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Subject: **State aid SA.34155 (2013/N) (ex 2011/PN) – Germany**
Regional law on the compensation of school bus transport in the Land Rhineland-Palatinate

Sir,

1 PROCEDURE

- (1) On 8 December 2011, the Commission received a complaint by a German bus company concerning a draft regional law on the compensation of school bus and tram transport in the Land Rhineland-Palatinate. The case was registered under SA.34048.
- (2) On 22 December 2011, Germany pre-notified the above-mentioned draft law. This case was registered under SA.34155.
- (3) On 12 January 2012, the complaint was forwarded to the German authorities, which submitted their comments on 8 February 2012. Another request for information was sent on 7 March 2012, to which Germany replied on 19 April 2012. Germany's comments to the complaint were sent to the complainant on 27 August 2012. A meeting with the complainant took place on 27 September 2012.

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- (4) On 6 September 2012, a meeting with the German authorities took place. Germany submitted a modified draft of the regional law on 10 October 2012, which was discussed with the German authorities in two telephone conferences in October and November 2012. Following these discussions, the German authorities submitted a revised draft law on 21 May 2013, to which the Commission services informally replied by e-mail of 10 June 2013.
- (5) On 25 June 2013, Germany formally notified the draft law.
- (6) On 28 June 2013, the notified draft law was sent to the complainant who provided its comments on 28 August 2013.
- (7) On 16 July 2013, another request for information was submitted to the German authorities, which submitted its reply on 10 September 2013. On 8 November 2013 and on 19 November 2013 additional requests for information were submitted to the German authorities, which replied by letters of 19 November 2013 and 13 December 2013 respectively.

2 DESCRIPTION OF THE MEASURE

- (8) According to Section 45a of the Federal Transport Act (*Personenbeförderungsgesetz*, hereinafter: "PBefG")¹, bus undertakings carrying passengers with student tickets are entitled to compensation. Under Section 45a PBefG, the amount of compensation is determined as half of the difference between the income resulting from the transport of passengers with student tickets and the product of transport kilometres per person times the average traffic-specific costs, which are calculated according to and determined in the form of a lump sum by Federal regulations that are based on the average figures of representative economically and efficiently operating undertakings. The payments under that federal scheme are financed from the budget of the *Länder*.
- (9) In its opening decision in case C 54/2007 *Emsländische Eisenbahn*² (hereinafter: "*Emsländische Eisenbahn* decision"), the Commission concluded that compensation granted under that scheme does not involve State aid because the scheme fulfils the conditions of the *Altmark* judgment of the European Court of Justice³ (recitals 110-114 of the *Emsländische Eisenbahn* decision).
- (10) According to Section 64a PBefG, the *Länder* are allowed to disapply the federal scheme established under Section 45a PBefG and to establish their own schemes by regional law. Based on that provision, the Land Rhineland-Palatinate decided to establish the notified measure.

¹ <http://www.gesetze-im-internet.de/bundesrecht/pbefg/gesamt.pdf>.

² Commission Decision of 28 November 2007 in Case C 54/2007 - State aid to Emsländische Eisenbahn GmbH, OJ C 174, 9.7.2008, p. 13.

³ Case C-280/00, *Altmark Trans GmbH und Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747, para. 87 *et seq.*

- (11) The notified measure, the regional law on the compensation for public service obligations concerning school bus and tram transport in the Land Rhineland-Palatinate (*Landesgesetz über den Ausgleich von gemeinwirtschaftlichen Verpflichtungen im Ausbildungsverkehr (LAGV) des Landes Rheinland-Pfalz*) and the implementing regulation for § 9 of that regional law (*Verordnung zu § 9 des LAGV*) (hereinafter "implementing regulation"), aims to ensure open access to education by providing cheap public transport tickets to pupils, students and trainees, which they can use *inter alia* for transport to their schools, universities and training places. Furthermore, the scheme pursues specific social aims by financially disburdening families with children as well as environmental aims by supporting public transport, which is more eco-friendly than individual motor car transport.
- (12) The notified measure imposes a public service obligation on all bus and tram undertakings in the Land Rhineland-Palatinate, obliging them to offer reduced rates to pupils, students and trainees. This reduction must amount to at least 15% of the standard rate for adults. The standard rate for adults is subject to approval by a State authority under the PBefG (§ 2 of the notified law in combination with § 39 for trams and §§ 9 to 25 for busses), which in the case of trams has to verify whether they are appropriate in view of the economic situation of the transport undertaking and a sufficient return on the invested capital.
- (13) In return for discharging that public service obligation, the bus and tram undertakings are entitled to compensation. That compensation, granted upon application by an authority of the Land Rhineland-Palatinate (*Landesbetrieb Mobilität Rheinland-Pfalz*) (hereinafter "granting authority"), corresponds to the difference between the reduced rate for pupils, students or trainees and the standard rate for adults, for transport services provided within the Rhineland-Palatinate. A special provision foresees that for yearly tickets valid for the regional transport association Rhein-Neckar (MAXX-ticket) and for compulsory⁴ half-year tickets for students (Semesterticket), bus and tram undertakings obtain an increase of 33.3% of the revenue, including the "solidarity contribution" made by the students, from the sale of these tickets.
- (14) However, in order to exclude over-compensation, all compensation is, besides the limitation to the difference between the reduced rate for pupils, students or trainees and the standard rate for adults or, in case of semester or MAXX tickets, the increase of 33.3% of the revenue, furthermore and as a second step limited to a maximum amount to be established in accordance with the implementing regulation. According to §§ 4 and 9 of the notified law in conjunction with § 1 of the implementing regulation, the implementing regulation is intended to ensure that the amount of this second cap to the compensation is calculated in accordance with the rules laid down in Regulation (EC) 1370/2007⁵ and in particular in its Annex. To this end the implementing regulation stipulates that the compensation must not exceed an amount corresponding to the net

⁴ The semester ticket is regulated differently in different regions of the Rhineland-Palatinate. For some students it is automatically included in the semester fees, other students can acquire it freely on the market.

