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 granted by Austria to the company *Postbus* in the *Lienz* district C 16/07 (ex NN 55/06)

(notified under document C(2008) 7034)

(Only the German text is authentic)

(Text with EEA relevance)

(2009/845/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 called on interested parties to submit their comments pursuant to the Articles cited above [1],

Whereas:

1. PROCEDURE

(1) By letters dated 2 August 2002 [2] and 23 August 2003 [3], a privately owned Austrian bus company filed a complaint with the Commission regarding alleged State aid granted in 2002 by the Tyrolean public transport authority (*Verkehrsverbund Tirol GmbH*, hereinafter: *Verkehrsverbund Tirol*) to its publicly owned competitor *Postbus AG* (hereinafter *Postbus*). By letter dated 14 July 2005 [4], the Commission requested information from Austria regarding this complaint. By letter dated 3 October 2005 [5], Austria provided the Commission with the information requested.

(2) By letter dated 30 May 2007 [6], the Commission informed Austria that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure in question.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*. The Commission invited third parties to submit their comments [7].

(4) Austria submitted its observations by letter dated 18 July 2007 [8].

(5) By letter dated 24 July 2007 [9] the complainant informed the Commission that it was no longer interested in pursuing the matter.

(6) The Commission received no comments from other third parties.

[1] OJ C 162, 14.7.2007, p. 19.
[2] Registered under Reference TREN (2002) A/63803.
[3] Registered under Reference TREN (2002) A/68846.
[4] Registered under Reference TREN (2005) D/113701.
[5] Registered under Reference TREN (2006) A/15295.
[6] Registered under Reference C (2007) 2209 final.
[7] Cf. footnote 1.
[8] Registered under Reference TREN (2007) A/38864.
[9] Registered under Reference TREN (2007) A/39395.

2. DETAILED DESCRIPTION OF THE AID

2.1. Measure under investigation

2.1.1. *Background*

(7) *Verkehrsverbund Tirol* is a publicly owned company governed by private law. Similar bodies exist in all other regions and are commonly referred to as *Verkehrsverbundgesellschaften*. These bodies are responsible for planning and coordinating bus transport within their respective region. According to the *Bundesgesetz über die Ordnung des öffentlichen Personennah- und Regionalverkehrs* (Federal act on the organisation of local and regional public passenger transport, hereafter: ÖPNRV-G), these bodies receive annual grants from the respective *Bundesland* in order to ensure adequate public passenger transport in the region.

(8) On 12 July 2002 *Verkehrsverbund Tirol* and *Postbus* agreed on a public service contract for public passenger transport on the bus routes numbered 5002, 5008, 5010, 5012, 5014, 5050 and 5052 in the district of *Lienz*.

(9) Under Austrian administrative law, a bus operator needs to hold a licence in order to be allowed to operate a bus route. The award of the licence is independent of the conclusion of a public service contract.

(10) *Postbus* already held the licences to operate the seven routes covered by the contract prior to the conclusion of the public service contract. *Postbus* had applied for the licences on its own initiative, without being sure of receiving compensation. Therefore, the routes in question are considered under Austrian legislation as being operated '*eigenwirtschaftlich*' (in the commercial interest). The distinction between *eigenwirtschaftlich* and *gemeinwirtschaftlich* (in the common interest) is important under Austrian public procurement rules, as only public service contracts for routes operated as *gemeinwirtschaftlich* are subject to public procurement rules. Therefore, the public service contract which is the object of the present decision was awarded without a public procurement procedure.

2.1.2. *Detailed description of the public service contract under investigation*

(11) The contract covers the provision of bus transport services by *Postbus* in return for remuneration. It entered into force retroactively on 1 January 2002 and was concluded for an indefinite period. Each of the parties has the right to terminate the contract subject to six months' notice as from December 2006.

(12) To calculate the remuneration, the contract distinguishes between *Bestellleistungen* and *Bestandsleistungen*.

(13) The contract defines *Bestellleistungen* as the core provision of bus transport services for which fixed compensation is paid. Part IV(3) of the contract provides that 204 807 km are accounted for by the *Bestellleistungen*. Part XIII of the contract provides that *Postbus* receives an annual payment of EUR 527 000, plus VAT. Payment is made in twelve instalments spread over the year.

(14) The contract defines *Bestandsleistungen* as the provision of bus transport services for which compensation is paid which is the sum of three different components. Part IV(3) of the contract provides that 952 761 km are accounted for by the *Bestandsleistungen*. Part X(2) fixes the payment for the *Bestandsleistungen* at EUR 1 690 000 for the year 2002. Part X(3) provides that this remuneration is made up as follows:

(a) compensation for interconnection (*Verbundabgeltung*), the amount of which is fixed each year for each route on the basis of passenger numbers;

(b) revenue from ticket sales, net of VAT, returned to *Postbus*;

(c) revenue from the compensation granted by the Federal Ministry for Health, Family Affairs and Youth for providing reduced fares for school pupils and apprentices under section 29 ÖPNRV-G and the contracts concluded between the Ministry and *Postbus* under sections 30(f) and 30(j) of the Familien Lasten Ausgleichs Gesetz (FLAG).

