



EUROPEAN COMMISSION

Brussels, 04.06.2015
C(2015) 3657 final

Subject: State Aid SA.34403 (2015/NN) (ex 2012/CP) - United Kingdom - Alleged unlawful State aid granted by Nottinghamshire and Derbyshire County Councils to community transport organisations

Sir,

1. PROCEDURE

- (1) On 22 February 2012, JA Travel Limited ("the complainant"), which runs a small minibus and private hire firm, submitted a complaint to the Commission, supplemented by additional information provided by e-mails sent between 12 March 2012 and 8 June 2012, concerning alleged unlawful State aid granted by Nottinghamshire County Council ("NCC") and Derbyshire County Council ("DCC") to community transport organisations ("CTOs") in the United Kingdom.
- (2) The Commission forwarded the complaint with a request for clarification to the UK authorities on 11 June 2012, to which they replied on 25 July 2012.
- (3) On 23 July 2012, the complainant informed the Commission that it intended to provide further information to substantiate the complaint. Consequently, on 15 November 2012, the complainant submitted a new version of the complaint.
- (4) On 19 December 2012, the Commission forwarded that version to the UK authorities with a request for additional clarifications, to which they replied on 2 April 2013.
- (5) On 13 June 2013, the Commission held a meeting with the UK authorities to discuss the issues raised in the complaint, followed by a conference call with the complainant on 17 June 2013.
- (6) On 28 June 2013, the complainant set out its priorities for resolving the complaint which, with its agreement granted on 19 July 2013, the Commission forwarded to the UK authorities on the same day.
- (7) In response, the UK authorities made further submissions on 10 September 2013, 12 December 2013 and 24 January 2014 and 7 July 2014.

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- (8) On 4 September 2014, the Commission held another conference call with the complainant, followed by new submissions by the complainant on 5 and 7 September 2014¹, which, with its agreement granted on 11 September 2014, the Commission forwarded to the UK authorities on the same day.
- (9) The UK authorities replied to those submissions on 6 and 24 October 2014.
- (10) On 8 December 2014, the Commission communicated its preliminary assessment of the complaint to the complainant, concluding that the funding awarded by NCC to CTOs does not constitute State aid, while the funding awarded by DCC to CTOs is most likely compatible with the internal market.
- (11) On 15 December 2014, the complainant informed the Commission that it did not agree with the preliminary assessment and submitted further information on 21 January 2015 and 23 February 2015.
- (12) Since the information available shows that the public funding has already been disbursed by DCC, in breach of the stand-still clause laid down in Article 108(3) TFEU and Article 3 of Council Regulation No 659/1999,² the aid measure has been registered as unlawful aid (2015/NN) and the procedural rules applicable are those laid down in Chapter III of that regulation.

2. BACKGROUND

2.1. The complaint

- (13) The complainant, JA Travel Limited, is a passenger transport company, set up in 1999 and operating in the Nottingham and Mansfield areas of England, which specialises in airport transfers, weddings, executive business travel and special occasions³. The complainant had also, for some 12 years, provided special educational needs home-to-school transport services for NCC, but lost those services in tenders organised in 2011 against bidders who offered lower prices. Among those bidders, specifically mentioned in the complaint, was Erewash Community Transport Limited ("Erewash CT"), a CTO.
- (14) In the view of the complainant, Erewash CT and other CTOs were able to offer lower prices to local authorities for public contracts than private undertakings, such as the complainant, because they could cross-subsidise their bids with grant funding received from the local authorities for other services.
- (15) The original complaint, submitted in February 2012, referred to two local authorities, NCC and DCC. The new version of the complaint, submitted in November 2012, broadened its scope to 60 local authorities and was, additionally signed by 58 privately owned businesses operating bus and coach passenger companies in various regions in the UK.
- (16) The complainant alleged that not-for-profit CTOs received unlawful State aid totalling nearly EUR 60 million during the five years up to 2012 in the form of

¹ Apart from the submissions specifically mentioned in this decision, the complainant also provided information on an ongoing basis in multiple e-mails sent between 5 July 2012 and 5 May 2015.

² Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty; OJ L 83, 27.3.1999, p.1 with further amendments.

³ www.jatravel.co.uk

grants and loans⁴ ("the funding") from at least 60 local authorities in the UK (including NCC and DCC) and that this allowed them to compete unfairly with private non-subsidised transport companies, such as itself, for passenger transport services procured by those authorities.

