COMMISSION DECISION (EU) 2015/635

of 15 October 2014

on State aid SA.20580 (C 31/07) (ex NN 17/07) implemented by Ireland for Córas Iompair Éireann Bus Companies (Dublin Bus and Irish Bus)

(notified under document number C(2014) 7275)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty, in respect of the aid C 31/07 (ex NN 17/07) ([2]),

Having called on interested parties to submit their comments pursuant to the provision(s) cited above, and having regard to their comments,

Whereas:

1. PROCEDURE

(1) Following a complaint and subsequent extensive correspondence between the Commission and the complainant, and between the Commission and the Irish authorities, the Commission informed Ireland on 18 July 2007 that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of alleged unlawful aid granted to the *Córas Iompair Éireann* (Irish Transport Board ('CIÉ')) bus companies *Bus Éireann* (also known as 'Irish Bus') ([3]) and *Dublin Bus* (also known as 'Bus Átha Cliath') by the Irish government in the form of grants under the National Development Plans and annual operating grants (the 'Opening Decision').

(2) On 31 October 2007, the Irish authorities submitted their comments on the Opening Decision.

(3) The Opening Decision was published in the *Official Journal of the European Union* ([4]). The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received comments from 12 interested parties. It forwarded those comments to Ireland who was given the opportunity to react; their comments were received by letter dated 26 February 2008.

(5) By letter of 24 April 2008, the Irish authorities submitted to the Commission a copy of the Dublin Transport Authority Act 2008, which had recently been published.

(6) By e-mail of 12 February 2009, the Irish authorities submitted to the Commission a copy of the *Cost and Efficiency Review of Dublin Bus and Bus Éireann*.

(7) On 25 March 2009, a videoconference took place at the request of the Irish authorities. That meeting was followed by the dispatch of additional information by the Irish authorities, as requested by the Commission, by letter dated 30 April 2009.

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

([2]) OJ C 217, 15.9.2007, p. 44.

([3]) Bus Éireann was referred to as Irish Bus in the Opening Decision. However, Bus Éireann is used throughout this Decision as this is the name of the company in common usage and the name that the company uses in its branding.

([4]) See footnote 2.

(8) By letter of 19 January 2010, the Irish authorities submitted to the Commission a copy of the public service contract concluded between the National Transport Authority and Dublin Bus on 1 December 2009.

(9) As Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([5]) entered into force on 3 December 2009, the Commission requested the Irish authorities and the interested parties, by letters and e-mails dated 30 March 2010, to provide their observations on the compatibility of the measures in question with that new regulation. By letter of 25 May 2010, the Commission received observations from the Irish authorities. The Commission also received observations from three of the interested parties.

(10) On 14 February 2011, the Commission requested further information from Ireland, which the Irish authorities provided by letter of 15 April 2011.

(11) On 19 September 2011, the Commission requested further information from the Irish authorities. At the request of the Irish authorities, a teleconference took place on 14 October 2011. That meeting was followed by the dispatch of additional information by the Irish authorities by letter dated 9 November 2011.

(12) On 13 September 2012, a meeting took place with the Irish authorities in Dublin at the request of the Commission. That meeting was followed by the Commission requesting further information from the Irish authorities by e-mail of 19 September 2012, to which Ireland replied by letter of 23 November 2012.

(13) On 21 February 2014, the Commission requested further information from Ireland, which the Irish authorities provided by letter of 15 May 2014.

2. **THE PARTIES**

2.1. **The complainant**

(14) The complainant, the Coach Tourism and Transport Council, is the representative body for independent private transport companies that operate transport services (including long distance national and international scheduled services, commuter, rural and urban transport services, school transport services, incoming tourism, outbound tourism and general hire) in Ireland on a commercial basis.

2.2. **The beneficiaries**

(15) The recipients of the alleged unlawful State aid are Bus Éireann and Dublin Bus. These bus operators are limited companies, 100 % owned by CIÉ ([6]).

2.2.1. *Bus Éireann*

(16) Bus Éireann provides bus services throughout Ireland, with the exception of Dublin city services, using its own and subcontractor resources. The bus services provided include long distance 'Expressway' bus services, urban, suburban, regional city and town bus services, Eurolines international coach services, school transport services and ancillary services, such as coach and bus hire, day tours, vehicle testing, contract maintenance, and parcel delivery.

(17) The school transport services are operated on behalf of the Department of Education and Skills ([7]).

2.2.2. *Dublin Bus*

(18) The primary activity of Dublin Bus is providing urban and suburban bus services for the Dublin Metropolitan Area (including Dublin city and county as well as contiguous areas). In addition, Dublin Bus is engaged in three areas of commercial activities: sightseeing tours, Airlink Airport Express and bus hire/special events.

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

([6]) CIÉ is a State owned statutory corporation, which had been set up by the Transport Act, 1950. The Transport Act, 1950 and Transport Act, 1958 set out the general duties of CIÉ and the obligations required. Under the terms of the Transport (Re-organisation of CIÉ) Act, 1986 CIÉ had been requested to form for operational purposes three limited liability companies: Irish Rail, Bus Éireann and Dublin Bus.

([7]) Until 2010, the department was named the *Department of Education and Science*.

3. NATIONAL LEGAL FRAMEWORK COVERING THE MEASURES

3.1. **Transport Acts**

(19) Section 15(1) of the Transport Act, 1950, first imposed on CIÉ as a general duty 'to provide or secure or promote the provision of an efficient, economical, convenient and properly integrated system of public transport' for passengers by road taking into account the safety of operation and the encouragement of national economic development.

(20) The section of the Transport Act, 1950, mentioned in the previous recital was repealed by the Transport Act, 1958, whose Section 7 provides: 'It shall be the general duty of the Board [CIÉ] to provide reasonable, efficient and economical transport services with due regard to safety of operation, the encouragement of national economic development and the maintenance of reasonable conditions of employment for its employees.'.

(21) The Transport (Re-organisation of CIÉ) Act, 1986, defines the principal objectives and duties of Bus Éireann and Dublin Bus. Section 8(2) of that Act provides that 'the principal object of the Irish bus company shall be stated in its memorandum of association to be to provide, within the State and between the State and places outside the State, a passenger service by road, except in so far as such a service is provided by the Dublin bus company, and to provide ancillary services and for those purposes to exercise functions in that behalf conferred on the Board [CIÉ] by the Act of 1950 or any other enactment'. Section 8(3) of that Act specifies that '[t]he principal object of the Dublin bus company shall be stated in its memorandum of association to be to provide a passenger service by road for the city and county of Dublin and contiguous areas and to provide ancillary services, within the State and between the State and places outside the State, and for those purposes to exercise functions in that behalf conferred on the Board by the Act of 1950 or any other enactment'. In addition, according to Section 8(10) of the Transport (Re-organisation of CIÉ) Act, 1986, CIÉ and its bus companies must take into account their social role and the need to maintain public transport services to the maximum extent possible within the available financial resources.

(22) The Irish authorities further explained that the standard journey fares (including the adult standard journey fares on all categories of services and school child fares on city services) ([8]) charged by Dublin Bus and Bus Éireann are subject to the control of the Minister of Transport in terms of the maximum fares that can be charged. Neither bus operator is permitted to increase those fares without the prior consent of the Department of Transport. Fares charged by private operators are not subject to any notification or control procedures.

(23) Since 10 January 2001, both CIÉ bus operators are required by a Ministerial direction ([9]) to notify to the Department of Transport proposed new services or proposed changes to existing services at least four weeks prior to their introduction. Such notification by CIÉ bus operators must be supported by full details of the services proposed. Where the Department of Transport determines that proposed services would conflict with an existing licensed passenger road service, CIÉ companies are required to formally seek the consent of the Minister of Transport under Section 25 of the Transport Act, 1958.

3.2. **Memoranda of Understanding**

(24) From 2003 to 2009, the payment of compensation to Dublin Bus and Bus Éireann was the subject of annual Memoranda of Understanding with both companies. The Irish authorities explained that those Memoranda of Understanding identify the quality (including customer service quality, cleanliness, bus age, accessibility, etc.) and quantity (including number of buses, operated kilometres, customers carried, etc.) of services to be provided by each of the companies in return for the Exchequer payments. Furthermore, the financial and operational requirements and monitoring and reporting arrangements are regulated by those Memoranda of Understanding.

([8]) Irish Competition Authority Report on bus and rail passenger transport sector pursuant to Section 11 of the Competition act 1991.
([9]) According to the Article 26(1) of the Transport (Re-organisation of CIÉ) Act, 1986, the Minister may give the CIÉ a direction in writing to the policy in relation to the functions of the CIÉ and the companies.

(25) From 2005 to 2008, payment of a fixed portion of the subsidy for each of the operating companies was conditional on meeting certain performance criteria laid down in the Memoranda of Understanding.

3.3. **National Development Plans**

(26) The National Development Plans cover all sectors of the economy and have as their main objectives the improvement of the Irish economic and social infrastructure. The activities of the National Development Plans are financed through public, private and Union funds ([10]). The National Development Plans examined by this Decision are for the periods 2000-06 and 2007-13. The National Development Plan 2007-13 was discontinued in 2011 and replaced by the Infrastructure and Capital Investment Plan 2012-16.

3.4. **National Transport Authority and new public service contracts**

(27) On 14 April 2008, the Irish authorities published the Dublin Transport Authority Act 2008 to 'facilitate the establishment of a new Transport Authority with overall responsibility for coordinating transport and traffic management, and allocating capital and current funding for public transport in the Greater Dublin Area'. The 2009 Public Transport Regulation Act later renamed the new authority as the National Transport Authority. The new authority took over the regulation of public bus passenger services for the whole country.

(28) Section 48(1)(b) of the Dublin Transport Authority Act 2008 states that 'Where the [National Transport] Authority proposes to secure the provision of public passenger transport services […] it shall […] do so in accordance with a public transport services contract.'.

(29) On 1 December 2009, the National Transport Authority signed two public service contracts pursuant to Regulation (EC) No 1370/2007, concerning compensation for public service obligations ('PSO's), for a period of five years. One contract was with Dublin Bus relating to services in the Greater Dublin Area, and the other with Bus Éireann relating to services in the rest of the country. Simultaneously, the aforementioned Memoranda of Understanding (see Section 3.2) were discontinued.

(30) Since the Opening Decision does not cover those public service contracts, the examination of the annual operating compensation granted by Ireland to Dublin Bus and Bus Éireann for urban, suburban and regional bus services in this Decision is limited to period before 1 December 2009, the date on which those contracts began to govern those services.

(31) The Irish authorities, in a letter to the Commission of 23 November 2012, stipulated that '[…] Capital Grants paid to Dublin Bus and Bus Éireann including grants for new buses […] have been made under the provisions of the Dublin Transport Authority Act 2008. These payments would arise under Section 45 of that Act which allows the NTA to fund public transport infrastructure and/or under Section 49 which provides for funding of public transport services contracts'.

(32) According to Section 45(1) of the Dublin Transport Authority Act 2008 'The [National Transport] Authority may, subject to such conditions as it sees fit, make grants to public transport authorities or third parties out of moneys provided by the Oireachtas [Irish National Parliament], in respect of the securing of public transport infrastructure assigned to such authorities or third parties […]'.