⁵ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

financial effect of compliance with the public service obligation. The implementing regulation provides that, in order to ensure that no transport undertaking receives compensation exceeding the amount of this second cap, the granting authority must carry out an *ex post* over-compensation control.

- (15) Furthermore, the calculation of the cap under the implementing regulation considers the following:
- (a) The undertakings have to establish their costs for the public transport services in question in accordance with the guidelines for the determination of prices on the basis of net costs (*Leitsätze für die Preisermittlung aufgrund von Selbstkosten*, hereinafter: "LSP"⁶). The LSP, which is generally used for the determination of prices in public contracts, provides a cost-based price calculation method based on established accounting standards taking into consideration all relevant cost categories. According to recital 4(2) of the LSP, only costs resulting from the discharge of services in an economical and efficient way are to be considered.
 - (b) The accounts of the compensated services subject to the public transport service obligations must be separated from the accounts connected to other activities in accordance with point 5 of the Annex of Regulation (EC) 1370/2007.
 - (c) Only costs incurred by carrying out the public service obligation defined in the notified law within the geographical area of Rhineland-Palatinate can be taken into account. These costs are derived from the profit and loss accounts and have to be attributed to transports carried out under the notified law. This is to be confirmed through a statement by a certified auditor. This statement, furthermore, lists the transport services (with the distance in km) carried out under the notified law and certifies in how far the relevant costs exceed the relevant revenues.
 - (d) The revenues to be taken into account include all commercial revenues either from revenue sharing agreements of transport associations or direct sale of tickets outside a transport association as well as other forms of revenues such as advertising revenues. Furthermore, the revenues include compensation received from other schemes as well as any kind of grants from the State, transport associations or other public entities.
 - (e) The calculation takes into account a reasonable profit.
 - (f) The cap is calculated as follows: *cost + reasonable profit – revenues*
 - (g) If a public service contract in the meaning of Regulation (EC) 1370/2007 exists, be they awarded on the basis of public procurement rules, on the basis of a competitive award or directly pursuant to the relevant rules of Regulation 1370/2007, over-compensation control is ensured under that contract if it takes compensation payments granted under the notified measure into account. Where

⁶ <http://www.gesetze-im-internet.de/bundesrecht/preisls/gesamt.pdf>.

this is not the case, for instance for public service contracts that have been concluded prior to the entry into force of the notified measures, overcompensation control is ensured on the basis of the implementing regulation.

- (16) If, after this *ex post* control it is established by the granting authority that overcompensation was paid to a transport undertaking, the implementing regulation requires these to be paid back immediately. Germany confirmed that this claw-back includes interest payments in line with Union rules on recovery of unlawfully granted State aid.
- (17) The annual budget for the notified measure amounts to EUR 42.80 million.
- (18) The law is foreseen to enter into force on 1 January 2014 and to be valid until 31 December 2023. The scheme is subject to revision by 1 January 2016 if the annual overall amount of compensation then exceeds the annual amount of the year 2014 by 3%.
- (19) Germany has notified the scheme as a general rule under Article 3(3) of Regulation (EC) 1370/2007 in order to exclude the measure from the scope of this Regulation.
- (20) The German authorities have fulfilled their obligation according to Article 108(3) Treaty on the Functioning of the European Union ("TFEU") by notifying the aid before putting it into effect. The Commission takes note of the fact that aid under the scheme will be granted only after approval by the Commission.

3 COMPLAINT

- (21) The complainant has submitted an economic study, based on the initial version of the measure pre-notified in 2011, which showed that the measures would lead to substantial re-distributions of compensation payments. As the compensation payment is no longer a function of the distance travelled and the costs of the undertaking providing the service, but merely based on the price difference, it favours undertakings that are active in urban areas and have an important number of eligible customers, whereas it creates important losses for undertakings serving rural areas with low population density (and therefore low numbers of tickets sold). According to the complainant, the undertaking benefitting most from the new rules, a subsidiary of Deutsche Bahn, would see an increase in its compensation payments by more than EUR 5 million per year, whereas the undertaking losing the most would have a loss of nearly EUR 1 million per year.
- (22) In its submission of 28 August 2013 the complainant upheld its complaint concerning the notified measure. It argued, first, that, contrary to the conditions under the *Altmark* judgment, the notified law does not clearly define the public service obligation and the compensation for carrying out that obligation *ex ante*.
- (23) It explains, second, that the notified measure punishes efficient transport undertakings (which have lower costs and therefore see their compensation capped), whereas inefficient undertakings enjoy higher aid payments.

