increases/decreases and changes in structures.
- (85) Germany emphasised in particular that, in its view, the fact that an undertaking is discharging a public service obligation (such as, for instance, paying employees higher than the normal rates due to social policy decisions) does not make it possible to conclude that such an undertaking is not well run.

5.7. DISTORTION OF COMPETITION AND EFFECT ON TRADE BETWEEN MEMBER STATES

- (86) Germany expressed the opinion that the public financing of infrastructure maintenance costs does not affect trade between Member States because this infrastructure is exclusively used by the beneficiary of such financing. Further, it argued that the financing of infrastructure

maintenance costs does not affect a distinct market open to competition, namely the local regional transport market, because VRR's financing system prevents financing earmarked for infrastructure maintenance costs (where the market is closed to competition) from being used by transport undertakings in the market open to competition. Furthermore, public transport operators are required to provide separate accounts for the different cost categories.

5.8. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

- (87) Germany being of the opinion that there is no State aid in favour of RBG or BSM, it provided comments on the compatibility of the alleged aid only in respect of the second subcategory of the fourth category, namely the social obligations in connection with operation imposed by the shareholder ⁽²⁵⁾. It argued that the compensation of the higher pay scale is, in any case, compatible with the internal market on the basis of Article 107(3)(c) TFEU.

5.9. COMPATIBILITY OF THE AID ON THE BASIS OF REGULATION (EC) No 1370/2007

- (88) As Regulation (EC) No 1370/2007 entered into force on 3 December 2009, the Commission requested Germany to provide its observations on the compatibility of the new financing system with the internal market on the basis of Regulation (EC) No 1370/2007.
- (89) Germany was in principle of the opinion that the Commission should assess the compatibility of the new financing system on the basis of Regulation (EC) No 1370/2007 only as from 3 December 2009.
- (90) Furthermore, Germany argued that the new financing system – if it involves State aid – is also compatible with the provisions of Regulation (EC) No 1370/2007.
- (91) Germany also informed the Commission of the following adjustments to the new financing system in order to comply with the requirements of Regulation (EC) No 1370/2007:

⁽²⁵⁾ It also provided comments on the compatibility on the basis of Article 107(3)(c) TFEU of aid for professional training which it considers to fall under the third subcategory of the fourth category. As no obligations were imposed on RBG and BSM in this category, these comments will not be mentioned in detail here.

(92) (a) Entrustment with the public service mission: The imposed public service obligations for RBG (decision of the competent authority dated 25 June 2009) and BSM (decision of the competent authority dated 26 November 2009) have been summarised in a single public service contract with a limited duration of 10 years.

(93) (b) Application of the Annex to Regulation (EC) No 1370/2007: The net financial effect will be calculated in line with the provisions of the Annex to Regulation (EC) No 1370/2007.

6. COMMENTS FROM THIRD PARTIES

(94) The Commission received comments from one interested party, which requested confidential treatment. The initial complainant, the city of Langenfeld, did not submit any observations.

(95) The interested party disputed the Commission's finding that the old financing system is existing aid.

(96) As regards the financing by cross-subsidisation, the third party submitted that this is a practice, usually termed '*kommunaler Querverbund*', common to a great number of municipal holding companies in Germany, which according to the third party has been called into question by a judgment of the German Federal Finance Court ⁽²⁶⁾. In the third party's opinion, where such cross-subsidisation occurs by way of a control and profit/loss transfer agreement, there is no way to prevent overcompensation in view of the automatic character of the transfer. The third party contested that VRR actually takes account of the cross-subsidisation when it applies its financing system in practice and that VRR consequently adjusts its financing amounts accordingly.

(97) As regards the financing by VRR, the third party argued that VRR's new financing system is not applied in practice as it is formulated in the Financing Guidelines, for the following reasons:

(98) According to the third party the public service obligations are defined in a non-transparent way in collaboration with the transport undertakings themselves. It argued that a threefold act of entrustment needs to comply with the requirement of clarity in the same way as a single act. It considered that the licences

under the PBefG are generally not capable of being regarded as the imposition of a public service obligation because they are granted on the initiative of the transport undertaking concerned, which therefore also defines the conditions of its service. In addition, the transport undertaking itself can ask for a later adjustment of the licence. The third party also considered the Local Public Transport Schemes not to be a suitable act of entrustment as they do not impose any obligations but rather only define – in a general manner – policy goals.

(99) Regarding the *infrastructure provision*, the third party submitted that no precise definition of the obligations is given and that only a framework of measures generally capable of being financed is spelled out. Furthermore, the third party stated that the bulk of the investment in this category would normally be carried out by the transport undertakings in their own economic interest.

(100) Regarding the *management and marketing tasks imposed by VRR or the competent local authority*, the third party argued that the management and marketing tasks connected with participation in a transport association such as VRR are an aspect of the general economic framework in the sector. In practice, no transport undertaking operates outside the system of a transport association. Therefore, according to the third party, compliance with management and marketing tasks imposed by a transport association is a necessary prerequisite to obtaining a licence which otherwise would be refused by the competent authority. Finally, participation in a transport association brings with it certain economic benefits, e.g. economies of scale.

(101) In relation to the *vehicle quality standards imposed by VRR or the competent local authority*, the third party submitted that VRR's new financing system does not define exactly which type of vehicle would be bought by the transport undertakings purely out of their own economic interest.

(102) Regarding the *additional costs of unprofitable services in off-peak periods imposed by the competent local authority or by VRR*, the third party stated that such services can be operated at marginal cost when they are well planned, a transport undertaking having in its opinion to calculate its vehicle and personnel requirements according to peak-hour demand.

(103) Regarding the *social obligations in connection with the operation imposed by the shareholder*, the third party submitted that bearing higher personnel costs cannot be regarded as a public service obligation or a service of general economic interest as it does not relate to the provision of transport services.

⁽²⁶⁾ Federal Finance Court, judgment of 14.7.2004 – I R 9/03 –, BFHE 207, 142.

- (104) Regarding the other requirements in connection with the operation or requirements inherent in the system imposed by the competent local authority or VRR which are justified individually and lead to an economic disadvantage, the third party argued that they cannot be regarded as public service obligations and that they are not in fact imposed on the transport undertakings.
- (105) Concerning the second *Altmark* criterion, the third party emphasised that no common system for the definition of the parameters applies to the second and third subcategory of the fourth category of public service obligations in VRR's new financing system. According to the third party, the establishment of the parameters in all of the categories cannot be verified by competitors for their correctness as they are not published. Also, VRR's budget for 2006 was only voted on in February/March 2006. According to the third party, this indicates that the parameters for 2006 were not established in advance.
- (106) Concerning the third *Altmark* criterion, the third party submitted that the public service obligations cannot be assessed completely separately from the commercial activities of the transport undertakings. Moreover, overcompensation must be assessed separately for every single category. In the third party's opinion, the new financing system does not ensure that the relevant receipts or other economic advantages in relation to the public service obligation are taken into account in the various categories. The automatic character of the cross-subsidisation mechanism makes it impossible to prevent overcompensation in VRR's financing system.
- (107) Concerning the fourth *Altmark* criterion, the third party argued that, on the basis of the information at its disposal, it was not in a position to evaluate the appropriateness of the benchmarking method employed by VRR. It submitted that the total number of undertakings from which comparative data are examined is not decisive in determining whether these comparative data reflect the costs of an average, well-run undertaking. In its opinion, the correct selection of the undertakings and the correct weighting of the data stemming from different kinds of undertaking are what matter.
- (108) Regarding the effect on competition and on trade between Member States, the third party agreed with the Commission's preliminary assessment and consequently considered that the measures constitute State aid within the meaning of Article 107(1) TFEU.
- (109) In the third party's opinion, Regulation (EEC) No 1191/69 is applicable in the present case. Germany has not made use of the possibility of exempting the services at issue from the scope of that Regulation. The

