DECISIONS

COMMISSION DECISION (EU) 2017/639

of 30 September 2016

on State aid SA.23216 — C 54/07 (ex NN 55/07) to Emsländische Eisenbahn GmbH, Germany

(notified under document C(2016) 6232)

(Only the German 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,

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 30 August 2002, the Ludger Albers oHG, the Reinhard Bittner enterprise, the Elbert GmbH & Co. KG, the Auto Fischer GmbH & Co. KG, the Kalmer GmbH, the Richters Reisen enterprise and the Wessels Reisen enterprise ('the Complainants') submitted a complaint to the European Commission ('the Commission'), alleging that the Emsländische Eisenbahn GmbH ('EEB') was granted unlawful State aid. On 13 July 2006 the Complainants sent another letter enlarging the scope of their complaint and submitted further information on 22 November 2006.

(2) Following the complaints the Commission requested information from the German authorities on several occasions ([2]), to which the authorities responded ([3]).

(3) By letter dated 28 November 2007, the Commission informed Germany of its decision to initiate the procedure provided for in Article 88(2) of the Treaty establishing the European Community (EC Treaty). Germany transmitted comments on 24 April 2008.

(4) The Commission decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ([4]) on 9 July 2008. The Commission invited interested parties to submit their comments.

(5) Following the decision to initiate the formal investigation, the Complainants transmitted a first set of comments on 21 February 2008. After the publication, the Complainants provided further comments on 25 August 2008 and 29 August 2008.

([1]) OJ C 174, 9.7.2008, p. 13.
([2]) On 3 October 2006, 27 November 2006 and 13 March 2007.
([3]) On 24 October 2006, 26 January 2007 and 19 June 2007.
([4]) Cf. footnote [1].

(6) Nahverkehrsberatung Südwest provided comments on 29 July 2008 and sent non-confidential versions of the information on 16 and 29 October 2008. Another third party, which chose to remain anonymous, provided comments on 23 July 2008.

(7) On 26 November 2008, the Commission transmitted the comments from the interested parties to Germany. The Commission received Germany's observations by letter dated 26 January 2009.

(8) On 9 July 2009, the German authorities provided further information following a request from the Commission of 30 April 2009.

(9) The German authorities provided further information on 16 December 2009, 4 August 2010 and 23 June 2011.

(10) On 20 October 2011 the Commission wrote to Germany and a response was received on 10 November 2011.

(11) Further information was provided by the German authorities upon the Commission's request on 5 June 2012, 6 May 2013 and 21 November 2013.

2. **THE FACTS**

2.1. *BENEFICIARY*

(12) The beneficiary of the allegedly unlawful State aid, *Emsländische Eisenbahn GmbH* ([5]) ('EEB'), was founded on 1 January 1997, having emanated from the non-separated public agency with the same name ('EE').

(13) The *Landkreis Emsland* (the public administration of the Emsland region) has been the sole shareholder of EEB ever since its founding. As such it has extensive control over the operations of EEB. In accordance with paragraph 10 of the articles of association (*Gesellschaftsvertrag*) of EEB, the Landkreis appoints EEB's managing director and has the final say on key business decisions (annual accounts, economic plans etc.).

(14) Pursuant to paragraph 3 of the articles of association of EEB, the following public tasks related to the planning and coordination of public local passenger transport have been assigned to EEB:

— drafting the *Nahverkehrsplan* (a local transport scheme, 'NVP') for the *Landkreis Emsland* after hearing the undertakings carrying out the transport;

— establishment and operation of a *Mobilitätszentrale* (a regional public passenger transport information centre; 'MCE' or 'Mobility Centre Emsland') and introduction of improved information systems;

— organisation of school transport and integration of the non-integrated school transport into the regular local passenger transport as foreseen in sections 109 and 114 of the *Niedersächsisches Schulgesetz* as of 3 March 1998 ([6]) (Lower Saxony School Act; 'NSG');

— introduction of tariff improvements;

— cooperation with the railway transport sector.

([5]) http://www.eeb-online.de/

([6]) Lower Saxony Law Journal of 1998, page 137, last amended by Article 2 of the law of 12 July 2007, Lower Saxony Law Journal No 22/2007, page 339 — VORIS 22410 01.

(15) EEB is in the possession of a few *Linienverkehrsgenehmigungen* (route transport permissions, 'LVG') for local bus passenger transport routes in the *Landkreis Emsland* ([7]). Where EEB holds such permissions, it has subcontracted the operation of these routes to various bus undertakings (so-called *Übertragung der Betriebsführung* ([8])), inter alia to its subsidiary EVG.

(16) EEB also engages in rail freight transport, in particular on own railway sidings, and in infrastructure management of these sidings.

2.2. *LOCAL BUS PASSENGER TRANSPORT MARKET IN THE* LANDKREIS EMSLAND

(17) Since 1 January 1996, cities and *Landkreise* are responsible, pursuant to the *Nahverkehrsgesetz des Landes Niedersachsen* (Lower Saxony Local Transport Act; 'NNVG'), for ensuring that adequate public transport is on offer. The *Landkreis Emsland*, therefore, had to ensure the planning, organisation and financing of public transport within the *Landkreis* were arranged. The *Landkreis* in turn tasked EEB to realise these tasks, as listed in paragraph 3 of the articles of association of EEB (see recital 14 above).

(18) The public bus transport network is divided into routes for which LVG are granted in accordance with sections 13 and 42 of the German *Personenbeförderungsgesetz* (national transport act) on a competitive basis. The majority of companies carrying out the public passenger transport in the *Landkreis Emsland* are from the *Landkreis* itself.

(19) The local bus transport market in the *Landkreis Emsland* is divided into two main parts. In the southern part of the *Landkreis*, private bus undertakings, among them two of the Complainants (Reinhard Bittner and Kalmer) have regrouped their bus transport activities in a tariff association, *Verkehrsgemeinschaft Emsland-Süd* (transport association Emsland-Süd, 'VGE-Süd').

(20) In central and northern Emsland, *RegioNetz-Mitte* (tariff association RegioNet-Centre; consisting of EEB and three private bus undertakings) and *Tarifgemeinschaft Emsland Mitte/Nord* (tariff association Emsland Centre/North; of which the other Complainants are part) are the main local transport associations.

(21) EEB arranges school transport across the entire *Landkreis Emsland* in an integrated and in a non-integrated form.

(22) School transport can be integrated into the regular bus routes. The operators of the respective routes are awarded a contract, by which they are obliged to take the demands of school transport into account. The school tickets are paid by the *Landkreis Emsland* via EEB.

(23) For those pupils that have a right to school transport, but that do not live along the regular bus routes EEB arranges non-integrated school transport. This service is tendered out to bus undertakings which must respect certain conditions, in particular as regards the routes and time schedules. The *Landkreis Emsland* reimburses EEB for the amounts invoiced by the operators.

3. **DETAILED DESCRIPTION OF THE MEASURES**

(24) In its opening decision ([9]) the Commission produced a table, based on information submitted by the German authorities, showing the financial transfers to EEB which were subject to the investigation. Columns 1 to 6 of this table are reproduced below ([10]). Columns 7 to 9 of the table have been taken out, as the Commission decided not to raise any objections to these payments in its opening decision.

([7]) In line with the Personenbeförderungsgesetz of 21 March 1961 (national transport act; hereinafter: PBefG).
([8]) Section 3(2) No 3 PBefG.
([9]) Cf. footnote [1].
([10]) All figures shall be understood in Euro (EUR). For the period 1997 until 2001, the figures listed in the budgetary forecasts and revisions in Deutsche Mark (DM) have been translated into EUR based on a rate of 1:1,9558 (EUR:DM). Minor discrepancies between the figures listed in the budgetary forecasts and revisions and figures provided for by GER are deemed to be caused by the currency translation process; the Commission bases its assessment on the figures given by Germany. — shall be understood as no declaration, 0 as no financial support granted.

Table 1

Relevant measures examined in the opening decision

	1.	2.	3.	4.	5.	6.
	Capital endowment	Dividends	'Loss Coverage for public local passenger services' ([1])	'Compensation for the costs of school Transport'	Financial support for administrative Costs section 7 (4) NNVG ([2])	Financial support for local passenger transport on basis of section 7 (5) NNVG ([3])
1997	11 658 593,93 ([4])	327 594,11	3 160 667,25	4 288 074,35	291 676,68	0
1998	0	418 018,20	1 459 116,26	5 948 469,02	289 186,01	0
1999	0	—	1 429 351,28	6 163 333,16	290 918,94	0
2000	0	—	1 447 246,49	6 605 600,64	292 573,43	0
2001	0	—	1 558 738,18	7 117 944,37	291 157,65	0
2002	0	—	1 554 410,99	7 254 574,48	281 804,60	0
2003	0	—	1 514 260,59	7 520 739,17	283 702,10	0
2004	0	—	1 483 620,21	7 765 750,42	285 199,42	0
2005	0	—	1 412 520,89	8 208 800,12	308 488,00	85 000,00
2006	0	0	0	8 022 784,94	248 642,42	780 459,84 ([5])
2007	0	0	0	9 300 000,00	248 000,00	—

([1]) These figures are listed in the budgetary forecasts and revisions of Emsland under No 67.500 'Verlustausgleich für ÖPNV-Leistungen' ('Offset of losses for local passenger transport services').

([2]) The NNVG of 28 June 1995 adapted thereafter on 16 December 2004 (Lower Saxony Local Transport Act), was adopted on the basis of the Regionalisierungsgesetz des Bundes of 27 December 1993 (National Regionalisation Act)

([3]) The adaptation of the NNVG of 16 December 2004, which entered into force on 1 January 2005 reflected the fact that the funding of public transport had changed at national level. The amount granted per inhabitant was slightly reduced, but this was supplemented with Regionalisierungsmittel (regional funding) to improve the functioning of public transport, which is reflected in column 6.

([4]) This amount contains the initially authorised capital EUR 410 000, as well as shares worth EUR 11 248 593,93.

([5]) This figure shall be understood as sub divided into the following categories: promotion of marketing and improvement of passenger information, comprising running costs of the Mobility Centre Emsland (EUR 116 876,09), Purchase of software DIVA-Geo as map-basis for MCE (EUR 17 402,90), draft of a bus stop register (EUR 28 815,34), Rolling stock (call-a-bus) (EUR 520 989,05), bus transport passenger waiting facilities (EUR 59 376,46) and software for planning of local passenger transport (EUR 37 000).

(25) In the following sections, factual information is summarised, based on documentation transmitted by Germany and the Complainants before and after the opening decision.