- (24) It argues, third, that the notified measure violates the general principle of Union law of non-discrimination. That is based on the fact that the implementing regulation foresees an *ex post* control only for bus lines which are not subject to a public service contract within the meaning of Article 3 (1) of Regulation (EC) 1370/2007. The complainant criticises in particular the lack of an *ex post* control for directly awarded contracts, which do not have to provide a certification by an accountant on compliance with Regulation (EC) 1370/2007, contrary to those bus undertakings that have won a contract following a tender.
- (25) The complainant stated, fourth, that the notified law does not qualify as aid with a social character under Article 107(2)(a) TFEU, as the compensation is not paid directly to consumers within the meaning of that provision, as payments are made to the transport undertakings, rather than to final consumers.
- (26) Finally, the complainant alleges that the ex-post control is not sufficient, as it does not provide for a claw-back of the interest on payments which have been too generous.

4 ASSESSMENT

4.1 Existence of aid

- (27) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (28) According to the Court of Justice of the European Union⁷, compensation for the discharge of a public service obligation does not constitute State aid within the meaning of Article 107(1) TFEU if four cumulative conditions are met (*Altmark criteria*):
- (1) the beneficiary must be entrusted with a clearly defined public service mission;
 - (2) the parameters for calculating the compensation must be established in advance in an objective and transparent manner;
 - (3) the compensation must not exceed the cost incurred in the discharge of the public service minus the revenues earned in providing the service (the compensation may, however, include a reasonable profit); and
 - (4) the beneficiary is chosen pursuant to a public tender or the compensation does not exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service.
- (29) Regardless of whether the first three *Altmark* criteria are fulfilled in the present case, the Commission notes that the beneficiaries are not chosen pursuant to a public tender and

⁷ See above, footnote 3.

that the notified measure does not ensure that the compensation granted does not exceed the costs of a well-run undertaking. Although the measure includes an over-compensation control mechanism (see recitals (14) and (15)), the compensation cap is calculated on the basis of net costs and those net costs are not required to correspond to the costs of a well-run undertaking. Since it cannot be excluded that the costs taken into account in the over-compensation control mechanism are above the comparable costs of a well-run undertaking, the Commission considers the fourth *Altmark* criteria not to be met in the present case. Therefore, the existence of an advantage in favour of the bus and tram undertakings cannot be excluded.

- (30) Moreover, the notified measure is selective since it is limited to bus and tram undertakings operating public services in the Land Rhineland-Palatinate. The measure will be financed by reserves accumulated in the public budget of the German Land Rhineland-Palatinate and will be paid out upon application by the *Landesbetrieb Mobilität Rheinland-Pfalz*, which is a State authority. The payment is, therefore, imputable to the German State and is financed through State resources.
- (31) It is also likely that this measure distorts competition and affects trade between Member States. For a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. The beneficiaries of the measure carry out economic activities in the field of public bus and tram transport. Regardless of the question whether the compensation under the notified measure is specifically deemed to compensate public service obligations, the notified scheme at least threatens to distort competition in relation to forms of transport other than transport by bus.
- (32) Furthermore, trade between Member States would be affected by the measure since local passenger transport markets are considered to have been opened to competition with undertakings established in other Member States since 1995⁸.
- (33) Therefore, the Commission concludes that the notified measure constitutes State aid within the meaning of Article 107(1) TFEU.

4.2 Compatibility with the internal market

- (34) Since the measure constitutes State aid, it is necessary to examine its compatibility with the internal market under the relevant provisions of the TFEU and applicable secondary legislation.

4.2.1 Regulation 1370/2007 and Article 93 TFEU

- (35) The scheme deals with compensation payments in return for the discharge of public service obligations in public passenger transport. In principle, Regulation (EC) 1370/2007 as *lex specialis* would form the relevant legal basis for the compatibility assessment of the notified measure. According to the case-law, the Commission cannot authorize; on the

⁸ ECJ, Case C-280/00, *Altmark Trans GmbH und Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, para. 69.

basis of Union law on State aid, a measure which falls into the scope of application of Regulation (EC) 1370/2007 if that measure does not comply with all provisions of Regulation (EC) 1370/2007.⁹ That is because Regulation (EC) 1370/2007, just as Regulation (EC) 1191/69, establishes a system which the Member States must comply with when they consider imposing public service obligations on undertakings in the land transport sector. The Commission may therefore not authorise compensation as State aid where Regulation (EC) 1370/2007 is not complied with.¹⁰

- (36) However, Germany has notified the measure explicitly referring to Article 3(3) of Regulation (EC) 1370/2007. According to that provision, Member States may exclude from the scope of the regulation general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility, provided that they notify those measures pursuant to Article 108 (3) TFEU prior to their implementation. Therefore, the notified measure does not fall into the scope of application of Regulation (EC) 1370/2007, but has to be assessed under Articles 93 and 107 TFEU.
- (37) Recital (36) of Regulation (EC) 1370/2007 stipulates that “any compensation granted in relation to the provision of public passenger transport service other than those covered by this Regulation which risks involving State aid within the meaning of Article [107(1) TFEU] should comply with the provisions of Articles [93, 106, 107 and 108] thereof, including any relevant interpretation by the Court of Justice of the European [Union] and especially its ruling in Case C-280/00 *Altmark Trans GmbH*. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest”. As the decision on the compatibility of State falls in the exclusive competence of the Commission, that recital may provide inspiration for the Commission, but cannot be binding on it.
- (38) According to Article 93 TFEU 1st alternative, aids shall be compatible with the Treaties if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service. That Article constitutes a *lex specialis* in relation to Articles 106 and 107 TFEU. According to the case-law¹¹, aid to land transport may be declared compatible on the basis of Article 93 TFEU only in well-defined cases which do not jeopardize the general interests of the Union.
- (39) Recital (28) above sets out the four conditions laid down by the Court of Justice in its ruling in Case C-280/00 *Altmark Trans GmbH*. On the basis of that ruling and the subsequent case-law in the field of services of general economic interest, the Commission considers that State aid for the discharge of public service obligations in the transport field

⁹ Case C-504/07 *Antrop* [2009] ECR I-3867, paragraphs 22 to 29.