reasoning of the BVerwG, which has ruled in the opposite sense, is erroneous. In the third party's view, the measures in question do not comply with the provisions of Regulation (EEC) No 1191/69 and are therefore not compatible with the internal market.

- (110) On a general note, the third party argued that VRR does not have the necessary means at its disposal for monitoring compliance with the provisions of the new financing system. VRR cannot therefore ensure compliance with the fourth *Altmark* criterion.
- (111) Finally, the third party commented extensively, especially in its later submissions, on the way in which VRR is financed by the contributions it levies from its member cities and districts.

7. COMMENTS FROM GERMANY ON THE THIRD PARTY'S COMMENTS

- (112) Germany began its observations by stating that it had provided the Commission with all necessary information and that it was therefore not necessary to comment on the aspects raised by the third party in its comments. At a later stage, Germany nevertheless replied to certain comments made by the third party.
- (113) Germany stated that VRR's budget is of no importance for the actual entrustment with public service obligations or the definition of the parameters. It explained that currently there is no obligation to publish data on the establishment of the parameters for the calculation of compensation.
- (114) Germany disputed the third party's contention that off-peak services can be operated at marginal cost. It further disputed that participation in a transport association is a general prerequisite for carrying on public transport activities.
- (115) Germany emphasised that earnings connected with activities discharging the public service obligations in the different categories are indeed attributed correctly to the respective categories and that, in any case, VRR would look into inappropriately high profits.
- (116) Germany made clear that the entrustment with the obligation to fulfil higher vehicle quality standards stems from Local Public Transport Schemes, decisions by the competent city or district council and the VRR's Financing Guidelines.

- (117) Regarding cross-subsidisation, Germany emphasised that the automatic element in a profit and loss transfer is reflected only in the accounting and that actual payment of the sums does not occur automatically.

8. SCOPE OF THE PROCEDURE AND OF THE FINAL DECISION

- (118) In the present case, Germany has argued that, because the complaint of the City of Langenfeld related to the old financing system, which was not subject to the formal investigation procedure at issue, the Commission is not entitled to issue a decision pursuant to Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 108 TFEU] of the EC Treaty ⁽²⁷⁾.

- (119) The Commission notes that it has acted in line with the provisions of Article 10(1) of Regulation (EC) No 659/1999 as it is requested to examine any information in its possession from whatever source regarding alleged unlawful State aid. Furthermore, it has also carried out a preliminary assessment according to the requirements of Article 6(1) of Regulation (EC) No 659/1999.

- (120) Hence the Commission is not precluded from taking a decision in the present case to close the formal investigation procedure in respect of the new financing system. The Commission also points out that the present investigation does not relate to the old financing system.

- (121) With regard to the financing for discharging a public service obligation, the Commission assumed in the opening decision that the new financing system entered into force on 28 June 2005, i.e. the date on which the decision to implement it was adopted.

- (122) However, as Germany made clear during the formal investigation procedure, the new financing system entered into force, not when the decision was adopted on 28 June 2005, but only on 1 January 2006.

- (123) The Commission can conclude therefore that the old financing system remained in force until 31 December 2005. As the Commission already explained in its

decision of 20 December 2006, the old financing system is existing aid. Accordingly, the Commission will limit its assessment to the period from 1 January 2006.

- (124) Germany has informed the Commission that the new financing system was modified in September 2009 in the light of the entry into force of Regulation (EC) No 1370/2007. In particular, the acts of entrustment and the rules for compensation in the Financing Guidelines were modified.

- (125) The Commission considers that it is not possible to take a final position on the existence of State aid and the possible compatibility of the thus modified new financing system with Regulation (EC) No 1370/2007 without first giving Germany the opportunity to comment on possible concerns of the Commission with regard to the modifications.

- (126) Hence, without taking a view on the Financing Guidelines as modified in 2009 in the light of Regulation (EC) No 1370/2007 and the acts of entrustment as modified in 2009 in the light of Regulation (EC) No 1370/2007, the Commission limits this final decision to compensation payments made to RBG and BSM on the basis of the new financing system and the revenue sharing agreements for the years 2006 to 2009. The Commission reserves the right to assess the Financing Guidelines as modified in 2009 in the light of Regulation (EC) No 1370/2007 and the acts of entrustment as modified in 2009 in the light of Regulation (EC) No 1370/2007 should doubts arise as to their compliance with the EU State aid rules.

9. EXISTENCE OF STATE AID

- (127) Article 107(1) TFEU provides that '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 internal market'.

9.1. STATE RESOURCES AND IMPUTABILITY TO THE STATE

- (128) For the assessment of the presence of state resources and their imputability it is necessary to distinguish between the compensation payments made by VRR to transport undertakings on the basis of the Financing Guidelines, on the one hand, and direct payments made to transport undertakings on the basis of paragraph 19 of the ZV VRR ordinance, on the other.

⁽²⁷⁾ OJ L 83, 27.3.1999, p. 1.

Payments under the Financing Guidelines

- (129) With regard to the compensation payments made by VRR to transport undertakings on the basis of the Financing Guidelines, the Commission observes that VRR is a public body which is financed by contributions levied from the cities and districts which are its members. Therefore, the Commission concludes that these amounts are paid from state resources. VRR forms part of the regional administration. Its financing decisions are therefore also imputable to the State.

Payments under the control and profit/loss transfer agreements

- (130) With regard to direct payments to transport undertakings on the basis of paragraph 19 of the ZV VRR ordinance in conjunction with the revenue sharing agreements, the Commission notes that all five options provided for by this rule originate from public undertakings or public bodies.
- (131) The Commission observes that the payments made to RBG and BSM through revenue sharing agreements or shareholder agreements also stem from public undertakings. The City of Düsseldorf holds 100 % of the shares in Holding der Landeshauptstadt Düsseldorf GmbH and the City of Monheim holds 100 % of the shares in Monheimer Versorgungs- und Verkehrs-GmbH. For this reason, irrespective of their corporate or other legal status, both are public undertakings within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings ⁽²⁸⁾.
- (132) The Commission concludes, therefore, that the funds paid to RBG and BSM through Holding der Landeshauptstadt Düsseldorf GmbH and Monheimer Versorgungs- und Verkehrs-GmbH are financed from state resources.
- (133) However, the Court of Justice has also ruled that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under state control is not sufficient for measures taken by that undertaking, such as the financing to the undertakings

in question, to be considered imputable to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of these measures. On that point, the Court indicated that the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken ⁽²⁹⁾.