3.1. *CAPITAL ENDOWMENT AND TRANSFER OF SHARES (COLUMN 1)*

(26) The *Landkreis Emsland* endowed EEB with authorised capital of DM 800 000 (approx. EUR 410 000) when the former non-separated public agency EE and its assets were outsourced and EEB was founded in 1997. In addition, EEB was endowed with the ownership of RWE ([11]) shares.

([11]) RWE is a leading energy company in Germany.

(27) At the time of the opening decision, it was unclear whether the transfer of shares was part of the initial capital endowment of EEB or a capital injection not foreseen when EEB was created. Germany clarified that the major part of the shares, 280 310 RWE shares with a market value of EUR 9 686 523,78, formed part of the initial capital endowment. They had been transferred to the non-separated public agency EE before the creation of EEB.

(28) Nevertheless, 37 630 shares with a market value of EUR 1 689 264,40 were only transferred on 12 October 1998, more than five years after the incorporation of EEB.

3.2. *INTEGRATED SCHOOL TRANSPORT IN SOUTHERN EMSLAND UNTIL 31 DECEMBER 2005 (COLUMNS 2 AND 3)* ([12])

(29) The amounts listed under column 2 (dividends) and the amounts listed under column 3 (financial support listed in the budgetary forecasts and revisions of Emsland under No 67.500 'Verlustausgleich für ÖPNV-Leistungen' ('offset of losses for local passenger transport services')) were used by EEB to reimburse VGE-Süd for integrated school transport services in southern Emsland.

(30) The dividends in column 2 are the dividends EEB received from the RWE shares mentioned above.

(31) In southern Emsland, school transport was mainly carried out in an integrated form by VGE-Süd, on the basis of a contract signed between VGE-Süd and EE. When EEB was founded in 1997, this contract was substituted by an identical contract between EEB and VGE-Süd. As of 31 December 2005, the contract was terminated by EEB.

(32) The initial contract between EEB and VGE-Süd foresaw a lump-sum compensation of EUR 1 705 362,94 annually. This amount was increased by 10 % on 1 November 2000 to EUR 1 839 116,88.

(33) Columns 2 and 3 add up to the lump-sum that was agreed between EEB and VGE-Süd. The *Landkreis Emsland* deducted the value of the dividends (column 2) from the total amount that had to be paid to VGE-Süd for its services and transferred the remainder (column 3) to EEB. This can be seen in the table below, which is based on additional figures provided by the German authorities after the opening decision.

Table 2

Payments to VGE-Süd for integrated school services

Year	Dividends (column 2)	'Loss Coverage for public local passenger services' (column 3)	Total (paid to VGE-Süd)
1997	196 572,65	1 508 790,29 ([1])	1 705 362,94
1998	246 246,68	1 459 116,26	1 705 362,94
1999	276 011,66	1 429 351,28	1 705 362,94
2000	258 116,45	1 447 246,49	1 705 362,94
2001	276 011,66	1 558 738,18	1 864 749,85
2002	284 397,33	1 554 719,55	1 839 116,88
2003	312 837,07	1 526 279,81	1 839 116,88

([12]) Dividends and 'loss coverage for public local passenger transport services'.

Year	Dividends (column 2)	'Loss Coverage for public local passenger services' (column 3)	Total (paid to VGE-Süd)
2004	355 496,67	1 483 620,21	1 839 116,88
2005	426 596	1 412 520,89	1 839 116,88

([1]) The German authorities originally indicated the figure EUR 3 160 667,25 for this cell. Later, Germany explained that for 1997 column 3 comprised not only the payments to VGE-Süd but also payments to other companies. Only from 1998, there was a clear distinction between payments to VGE-Süd (column 3) and payments for non-integrated school transport, for Deutsche Bahn AG and for other integrated school transport (column 4). If 1997 were calculated as in the following years, column 3 would show an amount of EUR 1 508 790,29 and column 4 an amount of EUR 5 936 951,31 (shift of EUR 1 651 876,97 from column 3 to column 4, corresponding to the amount paid to the bus undertakings of Northern and Central Emsland). The sum of both columns gives the total amount paid for school transport in Emsland.

(34) As the contract between EEB and VGE-Süd ended in 2005, EEB paid back the value of the dividends to the *Landkreis Emsland* from 2006.

(35) The Complainants provided the Commission with a table of all payments received by VGE-Süd until 31 December 2005, which differs from the figures provided above. It reads as follows:

Table 3

Payments to VGE-Süd for all services

(in EUR)

Year	Net value	7 % VAT	Gross value
1997	1 715 447,17	1 281,3	1 835 528,47
1998	1 799,19	119 636,31	1 828 726,5
1999	172 188,64	12 531,64	1 842 412,28
2000	178 981,17	119 628,68	182 869,85
2001	1 874 119,68	131 188,38	2 538,6
2002	185 152,71	12 966,45	1 981 127,16
2003	185 656,41	129 959,23	1 986 519,64
2004	1 867 827,64	13 747,93	1 998 575,57
2005	1 863 779,76	13 464,58	1 994 244,34

(36) The German authorities explained that the difference between the amount VGE-Süd received according to the Complainants and the sum of columns 2 and 3 results from the fact that VGE-Süd was not only carrying out integrated school transport services covered by columns 2 and 3, but on occasion also carried out non-integrated school transport services which were also compensated by the *Landkreis Emsland* via EEB.

3.3. *'COMPENSATION FOR THE COSTS OF SCHOOL TRANSPORT' (COLUMN 4)*

(37) The financial support listed in the budgetary forecasts and revisions of the *Landkreis Emsland* under No 67.510 'Erstattung der Kosten für die Schülerbeförderung' ('compensation of the costs of school transport') was dedicated to offset EEB's expenditures for the organisation of the school transport in central and northern Emsland ([13]), and, upon termination of the contract with VGE-Süd on 31 December 2005, also southern Emsland. This expenditure included both integrated and the non-integrated school transport.

(38) When opening the formal investigation the Commission had no information at its disposal to ascertain whether the financial resources received by EEB to reimburse the transport undertakings for carrying out this school transport equalled the actual payments by EEB to those undertakings.

(39) The German authorities provided further clarifications and documentation showing that, for integrated school transport falling under column 4, EEB acquired tickets from the bus undertakings for those pupils that travelled via regular bus lines. Yearly settlements with the *Landkreis* ensured that the amounts paid to EEB correspond to the amounts it transferred to the bus undertakings. The payments were handled through a clearing account. The *Landkreis Emsland* made the required amounts available and EEB passed these on in the *Landkreis*' name. The clearance account was verified by an independent chartered accountant on an annual basis to establish that revenues and expenditures match.

(40) The German authorities also clarified that the economic results of EEB contained revenues from integrated school transport carried out by third parties on routes for which EEB has the LVGs and from the non-integrated school transport. The matching of revenues and expenditures relating to these financial posts were also checked by an independent chartered accountant on an annual basis as part of the EEB's end-of-year report.

(41) In addition, the German authorities provided an updated and corrected overview of the yearly payments made to EEB for the coordination of school transport.

Table 4

Overview of actual school transport payments

(in EUR)

Year	'Loss Coverage for public local passenger services' (column 3)	'Compensation for the costs of school Transport' (column 4)	Total payment of the Landkreis to EEB
1997	15 879,29	5 573 355,48	73 361,73
1998	1 459 116,26	595 496,22	7 413 212,48
1999	1 429 351,28	6 175 822,86	765 174,14
2000	1 447 246,49	6 628 313,12	875 559,61
2001	1 588 738,19	7 158 797,33	8 747 535,52
2002	1 554 719,55	7 267 713,54	8 822 433,9
2003	1 526 279,81	7 636 828,1	916 317,91
2004	148 362,21	776 575,42	924 937,63
2005	141 252,88	8 288,13	9 621 321,1

([13]) Also VGE-Süd was compensated under this budgetary line.

(in EUR)

Year	'Loss Coverage for public local passenger services' (column 3)	'Compensation for the costs of school Transport' (column 4)	Total payment of the Landkreis to EEB
2006		822 784,94	822 784,94
2007		9 175 787,6	9 175 787,6

3.4. *FINANCIAL SUPPORT FOR ADMINISTRATIVE COSTS OF THE LOCAL PASSENGER TRANSPORT DERIVING FROM FEDERAL FINANCIAL MEANS PURSUANT TO SECTION 7 (4) NNVG (COLUMN 5)*

(42) The financial support listed in the budgetary forecasts and revisions of the Landkreis Emsland under No 71.510 'Zuwendungen an die Emsländische Eisenbahn aus dem Verwaltungskostenanteil des Landes' ('Subsidies to EEB from the share of Lower Saxony in the administrative costs') was dedicated to compensate EEB's costs incurred for carrying out tasks that fall within the public policy remit and which the *Landkreis Emsland* transferred to it

(43) These public tasks include the drafting the NVP ([14]). The material costs for the NVP which is developed every five years amounted to EUR 11 248,42 in 1997, EUR 25 000 in 2002 and EUR 8 793 in 2003.

(44) At the time of the opening decision the Commission had doubts whether the entire amount under column 5 was used for costs related to the drafting of the NVP or whether the payments were also used to finance other (economic) activities and whether the reimbursement of administrative costs for the establishment and operation of the Mobility Centre Emsland (MCE) were also covered under column 5.

(45) Germany clarified that the costs listed in column 5 included the staff and material costs for planning public transport, the MCE (until the end of 2004) and the coordination of school transport.

(46) Until the end of 2004 financing the MCE was not separated from the other costs which fall under column 5. From 2005, a separation was introduced following an amendment of the NNVG, and the amounts dedicated to the MCE were shifted to the new budget line covered by column 6 'allowances on the grounds of the NNVG'.

(47) The MCE provided local public transport information free of charge. It covered bus and train services in the *Landkreis Emsland* and provided information regardless of the operator offering the service. The *Kreisausschuß* (decision making body of the *Landkreis*) decided to create the MCE in July 1995. At that time, the *Landkreis* had identified the lack of information about public transport on offer in the region as a significant deficit of the public transport policy.

(48) When EEB was created in 1997, the *Landkreis* outsourced the MCE's activities to EEB. In paragraph 3 of its articles of association the management of the MCE was attributed to EEB as one of the tasks contributing to the organisation and coordination of transport. Citizens can call the MCE to obtain travel information and since 1999 the MCE has a counter in the train station of Meppen next to the counter of Deutsche Bahn AG.