- (17) In addition, the complainant alleged that CTOs benefit from a lighter regulatory system than private operators, in breach of Union law, which gives them a cost advantage when tendering in competition with private transport companies.
- (18) The UK authorities expressed concern at the expanded scope of the complaint, considering the severe practical difficulties that such an expansion would cause in responding to the issues raised. Given the large number of local authorities involved and many hundreds of affected CTOs, it would have been disproportionate and impracticable, in the view of the UK authorities, for the UK to answer queries in relation to all of them.
- (19) Noting the concerns as to the scale of any investigation that might have to be undertaken in light of a large number of stakeholders, the complainant requested the Commission on 28 June 2013, as one of its priorities to resolve the complaint, to limit the assessment of the alleged aid to two local authorities mentioned in the original complaint from February 2012, namely NCC and DCC. In addition, the complainant set out three other priorities to resolve the complaint:
 - The UK Government should abandon the alleged two-tier regulatory system favouring CTOs over private operators which, in the opinion of the complainant, is in breach of Regulation (EC) No 1071/2009 and 91/439/EEC⁵.
 - CTOs should be required to operate a system of accounting which separates financial information concerning their charitable work and commercial work.
 - The Commission should recommend that the UK Government give clear advice to local authorities regarding State aid.
- (20) In response to the last two priorities, the UK authorities published, on 14 January 2015, the *Guidelines on Community Transport Funding and the EU State aid rules* ("the Guidelines")⁶, prepared in consultation with the services of the Directorate-General for Competition, with the aim to assist local authorities, which provide funding in support of CTOs, in ensuring compliance with the Union State aid rules.

2.2. Community transport in the UK

- (21) The UK authorities consider the community transport sector a vital component of the public transport mix, which ensures that adequate transport provision is available to all members of society. CTOs provide not-for-profit transport services for particular groups of service users, often unable to make effective use of

⁴ According to p. 11-13 of the complaint from 15 November 2012.

⁵ Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC, OJ L 300, 14.11.2009; Council Directive 91/439/EEC of 29 July 1991 on driving licenses, OJ L 237, 24.08.1991.

⁶ <https://www.gov.uk/government/publications/community-transport-operator-funding-eu-state-aid-rules>

conventional transport. Passengers could include, for example, disabled, elderly or infirm people who find it difficult to use public transport, children requiring transport to and from schools, or people living in rural communities that are not well-served by public transport because it would not be commercially viable.

- (22) The services provided by CTOs vary but typically include a "dial-a-ride" type of service, whereby certain users (e.g. disabled or infirm people) are able to pre-book pick-ups and drop-offs by a minibus that has been specially adapted. Booking can also be made for small groups of persons (e.g. school children) to enable their safe transportation to a place of interest.
- (23) The UK authorities believe that such services would not be provided by market operators at prices that most service users could afford, without intervention by the State, given the varied needs of passengers and higher labour intensity required than in other forms of public transport.
- (24) That is why, in view of the UK authorities, many local authorities choose to provide funding for such services, in accordance with local circumstances and to meet particular local needs.
- (25) Many local authorities offer grants to CTOs, since they consider that the not-for-profit sector can best meet the needs of the users. CTOs generally have experience in providing transport to target users and can be cheaper than private operators, as around half of them uses entirely volunteer (i.e. unpaid) staff, while those CTOs that have some paid staff typically also rely on volunteers to a significant extent.
- (26) Local authorities also procure transport services through competitive tenders, open to commercial operators. Under UK law, CTOs can participate in such tenders to the extent that the services requested are specified in the permits under which they operate. Those permits allow CTOs to provide, for example, school transport or specialised door-to-door services, such as "dial-a-ride". Some grant-funded CTOs compete for local authorities' contracted work. According to the UK authorities, that work most commonly consists in one-off competitive spot contracts for the transportation of a particular individual.
- (27) CTOs are not-for-profit entities. Their revenues (including grants and contract income) can be legally used only to cover their costs. In addition, a contract cannot be undertaken by a CTO with a view to making a profit as this would invalidate the permit under which they operate. There is a wide range of legal structures open for not-for-profit organisations in the UK. Community groups and voluntary organisations should in principle register with the Charity Commission. Charities must pursue charitable objectives and be non-profit making organisations.
- (28) Any organisation in the UK that accepts any sort of payment for transport of passengers must hold either a public service vehicle (PSV) licence or private hire vehicle licence. Under Section 19 and 22 of Transport Act 1985 the non-for-profit operators are exempted from the need to hold PSV and thus they are subject to less stringent regulatory regime than commercial operators (the PSV holders). Most CTOs run under Section 19 or Section 22 permits. Nevertheless, CTOs must still meet certain legal requirements to ensure safe operation of vehicles (e.g. regular maintenance inspections).