- (134) Such indicators can be the integration of the undertaking into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains ⁽³⁰⁾.
- (135) The Commission first notes that, in general, as regards the operation of public transport services, these are activities that play a fundamental role in several policies: transport policy, regional economic development policy or town and country planning policy. The public authorities are in general not 'absent' when decisions on the compensation of a public service obligation are taken.
- (136) Second, as regards the supervision of the activities of Holding der Landeshauptstadt Düsseldorf GmbH and Monheimer Versorgungs- und Verkehrs-GmbH by the State, the Commission observes that, according to the most recent information available, seven of the ten members of the supervisory board of Holding der Landeshauptstadt Düsseldorf GmbH are members of Düsseldorf city council ⁽³¹⁾ and that all seven members of the supervisory board of Monheimer Versorgungs- und Verkehrs-GmbH are members of Monheim city council ⁽³²⁾. In both cases, the mayor is one of these members.

⁽²⁹⁾ Judgment in Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraphs 52 and 57 (*Stardust Marine*).

⁽³⁰⁾ *Stardust Marine*, paragraphs 55 and 56.

⁽³¹⁾ Landeshauptstadt Düsseldorf, Beteiligungsbericht 2006, Sheet 'Holding der Landeshauptstadt Düsseldorf GmbH' (available at: http://www.duesseldorf.de/finanzen/beteiligungsberichte/2006_pdf/beteiligungen/holding.pdf), p. 22.

⁽³²⁾ Bericht über die Beteiligungen der Stadt Monheim am Rhein an Unternehmen und Einrichtungen in der Rechtsform des privaten Rechts (Beteiligungsbericht gemäß § 117 GO NW) 2007 (available at http://www.monheim.de/rathaus/bekanntmachungen/bekanntmachungen_2007/beteiligungen_bericht_2007.pdf), p. 1.

⁽²⁸⁾ OJ L 318, 17.11.2006, p. 17.

(137) Third, the Commission further notes that the payments disbursed through a control and profit/loss transfer agreement have been subject to the approval of the Supervisory Board of Monheimer Versorgungs- und Verkehrs-GmbH. Equally, the capital transfers of Holding der Landeshauptstadt Düsseldorf GmbH require the approval of its Supervisory Board.

(138) In the light of the above, the Commission concludes that the decisions to disburse payments to RBG and BSM by the respective holding companies of the City of Düsseldorf and the City of Monheim are imputable to the State.

(139) In the light of the above, the Commission concludes that the measures are financed through state resources and are imputable to Germany.

9.2. SELECTIVE ECONOMIC ADVANTAGE

(140) It must next be established whether the measures grant a selective economic advantage to RBG and BSM.

(141) It follows from the *Altmark* judgment that 'where a State measure must be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty [now Article 107(1) TFEU]. However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied' ⁽³³⁾.

(142) In this regard, the German authorities claim that the financing of RBG and BSM through the measures at issue – both the financing provided through cross-subsidisation or directly by the public shareholders of undertakings in question and the financing provided directly by VRR – respect the four criteria of the *Altmark* judgment and therefore cannot be regarded as aid within the meaning of Article 107(1) TFEU.

9.2.1. THE RECIPIENT UNDERTAKING IS ACTUALLY REQUIRED TO DISCHARGE CLEARLY DEFINED PUBLIC SERVICE OBLIGATIONS

(143) Firstly, according to the above-mentioned judgment, it has to be established whether 'the recipient undertaking

is actually required to discharge public service obligations and (whether) those obligations have been clearly defined'.

(144) In the present case, RBG and BSM are entrusted with discharging public service obligations by virtue of a so-called threefold act of entrustment, namely:

— the licences issued by the Düsseldorf Regional Government;

— the Local Public Transport Schemes of the cities of Düsseldorf and Neuss, the Rhine district of Neuss and the district of Mettmann; and,

— the respective positive and negative financing notices on the amount of permissible compensation, issued by VRR on the basis of point 7.2 of the Financing Guidelines.

(145) The German authorities provided the Commission with copies of these acts.

(146) In reply to the observations of the third party, the Commission considers that, although it would increase transparency if the public service obligation had been imposed by a single act, this is not strictly necessary in order to fulfil the first *Altmark* criterion.

(147) In its decision to open the formal investigation procedure, the Commission considered that in the present case the public service obligation comprises the provision of public passenger transport services by bus, tram and rail on the basis of the licences pursuant to paragraphs 8 and 13 of the PBefG which RBG and BSM hold (see recital 61 of the opening decision).

(148) In addition, the Commission notes that the public service obligation of RBG and BSM to provide passenger transport services derives from the licences obtained together with the requirement to comply with the Local Public Transport Schemes as far as frequencies, routes served and other requirements are concerned; the financing notices of VRR based on the Financing Guidelines provide further details with regard to these conditions.

⁽³³⁾ Case C-280/00, cited above, paragraphs 87 and 88.

- (149) The Commission concludes, therefore, that in the present case the public service obligation comprises the entire provision of public passenger transport services by bus, tram and rail on the basis of the licences pursuant to paragraphs 8 and 13 of the PBefG which RBG and BSM hold.
- (150) This means that the public service obligations are not limited to the four cost categories for which transport undertakings can claim compensation, but also include the provision of transport services in peak periods. The definition of the four cost categories for which transport undertakings can claim compensation only comes into play for the assessment of compliance with the second *Altmark* criterion.
- (151) Therefore, the Commission concludes that the threefold act of entrustment clearly and specifically defines the public service obligations which RBG and BSM are required to discharge, namely all the transport services defined in the licences and the local public transport schemes.
- 9.2.2. THE PARAMETERS ON WHICH THE COMPENSATION IS CALCULATED HAVE BEEN ESTABLISHED BEFOREHAND IN AN OBJECTIVE AND TRANSPARENT MANNER
- (152) Secondly, the Commission has to establish whether 'the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner'.
- (153) The Commission notes that it is not necessary in order to fulfil the second *Altmark* criterion that the exact overall amount of compensation is determined beforehand as long as the methodology and the relevant parameters for the calculation of that amount are established in advance in a way that leaves no room for later discretionary adjustments.
- (154) In its decision to open the formal investigation procedure, the Commission expressed doubts as to whether all of the four cost categories for which the Financing Guidelines provide for compensation payments indeed relate to a public service obligation, whether they have been clearly defined, and whether at least a part of the costs covered by the cost categories should not be paid by the undertakings in their own commercial interest (see recitals 61 to 75 of the opening decision). The German authorities and the third party have provided additional information on this point.
- (155) The Commission first of all observes that the four cost categories, contrary to the wording of the Financing Guidelines, do not themselves constitute public service obligations (see also the previous section on fulfilment of the first *Altmark* criterion) ⁽³⁴⁾. They rather define cost categories for which the transport undertakings can claim compensation. These cost categories do not cover all cost categories a transport undertaking has. In particular, they exclude the basic provision of transport vehicles (only additional quality requirements are covered) as well as competitive salaries paid during peak periods on routes which are commercially viable. This point will also be elaborated further in the sections assessing the third and fourth *Altmark* criteria.
- (156) The Commission further needs to analyse each of the points on which it raised doubts, and assess them in the light of the comments received. The doubts of the Commission concerned the following points:
- Do the cost categories correspond to costs which are costs of discharging public service obligations?,
 - Is it possible to include, as the Financing Guidelines do, an 'open cost category'?,
 - Have the parameters on the basis of which the compensation is calculated been established beforehand in an objective and transparent manner?,
- The cost categories correspond to costs of discharging public service obligations
- (157) *Cost category 1: Infrastructure provision*
- (158) On the basis of the additional information provided by Germany, the Commission can conclude that compensation paid under this heading is limited to infrastructure which is necessary for the provision of public passenger transport services by bus, tram and rail on the basis of the licences pursuant to paragraphs 8 and 13 of the PBefG which RBG and BSM hold. With regard to the precise definition of the infrastructure, it observes that the threefold act of entrustment clearly defines the infrastructure which the transport undertakings have to provide.
- ⁽³⁴⁾ It is for that reason that the Commission included, in its opening decision, part of the assessment of the second *Altmark* criterion in the section dealing with the first *Altmark* criterion.