(33) According to Section 49(1) of the Dublin Transport Authority Act 2008 'Where the [National Transport] Authority enters into a public transport services contract under Section 48, it may, subject to such conditions as

([10]) The Commission approved by Decision of 7 December 2000 (SG (2000) D/109196) the operational programme for Economic and Social Infrastructure forming part of the Community Support Framework for Community structural assistance in the Border, Midland and Western region under Objective 1 and the Southern and Eastern region qualifying for transitional support under Objective 1 in Ireland. The total assistance from the Structural Funds granted under this operational programme amounts to EUR 854,8 million. The required national participation (from the public sector) amounts to EUR 624,7 million.

it sees fit, make payments to the public transport operator concerned out of moneys provided by the Oireachtas or otherwise, in respect of the provision of public passenger transport services referred to in that contract.'.

(34) In the light of recitals 31 to 33, and since the Opening Decision does not cover grants made under the Dublin Transport Authority Act 2008, the relevant period for the examination of the funding for new buses and for infrastructure by Ireland to these two companies in this Decision is limited to the period before 1 December 2009, the date on which the part of that Act which contains the sections of that Act mentioned in recitals 31 to 33, came into force ([11]).

3.5. **Agreements concerning the School Transport Scheme**

(35) Bus Éireann operates the School Transport Scheme on behalf of the Department of Education and Skills.

(36) The scheme has been operated by CIÉ since 1967, and since the Transport (Re-organisation of CIÉ) Act, 1986 ([12]), by Bus Éireann. The original financial arrangements for the scheme were set out in an accounting agreement from 1968 ([13]), which describes the costs eligible for reimbursement at the inception of the scheme. However, the Irish authorities confirmed that the current accounting arrangements are based on an updated agreement from 1975 ([14]).

(37) The majority of the School Transport Scheme services are currently subcontracted by Bus Éireann to private sector bus operators.

(38) The annual Memoranda of Understanding for Bus Éireann do not refer to the School Transport Scheme, which the Irish Authorities do not regard as a PSO and which is classified as a commercial service in Bus Éireann's accounts (see Section 4.4).

4. **DESCRIPTION OF THE MEASURES**

4.1. **Annual operating compensation for urban, suburban and regional bus services**

(39) The Irish authorities support Bus Éireann and Dublin Bus through annual compensation payments for the operation of public bus transport services that fall under a PSO.

(40) Bus Éireann's PSO services are all urban, suburban and regional services (Stage Carriage and City Services). Other Bus Éireann services, such as long distance interregional 'Expressway', private hire, day tours, Eurolines international coach services, and the School Transport Scheme, do not fall under a PSO and, according to Ireland, the company accounts for them as commercial services.

(41) Dublin Bus's PSO services are the urban city services that they operate in the Greater Dublin area. Other Dublin Bus services, namely sightseeing tours, Airlink Airport Express and bus hire/special events, do not fall under a PSO and the company accounts for them as commercial services.

(42) For the period 2003 to 2009, the Irish authorities provided the annual compensation payments set out in Table 1 to CIÉ for Bus Éireann and Dublin Bus for the purpose of running PSO services.

Table 1

Operating Compensation for PSO Services, EUR (millions)		
Year	Bus Éireann	Dublin Bus
2003	22,9	53,9
2004	24,0	61,8

([11]) See Dublin Transport Authority Act 2008 (Parts 3, 4 and 5 and Section 115(2)) (Commencement), Order 2009.
([12]) See recital 21.
([13]) CIÉ Free Transport Schemes for Primary and Post Primary School Children — Summary of Accounting Arrangements — 1 August 1968.
([14]) Free Transport Scheme for Primary and Post-Primary School Children — Summary of Accounting Arrangements — January 1975.

Operating Compensation for PSO Services, EUR (millions)		
Year	Bus Éireann	Dublin Bus
2005	25,2	64,9
2006	30,5	71,8
2007	36,6	80,1
2008	41,8	85,6
2009	49,4	83,2
Total	207,5	447,4
Total (Combined)	654,9	

(43) The Irish authorities state that these compensation payments are used solely for the purpose of running the PSO services and in no way subsidise the bus companies' commercial services. Furthermore, any profits generated by the commercial services of either company are used to cross-subsidise loss-making PSO services, and Bus Éireann in particular has supported its PSO services from its profitable commercial services.

(44) From 2003 to 2009, the annual compensation amounts were specified in advance in the Memoranda of Understanding which both bus companies signed with the Department of Transport each year. Those Memoranda also described the bus services to be provided.

4.2. **Financing of new buses**

(45) The Irish authorities also support Bus Éireann and Dublin Bus with grants for the funding of new buses under the National Development Plans.

(46) From 2000-08, grants were made to CIÉ for its bus operators for the purpose of running PSO services, as set out in Table 2. The grants for new buses examined by this Decision begin in 2000, because this is the first year of the National Development Plan 2000-06 ([15]), and end in 2009 ([16]).

Table 2

Capital Grants for Fleet Replacement, EUR (millions)		
Year	Bus Éireann ([1])	Dublin Bus
2000	6,5	24,2
2001	17,1	15,4
2002	2,3	14,8
2003	8,4	5,7
2004	—	—

([15]) See recital 26.
([16]) See recital 34.

Capital Grants for Fleet Replacement, EUR (millions)		
Year	Bus Éireann [1]	Dublin Bus
2005	—	5,3
2006	—	24,9
2007	32,1	21,4
2008	40,4	18,2
2009	0,1	—
Total	106,9	129,9
Total (Combined)	236,8	

[1] The figures in the table do not include fleet replacement capital grants made to Bus Éireann for school transport services which are detailed later in the section on School Transport Scheme, see recital 75.

(47) The Irish authorities stated that the grants are paid as partial compensation to Bus Éireann and Dublin Bus in respect of the purchase of vehicles that are only used for running PSO services and that the grants have the effect of lowering annual PSO compensation payments.

(48) However, the funding set out in Table 2 only accounts for part of the budget for the purchase of vehicles for PSO services, since some vehicles are purchased wholly or partially from Bus Éireann and Dublin Bus's own resources. Where this is the case, the fleet may be used on both commercial and PSO services.

(49) A depreciation charge is included with the PSO profit and loss account in respect of the use of such vehicles on PSO services. In the case of a vehicle whose purchase was only partially grant funded, only a depreciation charge proportionate to the contribution of the bus company is included with the PSO profit and loss account in respect of the use of such a vehicle on PSO services.

(50) The purchase of buses used for commercial services only is entirely at the expense of the bus companies.

4.3. **Financing of dedicated infrastructure**

(51) The Irish authorities have also made grants under the National Development Plans to CIÉ for the purpose of investment in infrastructure for bus services, in particular the upgrading of bus stations and the construction of a new bus garage in Dublin.

(52) The amounts of these grants from 2000 to 2008 are listed in Table 3. The grants for dedicated infrastructure examined by this Decision begin in 2000, because this is the first year of the National Development Plan 2000-06 ([17]), and end in 2009 ([18]).

Table 3

Capital Grants for Infrastructure, EUR (millions)		
Year	Bus Éireann	Dublin Bus
2000	—	4,6
2001	2,8	7,9

([17]) See recital 26.
([18]) See recital 34.

Capital Grants for Infrastructure, EUR (millions)		
Year	Bus Éireann	Dublin Bus
2002	1,6	15,4
2003	3,4	8,2
2004	5,5	7,3
2005	1,3	6,3
2006	1,7	3,1
2007	—	—
2008	—	—
2009	—	—
Total	16,3	52,8
Total (Combined)	69,1	

(53) The Irish authorities stated that the financing of new infrastructure and operational facilities was provided solely to meet PSOs, and also that the upgrading of the infrastructure was necessary to meet quality and accessibility requirements imposed by those PSOs.

(54) The infrastructure in question is owned by CIÉ and, according to the Irish authorities, had not been upgraded over the years to meet operating, safety and customer requirements.

(55) The grants, along with funds generated from their own resources, enabled the companies to bring those facilities up to the required standards, in particular facilitating the travel of mobility-impaired people.

(56) Both Dublin Bus and Bus Éireann received funding that went towards the cost of bus garages and maintenance facilities, and towards meeting the cost of accessibility works necessary at bus stations and bus stops.

(57) For Bus Éireann, the bulk of the funding for infrastructure/operational facilities provided related to the upgrading of the bus stations it uses across the country. Those upgrades were for improving accessibility, the provision of dished (Kassel) kerbing, and a range of other related measures.

(58) The Bus Éireann funding includes contributions from the European Regional Development Fund under its Interreg programme.

(59) In Dublin, an increase in the number of buses required for PSO services led to the requirement for more garage capacity. As a result, the Harristown Garage was built in 2004. That project accounts for EUR 22 million of the grants paid to Dublin Bus for infrastructure/operational facilities. The overall cost of the Harristown Garage was EUR 42,1 million, made up of EUR 22 million grant funding and a CIÉ/Dublin Bus own contribution of EUR 20,1 million. The buses garaged at Harristown operate only on PSO services.

(60) The physical access to all the infrastructure facilities aided by the grants set out in Table 3 is limited to Bus Éireann and Dublin Bus vehicles.

4.4. **School Transport Scheme**

4.4.1. *Description of the scheme*

(61) Bus Éireann operates the School Transport Scheme on behalf of the Department of Education and Skills. The scheme was operated from 1967 onwards by CIÉ, and since the Transport (Re-organisation of CIÉ) Act, 1986 ([19]), it has been operated by Bus Éireann.

(62) The scheme is aimed mainly at children in rural areas who, because of where they reside, might otherwise have difficulty in attending school regularly. To be eligible for the scheme, pupils must live beyond a certain distance from their nearest school, although for certain pupils with special needs a door-to-door transport between home and school is normally provided.

(63) Via the scheme, 135 000 children are carried each day on school transport to primary and post-primary schools, including about 8 000 children with special educational needs and 9 000 children who travel on scheduled bus and rail services, including those of licensed private operators.

(64) Bus Éireann operates a fleet of 700 school buses as part of the scheme. Private operators on contract to Bus Éireann run a further 3 000 vehicles.

(65) The Irish authorities state that 86 % of services are currently provided by private sector contractors, and that this percentage has gradually increased in recent years.

(66) The scheme is administered through Bus Éireann's 11 regional offices, the functions of which are coordinated by Bus Éireann's headquarters in Dublin.

(67) In addition to running its own dedicated school bus fleet, the administrative role of Bus Éireann in the scheme includes:

— contracting private operators and payment of contractor accounts,

— continuous monitoring of contractor operations,

— planning the provision of new services, including route itineraries and scheduling,

— annual review of every route to reflect the changes in pupil turnover,

— assessment of pupil eligibility,

— collection and accounting for pupil contributions,

— issue of tickets/passes to pupils,

— vetting of all drivers and inspectors, in conjunction with the police service,

— day-to-day supervision and monitoring of service performance and standards,

— all administrative support necessary for the operation of the scheme and its accountability as a State service.

4.4.2. *Financial arrangements for School Transport Scheme*

(68) The financial arrangements for the School Transport Scheme were set out in an Accounting Agreement from 1968 ([20]), which was updated in 1975 ([21]).

([19]) See recital 21.
([20]) See footnote 13.
([21]) See footnote 14.

