Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (notified under document C(2020) 1110) (Only the Italian text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2020/1412

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on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione

(notified under document C(2020) 1110)

(Only the Italian 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 provisions cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 5 October 2011 the Commission opened the formal investigation procedure in respect of various measures adopted by Italy in favour of the companies of the former Tirrenia Group[2] ('the 2011 Decision'). The investigation concerned *inter alia* the compensations granted to Tirrenia di Navigazione ('Tirrenia') for the operation of a number of maritime routes as of 1 January 2009, and the privatisation process (see section 2.3.3) which resulted in the Tirrenia business branch (see also recital 27) being acquired by Compagnia Italiana di Navigazione ('CIN').

(2) The 2011 Decision was published in the *Official Journal of the European Union*[3]. The Commission invited interested parties to submit their comments on the measures under investigation.

(3) As concerns the measures subject to this Decision, the Commission received comments from Tirrenia in Extraordinary Administration ('Tirrenia in EA'), Pan Med Lines ('Pan Med'), CIN and Grandi Navi Veloci (also referred to as

GNV) (see section 5). It forwarded them to Italy, which had the opportunity to react. Italy did not submit any comments.

(4) On 10 January 2012, the Italian authorities formally notified, allegedly for reasons of legal certainty, the draft public service contracts ('Conventions') which would be concluded with the respective future acquirers of the Tirrenia and Siremar business branches and on which basis compensation would be granted to these acquirers. On 24 January 2012, 4 February 2012 and 3 July 2012, the Commission requested additional information from the Italian authorities on the notified measures. That information was provided by the Italian authorities by letters dated 9 February 2012, 11 May 2012 and 19 July 2012. By their letter dated 19 July 2012, the Italian authorities also informed the Commission that the new Convention between the Italian State and CIN had been signed the day before.

(5) On 7 November 2012, the Commission extended the investigation procedure *inter alia* (see section 2.2) in respect of (i) the illegal prolongation of rescue aid granted to Tirrenia; and (ii) public service compensation granted to CIN under the new Convention concluded with the Italian State. An amended version[(4)] of that Decision was adopted by the Commission on 19 December 2012 ('the 2012 Decision').

(6) The 2012 Decision was published in the Official Journal of the European Union[(5)]. The Commission invited interested parties to submit their comments on the measures under investigation.

(7) As concerns the measures subject to this Decision, the Commission received comments from CIN, Tirrenia in EA and Pan Med (see section 5). It forwarded them to Italy, which had the opportunity to react. Italy did not submit any comments.

(8) On 5 October 2012 the Commission contracted Ecorys Netherlands BV to provide it with an estimation of the market value of the relevant assets of Tirrenia put up for sale (see section 2.3.3.5) based on two alternative scenarios. Ecorys submitted its final report on 4 September 2013 ('the Ecorys Report'). The Commission forwarded this report to Italy on 27 September 2013. Italy submitted its comments to the Ecorys Report, including a counter-valuation by its own independent expert Banca Profilo, by letter dated 17 December 2013.

(9) By its decision of 22 January 2014 ('the 2014 Decision')[(6)], the Commission closed the formal investigation procedure as concerns various measures adopted by the Sardinian Region in favour of Saremar. The appeal lodged by Saremar and the Region against that decision was dismissed by the General Court in 2017[(7)].

(10) On 12 February 2016, 29 May 2018, 18 September 2018, 10 October 2018 and 22 November 2018, Grimaldi Euromed S.p.A. ('Grimaldi') made submissions

to the Commission as described in section 6. At Grimaldi's request, the Commission services also met with the company's legal representative on 17 July 2018.

(11) On 25 January 2018, 29 March 2018, and 31 August 2018 the Commission requested additional information from the Italian authorities. The Italian authorities provided this information on 26 April 2018, 31 May 2018, 2 November 2018 and 11 December 2018. On 23 and 24 January 2019, the Commission services met with the Italian authorities in Rome. In the following months, the Italian authorities submitted the additional information requested by the Commission during that meeting.

(12) This Decision only concerns possible aid measures to Tirrenia and CIN, as specified in recital 31. All remaining measures subject to the 2011 and 2012 Decisions are being investigated separately under cases SA.32014, SA.32015 and SA.32016 and are not therefore covered by this Decision. In particular, those remaining measures concern other companies of the former Tirrenia Group.