(49) The lump-sum payment of EUR 3 558,65, agreed between EEB and the *Landkreis* in 1998 regarding the organisation and financial settlement of the school transport were also covered by column 5. This yearly lump-sum payment served as compensation for the accounting expenses linked to the payments to Deutsche Bahn AG and the regular bus undertakings in northern and central Emsland.

([14]) In recital 53 of the opening decision the Commission concluded that drafting the NVP was a task falling within the public policy remit.

3.5. *FINANCIAL SUPPORT FOR LOCAL PASSENGER TRANSPORT DERIVING FROM FEDERAL FINANCIAL MEANS PURSUANT TO SECTION 7 (5) NNVG (COLUMN 6)*

(50) The financial support listed in the budgetary forecasts and revisions of the *Landkreis Emsland* under No 71.500 'Zuwendungen nach dem NNVG' ([15]) ('allowances on the grounds of the NNVG') were granted following the last adaptation of the regional law NNVG (Lower Saxony Local Transport Act), which entered into force on 1 January 2005 to reflect the fact that the rules regarding the funding of public transport had changed at national level. The amount granted per inhabitant was slightly reduced, but this was partially compensated by new *Regionalisierungsmittel* (regional funding) to improve the functioning of public transport, which is reflected in column 6.

(51) The funds in column 6 were used to run the MCE and to acquire rolling stock, intended for a call-a-bus scheme. The payments listed in column 6 also covered other expenses on which the Commission concluded that they did not constitute State aid in the opening decision ([16]).

(52) As described above, the MCE was financed under column 5 until 2004, as of 2005 it was financed under column 6. Germany clarified that the amounts received by EEB for the MCE under column 6 were EUR 85 000 in 2005, EUR 98 000 in 2006 and EUR 93 460,87 in 2007.

(53) The *Landkreis Emsland* also decided to use part of the funds in column 6, which had to be dedicated to the promotion of public transport, to expand its call-a-bus system. This on-demand system makes call-busses available on fixed routes at fixed times if a person calls the Mobility Centre Emsland and introduces a request. The introduction of call-busses aimed at improving the connection to the train stations and between different districts in an efficient manner, without running busses if there is no demand.

(54) The German authorities explained that the *Landkreis Emsland* financed the acquisition of five new busses by EEB for a total of EUR 685 513,46. EUR 520 989,05 for four busses in 2006 and EUR 164 524,42 for a fifth bus in 2007.

(55) EEB offered the call-busses to transport undertakings at equal conditions dictated by the *Landkreis Emsland*. They were leased on the basis of a standard form contract, which foresaw that the transport undertakings bear the operation and maintenance costs but do not pay a rental fee. The busses were used by subcontractors on EEB routes and by other transport undertakings on their respective routes. The ownership of the busses remained with EEB, to allow the *Landkreis Emsland* to retain control over them.

3.6. *GROUNDS FOR INITIATING THE PROCEDURE*

(56) The opening decision concluded that the existence of aid in relation to the following measures could not be excluded, (see also Table 1 of this decision):

— Column 1: the transfer of shares;

— Columns 2-4: school transport;

— Column 5: administration of local passenger transport (notably the NVP and MCE);

— Column 6: MCE and the call busses.

(57) Should these measures be State aid, the opening decision expressed doubts regarding their compatibility with the internal market.

([15]) Germany has informed the Commission that the description of category No 71.500 in the budgetary forecast of 2006 'Zuwendungen an die Emsländische Eisenbahn nach dem NNVG' ('subsidies granted to EEB on the grounds of the NNVG') was wrong since the listed amount of subsidies was not granted to EEB only. The category thus was renamed in the budgetary forecast of 2007 into beneficiary-neutral 'Zuwendungen nach dem NNVG' ('subsidies on the grounds of the NNVG').

([16]) In recital 107 of the opening decision the Commission concluded that the purchase of the DIVA-Geo software, the drawing up of a bus-stop register and the acquisition of a public transport planning software were all linked to the elaboration of the NVP and thus public tasks.

3.6.1. EXISTENCE OF AID

(58) The opening decision found that all funds were directly granted to EEB by the *Landkreis Emsland* and that EEB is an undertaking carrying out economic activities, at least in part. It continued to state that in respect of the transfer of shares, the financial support for call busses and the MCE, there was no consideration on the part of EEB. With regard to the school transport, the opening decision expressed doubts whether the payments fully corresponded to the costs incurred by EEB. In particular with regard to the lump sum support overcompensation could not be excluded. In addition, it concluded that competition has at least been threatened to be distorted.

3.6.2. COMPATIBILITY OF AID

(59) In the opening decision it was stated that insufficient information was available to determine whether the measures under consideration could be categorised as public services or contributing to the coordination of transport and whether legal basis for the compatibility assessment should be Article 93 of the Treaty on the Functioning of the European Union (TFEU) (at the time Article 73 of the EC Treaty). In that case the compatibility would have had to be assessed with Regulation (EEC) No 1191/69 of the Council ([17]) or Regulation (EEC) No 1107/70 of the Council ([18]). Otherwise compatibility would have to be assessed with Article 107(2) or (3) TFEU (at the time Article 87 of the EC Treaty).

(60) Regarding the transfer of shares the opening decision expressed doubts in particular with regard to its incentive effect and whether it was proportionate.

(61) Regarding financial support for school transport it was not known whether all the funding was passed on to school transport services carried out by other operators or whether part of this funding was maintained by EEB. If part of the funding would have been retained by EEB the question was asked whether these funds were used for economic or non-economic activities and whether EEB was possibly overcompensated for carrying out school transport services itself.

(62) Regarding the administration of local passenger transport (NVP and EMC) the Commission could not exclude overcompensation.

(63) Regarding the call busses the Commission asked whether or not these were used by EEB on their own commercial routes for which there would be no justification under the EC Treaty.

4. **COMMENTS FROM GERMANY**

4.1. *CAPITAL ENDOWMENT, TRANSFER OF SHARES FROM RWE (COLUMN 1)*

(64) The German authorities demonstrated that when EEB was created all assets belonging to the former non-separated public agency EE were transferred to EEB. This included the capital endowment of approx. EUR 410 000 and 280 310 RWE shares. Germany therefore argues that neither of them constitute aid. In addition, the German authorities remark that the capital endowment and initial transfer of RWE shares took place before 13 March 1997 and would therefore not be recoverable.

(65) With regards to the 37 630 RWE shares transferred in 1998 the German authorities explained that the transfer took place after a change in voting rights related to the RWE shares eliminating certain benefits. They also confirmed that EEB still holds these shares today.

(66) Germany argued that the *Landkreis Emsland* acted as a market economy operator trying to optimise its tax structure and that no loss in revenues occurred for the *Landkreis Emsland*, as EEB had to use the totality of the dividends to pay for school transport until 2005 and had to pay the dividends back to the *Landkreis Emsland* after 2005.

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

([18]) 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).

4.2. *FINANCIAL SUPPORT FOR SCHOOL TRANSPORT (COLUMNS 2, 3 AND 4)*

(67) The German authorities commented that EEB is responsible for the organisation of school transport in the *Landkreis Emsland* in accordance with paragraph 3 of its articles of association (see also recital 14 and that the payments by the *Landkreis* to EEB are transferred to undertakings for the school transport services they provide. Thus, the German authorities claim that these transfers do not constitute State aid to EEB as suggested in recital 137 of the opening decision.

(68) EEB received the lists of pupils from all schools and determined which pupils were entitled to public school transport. For pupils that could not be transported via regular bus lines (integrated school transport) EEB arranged non-integrated school transport. For both, integrated and non-integrated school transport, bus undertakings, including the Complainants, received monthly payments by EEB. The German authorities claimed that in this context, EEB spent the entire amount provided by the *Landkreis Emsland* for school transport. As described in recitals 39 and 40 the clearance account and EEB's accounts were checked annually by chartered accountants to ensure that revenues and expenditures match.

(69) With regards to columns 2, 3 and 4 the German authorities explained that these cover all school transport (integrated and non-integrated) carried out in the Emsland.

(70) For columns 2 and 3 the German authorities provided missing figures and explained that these funds were used to pay VGE-Süd a fixed sum for its services carried out in southern Emsland until 2005 (see also recitals 29 f.).

(71) In response to the Commission's questioning of the alleged lump-sum of EUR 3 934 481,47 for non-integrated transport in 1997 ([19]) the German authorities explained that an estimation was made at the beginning of each year on the basis of which monthly payments were made. At the end of each year actual costs were established and corresponding settlements took place. EEB simply forwarded the payments from the Landkreis to the bus undertakings. Occasional overpayments were booked as debts (*Verbindlichkeiten*) towards the *Landkreis Emsland* and were deducted from the compensation the following year. The actual cost price established at the end of 1997 was EUR 3 755 618,14.

(72) The German authorities clarified that the payments described in column 4 also include payments for the acquisition of school tickets from Deutsche Bahn AG.

(73) The German authorities explained that the increasing amounts in column 4 are due to tariff increases by the bus undertakings themselves and the fact that the *Landkreis* granted a rise of 6 to 10 % for non-integrated school transport in 2000 to bus undertakings, including the Complainants.

4.3. *ADMINISTERING OF LOCAL PASSENGER TRANSPORT (COLUMN 5)*

(74) The German authorities stated that the Mobility Centre Emsland was established by the *Landkreis Emsland* on 31 July 1995, before the creation of EEB. The MCE provided information on schedules for all bus undertakings and the Deutsche Bahn AG. It updated the schedules in the public information system and provided information to passengers in the information office from Monday to Saturday.

(75) The German authorities argued that the MCE was not an economic activity as there would be no reason for an economic undertaking to set up a mobility centre providing information on behalf of bus undertakings and the Deutsche Bahn AG free of charge. The MCE should be regarded as a public remit duty of the *Landkreis Emsland* and EEB had simply been charged with its operation.

(76) As explained under recital 46, the financing of the MCE was included in the budget line reflected by column 5 until 2004 and thereafter financed from the new budget line covered by column 6.

([19]) Recital 50 of the opening decision.

(77) According to the German authorities, four staff members carried out the following three tasks: organisation of regional public transport (including the set-up of the NVP), school transport and running the MCE. A comparison with the standard salaries for the concerned salary grades (as provided by the *Kommunale Gemeinschaftsstelle*) showed that EEB could have requested EUR 169 312,26 instead of EUR 138 015,11 for the staff and material cost. The German authorities also claimed that only material and personnel costs were covered and that no profit margin was added.

