II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 26 November 2008

on State aid C 3/08 (ex NN 102/05) — Czech Republic concerning public service compensations for Southern Moravia Bus Companies

(notified under document number C(2008) 7032)

(Only the Czech text is authentic)

(Text with EEA relevance)

(2009/325/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], and in particular Article 6(1) and Article 14 thereof,

Having called on interested third parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

1. PROCEDURE

(1) By letter dated 28 June 2005 the Commission received a complaint from the Czech company ČAS — SERVICE a.s. (the Complainant). The complaint concerned State aid allegedly granted to various competitors of the Complainant by regional authorities between 2003 and 2005.

(2) By letters of 20 July 2005, 14 March 2006 and 7 December 2006, the Commission requested from the Czech authorities further information with regard to issues raised by the Complainant.

(3) The Czech authorities replied on 14 September 2005, 2 June 2006, 6 February 2007 and 18 October 2007.

(4) By letter dated 15 January 2008, the Commission informed the Czech authorities of the decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. The Czech authorities provided their comments on the aid by letter dated 18 February 2008.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 16 February 2008 [3]. The Commission invited any interested parties to submit their comments on the aid.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 43, 16.2.2008, p. 19.

[3] See footnote 2.

(6) On 14 March 2008, the Commission received comments from the Complainant as third party. On 17 April 2008, these comments were transmitted to the Czech authorities, which were invited to comment on the standpoints of the third party. On 13 May 2008, the Czech authorities requested an extension of the deadline for submitting their comments, on which the Commission agreed. On 17 June 2008, the Czech authorities submitted their observations on the third-party comments.

2. DETAILED DESCRIPTION

(7) The Complainant is a joint-stock company active in the field of regular bus transport, chartered transport, city bus transport in Znojmo territory and international transport.

(8) Until September 2004, operation of the regional public bus transport in Southern Moravia was the core activity of the Complainant, particularly on the basis of contracts concluded with the regional authorities. The services were provided in the Southern Moravia Region (Znojmo and Moravsky Krumlov Districts).

(9) The Complainant alleges that the Southern Moravia authorities granted, in the period between 2003 and 2005, illegal State aid to Bítešská Dopravní Společnost s.r.o. (Bítešská), BK Bus s.r.o. (BK Bus), Březanská dopravní společnost s.r.o. (Březanská společnost), Znojemská dopravnì společnost — PSOTA s.r.o. (PSOTA), Tredos, spol. s.r.o. (Tredos). This would be the consequence of a grant of licences that would be neither transparent nor objective.

(10) According to the Czech authorities the licence constitutes a permit granted by the authorities to operate a regular public transport service. The aim of the licence is to guarantee that bus transport will be conducted only by carriers who meet certain quality requirements. In this respect, according to Paragraph 18 of Law No 111/1994 Coll. on the road transport (the Road Transport Law) ([4]) these 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.

(11) The provision of Paragraph 19 of the Road Transport Law stipulates that the public service obligation is understood as 'the obligation by the carrier in the public interest which the carrier would otherwise not accept at all or partially due to its economic disadvantage. The public service obligation is agreed by the government with the carrier and the government shall also settle the provable loss to the carrier arisen by its fulfilment. The public service obligation consists in the obligation to operate (…), the obligation of the transport (…), the tariff obligation (…). The public service obligation in the public line transport arises on the basis of a written contract' (concluded between the relevant authorities and the operator) ([5]).

(12) Additionally, the provisions of Paragraph 19b(2) and (4) of the Road Transport Law stipulates that 'the preliminary professional estimate of the proven loss for the whole period for which the public service obligation is imposed, is the mandatory integral part of the public service obligation contract'. The relevant authorities 'shall settle the proven loss at the maximum level of this preliminary professional estimate increased only by the unforeseen costs. (…) If the carrier also provides transport services other than the public service obligations or other activities, he shall keep separate accounts for the public service obligations'.

(13) Pursuant to Paragraph 19b(5) of the Road Transport Law 'determination of the provable loss, method of calculation of the preliminary professional estimate of the provable loss, rules for allocation of funds from the relevant budgets, the documents by which calculations of the provable loss must be supported and the method of exercise of the professional government supervision over funding of the traffic services are determined by the implementing regulation.'. This regulation — Regulation 50/1998 of the Ministry of Transport and Communications of 13 March 1998 on provable loss in the public line passenger transport (the Regulation) — defines the provable loss in the public line passenger transport as: 'the difference between the sum of the economically substantiated costs and the adequate profit and between the earned receipts and revenue' (hereafter losses).