(69) The Irish authorities state that under those arrangements, the Department of Education and Skills reimburses Bus Éireann on a 'cost recovery' basis and that the reimbursement is for a range of direct costs identifiable as being incurred in the operation and administration of the scheme, plus a share of the indirect costs Bus Éireann incurs calculated according to an agreed formula, less the income from charges levied on the parents of the pupils using the Scheme.

(70) The formula for the calculation of the indirect costs incurred had been set at 13 % of certain defined direct costs in the 1975 agreement. However, following negotiations between the Department of Education and Skills and Bus Éireann, this charge was capped with an agreed maximum figure for the charge, which in 2011 amounted to EUR 16,7 million, or the equivalent of 10,7 % of the costs in question for that year, and then fixed at EUR 15 million for both 2012 and 2013 ([22]).

(71) The costs of paying private sector subcontractors make up a large proportion of overall direct costs, since a majority of school transport services are contracted out, rather than run by Bus Éireann's own school transport bus fleet.

(72) Modest charges are levied each school term on the families of eligible post-primary (secondary) school pupils and, from the 2011/12 school year, also on the families of eligible primary school pupils. Other higher charges apply to families of pupils at any school who avail of the scheme but are not eligible.

(73) The audited annual financial statements of the scheme for recent years are published by the Department of Education and Skills ([23]). The costs of the service each year, the charges paid by parents (pupil term charge contributions), the annual payment to Bus Éireann (net amount chargeable), and payments to contractors, since 2000 are summarised in Table 4:

Table 4

School Transport Scheme, EUR (millions)				
Year	Cost	Parental charges	Amount chargeable to Department of Education and Skills	Payments to subcontractors
2000	66,3	6,1	60,1	33,3
2001	77,5	6,1	71,3	40,7
2002	93,7	6,3	87,4	47,3
2003	99,1	6,5	92,6	52,9
2004	100,9	6,3	94,6	55,4
2005	112,6	6,6	106,0	64,0
2006	134,7	6,6	128,1	80,2
2007	152,8	6,6	146,2	96,4

([22]) Bus Éireann School Transport Audited Accounts 2010-13 and accompanying Explanatory Notes. It should be noted that in the Explanatory Note to the 2010 accounts, a clarification is made that the 'certain defined direct costs' in question are better described as a 'Transport Management Charge and Indirect Costs', with an explanation given.

([23]) Department of Education and Skills http://www.education.ie/en/Parents/Services/School-Transport/Bus-Eireann-Audited-Accounts/

School Transport Scheme, EUR (millions)				
Year	Cost	Parental charges	Amount chargeable to Department of Education and Skills	Payments to subcontractors
2008	170,8	8,8	162,0	108,9
2009	171,0	11,6	159,4	106,4
2010	165,7	11,7	154,0	105,5
2011	163,3	11,5	151,8	105,5
2012	162,0	12,6	149,5	106,1
2013	162,5	12,8	149,8	109,2

(74) The vehicles used in the School Transport Scheme have been in general 'cascaded' down from other parts of the Bus Éireann fleet. The rationale being that these older buses were still suitable for the generally lower mileage task of school transport. Therefore, as Bus Éireann supplied the buses for the scheme, it included a depreciation charge as part of the annual chargeable direct costs to the Department of Education and Skills.

(75) An exception to this practice of cascading was made for the period 2005 to 2008 when the Government decided to upgrade the school bus fleet to improve safety. In that period, funding amounting to EUR 24,6 million was provided by the Department of Education and Skills to Bus Éireann for the purchase of 161 additional school buses. That funding is additional to the amounts set out in Table 4 for the annual payments. No depreciation charges are made with respect to these buses as they were already fully funded by the Department of Education and Skills ([24]).

4.5. **Financing of disability awareness training**

(76) Ireland is committed to the development of accessible transport services to meet the accessibility needs of all people, including those with disabilities. Accordingly, the National Development Plan 2000-06 included a funding provision of EUR 13 million for accessibility improvements to existing public transport infrastructure and facilities for both publicly and privately provided transport.

(77) Some of this funding was used for the accessibility improvements for infrastructure, described in recitals 53 to 57. However, from 2001 onwards, the Department of Transport also supported disability awareness training to enhance the delivery of services by public and private transport operators to disabled people. Bus operators used this funding to train front line personnel such as drivers and ticketing staff.

(78) At the time of the Opening Decision, only Dublin Bus, Bus Éireann and Veolia Transport had disability awareness training programmes in place and the Irish authorities stated that, under the concept 'Transport for All', the Department of Transport was considering providing support for disability awareness training to all private bus and coach operator sectors.

(79) The disability awareness training programme for Bus Éireann staff commenced in November 2001 and was delivered throughout the country and a similar programme for Dublin Bus began in 2002.

([24]) Report of the Value for Money Review of the School Transport Scheme, p. 54 http://www.education.ie/servlet/blobservlet/st_vfm_school_transport_scheme_2011.pdf?language=EN

(80) Over the period 2001 to 2003 Dublin Bus and Bus Éireann received part funding for disability awareness training as set out in Table 5:

Table 5

Year	Funding for staff (EUR)		Costs borne by (EUR)	
	Bus Éireann	Dublin Bus	Bus Éireann	Dublin Bus
2001	374 827	—	127 450	—
2002	300 000	54 943	323 833	54 943
2003	194 205	61 617	46 717	61 617
Total per company	**869 032**	**116 560**	**498 000**	**116 560**
Total CIÉ	**985 592**		**661 560** [1]	

[1] Included in this figure is an additional EUR 47 000 cost borne by CIÉ in respect of training related to subcontractors operating under the School Transport Scheme even though CIÉ group companies' staff were not the beneficiaries of that training.

(81) The funding was paid to CIÉ and then transferred to the accounts of Dublin Bus and Bus Éireann.

(82) In subsequent years, no further grants were made for disability awareness training to Bus Éireann or Dublin Bus. Such training instead became part of the normal induction training processes in those companies.

(83) However, in recognition of the need for equivalent training in the private sector, funding was made available for disability awareness training from 2006 onwards, and for 2007 and 2008, that funding amounted to EUR 25 550, which the Irish authorities emphasise was 100 % of the funding requested for this purpose by the private sector.

5. GROUNDS FOR INITIATING THE PROCEDURE

5.1. Compensation for public bus transport services: operating compensation for urban, suburban and regional bus services, financing of new buses and the School Transport Scheme

5.1.1. *Existence of aid*

(84) With regard to the existence of State aid, the Commission considered in the Opening Decision that the Irish authorities had not yet provided enough information to enable it to conclude that all the criteria set by the *Altmark* judgment [25] had been fulfilled. On the basis of the information provided by the Irish authorities, the Commission could not exclude the possibility that the measures constituted State aid within the meaning of Article 107(1) of the Treaty.

5.1.2. *Compatibility of aid*

(85) As Bus Éireann and Dublin Bus operate scheduled and other bus services, they are undertakings which operate road transport services. Therefore, the Commission considered in the Opening Decision that Bus Éireann and Dublin Bus fell within the scope of the now repealed Regulation (EEC) No 1191/69 of the Council [26].

[25] Case C 280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg [2003] ECR I-7747.

[26] 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 (OJ L 156, 28.6.1969, p. 1). With the entry in force on 3 December 2009 of Regulation (EC) No 1370/2007, Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1) were repealed.

(86) According to the Irish authorities, a PSO had been imposed upon CIÉ and its subsidiaries by the Transport Act, 1950, the Transport Act, 1958, and the Transport (Re-organisation of CIÉ) Act, 1986 (the 'Transport Acts') ([27]). As from 2003, the conditions and the amount of the annual compensation by the Irish authorities to Dublin Bus and Bus Éireann had been the subject of Memoranda of Understanding. The Irish authorities had declared that they did not consider the Memoranda of Understanding with Dublin Bus and Bus Éireann to be public service contracts. On the basis of the information at its disposal at the time the Opening Decision was adopted, the Commission could not exclude the possibility that the Memoranda of Understanding should be considered as public service contracts.

(87) According to Article 10 of Regulation (EEC) No 1191/69 the amount of the compensation for the unilateral imposition of a PSO needs to be limited to the difference between the costs for discharging the obligation and the revenues generated through the obligation. In the Opening Decision, the Commission thus considered that for an assessment of compatibility under that regulation it had to verify whether the compensation paid by the Irish authorities was limited to the difference between the costs incurred for discharging the PSOs and the revenues generated through the sale of bus tickets. On the basis of the information available at that stage, the Commission had doubts whether Bus Éireann and Dublin Bus had been overcompensated. Both CIÉ subsidiaries also operate services that do not fall under what could be interpreted as a PSO (so-called 'commercial services') and may use publicly funded buses to operate those bus services. Therefore, the Commission was not able to conclude that the compensation was limited to expenditure for discharging PSOs. At that stage, the Commission did not have sufficient information at its disposal to determine whether the Irish authorities had calculated the compensation for discharging the 'tariff obligations' defined in Article 2(5) of Regulation (EEC) No 1191/69 in accordance with Articles 11, 12 and 13 of that regulation.

(88) The Commission also had doubts as to whether the measures in question would comply with Regulation (EEC) No 1191/69, if they were to be considered compensation for discharging PSOs.

(89) Similarly, as regards school transport, the Commission had doubts as to whether the agreements between the Irish authorities and Bus Éireann would comply with Regulation (EEC) No 1191/69, if they were to be considered compensation for discharging PSOs. At the time the Opening Decision was adopted, the Commission had incomplete information concerning the terms of the contractual arrangements, the revenues generated by and the costs of the school transport services provided.

5.2. **Financing of dedicated infrastructure**

5.2.1. *Existence of aid*

(90) With regard to the existence of State aid, the Commission considered in the Opening Decision that the condition that aid was granted by a Member State or through State resources was satisfied. Furthermore, the Commission noted that the use of the infrastructure seemed to be exclusively confined to Bus Éireann and Dublin Bus and that the measure could constitute a selective economic advantage within the meaning of Article 107(1) of the Treaty. Accordingly, the Commission could not exclude the possibility that the infrastructure investment grants constituted State aid within the meaning of Article 107(1) of the Treaty.

5.2.2. *Compatibility of aid*

(91) In the Opening Decision, the Commission expressed doubts as to whether the bus stations, bus stops, garages and maintenance facilities constituted a unilaterally imposed PSO, or whether the infrastructure investment grants were subject to public service contracts.

(92) The Irish authorities claimed that the infrastructure investment grants were covered by the exemption in Article 93 of the Treaty relating to the needs of coordination of transport and obligations of public service. The Commission considered that the compatibility of the grants needed to be assessed directly on the basis of Article 107(3)(c) of the Treaty. However, the Commission expressed doubts in the Opening Decision as to whether the measures in question were prejudicial to the common interest and as to whether the criteria for compatibility under Article 107(3)(c) of the Treaty had been satisfied in this case.

([27]) See Section 3.1.

5.3. **Financing of disability awareness training**

(93) At the time that the Opening Decision was adopted, the Irish authorities had not provided the Commission with the necessary information concerning the duration, budget, intensity and further conditions relating to the financing of disability awareness training to allow it to take a position on that measure.