(15) For the first year of the contract, the *Verbundabgeltung* is fixed at EUR 1 690 000 minus the revenue from ticket sales and minus the compensation for fare obligations. At the time of concluding the contract, the parties did not yet know what revenue there would be from the compensation for fare obligations. The contract therefore does not fix the absolute amount of the *Verbundabgeltung*.

(16) The cost paid by *Verkehrsverbund Tirol* to *Postbus* for 2002 was therefore EUR 2 217 000 (including the proceeds returned from ticket sales). In return, *Postbus* was obliged to provide 1 157 568 km of bus services based on the timetables and routes set out in the contract. The average price paid per kilometre was EUR 1,92.

2.1.3. *Historical development of the Austrian system*

(17) The distinction between *Bestellleistungen* and *Bestandsleistungen* is primarily due to the historical development of the ÖPNRV-G, which lays down the arrangements for the organisation and funding of local public transport in the rural parts of Austria.

(18) Section 10(1) ÖPNRV-G provides that bus transport companies owned by the Austrian State, such as *Postbus*, can claim compensation for their operating losses on public transport (*Alteinnahmegarantie*) from the Federal Government up to 1 June 1999.

(19) For the period starting on 1 June 1999, the Federal Government will pay an amount equivalent to the sum paid each year under the *Alteinnahmegarantie* to the regional bodies responsible for the organisation of public transport, the *Verkehrsverbundgesellschaften*. The latter use these sums to commission bus transport services from bus companies. Before commissioning these services, the *Verkehrsverbundgesellschaften* have to plan the public transport in their region in accordance with sections 11, 20 and 31 ÖPNRV-G, which define the economic and quality-related criteria with which public transport must comply (section 10(2) ÖPNRV-G).

(20) As from 2001, the Federal Government will reduce the amounts it pays to the *Verkehrsverbundgesellschaften* by one fifth each year (section 10(3) ÖPNRV-G).

(21) Sections 14 et seq. ÖPNRV-G lay down the requirements for the setting-up and organisation of the *Verkehrsverbundgesellschaften*. In particular, section 19(1) ÖPNRV-G requires the *Verkehrsverbundgesellschaften* to replace the *Alteinnahmegarantie* system by a system of public service contracts within a period of five years starting in 1999.

2.1.4. *Justification of the price provided for in the public service contract*

(22) Prior to signing the public service contract, *Verkehrsverbund Tirol* used three different methods to verify whether the public service compensation provided for in the contract was justified. The three methods were: costs per kilometre (*Prüfung nach Kilometersätzen*), costs per cost item (*Prüfung nach Kostensätzen*) and costs according to the different cost categories (*Prüfung nach Einzelkostenpositionen*).

2.2. **Initial assessment by the Commission**

(23) In its decision to initiate the procedure, the Commission raised doubts as to whether the public service contract concluded between *Verkehrsverbund Tirol* and *Postbus* met the second of the so-called *Altmark* criteria ([10]). The four *Altmark* criteria being cumulative, it has not assessed in detail whether the third and fourth criteria are fulfilled, but concluded that the presence of State aid cannot be excluded.

(24) With respect to possible compatibility of such State aid with the common market, the decision to initiate the procedure considers that the aid may be compatible with the common market on the basis of Article 73 of the EC Treaty and Article 14 of Regulation (EEC) No 1191/69 of the Council 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 ([11]). In particular, the Commission considered that the amount of compensation paid to *Postbus* appeared not to exceed what was necessary to cover the costs incurred in the discharge of the public service obligations of the contract, taking into account the related receipts and a reasonable profit for discharging the obligations.

(25) However, the Commission considered that, since there was no public tender, and a direct competitor of *Postbus* alleged that *Postbus* was receiving overcompensation, the competitor in question and all other interested third parties should be given the opportunity to comment on the methods used by Austria to check costs and avoid overcompensation before taking a definitive view on whether *Postbus* was receiving overcompensation or not. On these grounds, the Commission raised doubts as to whether *Postbus* received overcompensation for providing a public service under a public service contract.

3. **COMMENTS FROM AUSTRIA**

(26) The comments of Austria concern:

(a) the relationship between the *Altmark* criteria and Regulation (EEC) No 1191/69;

(b) the application of the second *Altmark* criterion in the present case;

(c) the application of the third and fourth *Altmark* criteria in the present case, in particular the methods used to verify costs and avoid overcompensation;

(d) the compatibility of the public service contract with Regulation (EEC) No 1191/69.

Relationship between the Altmark criteria and Regulation (EEC) No 1191/69

(27) Austria considers that Article 73 of the EC Treaty and Regulation (EEC) No 1191/69, which is based on it, constitute a *lex specialis* to Article 87(1) of the EC Treaty. Therefore, whenever a public service contract meets the criteria set out in Article 14 of Regulation (EEC) No 1191/69, there is no State aid, and therefore no need to assess the public service contract in question under Article 87(1) of the EC Treaty and the *Altmark* criteria. Austria bases this interpretation on point 37 of the *Altmark* judgement, which states:

([10]) These criteria have been established by the ECJ in its judgement of 24 July 2003, *Altmark*, case C-280/00, ECR I-7747 to assess whether a public service compensation constitutes State aid or not.