4.4. *FINANCIAL SUPPORT FOR LOCAL PASSENGER TRANSPORT DERIVING FROM FEDERAL FINANCIAL MEANS PURSUANT TO SECTION 7 (5) NNVG (COLUMN 6)*

(78) Column 6 includes payments to the Mobility Centre Emsland and the financing of rolling stock for the call-a-bus system as explained in recitals 50 f. The German authorities stressed that the payments correspond to real costs incurred by EEB in discharging public duties.

(79) With regard to the call-a-bus system, the German authorities explained that the *Landkreis Emsland* had invited the bus undertakings in November 2005 to submit proposals for the enlargement of the call-a-bus system.

(80) On the *Landkreis*' orders EEB acquired 4 call-busses in spring 2006. These busses were made available to all undertakings on the basis of the following conditions:

— the *Landkreis Emsland* maintains control over the busses because EEB is the owner of the vehicles and puts them at the disposal of the bus undertakings on the basis of a contract (*Fahrzeugüberlassungsvertrag*);

— the bus undertakings support the current costs of the use and maintenance of the vehicles;

— citizens call the MCE to request a call-bus and the MCE transfers the request to the relevant bus undertakings.

(81) In autumn 2007, an additional bus was acquired which was put at the disposal of the bus undertaking Wessels from Geeste under the same conditions.

(82) The German authorities claimed that EEB cannot make any profits with the call-a-bus system and provided the Commission with a copy of a letter of 16 February 2007 to the bus undertakings operating in the *Landkreis* showing that all of them had access to the busses at the same conditions.

5. **COMMENTS FROM INTERESTED PARTIES**

5.1. *THE COMPLAINANTS*

5.1.1. FINANCIAL SUPPORT FOR CARRYING-OUT SCHOOL TRANSPORT (COLUMNS 3 AND 4)

(83) The Complainants contested that EEB merely forwarded the amounts received from the *Landkreis* to the undertakings providing school transport. They believed that EEB received a lump-sum and organised school transport in a way as to maximize its own profit.

(84) The Complainants contested that EEB fulfilled public duties when organising school transport and acted in its own name rather than in the name of the *Landkreis Emsland*. If certain activities of EEB were to be considered as public duties, then these should come from separate accounts. They claimed that EEB was mixing its economic and non-economic activities.

(85) Regarding school transport in southern Emsland the Complainants argued that the contracts between VGE-Süd and EEB were always performance based and they submitted a table showing the payments received by the VGE-Süd (see also recitals 29 f.).

(86) The Complainants claimed that if the sum of columns 3 and 4 represented the total payments to undertakings carrying out school transport, then the sudden reduction between 2005 and 2006 is an indication of previously existing overcompensation.

(87) According to the Complainants, the costs for school transport by VGE-Süd varied only marginally (ca. 6 %) between 1997 and 2007. They had no explanation for the doubling of the amounts listed in column 4 over the same time span. They claimed that fare increases of no more than 10 % occurred between 1997 and 2006.

5.1.2. DRAFTING OF THE NVP (COLUMN 5)

(88) The Complainants argued that EEB drafted the NVP to suit its own interests and that this constituted an advantage for EEB with regard to the route authorizations (*Liniengenehmigungsanträge*). They also claimed that even though they were consulted during the elaboration of the NVP, their views were not taken into account.

(89) The Complainants also contested the Commission's conclusion in the opening decision that the establishment of the NVP is not an economic activity. The only public decision taken in this context in their view was the assessment and adoption of the NVP by the *Landkreis*. The preparatory work carried out by EEB constituted an economic activity that could have been carried out by any consultancy. The Complainants argued that they also have the necessary know-how to execute these tasks.

(90) The Complainants claimed that the acquisition of DIVA-software was not specific to the establishment of the NVP, but that it can also be used for other purposes such as optimization of transport supply by a bus undertaking. EEB would have received an advantage by receiving the DIVA-software for free.

5.1.3. FINANCING OF ROLLING STOCK FOR THE CALL-A-BUS SYSTEM (INCLUDED IN COLUMN 6)

(91) With regard to the call busses (*Rufbusse*), the Complainants contested that the busses were offered to all undertakings active in the *Landkreis Emsland*. EEB only offered the busses to those undertakings which register their bus trips via the Mobility Centre Emsland. The Complainants claimed that this forced the bus undertakings to provide economically sensitive data with regard to passenger transport to their competitor EEB. Furthermore, according to the Complainants, EEB deployed the busses not only on the call-a-bus routes, but also on its regular lines (such as Haselünne-Meppen).

(92) The Complainants claimed that none of them obtained a call bus. In particular, the Complainants Albers and Elbert claimed that they suffered a disadvantage in the authorization procedures (*Genehmigungswettbewerb*) as allegedly they had no access to the call-a-bus system.

5.2. *NAHVERKEHRSBERATUNG SÜDWEST*

(93) Nahverkehrsberatung Südwest contested the Commission's conclusion in the opening decision that payments according to §45a PBefG were compensations for public service obligations and fulfil the Altmark criteria. It claims that §45a PBefG does not define public service obligations, that there is no control against over-compensation and that the comparison with a representative economically and efficiently operating undertaking is flawed.

5.3. *ANONYMOUS COMMENT*

(94) An anonymous commentator expressed doubts whether the amounts listed in column 3 of the above table correspond to payments for school transport. He believed that they are direct subsidies to the bus undertakings in order to obtain other advantages (influence on schedules, membership of EEB in VGE-Süd, better schedules for non-pupil passengers, subcontracts for undertakings originally active in non-integrated school transport).

6. **COMMENTS FROM GERMANY ON COMMENTS BY INTERESTED PARTIES**

6.1. *FINANCIAL SUPPORT FOR CARRYING-OUT SCHOOL TRANSPORT (COLUMNS 3 AND 4)*

(95) The German authorities claimed the decrease in payments for school transport (columns 3 and 4) between 2005 and 2006 was not an indication of overcompensation prior to 2006, as alleged by the Complainants. They explained the decrease as follows:

— As a result of complaints to the Commission by the same Complainants, all contracts for non-integrated school transport were cancelled on 31 December 2005. Consequently school transport was reorganised and certain non-integrated routes were integrated into the regular bus services. The remaining non-integrated school transport was tendered out. This led to cost reductions.

— The lump-sum contract with VGE-Süd was also cancelled at the end of 2005 (see also recitals 29 f.) and the payments to VGE-Süd decreased from EUR 1 840 000 in 2005 to EUR 1 719 000 in 2006.

— In addition advances paid in 2005 turned out to be high which contributed to the fact that the amount listed in column 4 was considerably lower in 2006.

(96) With regard to the overall cost increases between 1997 and 2006, the German authorities caveated that column 4 does not give a precise picture of the real cost evolution as figures for individual years also contain advances for following years.

(97) In 2007, costs went up considerably following important tariff increases for the school bus tickets on the regular bus lines of VGE-Süd. The authorities provided figures on the evolution of tariffs in the area served by VGE-Süd which show increases of up to 45 %. They also explained that the number of eligible pupils increased by roughly 20 % from 1997 to 2003 (15 429 to 18 454). Considering this increase the authorities stated that overall the cost of school transport per pupil actually decreased, mainly due to the integration of school transport into regular bus services.

(98) The German authorities did not dispute that EEB carried out economic activities, but insisted that when it comes to the payments for school transport summarised in columns 3 and 4, EEB did not act as an undertaking but carried out public duties in accordance with paragraph 3 of its articles of association (see also recital 14). EEB merely forwarded the payments received from the *Landkreis Emsland* to the bus undertakings carrying out the school transport and settlements took place regularly to ensure that there was no over or under-compensation.

6.2. *DRAFTING OF THE NVP (COLUMN 5)*

(99) According to the German authorities, the claim that the Complainants were not sufficiently consulted in the elaboration of the NVP and that the NVP was adjusted to EEB's advantage is not correct. In 1996 the bus undertakings were invited to participate in a working group to discuss the NVP, which they did. However, in 2002, the undertakings Kalmer, Bittner, Elbert, Wessels, Fischer and Richers-Reisen refused to participate in a similar working group and sent written submissions. These comments were summarised and discussed in the decision making bodies (*Gremien*) of the *Landkreis Emsland*. Supporting documents were provided to the Commission.

(100) The German authorities further explained that the NVP did not contain any concrete information on the frequency of individual lines or on the trajectory of the lines (a copy of the NVP has been provided to the Commission). It was unclear to the German authorities in how far the drafting of the NVP could cause a competitive disadvantage to the bus undertakings.

(101) The German authorities also contested the Complainants' claim that part of the drafting of the NVP is an economic activity. They affirmed that the NVP is part of the public duties of the *Landkreis Emsland*. The articles of association (*Gesellschaftervertrag*) explicitly imposed the duty of drafting the NVP onto EEB.

6.3. *FINANCING OF ROLLING STOCK FOR THE CALL-A-BUS SYSTEM (INCLUDED IN COLUMN 6)*

(102) With regard to the call-a-bus system, the German authorities stressed that the busses were offered to all undertakings in the *Emsland* at the same conditions as an additional letter of 16 February 2007 to the bus undertakings shows. The German authorities did not understand how the compulsory call via the Mobility Centre Emsland could lead to the transfer of commercially sensitive data.

(103) The authorities disputed that the undertakings Albers and Elbert were not given access to these busses. They claimed that meetings with the undertaking Elbert showed that they did not agree with the conditions of use of the busses.

(104) With regard to the call busses the German authorities considered that EEB carried out public duties. Following a decision of 8 February 2006, the *Kreisausschuß* (decision making body) of the *Landkreis Emsland* instructed EEB to acquire the busses and to extend the call-a-bus system. By maintaining the busses in the ownership of EEB, the *Landkreis* wanted to ensure that it keeps the decisive power over the use of these busses.

(105) The German authorities stated that if a party would no longer be interested in operating a call-bus it would be offered to other interested parties. If no one could be found, the *Landkreis Emsland* would decide about their use. One of the five call-busses ceased to be operational in August 2012 and the German authorities explained that this bus would be sold and that the revenues from this sale would be reimbursed to the *Landkreis Emsland*, showing that the *Landkreis* maintained control over the buses. The same would happen if other busses would no longer be operational.

(106) The German authorities confirmed that the busses were partially used outside the call-a-bus system, more specifically for school transport. According to the German authorities this happened in coordination with the *Landkreis Emsland*. EEB's subsidiaries and third parties used the call-busses for school transport purposes between 3,9 % and 24,1 % of the time.

7. **ASSESSMENT OF THE MEASURES**

7.1. *SCOPE OF THE DECISION*

7.1.1. SCOPE SET BY THE OPENING DECISION

(107) The opening decision identified EEB as the potential beneficiary of a number of State aid measures between 1997 and 2007 covered by columns 1-6 of Table 1 of this decision.