(94) On the basis of the information in its possession at the time that it adopted the Opening Decision, the Commission expressed doubts as to the existence of State aid within the meaning of Article 107(1) of the Treaty.

(95) The Commission also considered that, were it to come to the conclusion that the training measure constituted State aid, the appropriate legal framework to assess compatibility would be Commission Regulation (EC) No 68/2001 ([28]).

(96) At the time of adopting the Opening Decision, the Commission could not conclude that all the provisions of Regulation (EC) No 68/2001 were complied with, and thus whether the exemption from the notification requirement laid down by Article 108(3) of the Treaty applied.

6. **COMMENTS OF IRELAND**

6.1. **Context**

(97) Ireland states that the last 15 to 20 years have seen unprecedented social and economic change in Ireland. Increased traffic volumes, population growth, industry, workforce travel, changes in settlement patterns and longer commuter times, have all highlighted the major deficiencies in transport infrastructure and services. In response to the urgent challenges, National Development Plans for economic and social development have, since the early 1990s, provided investment priorities for transport infrastructure and services to quickly expand the capacity of the transport system, through the upgrading and provision of new vehicles, plants and equipment.

(98) As the only body with a statutory obligation to provide integrated public transport, including loss-making social and economic services, CIÉ and its wholly owned subsidiaries became the focus of government investment in the public transport sector. In particular, because of their comprehensive and integrated network services, those operators were well placed to rapidly increase (loss-making) peak hour capacity. It is against this background that increased capital and current funding was provided.

6.2. **Existing aid**

(99) Ireland considers that all the aid measures covered by the Opening Decision are existing aid. However, Ireland responded separately to the Commission's arguments in relation to operating compensation and financing of infrastructure, without prejudice to Ireland's position that all of the aid measures in question are existing aid.

6.3. **Operating compensation**

(100) Compensation has been provided to CIÉ since the late 1950s, and that did not change with the reorganisation of CIÉ into separate companies in 1986. Nor did the compensation mechanism change with the introduction of the Memoranda of Understanding between the Department of Transport and Dublin Bus and Bus Éireann in 2003. According to Ireland, this was simply an administrative change to better manage the aid provided to CIÉ. All aid is provided to fund the legal obligation to provide the public passenger transport services laid down in the Transport Acts.

(101) Ireland provided evidence of an Irish Supreme Court ruling on the lack of legal effect under Irish law of Memoranda of Understanding. Ireland states that the reliance on Irish law in this instance is justified as it is alleged that the conclusion of the Memoranda of Understanding amounts to an alteration to the Irish statutory regime, however that judgment confirms that this cannot occur under Irish law.

([28]) Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20).

(102) In addition, Ireland pointed to the Memoranda themselves which contain wording saying that they have no legal effect and that the aid associated with those Memoranda is paid on the basis of the earlier legislative acts mentioned in recital 100.

(103) Ireland argues that this further demonstrates that the Memoranda of Understanding are based on the existing legislative regime, already in place since 1950.

(104) In the alternative, Ireland submits that the payments in question meet the four *Altmark* conditions and an economic advantage does not accrue to Bus Éireann or Dublin Bus. In the further alternative, Ireland argues that the obligations laid down in Irish law since 1950 are PSOs which comply with Regulation (EEC) No 1191/69 and are compatible with the Treaty. Furthermore, due to the character of the compensation paid, Ireland claims it amounts to lawful operating aid falling within the exceptions set out in Article 107(3)(c) of the Treaty. Finally, Ireland submits that Article 106(2) of the Treaty applies to undertakings like CIÉ, Bus Éireann and Dublin Bus.

6.4. **National Development Plans**

(105) Ireland states that the National Development Plan 2000-06 is not the correct comparator for the purposes of assessing the application of Article 1(c) of Council Regulation (EC) No 659/1999 ([29]) since the funding granted under the National Development Plan 1993-99 amounts to existing aid and no substantial alteration has been made to that aid by the conclusion of the National Development Plans 2000-06 and 2007-13.

(106) Ireland argues that the National Development Plan is a high-level policy document outlining the Government's investment strategies and priorities and that therefore the National Development Plans 2000-06 and 2007-13 have no legal effect constituting a substantial change under Article 1(c) of Regulation (EC) No 659/1999.

(107) Ireland states that Article 1(c) of Regulation (EC) No 659/1999 should not be applied to successive pre-budget high-level government policy documents.

(108) Ireland argues that the National Development Plans 2000-06 and 2007-13 do not affect the actual substance of the original scheme or the intrinsic functioning of the National Development Plan 1993-99. The actual substance and intrinsic functioning of the National Development Plans as policy documents has not changed. Given the policy nature of the National Development Plans 2000-06 and 2007-13, they cannot alter the character of the existing National Development Plan 1993-99 in any legal sense. In the alternative, any alterations are mere additions to the original National Development Plan.

6.5. **Infrastructure**

(109) According to Ireland, the financing of the infrastructure was solely to meet PSOs. The upgrading of the infrastructure was necessary to meet quality and accessibility requirements imposed by the PSOs. Should it be necessary to apply the *Altmark* conditions, the compensation meets the four criteria laid down by that judgment.

(110) Furthermore, Ireland submits that the infrastructure funding falls within the exception provided by Article 107(3)(c) of the Treaty. Ireland argues that as the Commission states at recital 185 of the Opening Decision, the motivation of the Irish authorities in granting financial support for the infrastructure in question was regional development, increase of the accessibility of certain areas, increase of the mobility of mobility-impaired people and environmental protection by the promotion of public transport. The aid in question increases the quality of public transport in Ireland and contributes to objectives of common interest, in accordance with the Irish national accessibility plan 'Transport for All'. Accordingly, Ireland submits that the infrastructural improvements clearly meet defined objectives of general interest (better public transport and improved services for the public) and that those infrastructural improvements are necessary and proportional to the objectives set.

(111) Finally, Ireland submits that Article 106(2) of the Treaty applies to the undertakings in question: CIÉ, Bus Éireann and Dublin Bus, and that that provision forms an exception to the other rules contained in the Treaty, including those relating to transport.

([29]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

6.6. **Disability awareness training**

(112) According to Ireland, the funding is social in character being directed at assisting the mobility of people with disabilities.

(113) Improvements to infrastructure and services have to be accompanied by relevant training if public transport services are to become accessible for people with disabilities. For that reason, funding was provided initially to the State owned CIÉ group of companies (as the main public transport providers) to develop and implement disability awareness training courses. Disability awareness training is now part of the normal induction training processes in those State owned companies and is no longer funded by the accessibility improvement allocation.

(114) Ireland argues that the funding received in connection with the provision of a disability awareness training programme does not confer an economic advantage on Dublin Bus or Bus Éireann. The programme provided appropriate training to enable staff to cater for people who have mobility and sensory impairments. The programme fully complied with Irish Government guidelines, Union procurement regulations and CIÉ procurement policies, and was subject to monitoring by the relevant government department.

(115) Ireland further points out that since 2006, financing of disability awareness training has been available to private operators on the same terms as those provided to Dublin Bus and Bus Éireann.

(116) According to Ireland, the financing of disability awareness training is not State aid within the meaning of Article 107(1) of the Treaty. It does not distort or threaten to distort competition. Nor does it affect trade between Member States.

(117) Furthermore, or in the alternative, according to the Irish authorities the financing of such training falls within the exception provided for in Article 107(2)(a) of the Treaty, since it has a social character, individual consumers with disabilities are the ultimate beneficiaries of the measure, and it is granted without discrimination related to the origin of the products concerned as the financing is available to all operators on equal terms.

(118) Finally, or in the alternative, the financing of disability awareness training falls within the exception provided for in Article 107(3)(c) of the Treaty.

6.7. **Compatibility of the aid on the basis of Regulation (EC) No 1370/2007**

(119) As Regulation (EC) No 1370/2007 entered into force on 3 December 2009, the Commission requested Ireland to provide its observations on the compatibility of the measures in question with the internal market on the basis of Regulation (EC) No 1370/2007.

(120) In its reply, Ireland did not add anything to its earlier responses which covered compatibility with the repealed Regulations (EEC) Nos 1191/69 and 1107/70, but stated that steps had been taken to comply with Regulation (EC) No 1370/2007, including the signing of public service contracts and the creation of a new transport authority.

6.8. **School Transport Scheme**

(121) Ireland states that 'the School Transport Scheme is outside the Commission's terms of reference, namely the alleged alterations of the Memoranda of Understanding and the National Development Plans'. Bus Éireann operates the school transport scheme on behalf of the Department of Education and Skills. According to Ireland, the School Transport Scheme is therefore not subject to State aid control, nor does it constitute a PSO. Nevertheless, Ireland supplied further details on the School Transport Scheme requested in the Opening Decision.

7. **OBSERVATIONS OF INTERESTED PARTIES**

7.1. **The complainant (Coach Tourism and Transport Council)**

(122) According to the complainant, Ireland has granted, and continues to grant substantial sums of illegal State aid. The aid is not provided on an equal and non-discriminatory basis and it clearly distorts competition in the internal market. The measures are in breach of Articles 107, 108 and 109 of the Treaty, but also in breach of various other provisions of Union law (including Articles 102 and 106 of the Treaty). The illegal State aid is damaging to both competition and the consumer interest.

(123) The aid in question is paid by Ireland to companies which are wholly-owned and controlled by the Irish Government, but which are clearly competing with private operators on actual and potential routes. The infrastructure which has been funded by State aid should be open on a non-discriminatory basis to everyone. Exclusivity cannot be justified where stations, bus stops and bus shelters are situated on routes where private operators also compete or want to compete.

(124) Ireland has argued that because the fares charged by CIÉ are regulated then this somehow demonstrates a social element in the provision of services. Regulation of fares does not determine the issue of whether an undertaking is entrusted with the operation of a PSO.

(125) According to the complainant, the funding of the fleet of both Dublin Bus and Bus Éireann constitutes unlawful State aid because:

— not all the routes classified as PSOs should properly be designated as such, and

— even where new buses operate on legitimate PSO routes, this frees up other buses (the purchase of which has been subsidised) which are then moved onto routes where private operators compete to the detriment of competition because they are now competing, with this unfair advantage, against private operators.

(126) The lack of specificity in relation to the calculation of the public compensation paid to both Dublin Bus and Bus Éireann means that the *Altmark* conditions are not met and there is overcompensation. The payments for the PSOs since 2003 constitute new aid within the meaning of Regulation (EC) No 659/1999.

(127) Competition has only been introduced to a limited extent. All liberalisation measures have been opposed by Bus Éireann and Dublin Bus and their unions. The liberalisation process has been further limited by the fact that while private operators are obliged to apply for licences to operate services, CIÉ companies are exempt from the licensing system and are merely required to notify the Department of Transport of proposed new services or proposed changes to existing services.

(128) The contract to operate school transport services has always been awarded without any tender process. Moreover, Bus Éireann is unable to fulfil the contract as it has to subcontract the work to the private sector.

(129) Finally, in response to the Commission's letter of 30 March 2010 concerning the compatibility of the aid on the basis of Regulation (EC) No 1370/2007 the complainant supplied comments which did not address the specific issue of the compatibility of the measures previously in place with that regulation.

(130) On 22 July 2008, the complainant supplied further comments with regard to *Mortons*, one of its member companies. Those comments were not taken into account since they were received after the deadline of 15 October 2007 laid down by the Opening Decision.