([11]) OJ L 156, 28.6.1969, p. 1.

'The first point to examine is whether Regulation (EEC) No 1191/69 is applicable to the transport services at issue in the main proceedings. Only if that is not the case will the application of the general provisions of the Treaty on State aid to the subsidies at issue in the main proceedings have to be considered.'

3.1. **Application of the second Altmark criterion in the present case**

(28) Austria argues that even if Council Regulation (EEC) No 1191/69 does not address the existence of State aid, but merely its compatibility with the common market, the public service contract concluded between *Verkehrsverbund Tirol* and *Postbus* in any event meets the four *Altmark* criteria.

(29) As far as the second *Altmark* criterion is concerned, Austria explains that both the remuneration for the *Bestellleistungen* and the remuneration for the *Bestandsleistungen* have been established in advance in an objective and transparent manner. With respect to the *Bestellleistungen*, Austria explains that the contract is a net contract, whereby *Postbus* receives a fixed price for each bus kilometre driven of EUR 2,57/km ([12]). Therefore, the price had been fixed in advance, using the objective and transparent criterion of the 'price per km driven'.

(30) With respect to the *Bestandsleistungen*, Austria explains that the price had also been agreed in advance by the parties as a fixed price, namely EUR 1 690 000 for 952 761 km to be driven. What had not been fixed in advance was the exact split between the three components of payment, namely ticketing revenues, compensation for tariff obligations and compensation for integrated transport systems. Austria explains that the explanation lies in the very nature of the three components, two of which depend on the number of passengers transported, the third one being the difference between the total agreed price and the sum of the first two elements.

(31) Also in this regard, Austria concludes that the contract is a net contract, whereby *Postbus* receives a fixed price for each bus kilometre driven of EUR 1,77/km, and that therefore, the price had been fixed in advance, using the objective and transparent criterion of the 'price per km driven'.

([12]) EUR 527 000: 204 807 km = EUR 2,57 per km.

3.2. **Application of the third and the fourth Altmark criteria in the present case, in particular methods to verify costs and avoid overcompensation**

(32) Austria argues that *Verkehrsverbund Tirol* ruled out the possibility of overcompensation being paid to *Postbus* by checking the price paid to *Postbus* per kilometre against the industry average, using three different methods: a check per cost per kilometre; a check of costs per cost item; and a check of costs according to different cost categories.

(33) In its reply to the decision to initiate the procedure, Austria provided the Commission with further information regarding two of the methods used to check costs for providing transport services and avoid overcompensation, namely the checking of costs per cost item and the checking of costs according to different cost categories. It considers that no further explanation is necessary with regard to the checking of costs per kilometre ([13]).

(34) Austria considers that these three cost checks ensure compliance with both the third *Altmark* criterion (absence of overcompensation) and the fourth *Altmark* criterion (average, well-run undertaking).

3.2.1. *Check of costs per cost item*

(35) Through the method 'checking of costs per item', *Verkehrsverbund Tirol* compared the costs per item of *Postbus* with the average costs in the industry sector.

(36) Based on the average costs in the industry sector, *Postbus* should meet the following cost targets for the public service contract in the *Lienz* district:

Cost item	Cost
Personnel costs	EUR […] (*)
Costs for fuel and maintenance	EUR […]
Vehicle costs (depreciation)	EUR […]
Administrative costs	EUR […]
Total	EUR […]

(*) Confidential information.

(37) Austria provides the following detailed explanation for these cost items.

([13]) For the explanations given by Austria in this regard at the stage of the preliminary assessment, see points 98 and 99 of the decision to initiate the procedure.

3.2.1.1. Personnel costs

(38) Austria based the calculation of personnel costs on 54 290 driving hours (*Lenkerstunden*) for scheduled route operation. Austria clarified that this amount is based on the number of kilometres needed to operate according to the schedule including dwell-time, but excluding round-trips to terminal bus stops/garages, rest periods etc. According to Austria, at 21 km per hour *Verkehrsverbund Tirol* assumed a relatively high number of driven kilometres per hour ([14]), as the average for Austria is 16-18 km per hour.

(39) Austria stated that the gross hourly rate for a driving hour (including all duties, taxes, garage, maintenance, administration and additional personnel costs) is valued at EUR […]. This amount is composed as follows: the 2002 Austrian collective agreement for employees in private-law governed bus undertakings provided for a net average hourly rate of EUR 7,55. To this amount, one has to add as a first step surcharges for Sunday and holiday work; overtime payment; taxes and social security. If these additional costs are taken into consideration, the average hourly rate is EUR 16,30.

(40) On top of this hourly rate, there is an additional charge of approximately […] % for the costs of personnel for garage services, planning and administration. Taking into account these overheads, one hour of bus operation generates costs of EUR […].

(41) Multiplication of the annual number of driving hours by the average hourly rate results in total personnel costs of EUR […] ([15]).