(14) The adequate profit is understood in the Regulation as 'the sum which — after taxation (…) — does not exceed 1/8 of the price of the buses used usually for the public line passenger transport providing the traffic services by fulfilment of the public service obligation reduced by the sum of the total real depreciation of these buses and the sum spent for investments related to operation of the public line passenger transport, provided that the relevant authority expressed its approval for the investment for purpose of its incorporation into the calculation of the provable loss'.

([4]) For the purposes of this Decision, the reference is made to the provisions of the Law in the version applied to the present case.

([5]) In Czech law the compensation for public service contracts is equivalent to a notion of provable loss. For a similar case, see also Commission Decision N 495/07 — Czech Republic — Program pořízení a obnovy železničních kolejových vozidel (OJ C 152, 18.6.2008, p. 21).

(15) With effect from 1 January 2003 the regional authorities, including Southern Moravia authorities, became responsible in the Czech Republic for concluding contracts with transport operators for providing public transport services. The Southern Moravia authorities compared the costs of providing public transport incurred by the Complainant with the average cost for bus transport operation in the Czech Republic obtained from statistical survey. They concluded that the Complainant's costs were higher than the average cost.

(16) On 24 March 2003, given the abovementioned assessment and after unsuccessful negotiations with the Complainant, the authorities of the Southern Moravia Region decided to conduct negotiations for providing transport services with other operators. They approached the known carriers operating in the Southern Moravia Region with a request to submit tenders for providing public transport services in Znojmo territory. The invitation to submit tenders was sent to 41 carriers, including the Complainant. It envisaged that the regional authorities were willing to pay to the operators a price of not more than CZK 26 per km for providing the service. Additionally, it envisaged a requirement that the operators must have an electronic processing system and be in a good standing with the administration.

(17) The regional authorities received answers from 9 carriers who subsequently were invited to a meeting with the regional authority. A selection committee appointed by the Southern Moravia Regional Council assessed and rated the tenders. It recommended that the contracts for providing transport services were concluded with 6 carriers, including the Complainant, namely: Bítešská, BK Bus, Břežanská společnost, PSOTA, Tredos and the Complainant (ČAS-Service a.s.).

(18) The criteria taken into account by the selection committee in assessing the tenders were clarity and completeness. Additionally, the Southern Moravia authorities took into account among others, the criterion of minimising the number of technical operational kilometres and cohesiveness of selected territory.

(19) According to the Czech authorities, the Complainant was considered to meet the selection criteria only conditionally, since it did not specify clearly the price of its transport operation. During subsequent meetings, the Complainant then expressed that it could not accept compensation at the rate proposed by the Southern Moravia authorities in the invitation to submit tenders.

(20) As a consequence, the regional authorities established that the Complainant did not fulfil the conditions of the selection procedure and that contract for providing public transport services could not be concluded with it.

(21) Contracts were concluded with these operators who accepted that the maximum price to be paid for providing public transport would amount to CZK 26 per km. According to the Czech authorities this meant that a well-managed and well-equipped company with costs of CZK 23 959 per km would have received a profit amounting to CZK 2 041 per km. The cost of CZK 23 959 per km was obtained from statistical surveys conducted pursuant to Act No 89/1995 Coll. on the State Statistical Service. These surveys referred to providing public bus services on the territory of the Czech Republic for the period of 2002.

(22) The estimated price per km (not exceeding CZK 26 per km) was specified in the contract with each operator. This served to establish an overall amount of revenues (price per kilometre multiplied by a number of kilometres) which would be paid to an operator for providing services. From this amount actual revenues were deducted in order to define losses ([6]).

(23) The operator had to provide the authority with documentary proof of actual revenues after providing the services. Only then would the final amount of losses be established and the payment of the compensation take place.

(24) Apart from the general requirements envisaged by the Road Transport Law for carriers and deriving from the fact that such operators held licences, each contract stipulated more specific obligations for each operator, namely the obligation to provide transport on specific lines and at defined times as well as conditions for amendments of the contracts and penalties in the event of failure to comply with contracts.

(25) The Czech authorities have informed the Commission that after 2003 the Southern Moravia authorities agreed to conclude further contracts for providing transport services with the same operators for 2004 and 2005.

(26) The Czech authorities have acknowledged that no specific procedure was undertaken for the purpose of selecting operators which would provide transport services in 2004 and 2005.