(108) In the opening decision the Commission also concluded that certain measures covered by these columns did not involve State aid in the sense of Article 107(1) TFEU. These measures do not form part of the present decision, as the Commission has already taken a definitive view on them.

(109) The comments of Nahverkehrsberatung Südwest refer to the payments pursuant to §45a PBefG, for which the Commission found that they did not involve State aid. That finding has not been challenged in the Union Courts, and has hence become definitive. Therefore, the Commission will not assess these comments any further.

(110) Part of the comments of the Complainants refer to some of the payments included in column 6 on which the Commission had already concluded that they do not constitute State aid, namely payments for the purchase of software DIVA-Geo, a draft bus stop register, bus transport passenger waiting facilities and software for planning of local passenger transport. That finding has not been challenged in the Union Courts, and has hence become definitive. Therefore, the Commission will not further assess these comments.

7.1.2. MEASURES NOT SUBJECT TO RECOVERY OF ILLEGAL AND INCOMPATIBLE STATE AID

(111) Concerning column 1 the Commission notes that the initial capital endowment and a major part of the RWE shares ([20]) were already at the disposal of the entity within the administration (EE) that was incorporated on 1 January 1997. As Germany pointed out, the capital endowment and the transfer of a major part of RWE shares took place more than 10 years before the first information request concerning these transfers was addressed to Germany ([21]). Therefore, these measures can no longer be subject to recovery of illegal and incompatible State aid pursuant to Article 17 of Council Regulation (EU) 2015/1589 ([22]). Those measures constitute State aid, for the reasons set out in section 7.2.1. However, that aid is deemed to be existing aid pursuant to Article 1(b)(iv) of Regulation (EU) 2015/1589 ([23]).

(112) A minor part of RWE shares ([24]) was transferred only on 12 October 1998 ('the 1998 shares'), which is less than 10 years before the first information request concerning the transfer was addressed to Germany. The transfer of 1998 shares is therefore new aid.

(113) The present decision will not, therefore, deal with the compatibility of the capital endowment and the major part of the RWE shares, but will limit itself to the shares transferred in 1998.

([20]) 280 310 RWE shares with a market value of approx. EUR 9 686 523,78, see recital 27 above.
([21]) The European Commission sent this information request on 13 March 2007.
([22]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9). This is in line with the Commission's conclusions in recital 143 of the opening decision.
([23]) See also recital 148 of the opening decision.
([24]) 37 630 shares with a market value of approx. EUR 1 689 264,40.

7.1.3. CONCLUSION ON THE SCOPE OF THIS DECISION

(114) In light of the observations above, the decision will assess whether EEB obtained State aid within the meaning of 107(1) TFEU, and if so, whether such State aid could be considered compatible, with regard to the following measures:

— The 1998 RWE shares and their dividends (columns 1 and 2);

— School transport (columns 3 and 4);

— Financial support for drafting the NVP (in column 5);

— Financing of the Mobility Centre Emsland (included in columns 5 and 6);

— Financing the acquisition of rolling stock (included in column 6).

7.2. *EXISTENCE OF AID*

(115) According to Article 107(1) TFEU, aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States, unless otherwise provided for in that Treaty.

(116) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measures under investigation constitute State aid within the meaning of Article 107(1) TFEU all of the following conditions need to be fulfilled. Namely, the financial support:

— is granted by the State or through State resources,

— favours certain undertakings or the production of certain goods,

— distorts or threatens to distort competition, and

— affects trade between Member States.

7.2.1. THE 1998 RWE SHARES AND THEIR DIVIDENDS

7.2.1.1. ***Selective economic advantage for an undertaking***

(117) As a first step it needs to be assessed whether EEB can be considered an undertaking in the context of the transfer of the 1998 shares and their dividends.

(118) The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([25]). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. As described in recitals 12 to 16 EEB is engaged in a variety of activities. In some areas EEB acts as an agent of the State, merely passing through payments to economic operators on behalf of the *Landkreis*; in other areas EEB carries out activities falling in the public policy remit. EEB is also engaged in activities of economic nature, EEB is a holder of LVG which are granted on a competitive basis and runs freight rail transport.

(119) The classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former ([26]). The Commission notes in this context that the *Landkreis* did not link conditions to the transfer of the shares. Rather, they were received as a gift, without counterpart.

(120) Regarding the dividends, however, the Commission notes that Germany has shown that the entire amount of dividends, which EEB received from the transferred shares, has been used to finance school transport until 2005 and has been paid back to the *Landkreis Emsland* as of 2006 (see also recitals 29 f.). Germany has thus demonstrated that, during the period under investigation, the dividends could not have been used for other activities of EEB, including its economic activities.

([25]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.
([26]) Judgment of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 108.

(121) Therefore the Commission concludes that by transferring the 1998 RWE shares, Germany has provided an advantage to EEB, because EEB has seen its assets increased without any remuneration or counterpart.

(122) Furthermore, EEB could use the shares to bolster its financial situation, and in particular use them as collateral for economic activities of EEB.

(123) The situation is different for the dividends flowing from the shares, which were not used for economic activities. EEB is thus to be considered an undertaking with regard to the 1998 RWE shares, with the exception of their dividends.

(124) As EEB is considered to be an undertaking with regard to the 1998 RWE shares (with the exception of their dividends) it needs to be assessed whether the transfer of the shares could lead to an advantage. An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention ([27]).

(125) Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ([28]). In this context the Union courts have developed the 'market economy investor principle'. To determine whether the economic transaction by the public body constitutes aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question ([29]).

(126) As explained under recital 66 Germany argued that the *Landkreis Emsland* acted as a market economy investor. In the present case, the *Landkreis* transferred the shares free of charge, without explicitly defining a counterpart, which would not occur under normal market conditions. Germany has not submitted any evidence that the tax optimisation the *Landkreis* allegedly sought to gain would exceed the market value of the 1998 shares. In any event, the benefit of the tax optimisation would not accrue to the Landkreis, but to *EEB*.

(127) The *Landkreis* transferred the 37 630 RWE shares with a value of approx. EUR 1 689 264,40 expecting it to lead to annual gains of approx. DM 34 000 (approx. EUR 17 000) considering a dividend pay-out of DM 1,60 (approx. EUR 0,80) per share.

(128) The *Landkreis* did not base this asset transfer on a business plan that foresaw a return acceptable to a market economy investor ([30]). On the contrary, the shares were transferred free of charge.

(129) The Commission, therefore, concludes that the transfer of the 1998 RWE shares was not carried out in line with normal market conditions and did not respect the 'market economy investor principle'.

(130) The transfer therefore constitutes an advantage. The mere ownership of shares can improve the financial situation of EEB (the shares can be sold or used as collateral).

(131) Through the transfer of the 1998 RWE shares the *Landkreis* has effectively foregone potential revenues that it could have gained by selling the shares or using them as collateral and transferred these to EEB (even though it has not retained in the period under this investigation any dividends stemming from these shares). The 1998 shares are registered as assets on the balance sheet of EEB and EEB can therefore freely dispose of them or use them as collateral. The Commission notes in this context that the *Landkreis* did not explicitly link any conditions to the transfer of the shares, such as that the shares cannot be sold or used as collateral.

(132) As the transfer and the ownership of the 1998 shares can benefit the economic activities of EEB, the Commission concludes that, with the exception of their dividends, it conferred a selective advantage on EEB as an undertaking within the meaning of Article 107(1) TFEU.

([27]) Judgment of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

([28]) Judgment in *SFEI and Others*, footnote 27 above, ECLI:EU:C:1996:285, paragraphs 60 and 61.

([29]) See, for instance, Judgment of 21 March 1990, *Belgium* v *Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of 21 March 1991, *Italy* v *Commission* ('ALFA Romeo'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of 30 April 1998, *Cityflyer Express* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 245.

([30]) See recital 89 of the opening decision.

7.2.1.2. ***State resources and a measure imputable to the State***

(133) The 1998 shares were an asset previously at the full disposal of the *Landkreis*, which is a public administration. As such they constitute State resources in the meaning of Article 107(1) TFEU. Their transfer to EEB was the result of a decision by the *Landkreis* and the transfer is therefore imputable to the State in the meaning of Article 107(1) TFEU.

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

(134) From 1995 several Member States started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin ([31]). As explained in recital 18, under German legislation LVG are granted on a competitive basis and EEB is a holder of such LVG. By strengthening EEB's general financial situation, the ownership of the 1998 RWE shares could distort competition for the provision of passenger transportation services by bus.

(135) Moreover, an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States. Indeed, 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid' ([32]). The transfer of the 1998 shares should therefore be considered liable to affect trade between Member States to the extent that they strengthen the market position of the EEB and its ability to bid for LVGs.

(136) Therefore, the transfer of the 1998 shares is liable to distort competition and affects trade between Member States with regard to economic activities of EEB.

7.2.1.4. ***Conclusion***

(137) On the basis of the foregoing, the Commission concludes that the transfer of the 1998 shares to EEB constitutes State aid within the meaning of Article 107(1) TFEU. The Commission therefore must assess whether this measure can be deemed compatible with the internal market.

(138) Conversely, the Commission concludes that the dividends accrued on RWE shares transferred to EEB do not constitute State aid within the meaning of Article 107(1) TFEU.

7.2.2. SCHOOL TRANSPORT (COLUMNS 3 AND 4)

(139) As a first step it needs to be assessed whether EEB can be considered an undertaking in the context of the organisation of school transport in the *Landkreis of Emsland*. As pointed out above in recital 119, the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([33]). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

(140) If an entity performs several different activities, of which some may be deemed non-economic and some economic, each activity must be assessed separately, if they are separable from each other ([34]). The fact that an entity carries out some economic activities does not necessarily mean that it is to be considered as an undertaking with regard to all its activities.

([31]) Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH*, C-280/00, ECLI:EU:C:2003:415.
([32]) Judgment of 4 April 2001, *Friuli-Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.
([33]) Judgment of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.
([34]) Judgement of 19 January 1994, *SAT Fluggesellschaft* v *European Organization for the Safety of Air Navigation (Eurocontrol)*, C-364/92, ECLI:EU:C:1994:7, paras. 19 *et seq.*; Judgment of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paras. 112 *et seq*.

(141) The German authorities explained that EEB was merely passing on the amounts received from the *Landkreis Emsland* to the bus undertakings carrying out both integrated and non-integrated school transport. Comprehensive overviews of annual payments to EEB by the Landkreis and payments by EEB, as well as a letter by a chartered accountant submitted by Germany confirm that the accounts of EEB were checked and incoming and outgoing payments for school transport were balanced. As such EEB did not perform an economic activity, but only acted as an administrative intermediary or a prolonged arm of the State.