3.2.1.2. Costs for fuel and maintenance

(42) Concerning the costs for fuel and maintenance, *Verkehrsverbund Tirol* assumes there will be a cost of EUR […] for every scheduled kilometre (1 157 568 km), which totals EUR […]. This amount includes all vehicle-related costs, except costs for financing, depreciation and controlling.

(43) Austria explains its calculation in detail. It is based on the assumption that, for the routes in the district of *Lienz*, four 15-metre buses with a fuel consumption of 45 l/100 km and twenty-one 12-metre buses with a fuel consumption of 36 l/100 km will be needed. The total estimated fuel consumption of this fleet is 478 000 litres. Based on a diesel price of EUR […]/litre, the total fuel costs are therefore EUR […].

(44) Maintenance costs are estimated at EUR […] per bus (personnel and material costs), totalling EUR […] for 25 buses. The costs for fuel and maintenance together equal EUR […].

(45) This is already more than the EUR […] that had been taken as a benchmark. Therefore, the Austrian authorities conclude that the cost item 'fuel and maintenance' is a very conservative estimate.

3.2.1.3. Costs for the purchase and depreciation of vehicles

(46) The costs for the purchase and depreciation of vehicles of EUR […] are based on the following assumptions:

(a) The bus routes are to be operated with four 15 m buses and twenty-one 12 m buses.

(b) The public service contract stipulates that the average age of the fleet shall not extend 6 years, and that at least 10 % of the fleet shall be renewed each year.

(c) The purchase price for a 12 m bus is EUR […]; the average annual return on capital is 5 %; and the amortisation period 8 years. Therefore, the annuity per vehicle is EUR […].

(d) However, as the contract allows for the use of vehicles for a period of 12 years, 1/3 of the fleet is used despite the fact that it is fully amortised. Therefore, the costs for purchase and depreciation of vehicles concern only 2/3 of the fleet, or 16 vehicles.

(47) Based on these assumptions, the annual costs for purchase and depreciation of vehicles are EUR […] ([16]).

3.2.1.4. Administrative costs

(48) Concerning the administrative costs of EUR […], *Verkehrsverbund Tirol* assumed […] % of all the other costs per cost item for its calculations ([17]). This amount covers the office rental fee and office equipment.

([14]) The figure of 21 km can be obtained by dividing the total number of kilometres by the number of driving hours: 1 157 568 km: 54 290 hours = 21,32 km per hour.

([15]) 54 290 hours × […] EUR/hour = […] EUR.

([16]) EUR […].

([17]) EUR […] (all other costs per item) × […] % = EUR […].

3.2.2. *Check of costs according to the different cost categories*

(49) The check of costs according to the different cost categories is a calculation of plausibility of the different cost categories. *Verkehrsverbund Tirol* has established the following costs as a benchmark:

Cost categories	Cost
Driver costs	EUR […]
Personnel costs (other than driver costs)	EUR […]
Vehicle costs (depreciation)	EUR […]
Fuel costs	EUR […]
Tyre costs	EUR […]
Other costs (repairs, maintenance, etc.)	EUR […]
Administrative costs	EUR […]
Total	EUR […]

(50) These benchmarks are again explained in more detail.

3.2.2.1. Driver costs

(51) *Verkehrsverbund Tirol* based the calculation of driver costs on 28 drivers which, according to Austria, is a low base figure for 25 buses, if holidays, non-working periods due to sick leave etc. are taken into account. Although the Austrian collective agreement for employees in private-law governed bus undertakings provides for an annual gross wage of EUR […] (without any surcharges or taxes), *Verkehrsverbund Tirol* assumed only EUR […]. Hence, the personnel costs amount to EUR […].

3.2.2.2. Personnel costs

(52) Concerning the other personnel costs for the personnel in administration, planning and garage services, *Verkehrsverbund Tirol* assumed an annual gross wage of EUR […] per employee. The number of employees was set at 8. Thus, other personnel costs account for EUR […].

3.2.2.3. Vehicle costs

(53) The vehicle costs are based on the same assumption as used for the check of costs per item.

3.2.2.4. Fuel costs

(54) Concerning the fuel costs, *Verkehrsverbund Tirol* based the calculation on a fuel consumption of 465 000 litres. The average price for fuel was assumed to be EUR […] per litre. Therefore, the overall fuel costs are EUR […] ([17]).

3.2.2.5. Tyre costs

(55) With regard to tyre costs, *Verkehrsverbund Tirol* assumed a purchase price of EUR […] for 2 pairs of tyres every year for 25 buses, resulting in costs of EUR […].

3.2.2.6. Other costs

(56) The material costs for vehicles, maintenance, insurance, tax etc., are estimated to be about EUR […] per year. This includes insurance for every vehicle at about EUR […] per year and material costs of EUR […] per kilometre driven. Maintenance for 25 buses totals EUR […] per year. The rent for garage space with a surface area of 1 500 m^2 is EUR […] per year.

3.2.2.7. Administrative costs

(57) The administrative costs are estimated to be about EUR […] per month, hence EUR […] per year.