([6]) According to the Czech legislation, losses are the difference between the sum of the economically substantiated costs and the adequate profit on the one hand and the earned receipts and revenue on the other hand.

(27) The following table provides data concerning the amounts of compensation envisaged in the contracts for 2004 (Table 1):

Name of the operator	Date of the contract	Maximum amount of the compensation envisaged in the contract
Tredos	21.1.2004	CZK 7 364 733
	Modified:	
	31.8.2004	CZK 7 399 733
BK Bus	22.1.2004	CZK 4 349 779
Bítešská	21.1.2004	CZK 4 780 000
PSOTA	20.1.2004	CZK 18 924 849
	Modified:	
	31.8.2004	CZK 18 956 769
	17.9.2004	CZK 18 979 733
Břežanská společnost	26.1.2004	CZK 10 615 611

(28) Furthermore, contracts concluded for 2004 were prolonged for 2005 (Table 2):

Name of the operator	Date of the contract	Maximum amount of the compensation envisaged in the contract
Tredos	4.3.2005	CZK 11 457 527
	Modified:	
	31.3.2005	CZK 11 593 799
BK Bus	4.3.2005	CZK 5 244 124
Bítešská	4.3.2005	CZK 6 000 000
PSOTA	4.3.2005	CZK 20 999 640
Břežanská společnost	4.3.2005	CZK 11 953 423

(29) According to the Czech authorities, with regard to transport services in the Southern Moravia Region, the abovementioned undertakings did not obtain in the course of 2004-2005 any other financing from the State or through State resources.

3. GROUNDS FOR INITIATING THE PROCEDURE

(30) The Commission decided to initiate the procedure on the grounds stated in recitals 31 to 38.

3.1. **Presence of aid**

(31) The Commission had doubts that the third condition set in the Altmark judgment ([7]) was fulfilled.

(32) As the calculation of the compensation was made on the basis of the parameter established in advance (CZK 26 per km) and as the final remuneration was based on evidence of the losses actually incurred, not exceeding what had been envisaged in advance in the contracts, the Commission took the preliminary view that the amount of compensation could not exceed the actual losses. Furthermore, the Commission considered the profit included in the sum of CZK 26 per km as reasonable.

(33) However, the Commission expressed doubts on the notion of unforeseeable cost in the Czech legislation, which could serve as a justification for an extraordinary increase of the cap for the compensation.

(34) In addition, the Commission concluded that neither the fourth condition set in the Altmark judgment was fulfilled. The Commission considered that the procedure applied by the Czech authorities could not be considered a public procurement procedure or a procedure ensuring that the level of compensation was determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means of transport would have incurred, as required by the Altmark judgment.

(35) As a consequence, the Commission considered that there was no clear evidence to prove that the compensation had not granted a selective advantage and therefore, given that the other conditions of Article 87(1) of the EC Treaty were fulfilled, State aid within the meaning of this provision.

3.2. **Compatibility**

(36) The Commission noted that the compatibility of such State aid with the common market should be assessed in light of the general principles derived from the EC Treaty, the jurisprudence of the Court of Justice and the Court of First Instance and the Commission's decision practice in other areas than public transport ([8]).

([7]) Judgment of the Court of 24 July 2003, C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkhersgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* (2003) E.C.R. I-07747, points 88 to 93.

([8]) See Commission Decisions: C 16/07 — Austria — Official support for *Postbus* in the *Lienz* district (OJ C 162, 14.7.2007, p. 19); C 31/07 — Ireland — State aid to Córas Iompair Éireann Bus Companies (Dublin Bus and Irish Bus) (OJ C 217, 15.9.2007, p. 44); C 47/07 — Germany — DB Regio AG — Contrat de service public (OJ C 35, 8.2.2008, p. 13); C 41/08 — Denmark — Public service contract between the Ministry of Transport and Danske Statsbaner (not yet published).

(37) Having examined the available information, the Commission considered that the general principles governing the assessment of compatibility of the aid were complied with in the case in hand. The pre-establishment in the selection procedure of a maximum price for compensation based on national statistical analysis guaranteed the absence of overcompensation of the operators.

(38) However, as in the case at hand there was no public procurement procedure and that the Complainant pleads that Bítešská, BK Bus, Břežanská společnost, PSOTA, Tredos received illegal State aid, the Commission considered that it had to give the opportunity to the Complainant and third parties to comment on the methodology applied for establishing the amount of compensation by the Southern Moravia authorities, before being able to conclude with certainty that the aid is compatible with Article 73 of the EC Treaty by virtue of Article 14 of Regulation (EC) No 659/1999.