2. BACKGROUND AND DESCRIPTION OF THE MEASURES SUBJECT TO INVESTIGATION

2.1. General framework

2.1.1. *The initial Conventions*

(13) The Tirrenia Group was traditionally owned by the Italian State through the company Fintecna[8] and initially included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded with the Italian State in 1991, in force for twenty years between January 1989 and December 2008 (hereinafter 'the initial Conventions'). Fintecna held 100 % of Tirrenia's share capital which in turn wholly owned the regional companies Adriatica, Caremar, Siremar, Saremar and Toremar. Adriatica, which used to operate a number of routes between Italy and Albania/Croatia/Greece/Montenegro, was merged with Tirrenia in 2004.

(14) The purpose of these public service contracts was to guarantee the regularity and reliability of the maritime transport services, the majority of them connecting mainland Italy with Sicily, Sardinia and other smaller Italian islands. To that effect, the Italian State granted financial support in the form of subsidies paid directly to each of the companies of the Tirrenia Group.

(15) Tirrenia has been providing maritime transport services on a number of mixed (passengers, cars and lorries) routes and also on some freight routes, mostly between mainland Italy and respectively Sardinia, Sicily and the Tremiti Islands, and also between Sardinia and Sicily. The exact routes concerned are described below.

(16) On 6 August 1999, the Commission initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of aid paid on the basis of the initial Conventions to the six companies that then formed the Tirrenia Group.

(17) During the investigation phase, the Italian authorities requested that the Tirrenia Group case would be split up so that priority could be given to reaching a final decision concerning Tirrenia. This request was motivated by the Italian authorities' plan to privatise the Group, beginning with Tirrenia, and their intention to speed up the process in relation to that company.

(18) The Commission acceded to the Italian authorities' request, and by Commission Decision 2001/851/EC[(9)] it closed the procedure initiated in respect of the aid awarded to Tirrenia ('the 2001 Decision'). The aid was declared compatible subject to certain commitments by the Italian authorities.

(19) By Commission Decision 2005/163/EC[(10)] ('the 2004 Decision'), adopted on 16 March 2004, the Commission declared the compensation granted by Italy to the Tirrenia Group companies other than Tirrenia[(11)] to be partially compatible with the internal market, partially compatible conditional upon the respect of a number of commitments by the Italian authorities, and partially incompatible with the internal market. The decision was based on accounting data spanning from 1992 to 2001 and contained certain conditions aimed at ensuring the compatibility of the compensation throughout the duration of the initial Conventions.

(20) By Judgment of 4 March 2009 in Cases T-265/04, T-292/04 and T-504/04[(12)] ('the 2009 Judgment') the General Court annulled the 2004 Decision. This Decision is without prejudice to the ongoing procedure following the 2009 Judgment.

2.1.2. *The prolongation of the initial Conventions*

(21) Article 26 of Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions (including the one applicable to Tirrenia) which were initially due to expire on 31 December 2008 for one year, until 31 December 2009.

(22) Article 19-*ter* of Decree Law No 135 of 25 September 2009, converted into Law No 166 of 20 November 2009 ('the 2009 Law'), laid down that, in view of the privatisation of the Tirrenia Group companies, the shareholding of the regional companies (except for Siremar) would be transferred from parent company Tirrenia without any consideration being paid as follows:

(1) Caremar to the Region of Campania. Subsequently, the Region of Campania would transfer to the Region of Lazio the going concern[(13)] operating the transport connections with the Pontino archipelago on a stand-alone basis from that moment under the name Laziomar;

(2) Saremar to the Region of Sardinia;

(3) Toremar to the Region of Tuscany.

(23) The 2009 Law also specified that new 'Conventions' were to be agreed between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in draft 'Public Service Contracts', to be agreed by Saremar, Toremar, and Caremar with the regional authorities by 31 December 2009 (with Sardinia and Tuscany) and 28 February 2010 (with Campania and Lazio) respectively. The draft new Conventions / Public Service Contracts would be put up for tender with the companies themselves and then signed with the buyers upon finalisation of the privatisation of each of those companies[(14)].

(24) To that end, the 2009 Law further prolonged the initial Conventions (including the one applicable to Tirrenia) from 1 January 2010 until 30 September 2010.