- (29) According to the UK authorities, there were around 20,000 registered local bus services in England in 2011, of which approximately 4,400 (22%) were subsidised by local authorities, of which less than 150 (0.75%) were operated by CTOs. The average annual income of a CTO in England (from all sources) was GBP 48,800.

2.3. Legal basis

- (30) CTOs operate and provide passenger transport services under Section 19 or/and Section 22 of the Transport Act 1985. Tenders organised by local authorities must comply with the Public Contracts Regulation 2006 (PCR 2006), which implements Union Directive 2004/18⁷.

3. DESCRIPTION OF THE MEASURES

- (31) According to the complaint, NCC provided funding to CTOs in the total amount of GBP 1,469,314 over a period of five years. From the information submitted by the UK authorities, the average funding per CTO did not exceed GBP 40,000 and the maximum funding received by CTOs amounted to GBP 243,603 (c. EUR 289,000) over any period of three financial years between 2007 and 2013.
- (32) According to the complaint, DCC provided funding to CTOs in the total amount of GBP 6,735,995 over a period of five years. From the information submitted by the UK authorities, the funding per CTO ranged from GBP 502,667 to GBP 514,041 (c. EUR 597,000-611,000) over the three financial years 2010/11, 2011/12 and 2012/13.

4. ASSESSMENT

4.1. Existence of aid

- (33) Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (34) It follows that, for a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative criteria must be met: (i) it must be granted by the State or through State resources; (ii) it must confer an advantage upon an undertaking; (iii) it must be selective, i.e. favour certain undertakings or the production of certain goods; and (iv) it must distort or threaten to distort competition and it must affect trade between Member States.
- (35) As regards the first criterion, the funding granted to CTOs by NCC and DCC is paid from the County Council budgets and from grants received from the UK Department of Transport and thus through State resources.
- (36) For the second criterion, the UK authorities contend that the measure funds public service obligations ("PSO") consisting of the provision of not-for-profit passenger transport services to particular groups of users that are unable to make effective

⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.04.2004.

use of conventional transport, such as disabled, elderly or infirm persons who find it difficult to use public transport, children requiring transport to and from schools, and/or people living in rural communities that are not well-served by existing public transport operators because it would not be commercially viable to offer those services to those communities.

(37) It follows from the case-law of the Court of Justice of the European Union that compensation granted by the State or through State resources to undertakings in consideration for the discharge of PSOs does not confer an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) TFEU, provided four cumulative conditions are satisfied⁸:

- First, the recipient undertaking is actually required to discharge PSOs and those PSOs have been clearly defined;
- Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- Fourth, where the undertaking which is to discharge PSOs is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(38) As regards the first condition, Member States have a wide margin of discretion in defining a given service as a PSO. The Commission's assessment of the exercise of that discretion is limited to checking whether the Member State has made a manifest error when defining a particular service as a PSO. However, Article 2(e) of Regulation (EC) No. 1370/2007,⁹ although not applicable to the present case,¹⁰ provides some guidance on the definition of PSOs in the field of passenger transport by road and by rail. That provision defines a PSO as "*a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.*"

(39) CTOs provide special transport services predominantly for vulnerable members of local communities who are often economically and/or physically disadvantaged and would arguably not be able to satisfy their transport needs in the absence of CTOs, or at least not under the same conditions. In the case of

⁸ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* [2003] EU.C.2003:415, points 87 and 88.

⁹ 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, 03.12.2007, p. 1.

¹⁰ See recital (55) below.

DCC, according to the UK authorities, all of the grants provided to CTOs support the provision of "dial-a-ride"-type services to disabled and older persons for modest fares that are manifestly insufficient to cover the cost of those services. In the case of NCC, the grants were awarded to ensure the provision of special transport services to disadvantaged users, such as physically or mentally disabled persons and the physically infirm. These services must be provided in ways that take account of the specific needs of such persons and thus require significant resources. Such persons are often also economically disadvantaged and have limited ability to fund the services they require.