- (159) The Commission had raised no doubts regarding cost category 2.
- (160) *Cost category 3: Vehicle quality standards imposed by VRR or the competent local authority*
- (161) On this point, the Commission concludes that Germany has demonstrated that the transport undertakings would not buy vehicles with the required level of quality, as any additional income generated by the better service quality would not be sufficient to offset the additional costs.
- (162) *Cost category 4: Additional transport services or other services in connection with operation imposed by VRR or the competent local authority*
- (163) On this point, the Commission concludes that, as far as services during off-peak periods are concerned, Germany has demonstrated that the transport undertakings would not provide them in their own commercial interest.
- No compensation of costs under the open cost category in the case of BSM and RBG
- (164) The second doubt on this point concerned the fact that the third subcategory of cost category 4 was an open category which enabled transport undertakings to claim compensation for any other requirements in connection with operation or the system (imposed by the competent local authority or VRR) which are justified individually and lead to an economic disadvantage.
- (165) The Commission observes in this regard that Germany has informed the Commission that RBG and BSM have not received any compensation payments under this subcategory.
- Parameters established beforehand in an objective and transparent manner
- (166) The method for calculating the compensation to which an individual transport undertaking is entitled is described in Annexes 2 and 8 to the Financing Guidelines.
- (167) Annex 2 contains a detailed description of the four cost categories, as well as forms to be filled in in order to transmit to VRR the information on the basis of which VRR calculates the compensation for each of the four cost categories concerning each of the services rendered (bus, tram, railway). This includes a description of the information required for the infrastructure provided (cost category 1), for the calculation of costs for management and marketing tasks (cost category 2), for the calculation of costs for additional vehicle quality standards (cost category 3), for the calculation of costs for off-peak period services (cost category 4a) and for the calculation of costs for social obligations under collective agreements (cost category 4b).
- (168) The costs which the transport undertakings incur for each of the possible measures accepted under the four cost categories have to be allocated. Annex 2 defines the applicable cost categories according to accounting standards and contains forms for the transport undertakings to report their current costs. It does not, however, contain any precise parameters expressed in terms of EUR. On the contrary, it stresses that the parameters need to be set individually for each local network and each mode of operation.
- (169) For cost category 1, 2 and 3 the costs have to be calculated using accounting cost categories and costs for material and energy, costs for rent or leasing, overhead costs, depreciation and interest. For cost category 4, first subcategory, VRR employs a parameter for the calculation of the compensation which is based on the difference between marginal revenue and marginal costs per kilometre and which is specific to each local network and to each mode of operation. For the second subcategory of cost category 4, the social obligations imposed by the shareholder, the parameter consists of an amount which is established by comparing the higher pay with the provisions of a certain collective agreement ('TV-N, group V, step 2'). This amount is calculated per driver (adjusted for services subcontracted to outside undertakings and for drivers hired after 1 January 2006 or after the TV-N first became applicable) and is specific to each local network and to each mode of operation, as the different public transport undertakings have negotiated different collective agreements and additional social advantages.
- (170) The base line data stem from 2003 and are updated according to an index in accordance with Annex 9 to the Financing Guidelines (provisions concerning 'evolution of the price level over time'). Annex 9 contains a number of indexes, which are each linked to a specific kind of cost and are chosen so that they reflect closely the average increase in prices for a given cost category.
- (171) Germany has transmitted to the Commission the negative financing notices issued pursuant to point 7.4.2 of the Financing Guidelines by VRR to RBG and BSM. The financing notices contain for each cost category the following information: parameter in EUR per cost unit; number of cost units; compensation amount defined as the product of parameter per cost unit and the number of cost units.

- (172) By way of illustration, in 2007 the parameters for RBG for operation of the 'Stadtbahn' (city railway) were as follows ⁽³⁵⁾:

Bedienungsgebiet	Baustein	Parameter in EUR je Leistungseinheit	Leistungseinheit	Ausgleichsbetrag in EUR
Rheinbahn	BS 1	[...]	[...]	[...]
	BS 2	[...]	[...]	[...]
	BS 3	[...]	[...]	[...]
	BS 4a	[...]	[...]	[...]
	BS 4b	[...]	[...]	[...]
	BS 4c	[...]	[...]	[...]
	Summe	[...]	[...]	[...]

[Bedienungsgebiet = Local network Baustein = Component Parameter in EUR je Leistungseinheit = Parameter in EUR per cost unit Leistungseinheit = Cost unit Ausgleichsbetrag in EUR = Amount of compensation in EUR Summe = Sum]

- (173) 'BS 1-4c' refers to each of the four cost categories. For each of the four cost categories in each of the transport sectors (in this example, the Stadtbahn) carried out by BSM and RBG a parameter in euro is established. The parameter is then multiplied by the unit expected to be spent. The sum arrived at is the sum which is established as the *ex ante* amount of compensation.

- (174) The Commission therefore concludes that the financing notices issued by VRR to RBG and BSM contain a calculation of the compensation which is based on parameters that have been established beforehand in an objective and transparent manner.

- (175) Therefore, the Commission concludes that the second *Altmark* criterion is met.

9.2.3. NO OVERCOMPENSATION

- (176) The third condition mentioned in the *Altmark* judgment is that 'the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations'.

- (177) The Commission considers that, with regard to fulfilment of this criterion, it is appropriate to verify first whether the negative financing notices issued by VRR to RBG and BSM make it possible, taken on their own, to exclude any overcompensation. Should this not be the case, the Commission assesses in a second step whether Germany has demonstrated that the concrete application for the years 2006 to 2009, in combination with the existing agreements between the undertakings and the municipalities owning them, suffice to exclude any overcompensation for RBG and BSM.