(142) Therefore, the Commission concludes that EEB did not act as an undertaking within the meaning of Article 107(1) TFEU in relation to the organisation of school transport in the *Landkreis Emsland*. Since the criteria laid down in Article 107(1) TFEU are cumulative, the Commission concludes that the financing of the organisation of school transport listed in columns 3 and 4 do not constitute State aid within the meaning of Article 107(1) TFEU.

7.2.3. FINANCIAL SUPPORT FOR DRAFTING THE NVP (IN COLUMN 5)

(143) In its decision to initiate the investigation the Commission already came to the conclusion that the drafting of the NVP by EEB for adoption by the Council of the *Landkreis* did not constitute an economic activity.

(144) Further information provided by the Complainants does not alter this conclusion. Indeed, § 2 (2) and § 6 NNVG stipulate that the provision of public transport is a task falling within the public remit. The way in which this public task is carried out is to be defined in a NVP. The NVP is therefore an integral part of the public policy tasks of the *Landkreis*, which it has delegated to EEB.

(145) The opening decision also expressed doubts as to the correct compensation of the costs related to the NVP. The information provided by the German authorities confirmed that the amounts transferred by the *Landkreis* for the financing of the NVP were limited to the reimbursement of material costs incurred (see also recital 43 and that it was one of the tasks of the EEB staff and no additional personnel costs were compensated.

(146) Therefore, the Commission confirms that EEB did not act as an undertaking within the meaning of Article 107(1) TFEU with regards to the drafting of the NVP. Since the criteria laid down in Article 107(1) TFEU are cumulative, the Commission concludes that the measures listed in column 5 do not constitute State aid within the meaning of Article 107(1) TFEU.

7.2.4. FINANCING OF THE MOBILITY CENTRE EMSLAND (INCLUDED IN COLUMNS 5 AND 6)

7.2.4.1. ***Selective economic advantage for an undertaking***

(147) As a first step it needs to be assessed whether EEB can be considered an undertaking in the context of the financing of the MCE. As pointed out above in recital 119, the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed ([35]). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

(148) At the time of the opening decision it was not clear that the MCE had been founded well before the creation of EEB and that the state had provided this information service as part of its tasks to ensure the functioning of public transport. The *Landkreis* decided to run a mobility centre on 31 July 1995 so it could provide a public transport information service to the general public. The State merely outsourced this task to EEB at its creation on 1 January 1997. This is explicitly stated in EEB's articles of association.

(149) § 2(2) and § 6 NNVG stipulate that the provision of public transport is a task falling within the public remit. The way in which this public task is carried out is to be defined in a NVP. The NVP of the *Landkreis Emsland* considers that the availability of extensive and up-to-date information about public transport services provided by the MCE is an essential and integral part of this public task.

([35]) Judgment of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

(150) As explained above (see recital 47), the Commission recalls that the MCE provided information free of charge and was only reimbursed for incurred material and personnel costs, which EEB had to finance upfront. No profit margin was foreseen. The Commission recognises that a market economy operator is unlikely to provide the information service in the way that the MCE does.

(151) The Commission also notes that it turns out that the situation of the MCE is different from the situation in the case *N 604/05, Landkreis Wittenberg, C(2005) 1847 final* which was quoted in the opening decision. In the Wittenberg case the bus undertakings were the recipients of public funding earmarked for a local mobility centre. The bus undertakings paid for a mobility centre in the Landkreis Wittenberg. The public funding, therefore, freed the bus undertakings from a cost they would normally incur and thus constituted an advantage for the bus undertakings within the meaning of Article 107(1) TFEU. In the present case, the MCE lies within the financial responsibility of EEB as an entity carrying out public tasks previously undertaken in-house within the public administration.

(152) However, it cannot be entirely excluded by the nature itself of the activity of the MCE that such an activity cannot, at least in principle, be carried out by a market economy operator.

(153) Based on the information provided by Germany and third parties after the opening decision, the Commission is not in a position to conclude whether, in this particular case, the running of the MCE constitutes an economic activity and whether therefore EEB has acted — when providing these services — as an undertaking within the meaning of Article 107(1) TFEU.

(154) Should EEB have acted as an undertaking the public funding provided for these services could have bestowed an advantage on EEB, if the state did not act as a market economy operator, which seems unlikely.

7.2.4.2. ***State resources and a measure imputable to the State***

(155) It has been established that the *Landkreis* decided to finance the MCE. The EEB therefore finances the MCE from State resources and the decision to do is imputable to the State within the meaning of Article 107(1) TFEU.

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

(156) If the activity of the MCE were indeed an economic activity, EEB would be active in the market of provision of information on public transport services in the region, which is in principle open for competition. Based on the available information and given the local character of the service provided by the MCE, the Commission is not in a position to conclude whether financing of the MCE can adversely affect trade between Member States within the meaning of Article 107(1) TFEU.

7.2.4.4. ***Conclusion***

(157) Based on the foregoing, the Commission considers that the investigation has not permitted a firm conclusion on whether the financing of the MCE constitutes State aid within the meaning of Article 107(1) TFEU. For reasons explained below, the Commission, however, considers in any event that, if financing of the MCE constituted State aid, such aid would be compatible with the internal market.

7.2.5. FINANCING THE ACQUISITION OF ROLLING STOCK (INCLUDED IN COLUMN 6)

7.2.5.1. ***Selective economic advantage for an undertaking***

(158) As a first step it needs to be assessed whether EEB can be considered an undertaking in the context of the financing the acquisition of rolling stock (see recital 117 above). In this context, the Commission first notes that the rolling stock was purchased by EEB at the request of the *Landkreis* in the context of the decision of the *Landkreis* to start a call-a-bus service in Emsland. EEB made these busses available to third parties on the basis of contracts and under transparent conditions, which had been set by the *Landkreis Emsland*. The busses were used by third parties, not EEB itself. EEB therefore acted as an administrative intermediary for a public transport service. It coordinated the call-a-bus service as part of its public transport duties inscribed in the articles of association (see recital 14).

(159) One could, therefore, be led to conclude that EEB did not carry out an economic activity and did not constitute an undertaking in this context, were it not for the fact that the *Landkreis Emsland* has provided assets to EEB free of charge and nothing explicitly prevents EEB to use these assets for its economic activities. EEB acquired five busses, with a market value of EUR 685 513,46, without having to bear the costs for this acquisition. These busses were registered on the balance sheet of EEB as assets, of which EEB can, in principle, dispose freely to the benefit of its economic activities. Even though the *Landkreis* ordered EEB to purchase the busses for a specific purpose, namely to expand the call-a-bus scheme, there was no explicit limitation on EEB to use the busses only within the framework of the call-a-bus scheme.

(160) The ownership of the busses could have potentially benefited the economic activities of EEB by strengthening the financial position of EEB. The Commission concludes that it cannot be excluded that the financing of this acquisition conferred a selective advantage on EEB as an undertaking within the meaning of Article 107(1) TFEU.

7.2.5.2. ***State resources and a measure imputable to the State***

(161) The acquisition was financed from the resources of the *Landkreis*, which is a public administration. It was therefore financed from State resources in the meaning of Article 107(1) TFEU. The financing of the acquisition was clearly a decision of the *Landkreis* and the financing is therefore imputable to the State in the meaning of Article 107(1) TFEU.

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

(162) As stated above, the financing of the acquisition of the five busses conferred a selective advantage on EEB in so far as it could have benefited economic activities of EEB. Apart from its public policy tasks, EEB engages in economic activities (see also recital 118).

(163) By strengthening its general financial situation, the ownership of rolling stock enables EEB to potentially distort competition and affect trade between Member States with regard to economic activities of EEB open to competition between Member States.

7.2.5.4. ***Conclusion***

(164) On the basis of the foregoing, the Commission considers that it cannot be excluded that the financing of the acquisition of five busses by EEB constitutes State aid within the meaning of Article 107(1) TFEU. The Commission therefore must assess whether this measure can be deemed compatible with the internal market.

7.2.6. CONCLUSION ON THE EXISTENCE OF AID AND ITS LAWFULNESS

(165) Following from the above it cannot be excluded that the RWE shares transferred in 1998, the funding provided for the MCE and the call-busses constitute State aid within the meaning of Article 107(1) TFEU.

(166) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid, and must not put the proposed measures into effect until the notification procedure has resulted in a final decision, unless the aid at stake is exempted from the notification requirement. The Commission notes as in previous cases, local and regional bus transport has been exempted from the scope of application of Regulation (EEC) No 1191/69 by Germany, making use of an option offered by that Regulation ([36]), and Article 3(2) of Regulation (EEC) No 1107/70 is applicable. As Regulation (EEC) No 1191/69 is not applicable, the measures under assessment can not have been block-exempted under this Regulation.

(167) Therefore, in so far as the measures above constitute State aid, the Commission considers that Germany has not respected the requirements of Article 108(3) TFEU ([37]).

([36]) See Commission Decision in State aid case N 604/2005 — Public bus transport services in Wittenberg, recitals 72-77.
([37]) Judgment of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, ECLI:EU:T:2004:4.

7.3. *COMPATIBILITY OF AID*

(168) Since the RWE shares transferred in 1998 constitute State aid, and it cannot be excluded that the funding provided for the MCE and the call-busses constitute State aid within the meaning of Article 107(1) TFEU, the Commission must therefore next determine whether the aid in question can be considered compatible on the basis of the derogations provided for in that Treaty. It is considered that the measures under investigation all represent the reimbursement for the discharge of certain obligations inherent in the concept of a public service which support the needs of coordination of transport.

(169) Article 93 TFEU provides that 'aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the notion of a public service'. That Article constitutes a lex specialis in relation to Articles 106 and 107 TFEU. According to case law of the Court of Justice ([38]), aid to land transport may be declared compatible on the basis of Article 93 of the Treaty only in well-defined cases which do not jeopardise the general interests of the union.