4. COMMENTS FROM THE CZECH AUTHORITIES

(39) The Czech Republic stated that the concept of unforeseeable costs is governed by the Road Transport Law with regard to the preliminary expert estimate of the demonstrable loss for the entire period for which the public service obligation contract is concluded. This estimate, which is submitted by the carrier, forms a mandatory part of the public service contract.

(40) Section 19b(3) of that law stipulates that the region must subsequently reimburse the demonstrable loss up to an amount not exceeding the expert estimate, augmented only by unforeseeable demonstrable costs. However, the Road Transport Law does not provide a more detailed definition of unforeseeable demonstrable costs and definition of this concept is left to the individual purchasers of transport services.

(41) The Czech Republic recalled that the public service contracts concluded by the Southern Moravia Region provided for a preliminary estimate of losses. If the amount of the actual demonstrable loss for the period in question was higher than the preliminary expert estimate of demonstrable loss, the Southern Moravia Region reimbursed the demonstrable loss only up to the amount of the preliminary expert estimate. In this context, the risk of higher actual costs and lower actual revenue in relation to the preliminary estimate of demonstrable loss was borne by the operators, with the exception of unforeseeable proven costs.

(42) The concept of unforeseeable costs was set out in greater detail in the public service contracts concluded by the Southern Moravia Region with the individual transport operators. Unforeseeable costs refer to situations which are independent from the companies' management such as natural disasters, price interventions by the State, diversions or changes in excise duties, VAT, etc. The Czech Republic provided the Commission with the relevant abstracts in the public service contracts.

5. COMMENTS FROM THIRD PARTIES AND OBSERVATIONS OF THE CZECH AUTHORITIES

(43) The Complainant was the only third party to submit comments following the decision of the Commission to initiate the procedure.

(44) Comments of the Complainant regarded the following aspects:

— the allegation that the concerned transport was not commissioned as public service contracts but within the notion of public service obligation deriving from the Road Transport Law,

— the allegation that the Altmark judgment should not have been applied in this case,

— the opposition to consider the amount of CZK 26 per km as the maximum price of the transport operation for the determination of the compensation. The Complainant considered indeed that this amount is rather just a part of the preliminary expert estimate according to which the provable loss should be compensated to the carrier in compliance with the Road Transport Act,

— the allegation that the local conditions of the public scheduled transport operations were not taken into account when setting the price paid for the provision of transport operations amounting to CZK 26 per km. Should these local conditions have been taken into account, it would have resulted in a higher amount,

— the public service compensation was a mean for the other carriers to replace their fleet,

— the Commission should have assessed the complaint also for the period before 1 May 2004,

— the allegation that the public service contracts led to a situation of competition between subsidised and non-subsidised transport which create a distortion of competition.

(45) However, the Complainant did not comment on the concept of unforeseeable costs. Nor did the Complainant 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. On the contrary, the Complainant argued that this reference amount of CZK 26 per km should not have been considered by the Czech authorities as a maximum transport price.

(46) Therefore, the Complainant comments did not specifically concern the doubts that the Commission expressed in the decision to initiate the procedure. In addition, the Czech Republic submitted to the Commission its observations on the comments of the Complainant. These observations confirmed the Commission assessment on the specific issues brought forward by the Complainant.

(47) As a consequence, the Complainant's comments do not alter the Commission legal assessment developed in the decision to initiate the procedure.

6. LEGAL ASSESSMENT

6.1. Competence of the Commission to examine measures granted by countries acceding European Union on 1 May 2004

(48) The provisions of Annex IV, Chapter 3 to the 2003 Act of Accession create a legal framework for assessment of measures which were put into effect by the acceding Member States before their accession to the EU and are still applicable after accession.

(49) With particular reference to the transport sector the provisions of Annex IV stipulate that 'aid schemes and individual aid (…), *put into effect* in a new Member State *before* the date of accession and *still applicable after* that date, shall be regarded as existing aid within the meaning of Article 88(1) of the EC Treaty subject to the following condition: the aid measures shall be communicated to the Commission within four months of the date of accession'.