Financing Guidelines

- (178) The Commission notes that Sections 5, 7 and 8 of the Financing Guidelines describe in detail the procedure for granting compensation. Transport undertakings need to submit their application for compensation at the latest on 31 October of the year that precedes the year for which they request compensation. Point 5.4 of the Financing Guidelines sets out the maximum amount of compensation to which a transport undertaking is entitled. For this purpose, it defines three different ceilings: the amount of compensation; the amount of financing, and the available financial resources.

- (179) The amount of compensation is calculated based on the information defined in Annex 2 to the Financing Guidelines for each of the four cost categories. On the basis of the information submitted by the transport undertakings pursuant to Annex 2, VRR calculates parameters which must reflect the costs which an average, well-run undertaking would have had to discharge the same obligations, and which are recorded in the financing notices.

- (180) The amount of financing is defined as the amount of funds which are available for a given municipality. They are augmented by any profits of the transport undertaking resulting from activities outside the four compensation categories.

- (181) The available financial resources are defined as the difference between the amount of compensation and the amount of financing.

- (182) VRR takes a preliminary decision on the compensation to which a transport undertaking is entitled, and disburses the compensation in four instalments on 15 February, 15 May, 15 August and 15 November. The disbursement of 15 February is based on the decision for the previous year; any changes are corrected in the instalment paid on 15 May (see point 7.3 of the Financing Guidelines).

⁽³⁵⁾ Covered by the obligation of professional secrecy.

(183) For undertakings such as RBG and BSM, which receive their compensation through a control and profit/loss transfer agreement or through an agreement with their holding company, special rules apply. In these cases, VRR will take a decision refusing the compensation payment. This decision states the compensation to which the undertaking is entitled. As an alternative, the Financing Guidelines provide that such undertakings can request a binding communication setting out the compensation to which they are entitled (see point 7.2 of the Financing Guidelines).

(184) The Financing Guidelines state for this latter case as well that, whenever the compensation constitutes State aid, the recipient undertaking, together with the municipality owning it needs to take in advance measures to avoid overcompensation. As Germany considers that the present measure does not constitute State aid, no such preventive measures have been implemented so far.

(185) The transport undertakings need to report each year the actual costs they have encountered for discharging the public service obligations. VRR verifies these reports and, should the compensation calculated in advance exceed the actual costs, orders the recovery of the amounts in excess.

(186) The Commission considers that, as they are currently worded, the Financing Guidelines are not sufficient to guarantee, on their own, the absence of overcompensation for RBG and BSM, for the following reasons:

(a) No consideration of profits from economically viable transport services in peak periods: As they are currently worded, the Financing Guidelines consider as public service obligations only the obligations imposed upon undertakings with respect to the four cost categories for which the Financing Guidelines provide for compensation. The calculation of the compensation takes into account revenues from services which are covered by the four cost categories, i.e. in particular services in off-peak periods and to remote areas, but they exclude profits from economically viable transport services provided in peak periods.

(b) No claw-back mechanism for overcompensation received under control and profit/loss transfer agreements and shareholder agreements: In their current form, the Financing Guidelines treat transport undertakings that receive compensation from VRR differently from transport undertakings that receive compensation in the form of control and profit/loss transfer agreements and shareholder agreements. Whereas the former have at their disposal only the amount corresponding to the compensation calculated according to the Financing

Guidelines, the latter obtain complete coverage of their costs. They are entitled to keep any difference between their actual losses and the amount to which they are entitled on the basis of the Financing Guidelines, as there is no legally binding procedure that would allow VRR to claw back the difference.

Assessment of RBG and BSM

(187) The public service compensations in the present case can be disbursed directly through contributions from the public shareholders of the undertakings in question, a control and profit/loss transfer agreement and/or by VRR. The Commission notes that, in order to fulfil the third *Altmark* criterion, there is no requirement according to which the payments have to be disbursed by the organising authority, such as VRR. However, it has to be ensured that the annual compensation does not exceed what is necessary to cover all actual costs in relation to the public service obligation.

(188) The financing notices state that the amount which is established in them constitutes the maximum amount to be paid subject to an *ex post* examination of the actual costs incurred. The maximum amount of financing is defined as the amount of funds which are available for a given municipality.

(189) The transport undertakings need to report each year the actual costs that they have incurred in discharging the public service obligations. The *ex post* assessment reflects the actual costs incurred for each of the four categories in each of the transport sectors. The sum of the *ex post* costs is then compared with the sum in the *ex ante* calculations. The *ex post* calculation is set out in a financing notice having the same structure as the *ex ante* financing notices in order to enable a comparison. According to Germany these financing notices are set up *ex ante* and *ex post* for RBG and BSM for each of the years under assessment. VRR verifies these reports and, should the compensation calculated in advance exceed the actual costs, orders the recovery of the amounts in excess. However, the Financing Guidelines do not contain any detailed rules on overcompensation or the method of clawing back any overpayment.

(190) Therefore, for the period from 1 January 2006 until 31 December 2009, the Commission needs to verify whether BSM and RBG received any overcompensation. Germany has provided the Commission with information on the actual payments that BSM and RBG received. For this purpose, it has transmitted to the Commission the annual profit and loss statements of RBG and BSM. Earnings and costs for each of the companies are checked annually by certified public accountants who also certified the respective annual balance sheets.

Payments under the Financing Guidelines and the control and profit/loss transfer agreements

- (191) In 2006, RBG incurred losses of EUR 65 million ⁽³⁶⁾. The losses were covered by loss assumption by the *Land* of North Rhine-Westphalia and VRR in the amount of EUR 64,1 million. This is EUR 7 million less than what RBG was entitled to according to VRR's financing notice. In 2007, the necessary overall compensation payments to RBG by the *Land* of North Rhine-Westphalia and VRR amounted to EUR 52,2 million. This is EUR 17,5 million less than what RBG was entitled to according to VRR's financing notice. RBG earned a net profit of zero in 2007. In 2008, RBG received compensation payments from the *Land* of North Rhine-Westphalia and VRR for discharging public service obligations in the amount of EUR 41,9 million, which covered its losses so that RBG earned a net profit of zero. This is EUR 14,1 million less than what RBG was entitled to according to VRR's financing notice. In 2009, RBG received compensation payments from the *Land* of North Rhine-Westphalia and VRR for discharging public service obligations in the amount of EUR 45,3 million, which covered its losses so that RBG earned a net profit of zero. This is EUR 11,4 million less than what RBG was entitled to according to VRR's financing notice.
- (192) In the years 2006-09, BSM each year incurred the following losses in the public passenger transport sector: EUR [...] (2006), EUR [...] (2007), EUR [...] ⁽³⁷⁾ (2008) and EUR [...] (2009). When comparing these losses with the amounts established in the financing notices, the Commission has found that the losses incurred by BSM in the public passenger transport exceeded the amounts established in the financing notices. The total losses, that is the sum of the amounts authorised in the financing notices and the additional losses, were covered by loss assumption through the existing control and profit/loss transfer agreement with Monheimer Versorgungs- und Verkehrs-GmbH leading to an annual profit/annual loss of zero.
- (193) With regard to the assumption of the additional losses, the Commission notes that it is based, not on the new financing system, but solely on the control and profit/loss transfer agreement. This control and profit/loss transfer agreement was concluded prior to the opening

of the market for bus transport by several Member States in 1995. As this market opening resulted from a spontaneous decision of the Member States, the control and profit/loss transfer agreement – if it were to constitute aid ⁽³⁸⁾ – has become existing aid pursuant to Article 1(b)(v) of the Procedural Regulation.