(25) The 2009 Law also laid down fixed annual compensation ceilings for the operation of the services as of 2010 (under the prolongation of the initial Conventions as well as under the new Conventions and Public Service Contracts), at a total amount of EUR 184 942 251, as follows:

TABLE 1

Compensation ceilings as of 2010

Company	**Maximum annual compensation (EUR)**
Tirrenia	72 685 642
Siremar	55 694 895
Saremar	13 686 441
Toremar	13 005 441
Caremar	29 869 832[a]

a Out of which EUR 19 839 226 from Campania and EUR 10 030 606 from Lazio.

(26) Finally, Article 1 of Law No 163 of 1 October 2010 converting Decree-Law No 125 of 5 August 2010 ('the 2010 Law') laid down the further prolongation of the initial Conventions (including the one applicable to Tirrenia) from 1 October 2010 until the completion of the privatisation processes of Tirrenia and Siremar.

2.1.3. *The privatisation of Tirrenia and the conclusion of the new Convention*

(27) In September 2010, a tender procedure (see section 2.3.3) was launched to find a buyer for the Tirrenia business branch bundled together with the new Convention for the provision of maritime services over a period of eight years

in exchange for public service compensation. In this context, reference is made to the Tirrenia business branch instead of to Tirrenia since the tender procedure concerned only those assets and contracts necessary to perform the public service obligations specified in a new Convention to be concluded with the acquirer. Tirrenia's remaining assets, which it used for other purposes (such as ships, real estate and works of art), were to be sold via separate procedures. Furthermore, the tender procedure did not concern the liabilities of Tirrenia so none of the debts accrued by Tirrenia until the date of sale were transferred to the buyer. To this date, Tirrenia in EA continues to exist as a separate entity albeit with the primary purpose of being liquidated after having reimbursed its creditors.

(28) Following its successful offer in the tender procedure, CIN signed on 25 July 2011 the contract to acquire the Tirrenia business branch. The new Convention between the Italian State and CIN was signed on 18 July 2012. On this basis, the ownership of the Tirrenia business branch was transferred from the State to CIN on 19 July 2012.

2.2. Measures in scope of the 2011 and 2012 Decisions

(29) The following measures have been subject to assessment in the formal investigation procedure opened by the 2011 and 2012 Decisions (see also section 3):

(a) Compensation for the provision of services of general economic interest ('SGEI') under the prolongation of the initial Conventions (*measure 1*);

(b) Illegal prolongation of rescue aid to Tirrenia and Siremar (*measure 2*);

(c) The privatisation of the companies of the former Tirrenia Group[(15)] (*measure 3*);

(d) Compensation paid for the operation of SGEI under the future Conventions / Public Service Contracts (*measure 4*);

(e) The berthing priority (*measure 5*);

(f) The measures laid down by the 2010 Law converting Decree Law 125/2010 (*measure 6*);

(g) Additional measures adopted by the Region of Sardinia in favour of Saremar (*measure 7*);

(30) By its 2014 Decision the Commission closed the formal investigation procedure as concerns the measures adopted by the Region of Sardinia in favour of Saremar referred to above as Measure 7 with the exception of one measure[(16)].

2.3. Detailed description of the measures subject to this Decision

(31) This Decision only deals with measures 1 to 6 as listed in recital 29. These measures are described in more detail in the following sections.

2.3.1. *The prolongation of the initial Convention between the State and Tirrenia*

2.3.1.1. *The public service obligations*

(32) Article 1 of the initial Convention with Tirrenia provided for five-year plans to detail the ports to be served, the type of vessels to be used and the required frequency of the service entrusted to Tirrenia.

(33) Italy informed the Commission that for Tirrenia the last five-year plan adopted by Ministerial Decree of 20 September 2001 covers the period 2000-2004. This plan fully reflects the commitments (most notably reductions in the scope of the public service regime) made by Italy in the context of the Commission's 2001 Decision. A plan for the period 2005-2008 was drawn up but never formally approved by the competent ministries. Instead, *ad hoc* decisions have been taken by the government with a view to bringing the services more closely into line with the needs of the local communities, without however making substantive changes to the public service system. The Italian authorities argued that longer-term planning had no longer been possible due to the lack of budgeting of the required funds. For this reason, the limited changes that were made mostly concerned reductions of the public service.