- (40) Consequently, an economic operator, if it were considering its own commercial interests, would not provide equivalent services under similar conditions. In addition, the obligations of the CTOs in question have been clearly defined in funding conditions and contracts. In particular, the funding documents specified i.a. the type of services to be provided, eligible journeys and users, area of operation, accessibility of the service, duration of the contract, basis for funding and monitoring requirements. It can therefore be concluded that CTOs provide a genuine public service that has been clearly defined so that the first condition for the absence of an advantage has been satisfied.
- (41) However, the case-law requires that all four of the aforementioned conditions are cumulatively satisfied in order to exclude the presence of an advantage where compensation is granted to undertakings in consideration for PSOs discharged by them. In the present case, the fourth Altmark condition is not satisfied, since NCC and DCC did not select the CTOs which received grant funding to provide the PSOs by way of an open, transparent, non-discriminatory and unconditional tender procedure nor was the level of compensation determined through a benchmarking exercise. It therefore follows that through the funding CTOs are granted an economic advantage for the purposes of Article 107(1) TFEU.
- (42) As regards the third criterion for a finding of State aid, the funding is selective because it was granted only to certain CTOs. In the case of NCC, funding was provided to 18 specific CTOs, while in the case of DCC, funding was awarded to 8 specific CTOs.
- (43) For the final criterion for a finding of State aid, Regulation (EU) No. 360/2012¹¹ ("SGEI *de minimis* Regulation") provides that aid granted to undertakings for the provision of services of general economic interest ("SGEI") shall be deemed not to meet all the criteria of Article 107(1) TFEU if the total amount of aid granted to any one undertaking providing SGEI does not exceed EUR 500,000 over any period of three fiscal years ("SGEI *de minimis*"). As recital (4) of that regulation explains, aid granted to undertakings providing a SGEI not exceeding that threshold should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition.
- (44) According to Article 1, the Regulation applies to aid granted to undertakings providing a SGEI. On the basis of the assessment in recitals (38) to (40) above, the Commission considers that CTOs provide SGEIs.¹² It is Article 2 of the

¹¹ Commission Regulation (EU) 360/2012 of 25 April 2012 on the application of articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114/8 of 26.04.2012.

¹² The Union Courts have established that the notion of PSO and SGEI should be given the same meaning; see Case T-289/03 *BUPA and Others v. Commission* EU:T:2008:29, point 162; Case T-

regulation which provides that the *de minimis* aid should not exceed the EUR 500,000 threshold and should be possible to be calculated precisely in terms of the gross grant equivalent without the need to undertake a risk assessment.

- (45) Based on the data received from the UK authorities, the funding awarded by NCC to CTOs was provided in the form of grants and was well below the EUR 500,000 ceiling for any one undertaking over the period of three fiscal years. Consequently, the funding awarded by NCC to CTOs does not constitute State aid within the meaning of Article 107(1) TFEU since it does not fulfil the fourth criterion for a finding of aid. That conclusion also applies to funding provided by NCC to CTOs prior to the entry into force of the SGEI *de minimis* Regulation, pursuant to Article 4 thereof, which provides that the regulation applies to *de minimis* aid granted for the provision of a SGEI before its entry into force (i.e. 29 April 2012), provided that such aid fulfils the conditions laid down in Articles 1 and 2 thereof.
- (46) By contrast, the funding awarded by DCC to CTOs exceeded the EUR 500,000 ceiling (see recital (32) above) and therefore cannot be considered as SGEI *de minimis* aid within the meaning of Regulation (EU) No. 360/2012. Although CTOs typically operate within local markets and on a relatively small scale, the provision of road passenger transport services is open to competition, also from providers established in other Member States. Accordingly, any compensation granted to CTOs should be considered liable to distort competition for the provision of passenger transport services by bus and liable to affect trade between Member States to the extent that it negatively impacts on the ability of transport undertakings established in other Member States to offer their services in the United Kingdom and strengthens the position of CTOs by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations¹³.
- (47) It follows from the foregoing that the funding awarded by NCC to CTOs from 2007 to 2013 does not constitute State aid within the meaning of Article 107(1) TFEU, while the funding awarded by DCC to CTOs from 2007 to 2013 meets all the criteria for a finding of State aid under that provision.

4.2. The alleged lighter regulatory system for CTO

- (48) The complainant also alleges that CTOs benefit from a lighter regulatory system than private operators, in breach of Union law, which gives them a cost advantage when tendering in competition with private transport companies.
- (49) The Commission notes that the lighter regulatory system alone does not involve additional burdens on the public authorities entailing a commitment of State resources to CTOs¹⁴. Accordingly, the lighter regulatory system does not involve a transfer of State resources and thus does not constitute State aid within the meaning of Article 107(1) TFEU, contrary to what the complainant implies.
- (50) In addition, as mentioned in the preliminary assessment letter communicated to the complainant, this aspect of the complaint was assigned to and is being

295/12 *Germany v. Commission* EU:T:2014:675 paragraph 72 and Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* EU:T:2014:676, paragraph 132.

¹³ Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55.

¹⁴ Case C-518/13 *Eventech* EU:C:2015:9 paragraph 41.

handled by the Directorate-General for Mobility and Transport ("DG MOVE"), which is the competent service in this matter.

4.3. Legality of the aid

- (51) In accordance with Article 108(3) TFEU and Article 3 of Regulation (EC) No 659/1999, aid shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising that aid ("standstill obligation").
- (52) In the present case, the United Kingdom did not fulfil the stand-still obligation as regards the funding granted by DCC to CTOs, since that aid has already been disbursed and has never been notified. Thus, the funding should be considered to constitute unlawful aid within the meaning of Article 1(f) of Regulation (EC) No. 659/1999.

4.4. Compatibility of the aid

- (53) Insofar as the funding granted by DCC to CTOs constitutes unlawful State aid within the meaning of Article 107(1) TFEU, the Commission must assess its compatibility with the internal market.
- (54) Since that funding concerns compensation for the provision of passenger transport services by road, the appropriate legal basis for assessing its compatibility is Article 93 TFEU.¹⁵ That provision provides that "*[a]ids shall be compatible with the Treaties [...] if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service*".
- (55) Regulation (EC) No. 1370/2007 lays down the conditions under which compensation payments stipulated in contracts and concessions for public passenger transport services shall be deemed compatible with the internal market and exempt from prior State aid notification to the Commission. That regulation is inapplicable as regards the funding granted by DCC to CTOs, however, since the services provided by those CTOs consist exclusively of on-demand "dial-a-ride" services provided to a limited segment of the general population, which are excluded from the scope of Regulation (EC) No. 1370/2007.¹⁶
- (56) For passenger transport services falling outside the scope of Regulation (EC) No. 1370/2007, the compatibility of compensation granted for the discharge of PSOs must be examined under Article 93 TFEU directly. Under that provision, such compensation may be declared compatible with the internal market if the following five conditions are met:¹⁷
- First, the aid must be granted for the discharge of a genuine and clearly defined public service.

¹⁵ According to Article 100 TFEU the provisions of Part 3, Title VI of the TFEU, which includes Article 93 TFEU, apply to transport by rail, road and inland waterway.

¹⁶ According to Article 2(a), "public passenger transport" means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis. Services that are offered only to certain sections of society, such as disabled, elderly or infirmed persons, instead of the public at large, and services that are offered on demand and not continuously according to fixed timetables do not fall under that definition.

¹⁷ See e.g. Commission Decision C(2014) 133 final of 22 January 2014 concerning the case SA.34155 Regional law on the compensation of school bus transport in the Land Rhineland-Palatinate, OJ C 120/2014 of 23.04.2014.

- Second, the parameters for compensation must be laid down in advance in an objective and transparent manner.
 - Third, the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.
 - Fourth, where an authority assigns the same public service to several undertakings, the compensation for the discharge of that service should be calculated on the basis of the same method in respect of each undertaking.
 - Fifth, the aid must not lead to distortions of competition contrary to the common interest.
- (57) The Commission notes that Regulation (EC) No. 1370/2007 and other legislation in the field of services of general economic interest are based on similar principles.

4.4.1. Public service obligation

- (58) As a first condition, the recipient undertaking must actually have PSOs to discharge, and the obligations must be clearly defined. As explained in recitals (38) to (40) above, the Commission considers the funding provided by DCC to CTOs to be granted for the discharge of a genuine and clearly defined PSO.

4.4.2. Entrustment act laying down compensation parameters in advance

- (59) The UK authorities have informed the Commission that CTOs were entrusted with a PSO by way of an entrustment act in the form of funding documents (*i.a.* funding contract).
- (60) Union rules do not impose any specific format of an entrustment act. An entrustment act may take the form of a legislative or regulatory instrument or a contract.¹⁸ In view thereof, the grant contract may be considered as a legitimate entrustment act.
- (61) As regards the parameters for compensation, the need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. It suffices if it is clear from the outset how the compensation is to be determined.
- (62) In the present case, the parameters for compensation were described in the funding documents and established in advance. More specifically, the level of funding was based on an agreed framework, which reflected both the expected volume of activity (number of eligible trips undertaken) and other funding factors, such as e.g.: number of kilometres driven, number of passenger boardings, number of journeys completed, number of members registered and drivers involved. Each funding factor was assigned a rate on the basis of which the level of funding was calculated. Payments were made upon receipt by local authority of quarterly monitoring data from CTOs.

¹⁸ Point 52 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8, 11.01.2012, p. 15.

- (63) Therefore, the Commission considers that the parameters of compensation were laid down in advance in an objective and transparent manner.

4.4.3. No overcompensation

- (64) CTOs operate as not-for-profit organisations. Their revenues (including grants and contract income) can be legally used only to cover their costs. If CTOs breached the "not-for-profit" requirement, the driving permits under which they operate would be invalidated and they would no longer be entitled to provide the PSO for which they have been contracted.
- (65) The UK authorities asserted that funding is provided to CTOs solely for the specific purpose of contributing towards meeting the costs of the specific activities set out in the funding application. The provision of services in accordance with the funding application is subject to monitoring by the local authority. The standard funding terms provide that the recipient must use the funding only for the purpose set out in the funding agreement. If the terms are breached, local authorities can require repayment of all or a part of the funding.
- (66) Moreover, from a review of the financial statements of selected CTOs, it was found that funding awarded by DCC was correctly reported as "restricted funds" that could only be used for the particular purposes for which they were provided. All financial statements concerned were examined by independent auditors who issued opinions confirming their compliance with UK generally accepted accounting principles. In addition, from a cost breakdown of a CTO funded by DCC it was found that the amount of funding provided was materially less than the costs associated with the services which that CTO was required to provide on behalf of DCC.
- (67) On the basis of the above, the Commission considers that CTOs funded by DCC were not overcompensated.
- (68) The complainant also alleges that CTOs use grants received from local authorities (and more specifically buses received from local authorities) to compete unfairly with private transport companies, such as the complainant's, for transport services procured by local authorities under competitive tenders. The complaint refers to a specific example of Erewash CT against which the complainant competed for home to school contracts awarded by NCC. He alleges that Erewash CT (which also received grants from DCC) was able to offer a lower price because it used grants (vehicles and funds), received from both local authorities for the provision of public services, to carry out commercial home to school contracts.
- (69) The complainant has not submitted any evidence to substantiate this claim apart from the information that CTOs participated in tenders organised by local authorities and were awarded contracts. Despite the absence of evidence, noting that the issue is important for the complainant, the Commission has examined the allegation and found as follows:
- (70) Under the UK law, CTOs are not prohibited from participating in tenders organised by local authorities for services which are covered by permits under which CTO operate. Nor do the Union rules prohibit CTO from participating in such tenders.