- (194) The Commission notes that the market for public passenger transport has been opened to competition by EU law as of 3 December 2009, when Regulation (EC) No 1370/2007 entered into force. Pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999, as a result of the liberalisation of the activity by an act of the EU, all existing aid for public passenger transport has therefore become new aid as of that day. For the reasons set out above in recitals 114 to 124, the present Decision covers only the period until the entry into force of Regulation (EC) No 1370/2007.
- (195) In view of the above, the Commission can conclude that, for the period 2006 to 2009, BSM and RBG have not received any overcompensation based on the new financing system, and the third *Altmark* criterion is thus fulfilled with regard to payments based on the new financing system.
- 9.2.4. TYPICAL UNDERTAKING, WELL RUN AND ADEQUATELY PROVIDED WITH MEANS OF TRANSPORT
- (196) Lastly, the *Altmark* judgment states that 'where the undertaking which is to discharge public service obligations ... is not chosen pursuant to a public procurement procedure ... the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligation'.

- (197) Neither RBG nor BSM was entrusted with the public service obligations at issue in the course of an open, transparent and non-discriminatory tendering procedure. Consequently, the Commission has to examine the second alternative stipulated in the fourth *Altmark* criterion, which provides that the level of compensation must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

⁽³⁶⁾ See *Beteiligungsbericht der Stadt Düsseldorf für das Jahr 2006* (for subsequent years see the corresponding link): http://www.duesseldorf.de/finanzen/beteiligungsberichte/2006_pdf/beteiligungen/rbg.pdf.

⁽³⁷⁾ This amount covers the losses incurred in the public passenger transport sector and the rail transport of goods sector. The Commission notes that, as explained in recitals 114 to 124, the scope of the procedure was limited to compensation payments which BSM and VRR have received on the basis of the new financing system of VRR for public passenger transport services. Therefore, the compensation which BSM has received for rail transport of goods is not covered by the scope of this Decision.

⁽³⁸⁾ See recital 215.

- (198) Germany argues that the parameters on the basis of which the compensation is calculated are established on the basis of the average costs of all the undertakings subject to VRR's financing system.
- (199) During the formal investigation procedure Germany submitted that VRR established the costs which are incurred by a typical undertaking which is well run and adequately provided with means of transport for the discharge of the activities covered by the four cost categories, on the basis of statistical data elaborated by its expert. These data were then adjusted by VRR taking account of certain (e.g. regional) specificities. At the end of the analysis VRR establishes a margin for average market prices in the various cost categories.
- (200) In this context, the Commission firstly notes that the use of statistical data aims at ensuring that the compensation was established with reference to the costs of a typical undertaking.
- (201) Secondly, all the operators which provide public transport services have a licence and/or a public service contract and must fulfil certain requirements imposed on them by the licences and/or public service contracts (e.g. they must have been adequately provided with means of transport to meet the necessary quality requirements).
- (202) However, as mentioned in the decision to open the procedure, the use of the statistical transport cost cannot *per se* lead to the conclusion that operators who have agreed to provide services under these parameters should be considered well managed carriers. The statistical data which served as the basis for establishing this amount concern only the actual costs of transport services in the different regions (Germany and Austria) in 2003. Therefore, there is no proof that an average of these costs represents the costs of an efficient undertaking. The Commission also came to this conclusion in its final decisions in case C 3/08 *Southern Moravia Bus Companies* ⁽³⁹⁾ and case C 16/07 *Postbus AG* ⁽⁴⁰⁾. The reasons set out in recitals 85 and 86 of the latter Decision are also valid for the present Decision.
- (203) Furthermore, the Commission observes that the statistical data were established for the year 2003 and then updated annually according to an index in accordance with Annex 9 to the Financing Guidelines and according to volume increases/decreases and changes in structures. The index uses a statistical price index by applying a methodology based on a basket of goods used for the public transport service sector by the German Association of Transport Enterprises (Verband deutscher Verkehrsunternehmen) using data of the German Statistical Office. However, such an updating procedure cannot fully reflect efficiency gains realised in the meantime in the sector.
- (204) Finally, the Commission observes that very existence of cost category 4b of the Financing Guidelines (which allows for the compensation of additional costs resulting from the politically induced application of pay scales which are above the pay scales normally observed in the market) indicates that transport undertakings in VRR pay salaries which are above the salaries that are usually observed in the market. Germany has confirmed that RBG and BSM pay such salaries and receive compensation payments under cost category 4b.
- (205) In conclusion, the evidence which the Commission has received does not show that the level of compensation has been calculated by comparing the costs incurred by RBG and BSM with a well run undertaking. The level of compensation therefore has not been calculated with reference to a well run undertaking.
- (206) The Commission therefore concludes that the fourth *Altmark* criterion is not satisfied in respect of the payments made to RBG and BSM as compensation for the discharge of public service obligations.

9.2.5. CONCLUSION

- (207) As the fourth *Altmark* criterion is not fulfilled, the Commission considers that the financing system in question has granted an economic advantage to RBG and BSM.

9.3. DISTORTION OF COMPETITION

- (208) The financing system might lead to a distortion of competition since the public financing strengthens the position of the operators entrusted with the public service obligation and allows them to use these advantages for a prolongation of the entrustment whereas competitors could not use these advantages when applying for an entrustment. The fact that the companies may be qualified as in-house companies does not impede a possible effect on competition since these companies act in a market together with other public and private companies.

⁽³⁹⁾ Decision of 26 November 2008 (OJ L 97, 16.4.2009, p. 14).

⁽⁴⁰⁾ Decision of 26 November 2008 (OJ L 306, 20.11.2009, p. 26).

- (209) In addition, the operators which receive financing might use these advantages in order to compete with other companies in other markets.

9.4. EFFECT ON TRADE BETWEEN MEMBER STATES

- (210) According to settled case law, trade between the Member States must be regarded as affected when a measure constituting an advantage strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade⁽⁴¹⁾. Such strengthening of the position of the recipient undertaking compared with other competing undertakings in intra-Union trade will therefore not only (threaten to) distort competition but also affect trade between the Member States⁽⁴²⁾.
- (211) It is consequently necessary to assess whether the financing granted to the transport undertakings RBG and BSM by VRR constitutes an economic advantage which strengthens the position of these undertakings compared with other undertakings competing in intra-Union trade.
- (212) At the outset of the analysis, the Commission recalls that the market for the provision of local public transport services in Germany in which these undertakings are operating is a market opened up to competition from undertakings established in other Member States⁽⁴³⁾.
- (213) Further, the Court of Justice stated in its *Altmark* judgment:

‘77. In this respect it must be observed, first, that 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.