(34) Based on the initial Convention, as prolonged and modified (for selected routes), Tirrenia operated the following routes between 1 January 2009 and 18 July 2012:

— Genova – Porto Torres: Tirrenia provided mixed services under the public service regime during the low season[17] and on a commercial basis during the high season. Under the public service regime, Tirrenia provided daily services with evening departures from both ports, based on pre-established timetables in order to provide reliable links to the rail network in Sardinia. The only competitor that also operated this route throughout the year during the relevant time period, Grandi Navi Veloci, only guaranteed three weekly departures in the low season. While in the high season Grandi Navi Veloci offered a daily service, it did not ensure evening departures from both ports.

— Civitavecchia – Olbia: Tirrenia provided mixed services under the public service regime during the low season[18] and on a commercial basis during the high season. Under the public service regime, Tirrenia provided daily services with evening departures from both ports, based on pre-established timetables. During at least part of the time period under assessment, SNAV operated on this route both during the low and the high season. However, in 2008 SNAV only operated on this route three times a week during the low season and daily during the high season. In 2009 and 2010, SNAV seems to have increased the operating frequency in the low season to daily. However, after May 2011, SNAV stopped operating on this route when Grandi Navi Veloci took over

this route. The latter company then decided to operate this connection only in the high season. The presence of other operators (e.g. Moby, Sardinia Ferries) on this route during part of this period was limited to the high season.

— Napoli – Palermo: in 2009 Tirrenia provided mixed services under the public service regime all year round, while from 2010 onwards Tirrenia provided these services under the public service regime during the low season and on a commercial basis during the high season. Under the public service regime, Tirrenia provided daily services with evening departures from both ports according to a pre-established schedule. During the entire prolongation period the only competitor that also operated this route throughout the year, SNAV, while offering daily departures would however not have guaranteed the same regularity and continuity as Tirrenia[19]. In addition, SNAV used much older ships than Tirrenia to operate on this route and hence did not offer the same quality[20]. Grandi Navi Veloci indicated that it operated on this route in 2011 from May to December, and all year in 2012 (see also recitals 266 and 267). Grandi Navi Veloci offered services on this route in collaboration with SNAV.

— Genova – Olbia – Arbatax: under the public service regime Tirrenia provided mixed services at least three times a week throughout the year. Arbatax was served twice a week as an extra stop after having called first at Olbia. During the period under assessment, the private operator Moby operated between Genova and Olbia during only part of the year (in most years from mid-March until mid-October). Likewise, GNV was only operating between Genova and Olbia in the high season. Tirrenia was the only operator operating the service to Olbia the entire year round. Furthermore, throughout the entire period under assessment Tirrenia was the only operator providing a link to Arbatax.

— Civitavecchia – Cagliari – Arbatax: under the public service regime Tirrenia provided mixed services on a daily basis with evening departures from both ports throughout the year. Arbatax was served twice a week as an extra stop. During the entire prolongation period Tirrenia was the only operator on this route both in the low and high season.

— Napoli – Cagliari: under the public service regime Tirrenia provided mixed services at least once per week from each port throughout the year. During the entire prolongation period Tirrenia was the only mixed service operator on this route both in the low and high season.

— Palermo – Cagliari: under the public service regime Tirrenia provided mixed services on a weekly basis from each port throughout the year. During the entire prolongation period Tirrenia was the only mixed service operator on this route both in the low and high season.

— Trapani – Cagliari: under the public service regime Tirrenia provided mixed services on a weekly basis from each port throughout the year. During the entire prolongation period Tirrenia was the only mixed service operator on this route both in the low and high season.

— Termoli – Tremiti Islands: under the public service regime Tirrenia provided mixed services on at least a daily basis from each port throughout the year.

During the entire prolongation period Tirrenia was the only operator on this route both in the low and high season.

— Livorno – Cagliari[21]: under the public service regime Tirrenia provided freight services five times a week throughout the year. During the relevant time period competitors (e.g. Moby) on this route only offered one departure per week and suspended the service during the high summer season and Christmas holidays.

— Napoli – Cagliari: under the public service regime Tirrenia provided freight services two to three times a week throughout the year. During the entire prolongation period Tirrenia was the only freight operator on this route both in the low and high season (in addition to its mixed service on the same route).

— Ravenna – Catania: under the public service regime Tirrenia provided freight services three times a week from each port throughout the year. During the entire prolongation period Tirrenia was the only freight operator on this route both in the low and high season.