¹⁰ Case C-504/07 *Antrop* [2009] ECR I-3867, paragraph 23; Case C-280/00 *Altmark Trans* and *Regierungspräsidium Magdeburg* [ECR I-7747], paragraph 53.

¹¹ Case 156/77 *Belgium v Commission* [1978] ECR I-1882, paragraph 10.

may be declared compatible with the internal market under Article 93 TFEU 1st alternative if the following five conditions are met:

- (1) The aid must be granted for the discharge of a genuine and correctly defined public service.
 - (2) The parameters for compensation must be laid down in advance in an objective and transparent manner.
 - (3) The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.
 - (4) Where an authority assigns the same public service to several undertakings, the compensation for the discharge of that service should be calculated on the basis of the same method in respect of each undertaking.
 - (5) The aid must not lead to distortions of competition contrary to the common interest.
- (40) The Commission notes that Regulation 1370/2007 and other legislation in the field of services of general economic interest are based on similar principles.

4.2.1.1 Public service obligation

- (41) The first *Altmark* criterion requires that the operator has a public service obligation to discharge and that that obligation is clearly defined. Generally speaking, the entrustment of a public service obligation implies the supply of services which, if it were considering its own commercial interests, an undertaking would not assume or would not assume to the same extent or under the same conditions¹². The Commission thus considers that it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions¹³.
- (42) As described in recital (12) above, the notified measure imposes a public service obligation on all bus and tram undertakings in the Land Rhineland-Palatinate, obliging them to offer reduced rates to pupils, students and trainees. This reduction must amount to at least 15% of the standard rate for adults.
- (43) As stated in recital (11) above, the aim of this public service obligation is to ensure open access to education by providing cheap public transport tickets to pupils, students and trainees for their transportation to their schools, universities and training places. It is, furthermore, intended to pursue specific social aims by financially disburdening families

¹² See, in particular, Article 2 of Regulation (EC) No 1370/2007.

¹³ Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 71.

with children as well as environmental aims by supporting public transport, which is more eco-friendly than individual motor car transport.

- (44) The Commission notes that private undertakings would not, if they were only considering their own commercial interests, offer the mentioned price reduction to the same extent or under the same conditions and would not take the aims pursued by the notified law into account.
- (45) The obligation to provide the described discount is, therefore, clearly defined in the notified measure, must be seen as a genuine public service obligation and applies to a clearly defined group of customers as well as within a clearly defined geographical area.

4.2.1.2 Entrustment act laying down compensation parameters in advance

- (46) The *Altmark* case-law requires an entrustment act to lay down the parameters on the basis of which the compensation is calculated in advance in an objective and transparent manner.
- (47) As regards the question of entrustment in the present case, the notified law in combination with the implementing regulation obliges all bus and tram undertakings operating in Rhineland-Palatinate to offer tickets at reduced fares to pupils, students and trainees and those acts taken together must be seen as the relevant entrustment act.
- (48) The notified measure establishes in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment is to be calculated. According to that measure, the compensation corresponds to and is limited to the difference between the reduced rate for pupils, students or trainees and the standard rate for adults.¹⁴ The standard rate for adults is subject to approval by a State authority under the PBefG. In addition, the implementing regulation lays down a second cap to the compensation and stipulates that this second cap is to be calculated in accordance with the Annex to Regulation (EC) 1370/2007.
- (49) All bus and tram undertakings operating in Rhineland-Palatinate receive compensation on the basis of these parameters, which means that all those undertakings receive compensation in all cases on the basis of the same principle. Furthermore, the notified law and the implementing regulation will be published and, thereby, accessible to all interested parties in a transparent manner.
- (50) It follows that the notified measure establishes the parameters on the basis of which the compensation payments are to be calculated in advance and in an objective and transparent manner. This is, contrary to the submissions of the complainant, not called into question by the fact that the standard rate for adults is subject to changes, as the level of reimbursement for the discounts is established objectively as the percentage of the

¹⁴ See also Commission Decision of 13 January 2009 in Case N 332/2008 – Compensation to long-distance bus operators for discounts given to certain types of passengers using long-distance bus services, OJ C 46, 25.2.2009, p. 8, para. 34.

price for the standard ticket by which the fare is lowered and is, furthermore, limited as a second step by the *ex-post* control, which is to be carried out in accordance with parameters defined objectively and in advance in the implementing regulation.