78. 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 ...’⁽⁴⁴⁾.

⁽⁴¹⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, paragraph 50.

⁽⁴²⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 12.

⁽⁴³⁾ Case C-280/00 *Altmark*, cited above, paragraph 79.

⁽⁴⁴⁾ Case C-280/00, cited above, paragraphs 77-78.

- (214) The Commission further observes that the public financing granted to the transport undertakings RBG and BSM by VRR, which constitutes an economic advantage for them, strengthens their financial situation. This strengthened financial situation allows them to maintain the supply of transport services. It also has the result that other undertakings from Germany as well as from other Member States have less chance of providing their transport services in the market served by these two transport undertakings (the Düsseldorf area), although it is legally possible for them to do so.
- (215) Therefore, the Commission concludes that the financing of public service compensation for RBG and BSM strengthens their position compared with other undertakings competing in intra-Union trade and that it therefore affects trade between the Member States.

9.5. CONCLUSION

- (216) For the reasons set out above, the Commission concludes that the financing granted to RBG and BSM by VRR for discharging the public service obligation constitutes State aid within the meaning of Article 107(1) TFEU.

10. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

- (217) Article 93 TFEU envisages conditions of compatibility of aid granted in the field of coordination of transport and public service obligation in transport.
- (218) The Commission notes that, as Article 93 constitutes a *lex specialis* with regard to Article 106(2), Article 106(2) cannot therefore be applied to the public transport undertakings in question⁽⁴⁵⁾.
- (219) According to the *Altmark* judgment⁽⁴⁶⁾, Article 93 TFEU could not be applied directly but only by virtue of Council Regulations, in particular Regulation (EEC) No 1191/69 or Regulation (EEC) No 1107/70.
- (220) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force. This Regulation also repealed Regulations (EEC) No 1191/69 and (EEC) No 1107/70.

⁽⁴⁵⁾ See recital 17 of Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽⁴⁶⁾ Case C-280/00, cited above, paragraph 107. See also Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917, paragraph 100.

- (221) Regulation (EC) No 1370/2007 applies to the compensation of public service obligations concerning public passenger transport services by rail and other track-based modes and by road. Therefore, the Commission has to assess the compatibility of the measures in the present case with the internal market on the basis of Regulation (EC) No 1370/2007, the instrument in force at the time of the Commission's decision.
- (222) Regulation (EC) No 1370/2007 lays down the conditions under which competent authorities may compensate public service obligations for passenger transport rendered through public service contracts. In the present case, the public service obligations have been imposed by the so-called threefold act of entrustment (i.e. by means of licences, the Local Public Transport Schemes and the respective financing notice by VRR based on VRR's Financing Guidelines).
- (223) The Commission notes further that the interested party has not contested the applicability of Regulation (EC) No 1370/2007 in the present case. The Commission also notes that Germany is of the opinion that Regulation (EC) No 1370/2007 should in principle apply only to payments disbursed as from 3 December 2009.
- (224) After examining the arguments advanced by Germany, the Commission has come to the conclusion, however, that they do not call into question the *ratione temporis* application of the State aid rules, according to which the Commission must base its reasoning on the law applicable at the time when it takes its decision. The Commission considers that the public service contracts must be examined on the basis of Regulation (EC) No 1370/2007 for the following reasons:
- (225) Firstly, the Commission points out that Regulation (EC) No 1370/2007 itself provides for the procedures concerning its entry into force and its *ratione temporis* application. Pursuant to its Article 12, Regulation (EC) No 1370/2007 entered into force on 3 December 2009. By virtue of Article 10(1), Regulation (EEC) No 1191/69 was repealed on the same date. Hence the Commission can no longer base its assessment on Regulation (EEC) No 1191/69, as it was no longer in force at the time when it adopted its decision; instead, it must base its assessment on Regulation (EC) No 1370/2007.
- (226) Secondly, the Commission points out that Regulation (EC) No 1370/2007 contains no indication that it does not apply to public service contracts concluded prior to its entry into force. Article 8(3) of Regulation (EC) No 1370/2007 thus lays down transitional arrangements for contracts which were awarded before the Regulation entered into force. This provision is in reality an exception to the application of Article 8(2) of the Regulation, which concerns the application of the provisions of Article 5 on the award of contracts. It should be noted that these exceptional transitional arrangements for the award of contracts would not have been necessary if public service contracts awarded before the entry into force of the Regulation did not fall within its scope. On the contrary, Article 8 thus confirms that the other provisions of the Regulation apply to such contracts.
- (227) Thirdly, the Commission points out that its notice on the determination of the applicable rules for the assessment of unlawful State aid⁽⁴⁷⁾ is not applicable in the present case. The notice states expressly that it is without prejudice to the interpretation of Council and Commission regulations in the field of State aid. And Regulation (EC) No 1370/2007 specifically lays down rules for its temporal application.
- (228) Fourthly, the Commission points out that the Court of Justice has confirmed the principle that new rules apply immediately to the future effects of a situation which arose under the old rule. The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule⁽⁴⁸⁾.
- (229) Fifthly, the Court has held that the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them⁽⁴⁹⁾. As indicated in recital 228, this last condition is clearly fulfilled in the case of Regulation (EC) No 1370/2007.
- (230) Sixthly, the Commission points out that, in the same judgment, the Court concluded that, where the law in force at the date on which the notification of a Member State's proposed aid scheme took place changes before the Commission takes its decision, the Commission must decide on the basis of the new rules⁽⁵⁰⁾. The Court has further held that the notification by a Member State of a proposed aid scheme does not give rise to a definitively established legal situation or a legitimate expectation which requires the Commission to rule on the compatibility of the aid with the internal market by applying the rules in force at the date on which that notification took place. Consequently, it would be contradictory to allow a Member State which has not complied with the obligation to notify to create a definitively established legal situation by granting unlawful aid.

⁽⁴⁷⁾ OJ C 119, 22.5.2002, p. 22.

⁽⁴⁸⁾ See the judgment in Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 43.

⁽⁴⁹⁾ Case C-334/07 P, cited above, paragraph 44.

⁽⁵⁰⁾ Case C-334/07 P, cited above, paragraph 53.

- (231) Consequently, Regulation (EC) No 1370/2007 is applicable in the present case ⁽⁵¹⁾.

10.1. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET ON THE BASIS OF REGULATION (EC) No 1370/2007

- (232) According to Article 9(1) of Regulation (EC) No 1370/2007 'public service compensation for the operation of public passenger transport services ... paid in accordance with this Regulation shall be compatible with the common market.' In what follows, the Commission will examine whether the Financing Guidelines and the compensation paid on their basis to RBG and BSM fulfil the requirements set out in Regulation (EC) No 1370/2007.

- (233) Pursuant to Article 3(1) of Regulation (EC) No 1370/2007, 'where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.'

- (234) In the present case the public service obligations were imposed by the so-called threefold act of entrustment (i.e. by means of licences, the Local Public Transport Schemes and the respective financing notice by VRR based on VRR's Financing Guidelines). The Commission therefore concludes that Article 3 of Regulation (EC) No 1370/2007 is complied with.

- (235) Article 4 of Regulation (EC) No 1370/2007 establishes the following mandatory content of public service contracts:

- (236) *Article 4(1)(a) – Clearly defined public service obligation:* As indicated in Section 8.2.1, RBG and BSM were entrusted with a clearly defined public service obligation.

- (237) *Article 4(1)(b) – The parameters on the basis of which the compensation is calculated has to be established in advance in an objective and transparent manner in a way that prevents overcompensation:* As indicated in Section 9.2.2, the parameters for compensation are set out before

discharging the public service obligation in the negative financing notice, in an objective and transparent manner, stating the maximum amount for each of the cost categories concerning each transport area.

- (238) *Article 4(1)(c) and Article 4(2) – Arrangements with regard to the allocation of costs and revenues:* On the basis of the parameters referred to above, there are clear arrangements with regard to the allocation of costs and revenues that relate to the four cost categories for which compensation is paid. For each of the four different categories of public service obligations costs and revenues are allocated separately, in separate accounts, using standard accounting principles applicable under German law, with an annual examination by certified public accountants and VRR.

- (239) *Article 4(3) – Duration of public service contracts shall be limited to 10 years for bus and coach services and 15 years for passenger transport services by rail or other track-based modes:* Originally, the public service obligations were imposed by the so-called threefold act of entrustment (i.e. by means of licences, the Local Public Transport Schemes and the respective financing notice by VRR based on VRR's Financing Guidelines). Following the entry into force of Regulation (EC) No 1370/2007 they have been summarised in a single public service contract for each of the undertakings with a limited duration of 10 years. For public service contracts which were already in place when Regulation (EC) No 1370/2007 entered into force, transitional provisions apply. According to Article 8(3)(d) of Regulation (EC) No 1370/2007, public service contracts concluded as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4. In the present case, the contract was concluded in the period mentioned in Article 8(3)(d) without a tendering procedure. Therefore, the limited duration as set out in Article 4 applies. The duration of the contract is now limited to 10 years; it therefore complies with the requirements of Article 4(3).

- (240) *Article 4(5) – The requirement to comply with certain social standards:* The applicable collective agreements are indicated in the respective acts since RBG and BSM are obliged to apply the collective agreement concluded by the Municipal Employers Association of North Rhine-Westphalia.

- (241) *Article 4(6) – The requirement to comply with certain quality standards:* Provisions on the quality standards are indicated in the respective acts of entrustment.

⁽⁵¹⁾ This corresponds also to the established decision-making practice of the Commission (see Decision C 41/2008, *Danske Statsbaner*, final decision of 24.2.2010, paragraphs 303-313) and of the EFTA Surveillance Authority (see Decision 254/10/COL, *AS Oslo Sporveier and AS Sporveibussene*, decision of 21.6.2010, pp. 17 and 18).

- (242) In the light of the considerations set out in recitals 54 et seq., the Commission considers that the threefold act of entrustment includes all mandatory provisions provided for by Article 4 of Regulation (EC) No 1370/2007.
- (243) Article 5 of Regulation (EC) No 1370/2007 contains provisions on the award of public service contracts. However, according to the transitional provisions in Article 8(2) of Regulation (EC) No 1370/2007 the award of public service contracts by rail and by road must comply with Article 5 only as from 3 December 2019. Thus, the provisions of Article 5 of Regulation (EC) No 1370/2007 are not applicable in the present case.
- (244) The Commission would remind Germany that during this transitional period Member States must take measures to gradually comply with Article 5 of Regulation (EC) No 1370/2007.
- (245) According to Article 6(1) of Regulation (EC) No 1370/2007, all compensation must comply with the provisions laid down in Article 4 and in the Annex to the Regulation.
- (246) First, the Commission recalls that, as explained above, all the provisions laid down in Article 4 were complied with in the present case.
- (247) The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the public service obligation minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, the Annex requires that costs and revenue be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be a separation of accounts.
- (248) In the present case, the Commission notes that the public service compensation is calculated in line with the requirements of the Annex as described above in Section 9.2.3, and that the compensation payments did not lead to any overcompensation. After calculating receipts from tariffs, revenues, other positive financial effects and the costs connected with the public service obligation, the outcome was that BSM and RBG annually incurred a deficit in discharging the public service obligation. This deficit was in each of the years 2006-2009 covered by compensation payments which led to a net profit of zero.
- (249) The Commission further observes that in the present case the undertakings in question do not receive a reasonable profit. The costs and revenues attributed to the public service obligation are also audited so that they comply with the accounting and tax rules in force. For transparency reasons the undertakings in question have separate accounts for activities which fall within the public service obligation and for those which are outside the scope of the public service obligation.
- (250) In view of the above, the Commission concludes that the public service compensation avoids any overcompensation and is in line with the requirements of Articles 4 and 6 of Regulation (EC) No 1370/2007 and of the Annex to that Regulation.
- (251) The Commission is therefore of the opinion that the general principles governing the assessment of compatibility of the aid are complied with in the present case. The Commission further notes that an assessment of the public service compensation in favour of RBG and BSM under Regulation (EC) No 1107/70 would lead to the same conclusion.
- (252) Consequently, the Commission concludes that the aid in favour of RBG and BSM is compatible with the internal market under Article 93 TFEU and Article 9(1) of Regulation (EC) No 1370/2007.
- ## 11. CONCLUSION
- (253) The Commission finds that the aid is compatible with the internal market under Article 9(1) of Regulation (EC) No 1370/2007 and Article 93 TFEU. The Commission points out that this Decision concerns the compatibility of the measures with the internal market as State aid and that this assessment does not prejudice the analysis by the Commission of the application in this case of the Union legislation on public contracts and concessions.
- (254) The Commission points out that, according to the settled case law of the Court of Justice, it can assess the compatibility of State aid with the internal market independently of any infringement of another provision of Union law provided that the latter is not so indissolubly linked to the object of the aid that it is impossible to evaluate them separately.

(255) In the present case, the Commission notes that any infringement of the provisions on public contracts and concessions such as the granting of the licences at issue to BSM and RBG would not necessarily have a distorting effect on competition which further increases the distortion of competition resulting from the aid. This Decision therefore confines itself to examining the State aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Rheinbahn AG and Bahnen der Stadt Monheim in the years 2006-2009 on the basis of the Richtlinie zur Finanzierung des ÖSPV im

Verkehrsverbund Rhein-Ruhr is compatible with the internal market under Article 9(1) of Regulation (EC) No 1370/2007 and Article 93 of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 February 2011.

For the Commission
Joaquín ALMUNIA
Vice-President