(50) According to the established decision practice ([9]), 'aid measures granted before accession and not applicable after accession cannot be examined by the Commission neither under the procedures laid down in Article 88 EC Treaty nor under the interim mechanism. Only such measures that can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, may qualify as existing aid by virtue of the interim mechanism — if they fulfil the relevant conditions — and are therefore subject to it. On the other hand, the interim mechanism is devoid of any purpose in respect of aid measures that have already been finally and unconditionally granted for a given amount before accession. (…) [I]n order to determine whether this is the case, the relevant criterion is the legally binding act by which the competent national authorities undertake to grant aid. If no such act exists, the measure has not been granted before accession and constitutes new aid the compatibility of which with the common market is assessed by the Commission on the basis of Articles 87 and 88 EC Treaty. A new measure must be assessed at the point in time when the aid is granted; it is the legal commitment of the state that is synonymous with the granting of aid and not the mere payment thereof. Any payment, current or future, under a legal commitment is an act of simple implementation and cannot be construed to be new or additional aid. Therefore, the Commission considers that for a measure to be considered as applicable after accession it must be shown that it is liable to produce after accession an additional benefit that was not known, or not precisely known, when the aid was granted'.

(51) The Commission first notes that the Czech authorities did not communicate the contracts of Table 1 (all put into effect before 1 May 2004) to the Commission within the framework of the procedure established by Annex IV(3) of the 2003 Act of Accession.

(52) Further, the Commission notes that, given the definition of unforeseeable costs, as explained following the decision to initiate the procedure, the measures were liable to produce an additional benefit not precisely known when the aid was granted.

(53) As a result, all contracts enumerated in Table 1, in so far as they involve State aid, concern State aid applicable after accession which is not existing aid and for which the Commission is competent.

(54) With regards to the contracts listed in Table 2, which were all concluded after 1 May 2004, the Commission is competent to investigate.

6.2. Presence of aid

(55) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States, save as otherwise provided for in the Treaty.

([9]) Commission Decision C 3/05 — Poland — Restructuring aid to Daewoo-FSO (OJ C 100, 26.4.2005, p. 2, points 40 to 43).

6.2.1. *State resources*

(56) The Commission notes that the compensations were paid by the Southern Moravia authorities from the public budget. Therefore, they were granted through State resources.

6.2.2. *Selective economic advantage*

(57) It must be established whether the measure grants a selective economic advantage.

(58) It follows from the Altmark judgment that 'where a State measure must be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty. However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied' ([10]).

(59) Firstly, according to the abovementioned judgment, it has to be established whether 'the recipient undertaking is actually required to discharge public service obligations and (whether) those obligations have been clearly defined'.

(60) The Commission did not raise doubts as regards the fulfilment of this condition in its decision to initiate the procedure.

(61) With regard to this requirement, the Commission notes that the Road Transport Law provides a definition of the public service obligation and stipulates that the public service obligation in the public line transport arises on the basis of the written contract made between the authorities and the carrier. The Czech authorities provided the Commission with the copies of the contracts and subsequent annexes concluded with transport operators.

(62) The Commission also noted that the public service obligation was clearly and specifically defined in the contracts, namely the links and the periods in which transport services were to be provided were clearly defined for particular operators.

(63) Secondly, it must be shown that 'the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner'.

([10]) Judgment C-280/00 Altmark, points 87 and 88.

(64) The Commission did not raise doubts as regards the fulfilment of this condition in its decision to initiate the procedure.

(65) The Commission noted that the maximum price for transport services was established by the authorities on the basis of the criteria indicated in Paragraph 19b of the Road Transport Law and of Regulation at the level of CZK 26 per km. This price was included in the invitation for submitting offers sent to all potentially interested operators in 2003. The Commission noted that the price was established on the basis of the statistical data.

(66) Therefore, the price was established in advance, i.e. before the selection of the operators took place, in an objective and transparent manner. The parameter was not modified in annexes agreed upon after accession of the Czech Republic to the European Union.

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

(68) In its decision to initiate the procedure, the Commission noted that the regional authorities expressed in the invitation to submit offers that the price of maximum CZK 26 per km was the price that they were willing to pay to the carriers for providing transport services.

(69) Additionally, it also noted that all the contracts contain an estimation of the losses which the particular bus operator will incur when providing transport services as foreseen in the contract. The estimation of losses is carried out in the following manner: first, the losses are calculated for the scenario that the company receives CZK 26 per km plus the revenues from passenger tickets. Then, the losses are calculated taking into account only the revenues from passenger tickets. The price of CZK 26 per km includes also a reasonable profit, calculated on the basis of objective parameters established in the Regulation with reference to the value of the assets of undertakings. The final settlements and payments of compensation take place only once the particular bus operator has provided the documentary proof of the actual losses. If the actual losses are lower than the forecast, then only the actual losses are compensated. If the actual losses are higher than the forecast, then the maximum level of compensation is the level of the preliminary estimation. An increase of this cap is only possible if there are unforeseeable costs.

(70) As regards this latter concept on which the Commission expressed doubts in its decision to initiate the procedure, it should be mentioned that the concept of unforeseeable costs is governed by the Road Transport Law. It is set out in greater detail in the public service contracts concluded by the Southern Moravia Region with the individual transport operators. Unforeseeable costs refer to situations which are independent from the companies' management such as natural disasters, price interventions by the State, diversions or changes in excise duties, VAT, etc. The operators must prove the reality of these unforeseeable costs. The existence of this exception to the maximum transport price does not compromise the ability of the compensation mechanism to make sure that the compensation does not exceed the actual losses ([11]).

(71) Therefore, as the calculation of the compensation was made on the basis of the parameter established in advance (CZK 26 per km) and as the final remuneration was based on evidence of the losses, and therefore the costs, actually incurred, including unforeseeable costs, the Commission considers that the amount of compensation could not exceed the actual losses, and therefore the actual costs. Furthermore, the Commission considers the profit of CZK 2 041 per km included in the sum of CZK 26 per km as reasonable as it does represent a margin of 7,85 %.

(72) As a result, the Commission comes to the conclusion that the third condition of Altmark is fulfilled.

(73) Lastly, the Altmark judgment foresees that if 'the undertaking, which is to discharge public service obligations, is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligation'.

(74) The Commission must first of all examine whether the procedure applied by the Czech authorities could be considered a public procurement procedure. In its decision to initiate the procedure, the Commission noted that the Southern Moravia Region distributed to the known carriers (41 of them) in the region an invitation to submit tenders for the provision of transport services in Znojmo district.

(75) Therefore, the procedure excluded the possibility that operators from other regions or districts were informed about the procedure and had a possibility to submit their tenders. Furthermore, this procedure ran counter to the possibility that carriers from other Member States could be taken into account in choosing the operator providing the services. The Commission noted also that the Czech authorities did not envisage any procedure for choosing the carriers for years 2004-2005 but simply prolonged contracts with these carriers which had been chosen for providing services in 2003.

(76) These facts remain valid. The Commission can therefore conclude that the procedure applied by the Czech authorities cannot be considered a public procurement procedure as required by the Altmark judgment.

(77) This conclusion does not prejudice the position the Commission might take on the compatibility of the relevant measures with public procurement rules.

(78) Consequently, the Commission has to examine the second alternative stipulated in the fourth Altmark condition.

(79) 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, which should be an alternative to the analysis of the level of compensation established through the tender. As mentioned in the decision to initiate the procedure, according to the Czech authorities, the contractual price for the services was established on the basis of statistical costs which meant that a well-managed and well-equipped company bearing costs of CZK 23 959 (EUR 0,87) per km would receive a profit of CZK 2 041 (EUR 0,08) per km.

(80) In this context, the Commission noted firstly that the use of statistical data aims at ensuring that the price was established with reference to the costs of a typical undertaking.

(81) Secondly, taking into account that all the operators taking part in the procedure had to obtain licences to conduct their activity and that they must have fulfilled certain requirements imposed on them in the invitation to submit offers, they must have been adequately provided with means of transport to meet the necessary quality requirements.

(82) However, as mentioned in the decision to initiate the procedure, the use of the statistical transport cost cannot per se lead to a conclusion that the operators who accepted to provide the services for CZK 26 per km should be considered well-managed carriers. Statistical data which served as the basis for establishing this amount concerned only the actual costs of transport services in the Czech Republic for the period of 2002. Therefore, there is no proof that an average of these costs represents the costs of an efficient undertaking. The Czech authorities have not provided sufficient information on this point, including after the decision to initiate the procedure.

([11]) It should be recalled that losses are the difference between the sum of the economically substantiated costs and the adequate profit on the one hand and the earned receipts and revenue on the other hand.

(83) Hence, as not all of the requirements from the second alternative of the fourth Altmark condition are fulfilled, the Commission cannot conclude that the procedure applied by the regional authorities can be considered a procedure ensuring that the level of compensation was equal to the level to be obtained in the open public tender.