4.2.1.3 No overcompensation

- (51) As described above in recital (13), the notified measure foresees that any compensation for the fulfilment of the public service obligation provided for in it corresponds to and is limited to the difference in price between the reduced rate for pupils, students or trainees and the standard rate for adults (first cap).
- (52) However, as this system for the calculation of the applicable compensation is not based on the costs for carrying out the transport services at stake, but on the reduction in price, it cannot be excluded on the basis of this first cap alone that no over-compensation is granted to transport undertakings.¹⁵ The notified law, therefore, introduces a second cap in the form of an *ex-post* over-compensation control to be carried out under the rules laid down in its implementing regulation. As explained above in recitals (14)-(15), the implementing regulation is intended to ensure that this second cap to the compensation is calculated in accordance with the rules laid down in Regulation (EC) 1370/2007 and in particular in its Annex. Thus, the implementing regulation stipulates that the compensation must not exceed an amount corresponding to the net financial effect of compliance with the public service obligation.
- (53) To this end the implementing regulation lays down the basic principle that this second cap is to be calculated as follows: *cost + reasonable profit – revenues*.
- (54) The costs are established in accordance with the guidelines for the determination of prices on the basis of net costs (LSP). The LSP provides a cost-based price calculation method based on established accounting standards taking into consideration all relevant cost categories and is generally used for the determination of prices in public contracts. According to recital 4(2) of the LSP, only costs resulting from the discharge of services in an economical and efficient way are to be considered.
- (55) Only costs incurred by carrying out the public service obligation defined in the notified law within the geographical area of Rhineland-Palatinate can be taken into account. These costs are derived from the profit and loss accounts and have to be attributed to transports carried out under the notified law. The implementing regulation provides that this is to be confirmed through a statement by a certified auditor. This statement, furthermore, lists the transport services (with the distance in km) carried out under the notified law and certifies in how far the relevant costs exceed the relevant revenues. The accounts of the compensated services subject to the public transport service obligations must be separated from the accounts connected to other activities in accordance with point 5 of the Annex of Regulation (EC) 1370/2007.

¹⁵ See, in particular, Commission Decision in Case N 332/2008 – Compensation to long-distance bus operators for discounts given to certain types of passengers using long-distance bus services, para.35.

- (56) The Commission considers that the LSP forms a reasonable basis to establish the relevant costs and that the implementing regulation ensures that only costs incurred in connection with the discharge of the public service obligation laid down in the notified law are taken into account. The Commission positively notes that this is to be proven by an expert statement of a certified auditor on a yearly basis.
- (57) Furthermore, all relevant revenues are taken into account. As described above in recital (15), these include all commercial revenues either from revenue sharing agreements of transport associations or direct sale of tickets outside a transport association as well as other forms of revenues such as advertising revenues. Furthermore, the revenues include compensation received from other schemes as well as any kind of grants from the State, transport associations or other public entities.
- (58) As with the relevant costs, also only revenues connected with services under the notified law carried out in Rhineland-Palatinate are considered. Furthermore, transport undertakings have to keep separate accounts in accordance with point 5 of the Annex of Regulation (EC) 1370/2007. The relevant revenues have to be confirmed by a statement by a certified auditor, who also has to confirm whether the relevant revenues exceeded the relevant costs.
- (59) Both costs and revenues are established in accordance with the accounting and tax rules in force.
- (60) In addition, the German authorities have sufficiently demonstrated that the calculations carried out to establish the reasonable profits to be taken into account are in line with the concept of a reasonable profit as defined in the Annex to Regulation (EC) 1370/2007 and with the assumptions accepted in other similar cases dealing with bus transport.¹⁶
- (61) Accordingly, the Commission considers that the system established by the notified measure, which, firstly, limits the amount of the compensation to the difference between the reduced rate for pupils, students and trainees and the standard rate for adults and, secondly, introduces a second and additional limitation in the form of an *ex-post* over-compensation control under the implementing regulation, ensures that no over-compensation is paid to transport undertakings.
- (62) The Commission, furthermore, considers that the argument by the complainant that the notified measure infringes the General Principle of non-discrimination since it does not foresee an over-compensation control for all transport services cannot be upheld. More specifically, the complainant criticises that Article 3(1) of the implementing regulation foresees that, if a public service contract in the meaning of Regulation (EC) 1370/2007 exists, over-compensation control under such a contract takes priority over the compensation-control under the notified measure.
- (63) The Commission notes at the outset that the notified measure, as a general rule, foresees an *ex post* over compensation control for all payments made under it and that Article 3(1)

¹⁶ C 41/2008 (*Danske Staatsbaner*): 6-12%; C 47/2007 (*Berlin/Brandenburg*): 7%; C 3/2008 (*Bus transport in Southern Moravia*): 7.85%; N 207/2009 (*Wittenberg*) and N 206/2009 (*Anhalt-Bitterfeld*): 5%.

of the implementing regulation lays down an exception to this general rule. In order to establish whether the notified measure foresees an equivalent over-compensation control in all instances it is, therefore, necessary to distinguish between situations in which a public service contract in the meaning of Regulation (EC) 1370/2007 exists and such situations, in which no such contract exists.