7.2. **Bus Éireann, Dublin Bus and CIÉ**

(131) The alleged beneficiaries of the aid measures in question, Bus Éireann and Dublin Bus, jointly submitted comments to compliment the legal issues that were dealt with by the comments of Ireland (see Section 6). The comments of Bus Éireann and Dublin Bus were received by letter dated 21 April 2008 and as such were not taken into account, since they were received after the deadline of 15 October 2007.

(132) On 19 April 2010, CIÉ replied to the Commission's letter of 30 March 2010 concerning the compatibility of the aid on the basis of Regulation (EC) No 1370/2007 and claimed that all measures were fully compatible with that regulation, that neither overcompensation nor incompatible aid had been awarded, and that all public service compensation was limited to what was strictly necessary to cover costs incurred in meeting PSOs.

7.3. **Other bus companies**

7.3.1. *Aircoach*

(133) According to Aircoach, the payments made by the Irish authorities to Bus Éireann and Dublin Bus in the form of grants under the National Development Plan and annual operating grants should be considered to constitute State aid and should be subject to the conditions laid down by Regulation (EEC) No 1191/69.

(134) Aircoach is concerned with respect to the alleged illegal State aid, in the areas of:

(a) assisted development of property;

(b) assisted fleet renewal;

(c) provision of subsidised staff training;

(d) compensation payments.

(135) Aircoach states that the State funding mentioned in the previous recital has the effect of distorting the market for the provision of bus and coach services in Ireland by conferring upon Bus Éireann and Dublin Bus an unfair commercial advantage. In combination with the closed nature of most of the Irish bus and coach market, this has had the effect of severely restricting the ability of other bus and coach operators to offer the public alternative services, thereby depriving the public of freedom of choice. Aircoach considers the State funding granted to Bus Éireann and Dublin Bus could be more beneficial if such funding was made available to all operators of bus and coach services in Ireland and if access to public facilities (bus stations, interchanges and stops) was opened up as a precursor to a more general opening up of the market.

(136) On 23 April 2010, Aircoach replied to the Commission's letter of 30 March 2010 concerning the compatibility of the aid on the basis of Regulation (EC) No 1370/2007, but did not specifically address the issue of the compatibility of the measures on the basis of that regulation.

7.3.2. *Citylink*

(137) According to Citylink, there are problems with the competitive commercial routes in Ireland. Citylink states that when Bus Éireann enters the competitive commercial market, the subsidy it receives is used to supplement fares to a level where non-subsidised private operators are unable to compete.

(138) Citylink make the following suggestions to ensure courteous, suitable, dependable, safe and affordable rates for all bus passengers in Ireland:

(a) all commercial/competitive routes should offer fares which would give all operators a fair return on their investments;

(b) allocation of new routes or reallocation of existing routes should be open to all operators;

(c) timing of all services should be agreed;

(d) coach terminals should be shared;

(e) all operators and their staff should be given a day of revision and update on the courtesy and affability of customer care.

7.4. **Trade Unions**

7.4.1. *National Bus and Rail Union*

(139) The National Bus and Rail Union, a trade union representing the interests of transport workers of Bus Éireann, Dublin Bus and Irish Rail, is of the opinion that the issues raised by the complainant are being used as a diversionary tactic to gain an advantage and have little to do with providing better bus services to the general public.

(140) A fragmented, privatised system of public transport will be more expensive and less efficient. Competition for market share on profitable routes for the benefit of shareholders is not always in the customers' interest. Public interest must be the main criteria when licensing bus transport operators.

(141) Private operators will not be interested in loss-making routes or in cross-subsidising them from profitable ones.

7.4.2. *SIPTU (Services Industrial Professional and Technical Union)*

(142) According to SIPTU, the School Transport Scheme does not constitute State aid to Bus Éireann nor does it constitute a contracting out of a public service owing to the absence of financial gain by Bus Éireann from this process.

(143) CIÉ is governed by the terms of Transport Act, 1958. CIÉ fulfils the three functions of the PSO listed in the Transport Act, 1958.

(144) The Memoranda of Understanding are not legally binding and thus cannot be said to form contracts. The Memoranda comply, in SIPTU's opinion, with the terms of Regulation (EEC) No 1191/69 and should not form the basis of an assumption that the PSO has been replaced by the Memoranda, as was incorrectly stated in the draft report by the Competition Authority of Ireland.

7.4.3. *TSSA (Transport Salaried Staffs' Association)*

(145) According to the TSSA, the claim that Dublin Bus and Bus Éireann received unlawful State aid is without basis when you consider that those companies have been deprived of investment and adequate funds for decades for operating socially necessary but heavily loss-making bus services.

(146) It should be borne in mind that at the time that CIÉ was formed, Ireland was a new republic and thus private transport companies could not provide an organised network of services to meet the needs of the population. CIÉ was set up to operate safe reliable, viable, social network services which included loss-making social services, and it continues to operate such services. CIÉ has been expected to be a commercial body and an instrument of social policy, which is an impossible dilemma.

(147) Dublin Bus and Bus Éireann continue to meet their PSOs by delivering quantitative and qualitative improvements to the range and quality of service on offer to the travelling public through their integrated networks of services which are delivered in line with government objectives.

7.5. **Academics**

7.5.1. *Professor Austin Smyth, University of Westminster*

(148) According to Prof. Smyth, any determination by the Commission based solely on legal provisions will lead to unintended and adverse consequences for the Irish consumer and/or taxpayer.

(149) Prof. Smyth believes that the problem with the bus system in Ireland is that the licensing system has not been applied on a consistent basis or in a manner that serves to underpin the objectives which CIÉ has been set. Under the current licensing arrangements Ireland is experiencing withdrawal of socially necessary services and the progressive collapse of the country's public transport network.

(150) Prof. Smyth describes the benefits of various models for the bus sector and makes a number of suggestions for improving the existing model in Ireland, including:

(a) greater transparency in the allocation and use of grant aid;

(b) strengthening the Irish Department of Transport in terms of transport economics;

(c) enhancing transparency in the attribution of costs, revenues and other net benefits between the commercial and socially necessary routes;

(d) encouraging further participation by private sector companies;

(e) undertaking a number of PSO pilot projects to assess the cost and benefits of a more formal approach.

7.5.2. *Doctor Sean Barret, Trinity College, Dublin*

(151) Dr Barret emphasises that economists in Ireland have been concerned for many years about the unsatisfactory regulation of the Irish bus sector. The bus policy is unsatisfactory and there is no attempt to achieve optimum efficiency in relation to both the commercial aspects of bus transport and the public service aspects.

(152) Dr Barret contends that the bus market is characterised by the close relationship between the Department of Transport and CIÉ, and in this regard he states that there has been a steady growth of operating subsidies since the 1950s, all of which have been allocated to CIÉ. Dr Barret adds that National Development Plan funds have been allocated exclusively to CIÉ to the exclusion of all other operators.

(153) According to Dr Barret, the Memoranda of Understanding are an example of the insider-outsider model in operation and do not constitute an efficient method of ensuring the provision of either commercial or public service bus transport.

(154) Dr Barret states that the combination of State compensation to CIÉ in excess of its actual losses, permission by the Department of Transport to charge different fares on contested and uncontested routes, and the lack of transparent procedures in the allocation of public service and investment grants, de facto gives CIÉ a massive war chest from which to finance lower fares on routes where there is competition with more efficient independent bus companies.

7.5.3. *Professor Frank W. Roche, Michael Smurfit Graduate Business School at the University College of Dublin*

(155) According to Prof. Roche, the State compensation in question relates to loss-making urban, commuter and rural services only. The long distance coach market in Ireland is already open to all operators.

(156) Prof. Roche emphasises the important role that Bus Éireann plays in relation to small- and medium-sized bus enterprises in Ireland. Through subcontracting, Bus Éireann facilitates access to the market for SMEs, the majority of whom would not have the scale or the capabilities to survive if they were competing directly with larger indigenous or multinational operators.

7.5.4. *Professor Peter Mackie, University of Leeds*

(157) Prof. Mackie states that the real issue is not competition versus monopoly, but how the dominant firms are owned, organised and managed.

(158) Prof. Mackie describes the methodology he recommends for regulating the bus sector. According to Prof. Mackie, if the market is opened then all operators, public and private, should be required to submit audited traffic and revenue returns. Separate accounts for long distance services would enable operators such as Bus Éireann to demonstrate publicly that they are not unfairly competing through cross-subsidy.

7.6. **Other interested parties**

Jerome Casey and Company Ltd Marketing & Strategic Management

(159) Mr Casey contends that the State aid for passenger and garage facilities has been provided, not as a public good, but to fund the private, exclusive property of publicly owned bus companies.

(160) According to Mr Casey, the argument must be addressed whether the funding of those facilities conferred a competitive advantage on Dublin Bus and Bus Éireann, that is to say whether the net cost to the companies in question of operating those facilities was lower than the net cost of comparative market-provided facilities. It is not clear at all that the economic advantage to the public bus companies from those facilities outweighed their cost.

(161) Mr Casey states that it is difficult to understand the logic underlying the complainant's argument that disability training grants are anti-competitive and a constraint on the complainant's trade. None of the member companies of the complainant integrate disabled travel into their normal operations, whereas Dublin Bus and Bus Éireann do. Mr Casey asks why the complainant's member companies should be paid for work they deliberately retreat from and refuse to undertake.

8. COMMENTS FROM IRELAND ON THIRD PARTY OBSERVATIONS

(162) Ireland limited itself to commenting on the complainant's observations, and not on any other third party observations, and limited itself to the legal authorities and provisions relied upon by the complainant and the allegation of failure to distinguish between different routes in the application of subsidies.

(163) In this regard, Ireland stated that Dublin Bus and Bus Éireann both meet their PSOs with a network approach, with scale, range and complexity of the obligations imposed meaning that services and routes are planned and operated as a network rather than as individual routes.

9. ASSESSMENT OF THE MEASURES

(164) The Commission notes, as a preliminary matter, that Ireland, in response to the Opening Decision, alleged that the School Transport Scheme was not within the scope of the preliminary investigation and therefore could not be considered during the formal investigation procedure.

(165) While the Commission acknowledged in recital 40 of the Opening Decision that it did not have any information concerning the conditions and the amount of the compensation paid by the Irish authorities under that scheme, it did explain the contours of the School Transport Scheme in recitals 20 and 30 of the Opening Decision and school transport figures in the examination in Section C.2 of the Opening Decision on the existence of State aid. Finally, as is clear from recital 90 of the Opening Decision the Commission clearly invited the Irish authorities 'to provide detailed information concerning the terms and conditions of contracts for the operation of public transport *and school transport services* including the procedures under which such contracts are concluded'. There can therefore be no doubt that the School Transport Scheme was covered by the Opening Decision.

9.1. Existence of aid

(166) Article 107(1) of the Treaty provides that '[…] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(167) This means that for any of the measures to be qualified as State aid within the meaning of that provision, the following four cumulative conditions have to be met: (i) the measure must be granted by the State or through State resources; (ii) the measure must confer an economic advantage on the recipient undertaking; (iii) the advantage must be selective; and (iv) the measure must distort or threaten to distort competition and to affect intra-EU trade.