(84) In other words, the Commission cannot exclude that in the open public tender the regional authorities could have been able to find operators representing lower costs and consequently offering to provide the services demanding lower remuneration. Further, the Commission cannot conclude that the amount of compensation was established at the level which guarantees that no advantage was conferred to certain operators.

(85) Therefore, the Commission considers that the compensation has granted an advantage to certain operators of public transport. Consequently, the second condition for the application of Article 87(1) of the EC Treaty is fulfilled in the case.

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

(86) With regard to this condition, it needs to be verified whether the advantage granted from the State resources can distort competition to the extent that it affects trade between Member States.

(87) In its decision to initiate the procedure, the Commission noted in this respect that the Altmark judgment provides that: 'It is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States. Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (see, to that effect, Case 102/87 France v Commission [1988] ECR 4067, paragraph 19; Case C-305/89 Italy v Commission [1991] ECR I-1603, paragraph 26; and Spain v Commission, paragraph 40). In the present case, that finding is not merely hypothetical, since, as appears in particular from the observations of the Commission, several Member States have since 1995 started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin. Finally, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see Tubemeuse, paragraph 43, and Spain v Commission, paragraph 42). The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned' ([12]).

(88) Thus, the Commission comes to the conclusion that the condition that the aid must distort competition and affect trade between Member States is fulfilled in the case at hand.

(89) Taking into account the abovementioned considerations, the Commission concludes also that the measures put into effect constitute State aid in the meaning of Article 87(1) of the EC Treaty.

6.3. **Compatibility of the aid**

(90) Article 73 of the EC Treaty envisages conditions of compatibility of aid granted in the field of coordination of transport and public service obligation in transport. That Article constitutes a *lex specialis* with relation to Article 86(2), and Article 87(2) and (3) of the EC Treaty.

(91) According to the Altmark judgment ([13]), Article 73 of the EC Treaty cannot be applied directly but only by virtue of Council Regulations, in particular Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligation inherent in the concept of a public service in transport by rail, road and inland waterway ([14]).

(92) Pursuant to Article 1(1) of Regulation (EEC) No 1191/69 it can only be applied with relation to State aid granted to transport operators in rail, road and inland waterways.

(93) However, the Member States may exclude from the scope of that Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

(94) In its decision to initiate the procedure, the Commission already noted that the Czech authorities did not make such an exemption. Therefore, the relevant provisions of Regulation (EEC) No 1191/69 are applicable.

([12]) Case C-280/00, Altmark, points 77 to 82.
([13]) Case C-280/00, Altmark, cited above.
([14]) OJ L 156, 28.6.1969, p. 1.

(95) Pursuant to Article 1(4) of Regulation (EEC) No 1191/69, in order to ensure adequate transport services the competent authorities of the Member States may conclude public service contracts with a transport undertaking.

(96) Article 14 of Regulation (EEC) No 1191/69 stipulates that a public service contract is a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services.

(97) According to Article 14(2) of Regulation (EEC) No 1191/69, a public service contract shall cover, *inter alia*, the following points:

(a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality;

(b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties;

(c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes;

(d) the period of validity of the contract;

(e) the penalties in the event of failure to comply with the contract.

(98) First of all, as already mentioned in the decision to initiate the procedure, the Commission notes that according to Paragraph 19 of the Road Transport Law, 'the public service obligation in the public line transport arises on the basis of the written contract' between the relevant authorities and operators. Additionally, the Commission notes that the conditions of providing transport services were not imposed by the authorities but were negotiated and agreed upon between the operators and the regional authorities. Therefore, the Commission comes to the conclusion that despite the wording of the Road Transport Law (public service obligation) the provisions of Section V — 'Public service contracts' of Regulation (EEC) No 1191/69 can be applied.

(99) Secondly, the Commission notes that the nature of the service was defined in the contracts both *expressis verbis* and by reference to the fact that the operators held licences for providing public transport services.

(100) Thirdly, contracts included price per km and the overall amount of remuneration to be paid for providing the service.

(101) Fourthly, the contracts envisaged the conditions and the procedure for their amendment, period of validity and penalties in the case of failure to comply with the contract.

(102) Therefore, the Commission comes to the conclusion that the basic elements of contract enumerated in the provision of Article 14(2) of Regulation (EEC) No 1191/69 were covered by the contracts concluded with Bítešská, BK Bus, Březanská společnost, PSOTA, Tredos.