- (71) Erewash CT currently provides a total of 14 home-to-school transport contracts for NCC and DCC (5 in Nottinghamshire and 9 in Derbyshire). Erewash CT has confirmed that their tenders for all these contracts were submitted on a cost recovery basis.
- (72) In Nottinghamshire, all 5 home-to-school transport contracts relate to special education needs. Erewash CT received funding to purchase one vehicle from NCC's "Community and Voluntary Transport Vehicle Replacement Scheme", which supports the capital purchase of vehicles for schemes which benefit the community and are not being covered by the commercial sector. The UK authorities informed the Commission that this vehicle has not been used on any of their home-to-school transport services.
- (73) In Derbyshire, all 9 home-to-school transport contracts were awarded under the terms of DCC's "Taxi and Small Vehicles Passenger Transport" Framework agreement. The UK authorities informed the Commission that Erewash CT has received the Local Transport Plan funding from DCC to assist them in purchasing 5 vehicles since 2006, but that none of these vehicles has been used on Council contracts and, in particular, to run their home-to-school transport services.
- (74) In view of the above, the allegation that CTOs use grant funding to cross-subsidise their contract services appears unfounded. Indeed, given that half of the CTOs rely entirely on volunteer (i.e. unpaid) staff while the other rely on volunteers to a significant extent and that CTOs do not operate for profit, it is plausible to assume that they can have lower operating costs than private operators, who must cover full payroll costs and generate profit, and therefore, offer lower bids, without taking advantage of the grant funding.
- (75) As a final remark, the Commission notes that, without prejudice to the conclusions reached in recitals (64) to (74) above, the Guidelines issued by the UK authorities and mentioned in recital (20) above, have introduced further control mechanisms to prevent potential overcompensation and cross-subsidisation of other services provided by CTOs.
- (76) In particular, the Guidelines impose on CTOs *i.a.* a requirement to keep separate accounts that enable the local authority to ensure that the funding and revenues received are not being used to cross-subsidise other services or activities of a CTO. Accordingly, where the organisation's activities are not limited to providing the supported community transport services, it must put in place internal accounting mechanisms to ensure that such accounts are available and are prepared in accordance with generally accepted accounting principles.
- (77) In addition, the Guidelines require local authorities to ensure that public funding granted to CTOs is not used by the beneficiaries to cross-subsidise their commercial activities. For example, CTOs which receive public funding in the form of vehicles must in principle not use such vehicles to provide transport services procured by local authorities in competitive tenders. Where CTO uses a vehicle provided for the PSO also for other activities, that vehicle can only be subsidised by local authorities to the extent that it is used for the provision of the PSO, by applying a pro-rata calculation.

- (78) Finally, the Commission notes that the complainant itself observed in the reply to the preliminary assessment letter that, following publication of the Guidelines, it has already seen a positive change in the way grant funding is awarded to CTOs.

4.4.4. *Non-discrimination*

- (79) From the information provided by the UK authorities it appears that the funding under scrutiny was available to all not-for-profit CTOs on the basis of standard terms and conditions. Accordingly, the compensation for the discharge of the PSOs in question was calculated on the basis of the same method in respect of each CTO, so that the funding was granted without discrimination.

4.4.5. *No distortion of competition contrary to the common interest*

- (80) The share of CTOs, even if taken together, in the local passenger transport market is very small. According to the UK authorities, there were around 20,000 registered local bus services in England in 2011, of which fewer than 150 (0.75%) were operated by CTOs, of which only 8 (0.04%) received funding from DCC. In addition, the average revenue of each individual CTO in 2011 was GBP 48,800. It can therefore be reasonably assumed that the vast majority of CTOs received funding well below the SGEI *de minimis* threshold.
- (81) The impact on competition is further limited by the nature and geographical scope of the services concerned. CTOs provide predominantly unscheduled transport services which are inherently directed at serving the needs of people in a particular community. To the extent that there is any competition at all between such services and commercial operators' services, it appears likely to be very small because the specific needs of the users of the CTO's services make it difficult or impossible for them to use commercial operators' services.
- (82) Whereas the impact of CTOs on competition in the UK already appears very small, the impact on the broader EU market would be negligible. Indeed. It seems unlikely that EU companies would be interested in providing special transport services on any significant scale to local communities in the UK or that CTOs would seek to offer such services on a significant scale in other MS.
- (83) Therefore, the Commission concludes that the aid does not distort competition to an extent that would be contrary to the common interest.

4.5. Conclusion on the compatibility of the aid

- (84) On the basis of the foregoing analysis, the Commission concludes that the aid granted by DCC to CTOs from 2007 to 2013 is compatible with the internal market on the basis of Article 93 TFEU.

5. CONCLUSION

On the basis of the foregoing assessment, the Commission concludes that the funding granted by NCC to CTOs during the period 2007 to 2013 does not constitute State aid within the meaning of Article 107(1) TFEU.

As regards the funding granted by DCC to CTOs during the period 2007 to 2013, the Commission concludes that that funding constitutes State aid within the meaning of Article 107(1) TFEU. The Commission regrets that the United Kingdom of Great Britain and Northern Ireland put that aid into effect without prior notification to the Commission, in breach of Article 108(3) of the Treaty on the Functioning of the European Union. Nevertheless, the Commission has decided to consider that aid compatible with the internal market pursuant to Article 93 of the Treaty on the Functioning of the European Union.

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Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
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