(168) Furthermore, a measure can only constitute State aid if the beneficiary performs an economic activity so that that beneficiary can be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The case-law of the Court of Justice of the European Union defines an economic activity as 'any activity consisting in offering goods and services on a given market' ([30]).

(169) Dublin Bus and Bus Éireann operate bus services and receive fares for the provision of those services. They thus perform an economic activity and should therefore be considered undertakings for the purposes of Article 107(1) of the Treaty.

(170) In the Opening Decision, the Commission was not able to exclude the possibility that the measures at issue constituted State aid within the meaning of Article 107(1) of the Treaty.

(171) The Irish authorities have submitted that all the measures at issue are existing aid. This implies that the Irish authorities consider all the measures at issue to constitute State aid within the meaning of Article 107(1) of the Treaty.

(172) The Commission will explain in the following sections why it considers each of the measures at issue to constitute State aid within the meaning of that provision.

([30]) Case C-180-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; Case C-118/85 *Commission* v *Italy* [1987] 2599, paragraph 7.

9.1.1. *State resources*

(173) On the basis of the information provided by the Irish authorities, all of the measures at issue involve financial contributions, either directly from the Irish authorities, or via CIÉ, transferred to Dublin Bus and Bus Éireann. Those contributions comprise State resources. Therefore, the Commission considers that the condition that aid must be granted by a Member State or through State resources is therefore satisfied.

9.1.2. *Selective economic advantage*

(174) To constitute State aid, the measures at issue must confer an economic advantage which the recipient undertaking would not have obtained under normal market conditions.

9.1.2.1. Annual operating compensation for urban, suburban and regional bus services until 30 November 2009 and the financing of new buses ([31])

(175) Ireland claims that the compensation granted for urban, suburban and regional bus services and the financing of new buses granted to Bus Éireann nor Dublin Bus constitute compensation for the discharge of PSOs in accordance with conditions laid down in the *Altmark* judgment ([32]) and thus do not confer an advantage on their recipients.

(176) In the *Altmark* judgment, the Court of Justice considered that 'where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations (…) such a measure is not caught by Article [107(1)] of the Treaty' provided that the following cumulative conditions are fulfilled:

'(a) First, the recipient undertaking is actually required to discharge public service obligations, and those obligations have been clearly defined.

(b) Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.

(c) Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(d) 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 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 obligations ([33]).'.

(177) With regard to the application of the fourth condition of the *Altmark* judgment to the annual operating compensation for urban, suburban and regional bus services and financing of new buses, neither Bus Éireann nor Dublin Bus were entrusted with the PSOs at issue in the course of an open, transparent and non-discriminatory tendering procedure.

(178) Consequently, the Commission has to examine the second alternative stipulated in the fourth *Altmark* condition, which provides that the level of compensation must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

(179) In this regard, the Irish authorities stated: 'The level of compensation paid to Bus Éireann and Dublin Bus, both in terms of annual operating compensation and funding for fleet upgrades and replacements, reflects the outcome of a negotiation process with the companies which has regard to company finances and operations and Value For Money studies such as the 2006 report ([34]) which has already been provided to the Commission.'.

([31]) See Sections 4.1 and 4.2.
([32]) See footnote 25.
([33]) Ibidem, paragraph 95.
([34]) The report referred to was a review, carried out by the consultancy firm Booz Allen Hamilton, on the PSO compensation paid to CÍE between 2001 and 2005.

(180) The Commission notes the 2006 report referred to in the previous recital, and accepts that to some extent it may have contained analysis of the costs incurred by a 'well run' undertaking as referred to in the fourth *Altmark* condition. However, the Commission notes that the Irish authorities also based the level of compensation both in terms of annual operating compensation and financing of new buses on a process which takes into account 'company finances'.

(181) The need for financing of recipient undertakings may not be taken into account in assessing whether a State measure may be regarded as compensation for discharging PSOs. Therefore, the Commission concludes that the fourth *Altmark* condition is not met, and, since the four conditions are cumulative, that the *Altmark* conditions are not fulfilled for a finding of no aid. Consequently, the Commission considers that the annual operating compensation for urban, suburban and regional bus services until 30 November 2009 and the financing of new buses confer a selective economic advantage on Bus Éireann and Dublin Bus, since they relieve those undertakings of expenses they would normally have to bear in the operation of their business, which they could have not obtained under normal market conditions.

9.1.2.2. Financing of dedicated infrastructure

(182) The construction of any type of infrastructure that is meant to be exploited economically is an economic activity in itself, which means that the State aid rules apply to the way in which it is financed ([35]). Nevertheless, the Commission considers that public authorities may legitimately consider that the financing of infrastructure granted prior to the *Aéroports de Paris* judgment of 12 December 2000 ([36]) did not entail State aid and that, accordingly, such measures did not need to be notified to the Commission. It follows that the Commission cannot put such financing measures definitely adopted before the *Aéroports de Paris* judgment (12 December 2000) into question on the basis of the State aid rules ([37]). Therefore the compensation granted to Dublin Bus in 2000 of EUR 4,6 million cannot be considered within the scope of State aid control.

(183) As regards the compensation granted after 2000, the question of the presence of aid in financing the construction of a commercially exploited may arise at three different levels: at the level of the users, at the level of the builder of the infrastructure and at the level of the manager of the infrastructure ([38]).

(184) In this case, while the owner of the infrastructure is CIÉ, the user and the manager of the infrastructure appear to be identical, as the infrastructure in question is managed and used exclusively by Bus Éireann and Dublin Bus, which are entirely owned by CIÉ. As Bus Éireann and Dublin Bus do not raise any income out of the managing of the infrastructure, for the purpose of this case they can therefore only be considered as users of the infrastructure. As regards the construction companies involved in the construction of the different infrastructure elements under assessment, the Commission has no indication that those companies might have received an advantage. As regards the user of the infrastructure, the Commission notes that the infrastructure in question is managed by Bus Éireann and Dublin Bus, and that use is exclusively confined to those undertakings.

(185) As a general rule, the Commission considers that the financing of infrastructure through State resources does not confer and advantage on its users provided that the infrastructure is open without discrimination to all in accordance with Union legislation, and does not favour one user in particular ([39]). In this case, that condition is not fulfilled, as the infrastructure in question, which is financed through State resources, exclusively benefits Bus Éireann and Dublin Bus.

(186) Ireland also claims that with regard to the financing of infrastructure, the conditions laid down in the *Altmark* judgment are met ([40]).

([35]) Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al* v *Commission* [2011] ECR II-1311, in particular paragraphs 93 and 94, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, EU:C:2012:821.

([36]) Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 125. See also Case T-196/04 *Ryanair* v *Commission* [2008] II-3643, paragraph 88.

([37]) Commission Decision 2013/693/EU of 3 October 2012 on the measure SA.23600 — C 38/08 (ex NN 53/07) — Germany — Financing arrangements for Munich Airport Terminal 2, recitals 74 to 81 (OJ L 319, 29.11.2013, p. 8).

([38]) See, for example, Decision in State aid case 713/97 *Rion Antirion motorway bridge*, point 39, Decision in State aid case N 60/06, *Project Main Port Development Rotterdam*, point 39; Decision N 597/07 *Thessaloniki submerged tunnel project*; Decision in State aid case N 478/04, *Irish Rail*, point 26 with further references.

([39]) See, for example, Decision in State aid case 713/97 *Rion Antirion motorway bridge*, point 38, Decision in State aid case N 60/06, *Project Main Port Development Rotterdam*, point 40; Decision in State aid case N 478/04, *Irish Rail*, point 26 with further references.

([40]) See recital 109.

(187) With regard to the application of the fourth condition of the *Altmark* judgment to the grants for the financing of infrastructure, neither Bus Éireann nor Dublin Bus were entrusted with the PSOs at issue in the course of an open, transparent and non-discriminatory tendering procedure.

(188) Consequently, the Commission has to examine the second alternative stipulated in the fourth *Altmark* condition, which provides that the level of compensation must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

(189) The Commission has no indication that such an analysis took place. Consequently, the Commission concludes that the fourth *Altmark* condition is not met, and that the *Altmark* conditions are not fulfilled, since the four criteria are cumulative.

(190) Moreover, the Commission notes that the grant-funded infrastructure used by Bus Éireann benefits both the companies' commercial and PSO services. Consequently, it seems unlikely in the case of Bus Éireann, that the first *Altmark* condition is met, since the funding does not solely relate to the recipient undertaking actually being required to discharge PSOs.

(191) The Commission therefore concludes that the grants for the financing of dedicated infrastructure confer a selective economic advantage on Dublin Bus and Bus Éireann.

9.1.2.3. School Transport Scheme

(192) With regard to the School Transport Scheme, the Commission will assess whether the scheme fulfils the conditions set out in the *Altmark* judgment ([41]).

(193) The financial arrangements for the School Transport Scheme were set out in an Accounting Agreement from 1968, and then updated in 1975 ([42]), albeit with a cap on 'indirect costs' from 2011 onwards ([43]).

(194) With regard to the application of the fourth condition of the *Altmark* judgment ([44]) to the School Transport Scheme, Bus Éireann was not entrusted with the PSOs at issue in the course of an open, transparent and non-discriminatory tendering procedure.

(195) Consequently, the Commission has to examine the second alternative stipulated in the fourth *Altmark* condition, which provides that the level of compensation must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

(196) The Commission has no indication that such an analysis took place. Moreover, the Commission considers it unlikely that compensation still being paid in the present day, but based on financial arrangements set out nearly 40 years ago, could constitute the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

(197) Consequently, the Commission concludes that the fourth *Altmark* condition is not met, and considers that the *Altmark* conditions are not fulfilled, since the four criteria are cumulative.

(198) The School Transport Scheme relieves Bus Éireann of expenses it would normally have to bear in the operation of that activity, which it could not have obtained under normal market conditions. The Commission therefore concludes that the funding of the School Transport Scheme confers a selective economic advantage on Bus Éireann.

9.1.2.4. Financing of disability awareness training

(199) With regard to the presence of an advantage resulting from the financing of disability awareness training, the Commission noted in the Opening Decision that the public financing of disability awareness training should normally be financed by undertakings, since it relieves them of a burden they would normally have to bear in the operation of their business. Nevertheless, the Commission noted that this type of training might have a social character and might improve the mobility of the disabled people.

([41]) See recital 175.
([42]) See recital 68.
([43]) See recital 70.
([44]) See recital 175.

(200) Ireland argues that the financing of disability awareness training is not State aid within the meaning of Article 107(1) of the Treaty, and that it does not distort or threaten to distort competition, or affect trade between Member States. However Ireland does not provide any reasoning for these arguments.

(201) Ireland further points out that since 2006, financing of disability awareness training has been available to private operators on the same terms as those provided to Dublin Bus and Bus Éireann ([45]). In this regard the Commission notes that the financing for disability awareness training examined in this decision occurred in the period 2001-03, as set out in Table 5, and at the time of that financing it was not available to all operators.

(202) Consequently, the Commission concludes that the financing of disability awareness training confers a selective economic advantage on Dublin Bus and Bus Éireann since it relieves them of a burden they would normally have to bear in the operation of their business.

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

(203) It furthermore needs to be verified whether the economic advantage granted from State resources is liable to distort competition and to thereby affect trade between Member States.