3.2.3. *Austria's conclusion on the third and fourth Altmark criteria*

(58) Austria concludes that *Verkehrsverbund Tirol* has assessed the price paid to *Postbus* against adequate, realistic and conservative estimates of how much an average bus undertaking would have spent for executing a comparable contract. Austria underlines that the price paid to *Postbus*, namely EUR 2 217 000, is well within the range between the two cost checks, which give results of EUR 2 224 965 and EUR 2 205 619 respectively.

(59) Therefore, Austria considers that the likelihood of over-compensation being paid to *Postbus* can be ruled out, and that the price paid to *Postbus* corresponds to the price that an average, well-run undertaking adequately equipped with means of transport would have demanded to provide the transport services in question.

3.3. **Compatibility of the public service contract with Regulation (EEC) No 1191/69**

(60) For the reasons set out in section 3.3, Austria considers that the public service contract also fully complies with Article 14 of Regulation (EEC) No 1191/69.

4. LEGAL ASSESSMENT

(61) First of all, Austria's argument that Article 87(1) of the EC Treaty does not apply to a public service contract covered by Regulation (EEC) No 1191/69 must be rejected.

(62) Amongst other things, Regulation (EEC) No 1191/69 enables certain aid granted by Member States in the form of compensation for the imposition of a public service obligation to be deemed to be compatible with the common market and exempts Member States from the requirement in Article 88(3) to notify the aid to the Commission before it is granted.

(63) However, the State aid rules in Regulation (EEC) No 1191/69 apply only to measures which constitute State aid within the meaning of Article 87(1) of the EC Treaty. In other words, Regulation (EEC) No 1191/69 is concerned with compatibility.

(64) It is therefore necessary, in the first instance, to consider whether the payments provided for in the contract between *Postbus* and *Verkehrsverbund Tirol* constitute State aid within the meaning of Article 87(1) of the EC Treaty. If they do, it is necessary, in the second instance, to consider whether they are compatible with the common market.

4.1. **Existence of aid**

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

(66) Bus operators such as *Postbus* are performing an economic activity, namely the transportation of passengers in return for payment; they are therefore undertakings within the meaning of Article 87(1) of the EC Treaty.

(67) The subsidies to *Postbus* are paid by *Verkehrsverbund Tirol*, which is financed by the *Land* of Tyrol and the Federal Government. These sums are therefore paid from State resources.

(68) The next question is whether *Postbus* gains a selective economic advantage through the public service contract which is the subject of this decision. In its judgment in *Altmark Trans* [18] the Court set out the criteria which must be applied when assessing whether compensation has been given for a public service:

'… public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. […]:'

According to the Court, that is the case if the following four criteria have been met:

'— first, the recipient undertaking must be actually required to discharge public service obligations and those obligations must have been clearly defined;

— second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

— third, 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;

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

4.1.1. *Recipient undertaking actually required to discharge clearly defined public service obligations*

(69) Article 2(1) of Regulation (EEC) No 1191/69 defines public service obligations as follows: 'Public service obligations' means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions'.

[18] Case C 280/00, Altmark Trans [2003] ECR I-7747, as referred to above.

(70) The contract concluded between *Postbus* and *Verkehrsverbund Tirol* formalises specific requirements which are imposed on the service provider to ensure that a balanced transport network exists given the rural nature, the low population density and the geographical characteristics of the areas served. These factors are likely to discourage an operator from offering such services on a strictly commercial basis. *Postbus* is obliged to offer such services and to propose the relevant timetables; the routes on which the services must be offered are clearly set out in a contractual manner as specified in point 2 of the contract.

(71) It is therefore clear from the contract concluded between *Postbus* and *Verkehrsverbund Tirol* that *Postbus* is actually responsible for the public transport service in the district of *Lienz*. The first *Altmark* criterion is therefore met.

4.1.2. *Parameters on the basis of which the compensation is calculated established beforehand in an objective and transparent manner*

(72) Secondly, it must be determined whether the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.

(73) The contract distinguishes between payment for *Bestellleistungen* and payment for *Bestandsleistungen*. As explained by Austria in its reply to the decision opening the formal investigation procedure, the contract provides for remuneration per kilometre of transport supplied for both categories of transport service. The price is EUR 2,57/km for *Bestellleistungen* and EUR 1,77/km for *Bestandsleistungen*. The only difference between the *Bestandsleistungen* and the *Bestellleistungen* is that one of the components of the compensation is adjusted so that the sum of EUR 1,77/km is systematically complied with.

(74) It should be noted that it is common practice in bus transport contracts to fix the compensation on the basis of a price per kilometre driven and the total number of kilometres driven, in particular where the public authority responsible for the organisation of public transport bears the risk as regards ticket sales revenue. Having re-examined the content of the contracts on the basis of the additional explanations given by Austria, the Commission notes that, contrary to the findings of its preliminary analysis in points 64 to 71 of the decision to open the formal investigation procedure, the contract concluded between *Postbus* and *Verkehrsverbund Tirol* is a contract of this type.

(75) Fixing the compensation on the basis of a price per kilometre to be driven and the total number of kilometres to be driven meets the second *Altmark* criterion since the price per kilometre and the total number of kilometres to be driven are established beforehand in an objective and transparent manner.