2.3.1.2. *Budget and duration*

(35) The table below shows the annual compensation granted to Tirrenia for the period 2009 - July 2012:

TABLE 2

Compensation granted for the period 2009 – July 2012

Year	Compensation (EUR)
2009 (January – December)	80 010 000
2010 (January – December)	72 685 642
2011 (January – December)	72 685 642
2012 (January – July)	39 978 409,46[a]

a The amount paid to Tirrenia until the transfer of ownership of the Tirrenia business branch to CIN. For the remainder of 2012, CIN was paid EUR 32 707 232,54. The total compensation paid for 2012 hence amounted to EUR 72 685 642 in line with the compensation ceiling set by the 2009 Law.

(36) The initial Convention provides for the annual public service compensation to be paid as follows: an initial advance payment is made by 30 March of each year, equivalent to 70 % of the compensation paid the previous year. A second payment, made by 30 June, is equal to 20 % of the compensation. The difference between the amounts paid and the shortfall between operating costs and revenue during the year in progress constitutes the balance, which is paid by 30 November. If it turned out that Tirrenia has received a sum greater than the net cost of the services provided (revenue minus losses), it is required to reimburse the difference[22].

(37) As described above (see recital 34), during the high season Tirrenia operates the routes Genova – Porto Torres, Civitavecchia – Olbia and Napoli – Palermo

(from 2010 onwards) on a commercial basis. Any profits made on those routes during the high season are deducted from the amount of public service compensation payable to Tirrenia, while any losses incurred during that period would have to be borne by Tirrenia itself. This reduces the amount of compensation necessary for the operation of these routes under the public service regime that applies during the low season.

— Compensation granted in 2009

(38) Presidential Decree No 501 of 1 June 1979 ('Decree No 501/79') specifies the various elements (revenues and costs) which enter into the calculation of the subsidy paid to maritime public service operators. Furthermore, Law No 856 of 5 December 1986 ('Law 856/86') provided for certain alterations to the system of maritime public service obligations in Italy. Regarding the connections with major and minor islands, Article 11 thereof amended the criteria for the calculation of the public service compensation. Indeed, the subsidy had to be calculated based on the difference between the revenues and the costs of the service as determined with reference to average and objective parameters, and had to include a reasonable return on invested capital. The same article also lays down that the public service contracts had to include the list of the subsidized routes, the frequency and the types of ships to be used. The subsidies were to be approved by the responsible Ministers. The principles laid down in Presidential Decree No 501/79 and Law No 856/86 were reflected in the initial Conventions.

(39) Indeed, for 2009, the compensation for the discharge of SGEI was calculated in accordance with the methodology laid down by the initial Convention in force since 1991 and prolonged after its initial expiry date of 31 December 2008. In particular, the compensation corresponded to the accumulated net loss on the services operated under the public service regime, to which a variable amount corresponding to the return on invested capital was added.

(40) The various cost elements taken into consideration in order to calculate the compensation defined by the public authorities were the following: acquisition, advertising and accommodation costs, loading, unloading and manoeuvring costs, cost of shore administrative personnel, ship maintenance costs, administrative costs, insurance costs, rent and leasing costs, fuel, taxes and depreciation costs.

— Compensation granted in 2010, 2011 and 2012

(41) As from 2010 the compensation for the operation of the SGEI has been determined by the application of a new methodology laid down in the CIPE[23] Directive of 9 November 2007 titled 'Criteria for the definition of the public service obligations and the fare dynamics in the sector of maritime cabotage of public interest' ('the CIPE Directive')[24]. According to its preamble, the CIPE Directive was issued in view of the privatisation of the public companies operating maritime services under a public service regime[25]. The provisions of the CIPE Directive were applied in respect of the services provided by the

companies of the Tirrenia Group as of 2010, even prior to the entry into force of the respective new Conventions and Public Service Contracts following the respective privatisations.

(42) The method laid down in the CIPE Directive allows the companies operating the maritime public service to make an appropriate return. The rate of return on capital would be calculated on the basis of the weighted average cost of capital (WACC).

(43) The required return to equity[(26)] is to be calculated using the Capital Asset Pricing Model. On the basis of this model, the cost of equity is derived as a function of (i) the risk-free rate; (ii) the Beta (an estimate of risk profile of the company relative to equity market); and (iii) the equity risk premium assigned to the equity market.