(204) In this respect, as the *Altmark* judgment ([46]) points out:

'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 ([47]).'

(205) 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 ([48]).

(206) In this 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.

(207) 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 ([49]).

(208) 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.

(209) The Commission thus considers the public financing at issue in the current case might affect inter-State trade and distort or threaten to distort competition in the internal market.

9.1.4. *Conclusion: existence of State aid*

(210) In the light foregoing observations, the Commission considers that all the measures at issue constitute State aid within the meaning of Article 107(1) of the Treaty.

([45]) See recital 83.
([46]) Case C-280/00, *Altmark*, paragraph 82.
([47]) Case C-280/00, *Altmark*, paragraph 77 and following.
([48]) 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 joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 40.
([49]) See Case C-142/87 *Belgium* v *Commission* (Tubemeuse) [1990] ECR I-959, paragraph 43; See also Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42.

9.2. **Classification of the measures as existing aid**

(211) Ireland claims that all of the measures at issue constitute existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999. The Commission will examine this claim in the following section.

9.2.1. *General observations*

(212) Article 1(c) of Regulation (EC) No 659/1999 defines new aid as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

(213) Article 1(b)(v) of Regulation (EC) No 659/1999 considers as existing aid 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'. Article 1(b)(v) further provides that '[w]here certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.'.

(214) In the Opening Decision, the Commission noted that when the Transport Acts and the first National Development Plan (1993-99) were put into effect, the market for public transport services (including urban, suburban and regional transport by road) was closed to competition throughout the Union. Therefore, at that time those measures did not constitute State aid, since they did not have the potential to distort competition, the relevant markets being closed to competition.

(215) Since the *Altmark* judgment, the Commission has accepted, in its subsequent decisional practice ([50]), that since 1995 the market for public transport services has been *de facto* opened to competition in parts of the internal market. As pointed out in the *Altmark* judgment, the market for transport services had not been opened following a liberalisation of an activity by Union law, but rather a result of independent and spontaneous decisions of some Member States. As of 3 December 2009, however, the market for public passenger transport has been opened to competition by Union law by the entry into force of Regulation (EC) No 1370/2007.

(216) According to settled case-law ([51]), the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. In other words, to establish whether an aid has been altered, it is decisive to examine whether the provisions providing for it have been altered.

(217) Moreover, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme ([52]). Only substantial alterations convert existing aid into new aid ([53]).

(218) On the basis of these principles, the Commission will examine in relation to each of the measures at issue whether they can be considered to constitute existing aid as Ireland contends.

9.2.2. *Annual operating compensation for urban, suburban and regional bus services*

(219) In the Opening Decision, the Commission came to the preliminary conclusion that the introduction of yearly Memoranda of Understanding from 2003 onwards altered the compensation mechanism for the two bus companies, so that the compensation payments for PSOs initially based on the Transport Acts could be considered to constitute new aid, within the meaning of Article 1(c) of Regulation (EC) No 659/1999, as from 2003.

([50]) Commission Decision 2011/501/EU of 23 February 2011 on State aid No C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ L 210, 17.8.2011, p. 1).

([51]) Case C-44/93, *Namur-Les Assurances* [1994] ECR I-3829, paragraph 28.

([52]) Joined Cases C-91/83 and C-127/83 *Heineken* [1984] ECR 3435, paragraphs 21 and 22; See also Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 109 to 114.

([53]) Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani* v *Commission* [2008] ECR II-3269, paragraph 362.

(220) However, Ireland subsequently demonstrated, in response to the Opening Decision, that the yearly Memoranda of Understanding did not change the aid in terms of the annual operating compensation payments to the two bus companies, and, that they were simply an administrative change to better manage the aid provided to CIÉ. According to Ireland, all aid provided in the form of annual operating compensation payments is used to fund the legal obligations to provide PSO services, as laid down in the Transport Acts.

(221) In this regard, Ireland pointed to the lack of legal effect under Irish law of the Memoranda of Understanding. This was demonstrated by reference to a judgment of the Irish Supreme Court ([54]), which stated [emphasis added]:

'There is […] no warrant whatever for regarding the [Statutory] Instrument or any part thereof as being "subject to" the Memorandum of Understanding. This is not a question of construction but a matter of principle. […] no document which is not of a legislative nature can be regarded as in any way affecting the provisions of such an Instrument. It is of high importance that a lay person be able to distinguish readily between documents having the force of law and all others.'.

(222) On the other hand, according to the information provided by Ireland, the 2003 and 2007 Memoranda of Understanding for Dublin Bus and Bus Éireann themselves respectively state:

'This Memorandum of Understanding on Service Levels and Targets is of no legal effect and is not binding on Bus Átha Cliath [Dublin Bus] or on the Department of Transport.'

'This Memorandum of Understanding on Service Levels and Targets is of no legal effect and is not binding on Bus Éireann or on the Department of Transport.'.

(223) The 2003 Memorandum of Understanding for Bus Éireann further provides:

'The memorandum is based on the existing regulatory regime and on the existing statutory duties of Bus Éireann, as specified in relevant legislation and as extant on 10 July 2003.'.

(224) On the basis of this information, the Commission considers that the overall duties of Bus Éireann and Dublin Bus to provide a public service, defined in Section 8(2) and 8(3) of the Transport (Re-organisation of CIÉ) Act, 1986, were not altered with the introduction of the Memoranda of Understanding. The Commission further notes that the annual operating compensation was governed by the Transport (Re-organisation of CIÉ) Act, 1986, which provides in Section 8(10): 'The Board [CIÉ] and the companies shall have due regard to the Board's social role and the need to maintain public transport services integrated to the maximum extent possible within the financial resources available to them ([55]).'.

(225) On 1 December 2009, new public service contracts concluded between the National Transport Authority, on the one hand, and Bus Éireann and Dublin Bus, on the other hand, entered into force, thereby putting an end to the legal regime previously governing the annual operating grants for urban, suburban and regional bus services.

(226) Accordingly, since no substantial alteration can be said to have occurred to the legal regime providing for the annual operating compensation paid to Bus Éireann and Dublin Bus until the entry into force of those public service contracts, all annual operating compensation paid to those undertakings until 30 November 2009 should be considered existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

9.2.3. *Financing of new buses and the financing of infrastructure*

(227) In the Opening Decision, the Commission came to the preliminary conclusion that the National Development Plans 2000-06 and 2007-13 had altered the National Development Plan 1993-99 and that, therefore, the National Development Plans 2000-06 and 2007-13 were to be considered as constituting new aid within the meaning of Article 1(c) of Regulation (EC) No 659/1999.

([54]) *Curley* v *The Governor of Arbour Hill Prison* [2005] 3 I.R. 308 p. 317.
([55]) See recital 21 above.

(228) However, Ireland has subsequently demonstrated, in response to the Opening Decision, that the National Development Plans are high-level pre-budget policy documents outlining the Government's investment strategies and priorities, so that the National Development Plans 2000-06 and 2007-13 can be considered to lack legal effect and therefore do not constitute a substantial alteration to an existing aid scheme.

(229) This has been demonstrated by reference to a judgment of the Irish High Court which held ([56]):

'The [National Development Plan] is essentially a financial plan or framework setting out what the Government sees as the investment priorities for the next seven years, and how resources can be invested amongst different investment priorities.[…] It is essentially a financial or budgetary plan and even if, as is the case, a project of national significance is mentioned in the [National Development Plan] such is for administrative purposes as indicative of the type of project that would be financed out of a particular financial "envelope". […] In my judgment the mere provision of the funding envisaged by the [National Development Plan] is indicative of how an activity could be financed. It in no way seeks to set a framework as to what decision or decisions should be made by the appropriate authority or authorities in relation to the actual proposal or project to be so funded.'.

(230) The non-binding nature of the plans is further evidenced by the plans themselves. The National Development Plan 2000-06 states that it 'reflects the broad consensus in the consultation process as to the future development needs of the country' ([57]), while the National Development Plan 2007-13 'sets out the roadmap to Ireland's future' ([58]) and 'sets out the economic and social investment priorities needed to realise the vision of a better quality of life for all ([59]).'.

(231) Finally, Ireland explained that funds earmarked for disbursement under the National Development Plans are scrutinised by Parliament before being agreed and approved in the national budget each year.

(232) From this description it would appear that the investment policies set out in the National Development Plans are statements of policy, so that funds cannot be used unless their disbursement complies with the provisions laid down by law, in this case the Transport Acts.

(233) The Commission considers that the financing of new buses and the financing of infrastructure are governed by the Transport (Re-organisation of CIÉ) Act, 1986, which states in Section 8(10): 'The Board [CIÉ] and the companies shall have due regard to the Board's social role and the need to maintain public transport services integrated to the maximum extent possible within the financial resources available to them.' The overall duties to provide a public service are defined in Section 8(2) and 8(3) of the same Act, as previously described in recital 21.

(234) The Commission therefore considers that the National Development Plans 2000-06 and 2007-13 do not constitute substantial alterations to the scheme laid down by the Transport Acts for the financing of new buses and the financing of infrastructure. Those measures thus constitute existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

(235) The Commission notes that the National Development Plan 2007-13 was discontinued in 2011, and replaced by the Infrastructure and Capital Investment Plan 2012-16. This was after the date on which Regulation (EC) No 1370/2007 entered into force.

(236) On 1 December 2009, Sections 45 and 49 of the Dublin Transport Authority Act 2008 came into force, thereby putting an end to the legal regime previously governing the financing of new buses and the financing of infrastructure.

([56]) *Kavanagh* v *Ireland*, unreported, 31 July 2007 Irish High Court (pp. 16-17, p. 51).
([57]) National Development Plan 2000-06, p. 5.
([58]) National Development Plan 2007-13, p. 15.
([59]) Ibidem, p. 15.

(237) Accordingly, since no substantial alteration can be said to have occurred to the legal regime providing for the financing of new buses and of infrastructure paid to Bus Éireann and Dublin Bus until the entry into force of that Act, all financing of new buses and of infrastructure paid to those undertakings until 30 November 2009 should be considered existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

9.2.4. *School Transport Scheme*

(238) As regards Ireland's contention that the School Transport Scheme is existing aid, the Commission recalls that the scheme has been operated by CIÉ since 1967, and by Bus Éireann since the Transport (Re-organisation of CIÉ) Act, 1986 ([60]), which was created under Section 6(1) of that Act, along with other subsidiary companies of CIÉ. The duties of Bus Éireann in terms of the provision 'within the State and between the State and places outside the State, a passenger service by road' which would include school transport services are described more fully in recital 21.

(239) The original financial arrangements for the scheme were set out in an accounting agreement from 1968 ([61]), which describes the costs eligible for reimbursement at the inception of the scheme. However, the Irish authorities confirmed that the current accounting arrangements are based on an updated agreement from 1975 ([62]). In a letter to the Commission of 23 November 2012, Ireland maintained that '[t]he accounting document of 1975 remains the core document in relation to the financial arrangements between the Department [of Education and Skills] and Bus Éireann'.