(76) The second *Altmark* criterion is therefore met.

4.1.3. *No overcompensation*

(77) On the basis of paragraphs 96 to 102 of the decision to open the formal investigation procedure, the Commission considers that the method which *Verkehrsverbund Tirol* has chosen to ensure that there is no overcompensation, namely the use of three different ways of comparing the price asked by the bus undertaking with the averages found in the sector concerned, can be accepted as proof that there is no overcompensation.

(78) In the present case, the Commission considers that since there was no public tender, and that a direct competitor of *Postbus* stated that Postbus received overcompensation, the competitor in question and all interested third parties should be given the opportunity to comment on the methods used by Austria to check costs before it can be decided with certainty whether or not *Postbus* is receiving overcompensation.

(79) It should firstly be noted that the Commission has been informed by the complainant that the latter is no longer interested in the present case. Secondly, no third party has challenged the finding that there is no overcompensation.

(80) The Commission furthermore considers that Austria has provided additional information which shows that the price paid by *Verkehrsverbund Tirol* to *Postbus* is fair and adequate given the average costs observed in the sector of the industry in question and the experience of public authorities. Sections 3.3.1 to 3.3.3 above summarise the methods of calculation used and the resulting comparisons and conclusions. More generally, a method such as that in the case in question which systematically compares the compensation with the costs in the sector a posteriori and in three different ways ensures that there is no overcompensation. If such a comparison were to lead to the finding that there is overcompensation, Austria would have to demand its recovery.

(81) On this basis, it can be concluded that *Postbus* is not receiving overcompensation for the performance of the public service contract which is the subject of this decision and that the third *Altmark* criterion is therefore met.

4.1.4. *Price corresponding to the cost in an average undertaking that is well-managed and adequately furnished with means of transport*

(82) It still has to be checked whether the price paid by *Verkehrsverbund Tirol* to *Postbus* corresponds to the cost in an average undertaking that is well-managed and is adequately furnished with means of transport. To check whether this criterion is met, the three components in question should be analysed separately.

4.1.4.1. Costs in an average undertaking

(83) In this regard, it should firstly be noted that Austria has based its checks on standard parameters, the averages found in the sector of the industry in question. They can therefore be regarded as reflecting the average in the sector in question.

(84) Consequently, the costs in *Postbus* correspond to the costs in an average Austrian undertaking.

4.1.4.2. Costs in a well-managed undertaking

(85) The next question is whether the costs in *Postbus* also correspond to the costs in a well-managed undertaking. In the bus transport sector, which has been dominated by monopolies and in which contracts have been awarded without tenders for a long time, an undertaking operating in the market is not necessarily a well-managed undertaking.

(86) In this regard, it should firstly be noted that Austria has not explained how these parameters also represent the average in a well-managed undertaking. By way of example, the Commission considers that Austria could have taken as a basis the average costs in undertakings which have won a significant number of tenders in the sector in the last few years.

(87) It should also be noted that there is a difference of EUR 0,80 per km between the price for the *Bestellleistungen* and the price for the *Bestandsleistungen*. This seems to imply that *Postbus* has a certain margin for improving its efficiency as regards the *Bestellleistungen*.

(88) It must be concluded that Austria has not demonstrated that the price paid by *Verkehrsverbund Tirol* to *Postbus* corresponds to the cost in a well-managed undertaking. The fourth *Altmark* criterion is therefore not met.

4.1.4.3. Conclusion as regards compliance with the Altmark criteria

(89) As the four criteria are cumulative, the fact that one of the four criteria has not been met leads the Commission automatically to conclude that the payments in question should be regarded as granting a selective economic advantage to the undertaking *Postbus*.

4.1.5. *Distortion of competition and effects on trade*

(90) The undertaking *Postbus* operates in the bus transport market throughout Austria and has a large share of the market. Giving an economic advantage to this undertaking could therefore distort competition.

(91) In the case in hand, competition could in particular be distorted by the fact that the public funding is granted to the undertaking which holds the bus transport licence in the district in question. Public financing might therefore prevent other firms from securing licences for operating public transport routes, since it strengthens the position of the recipient undertakings and allows them to offer more attractive business terms when they come to renew their licences.

(92) With regard to the potential of the measure in question to affect trade between the Member States, it should firstly be noted that the local and regional public transport market is open to competition in Austria and other Member States in that there is no national monopoly for one or more companies in this market.

(93) In this context, attention is drawn to paragraphs 77 et seq. of the judgment in *Altmark Trans*, in which the Court ruled 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, as referred to above, paragraph 40).

[…]

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.'

(94) It therefore cannot be ruled out that undertakings established in other Member States have less chance of providing their transport services in the Austrian market as a result of the measure in question.

(95) Consequently, the public funding granted by *Verkehrsverbund Tirol* to *Postbus* could distort competition and affect trade between Member States.

4.1.6. *Conclusion*

(96) As the fourth *Altmark* criterion is not met but all the other conditions of Article 87(1) of the EC Treaty are met, the payments in question constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(97) It is therefore necessary to examine whether this aid can be considered compatible with the common market.