(103) Additionally, the Commission first of all notes that the goal of the legislator, when adopting Regulation (EEC) No 1191/69, was to define under which conditions 'aid […] which corresponds to the reimbursement of certain obligations inherent in the notion of public services' mentioned in Article 73 of the Treaty is compatible with the common market. Both the application of Article 73 of the Treaty and the application of Regulation (EEC) No 1191/69 presuppose the existence of an aid in the sense of Article 87(1) of the Treaty. If the content of the contracts can be covered by the notion of Article 73 'obligations inherent in the notion of public services', the form of the instrument, that is contract or unilaterally imposed obligation, should not be, in itself, an obstacle for declaring potential State aid inherent in the contract price compatible with the common market. Indeed, the decisive element for qualifying a service, be it imposed by a Member State or agreed in a contract, as a public service obligation within the meaning of Article 73 must be the substance of the service, not the form in which it is organised ([15]).

([15]) Similarly, Article 4 of Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67) resorts to the concept of an 'act of entrustment', the form of which is left to Member States to determine. See also Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70 (OJ L 315, 3.12.2007, p. 1).

(104) In the light of these considerations, the Commission concludes that from a legal point of view, there is no reason why State aid inherent in the price paid for a public service contract could not be compatible with the common market in accordance with Article 73. The Commission notes that this solution was chosen by the co-legislators in Regulation (EC) No 1370/2007. According to its Article 12, this Regulation will however only enter into force on 3 December 2009. As the present contracts were signed before this date, Regulation (EC) No 1370/2007 is therefore not applicable to them.

(105) As Article 14 of Regulation (EEC) No 1191/69 does not contain any precise conditions for declaring State aid inherent in the price paid for a public service contract compatible with the common market, the Commission considers that the general principles derived from the Treaty, the jurisprudence of the Community courts and the Commission's decision practice in other areas than public transport shall be applied for deciding whether such State aid can be declared compatible with the common market ([16]).

(106) These principles have been recalled by the Commission in a general manner in the Community framework for State aid in the form of public service obligations ([17]). With respect to the compatibility of State aid inherent in the price paid for a public service contract, this Community framework foresees the following at point 14: 'The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever'.

(107) The Commission notes that by pre-establishing in the selection procedure, as described in recitals 12 to 20, that the price the authorities were willing to pay was not more than CZK 26 per km, and subsequently by applying this parameter and adding the unforeseeable costs to calculate the revenues of the carriers, the Southern Moravia authorities ensured that the compensation could not exceed the costs incurred by the operators.

(108) The Commission notes that although the Complainant contested the parameter to calculate the compensation, it did not bring any element showing that the compensation could exceed the costs incurred by the operators. On the contrary, the Complainant argued that the considered amount was rather just a part of the preliminary expert estimate according to which the provable loss should be compensated to the carrier and should even be set at a higher level.

(109) Additionally, with regard to services provided in the Southern Moravia Region, the Commission notes that, apart from the compensations from the regional authorities, the operators did not receive any other advantages from the State or through State resources in the period of 2004-2005.

(110) Therefore, the Commission considers that the general principles governing the assessment of compatibility of the aid, as described above, are complied with in the case in hand.

(111) As a consequence, the Commission concludes that the aid is compatible with Article 73 of the Treaty.

7. **CONCLUSION**

(112) In the light of the legal assessment, the Commission finds that the Czech Republic has acted in breach of Article 88(3) of the EC Treaty, and therefore unlawfully granted aid under the aid scheme in question.

(113) The Commission considers that the aid granted to Bítešská, BK Bus, Březanská společnost, PSOTA, Tredos via the public service contracts for road transport in Southern Moravia is compatible with Article 73 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Czech Republic has implemented through the public service contracts for road transport in Southern Moravia with Bítešská dopravní společnost spol. s r.o., BK BUS s.r.o., Březanská dopravní společnost s.r.o., Znojemská dopravní společnost — PSOTA, s.r.o. and Tredos, spol. s r.o. is compatible with the common market.

([16]) See Commission Decisions: C 16/07 — Austria — Official support for *Postbus* in the *Lienz* district; C 31/07 — Ireland — State aid to Córas Iompair Éireann Bus Companies (Dublin Bus and Irish Bus); C 47/07 — Germany — DB Regio AG — Contrat de service public; C 41/08 — Denmark — Public service contract between the Ministry of Transport and Danske Statsbaner.

([17]) OJ C 297, 29.11.2005, p. 4.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 26 November 2008.

For the Commission
Antonio TAJANI
Vice-President