(240) The Commission notes that the 1975 update of the Accounting Agreement describes its purpose in a preamble: 'The attached statements and draft accounts describe the agreed accounting arrangements for the computation and presentation of the cost to CIÉ of supplying, supervising and administering on behalf of the Department of Education, the conveyance, to and from school, of school children who are eligible for free transport in accordance with the rules and regulations of the free transport scheme organised and operated by CIÉ, on behalf of the Department of Education. These arrangements up-date and supersede the Summary of Accounting Arrangements dated 1 August 1968.'

(241) That document describes in detail the accounts for school transport services that CIÉ must supply to the Department of Education to receive payment. The description includes definitions of what can be billed to the Department of Education principally under the categories of 'direct costs' and 'indirect costs', with various adjustments made including 'depreciation', 'interest', 'receipts from fare-paying passengers', and 'charge for children carried free [on scheduled services]'. The overall purpose is to calculate a total 'Net amount chargeable to the Department of Education' ([63]).

(242) There is no indication that any substantial alternations have been made to the School Transport Scheme since the 1975 update of the Accounting Agreement governing its financial arrangements. In addition, the Commission notes that Regulation (EC) No 1370/2007 cannot be said to have opened the market for school transport, considering that the transport services provided under the scheme are not provided to the public at large on a non-discriminatory and continuous basis ([64]). The Commission therefore considers the School Transport Scheme to constitute existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

9.2.5. *Financing of disability awareness training*

(243) Ireland maintains that the financing of disability awareness training is existing aid.

(244) The Commission notes, however, that the scheme was first put into place in 2001 and that there is no indication that the scheme was based on an earlier scheme. For this reason Ireland cannot claim the existing aid exemption as laid down by Article 1(b) of Regulation (EC) No 659/1999 since the aid was not already in place by 1995.

([60]) See recital 21.
([61]) CIÉ Free Transport Schemes for Primary and Post Primary School Children — Summary of Accounting Arrangements — 1 August 1968.
([62]) Free Transport Scheme for Primary and Post-Primary School Children — Summary of Accounting Arrangements — January 1975.
([63]) Ibidem, Appendix 1.
([64]) See Article 2(a) of Regulation (EC) No 1370/2007 for the definition of 'public passenger transport' covered by that regulation.

(245) Since Ireland has not put forward any other arguments for arguing that the financing of disability awareness training constituted existing aid, the Commission concludes that that measure should be considered new aid within the meaning of Article 1(c) of Regulation (EC) No 659/1999. It therefore falls to the Commission to assess the compatibility of that measure with the internal market (see Section 9.4).

9.3. **Appropriate measures: School Transport Scheme**

(246) The annual operating compensation for urban, suburban and regional bus services, and the financing of new buses and funding of infrastructure, constitute existing aid which has been brought to an end. By contrast, the School Transport Scheme is an existing aid scheme which Ireland continues to operate, with the essential framework under which the scheme operates still in place.

(247) Consequently, the Commission, subsequent to the adoption of this Decision, intends to initiate a dialogue with Ireland, in accordance with Article 17(2) of Regulation (EC) No 659/1999, to agree on appropriate measures to ensure the School Transport Scheme, in its future implementation is compatible with the internal market.

9.4. **Compatibility of aid: disability awareness training aid**

(248) Since the annual operating compensation for urban, suburban and regional bus services, and the financing of new buses and funding of infrastructure, constitute existing aid which has been brought to an end, there is no need to assess the compatibility of these measures with the internal market. By contrast, since the School Transport Scheme is an existing aid scheme which Ireland continues to operate, it is in the context of the dialogue referred to in the previous recital that the Commission intends to inform Ireland why it believes that that scheme is incompatible with the internal market.

(249) As regards the financing by Ireland to Bus Éireann and Dublin Bus of disability awareness training, that constitutes new aid so that the Commission must examine its compatibility with the State aid rules. It is settled case-law that the rules, principles and criteria of assessment of the compatibility of State aid in force on the date on which the Commission takes its decision may, as a rule, be regarded as better adapted to the context of competition ([65]). Any compatibility assessment of the measure must therefore be made on the basis of the rules in force at the time the Commission takes its decision as to whether the aid should be recovered as a result of its being incompatible with the internal market ([66]): in this case the rules in force are set out in Commission Regulation (EU) No 651/2014 ([67]).

(250) However, at the time the financing occurred, the compatibility of training aid was governed by Regulation (EC) No 68/2001 which provided for an exemption from the notification requirement laid down in Article 108(3) of the Treaty, provided that all the conditions of that regulation were fulfilled ([68]). Pursuant to Regulation (EC) No 68/2001, such training aid is compatible with the internal market within the meaning of Article 107(3) of the Treaty. Therefore, it is necessary to examine whether the financing of disability awareness training fulfils all the conditions of Regulation (EC) No 68/2001.

(251) The exemption from notification provided for in Regulation (EC) No 68/2001 requires both individual aid grants and aid schemes to contain an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union* ([69]).

(252) There is no indication that the financing by Ireland to Bus Éireann and Dublin Bus of disability awareness training ('financing of training') was subject to such a publication. Indeed, Ireland did not state that the financing of training was compatible with Regulation (EC) No 68/2001.

(253) Therefore, without examining the remainder of the compatibility conditions in Regulation (EC) No 68/2001, the Commission considers that the financing of training does not satisfy the conditions for exemption from notification under this regulation. It follows from this conclusion that the financing of training must be examined under Regulation (EU) No 651/2014, which entered into force on 1 July 2014.

(254) Article 58(1) of Regulation (EU) No 651/2014 states that the Regulation applies to individual aid granted before its entry into force if the aid fulfils all the conditions laid down in the Regulation, with the exception of Article 9.

([65]) Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR 1-9465, paragraph 51.
([66]) Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others* v *Commission* [2011] ECR I-83, paragraphs 125 and 128. Most recently, Case T-570/08 RENV *Deutsche Post* v *Commission*, EU:T:2013:589, paragraph 167.
([67]) Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).
([68]) Article 3 of Regulation (EC) No 68/2001.
([69]) Article 3(1) and Article 3(2)(b) of Regulation (EC) No 68/2001.

(255) The Commission considers that the financing of training amounts to 'individual aid', within the meaning of Article 2(14) of Regulation (EU) No 651/2014, rather than an 'aid scheme' within the meaning of Article 2(15) of that regulation, since at the time of the award, 2001-03, the aid was more of an ad hoc nature, and was only formalised so as to resemble an aid scheme much later, in 2006 ([70]).

(256) Article 31(4) of Regulation (EU) No 651/2014 sets the maximum permitted aid intensity for training aid such as this at 50 % of eligible costs. However the financing of training has a higher aid intensity, meaning this condition is not met.

(257) Article 58(2) of Regulation (EU) No 651/2014 states that 'any aid not exempted from the notification requirement of Article 108(3) of the Treaty by virtue of this Regulation or other regulations adopted pursuant to Article 1 of Regulation (EC) No 994/98 previously in force shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.'.

(258) Therefore the Commission will assess whether the measure at issue might be compatible under Commission Regulation (EC) No 800/2008 ([71]), which was the regulation previously in force until its repeal by Regulation (EU) No 651/2014. According to Article 39(1) of Regulation (EC) No 800/2008, training aid shall be compatible with the internal market and exempt from the pre-notification requirement, provided that the conditions laid down in paragraphs 2, 3 and 4 of that provision are fulfilled.

(259) Article 39(2) of Regulation (EC) No 800/2008 on training aid states:

'The aid intensity shall not exceed: (a) 25 % of the eligible costs for specific training; and (b) 60 % of the eligible costs for general training. […].'.

(260) In the Opening Decision, the Commission considered that disability awareness training should be classified as 'general training' within the meaning of Regulation (EC) No 68/2001.

(261) According to Article 38(2) of Regulation (EC) No 800/2008, 'general training' means:

'[…] training involving tuition which is not applicable only or principally to the employee's present or future position in the undertaking, but which provides qualifications that are largely transferable to other undertakings or fields of work. Training shall be considered "general" if, for example:

(a) it is jointly organised by different independent undertakings or where employees of different undertakings may avail themselves of the training;

(b) it is recognised, certified or validated by public authorities or bodies or by other bodies or institutions on which a Member State or the Community has conferred the necessary powers.'.

(262) The Commission notes that although the training grants were first made only to Bus Éireann and Dublin Bus, the aided training was also provided to employees other bus and transport undertakings from 2006 onwards ([72]), so it can be considered that 'employees of different undertakings may avail themselves of the training'.

(263) Therefore, the Commission considers that the current training aid measure should also be considered 'general training' within the meaning of Regulation (EC) No 800/2008 Article 38(2).

(264) Article 39(2) of Regulation (EC) No 800/2008 sets the threshold for aid intensity for 'general training' at 60 % of eligible costs.

(265) In Table 5, the grant funding to CIÉ is EUR 985 592, against costs borne by CIÉ of EUR 661 560, resulting in an aid intensity of 59,8 %, which is below the maximum permissible of 60 % mentioned in recital 264.

([70]) See recitals 79 to 83.
([71]) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).
([72]) See recital 83.

(266) Therefore, given that the aid intensity is below the threshold laid down by that provision, this criterion of Regulation (EC) No 800/2008 has been respected.

(267) Article 39(4) of Regulation (EC) No 800/2008 defines the types of costs that are eligible for training aid projects. According to Ireland, the costs borne by CIÉ of EUR 661 560 mentioned in Table 5 relate to CIÉ's personnel costs. That is an eligible category of cost under Article 39(4)(a) of that regulation. This condition is therefore met.

(268) With regard to the various other articles of that regulation, the Commission notes that the transparency requirement of Article 5 of Regulation (EC) No 800/2008 has been met, since the measure at issue relates to grants within the meaning of Article 5(1).

(269) With regard to Article 7 of Regulation (EC) No 800/2008, concerning cumulation, the Commission has no indication that the measure at issue was funded by another source. This condition is therefore met.

(270) With regard to Article 8 of Regulation (EC) No 800/2008, concerning incentive effect, it seems unlikely that the measure at issue would have been carried out in the absence of the State support. This condition is therefore met.

(271) The Commission therefore concludes that the disability awareness training aid granted by Ireland to Bus Éireann and Dublin Bus is compatible with the internal market on the basis of Article 107(3) of the Treaty, by virtue of Regulation (EC) No 800/2008.

10. **CONCLUSION**

(272) The annual operating compensation, the grants for new buses, the grants for infrastructure and the School Transport Scheme constitute existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

(273) The disability awareness training grants are compatible with the internal market within the meaning of with Article 107(3) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Ireland implemented in the form of annual operating compensation until 30 November 2009, amounting to EUR 654,9 million, constitutes existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

Article 2

The State aid which Ireland implemented in the form of the financing of new buses until 30 November 2009, amounting to EUR 236,8 million, constitutes existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

Article 3

The State aid which Ireland implemented in the form of the financing of infrastructure from 12 December 2000 until 30 November 2009, amounting to EUR 64,5 million, constitutes existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

Article 4

The State aid which Ireland implemented under the School Transport Scheme, constitutes existing aid within the meaning of Article 1(b)(v) of Regulation (EC) No 659/1999.

Article 5

The State aid which Ireland implemented for disability awareness training, amounting to EUR 985 592, is compatible with the internal market within the meaning of Article 107(1) of the Treaty.

This Decision is addressed to Ireland.

Done at Brussels, 15 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President