(170) Germany has not brought forward any compatibility grounds, as it is of the opinion that none of the measures would entail State aid. The opening decision raised doubts as regards compatibility on the basis of Regulation (EEC) No 1107/70, Regulation (EEC) No 1191/69 as well as on the basis of Article 107(3)(c) TFEU. Given that the measures at stake concerned the reimbursement for the discharge of certain obligations inherent in the concept of public service which support the needs of the coordination of transport, they fall under Regulation (EEC) No 1107/70; Article 3(2) of the Regulation allows for the assessment of the reimbursement for the discharge of obligations inherent in the concept of a public service to a transport undertaking or activities to which Regulation (EEC) No 1191/69 does not apply. Both Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 were repealed by Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([39]). While aid that used to fall under Regulation (EEC) No 1191/69 will now be examined under Regulation (EC) No 1370/2007, aid for the compatibility of aid for certain obligations inherent in the concept of public service which support the needs for coordination of transport can now be examined directly under Article 93 TFEU.

(171) For the sake of completeness, the compatibility of the measures at stake will be assessed both in accordance with the rules applicable at the time of the decision as well as the rules applicable at the time the measures were paid. This is why compatibility is assessed according to Article 93 TFEU as well as Article 3(2) of Regulation (EEC) No 1107/70, as explained further below in recitals 172 f. and 212 f.

7.3.1. COMPATIBILITY ASSESSMENT WITH ARTICLE 93 TFEU

(172) The Court of Justice has ruled that Article 93 'acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community'. The concept of 'coordination of transport' used in Article 93 TFEU has a significance which goes beyond the simple fact of facilitating the development of an economic activity. It implies an intervention by public authorities, which is aimed at guiding the development of the transport sector in the common interest.

(173) The transport sector may experience 'coordination' difficulties in the economic sense of the term, for example, in the connections between different transport networks. The Commission has, on this basis, already authorized State aid under Article 93 TFEU ([40]).

(174) In the current case, the RWE shares were transferred to EEB to enable it to fulfil public tasks related to the planning and coordination of public local passenger transport. These tasks listed in paragraph 3 of EEB's articles of association (see also recital 14) include the drafting the NVP for the *Landkreis Emsland*, the running of the EMC and organisation of school transport. All of these services contribute to the coordination of transport.

([38]) Judgment of 12 October 1978, *Commission* v *Belgium*, 156/77, ECLI:EU:C:1978:180, paragraph 10.
([39]) 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).
([40]) See for example the Decision of the Commission of 20 January 2010 in case N 490/2010, Vlaamse regeling voor publiek-private samenwerking voor de bouw van laad- en losinstallaties (OJ C 122, 20.4.2011, p. 2); see in this sense also decision of the Commission of 20 July 2010 in case C17/2010, Firmin srl (OJ C 278, 15.10.2010, p. 28).

(175) To the extent that the financing of the MCE is considered as State aid, the Commission considers that the objective of the measure is the coordination of information on public transport.

(176) With regard to the call busses, the Commission notes that the measure in question concerns the purchase of rolling stock in view of making it available to the actual operators of transport services. EEB set up and coordinated a public transport service, rather than carrying out the transport service itself.

(177) The Commission acknowledges that the objective of all those measures has been to enable EEB to fulfil certain tasks in the area of public transport previously carried out within the administration of the *Landkreis*. While the objective of a measure is not relevant for the analysis of existence of State aid within the meaning of Article 107(1) TFEU (where the effect of the measure is decisive), the objective must be taken into consideration in the assessment of the compatibility of these measures with the internal market.

(178) According to a constant decisional practice, aid for the coordination of transport will be deemed compatible with the internal market under Article 93 TFEU if the following conditions are met:

— the aid must contribute to a well-defined objective of common interest;

— the aid must be necessary and provide an incentive effect;

— the aid must be proportionate;

— the access to the infrastructure in question must be open to all users on a non-discriminatory basis;

— the aid must not lead to distortions of competition contrary to the common interest.

7.3.1.1. ***Well-defined objective of common interest***

7.3.1.1.1. **The 1998 shares**

(179) As described above, the RWE shares were transferred to EEB in the context of the decision of the *Landkreis* to incorporate the entity EE, which previously carried out public tasks related to the planning and coordination of public local passenger transport within the administration of the *Landkreis*. To enable EEB to operate it had to be endowed with an initial balance sheet. Pursuant to paragraph 3 of the articles of association of EEB, its tasks include the drafting the NVP for the *Landkreis Emsland*, the running of the EMC and the organisation of school transport. All of these tasks can be qualified as contributing to the development of public transport in the *Landkreis* and thus as necessary for the coordination of transport.

(180) Nonetheless, the Commission recalls its conclusion that the transfer and the ownership of the 1998 shares is not legally linked to any of those activities. To date, Germany has shown that the shares have de facto not been used for any other activity.

(181) However, there is a risk that EEB can dispose of these shares and finance economic activities in other areas from the proceeds from a sale or by using the shares as collateral in such context.

(182) EEB still possesses the shares, it can therefore be excluded that the proceeds from the sale were used for the purpose of economic activities during the period under investigation.

(183) If the 1998 shares were to be used by EEB in this way in future, it could be argued that the transfer of the 1998 shares would no longer contribute exclusively to the objective of coordination of transport. The first criterion of compatibility of aid under Article 93 TFEU therefore is only met if EEB does not use the 1998 shares to finance economic activities outside its public tasks. The Commission therefore must impose conditions on the use of the 1998 shares as a condition for compatibility of the transfer of the 1998 shares with the internal market (described below).

7.3.1.1.2. **Mobility Centre Emsland**

(184) As described in recital 47, the *Landkreis* decided to run a mobility centre on 31 July 1995 so it could provide a public transport information service to the general public. The *Landkreis* transferred this task to EEB when it was founded on 1 January 1997. The running of the EMC is one of the tasks related to the planning and coordination of public local passenger transport that have been explicitly assigned to EEB in its articles of association.

(185) § 2(2) and § 6 of the regional law NNVG stipulate that the provision of public transport is a task falling within the public remit. The way in which this public task is carried out is to be defined in a NVP. The NVP of the Landkreis Emsland considers that the availability of extensive and up-to-date information about public transport services provided by the MCE is an essential and integral part of this public task.

(186) The running of the EMC is contributing to the efficient and smooth provision of public transport and is therefore contributing to an objective of common interest.

7.3.1.1.3. **Call-busses**

(187) The *Landkreis Emsland* decided to expand the call-a-bus scheme in the district for two distinct reasons ([41]):

— to improve the connection of the cities and villages in the region to the train stations;

— to optimise the inter-connection between different parts of cities and villages.

(188) The call-busses are used on public transport routes at off-peak hours to improve the public transport offer at this point in time. The call-busses are adapted for wheel-chairs and prams.

(189) The Commission has been stressing the importance of better intermodal connection in a variety of policy papers over the past years. The 2013 Union guidelines for the development of the trans-European transport network laid down in Regulation (EU) No 1315/2013 of the European Parliament and of the Council ([42]) define the optimal integration and interconnection of all transport modes as one of their key objectives. Also the interconnection of different parts of cities and villages leads to a more efficient transport scheme. The improved frequency of potentially available inclusive public transport options is in the interest of the inhabitants of the *Landkreis Emsland*, especially as it is one of the less densely populated areas of Germany. The coordination of the expansion of the call-a-bus scheme can therefore be qualified as contributing to an objective of common interest.

(190) Similar as for the 1998 shares, in as far as the ownership of the call-busses could provide an advantage to the economic activities of EEB, financing of the call-busses would no longer contribute exclusively to the objective of coordination of transport. The first criterion of compatibility of aid under Article 93 TFEU therefore is only met if EEB does not use the call-busses to the benefit of its economic activities. In its submission of 5 November 2012 Germany confirmed that during the period under investigation the call-busses were principally be used for the call-a-bus service and when EEB sold one of the busses EEB returned the proceeds to the *Landkreis*. The German authorities confirmed that the same principles would be applicable for the future. Based on this commitment from the German authorities, the Commission accepts that the financing of the call-busses contributed solely to the objective of transport coordination.

7.3.1.2. ***Necessity of the aid and incentive effect***

7.3.1.2.1. **The 1998 shares**

(191) The transfer of the 1998 shares (together with other measures — such as the initial capital injection — not subject to this decision) enabled the very existence of EEB. Without this measure, EEB would not have been able to fulfil its public tasks related to the planning and coordination of public local passenger transport. The aid in the form of the transfer of the 1998 shares therefore is necessary to attain the objective of common interest as described above and has an incentive effect.

([41]) Decision of the *Kreistag* (decision making body) of the *Landkreis Emsland* of 20 February 2006.
([42]) Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1).

7.3.1.2.2. **Mobility Centre Emsland**

(192) The *Kreisausschuß* (decision making body of the *Landkreis*) had identified the lack of easily available information on travel options as one of the main deficiencies of public transport in the *Landkreis Emsland* when creating the MCE in July 1995. The market did not provide such aggregate services in the *Landkreis Emsland*. The MCE did not charge the citizens for providing the information, the EEB therefore did not have revenues from this activity from which it could have covered the related operating costs. The Commission therefore accepts that the aid was necessary for the operation of the MCE and had an incentive effect.

7.3.1.2.3. **Call-busses**

(193) When assessing the necessity and incentive effect of the aid, the Commission takes into account the fact that, without the making available of the call busses, the project would not have been financially sustainable. At the meeting of the *Kreistag* on 8 February 2006, it was explicitly mentioned that the expansion of the call-bus system should not affect any existing call-bus schemes. The call-bus system should only be introduced in areas where it would not be economically viable otherwise.

(194) EEB bought the busses on behalf of the *Landkreis* and made them available to third parties on the basis of contracts and under transparent conditions, set by the *Landkreis Emsland*. Third parties obtained the busses free of charge and EEB did not gain any rental or other proceeds for making the busses available, from which it could have financed the acquisition of the busses. The busses were used by subcontractors and third parties, not EEB itself, so again EEB has not received any revenues from an economic exploitation of the call-busses. EEB acted as an administrative intermediary for a public transport service. It coordinated the call-a-bus service as part of its public transport duties inscribed in the articles of association (see recital 14). The Commission therefore considers that the aid to EEB was necessary to develop the call-a-bus system and had an incentive effect.

7.3.1.3. ***Proportionality of the aid***

7.3.1.3.1. **The 1998 shares**

(195) The Commission recalls that the dividends resulting from the ownership of the 1998 shares have not been retained by EEB. They have been either used to pay for school transport (thus replacing the resources of the *Landkreis*) or paid to the *Landkreis*. It is therefore argued that as long as the obligation to pay the dividends to the *Landkreis* continues, the market value of the 1998 shares is reduced as the economic value of these shares is reduced by such an obligation.

(196) The Commission therefore considers that the aid in the form of the transfer of the 1998 shares is limited to the minimum necessary for EEB to carry out its public tasks in the area of coordination of transport and therefore proportionate to the objective sought by the measure.