4.2. **Compatibility of the aid**

(98) Article 73 of the EC Treaty provides for overland transport that 'aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

4.2.1. *The Altmark case law on the applicability of Article 73*

(99) According to the Court, 'Article 77 of the EC Treaty (now Article 73 EC) provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty. … Following the adoption of Regulation No 1107/70 on the granting of aids for transport by rail, road and inland waterway, Member States are no longer authorised to rely on Article 77 of the Treaty, which provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty, outside the cases referred to in secondary Community legislation. To the extent that Regulation (EEC) No 1191/69 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway does not apply and the subsidies at issue fall within Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC), Regulation (EEC) No 1107/70 lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 77 of the Treaty.' ([19])

(100) The question therefore is whether Regulation (EEC) No 1191/69 or Regulation (EEC) No 1107/70 contain rules on the compatibility of State aid which are applicable in the present case.

4.2.2. *Compatibility on the basis of Regulation (EEC) No 1191/69*

4.2.2.1. Scope of Regulation (EEC) No 1191/69

(101) The scope of Regulation (EEC) No 1191/69 is defined as follows in Article 1(1) and (2) of the Regulation:

'1. This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway. Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

2. For the purpose of this Regulation:

— "urban and suburban services" means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas,

— "regional services" means transport services operated to meet the transport needs of a region.'

(102) Austria has availed itself of the option of excluding certain undertakings from the scope of the Regulation: according to Article 2 of the *Privatbahnunterstützungsgesetz 1998* (1998 Private Railways Support Act) ([20]), undertakings which operate exclusively in the field of urban or suburban services are excluded from the scope of Regulation (EEC) No 1191/69.

(103) However, in the present case the services concerned are regional services. Regulation (EEC) No 1191/69 does therefore apply to them.

4.2.2.2. The scheme chosen by Austria

(104) Article 1(3) to (5) of Regulation (EEC) No 1191/69 describe the two different schemes between which Member States can choose as regards the organisation and financing of public transport, namely the scheme under which public service obligations are imposed and the contractual scheme.

([19]) Case C 280/00, *Altmark Trans GmbH* [2003] ECR I-7747, paragraphs 101, 106, 107, Regulation (EEC) No 1107/70 of the Council (OJ L 130, 15.6.1970, p. 1).

([20]) Bundesgesetzblatt I 1994/519.

'3. The competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

4. In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking. The conditions and details of operation of such contracts are laid down in Section V.

5. However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV. Where a transport undertaking not only operates services subject to public service obligations but also engages in other activities, the public services must be operated as separate divisions meeting at least the following conditions:

(a) the operating accounts corresponding to each of these activities shall be separate and the proportion of the assets pertaining to each shall be used in accordance with the accounting rules in force;

(b) expenditure shall be balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.'

(105) Austria has opted for the contractual scheme (section 19 ÖPNRV-G). Consequently, the provisions applicable to the measures in question are those in Section V of Regulation (EEC) No 1191/69.

4.2.2.3. Application of Section V of Regulation (EEC) No 1191/69

(106) Section V of Regulation (EEC) No 1191/69 consists of a single article, Article 14, which provides:

'1. A "public service contract" shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services.

A public service contract may cover notably:

— transport services satisfying fixed standards of continuity, regularity, capacity and quality,

— additional transport services,

— transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes,

— adjustments of services to actual requirements.

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

3. Those assets involved in the provision of transport services which are the subject of a public service contract may belong to the undertaking or be placed at its disposal.

4. Any undertaking which intends to discontinue or make substantial modifications to a transport service which it provides to the public on a continuous and regular basis and which is not covered by the contract system or the public service obligation shall notify the competent authorities of the Member State thereof at least three months in advance. The competent authorities may decide to waive such notification. This provision shall not affect other national procedures applicable as regards entitlement to terminate or modify transport services.

5. After receiving the information referred to in paragraph 4 the competent authorities may insist on the maintenance of the service concerned for up to one year from the date of notification and they shall inform the undertaking at least one month before the expiry of the notification. They may also take the initiative of negotiating the establishment or modification of such a transport service.

6. Expenditure arising for transport undertakings from the obligations referred to in paragraph 5 shall be compensated in accordance with the common procedures laid down in Sections II, III and IV'.

(107) The contract concluded between *Postbus* and *Verkehrsverbund Tirol* is a contract concluded between a competent authority of a Member State and a transport undertaking in order to provide the public with adequate transport services.

(108) This contract includes in particular: transport services satisfying fixed standards of continuity, regularity, capacity and quality; transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger; adjustments of services to actual requirements.

(109) This contract may therefore be considered to be a public service contract within the meaning of Article 14 of Regulation (EEC) No 1191/69.

(110) It should be noted that both the intended purpose (to provide the public with adequate transport services) and the content of the public service contracts ('fixed standards of continuity, regularity, capacity and quality', determination of fares, conditions of service 'for certain categories of passenger or on certain routes', 'adjustment of services to actual requirements' etc.) do not differ from those which may be the subject of public service obligations imposed by the State or public bodies. However, it has already been explained that compensation for such services constitutes aid to the provider.

(111) In this respect, it should firstly be noted that the legislator's aim 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' as referred to 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 State aid within the meaning of Article 87(1) of the Treaty. If the content of contracts can be covered by the concept in Article 73 of the EC Treaty of 'obligations inherent in the concept of public services', the type of instrument, a contract and not a unilaterally imposed obligation, should not per se prevent aid which might be contained in the price from being deemed to be compatible. The decisive factor when determining the nature of a service, whether imposed by the State or approved by the parties to a contract, as a public service obligation is its content and not the form in which it originates ([21]). It can therefore be concluded that there is no legal obstacle to aid included in the cost of services provided for by a public service contract being deemed by the Commission to be compatible with the common market. It should be noted that this solution was also chosen by the co-legislators in the new 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 ([22]). However, Article 12 of that Regulation stipulates that it does not enter into force until 1 December 2009. It is therefore not applicable to the contract in question which has been concluded before the Regulation enters into force.

(112) In the absence of specific conditions regarding compatibility in Regulation (EEC) No 1191/69, the Commission considers that the general principles which flow from the Treaty, the case-law and the decision-making practice in other fields should apply when determining whether such aid is compatible.

(113) The Commission provided a general summary of those principles in part 2,4 of the above-mentioned Framework ([23]). As regards the compatibility of the aid included in the cost paid by a public authority to a public service provider, paragraph 14 of the Framework provides:

'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.'

(114) The payments from *Verkehrsverbund Tirol* to *Postbus* must therefore be deemed to be compatible with the common market if they satisfy these requirements.

(115) These requirements correspond very precisely to the third *Altmark* criterion which – as stated above – has been met in the case in question.

([21]) See the Court judgment in Case C 280/00, *Altmark Trans*, concerning a German public service contract [2003] ECR I-7747. This did not prevent the Court from assessing whether or not aid was involved on the basis of the content and not the type of instrument; See also 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 service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67), which also disregards the type of instrument.

([22]) OJ L 315, 3.12.2007, p. 1.

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

(116) It can therefore be concluded that the State aid granted by *Verkehrsverbund Tirol* to *Postbus* in the framework of the public service obligation is compatible with the common market on the basis of Article 14 of Regulation (EEC) No 1191/69.

4.3. **No exceptions to notification obligation**

(117) Austria considers that, on the basis of Article 17(2) of Regulation (EEC) No 1191/69, the public service contract between *Verkehrsverbund Tirol* and *Postbus* is exempt from compulsory notification under Article 88(3) of the EC Treaty.

(118) Article 17(2) of Regulation (EEC) No 1191/69 states that 'compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community'.

(119) The question therefore is whether the payments which *Verkehrsverbund Tirol* makes under the public service contract with *Postbus* constitute compensation within the meaning of Article 17(2) of Regulation (EEC) No 1191/69.

In the above-mentioned judgment in *Danske Busvognmænd*, the Court of First Instance of the European Communities considered that 'the contractual relationships established following a tender procedure between the transport undertaking and the competent authority include, by virtue of Article 14(1) and (2) of Regulation (EEC) No 1191/69, a specific financing scheme which leaves no room for compensation according to the methods laid down in Sections II, III and IV of that Regulation' ([24]).

(120) It emerges from this judgment that the concept of 'public service compensation' within the meaning of Article 17(2) of Regulation (EEC) No 1191/69 must be interpreted in a very narrow manner. It therefore covers only compensation for public service obligations *imposed* unilaterally on an undertaking pursuant to Article 2 of the Regulation which are calculated using the method described in Articles 10 to 13 of the Regulation and which do not have to be notified to the Commission under the procedure provided for in Article 88(3) of the EC Treaty.

(121) However, payments provided for in a transport services contract based on public service oblligations within the meaning of Article 14 of Regulation (EEC) No 1191/69 do not constitute compensation within the meaning of Article 17(2) of the Regulation.

(122) Payments provided for in a transport services contract based on a public service contract within the meaning of Article 14 of Regulation (EEC) No 1191/69, such as in the contract between *Verkehrsverbund Tirol* and *Postbus*, are therefore not exempt from the notification requirement provided for in Article 88(3) of the EC Treaty. Their compatibility therefore has to be assessed by the Commission.

5. **CONCLUSION**

(123) Austria has unlawfully implemented the public service contract between *Verkehrsverbund Tirol* and *Postbus* which is the subject of this Decision in violation of Article 88(3) of the Treaty. However, the State aid provided for in that contract can be deemed compatible therewith on the basis of Article 73 of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Austria to *Postbus* under the contract concluded on 12 July 2002 with *Verkehrsverbund Tirol* is compatible with the common market subject to the conditions and terms set out in Article 2.

Article 2

Austria shall each year compare the compensation payment with the average costs as determined in the sector on the basis of the methods set out in section 3.3. of this Decision and shall demand repayment of any overcompensation paid.

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels, 26 November 2008.

For the Commission
Antonio TAJANI
Vice-President

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