(44) In particular, the cost of equity would be calculated by applying a premium for bearing extra risk to the rate of return on risk-free activities. This premium is to be calculated as the risk premium of the market multiplied by its Beta, which measures how risky a specific activity is relative to the market.

(45) According to the CIPE Directive, the rate of return on risk-free activities corresponds to the average gross yield on benchmark ten-year bonds with reference to the previous twelve months for which available data exists.

(46) The CIPE Directive sets a 4 % market risk premium. Moreover, in case of a service which is operated on a non-exclusive basis, the presumably greater risk borne by the operator is remunerated by the addition of an extra 2,5 % to the market risk premium.

(47) In practice, the amount of compensation paid to Tirrenia can however not exceed the ceiling of EUR 72 685 642 per year as laid down by the 2009 Law (see recital 25). Although the 2009 Law caps the annual compensation paid to all Tirrenia companies for the operation of the maritime services subject to the public service regime, the CIPE Directive also contains certain safeguards that enable those operators to sufficiently cover their operating costs.

(48) In particular, according to the CIPE Directive the scope of the services, the maximum fares set out by the new Convention and the compensation actually granted must be defined such as to grant the service provider coverage of the entirety of admissible costs. The following formula is applicable:

$$VA(RSP) + VA(AI(X)) = VA(CA)$$

where:

— *VA(RSP)* is the discounted value of the compensation for the discharge of the public service obligations,

— *VA(AI(X))* is the discounted value of other revenue (fare receipts and other),

— *VA(CA)* is the discounted value of the admissible operating costs, debt repayment and return on invested capital.

(49) In case the above equation does not hold, the scope of the subsidised activities could be reduced (see also recital 103), or alternatively the service organisation (e.g. type of ships) could be reviewed, or the maximum fares could be modified.

(50) Furthermore, the fare ceiling applicable to each service, net of taxes and port dues, is adjusted every year on the basis of a price-cap formula as follows:

$\Delta T = \Delta P - X$

where:

— ΔT is the annual percentage change in the fare ceiling,

— ΔP is the rate of inflation for the year of reference,

— X is a real annual rate of adjustment of the fare ceiling, laid down in the Convention, which remains constant over the duration of the Convention.

(51) The CIPE Directive also specifies that the fare ceiling may be adjusted to reflect variations in fuel costs, taking standard publicly available prices as reference.

2.3.2. *Illegal prolongation of rescue aid to Tirrenia*

(52) On 16 November 2010, the Commission approved rescue aid to Tirrenia and Siremar ('the 2010 Decision')[27]. The aid consisted of a guarantee on credit lines provided by private banks for an amount of up to EUR 95 000 000. Italy undertook to communicate to the Commission, no later than six months after the rescue aid measure had been authorized, a restructuring plan or proof that the loan had been reimbursed in full and/or that the guarantee had been terminated.

(53) Italy subsequently informed the Commission that the selected financial institutions, Banca Infrastrutture Innovazione e Sviluppo ('BIIS') and Unicredit, had authorised a credit line of EUR 40 000 000 to Tirrenia and Siremar (i.e. EUR 25 000 000 for Tirrenia and EUR 15 000 000 for Siremar) with the maturity date set at 30 June 2011. The State guaranteed the credit line on 15 February 2011.

(54) The financing was disbursed as follows:

(a) the first instalment on 28 February 2011 (EUR 20 000 000 for Tirrenia and EUR 12 000 000 for Siremar);

(b) the second instalment on 23 March 2011 (EUR 5 000 000 for Tirrenia and EUR 3 000 000 for Siremar).

(55) Italy informed the Commission that, given that the first instalment of the guaranteed loan had been disbursed to Tirrenia and Siremar only on 28 February 2011, the six-month period for the reimbursement of the credit within the meaning of paragraph 25(a) of the Community guidelines on State

aid for rescuing and restructuring firms in difficulty ('the 2004 Rescue and Restructuring Guidelines')[28] and recitals 32 and 47 of the 2010 Decision, would elapse on 28 August 2011.

(56) However, Tirrenia and Siremar defaulted on their loans and as a result on 11 July 2011 the State guarantee was called by BIIS. On this date, therefore, Tirrenia held a debt towards the State of EUR 25 203 063,89. This includes both the principal amount of the respective loans and outstanding interest owed to the bank.