7.3.1.3.2. **Mobility Centre Emsland**

(197) As explained above (see recital 77) the Landkreis reimbursed the actual costs incurred by EEB in relation to the running of the MCE, no profit margin was foreseen. The Commission, therefore, considers the aid accorded as a result of the notified measure to be proportional.

7.3.1.3.3. **Call-busses**

(198) When assessing the proportionality of the aid, the Commission takes into account the following elements:

— EEB has bought the busses on behalf of the *Landkreis* and was reimbursed for their actual cost;

— EEB does not obtain any income from making the call busses available to third parties;

— should EEB not be able to find any third party interested in operating the call busses these busses are returned to the *Landkreis*;

— When call busses are no longer operational, they are sold and the proceeds from the sale are returned to the *Landkreis*.

(199) On the basis of these elements, the Commission considers the aid related to the financing of call-busses to be proportional.

7.3.1.4. ***The aid/aided activity is open to all users on a non-discriminatory basis***

7.3.1.4.1. **The 1998 Shares**

(200) EEB's services in the area of transport coordination are public tasks and by definition these activities are open on a non-discriminatory basis.

7.3.1.4.2. **Mobility Centre Emsland**

(201) The MCE provides information free of charge to all interested citizens. It also collects information from all public transport providers interested in sharing this information. The public transport providers are not charged by the MCE for the fact that it makes available information regarding the services they provide.

(202) It can, therefore, be concluded that the access to the service in question is open to all users on a non-discriminatory basis.

7.3.1.4.3. **Call-busses**

(203) EEB offered the call-busses to all bus undertakings in the Landkreis performing public transport services at equal terms dictated by the *Landkreis Emsland*. The *Landkreis* wrote to the bus undertakings detailing the conditions under which the call-busses would be available and asking them to express their interest.

(204) They were leased on the basis of a standard form contract (see also recital 80), which foresaw that the transport undertakings bear the operation and maintenance costs but do not have to pay any rental fee. The busses were used by subcontractors on EEB routes and by other transport undertakings on their respective routes.

(205) After consultation with the *Landkreis*, the busses have also been used for school transport services in part. This holds true for all the five call busses.

(206) It can, therefore, be concluded that the access to the infrastructure in question was open to all users on a non-discriminatory basis.

7.3.1.5. ***The aid does not lead to distortions of competition contrary to the common interest***

7.3.1.5.1. **The 1998 Shares**

(207) The transfer of the 1998 shares merely enabled the creation — from a financial perspective — of a corporate entity EEB, which primarily executes public tasks in the area of transport coordination. As such this measure does not lead to distortion of competition contrary to the common interest.

7.3.1.5.2. **Mobility Centre Emsland**

(208) As stated above the MCE gathers information from all transport undertakings operating in the Landkreis Emsland on equal terms and provides this information free of charge to the citizens. It does not, therefore, distorts competition contrary to the common interest.

7.3.1.5.3. **Call-busses**

(209) As stated above the *Landkreis Emsland* ordered the expansion of the call-bus scheme under the condition that it does not have any effect on existing schemes and on routes that would not be financially viable. They have been made available to all interested parties under the same conditions and it is, therefore, not expected that the introduction of these additional routes has led to a distortion of competition contrary to the common interest.

7.3.1.6. ***Conclusion and condition***

(210) In the light of the above, the Commission considers that the aid granted in the form of shares in 1998, the call-busses and the MCE contributes to an objective of common interest, that it is necessary and proportionate to this objective and that trade between Member States will not be affected in a way contrary to the common interest.

(211) As mentioned in recitals 178 f. above, the transfer of 1998 shares could not be considered as exclusively contributing to the objective of coordination of transport as the ownership of these shares and the ability of EEB to freely dispose of them represents a potential advantage for economic activities of EEB, which do not necessarily serve the needs of transport coordination. For this measure to comply with the first compatibility condition, EEB cannot be allowed to retain dividends, proceeds from a possible sale of the 1998 shares or use these shares as collateral to obtain financing from third parties for economic activities. The Commission will impose this as a condition for compatibility of the transfer of the 1998 shares with the internal market.

(212) Based on the foregoing, the Commission considers that these measures are compatible under Article 93 TFEU, subject to the condition on the utilisation of 1998 shares.

7.3.2. COMPATIBILITY ASSESSMENT WITH REGULATION (EEC) NO 1107/70

(213) Article 3(2) of Regulation (EEC) No 1107/70 allows for the assessment of the reimbursement for the discharge of obligations inherent in the concept of a public service to a transport undertaking or activities to which Regulation (EEC) No 1191/69 does not apply.

(214) As in previous cases, local and regional bus transport is considered to be exempted from the application of Regulation (EEC) No 1191/69 ([43]) and Article 3(2) of Regulation (EEC) No 1107/70 is applicable. In accordance with this Regulation the payments of the *Landkreis Emsland* can be declared compatible with the internal market if the payments cover the costs and not more than the costs of the specific public task EEB was carrying out. In the following it will, thus, be assessed whether EEB has been adequately compensated for its tasks.

7.3.2.1. ***The 1998 shares***

(215) As described above, the RWE shares were transferred to EEB in the context of the decision of the *Landkreis* to incorporate the entity EE, which previously carried out public tasks related to the planning of public local passenger transport within the administration of the *Landkreis*. To enable EEB to operate it had to be endowed with an initial balance sheet. Pursuant to paragraph 3 of the articles of association of EEB, its tasks include the drafting the Nahverkehrsplan for the Landkreis Emsland, the running of the MCE and the organisation of school transport. All of these tasks can be qualified as contributing to the development of public transport in the *Landkreis*.

(216) Without the revenues from the dividends the market value of the 1998 shares is reduced to the economic value of these shares on EEB's balance sheets. The Commission therefore considers that the aid in the form of the transfer of the 1998 shares is limited to the minimum necessary for EEB to carry out its public tasks and therefore there is no overcompensation.

7.3.2.2. ***Mobility Centre Emsland***

(217) As described in recital 47, the *Landkreis* decided to run a mobility centre on 31 July 1995 so it could provide a public transport information service to the general public. The *Landkreis* transferred this task to EEB when it was founded on 1 January 1997. The running of the MCE is one of the tasks that have been explicitly assigned to EEB in its articles of association.

(218) As explained above (see recital 77) the Landkreis reimbursed the actual costs incurred by EEB in relation to the running of the MCE, no profit margin was foreseen. The Commission, therefore, considers the aid accorded as a result of the notified measure does not lead to an overcompensation of EEB.

([43]) See footnote 36.

7.3.2.3. ***Call-busses***

(219) As described above the *Landkreis Emsland* decided to expand the call-a-bus scheme in the district for two distinct reasons ([44]):

— to improve the connection of the cities and villages in the region to the train stations;

— to optimise the inter-connection between different parts of cities and villages.

(220) The call-busses are used on public transport routes at off-peak hours to improve the public transport offer at this point in time. The call-busses are adapted for wheel-chairs and prams.

(221) Germany has confirmed that the call-busses can only principally be used for the call-a-bus service and should EEB sell the busses, EEB will be obliged to return these proceeds to the *Landkreis* (which has already happened in one case).

(222) The Commission considers that there is no over-compensation because:

— EEB has bought the busses on behalf of the Landkreis and was reimbursed for their actual cost;

— EEB does not obtain any income from making the call busses available to third parties;

— should EEB not be able to find any third party interested in operating the call busses these busses are returned to the Landkreis;

— when call busses are no longer operational, they are sold and the proceeds from the sale are returned to the Landkreis.

7.3.2.4. ***Conclusion and condition***

(223) In the light of the above, the Commission considers that the aid granted in the form of shares in 1998, the call-busses and the MCE do not overcompensate EEB for the discharge of public tasks it carries out for the *Landkreis Emsland*.

(224) As mentioned in recitals 117 f. above, the transfer of 1998 shares could not be considered as exclusively contributing to EEB's non-economic activities as the ownership of these shares and the ability of EEB to freely dispose of them represents a potential advantage for economic activities of EEB. For this measure to comply with the first compatibility condition, EEB cannot be allowed to retain dividends, proceeds from a possible sale of the 1998 shares or use these shares as collateral to obtain financing from third parties for economic activities. The Commission will impose this as a condition for compatibility of the transfer of the 1998 shares with the internal market.

(225) Based on the foregoing, the Commission considers that these measures are compatible under Article 3(2) of Regulation (EEC) No 1107/70, subject to the condition on the utilisation of 1998 shares,

HAS ADOPTED THIS DECISION:

Article 1

The initial capital endowment and 280 310 shares of the energy company RWE constitute existing aid pursuant to Article 108(1) of the Treaty on the Functioning of the European Union and Article 1(b)(iv) of Council Regulation (EC) No 659/1999 ([45]).

Article 2

The dividends *Emsländische Eisenbahn GmbH* received from the shares, the compensation for the coordination of school transport services and for drawing up the local transport scheme (Nahverkehrsplan) do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

([44]) See footnote 41.
([45]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

Article 3

In so far as the compensation *Emsländische Eisenbahn GmbH* received for running the Mobility Centre Emsland the aid is compatible with the internal market within the meaning of Article 93 of the Treaty on the Functioning of the European Union and Article 3(2) of Regulation (EEC) No 1107/70.

Article 4

1. In so far as the busses transferred to *Emsländische Eisenbahnen GmbH* constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, the aid is compatible with the internal market within the meaning of Article 93 of the Treaty on the Functioning of the European Union and Article 3(2) of Regulation (EEC) No 1107/70, subject to the commitment of Germany set out in paragraph 2.

2. The call-busses are used for the call-a-bus service. If EEB was to sell one of the busses, EEB is obliged to return the proceeds to the *Landkreis Emsland*.

Article 5

The aid which Germany has implemented by the transfer of 37 630 RWE shares to *Emsländische Eisenbahn GmbH* in 1998 is compatible with the internal market subject to the conditions set out in Article 6.

Article 6

1. The shares shall not be used as collateral or sold, unless the conditions set out in paragraph 2 are met.

2. Within two months from the adoption of this Decision, *Emsländische Eisenbahn GmbH* shall sign an agreement with the *Landkreis Emsland* regarding the RWE shares. The agreement shall confirm that:

— the RWE shares may not be used as collateral or in any other form to the benefit of EEBs economic activities.

— any dividends resulting from the RWE shares will be paid back to the *Landkreis Emsland* by EEB.

— any proceeds EEB would obtain from selling the RWE shares will be paid back to the *Landkreis Emsland*.

Article 7

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 8

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 September 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission