

COMMISSION DECISION**of 25 June 2014****on State aid SA.20350 — (C 17/08) (ex NN 1/06) implemented by the Czech Republic for several regional bus service operators in the Ústí Region***(notified under document C(2014) 4081)***(Only the Czech text is authentic)****(Text with EEA relevance)**

(2014/791/EU)

THE EUROPEAN COMMISSION,

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

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 provisions cited above ⁽¹⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 14 February 2005, the Commission received a complaint from Dopravní podnik Ústeckého kraje a.s. ('DPÚK') against alleged State aid granted to regional bus transport operators in the Ústí Region of the Czech Republic. DPÚK is a joint stock company and an operator of regional bus transport services in the Ústí Region.
- (2) The Commission requested information from the Czech authorities on 11 May 2005, 23 January 2006, 5 October 2006 and 19 July 2007.
- (3) The Czech authorities replied on 22 November 2005, 7 April 2006, 21 December 2006, 17 October 2007 and 25 March 2008.
- (4) DPÚK submitted additional information by letters of 21 February 2006 and 31 October 2006.
- (5) The Commission held a meeting with DPÚK on 26 July 2007 and with the Czech authorities on 28 August 2007.
- (6) By letter dated 16 April 2008, the Commission informed the Czech Republic that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of certain measures allegedly constituting State aid ('the Opening Decision'). The Czech Republic submitted comments on the Opening Decision on 21 August 2008.
- (7) The Commission invited interested parties to submit their comments on the alleged aid through publication of the Opening Decision in the *Official Journal of the European Union* ⁽²⁾.

⁽¹⁾ Commission Decision of 16 April 2008 (OJ C 187, 24.7.2008, p. 14).

⁽²⁾ See footnote 1.

- (8) The Commission received comments from one interested party, DPÚK, on 22 August 2008. It forwarded those comments to the Czech Republic, which was given the opportunity to respond; its response was received by letter dated 4 December 2008.
- (9) On 15 July 2010, the Commission requested the Czech Republic to provide comments on the Commission's intention to examine the compatibility of certain of the measures complained of under Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽³⁾. The Czech Republic provided its comments on 12 August 2010.

2. DESCRIPTION OF THE MEASURES

- (10) According to DPÚK, the authorities of the Ústí Region granted compensation to certain regional bus transport operators for the discharge of public service obligations between 2004 and 2007. In addition, a number of alleged aid measures were granted to those operators in various forms, namely through soft loans, grants, guarantees, increase of equity capital, lease of vehicles, renting of bus stations and the operation of parking meters.
- (11) In the Opening Decision, the Commission concluded that it could not assess the compatibility of a number of measures with the Treaty because those measures had been implemented before the Czech Republic acceded to the Union. For other measures, the Commission had already found in the Opening Decision that they did not constitute State aid.
- (12) As a result, the Commission expressed doubts with respect to the following measures:
- (a) compensations provided by the Ústí Region to certain regional bus transport operators for discharging public service obligations in the field of transport services in 2005 and 2006;
 - (b) compensations granted by the Ústí Region to certain regional bus transport operators for discharging public service obligations for the period of 9 September 2006 to 2 June 2007;
 - (c) compensations granted by the Ústí Region to certain regional bus transport operators for discharging public service obligations for the period of 9 September 2006 to 31 December 2006;
 - (d) guarantees provided by the Municipality of Ústí nad Labem to Dopravní podnik města Ústí nad Labem a.s. ('DP Ústí') dated 23 July 2004 and 11 April 2005 securing loans worth CZK 35 million and CZK 5 million respectively;
 - (e) an increase of equity capital of DP Ústí by CZK 160 million provided by the Municipality of Ústí nad Labem in 2006.

2.1. RELEVANT LEGAL FRAMEWORK DURING THE PERIOD 2004-2007

- (13) In the Czech Republic, public bus transport services can be provided only by operators possessing a license. There are two regimes for the operation of public bus transport services in the Czech Republic. The first regime concerns transport services provided on a commercial basis based on licences issued to operators who are holders of a general authorisation ('koncese') for public bus transport activities. The second regime concerns transport services with a public service obligation based on licences for individual lines issued to operators who are holders of a general authorisation ('koncese') for public bus transport activities and on (i) a contract for public service obligation, or (ii) a decision of the relevant authority on the imposition of a public service obligation ⁽⁴⁾.

⁽³⁾ 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 (OJ L 315, 3.12.2007, p. 1).

⁽⁴⁾ According to the Czech authorities the majority of the public passenger bus transport market is served on the basis of contracts for public service obligations.

- (14) In the Czech Republic, public bus transport services can be provided only by operators possessing a license. According to the Czech authorities, the licence constitutes a permission granted by the authorities to operate a regular public transport service. The aim of such a licence is to guarantee that bus transport will only be carried out by operators who meet certain quality requirements. According to section 18 of Act No 111/1994, on road transport (the 'Road Transport Act' ⁽⁵⁾), those requirements comprise, in particular, the obligation to provide services in accordance with the approved timetable, to ensure a certain level of safety for passengers, and to publish timetables and mark buses with the names of the lines. Regional bus transport services were fully liberalised in the Ústi Region during the period under investigation since any operator from another Member State which fulfilled the conditions for obtaining a license could provide regional bus transport services in the Czech Republic during the period under investigation. The system in its current form has existed since 2004.
- (15) Section 19 of the Road Transport Act provides that a public service obligation is to be understood as meaning an obligation performed by an operator in the public interest which that operator would not otherwise accept or only partially accept due to its economic disadvantages. Public service obligations are entrusted to the operator by way of a written agreement with the relevant public authorities ⁽⁶⁾. The public service obligation is defined by a way of direct reference to Article 14 of Council Regulation (EEC) No 1191/69 ⁽⁷⁾, which provides in paragraph 1 thereof that 'a public service contract may cover notably: — transport services satisfying fixed standards of continuity, regularity, capacity and quality; — additional transport services; — transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes; — adjustment of services to actual requirements'.
- (16) Under the Road Transport Act, the relevant public authority is obliged to compensate the provable loss which the operator suffers as a result of fulfilling the public service obligation ⁽⁸⁾. Pursuant to section 19b of that law, the provable loss in public line passenger transport is defined as 'the difference between the sum of economically substantiated costs and a reasonable profit ⁽⁹⁾, and the earned receipts and revenue generated by the operator while performing the public service obligation'.
- (17) Section 19b(3) of the Road Transport Act provides that the operator shall submit an objective estimate of the provable loss for the entire period for which the public service obligation contract is concluded as a mandatory requirement for the conclusion of the public service contract. The region shall reimburse the provable loss to an amount not exceeding the objective estimate, augmented only by unforeseeable costs. This objective estimate of the provable loss is an estimate of expected losses drawn up by an independent expert before the service is performed. In accordance with section 19b(3) of the Road Transport Act, even if the operator claims a higher compensation for losses after the performance of the contract, the public authorities will stick to the pre-established ceiling established by that estimate. If, by contrast, the actual losses are lower than the objective estimate of the provable loss, only the actual losses are compensated. Unforeseeable costs incurred during the performance of the contract, which could not have been predicted at the time that the contract was concluded, may also be compensated.

⁽⁵⁾ Some provisions of the Road Transport Act, in particular with respect to the public service obligation, were repealed as of July 2010 by Act No 194/2010, on public services in passenger transport, and replaced by specific provisions of the latter act. However, the legal framework described in this section reflects the situation in the period relevant for the assessment of the alleged State aid measures, i.e. years 2004-2007.

⁽⁶⁾ Before the accession of the Czech Republic to the Union, the compensation for losses from public transport obligations was ensured through contracts between the municipality and the main provider of public transport. Those contracts, though not formally contracts of public service obligations as regards their form, fulfilled the substantial character of such contracts. The basis for the calculation of compensation was an expert opinion of forecasted losses from the operation of the public transport line as determined by the public service obligation. If the actual loss was significantly different from the loss forecasted by the expert opinion, the final settlement was carried out at the end of the calendar year. The same principle applied to possible overcompensations.

⁽⁷⁾ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

⁽⁸⁾ Under Czech law, the compensation for public service contracts is equivalent to the notion of provable loss. For a similar case, see also Commission Decision C 3/08 (ex NN 102/05) of 26 November 2008 — Czech Republic — Public service compensations for Southern Moravia Bus Companies (OJ L 97, 16.4.2009, p. 14), or Commission Decision C(2008) 1627 final N 495/07 of 30 April 2008 — Czech Republic — Program pořizení a obnovy železničních kolejových vozidel (OJ C 152, 18.6.2008, p. 21).

⁽⁹⁾ The reasonable profit is to be understood as meaning "the sum which — after taxation [...] — does not exceed 1/8th of the price of the buses normally used for the public line passenger transport providing the traffic services in the framework of the fulfilment of the public service obligation, reduced by the sum of the total real depreciation of those buses, and the sum spent for investments related to the operation of the public line passenger transport, provided that the relevant authority expressed its approval for the investment for the purpose of its incorporation into the calculation of the provable loss".

- (18) The determination of the provable loss, the method for calculating the objective estimate of the provable loss, the rules for the allocation of funds from the relevant budgets, the documents through which the calculation of the provable loss must be supported, and the manner in which government supervision is to be exercised over funding of the transport services are determined by an implementing regulation ⁽¹⁰⁾.
- (19) As from 1 January 2003, the regional authorities, including those of the Ústí Region, became responsible for concluding contracts with transport operators for the provision of regional public transport services in the Czech Republic. The provision of general bus transport services in the Czech Republic is ensured in two possible ways. First, basic transport services, which according to sections 19a and 19b of the Road Transport Act are to be understood as services ensuring regional transport, are managed by the relevant regional authorities. The provable loss is covered by the regions from their budgets. Second, other transport services, which according to section 19c of the Road Transport Act are to be understood as ensuring the transport needs of municipalities beyond the basic transport service of the region, are managed by the municipalities. With respect to those other transport services, the municipality concludes a public service contract with the operator and covers from its own budget the provable loss generated by discharging the public service obligation. Compensation for basic and other transport services cannot overlap: if the loss of a particular line is covered by a regional authority, the same loss cannot be compensated by the municipality, and *vice versa*, so that no double compensation is possible.

2.2. COMPENSATIONS FOR DISCHARGING PUBLIC SERVICE OBLIGATIONS IN 2005 AND 2006

- (20) According to the Czech authorities, the Ústí Region attempted to replace the existing multi-annual contracts for the provision of regional bus transport services with new, possibly cheaper contracts in the autumn of 2004. To do so, the Ústí Region announced the opening of an information gathering exercise to obtain sufficient knowledge on expected market prices for providing those services. The results of that exercise did not ultimately lead to the conclusion of new contracts.
- (21) Instead, the authorities of the Ústí Region decided to extend the existing contracts until 30 April 2005 by concluding addenda with the following operators: ČSAD BUS Ústí nad Labem a.s. ('ČSAD') ⁽¹¹⁾, Dopravní podnik města Ústí nad Labem a.s. ('DP Ústí'), Dopravní podnik Teplice, s.r.o. ('DP Teplice'), Dopravní podnik měst Chomutova a Jirkova a.s. ('DP Chomutov'), Dopravní podnik města Děčín, a.s. ('DP Děčín'), Dopravní podnik měst Mostu a Litvínova a.s. ('DP Most'), Autobusová doprava, s.r.o., Podbořany ('Podbořany'), Miroslav Ohem — SADO ('Miroslav Ohem'), Petr Frommel — FOBUS ('Petr Frommel'), and Petr Stejskal — SPORTBUS ('Petr Stejskal').
- (22) In the spring of 2005, further addenda were concluded which extended the validity of the contracts to 31 December 2005. Those addenda were concluded with the same operators as those listed in the recital above, with the exception of Petr Frommel, who was no longer interested in providing transport services in the region. Instead, a new contract was concluded with Vilém Graupner, stroj. a stav. údržba ('Vilém Graupner').
- (23) Table 1 provides the parameters included in the addenda which served as the basis for the objective estimate of the provable loss for each of those operators for 2005.

Table 1 ⁽¹⁾

Overview of contracts in 2005

(Corrected figures provided by the Czech Republic following the Opening Decision)

2005	Number of km	Expected price of transport services ⁽²⁾ in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue ⁽³⁾ in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
ČSAD	11 279 177,68	30,59	345 071 757,00	14,47	163 224 589,00	16,12	181 847 168,00
DP Ústí	150 696,60	37,16	5 599 878,00	20,01	3 015 435,00	17,15	2 584 443,00

⁽¹⁰⁾ Decree of the Ministry of Transport and Communications No 50/1998, on provable loss in the public line passenger transport, was replaced by Regulation No 493/2004 as of 21 September 2004. Regulation No 493/2004 remained in force until 1 July 2010, that is during the period when the compensations under investigation were granted.

⁽¹¹⁾ The incumbent and formerly State-owned regional bus transport provider for the Ústí Region and the Liberec Region in 2004. DPÚK is one of the legal successors to ČSAD following its dissolution into two regional bus companies: one for the Ústí Region (DPÚK) and one for the Liberec Region.

2005	Number of km	Expected price of transport services ⁽²⁾ in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue ⁽³⁾ in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
DP Teplice	409 412,40	33,35	13 653 903,00	17,56	7 191 006,00	15,79	6 462 897,00
DP Chomutov	1 155 060,00	30,40	35 113 824,00	11,55	13 340 905,00	18,85	21 772 919,00
DP Děčín	636 830,00	29,24	18 619 839,30	13,71	8 729 066,00	15,53	9 890 772,00
DP Most	229 878,90	34,51	7 933 109,00	14,25	3 275 769,00	20,26	4 657 340,00
Podbořany	395 081,00	27,06	10 689 652,00	13,65	5 392 773,00	13,41	5 296 879,00
Miřslav Ohem	68 936,00	29,00	1 999 144,00	11,54	795 642,00	17,46	1 203 502,00
Petr Frommel	14 868,00	24,00	356 832,00	7,27	108 125,00	16,73	248 707,00
Petr Stejskal	11 144,00	21,70	241 825,00	6,92	77 105,00	14,78	164 720,00
Vilém Graupner	20 492,00	21,50	440 578,00	4,63	94 878,00	16,87	345 700,00

(1) Even with the figures as corrected by the Czech authorities, the amounts indicated in the table do not entirely correspond to the given formula in some cases (provable loss in CZK/km multiplied by the number of kilometres does not entirely match the overall provable loss in CZK). However, the differences are only marginal and in all cases the amounts presented in Table 2 (compensation actually given) are lower than the results of the logical formulas.

(2) Expected price of transport services is the sum of the economically admissible costs which should be incurred by an operator in performing transport public service obligations and a reasonable profit relating to such expenditure.

(3) Foreseen revenue is receipts and revenues which should be achieved by the operator in performing the transport public service obligation including ticketing revenue.

(24) The expected overall price of transport services is reduced by the company's expected revenues based mainly on ticketing and other revenues. The resulting provable loss, which includes a reasonable profit, constitutes the objective estimate of the provable loss, a mandatory and binding ceiling for the public service compensation the Ústí Region may pay to the operator, as explained in recital 17.

(25) According to the Czech authorities, the actual compensation paid out for 2005 was as follows:

Table 2

Actual loss compensations in 2005

OPERATOR	CZK
ČSAD	181 106 734,73
DP Ústí	2 584 442,98
DP Teplice	5 972 688,46
DP Chomutov	21 024 546,00
DP Děčín	8 792 202,00

OPERATOR	CZK
DP Most	4 491 342,03
Podbořany	5 189 441,00
Miroslav Ohem	1 203 502,00
Petr Frommel	248 707,00
Petr Stejskal	95 823,00
Vilém Graupner	338 807,50

- (26) According to the information provided by the Czech authorities, DP Ústí received additional public service compensations for 2005 amounting to CZK 7 335 000 and CZK 4 591 200. However, as clarified by the Czech authorities in response to the Opening Decision, those compensations were provided by the Municipality of Ústí nad Labem and related exclusively to municipal public transport within that municipality. Therefore, those compensations are unrelated to and clearly separate from the public service compensations provided by the Ústí Region for regional bus transport services and thus do not relate to the measures examined under this Decision.
- (27) According to the information provided by the Czech authorities, DP Teplice also received additional public service compensations for 2005 amounting to CZK 34 500 000. Moreover, two lease agreements between the Municipality of Teplice and DP Teplice were concluded in 2003 and addenda thereto signed on 5 May 2006 and 18 October 2006 to lease new trolley-buses for the discharge of public service obligations. However, as clarified by the Czech authorities in response to the Opening Decision, that public service compensation and those trolley-bus leases related exclusively to municipal public transport within the Municipality of Teplice. Those measures are unrelated to and clearly separate from the public service compensations provided by the Ústí Region for regional bus transport services and thus do not relate to the measures examined under this Decision.
- (28) In 2006, the Ústí Region authorities concluded further addenda with all operators who provided transport services between May and December 2005, with the exception of DPÚK. During the negotiations leading up to those addenda, DPÚK demanded an increase in remuneration, which was rejected by the authorities of the Ústí Region. Consequently, on 31 January 2006, the Ústí Region terminated its contract with DPÚK. The notice period of three months laid down by that contract ended on 1 May 2006. In that period, DPÚK provided transport services for which it received compensation.
- (29) The Czech authorities provided the Commission with the parameters included in the addenda taken into account for estimating the provable losses with regard to the following operators in 2006:

Table 3 ⁽¹⁾**Overview of contracts in 2006**

(Corrected figures provided by the Czech Republic following the Opening Decision)

2006	Number of km	Expected price of transport services in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
DP Ústí	151 905,00	40,49	6 150 388,18	20,39	3 097 230,55	17,49	2 657 274,00
DP Teplice	407 085,00	34,54	14 060 716,00	18,43	7 502 577,00	16,11	6 558 140,00

2006	Number of km	Expected price of transport services in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
DP Chomutov	1 114 320,00	31,34	34 922 789,00	12,09	13 467 600,00	19,25	21 455 189,00
DP Děčín	648 974,00	32,90	21 351 245,00	14,77	9 582 505,00	16,40	10 640 675,00
DP Most	233 195,00	37,89	8 835 760,00	15,60	3 637 843,00	20,67	4 819 011,00
Podbořany	410 802,00	28,03	11 515 089,00	15,44	6 343 433,00	12,59	5 171 656,00
Miřoslav Ohem	68 322,00	29,00	1 981 338,00	11,50	785 703,00	17,50	1 195 635,00
Petr Stejskal	11 032,00	30,30	334 270,00	12,69	139 996,00	17,34	191 295,00
Vilém Graupner	35 556,00	21,50	764 454,00	4,63	164 624,00	16,87	599 830,00

(¹) In some cases, the amounts indicated in the table do not entirely correspond to the mathematical formulas (expected overall price of transport services being calculated as number of km multiplied by expected overall price of transport services; foreseen overall revenue being calculated as number of km multiplied by foreseen revenue in CZK/km; provable loss CZK/km being calculated as expected price of transport services in CZK/km minus foreseen revenue in CZK/km, etc.) According to the Czech authorities, the provable loss was negotiated with certain transport providers to be lower than the difference between the expected price of transport services and foreseen revenue.

(30) The actual remuneration paid to those operators for providing services in 2006 amounted to:

Table 4

Actual loss compensations in 2006

OPERATOR	CZK
DP Ústí	2 657 274,00
DP Teplice	6 558 140,00
DP Chomutov	21 455 189,00
DP Děčín	10 640 675,00
DP Most	4 819 011,00
Podbořany	5 035 557,00
Miřoslav Ohem	1 195 635,00
Petr Stejskal	191 294,80
Vilém Graupner	599 830,00

(31) According to the information provided by the Czech authorities, DP Teplice received additional public service compensations for 2006 from the Municipality of Teplice amounting to CZK 35 514 000. However, as clarified by the Czech authorities in response to the Opening Decision, that compensation related exclusively to the municipal public transport within that municipality. Therefore, that compensation is unrelated to and clearly separate from the public service compensations provided by the Ústí Region for regional bus transport services and thus does not relate to the measures examined under this Decision.

- (32) As explained in recital 28, DPÚK received compensation for the public service it discharged between January and April 2006. According to the Czech authorities, that compensation amounted to CZK 92 172 509,24. That sum was calculated on the basis of the following parameters stipulated in the addendum:

Table 5

Compensations paid to DPÚK for Jan-Apr. 2006

January-April 2006	Number of km	Expected price in CZK/km	Expected overall price in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
DPÚK	3 828 910,45	39,63	151 744 748,24	15,56	59 572 239,00	24,07	92 172 509,24

- (33) As a consequence of DPÚK's withdrawal from the contract, the Ústí Region authorities launched a tender procedure which aimed at selecting operators willing to provide regional bus transport services on lines previously operated by DPÚK. As a result of that procedure, ČSAD Česká Lípa was selected to operate those lines. In the meantime, DPÚK still provided transport services, but no compensation was paid for that period, so that DPÚK stopped its services in the Ústí region on 1 August 2006. Since ČSAD Česká Lípa was unable to immediately start operating the lines on that date, the authorities unilaterally imposed an obligation on DPÚK to provide further transport services from 8 August 2006 to 8 September 2006 on the basis of Regulation (EEC) No 1191/69. An advance payment was made to DPÚK to cover losses for the performance of the obligation resulting from that imposition.

2.3. COMPENSATIONS FOR DISCHARGING PUBLIC SERVICE OBLIGATIONS IN THE PERIOD FROM 9 SEPTEMBER 2006 TO 2 JUNE 2007

- (34) On 8 September 2006, DPÚK definitively terminated transport services in the Ústí Region. On 9 September 2006, ČSAD Česká Lípa was supposed to commence operations on the lines previously operated by DPÚK, but again failed to do so, so that the authorities of the Ústí Region decided to conclude contracts for the provision of those services with those operators whose offers were not selected following the procedure launched to find a replacement for DPÚK's services. The selection of those operators was made on the basis of the most advantageous offer following that submitted by ČSAD Česká Lípa, in other words, the second best offer. This was possible in nine out of a total of 15 areas where ČSAD Česká Lípa had initially been selected by the Ústí Region to replace DPÚK.
- (35) Table 6 lists the operators with which the Ústí Region concluded public service contracts to provide regional bus transport services on the lines previously operated by DPÚK and the parameters taken into account for determining the amount of remuneration on the basis of the objective estimate of the provable loss resulting from the provision of those services between 9 September 2006 and 2 June 2007.

Table 6

Overview of contracts in 9.2006-6.2007 ⁽¹⁾

(Corrected figures provided by the Czech Republic following the Opening Decision)

9 September 2006 - 2 June 2007	Number of km	Expected price of transport services in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
ZDAR, a.s.	391 462,00	31,50	12 331 053,00	16,10	6 300 903,59	15,40	6 030 149,41
DP Most	453 962,00	29,80	13 528 067,60	9,40	4 269 395,10	20,40	9 258 672,50

9 September 2006 - 2 June 2007	Number of km	Expected price of transport services in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
DP Most	646 065,00	29,80	19 252 737,00	11,13	7 192 416,86	18,67	12 060 320,14
Autobusy Kavka, a.s.	569 514,00	27,85	15 860 964,90	13,62	7 755 780,81	14,23	8 105 184,09
Autobusy Karlovy Vary, a.s.	334 582,00	32,30	10 806 998,60	14,68	4 911 462,09	17,62	5 895 536,51
Autobusy Karlovy Vary, a.s.	199 218,50	32,70	6 514 444,95	12,44	2 479 272,62	20,26	4 035 172,33
Autobusy Karlovy Vary, a.s.	740 074,00	31,50	23 312 331,00	13,94	10 319 904,50	17,56	12 992 426,50
ČSAD Slaný a.s.	374 460,00	27,90	10 447 434,00	12,36	4 628 845,79	15,54	5 818 588,21
ČSAD Slaný a.s.	798 764,50	28,40	22 684 911,80	13,77	11 002 327,62	14,63	11 682 584,18
ZDAR, a.s.	536 733,00	31,50	16 907 089,50	13,70	7 352 493,40	17,80	9 554 596,10

(¹) The reason why certain names appear more than once is that there are multiple contracts involving the same service provider. In some cases, the amounts indicated in the table do not entirely correspond to the given formula (provable loss in CZK/km multiplied by the number of kilometres does not entirely match the overall provable loss in CZK). However, the differences are only marginal and in all cases the amounts presented in the Table 7 below (compensation actually given) are lower than the results of the mathematical formulas.

- (36) Table 7 demonstrates that the actual payments made to those operators did not exceed the amounts established as the objective estimate of the provable loss.

Table 7

Actual loss compensations paid under the contracts for the period 9.9.2006-2.6.2007

OPERATOR	CZK
ZDAR, a.s.	3 485 619,00
DP Most	4 300 909,19
DP Most	5 802 759,25
Autobusy Kavka, a.s.	4 893 192,50
Autobusy Karlovy Vary, a.s.	2 857 950,00
Autobusy Karlovy Vary, a.s.	2 042 809,00
Autobusy Karlovy Vary, a.s.	6 653 077,00
ČSAD Slaný a.s.	2 443 620,50
ČSAD Slaný a.s.	5 059 228,25
ZDAR, a.s.	2 613 935,34

2.4. COMPENSATIONS FOR DISCHARGING PUBLIC SERVICE OBLIGATIONS IN THE PERIOD FROM 9 SEPTEMBER 2006 TO 31 DECEMBER 2006

- (37) In six of the 15 areas that ČSAD Česká Lípa had initially agreed to take over from DPÚK, there was no second-placed bidder with which the Ústí Region could conclude a public service contract. For those areas, the Ústí Region opened a second concession round, but only one bidder participated. Consequently, operators were selected to operate those lines pursuant to negotiated proceedings and contracts were concluded with those operators only and exclusively for the period following the termination of service by DPÚK and the subsequent failure of ČSAD Česká Lípa to ensure a smooth continuation of its services ⁽¹²⁾, i.e. until the end of 2006, in order to ensure a sufficient level of transport services for the inhabitants of the region ⁽¹³⁾.
- (38) Table 8 lists the additional operators with which the Ústí Region concluded contracts and the parameters taken into account to estimate the level of the provable loss:

Table 8

Overview of contracts in 9.9.2006-31.12.2006 ⁽¹⁾

(Corrected figures provided by the Czech Republic following the Opening Decision)

9 September-31 December 2006	Number of km	Expected price of transport services in CZK/km	Expected overall price of transport services in CZK	Foreseen revenue in CZK/km	Foreseen overall revenue in CZK	Provable loss CZK/km	Overall provable loss in CZK
ČSAD Semily, a.s.	359 299,00	32,00	11 497 568,00	12,58	4 518 992,15	19,42	6 978 575,85
DP Děčín	20 572,00	32,90	676 818,80	8,87	182 496,40	24,03	494 322,40
ČSAD Střední Čechy, spol. sr.o.	82 189,00	32,00	2 630 048,00	7,18	590 203,09	24,82	2 039 844,91
DP Teplice	70 240,60	34,54	2 426 110,32	16,11	1 131 576,06	18,43	1 294 534,26
DP Ústí	22 654,00	38,17	864 703,18	16,72	378 774,88	21,45	485 928,30
DP Chomutov	35 443,00	31,34	1 110 783,62	6,10	216 070,92	25,24	894 712,70
Dopravní podnik Mladá Boleslav, s.r.o.	86 360,00	33,00	2 849 880,00	7,20	622 061,90	25,80	2 227 818,10

⁽¹⁾ In some cases, the amounts indicated in the table do not entirely correspond to the given formula (provable loss in CZK/km multiplied by the number of kilometres does not entirely match the overall provable loss in CZK). However, the differences are only marginal and in all cases the amounts presented in the Table 9 below (compensation actually given) are lower than the results of the mathematical formulas.

- (39) Table 9 demonstrates that the actual remuneration received by those operators was lower than the objective estimate of the provable loss.

⁽¹²⁾ Following the termination of service by DPÚK on 8 September 2006 and as a result of the fact that the operator chosen as a replacement in the tender failed to ensure the service.

⁽¹³⁾ Subsequent contracts for these lines, which do not form the subject matter of this Decision, were concluded following an open, transparent and unconditional awarding procedure with the sole criterion being the price of the offered service. Those contracts were concluded for a period of eight years.

Table 9

Actual loss compensations paid under the contracts for the period 9.9.2006-31.12.2006

OPERATOR	CZK
ČSAD Semily, a.s.	5 253 038,00
DP Děčín	484 084,00
ČSAD Střední Čechy, spol. sr.o.	1 726 387,00
DP Teplice	921 868,68
DP Ústí	437 498,00
DP Chomutov	823 855,10
Dopravní podnik Mladá Boleslav, s.r.o.	2 227 818,00

2.5. GUARANTEES AND INCREASE OF EQUITY CAPITAL FOR DP ÚSTÍ

- (40) On 23 July 2004 and 11 April 2005, the Municipality of Ústí nad Labem provided two guarantees in favour of DP Ústí securing bank loans of CZK 35 000 000 and CZK 5 000 000 respectively. Those loans were granted by Komerční banka, a.s. ⁽¹⁴⁾. The Czech authorities have informed the Commission that those guarantees, covering 100 % of the loans, were granted in relation to loans earmarked exclusively for the construction of a trolley-bus line to replace the less expensive but more polluting bus services in the Municipality of Ústí nad Labem.
- (41) In 2006, the Municipality of Ústí nad Labem increased the equity capital of DP Ústí by CZK 160 000 000. The capital increase was provided exclusively to finance DP Ústí's construction of a trolley-bus route (Ústí nad Labem — Střekov) in accordance with the long-term strategic objective of the Municipality of Ústí nad Labem for the electrification of transport. The resources from that capital increase were kept on a separate account.

3. THE OPENING DECISION

- (42) In the Opening Decision, the Commission assessed the following measures raised by the complainant:
- public service compensations granted to certain transport undertakings for the provision of regional bus services for 2005-2006;
 - public service compensations granted to certain transport undertakings for the provision of regional bus services from 9 September 2006 to 2 June 2007;
 - public service compensations granted to certain transport undertakings for the provision of regional bus services from 9 September 2006 to 31 December 2006;
 - two guarantees securing loans worth CZK 35 million and CZK 5 million in favour of DP Ústí;
 - a capital increase of CZK 160 million in favour of DP Ústí;
 - a loan of CZK 3,5 million in favour of DP Chomutov;
 - entrusting DP Děčín with operating parking meters;

⁽¹⁴⁾ Bank belonging to the Société Générale Group.

- (h) a lease of vehicles to DP Teplice (additional vehicles as of 2006);
 - (i) public service compensations granted to certain transport undertakings for the provision of regional for bus services for 2004;
 - (j) a guarantee for DP Ústí worth CZK 30 million;
 - (k) a guarantee for DP Chomutov worth CZK 5,2 million;
 - (l) a subsidy to DP Most of CZK 245 000;
 - (m) the lease of bus station to DP Děčín;
 - (n) a subsidy to DP Teplice of CZK 13,7 million;
 - (o) the lease of vehicles to DP Teplice as of 2003;
 - (p) a subsidy to DP Most of CZK 455 000.
- (43) With respect to the measures listed in recital 42 under (i) to (o), the Commission found in the Opening Decision that those measures were based on contracts concluded before 1 May 2004, i.e. before the accession of the Czech Republic to the Union. Therefore, the Commission concluded that it had no competence to assess those measures. In addition, the Commission found that the measure referred to in recital 42 under (p) was granted within the scope of an existing aid scheme.
- (44) As regards the measure referred to in recital 42 under (f), the Commission concluded that the loan of CZK 3,5 million in favour of DP Chomutov does not entail State aid.
- (45) Similarly, as regards the measure referred to in recital 42 under (g), the Commission concluded that any potential advantage involved in the operation of parking meters by DP Děčín cannot distort competition and affect trade between Member States as that measure meets the conditions for *de minimis* aid in line with Commission Regulation (EC) No 69/2001 ⁽¹⁵⁾.
- (46) As regards the measure referred to in recital 42 under (h), the Commission concluded that it did not have the competence to assess the lease of trolley-buses to DP Teplice by the Municipality of Teplice on the basis of the original agreement of 10 December 2003. However, since that lease agreement has been twice amended — on 5 May 2006 and 18 October 2006 — to cover the lease of additional trolley-buses, the Commission could assess the lease resulting from those amendments. In the Opening Decision, the Commission explained that since those vehicles were only used for fulfilling public service obligations, all the costs resulting from the lease contract should be considered as being part of the public service compensation. However, as indicated in recital 27, those trolley-bus leases related exclusively to the municipal public transport within the Municipality of Teplice, so that those measures are unrelated to and clearly separate from the public service compensations for regional bus transport provided by the Ústí Region and thus do not relate to the measures analysed under this Decision.
- (47) As regards the public service compensations granted to certain transport operators for different periods listed in recital 42 under (a), (b) and (c), the Commission examined in the Opening Decision whether those measures entailed State aid under the conditions laid down by the Court of Justice in the *Altmark* judgment ⁽¹⁶⁾. Since the Commission expressed doubts whether the second, third and fourth *Altmark* conditions were fulfilled, it concluded that it could not be excluded that the compensations constitute State aid within the meaning of the Treaty.
- (48) As regards the measures listed in recital 42 under (d) and (e), the Commission analysed whether the guarantees and the increase of equity capital for DP Ústí constituted State aid and, in particular, whether they could be considered to be in line with the market economy investor principle ('MEIP'). In the Opening Decision, the Commission concluded that it could not be excluded that those measures do not comply with the MEIP and therefore that they may constitute State aid within the meaning of the Treaty.
- (49) The Commission then examined whether the measures listed in recital 42 under (a) to (e) could be considered compatible with the internal market.

⁽¹⁵⁾ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

⁽¹⁶⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747. For the four *Altmark* conditions, see recital 98.

- (50) With respect to the public service compensations referred to in recital 42 under (a), (b) and (c), the Commission stated that it could not conclude at the stage of the Opening Decision that the amount of compensation did not exceed what was necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- (51) In particular, the Commission expressed doubts regarding the notion of unforeseeable costs and the methodology used for its calculation, especially since it led to payments exceeding the expected limit of remuneration for DP Teplice and DP Ústí in 2005 and 2006. Furthermore, the Commission expressed doubts concerning the methodology applied to verify whether the level of prices expected by the operators corresponded to the specificities of the services provided. In that regard, the Commission also expressed doubts whether the prices included a profit which could be considered reasonable.
- (52) In light of the above, the Commission concluded that there were doubts whether the public service compensations were compatible with the Treaty. The Commission requested additional information, in particular as regards the methodology used to calculate the compensations (as regards establishing the level of expected prices, the calculation of a reasonable profit and the notion of 'unforeseeable costs').
- (53) With respect to the measures referred to in recital 42 under (d) and (e), the Commission explained in the Opening Decision that the Czech authorities had not provided it with sufficient information to allow it conclude whether the capital increase and the two guarantees were necessary and proportionate to attain a common interest objective, and as such did not entail an undue distortion of competition. The Commission therefore expressed doubts whether those measures could be considered compatible with the Treaty.

4. COMMENTS FROM THE CZECH REPUBLIC

- (54) Along with its reply to the Opening Decision, the Czech authorities submitted the following three documents: a statement by the Ústí Region, a statement by the Municipality of Teplice and a statement by DP Ústí (one of the alleged beneficiaries). It also used the opportunity to correct the information provided in tables 1, 3, 6 and 7 of the Opening Decision. The mistakes in those tables were due to the non-inclusion of certain transport services and due to an incorrect transcription of data. The corrected data is now provided in tables 1, 3, 6 and 8 above.

4.1. COMMENTS ON THE EXISTENCE OF AID AS REGARDS THE PUBLIC SERVICE COMPENSATIONS

- (55) According to the Czech authorities, the public service compensations granted by the Ústí Region to regional transport operators listed in recital 42 under (a), (b) and (c) comply with the four *Altmark* criteria and thus do not constitute State aid.
- (56) As regards the first *Altmark* condition, the Czech authorities claimed that the Commission already concluded in the Opening Decision that that condition was fulfilled for all of the public service contracts under examination.
- (57) As regards the second *Altmark* condition, the Czech authorities explained that, under all the public service contracts under examination, the Ústí Region covered the provable loss of the operators calculated as a difference between (a) the cost of the transport service stemming from the public service contract and (b) revenues obtained by the transport provider. The cost of transport services included (i) the costs of the transport provider in line with the costs of a typical undertaking, and (ii) a reasonable profit. Those criteria were established in advance in a transparent and objective manner, with the maximum level of compensation being limited at the outset by the expert opinion. The regional authorities also had powers to check that the data used for such estimates are correct and correspond to the situation of that particular operator.
- (58) As regards the different prices per kilometre used for each of the operators, in connection with which the Commission expressed doubts in the Opening Decision, the Czech authorities replied that those prices are linked to the costs of the different bus service providers, to the relevant line and time of operation, and other specificities related to a single line. As a further argument, the Czech authorities presented results of the standard long-term concessions where the offered price varies between CZK 25,48/km in rural areas and CZK 45,79/km in suburban areas.
- (59) The Czech authorities therefore believe that the second *Altmark* condition has been fulfilled as regards all of the public service contracts.

- (60) As regards the third *Altmark* condition, the Czech authorities recalled that the public service contracts concluded by the Ústí Region provided for a preliminary objective estimate of the provable loss. According to section 19b(3) of the Road Transport Act, the region must reimburse the provable loss up to an amount not exceeding that estimate, augmented only by unforeseeable costs. Thus, if the amount of the actual losses for the period in question is higher than the preliminary estimate, the Ústí Region reimburses losses only up to the amount of the estimate, with the exception of unforeseeable costs.
- (61) In that regard, the Czech authorities noted that no transport provider received compensation for its basic transport services higher than the level of the preliminary objective estimate of the provable loss included in the public service contracts in 2005 and 2006. Moreover, in 2006 the three transport providers serving five areas of the Ústí Region suffered an economic loss. The documents provided by the Czech authorities demonstrate that those three providers tried to obtain additional compensations from the Ústí Region. The Ústí Region however did not provide any extra compensation and thus forced those transport providers to bear their business risks. The Czech authorities further noted that the transport provider cannot unilaterally decide to stop the provision of transport services on certain lines or influence the scope and frequency of the offered service. If the transport provider did not ensure the basic transport service stipulated in his contract, the Ústí Region would be entitled to impose contractual fines.
- (62) The Czech authorities acknowledged, however, that the Road Transport Act does not provide a more detailed definition of 'unforeseeable costs' and that the definition of that notion is left to the individual purchasers of transport services. The notion of unforeseeable costs was set out in greater detail in the public service contracts concluded by the Ústí Region with the individual transport operators. Unforeseeable costs refer to situations which are independent of the companies' management, such as natural disasters, price interventions by the State, changes in excise duties, VAT, etc. The Czech authorities provided the Commission with the relevant extracts of the public service contracts.
- (63) Finally, concerning the fourth *Altmark* condition, the reasoning of the Czech authorities as regards each of the three public service compensation measures was slightly different and will be explained separately.
- (64) In relation to the public service contracts for 2005 and 2006 (measure referred to in recital 42 under (a)), the Czech authorities argued that by comparing the price of transport services in the Ústí Region in 2005 and those offered on the basis of the concession tenders in 2007 and onwards, those contracts should be considered as complying with that condition. Since the concession tenders in 2007 were transparent, open and non-discriminatory, the prices offered in response to those tenders were market prices where the price of the transport service included only the costs of a typical rational operator and a reasonable profit. An analysis of price differences shows that the average price of transport services was CZK 30,60/km in 2005 and CZK 30,24/km in 2007. In 2005, the price of regional transport services varied between CZK 21,50/km and CZK 37,16/km. In 2007, after the long-term concession selection procedures were completed, the prices varied between CZK 25,48/km and CZK 45,79/km. The Czech authorities claim that it follows from that comparison that the price did not significantly differ and that the price variations between different areas were even higher in 2007 than in 2005. The same analysis shows that profits also did not differ significantly between the 2005 and 2007 contracts. Therefore, the profits generated by transport providers in the period under examination should be considered in line with the fourth *Altmark* condition.
- (65) In addition, the Czech authorities submitted an expert opinion carried out by professors of the Prague Technical University (*České vysoké učení technické v Praze*) which shows that the costs of service providers were those of *prudential* operators. The only exception was the complainant DPÚK, which had an inadequately high price for its regional transport services, and two local operators whose price was found to be too low.
- (66) As regards the contracts for the period from 9 September 2006 to 2 June 2007 (measure referred to in recital 42 under (b)) and from 9 September 2006 to 31 December 2006 (measure referred to in recital 42 under (c)), the Czech authorities claimed that the Ústí Region precisely defined the scope of requested services and provided the interested transport providers with relevant revenue estimates based on historical data. The expert opinion had to be provided by the transport provider. The expert opinion of the selected transport provider is then binding for the whole contractual period. Consequently, the only criterion when taking the decision was the price offered by the interested transport providers.

- (67) In relation to the public service compensations for bus services from 9 September 2006 to 2 June 2007 (measure referred to in recital 42 under (b)), the Czech authorities argued that the public service contracts on the basis of which those compensations were paid out were awarded following an open, transparent and unconditional tender procedure. The fact that the second-best bidder ultimately had to be selected because the winner of the tenders refused to provide required services does not undermine the open, transparent and unconditional nature of the tender procedure.
- (68) The price offered in the first selection round was the price objectively achieved through the selection procedure and that price thus fulfils the third and fourth *Altmark* conditions, since it ensures that the service provider will not obtain undue profits from performing the service. The contracts under the measure referred to in recital 42 under (b) were concluded for a transitory period of nine months in relation to nine out of 15 areas of the Ústí Region.
- (69) Should the Commission consider the first leg of the fourth *Altmark* condition not to be fulfilled as regards the measure referred to in recital 42 under (b), the Czech authorities argued that the second leg of the *Altmark* condition should be considered as complied with since the selection of the service provider was done according to the analysis of the costs of a typical service provider operating with a reasonable profit.
- (70) Finally, in relation to the public service compensations granted by the Ústí Region for bus services in the period from 9 September 2006 to 31 December 2006 through direct negotiations (measure referred to in recital 42 under (c)), the Czech authorities explained that the Ústí Region ensured as far as possible that public transport services in the five areas in which there was no second-placed bidder was offered for the lowest possible price. A second concession round was organised to ensure basic public transport services until a standard (non-accelerated) concession selection could be organised. The announcement of the second concession round was published on 16 August 2006 in several important Czech daily newspapers ⁽¹⁷⁾. The Czech authorities provided documentation for the second concession round. Since those contracts had to be concluded within two weeks due to the unexpected withdrawal of ČSAD Česká Lípa, and considering that any concessions would be granted for a temporary period of less than four months, the Ústí Region included as a selection parameter in the concession selection procedure that the winning transport provider must ensure the commencement of transport services as from 9 September 2006, i.e. within two weeks from the announcement of the concession selection procedure.
- (71) However, since it was not possible to conclude contracts on the basis of the second concession round, as it had received only one bid for the six areas ⁽¹⁸⁾, the Ústí Region concluded contracts directly with available transport providers. According to the Czech authorities, there was no time to organise a third concession selection procedure due to the exceptional circumstances surrounding the conclusion of those contracts and the same time constraints did not allow for the delivery of an expert opinion. The Czech authorities further stressed that, in any event, the price for the transport service was not significantly different from the price obtained through the first and second concession round. The difference in the amount of ca. 7 % could be considered standard in light of the fact that the temporary allocation of human and capital resources for the period of 4 months was more costly than for a longer period.

4.2. COMMENTS ON THE EXISTENCE OF STATE AID AS REGARDS THE GUARANTEES AND THE INCREASE OF EQUITY CAPITAL IN FAVOUR OF DP ÚSTÍ

4.2.1. Guarantees

- (72) As regards the CZK 5 million and CZK 35 million guarantees provided by the Municipality of Ústí nad Labem securing bank loans obtained by DP Ústí, the Czech authorities argued that DP Ústí would have been able to obtain the loans absent the guarantees. The Czech authorities note that DP Ústí obtained a CZK 40 million loan in 2007 for the finalisation of the construction of the trolley-bus line Ústí nad Labem — Střekov and for the purchase of two buses. That loan was granted by Komerční banka, a.s., that is, the same financial institution which granted the two loans to DP Ústí in 2004 and 2005 for which the Municipality of Ústí nad Labem granted the contested guarantees. The collateral for that CZK 40 million loan was formed by assets of DP Ústí. The provider of the loan was selected in an open tender as a result of which the best offer was selected without differentiating between the options of securing the loan, i.e. either by a guarantee provided by the Municipality of Ústí

⁽¹⁷⁾ The Czech authorities further noted that the fact that the Ústí Region published the second concession round demonstrated its open and transparent approach because in the case at hand the conditions for public procurement under a non-public procedure would be fulfilled (in line with Article 31(1)(c) of Directive 2004/18/EC of the European Parliament and of the Council (OJ L 134, 30.4.2004, p. 114)).

⁽¹⁸⁾ Zdar, a.s. ensured basic public transport service in one area of the Ústí Region.

nad Labem or a guarantee in the form of the company's assets. This demonstrates, according to the Czech authorities, that the conditions of the loan in 2007 did not depend on the form of security and that DP Ústí was able to obtain the loan on the same conditions even without the guarantee. The Czech authorities argue that this was also the case for the two loans in 2004 and 2005 and that the guarantee thus did not provide any economic advantage to DP Ústí.

- (73) In any event, the funds obtained from the loans could not have been used for other purposes than the construction of the trolley-bus line. The Ústí Region is an area of low environmental quality and the project served the purpose of improving that situation in the region. If the bank loan was not granted to DP Ústí, DP Ústí would have been obliged to continue its bus transport service. According to the Czech authorities, the measure effectively prioritised environmental protection over the higher costs associated with the construction of the trolley-bus line and should therefore be considered compatible with the Treaty.

4.2.2. Increase of equity capital for DP Ústí

- (74) The Czech authorities explained that the resources from the increase of equity capital of CZK 160 million were earmarked for exclusive use in the financing of the construction of the trolley-bus line Ústí nad Labem — Střekov. They were kept on a separate account of DP Ústí, from which payments were made for the construction of the trolley-bus line Ústí nad Labem — Střekov.
- (75) That line is an integrated part of the backbone of urban public transport in the Municipality of Ústí nad Labem, composed of large-capacity and ecological trolley-bus transport, which has been built up in the municipality since 1984 and gradually introduced into operation from 1988. The construction of the line represents the final stage of the construction of the system, the completion of which will connect a major part of the right-bank of the municipality to the backbone trolley-bus transport. This extension of the system has been planned since 1996.
- (76) According to the Czech authorities, the investment will result in a significant improvement in environmental conditions in the municipality, chiefly a reduction of air pollution in the right bank area of the city, a reduction in the noise levels of transport on the affected lines by deployment of trolley-buses instead of buses (above all, in night operation), reduction of emissions on affected lines and reduction of the risk of photochemical smog in the Střekov area.
- (77) Accordingly, the Czech authorities claimed that the capital increase is covered by an exemption provided for in Article 3(1)(b) of Council Regulation (EEC) No 1107/70⁽¹⁹⁾. The Czech authorities argue that the conditions for the application of Article 3(1)(b) are met since (i) the trolley-bus network construction aims at co-ordination and optimisation of transport, (ii) it involves infrastructure costs which other operators using other types of road transport do not have to bear, and (iii) there is no other, financially less burdensome alternative to achieve the common policy objective (i.e. coordination of transport and reduction of CO₂ emissions).

4.3. COMMENTS ON ADDITIONAL MEASURES GRANTED TO DP ÚSTÍ AND DP TEPLICE

- (78) In 2005, DP Ústí obtained two additional compensations of CZK 4 591 200 and CZK 7 335 000 in the context of its public service obligations. However, the Czech authorities clarified that those compensations, provided by the Municipality of Ústí nad Labem, concerned exclusively municipal transport within that municipality and that they were not related to the regional transport compensations granted by the Ústí Region which are the subject-matter of the Opening Decision.
- (79) As regards the measures granted to DP Teplice, the Czech authorities clarified that the compensations granted by the Municipality of Teplice as well as the lease of vehicles concerned exclusively public service obligations related to the transport within that municipality. They were thus unrelated to the regional transport compensations granted by the Ústí Region which are the subject-matter of the Opening Decision. In any event, due to the account separation put in place by DP Teplice, there was no risk that those compensations would in any way cross-subsidise the regional transport activities of DP Teplice. Finally, by their very nature, trolley-buses cannot be used outside the trolley-bus lines within the Municipality of Teplice to provide regional transport services.

⁽¹⁹⁾ Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1). Even though the Regulation was repealed as of 3 December 2009, it was applicable at the time of the capital increase of 2006.

5. COMMENTS FROM INTERESTED PARTIES

- (80) DPÚK was the only interested party to submit comments in response to the Opening Decision.
- (81) DPÚK submitted general comments on the legal framework for compensation for public service obligations in the regional bus services sector in the Czech Republic. DPÚK claimed that there has been no liberalisation of the public transport sector in the Czech Republic. According to DPÚK, this meant that the obligations of the operators were clearly set out in the administrative decisions granting licences to operators since Czech legislation is based on a system of 'public service obligations' within the meaning of Article 2 of Regulation (EEC) No 1191/69 and not 'public service contracts' within the meaning of Article 14 of that Regulation. DPÚK contends that the assessment of the public service compensations in the Opening Decision is affected by an incorrect interpretation of the relevant legal framework. It further contends that the *Altmark* judgment cannot be applied in this case because that judgment concerned a system based on public service contracts and not public service obligations as in the present case.
- (82) On that basis, DPÚK claimed that the public service obligations and the level of compensation could not be subject to negotiations between the regional authorities and the operators. They could not be subject to competition between operators, as this was impossible in a system based on public service obligations, and the compensation did not represent any contractual price of transport services provided, but was a loss due to the fulfilment of the relevant obligations which resulted from the application of legal provisions, was independent of the will of the operator and the authorities and thus could not be negotiated. DPÚK further claimed that the Ústí Region breached the existing legislation by concluding public service contracts with operators selected on the basis of quasi-tendering procedures. DPÚK contended that such attempts to apply competition principles are in contravention of the system based on public service obligations and thus illegal. DPÚK argued that the newly selected operators have been granted licences and received public service compensations illegally, since DPÚK is the holder of the primary licences for the same bus lines. The approach of the Ústí Region authorities was motivated by their unwillingness to pay the incumbent operators the compensations to which they are entitled on the basis of the law and incumbent operators which are not willing to accept lower operational subsidies are bullied and replaced by new operators by means of illegal pseudo-tenders. DPÚK demanded that the situation be rectified and that it be allowed to take over buses and employees from the current illegally selected operators and to return to fulfilling the originally imposed public service obligations which were only due to expire in 2011. In addition, DPÚK claimed that data for 2006-2008 proved its assertion that the final costs of ensuring regional bus services by the new operators would be more costly.
- (83) Finally, DPÚK noted that the newly selected operators are in many instances municipal bus service operators, owned and subsidised by the relevant municipalities, so that unfair competition exists between those operators and operators in the regional passenger transport market. DPÚK argued that it is unacceptable that the local bus operators are allowed to operate regional lines beyond the area of their municipality.
- (84) As regards the guarantee and increase of equity by the Municipality of Ústí nad Labem, DPÚK claimed that it had proposed to the authorities a significantly cheaper alternative for an environmentally-friendly local transport service on the line Ústí nad Labem — Střekov (based on CNG-buses instead of the trolley buses of DP Ústí), but that that alternative was rejected.
- (85) As regards the measures which according to the Opening Decision were granted before the accession of the Czech Republic to the Union, DPÚK claimed that all of them have a long-term effect going well beyond the date of accession.
- (86) As regards the assessment by the Commission of the transfer of operation of parking meters to DP Děčín, DPÚK claimed that the analysis in the Opening Decision is incorrect as the *de minimis* threshold did not apply in the public transport sector.
- (87) DPÚK did not comment on the notion of unforeseeable costs. Nor did it comment on the fact that the pre-establishment of a maximum price for compensation based on national statistical analysis could guarantee the absence of over-compensation for the operators.

6. COMMENTS OF THE CZECH REPUBLIC ON THE COMMENTS FROM THE INTERESTED PARTY

- (88) The Czech authorities did not agree with the interpretation of the legal framework for compensations for public service obligations in the regional bus services sector in the Czech Republic as described by DPÚK in its submissions. The Czech authorities also disagreed with the DPÚK's claim that public transport services had not yet been liberalised in the Czech Republic.
- (89) The Czech authorities argued that the national legislative framework included two possibilities for arranging public bus transport under the public service obligation regime: (i) on the basis of a public service contract based on section 19 of the Road Transport Act and Article 14 of Regulation (EEC) No 1191/69 and (ii) on the basis of a decision unilaterally imposing a public service obligation. The second type is, however, only used marginally. In the Ústí Region, all regional public bus transport operations are currently based on contracts resulting from open, transparent and non-discriminatory tendering procedures. The Czech authorities argued that despite certain differences in the terms used, the public service contracts corresponded to public service contracts within the meaning of Regulation (EEC) No 1191/69. This was clear from the reading of the Road Transport Act as well as from its interpretation in various decisions of the relevant authorities.
- (90) The Czech authorities also clarified that the licence for operating bus transport services was an authorisation enabling the operator to provide bus transport services on individual lines but did not represent an entrustment of public service obligations. Those obligations were entrusted to the operators by way of public service contracts between the respective operator and the relevant authority (the Ústí Region in this case). There could be more operators with a licence for a certain bus line, but the public service compensation was accorded only to the operator who had concluded the contract for that line with the regional authorities or on whom the obligation was imposed by a decision of the authorities. In addition, the licence could not represent a decision on the imposition of public service obligations within the meaning of Article 1 of Regulation (EEC) No 1191/69, as it did not provide for compensation to be granted in respect of the financial burden resulting from the obligation as required by Article 6 of that Regulation.
- (91) The Czech authorities further considered that the compensations paid on the basis of the public service contracts fulfilled the *Altmark* criteria and for that reason they were not notified to the Commission.
- (92) The Czech authorities claimed that due to the open, transparent and non-discriminatory selection procedures, the bus transport services within the framework of the public service obligation in the Ústí Region had been provided for prices which were much more advantageous than before. This led to more efficient use of resources of the Ústí Region than if it had to pay compensation for losses unilaterally required by DPÚK.
- (93) As regards the arguments of DPÚK concerning the guarantee and increase of equity by the Municipality of Ústí nad Labem, the Czech authorities clarified that there was an existing trolley-bus network in that municipality and that those measures were used for the interconnection of two existing trunk trolley-bus networks. Therefore, the new trolley-bus lines only supplemented the existing trolley-bus network which had been gradually rolled out since 1988. Finally, the Czech authorities claimed that there was no official record of any formal submission by DPÚK of an alternative project for ensuring an ecological transport in the municipality. The project attached to the DPÚK's submission is dated June 2001 and was thus not relevant at the time of the assessed measures.

7. ASSESSMENT OF THE MEASURES

- (94) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States.
- (95) The qualification of a measure as aid within the meaning of Article 107(1) of the Treaty therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

- (96) The Commission will examine whether each of those conditions has been fulfilled as regards the following five measures:
- (a) compensations for discharging public service obligations granted by the Ústí Region to ČSAD, DP Ústí, DP Teplice, DP Chomutov, DP Děčín, DP Most, Podbořany, Miroslav Ohem, Petr Frommel, Petr Stejskal and Vilém Graupner for providing regional transport services in 2005 and 2006;
 - (b) compensations for discharging public service obligations granted by the Ústí Region to Autobusy Karlovy Vary, a.s., Autobusy Kavka, a.s., ČSAD Slaný a.s., DP Most and ZDAR, a.s. for providing regional transport services in the period from 9 September 2006 to 2 June 2007;
 - (c) compensations for discharging public service obligations granted by the Ústí Region to ČSAD Semily, DP Děčín, ČSAD Střední Čechy, DP Teplice, DP Ústí, DP Chomutov and DP Mladá Boleslav for providing regional transport services in the period from 9 September 2006 to 31 December 2006;
 - (d) guarantees dated 23 July 2004 and 11 April 2005 granted by the Municipality of Ústí nad Labem in favour of DP Ústí to secure loans worth CZK 35 million and CZK 5 million respectively;
 - (e) an increase of equity capital of DP Ústí by CZK 160 million granted by the Municipality of Ústí nad Labem in 2006.

7.1. EXISTENCE OF STATE AID

7.1.1. **Compensations for discharging public service obligations (measures referred to in recital 96 under (a), (b) and (c))**

7.1.1.1. *State resources*

- (97) The public service compensations for providing transport services were paid out on the basis of contracts concluded between the Ústí Region authorities and operators listed in recital 96 under (a), (b) and (c) and were paid from the public budget of those authorities. Those compensations are therefore imputable to the State and granted through State resources.

7.1.1.2. *Economic advantage*

- (98) It follows from the *Altmark* judgment that compensation granted by the State or through State resources to undertakings in consideration for the discharge of public service obligations does not confer an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) of the Treaty, provided four cumulative conditions are satisfied:
- (a) the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined;
 - (b) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
 - (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
 - (d) where, in a specific case, the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.
- (99) In order to exclude the presence of an economic advantage where compensation is granted to undertakings in consideration for the discharge of public service obligations, the *Altmark* judgment requires that all four conditions be satisfied cumulatively.

- (100) As regards the first condition, a public service obligation in the field of land transport is a requirement to ensure transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward ⁽²⁰⁾. Within those confines, Member States have a wide discretion in defining public service obligations in line with the needs of end users. The Commission's task in such cases is to ensure that that margin of discretion is applied without a manifest error as regards the definition of the public service obligation.
- (101) In the Opening Decision, the Commission already noted that the Czech authorities had provided it with the contracts on the basis of which the Ústí regional authorities arranged the provision of public service obligations with the operators. Those contracts define the scope of the public service obligation to provide transport services. More specifically, those contracts define the lines on which the bus transport providers operate, the timetables and the objective estimate of the provable loss. That those lines cannot be operated on a commercial basis is demonstrated through a comparison of the expected provable loss and the actual loss for those lines as provided in Tables 1 to 9 above. Moreover, the operators cannot unilaterally decide to stop the operation of unprofitable lines; neither can they influence the scope and frequency of services on the lines they operate. They therefore bear a certain degree of business risk stemming from the fact that they can face an economic loss if their operating losses are greater than what was established beforehand by the objective estimate of the provable loss. Accordingly, the Commission concludes that, as regards the measures listed in recital 96 under (a), (b) and (c), genuine public service obligations exist which were clearly defined in advance. The first *Altmark* condition is thus fulfilled.
- (102) As regards the second *Altmark* condition, the parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined.
- (103) In the Opening Decision, the Commission noted that the public service compensation was calculated under the contracts on the basis of an expected price per kilometre and foreseen revenues. The Commission acknowledged that such a methodology could ensure an *ex ante* calculation of compensation in an objective and transparent manner. However, the Commission had not received sufficient information concerning the methodology used to establish the level of expected prices per kilometre in this case and could therefore not yet conclude whether the second *Altmark* condition had been fulfilled.
- (104) The Czech authorities have since explained that the applicable Czech legislation lays down all the parameters on the basis of which the compensation payments are to be calculated, in particular the costs of the services, revenues and reasonable profit. Subsequently, each contract concluded between the Ústí Region and the operator contained the relevant parameters used for calculating the objective estimate of the provable loss. That estimate is based on the difference between (a) the price per kilometre agreed upon in the contract and (b) the revenues of the operator for the relevant services. The price per kilometre included (i) the costs of the operations and (ii) a reasonable profit.
- (105) As regards the differences in price per kilometre for each of the operators, the Czech authorities explained that they reflect the different situation of each operator (e.g. the costs per kilometre are naturally different in rural and suburban areas). In any event, all the parameters for calculating the prices for each of the operators were clearly laid down in advance in the individual contracts. The regional authorities also had the power to check that the data used for such estimates were correct and corresponded to the situation of that particular operator.
- (106) The Commission therefore considers that the parameters for calculating the compensation for each operator were established in advance in an objective and transparent manner. The second *Altmark* condition has thus been fulfilled as regards the measures listed in recital 96 under (a), (b) and (c).

⁽²⁰⁾ That approach is consistent with the Commission's general approach to Services of General Economic Interest in other sectors. See, in particular, point 48 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

- (107) As regards the third *Altmark* condition, the Commission notes that the final settlement and payment of compensation takes place only once the specific operator has provided documentary proof of actual losses incurred in the performance of the service. At the same time, the maximum amount of the compensation is limited in advance by an objective estimate of the provable loss, which is included in the contract.
- (108) Pursuant to section 19b(3) of the Road Transport Act, the objective estimate of the provable loss constitutes a pre-established ceiling above which the competent authority cannot compensate actual losses ⁽²¹⁾. Thus, if an operator claims a higher loss compensation after the performance of the contract, the public authorities cannot cover those losses. If, by contrast, the actual losses are lower than the expected estimated losses, only the actual losses are compensated.
- (109) This is evidenced by the fact that the actual compensation paid to the operators, as indicated in Table 2, Table 4, Table 7 and Table 9, is in many instances lower than the forecasted losses specified in the contract, as indicated under the heading 'overall provable loss' in Table 1, Table 3, Table 6 and Table 8.
- (110) An increase of those caps is only possible if there are unforeseeable costs, which was, however, not the case for any of the regional transport contracts examined under this Decision. As regards the notion of 'unforeseeable costs', in connection with which the Commission expressed doubts in its Opening Decision, that notion concerns costs which are independent of the companies' management decisions, such as those relating to natural disasters, price interventions by the State, changes in excise duties, VAT, etc. To claim compensation, the operators must prove that those costs were genuinely incurred in the discharge of the public service obligations. The existence of that exception to the maximum cap on compensation does not, however, compromise the ability of the compensation mechanism to ensure that the ultimate compensation received by the operator does not exceed its actual losses.
- (111) As regards the determination of the reasonable profit, which forms a part of the calculation of costs and in connection with which the Commission also expressed doubts in the Opening Decision, the Czech authorities demonstrated that the average profit in 2005 amounted to CZK 1,53 per kilometre. With an average price per kilometre in 2005 amounting to CZK 30,60 per kilometre, the average profit margin amounted to around 5 %, which the Commission considers to be reasonable. In 2007, the average profit amounted to CZK 0,97 per kilometre and the average price per kilometre was CZK 30,24 per kilometre. The average profit margin thus amounted to around 3,2 %. The Czech authorities did not provide the average profit figures for the year 2006. However, the average profit margin for 2006 is likely to be in the same range as those for 2005 and 2007 since the other relevant figures (such as the average price per kilometre amounting in 2007 to CZK 31,72, average provable loss per kilometre amounting to CZK 17,49) remained in the same range and the methodology for calculation of the reasonable profit was the same (see footnote 9).
- (112) Therefore, the Commission concludes that the third *Altmark* condition has been complied with as regards measures listed in recital 96 under (a), (b) and (c).
- (113) Finally, the fourth *Altmark* condition requires that the provider of the public services is selected in a public procurement procedure or that the costs for providing that service are limited to the costs of a typical well-run undertaking through benchmarking.
- (114) According to the information provided by the Czech authorities regarding measures listed in recital 96 under (a) and (c), the contractual relationships between the Ústí Region and the operators for 2005 and 2006 were established by simply extending the existing contracts, while the contracts for the period from 9 September 2006 to 31 December 2006 were concluded following negotiated proceedings. In both procedures, other operators were prevented from submitting their bids to provide transport services for the period in question and neither constitutes a public procurement procedure which would allow selecting bids reflecting market conditions as required by the first branch of the fourth *Altmark* condition ⁽²²⁾.

⁽²¹⁾ See recital 17.

⁽²²⁾ This conclusion is without prejudice to the Commission's assessment concerning the application of Union law with regard to public procurement.

- (115) Consequently, the Commission must examine whether the second branch of the alternative stipulated in the fourth *Altmark* condition is fulfilled as regards the contracts in question. According to that alternative, 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 (benchmarking).
- (116) The Czech authorities claim that the level of compensation for operators in 2005 and 2006 correspond to the costs of a typical, well-run and adequately equipped undertaking. They argue that this is proven by comparing the prices in 2005 and 2006 with the prices resulting from the open and transparent tendering procedures for services as from 2007. While in 2005, the average price corresponded to CZK 30,60 per kilometre (with average costs of CZK 29,06 per kilometre), the average price resulting from the 2007 tenders amounted to CZK 30,24 per kilometre (average costs of CZK 29,22 per kilometre). In addition, while the range of prices for different operators was between CZK 21,50 and CZK 37,16 per kilometre in 2005, it ranged between CZK 25,48 and CZK 45,79 per kilometre in 2007. The Czech authorities argue that since the average level of the price per kilometre and the range of individual prices did not differ materially between 2005 and 2007, the prices in 2005 should be considered as corresponding to the costs of a typical undertaking, well-run and adequately provided with means of transport. In addition, the Czech authorities submitted an expert opinion testifying that, with the exception of exceptionally high costs of the complainant, all other operators' costs corresponded to the costs of a typical undertaking, well-run and adequately provided with means of transport.
- (117) The Commission notes that the use of statistical data described in the preceding recital aims at establishing that the price was determined with reference to the costs of a typical undertaking. However, as already noted in the Opening Decision, the use of statistical historical costs does not lead to a conclusion that the operators who accepted to provide the services at the level of costs of 2005 should be considered well-managed operators. Indeed, fixing the level of costs in the past does not provide an incentive for efficiency in the cost management of transport operators. On the other hand, if any important cost parameters change (such as the price of fuel) the historical cost data become immediately obsolete. In addition, when identifying the benchmark undertakings the Czech authorities have not applied any objective criteria that are economically recognised as being representative of satisfactory management and did not base their analysis on any analytical ratios representative of productivity or relating to the quality of supply ⁽²³⁾.
- (118) As regards the measure referred to in recital 96 under (c), the Czech authorities have not provided the Commission with any information indicating that the level of compensation for the contracts in the period from 9 September 2006 to 31 December 2006 was determined on the basis of an analysis of the costs of a typical, well-run and adequately equipped undertaking.
- (119) Accordingly, as not all of the requirements of the second alternative of the fourth *Altmark* condition have been fulfilled, the Commission cannot conclude that the amount of compensation resulting from measures referred to in recital 96 under (a) and (c) was established at a level which guarantees that no advantage was conferred to certain operators. The Commission therefore considers that the public service compensations granted as a result of measures referred to in recital 96 under (a) and (c) have conferred an economic advantage upon the regional public transport operators referred to in that same recital.
- (120) As regards the measure referred to in recital 96 under (b), the public service contracts concluded for the period between 9 September 2006 and 2 June 2007 were concluded following a tender procedure. That tender procedure divided the Ústí Region into 15 areas on which operators could bid separately. The tender announcement was published on a website, on the public announcements board of the Ústí Region and in two daily newspapers covering the whole of the Czech Republic. Twenty-three interested parties collected the tender documentation. The allocation criteria were made known in advance: the selection was to be made solely on price, no qualitative parameters were evaluated and the winner of the tender was the operator which offered the lowest price per kilometre. The tender procedure was thus sufficiently well-publicised, open and transparent.
- (121) According to the Czech authorities, the offered price was in the range of CZK 27,57/km and CZK 43,73/km. Eliminating the bid made by DPÚK, the offered price range would be between CZK 27,57/km and CZK 33,5 CZK/km. The prices per km were offered by operators for the areas in which they decided to bid. ČSAD Česká Lípa won in all 15 tender procedures. Since that operator could not ultimately provide the service, the Ústí

⁽²³⁾ In this respect, see also the Communication from the Commission on the application of the European Union State aid rules to compensations granted for the provision of services of general economic interest, cited in footnote 32, section 3.6.2.

Region concluded public service contracts with the bidders who came second in those cases where this was possible (that was the case in nine areas). Selecting the second highest bidder in a case where the highest bidder fails to perform the services does not invalidate the finding that the bid ultimately selected in these nine areas was selected pursuant to a sufficiently well-publicised, open and transparent tendering procedure in line with the first branch of the fourth *Altmark* condition.

- (122) Accordingly, the Commission finds that the public service compensation granted by the Ústí Region as a result of the measure referred to in recital 96 under (b) does not confer an advantage upon the operators listed in that recital and therefore does not constitute State aid within the meaning of Article 107(1) of the Treaty. Since a finding of State aid under that provision only follows if all four conditions listed in recital 95 are present, there is no need to continue to examine the measure listed in recital 96 under (b) in the absence of an advantage.

7.1.1.3. *Selectivity*

- (123) The advantage granted as a result of measures listed in recital 96 under (a) and (c) is selective as only certain undertakings benefit from those compensations.

7.1.1.4. *Distortion of competition and effect on trade between Member States*

- (124) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽²⁴⁾. For all practical purposes, a distortion of competition within the meaning of Article 107 of the Treaty is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ⁽²⁵⁾.
- (125) Aid granted to operators in a market or a sector which has not yet undergone a process of liberalisation through the opening of that market to outside competition is deemed not to constitute State aid within the meaning of Article 107(1) since it does not affect trade between Member States. As noted in the *Altmark* judgment, with effect from 1995 several Member States started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin. As explained in recital 14, under Czech Legislation in force since 2004, regional bus services provided under a public service contract can be ensured by any operator who has a licence for a particular line, has obtained a general authorisation ('koncese') under the Trades Licensing Act ('živnostenský zákon') for public bus transport activities and respects an agreed timetable. As further noted in that recital, regional bus transport services were fully liberalised in the Ústí Region during the period under investigation since any operator from another Member State which fulfilled the conditions for obtaining a license could provide regional bus transport services in the Czech Republic during the period under investigation.
- (126) Accordingly, any compensation granted to providers of regional bus services should be considered liable to distort competition for the provision of passenger transportation services by bus.
- (127) Moreover, an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States. Indeed, 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid' ⁽²⁶⁾. The measures referred to in recital 96 under (a) and (c) should therefore be considered liable to affect trade between Member States to the extent that they have a negative impact on the ability of transport undertakings established in other Member States to offer their services in the Czech Republic and strengthen the market position of the recipients of the public service compensation.

⁽²⁴⁾ Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta* [2000] ECR II-2319, paragraph 80.

⁽²⁵⁾ *Alzetta*, paragraphs 141 to 147; *Altmark Trans*.

⁽²⁶⁾ Case T-288/97 *Friuli-Venezia Giulia* [2001] ECR II-1619, paragraph 41.

7.1.2. Guarantees in favour of DP Ústí (measure referred to in recital 96 under (d))

- (128) DP Ústí obtained guarantees from the Municipality of Ústí nad Labem securing bank loans of CZK 35 million and CZK 5 million in 2004 and 2005. Those loans were obtained for finalising the construction of the trolley-bus line Ústí nad Labem — Střekov.
- (129) For such guarantees to constitute aid, they must confer an advantage upon the recipient. In that regard, reference should be made to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽²⁷⁾.
- (130) The Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees stipulates that under certain circumstances, which must appear cumulatively, guarantees granted by the State cannot be considered State aid.
- (131) Firstly, the borrower must not be in financial difficulty. The Commission analysed the accounts of DP Ústí and concluded that the company was not in difficulty in 2004 and 2005, i.e. at the time when it obtained the guarantees.
- (132) Secondly, the extent of the guarantee must be properly measured at the time at which it is granted. This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. The Commission notes that in the present case the guarantee was indeed properly measurable since it was directly linked to two bank loans of CZK 35 million and CZK 5 million. Moreover, those loans were obtained strictly for the financing of public transport infrastructure — the construction of the additional trolley-bus line in Ústí nad Labem. The guarantees were limited in time since they were granted for the period of repayment of the loan (i.e. until 30 June 2009 for the loan of CZK 35 million and until 31 March 2010 for the loan of CZK 5 million).
- (133) Thirdly, the guarantee should generally not cover more than 80 % of the outstanding loan. Although failure to comply with that requirement does not mean that a guarantee is automatically regarded as State aid (point 4.4 of the Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees), the Commission must nevertheless examine any guarantees covering the entirety (or nearly the entirety) of a financial transaction, such as the one provided by the Municipality of Ústí nad Labem.
- (134) The Commission notes that DP Ústí, a wholly-owned subsidiary of the Municipality of Ústí nad Labem, derived more than 95 % of its revenues from the discharge of public services for municipal bus and tram transport. Those public services were entrusted to DP Ústí by the Municipality of Ústí nad Labem by means of a public service contract. In addition, the two loans covered by the guarantees were exclusively reserved for financing the construction of a trolley-bus line to be operated under the public service obligations of DP Ústí. Therefore, the covered loans were exclusively reserved for the public service activities of DP Ústí. Moreover, DP Ústí is a company whose activity is almost solely constituted by a properly entrusted public service obligation.
- (135) For those reasons, the Commission considers that the 100 %-coverage of the guarantees is in line with point 3.4 of the Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees.
- (136) Fourthly, a market-oriented price should be paid for the guarantee. Indeed, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, that guarantee does not contain aid.
- (137) In the present case, the guarantee fee amounted to 2,3 %. Given that the beneficiary of the aid is a small regional bus transport operator it is not possible to find an appropriate premium benchmark. However, the Czech authorities provided evidence that the remuneration for the guarantee was set at that time on the basis of an independent expert opinion and reflected standard market conditions.
- (138) Finally, the borrower must, in principle, be able to obtain a loan on market conditions from the financial markets without any intervention by the State. In that regard, the Czech authorities submitted an offer for another loan by the same bank of August 2008 in which that bank offered to DP Ústí a loan amounting to CZK 40 million with two alternative collaterals possible: either a guarantee by the municipality of Ústí nad Labem or a pledge over DP Ústí's assets. The conditions of the loan were the same under both alternatives, which is also expressly confirmed by a letter from the bank. This demonstrates that DP Ústí was able to obtain the loan under the same conditions even without the guarantee.

⁽²⁷⁾ OJ C 71, 11.3.2000, p. 14.

- (139) Even though that loan was provided later than the loans covered by the guarantees assessed in this case, there are no indications that the financial situation of DP Ústí was significantly different in those two periods. According to the balance sheet of DP Ústí of 31 December 2004, DP Ústí's own capital amounted to CZK 668 million while its total debts amounted to only CZK 122 million (including the guaranteed loan of CZK 35 million). Therefore, in light of its financial situation, DP Ústí would have been able to provide sufficient collateral even in 2004/2005.
- (140) In light of the above, the Commission considers that, although the guarantee covered 100 % of the loans, the Czech authorities submitted sufficient evidence that the guarantees did not provide any economic advantage to DP Ústí. Accordingly, the Commission concludes that the guarantees in favour of DP Ústí do not constitute State aid within the meaning of Article 107(1) of the Treaty.

7.1.3. Increase of equity capital in DP Ústí (measure referred to in recital 96 under (e))

7.1.3.1. State resources

- (141) The increase of the equity capital of DP Ústí was carried out by the Municipality of Ústí nad Labem. Hence, State resources were involved in that operation.

7.1.3.2. Economic advantage

- (142) As regards the capital increase, the Czech authorities argue that its purpose was to provide financing for the last stage of the construction of a trolley-bus network which had been under construction since 1984. That additional investment into electrification of the municipal transport network of Ústí nad Labem would, according to the Czech authorities, improve the environmental conditions in the municipality.
- (143) In the absence of evidence that DP Ústí would have been able to obtain similar financing from other sources or that a hypothetical private investor would have provided such a capital increase as well, the capital increase should be considered to provide an advantage to DP Ústí.

7.1.3.3. Selectivity

- (144) The capital increase is selective insofar as it was granted to only one company, DP Ústí.

7.1.3.4. Distortion of competition and effect on trade between Member States

- (145) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition within the meaning of Article 107 of the Treaty is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (146) Moreover, an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States. Even a public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States might provide such services. Therefore, where a public authority grants a capital increase to an undertaking supplying transport services, the supply of those services may, by virtue of that increase, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State ⁽²⁸⁾.
- (147) Therefore, the Commission concludes that the capital increase in favour of DP Ústí is liable to distort competition and affect trade between Member States.

7.1.3.5. Conclusion

- (148) In light of the foregoing, the Commission concludes that the increase of the equity capital of DP Ústí by the Municipality of Ústí nad Labem constitutes State aid within the meaning of Article 107(1) of the Treaty.

⁽²⁸⁾ *Altmark Trans*, paragraphs 77 and 78.

7.1.4. Additional compensations/other measures granted to DP Ústí and DP Teplice in 2005 and 2006

- (149) As explained in recitals 26, 27 and 31, the additional compensations granted to DP Ústí by the Municipality of Ústí nad Labem and the additional compensations and the three trolley-bus leases granted to DP Teplice by the Municipality of Teplice relate exclusively to municipal public transport services within those municipalities, so that those measures are unrelated to and clearly separate from the public service compensations for regional bus transport provided by the Ústí Region examined in the Opening Decision and this Decision.

7.1.5. Entrusting DP Děčín with the operation of parking meters

- (150) Although the Commission explicitly concluded in the Opening Decision that any potential advantage involved in entrusting DP Děčín with the operation of parking meters cannot distort competition and affect trade between Member States, since it meets the conditions for *de minimis* aid in line with Regulation (EC) No 69/2001, DPÚK disputed that finding by arguing that the *de minimis* threshold does not apply in the public transport sector.
- (151) In response to that contention, the Commission notes that the operation of parking meters cannot be considered as a transport activity. Although DP Děčín is a provider of passenger bus services and active in the transport sector, the fact that it operated parking meters as a secondary activity does not mean that the operation of the parking meters should qualify as a transport activity excluded from the *de minimis* threshold. The Commission therefore maintains its conclusion that payments received by DP Děčín for the operation of parking meters fall within the scope of Regulation (EC) No 69/2001.

7.2. COMPATIBILITY OF THE AID

- (152) Article 93 of the Treaty provides that '[a]ids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the notion of a public service.' That Article constitutes a *lex specialis* in relation to Articles 106 and 107 of the Treaty. According to the case-law of the Court of Justice ⁽²⁹⁾, aid to land transport may be declared compatible on the basis of Article 93 of the Treaty only in well-defined cases which do not jeopardise the general interests of the Union.
- (153) The Commission has concluded that the measures listed in recital 96 under (a), (c) and (e) constitute aid within the meaning of Article 107(1) of the Treaty. As regards the compatibility of those measures with the internal market, the Commission will examine the measures listed in recital 96 under (a) and (c) together, as they both concern compensation granted by the Ústí Region for discharging public service obligations, while the measure under (e) concerns an increase in the capital of DP Ústí by the Municipality of Ústí nad Labem.

7.2.1. Compensations for discharging public service obligations granted for providing transport services (measures referred to in recital 96 under (a) and (c))

- (154) Since the public service compensation in the measures listed in recital 96 under (a) and (c) results from the conclusion of public service contracts between the Ústí Region and the selected operators, rather than from the unilateral imposition of public service obligations, the Czech authorities cannot rely on the exemption from prior notification to the Commission provided by Article 17(2) of Regulation (EEC) No 1191/69. It follows from the *Combus* judgment that the notion of 'public service compensation' within the meaning of that provision must be interpreted in a very narrow manner ⁽³⁰⁾. The exemption from notification provided by Article 17(2) covers only compensation for public service obligations imposed unilaterally on an undertaking, pursuant to Article 2 of that Regulation, which is calculated using the method described in Articles 10 to 13 of that Regulation (the common compensation procedure), and not to public service contracts as defined by Article 14 of that Regulation. By contrast, compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which constitutes State aid should have been notified to the Commission before it was put into effect. Failure to do so results in that compensation being deemed illegally implemented aid ⁽³¹⁾.

⁽²⁹⁾ Case 156/77 *Commission v Belgium* [1978] ECR I-1881, paragraph 10.

⁽³⁰⁾ Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, paragraphs 77 to 79.

⁽³¹⁾ Case C-504/07 *Antrop and Others* [2009] ECR I-3867.

- (155) Accordingly, the Commission considers that the examination of the compatibility of the public service compensations should be conducted under Regulation (EC) No 1370/2007⁽³²⁾. It is settled case-law that the rules, principles and criteria of assessment of the compatibility of State aid in force on the date on which the Commission takes its decision may, as a rule, be regarded as better adapted to the context of competition⁽³³⁾. Regulation (EEC) No 1191/69 is no longer applicable to passenger road transport services as a result of its repeal by Regulation (EC) No 1370/2007 on 3 December 2009. Thus, any compatibility assessment of the measure must therefore be made on the basis of the rules in force at the time the Commission takes its decision as to whether the aid should be recovered as a result of its being incompatible with the internal market⁽³⁴⁾, in this case, Regulation (EC) No 1370/2007, which governs the award of public service contracts in the field of public passenger transport by road and by rail.
- (156) According to Article 9(1) of Regulation (EC) No 1370/2007 ‘[p]ublic service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty’. For public service compensation to be considered as being paid in accordance with Regulation (EC) No 1370/2007 a number of conditions must be met. Article 6(1) of that Regulation provides that in the case of directly awarded public service contracts compensation must comply with the provisions of Article 4 of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to that Regulation to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation.
- (157) As explained in sections 2.2 and 2.4, the public service contracts concluded in relation to the measures listed in recital 96 under (a) and (c) were not granted pursuant to a tender⁽³⁵⁾, but directly awarded to the operators in question. Thus, for the compensation resulting from those contracts to be considered in compliance with Regulation (EC) No 1370/2007 and thus compatible with the internal market and exempt from prior notification to the Commission, that compensation must comply with the provisions of Article 4 of the Regulation and the Annex thereto.
- (158) Article 4 of Regulation (EC) No 1370/2007 establishes the mandatory content of public service contracts and sets out general rules:
- (a) Article 4(1)(a) of Regulation (EC) No 1370/2007 requires that the public service obligation be clearly defined. Moreover, to fall within the scope of Regulation (EC) No 1370/2007, the public service obligations laid down by those contracts have to comply with the definition laid down in Article 2(e) thereof⁽³⁶⁾. As noted in recital 101, the contracts on the basis of which the authorities of the Ústí Region arranged the provision of public service obligations with the transport operators listed in recital 96 under (a) and (c) define the scope of the public service obligation to provide transport services. Moreover, as demonstrated through a comparison of the expected provable loss and the actual loss for those lines as provided in Tables 1 to 9 above, those lines cannot be operated on a commercial basis so that an operator, if they were considering its own commercial interests, would not assume the operation of the lines or would not assume it to the same extent or under the same conditions without reward. The Commission therefore finds that Article 4(1)(a) of Regulation (EC) No 1370/2007 has been complied with as regards the measures listed in recital 96 under (a) and (c).

⁽³²⁾ The Commission also refers in this respect to the reasoning developed in recitals 307 to 313 of its Decision C(2010) 975 final of 24 February 2010 in Case C 41/08 (ex NN 35/08) concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (OJ L 7, 11.1.2011, p. 1). That Decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v Commission* [2013] ECR II-0000. The judgment is currently under appeal before the Court of Justice in Case C-303/13 P.

⁽³³⁾ Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 51.

⁽³⁴⁾ Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others v Commission* [2011] ECR I-83, paragraphs 125 and 128. Most recently, Case T-570/08 RENV *Deutsche Post v Commission* [2013] ECR II-0000, paragraph 167.

⁽³⁵⁾ Article 5 of Regulation (EC) No 1370/2007 lays down rules on the award of public transport service contracts. However, according to Article 8(2), ‘without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019’. On that basis, the public transport service contracts in question could be awarded directly. In any event, for contracts concluded after 31 December 2006 the Czech authorities explained that the operators were selected pursuant to an open, transparent and unconditional award procedure with the sole criterion being the price of the offered service. Those contracts were concluded for a period of eight years, so that the Ústí Region has already taken measures to gradually comply with Article 5 of the Regulation.

⁽³⁶⁾ Article 2(e) of Regulation (EC) No 1370/2007 defines the ‘public service obligation’ as ‘a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward’.

- (b) Article 4(1)(b) of Regulation (EC) No 1370/2007 provides that the parameters on the basis of which the compensation is calculated have to be established in advance in an objective and transparent manner in a way that prevents overcompensation. In its assessment of the second *Altmark* condition in recitals 102 to 106, the Commission noted that all the parameters for calculating the prices for each of the operators were clearly set in advance in the individual contracts. In addition, the maximum level of compensation was established in advance and limited by the objective estimate of the provable loss so as to avoid overcompensation. As such, the measures listed in recital 96 under (a) and (c) comply with Article 4(1)(b) of the Regulation.
- (c) Article 4(1)(c) and Article 4(2) of the Regulation contain arrangements with regards to the allocation of costs and revenues. The Commission notes that the economically substantiated costs declared by the operator were determined in line with Article 4(1)(c) and that the public service contracts related to measures listed in recital 96 under (a) and (c) stipulate that the revenues from the sale of tickets are kept by the operator. The requirement of Article 4(2) is therefore also met.
- (d) Article 4(3) of the Regulation requires that the duration of public service contracts be limited to 10 years for bus and coach services. The public services contracts under consideration cover periods of no more than a year.
- (e) Article 4(6) of the Regulation contains the requirement to comply with certain quality standards. Indeed, the Commission notes that the requirements for quality standards (e.g. obligations to provide services in accordance with the approved timetable, to ensure a certain level of safety for passengers, to publish timetables and mark buses with the names of the lines, etc.) were laid down in the applicable legislation and duly included in the tender documents and in the public service contracts. Therefore, Article 4(6) is complied with.

In the light of those observations, the Commission concludes that all mandatory provisions of Article 4 of Regulation (EC) No 1370/2007 were respected as regards the public service contracts concluded in relation to the measures listed in recital 96 under (a) and (c).

- (159) 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 (point 2 of the Annex). Point 6 of the Annex defines a reasonable profit as 'a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention'.
- (160) As regards the measures listed in recital 96 under (a) and (c), overcompensation was prevented by an *ex post* verification of the actual costs incurred and revenues received. In the event the actual losses were lower than the objective estimate of the provable loss, the operators were compensated only to the amount of the actual losses. In the event actual losses were higher, the compensation was limited to the amount of the preliminary objective estimate of the provable loss, with provision possible for unforeseeable costs. In any event, the compensation could not be higher than the actual losses incurred by the operator.
- (161) As regards the 'reasonable profit', its calculation under the Road Transport Act ⁽³⁷⁾ is linked to the necessity of investments of bus operators into their rolling stock. More specifically, it is defined as 'the sum which — after taxation [...] — does not exceed 1/8th of the price of the buses normally used for the public line passenger transport providing the traffic services in the framework of the fulfilment of the public service obligation, reduced by the sum of the total real depreciation of those buses, and the sum spent for investments related to the operation of the public line passenger transport, provided that the relevant authority expressed its approval for the investment for the purpose of its incorporation into the calculation of the provable loss'. The Commission

⁽³⁷⁾ Decree of the Ministry of Transport and Communications No 50/1998, on provable loss in the public line passenger transport, was replaced by Regulation No 493/2004 as of 21 September 2004. Regulation No 493/2004 remained in force until 1 July 2010, that is during the period when the compensations under investigation were granted.

notes that in the present case the reasonable profit included in the calculations of the objective estimate of the provable loss was around 5 % in the contracts under consideration and that such profit is considered reasonable for the regional bus transport sector of the Czech Republic ⁽³⁸⁾. Therefore, the calculation of the reasonable profit in the contracts under consideration complies with the requirements of point 6 of the Annex to Regulation (EC) No 1370/2007.

- (162) Point 4 of the Annex to Regulation (EC) No 1370/2007 requires that costs and revenues be calculated in accordance with the accounting and tax rules in force (point 4 of that Annex). Furthermore, for transparency reasons, there should be a separation of accounts (point 5 of that Annex).
- (163) The Czech authorities confirmed that the calculation of costs and revenue was carried out in accordance with the tax and accounting rules in force and that the legal framework applicable to all operators in terms of accounting standards and national rules on competition required the undertaking to keep separate accounts for its different activities, so that the requirement of account separation was also respected. The Czech authorities confirmed that the contractual payments made to regional bus transport operators in the Ústí Region on the basis of the public service contracts were entered in the accounts separately from the other activities carried out on a purely commercial basis, thereby avoiding any form of cross-subsidisation.
- (164) Finally, point 7 of the Annex to Regulation (EC) No 1370/2007 requires the method of the compensation to promote the maintenance or development of an effective management by the public service operator, which can be the subject of an objective assessment. It also requires promoting the provision of passenger transport services of a sufficiently high standard. The method of compensation in the contracts under consideration promotes the maintenance of an effective management as well as the provision of passenger transport services of a sufficiently high standard, in particular because the compensations cannot exceed the objective estimate of the provable loss. The transport operators therefore have an incentive to manage their operations effectively and provide a sufficiently high standard to passengers because if the operator generates additional losses exceeding the objective estimate of the provable loss, those losses will not be compensated. The quality standards of the services provided are ensured by the quality requirements included in the public service obligation contracts with the operators. The method of compensation therefore complies with point 7 of the Annex to Regulation (EC) No 1370/2007.
- (165) In light of the above, the Commission concludes that all of the requirements of the Annex to Regulation (EC) No 1370/2007 have been complied with.
- (166) As a consequence, the Commission considers that the compensation granted to certain regional bus transport operators and referred to in recital 96 under (a) and (c) complies with the provisions of Regulation (EC) No 1370/2007, so that in accordance with Article 9 thereof the aid should be considered as compatible with the internal market and exempt from prior notification.

7.2.2. Increase of equity capital for DP Ústí (measure referred to in recital 96 under (e))

- (167) According to the Czech authorities, the increase of the equity capital of DP Ústí by CZK 160 000 000 carried out by the Municipality of Ústí nad Labem in 2006 is compatible with the internal market as a measure meeting the needs of coordination of transport in line with Article 3(1)(b) of Regulation (EEC) No 1107/70 ⁽³⁹⁾. Under that exemption, aid for the coordination of transport is compatible with the internal market where that 'aid is granted to undertakings which have to bear expenditure relating to the infrastructure used by them, while other undertakings are not subject to a like burden. In determining the amount of aid thus granted, account shall be taken of the infrastructure costs which competing modes of transport do not have to bear.'

⁽³⁸⁾ See, e.g. Commission Decision C 3/08 (ex NN 102/05) of 26 November 2008 — Czech Republic — Public service compensations for Southern Moravia Bus Companies (OJ L 97, 16.4.2009, p. 14), recital 71.

⁽³⁹⁾ The exemption under Article 3(1)(b) was used in the past in a number of Commission decisions involving State aid schemes. See, e.g. Commission Decision C(2007) 3394 final of 18 July 2007 in Case N 720/06 — Port of Brussels (OJ C 307, 18.12.2007, p. 10), and Commission Decision C(2002)3248 final of 18 September 2002 in Case N 308/02 — Scheme for granting investment aid for railway infrastructure in Saxony-Anhalt (OJ C 277, 14.11.2002, p. 2). As regards *ad hoc* measures, the exemption was applied in the case of investment aid in favour of *Stora Enso Langerbrugge*; see Commission Decision C(2004) 3351 of 8 September 2004 in Case C 73/03 — Investment aid in favour of *Stora Enso Langerbrugge* (OJ L 53, 26.2.2005, p. 66). The conditions used in that Decision for assessing compatibility include: qualification of the measure as transport coordination, higher infrastructure costs compared to competing modes of transport, maximum intensity of the aid of 50 % and existence of an incentive effect.

- (168) Regulation (EEC) No 1107/70 was repealed by Regulation (EC) No 1370/2007, so that the compatibility of aid for the construction of transport infrastructure can now be examined directly under Article 93 of the Treaty. The Commission considers that the capital increase provided by the Municipality of Ústí nad Labem to finance DP Ústí's construction of a trolley-bus route constitutes a coordination activity within the meaning of that provision since it seeks to shift transport activities from one mode to another.
- (169) In line with its decisional practice ⁽⁴⁰⁾, aid granted to undertakings for the coordination of transport is compatible with the internal market on the basis of Article 93 TFEU, if the following conditions are met:
- (a) the aid contributes to an objective of common interest;
 - (b) the aid is necessary and proportionate;
 - (c) the access to the infrastructure in question is open to all users on a non-discriminatory basis;
 - (d) the aid does not lead to distortions of competition contrary to the common interest.

7.2.2.1. *Objective of general interest*

- (170) The Union has for some time pursued a policy aimed at balancing different modes of transport as well as boosting the competitiveness of intermodal transport vis-à-vis road transport. The main purpose of the intermodal transport policy of the Union is to create a modal shift from road to other modes of transport. The White Paper on European transport policy ⁽⁴¹⁾ encourages the use of environmentally friendly modes of transport to make them competitive alternatives to road transport.
- (171) The Commission recalls that the transport sector is affected by negative externalities due to the fact that different modes do not pay the real cost they impose on society. It follows that intermodal competition is distorted and entails market failures. Accordingly, the Commission considers that it may be necessary for the State to intervene by coordinating measures in the transport sector.
- (172) The capital increase at issue was provided exclusively to finance DP Ústí's construction of a trolley-bus route (Ústí nad Labem — Střekov) with the aim of improving traffic flows between those two geographical points and reducing environmental pollution. The aid thus seeks to promote intermodality and improve environmental standards of transport in the Ústí region, which is in line with the general interest of the Union. Therefore, the Commission concludes that the measure helps to achieve a clearly defined objective of general interest.

7.2.2.2. *Necessity and proportionality of the aid*

- (173) The Commission considers that the measure is necessary to achieve the objective of transferring a part of the activity of transport from a standard bus line to a trolley-bus line, encouraging intermodal and more environmentally-friendly public transport. In the absence of aid, such a shift would not take place and transport on the line in question would continue to be carried out by less-environmentally friendly bus transport.
- (174) The Commission notes that DPÚK claimed in its comments that it had proposed to the authorities a significantly cheaper alternative for an environmentally friendly form of local transport on the line Ústí nad Labem — Střekov (based on CNG-buses instead of the trolley-buses of DP Ústí), but that that alternative was rejected. However, the Czech authorities have no official record of any formal submission by DPÚK of an alternative project for ensuring a more environmentally-friendly transport in the municipality. The project attached to DPÚK's submission is dated June 2001 and was thus not relevant at the time of the assessed capital increase. In addition, the Czech authorities claim that the line Ústí nad Labem — Střekov was an integral part of the trolley-bus system gradually being constructed since 1984 and operated since 1988.

⁽⁴⁰⁾ See point 52, decision of the Commission Decision of 9 November 2011, SA.32632 (2011/N), Belgium, Intermodal Container Terminal Genk (OJ C 82, 21.3.2012, p. 2); Commission Decision of 15 June 2011, SA.32224, Netherlands, Development of the Alblisserdam Container Transferium (OJ C 215, 21.7.2011, p. 22); Commission Decision of 20 July 2010, C 17/10, Italy, Firmin srl (OJ C 278, 15.10.2010, p. 28); Commission Decision of 27 June 2012, SA.34056 (12/N), United Kingdom, Cable Car for London (OJ C 220, 25.7.2012, p. 6); Commission Decision of 17 October 2012, SA.34501, Germany, Extension of the inland port of Königs Wusterhausen/Wildau (OJ C 176, 21.6.2013, p. 1); Commission Decision of 18 March 2013, SA.37402 (2013/N), Hungary, The intermodal development of the Freeport of Budapest (OJ C 141, 9.5.2014, p. 5).

⁽⁴¹⁾ White paper: European transport policy for 2010 (http://europa.eu/legislation_summaries/environment/tackling_climate_change/l24007_en.htm)

- (175) Therefore, the line Ústí nad Labem — Střekov was constructed as an integral part of the existing trolley-bus system built, owned and operated by DP Ústí. In addition, there is no clear evidence that any reasonable and available alternative existed at the time of the capital increase. Therefore, the Commission considers that any alternative solutions for this particular part of the network by competing providers were not a reasonable alternative that would need to be taken into account by the Municipality of Ústí nad Labem.
- (176) As regards the proportionality of the measure, the Commission has authorised investment aid for transport infrastructure in the past up to an aid intensity of 50 % ⁽⁴²⁾. Recently, where Member States have demonstrated the economic need for a higher aid intensity, the Commission has been willing to accept such higher intensities in duly justified cases ⁽⁴³⁾.
- (177) In the present case, the measure referred to in recital 96 under (e) provides for an aid intensity of 89 % in favour of DP Ústí: the total costs of construction of the trolley-bus line amounted to around CZK 179,3 million, while CZK 160 million thereof was financed by the capital increase. Nevertheless, the Commission considers the capital increase to be proportionate to achieve the stated objective of general interest for the following reasons:
- Contrary to aid in the form of a direct grant, the aid in question was granted through a capital increase. This means that the actual aid amount involved in the operation is significantly lower than the value of the capital increase, since the Municipality of Ústí nad Labem is the sole shareholder of DP Ústí both before and after the capital increase. As a 100 % shareholder in DP Ústí, the Municipality of Ústí nad Labem retains an indirect ownership of the trolley-bus line financed from the capital increase and will be able to reap profits from its operation or from its eventual sale since the value of DP Ústí would be increased due to this investment. Therefore, the provision of financing in the form of a capital increase ensures that the actual aid intensity is lower than the one resulting from a simple comparison of the capital increase and total costs of the project.
 - As regards the incentive effect, due to the amount of the investment in this project it seems unlikely that DP Ústí would be able to carry out these investments without additional capital. The Commission notes in this respect that the construction of other, less significant parts of the trolley-bus system network in Ústí nad Labem were financed by other means (e.g. bank loans amounting to CZK 5 million and CZK 35 million in 2004 and 2005 or to CZK 40 million in 2007 — see above section 7.1.2). However, the trolley-bus line Ústí nad Labem — Střekov was the last outstanding significant part of the trolley-bus network system under construction in Ústí nad Labem since 1984.
 - Furthermore, the Commission notes that the resources from the increase of equity capital of CZK 160 million are strictly bound for exclusive use in the financing of the construction of the trolley-bus line Ústí nad Labem — Střekov. The resources from the capital increase are kept on a separate account of DP Ústí, from which payments are made for the construction of the trolley-bus line. The money thus cannot be used for possible cross-subsidisation of the transport operation of DP Ústí.
 - Finally, the remaining amount of the construction costs for the trolley-bus line of CZK 19,3 million was financed from the own resources of DP Ústí. Thus, the aid has been limited to the minimum amount necessary to close the funding gap of the project.
- (178) Accordingly, the Commission considers the aid to be proportionate to achieve the stated objective of general interest.

7.2.2.3. Access to the infrastructure in question is open to all users on a non-discriminatory basis

- (179) As a part of the public transport system, the use of the trolley-buses will be open to all passengers on a non-discriminatory basis.

⁽⁴²⁾ See Commission Decision of 31 January 2001 in Case N 597/2000, Netherlands — *Subsidieregeling voor bijzondere bedrijfsaansluitingen op vaarwegen* (OJ C 102, 31.3.2001, p. 8), Commission Decision of 14 September 2001 in Case N 208/2000, Netherlands — *SOIT* (OJ C 315, 4.11.2000, p. 22), Commission Decision of 15 November 2000 in Case N 755/1999, Italy — *Bolzano* (OJ C 71, 3.3.2001, p. 19), and Commission Decision of 20 December 2010 in Case N 490/10, Belgium — *Verlenging van steunregeling N 550/2001 inzake publiek-private samenwerking voor de bouw van laad- en losinstallaties langs de waterwegen in het Vlaams Gewest* (OJ C 122, 20.4.2011, p. 2).

⁽⁴³⁾ See Commission Decision of 20 December 2011 in Case SA.33434, France — *Aide au financement d'un chantier multimodal sur le Grand port maritime du Havre* (OJ C 53, 23.2.2012, p. 2); Commission Decision of 17 October 2012 in Case SA.34501, Germany — *Extension of the inland port of Königs Wusterhausen/Wildau* (OJ C 176, 21.6.2013, p. 1); Commission Decision of 19 June 2013 in Case SA.35738, Greece — *Aid for the upgrading of Katakolo port* (OJ C 204, 18.7.2013, p. 3); Commission Decision of 2 July 2013 in Case SA.35418, Greece — *Extension of Piraeus port* (OJ C 256, 5.9.2013, p. 2).

7.2.2.4. *The aid must not contribute to a distortion of competition contrary to the general interest*

- (180) Transport by trolley-bus requires certain basic infrastructure in order to constitute a viable alternative to road transport. Given that that the capital increase is limited to the additional costs necessary for the construction of the trolley-bus line and does not cover the operational costs of DP Ústí, the measure referred to in recital 96 under (e) will not result in the distortion of competition vis-à-vis transport by bus to an extent contrary to the general interest.
- (181) Accordingly, the Commission concludes that the State aid resulting from that operation can be deemed compatible with the internal market on the basis of Article 93 of the Treaty.

8. CONCLUSION

- (182) In light of the above, the Commission concludes that compensations granted by the Ústí Region to certain regional bus transport operators for discharging a public service obligation in the period from 9 September 2006 to 2 June 2007 and the guarantees granted by the Municipality of Ústí nad Labem in favour of DP Ústí to secure loans of CZK 35 million and CZK 5 million do not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (183) The Commission further concludes that compensations granted by the Ústí Region to certain regional bus transport operators for discharging a public service obligation in the period of 2005-2006 and compensations granted by the Ústí Region to certain regional bus transport operators for discharging a public service obligation in the period between 9 September 2006 and 31 December 2006 constitute State aid within the meaning of Article 107(1) of the Treaty which is compatible with the internal market and exempt from the prior notification requirement laid down in Article 108(3) of the Treaty pursuant to Article 9(1) of Regulation (EC) No 1370/2007.
- (184) Finally, the Commission concludes that the capital increase of CZK 160 million by the Municipality of Ústí nad Labem in favour of DP Ústí constitutes State aid which the Czech Republic unlawfully implemented in violation of Article 108(3) of the Treaty. However, the State aid resulting from that operation can be deemed compatible with the internal market on the basis of Article 93 of the Treaty.
- (185) Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Czech Republic implemented in favour of ČSAD BUS Ústí nad Labem a.s., Dopravní podnik města Ústí nad Labem a.s., Dopravní podnik Teplice, s.r.o., Dopravní podnik měst Chomutova a Jirkova a.s., Dopravní podnik města Děčín, a.s., Dopravní podnik měst Mostu a Litvínova a.s., Autobusová doprava, s.r.o., Podbořany, Miroslav Ohem — SADO, Petr Frommel — FOBUS, Petr Stejskal — SPORTBUS and Vilém Graupner, stroj. a stav. údržba in the form of public transport service compensations in the period 2005 to 2006 is compatible with the internal market pursuant to Regulation (EC) No 1370/2007 and therefore Article 93 of the Treaty.

The State aid which the Czech Republic implemented in favour of ČSAD Semily a.s., Dopravní podnik města Děčín, a.s., ČSAD Střední Čechy, spol. s r.o., Dopravní podnik Teplice, s.r.o., Dopravní podnik města Ústí nad Labem a.s., Dopravní podnik měst Chomutova a Jirkova a.s. and Dopravní podnik Mladá Boleslav, s.r.o. in the form of public transport service compensations in the period from 9 September 2006 to 31 December 2006 is compatible with the internal market pursuant to Regulation (EC) No 1370/2007 and therefore Article 93 of the Treaty.

The State aid which the Czech Republic unlawfully implemented in violation of Article 108(3) of the Treaty in favour of Dopravní podnik města Ústí nad Labem a.s. in the form of a capital increase amounting to CZK 160 million is compatible with the internal market pursuant to Article 93 of the Treaty.

Article 2

The measure which the Czech Republic implemented for Autobusy Karlovy Vary, a.s., Autobusy Kavka, a.s., ČSAD Slaný a.s., Dopravní podnik měst Mostu a Litvínova, a.s. and ZDAR, a.s. in the form of public transport service compensations in the period from 9 September 2006 to 2 June 2007 and for Dopravní podnik města Ústí nad Labem a.s. in the form of guarantees amounting to CZK 35 million and CZK 5 million do not constitute State aid within the meaning of Article 107(1) of the Treaty.

Article 3

This Decision is addressed to the Czech Republic.

Done at Brussels, 25 June 2014.

For the Commission
Joaquín ALMUNIA
Vice-President