- (64) As stated above, if a public service contract in the meaning of Regulation (EC) 1370/2007 exists, Article 3(1) of the implementing regulation stipulates over-compensation control is ensured under that contract, *if* it takes the compensation payments granted under the notified measure into account. This means that in such situations the competent (local) authorities in the meaning of Article 2 (b) and (c) Regulation (EC) 1370/2007 must take any compensation payments under the notified measure into account when carrying out the over-compensation control concerning the public service contract in accordance with Regulation (EC) 1370/2007. The German authorities confirmed that only if this condition is fulfilled will over-compensation control take place under existing public service contracts as foreseen in Article 3(1) of the implementing regulation. If payments under the notified scheme are, however, not taken into account already in the over-compensation control under the public service contract (over compensation control in accordance with Regulation (EC) 1370/2007), the notified measure is applicable and the over-compensation control is carried out in accordance with its rules and, in particular, with its implementing regulation.
- (65) More specifically, in situations in which public service contracts were directly awarded in accordance with Articles 3(1) and 5(2)(4)(5) of Regulation (EC) 1370/2007, it follows from Article 6(1) of this Regulation that an over-compensation control in accordance with its Annex has to be carried out. The implementing regulation provides that the transport undertakings in such cases have to communicate the result of this over-compensation control under Regulation (EC) 1370/2007 to the granting authority. As stated above, this means that the competent (local) authority will carry out the over-compensation control in accordance with Regulation (EC) 1370/2007 and, in particular, its Annex. By communicating the results of this control it is ensured that the granting authority can verify that payments under the notified measure were taken into account. Thereby an *ex post* over-compensation control is ensured.
- (66) In cases in which public service contracts were awarded in a public tender, the notified measure provides that the transport undertaking has to, on an annual basis, prove by means of a statement by a certified auditor that the accounting was done in accordance with the public service contract and that the rules concerning separate accounts as laid down in point 5 of the Annex to Regulation (EC) 1370/2007 were respected. This means that, in accordance with Article 6 of Regulation (EC) 1370/2007, which stipulates that all compensation connected with a public service contract has to comply with its Article 4, the transport undertakings are under an obligation to prove that the rules concerning public service compensations under Article 4 of Regulation (EC) 1370/2007 were respected and, in addition, that the provisions concerning separate accounts laid down in the Annex were respected. Thus, also in cases in which a public service contract was awarded in a public tender, over-compensation control in accordance with Regulation (EC) 1370/2007 is ensured.

- (67) In cases in which no public service contract in the meaning of Regulation (EC) 1370/2007 exists the compensation is to be calculated on the basis of the notified measure. In these situations the compensation is, therefore, subject to the first cap, which limits it to the difference between the reduced rate and the standard rate for adults, as well as the second cap, under which the *ex-post* over-compensation control in accordance with Regulation (EC) 1370/2007 and in particular its Annex has to be carried out.
- (68) Thus, contrary to arguments submitted by the complainant, the notified measure in conjunction with Regulation (EC) 1370/2007, which is directly applicable in all Member States, prevents over-compensation in a non-discriminatory manner for all transport undertakings carrying out a public service obligation. This is ensured by a control either directly on the basis of Regulation (EC) 1370/2007 (in cases of directly awarded public service contracts or contracts awarded in a tender *if* the contract foresees that compensation payments granted under the notified measure into account) or on the basis of the notified law in conjunction with its implementing regulation in all other cases (in cases of directly awarded public service contracts or contracts awarded in a tender where the contract does not foresee that compensation payments granted under the notified measure are taken into account and in case of bus and tram transport that is not subject to Regulation 1370/2007 because the operator receives neither compensation nor enjoys an exclusive right).
- (69) As to the argument of the complainant that in cases in which a public service contract in the meaning of Regulation (EC) 1370/2007 was awarded directly it is only necessary to communicate the result of the over-compensation control under that contract to the granting authority, whereas in cases in which such contracts were awarded following a public tender the compliance with the rules of said contract need to be proven by a statement of a certified auditor, the Commission notes that this is a direct result of and in accordance with Regulation (EC) 1370/2007.
- (70) Article 6(1) of Regulation (EC) 1370/2007 itself foresees different rules concerning over-compensation control for contracts awarded in a tender on the one hand, and for contracts awarded directly as well as for compensation granted on the basis of a general rule on the other hand. As to the latter, and in particular directly awarded contracts, Article 6(1) of Regulation (EC) 1370/2007 foresees that, in addition to the provisions laid down in Article 4 of said regulation, the provisions laid down in the Annex to the Regulation are to be complied with. This means that for all such contracts, the over-compensation control under Regulation (EC) 1370/2007 carried out by the competent (local) authority has to ensure that the provisions of the Annex to that Regulation are respected. It is, therefore, sufficient to communicate the result of this control to the granting authority, which will verify that any payments under the notified scheme have been taken into account by the competent (local) authority.
- (71) As to contracts awarded in a tender, Article 6(1) of Regulation (EC) 1370/2007 merely requires that any compensation must be granted in accordance with its Article 4. The Regulation does not, however, in these cases directly require the application of its Annex. Yet, the notified measure constitutes a general rule and if a transport undertaking in such a situation receives compensation both under a public service contract awarded in a tender

as well as under the notified measure, the rules concerning such public service contracts and general rules collide.

- (72) Upon question by the Commission the German authorities explained that this is the reason why directly awarded contracts and contracts awarded in a tender are treated differently. According to the German authorities Article 3(3) of the implementing regulation is, therefore, to be understood as requiring transport undertakings subject to a contract awarded in a tender to prove by statement of a certified auditor that the provisions under the Annex to that Regulation are complied with.
- (73) With regard to the argument put forth by the complainant that the notified measure favours undertakings with higher costs, the Commission, firstly, notes that, as stated above, the notified measure ensures that no over-compensation is paid out. Secondly, the Commission recalls that it follows from recital 4(2) of the LSP that only costs resulting from the discharge of services in an economical and efficient way are to be considered in the calculation of the amount of compensation. Thirdly, as over-compensation is excluded, the Commission holds that even if undertakings with higher costs might receive a higher amount of compensation, this does not lead to higher profits but merely reflects higher costs and, therefore, does not lead to distortions of competition contrary to the common interest.
- (74) Finally, with regard to the argument by the complainant that the *ex post* over-compensation control is not sufficient to prevent actual over-compensation to take place, as the implementing regulation does not provide for a claw-back of interest on payments constituting over-compensation, the German authorities confirmed that a claw-back including interest in line with Union rules on recovery of unlawfully granted State aid.. It follows that any possible over-compensation will be recovered including interest.
- (75) Furthermore, the Commission notes that the aid is necessary and has an incentive effect since, as was already mentioned above, private transport undertakings would not offer the same discounts for pupils, students and trainees without the aid. This is equally true for the MAXX ticket and the Semester tickets mentioned above in recital (13), which private transport undertakings only taking their own economic interests into account would not offer under the same conditions to pupils, students and trainees without the aid. As regards the fact that transport undertakings will receive an increase of 33.3% of the revenues from the sale of these tickets, the German authorities submitted that the discount granted for these tickets are larger than 25%. By limiting the increase received by transport undertakings to 33.3% the notified measure ensures that the compensation granted will be less than 25% of the full price. The compensation granted under the notified measure for MAXX tickets will, therefore, be less than under the current system. In addition, the Commission recalls that also with regard to MAXX and semester tickets the over-compensation control laid down in the notified measure applies, which means that over-compensation for these tickets is excluded.

4.2.1.4 Non-discrimination

- (76) The notified scheme applies to *all* bus and tram undertakings operating public transport services by bus or tram in Land Rhineland-Palatinate. Under the PBefG, every EU undertaking which fulfils the legal requirements (especially the requirements of Regulation (EC) 1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator¹⁷) is free to apply for public transport routes in Germany, thus also in the Land Rhineland-Palatinate. Against this background, the Commission considers that the aid is granted without discrimination.

4.2.1.5 No distortion of competition contrary to the common interest

- (77) Lastly, as stated above in recital (39), State aid for the discharge of public service obligations in the transport field may be declared compatible with the internal market under Article 93 TFEU only if it does not lead to a distortion of competition contrary to the common interest. At the current level of development of State aid law, the Commission usually considers that that condition is complied with if it has been demonstrated that there is no risk of overcompensation.¹⁸
- (78) The Commission notes that the impact on competition between different modes of transport is low, since the aid is granted only for services provided to a pre-defined group of passengers, namely pupils, students and trainees.
- (79) As to the argument by the complainant submitted during the pre-notification phase, that the notified law will lead to a distortion of competition between different bus or tram undertakings operating within the Rhineland-Palatinate, by favouring undertakings operating in urban areas over those operating in rural areas, the Commission notes that the notified measure indeed leads to a certain re-distribution of compensation payments. However, in this regard the Commission is only competent to ensure that the notified measure is in accordance with the State aid rules and in particular to control whether undertakings do not receive over-compensation.
- (80) As stated above, the notified law does not make any distinctions between different types of transport undertakings but is equally applicable to all undertakings carrying out the public service obligation laid down in it. Furthermore, the *ex-post* over-compensation control in accordance with the implementing regulation ensures that no compensation exceeding the relevant costs and a reasonable profit minus the relevant revenues is paid out. Thus, this system, and especially the *ex-post* control in accordance with the implementing regulation, ensures that no over-compensation is paid to any transport undertaking. It is, from the point of view of State aid control, therefore irrelevant if some

¹⁷ Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC, OJ L 300, 14.11.2009, p. 51.

¹⁸ Paragraph 51 of the SGEI framework 2012.

undertakings receive a higher amount of compensation than under the old system as long as they are not over-compensated.

- (81) In this regard it should also be recalled that the public service obligation under the notified measure does not oblige undertakings to carry out transport services, but merely to offer tickets at a reduced prices if they decide to carry out transport services. In other words, the notified measure does not require any transport undertaking to carry out any public transport, but merely lays down that they have to, if they offer such transport, offer tickets at the reduced rate. The German authorities submitted that in contrast to this, the old system under section 45a PBefG granted compensation for carrying out transport services and was intended to lead to the creation of new public transport lines. Thus, the two systems grant compensation with diverging objectives. A direct comparison is, therefore, not appropriate.
- (82) Finally, the German authorities submitted that the notified measure does also not have any effects on existing public service contracts and compensation granted under such contracts. According to Germany, the plans to change the system of compensation were well known on the market since 2008 and the new system of compensation could therefore be taken into account when entering into public service contracts. If any old contract did, however, not take this new system into account yet, German law foresees a possibility to adjust those contracts to the new system.
- (83) The Commission, therefore concludes that the notified measure does not lead to a distortion of competition contrary to the common interest.

4.2.2 Article 107(2)(a) TFEU

- (84) In addition to its assessment under Article 93 TFEU, the Commission also considers that the present scheme is compatible with the internal market under Article 107(2)(a) TFEU.
- (85) According to Article 107(2)(a) TFEU, aid having a social character, granted to individual consumers, shall be compatible with the internal market, provided that such aid is granted without discrimination related to the origin of the products concerned.
- (86) The Commission recalls that Paragraph 24 of the Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (1994 Aviation Guidelines)¹⁹ explains that aid of a social character, as set out in what was then Article 92(2)(a) EC Treaty (now, Article 107(2)(a) TFEU), may apply in "*the case of direct operational subsidisation of air routes*" provided the following requirements are fulfilled:

- The aid must effectively be for the benefit of final consumers.

¹⁹ OJ C 350 of 10.12.1994, p. 5.

- The aid must have a social character, that is, it must, in principle, only cover certain categories of passengers travelling on a route such as children, handicapped people, people with low incomes, etc. However, in the case where the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.
 - The aid must be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operate the service. This also implies the absence of any barrier to entry on the route concerned for all EEA air carriers.
- (87) These principles have been applied in a number of decisions concerning air transport in recent years²⁰ and the Commission considers them transferrable to other modes of transport, such as bus and tram transport. Accordingly, the Commission will assess the compatibility of the notified measure under Article 107(2)(a) TFEU and will apply analogously the principles described above.
- (88) In the present case, the Commission finds, first, that the notified measure is indeed for the benefit of final consumers. The measure clearly defines the obligation imposed on all bus undertakings operating public bus transport services in the Land Rhineland-Palatinate to offer a price reduction to pupils, students and trainees which shall amount to at least 15% of the standard rate for adults. Consequently, the compensation granted covers only the difference between the reduced rates and the standard rate.
- (89) Contrary to the arguments put forth by the complainant, it is therefore irrelevant that the reduction in price is not directly paid to consumers but rather to the transport undertakings, as the decisive criterion must be seen in the fact that the reduction ultimately and effectively benefits consumers.
- (90) Second, the Commission finds that the notified aid scheme has a social character because it is reserved for a particular category of passengers whose situation justifies the payment of aid for social reasons. Pupils, students and trainees are passengers who are dependent on regular transport to their schools, universities and training places and who usually have no significant income. As explained above, the measure aims at an open access to education by providing cheap public transport tickets for pupils, students and trainees to their schools, universities and training places. Furthermore, the scheme pursues specific social aims by financially disburdening families with children.
- (91) Third, the aid must be granted without discrimination, which requires the absence of any entry barrier to the relevant public transport market. As explained in recital (76) above, the Commission considers the aid to be granted without discrimination as it applies to *all* bus and tram undertakings operating public transport services by bus or tram in Rhineland-Palatinate.

²⁰ For example, the Commission decisions in the cases N 169/2006 (*Aid of a Social Character for Air Services in the Highlands and Islands of Scotland*), N 471/2007 (*Régime d'aide à caractère social aux transports aériens de la région autonome de Madeira*) and N 426/2010 (*Dispositif d'aides à la continuité territoriale de la Réunion*).

- (92) Finally, the Commission positively notes that the scheme is limited in time. The notified measure will expire on 31 December 2023. As explained above, the notified measure also prevents over-compensation.
- (93) On the basis of the above considerations, it can be considered that the notified measure is an appropriate, necessary and proportionate measure to support pupils, students and trainees, while adequately limiting the distortion of competition created by the aid since the scheme is non-discriminatory, limited in time, has a social character and, at the same time, ensures that over-compensation of the bus and tram undertakings which pass the advantage on to the final consumers is avoided.

4.2.3 Conclusions on the compatibility

- (94) Against this background, the Commission concludes that the notified scheme is compatible with the internal market under Article 93 TFEU as well as under Article 107(2)(a) TFEU.
- (95) The notification does not comprise the text of those public service contracts which take the compensation payments granted under the notified measure into account. Therefore, the Commission has not been able to verify whether *ex post* control is indeed ensured by those contracts.
- (96) This is a logical consequence of the system established by Regulation (EC) Nr. 1370/2007, which exempts from prior notification pursuant to Article 108 (3) TFEU any public service contract that complies with that Regulation. Responsibility for compliance lies first and foremost with Member States. Therefore, the approval is based on the assumption that any aid granted under the present scheme will be subject to effective *ex post* control in accordance with the substantive rules of Regulation (EC) Nr. 1370/2007 and its annex. Where the Commission has indications that any public service contract which take the compensation payments granted under the notified measure into account does not comply with Regulation (EC) Nr. 1370/2007, it reserves the right to open the procedure foreseen in Article 108 (2) TFEU and order, where it finds that Regulation (EC) Nr. 1370/2007 has not been complied with, recovery of any aid granted on the basis of that public service contract.
- (97) The present decision is based on the commitment of the German authorities that all public service contracts which take the compensation payments granted under the notified measure into account comply with Regulation (EC) Nr. 1370/2007. It hence authorizes aid paid pursuant to the notified measure only for those public service contracts that indeed comply with Regulation (EC) Nr. 1370/2007. Recovery in cases of aid granted under public service contracts that do not comply with Regulation (EC) Nr. 1370/2007 may therefore include any aid granted under the present scheme.
- (98) The present decision is based on the current factual situation of a reduced rate for the MAXX ticket and the Semester ticket set at more than 25% lower than the normal rate. Should the competent authority approve a reduced rate at less than 25% lower than the normal rate, the absence of overcompensation can no longer be ascertained, and Germany therefore has to re-notify the measure in that regard.

5. CONCLUSION

- (99) The Commission has accordingly decided to consider the aid (SA.34155) to be compatible with the internal market. At the same time, the present decision closes the complaint (SA.34048).

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request within that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>

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Yours faithfully,

For the Commission

Joaquín Almunia
Vice-president of the Commission