(57) The Bankruptcy Court authorised the inclusion of the Ministry for Economy and Finance amongst the preferential ('*prededucibili*') creditors of Tirrenia. According to the Italian authorities, the Extraordinary Commissioner entrusted with the management of the company in the insolvency procedure considered, at that time, that Tirrenia could reimburse the financing by 28 August 2011, drawing from the proceeds of the planned privatisation (see section 2.3.3).

(58) On 25 July 2011 the contract for the sale of the Tirrenia business branch to CIN was signed. However, the transfer of the assets and hence also the payment was delayed, mostly due to difficulties to obtain the necessary merger authorisations[29]. The Italian competition authority, the *Autorità Garante della Concorrenza e del Mercato* ('AGCM'), eventually approved the Tirrenia – CIN transaction on 21 June 2012, and the sale was finalised on 19 July 2012.

(59) On 18 September 2012, Tirrenia reimbursed an amount of EUR 25 852 548,93 to the State. On 24 October 2012, Italy informed the Commission that the amounts due by Tirrenia as of 11 July 2011, including interest owed to the State for an amount of EUR 649 485,04, had been fully repaid by the company, and provided proof thereof.

2.3.3. *Tirrenia's privatisation and the deferred payment of the purchase price by CIN*

(60) On 23 December 2009 Fintecna published the first call for tenders for the sale of the entire share capital of Tirrenia including its subsidiary Siremar. On 19 February 2010, 16 expressions of interests had been received from 19 entities. On 4 August 2010, after the failure of the negotiations with the only bidder having submitted a binding offer, Fintecna declared the procedure closed. According to Italy, the negotiations failed due to concerns related to financial aspects of the offer.

(61) After the failure of the first privatisation attempt, Tirrenia and Siremar, facing severe financial difficulties, were both admitted into the collective insolvency procedure foreseen under the Italian law for large companies, i.e. the extraordinary administration procedure ('*amministrazione straordinaria*') and were soon thereafter declared insolvent. More specifically, Tirrenia was admitted to the extraordinary administration procedure on 5 August 2010.

On 12 August 2010, the Court of Rome delivered judgment No 332/2010 by which it declared Tirrenia insolvent.

2.3.3.1. *Extraordinary administration procedure*

(62) Unlike the normal bankruptcy procedure, whose primary aim is to liquidate the insolvent company in order to satisfy claims of the creditors, the extraordinary administration procedure, laid down by Decree Law No 270 of 8 July 1999, is a specific insolvency procedure for large companies that aims to safeguard the assets and ensure the continuation of the business.

(63) Under this procedure, the management of the insolvent company is transferred to an Extraordinary Commissioner who is appointed by the competent Ministry. The Extraordinary Commissioner proposes a recovery plan of the business in question, either by the restructuring or the sale of assets of the insolvent company. This plan is subject to previous authorisation by the competent Ministry, whilst considering the opinion of a Supervisory Board (composed by experts appointed by the Ministry).

(64) The Decree Law No 347 of 23 December 2003 laying down urgent measures for the restructuring of large insolvent companies, converted with amendments into Law No 39 of 18 February 2004 ('Marzano law'), regulates the extraordinary administration procedure applicable to insolvent companies, which intend to undergo this restructuring procedure. These companies also need to satisfy cumulatively certain criteria concerning the number of employees in the preceding year and the level of indebtedness.

(65) The procedure requires that the insolvent company file both an application to the Italian Minister for Economic Development and a petition to the competent bankruptcy Court. The Ministry then decides on the admission of the insolvent company to the procedure and appoints the Extraordinary Commissioner under the supervision of the Supervisory Board, while the Court ascertains the state of insolvency of the company.

(66) Within 180 days of his appointment, the Extraordinary Commissioner must submit a restructuring plan to the Ministry. The ordinary bankruptcy procedure is only triggered in case the Ministry does not approve such restructuring plan and the alternative asset sale procedure is not viable.

(67) Decree Law 134/2008 ('Decree 134/2008')[30] introduced several amendments to the Marzano law. These amendments are applicable to companies providing essential public services, and concern *inter alia* the possibility for the Extraordinary Commissioner to identify a buyer of the insolvent company's assets through a negotiation procedure with parties that guarantee continuity of the public service on the medium term and an expeditious intervention. Decree 134/2008 specifies that the sale price cannot be lower than the market value of the assets as set by an independent expert appointed by Ministerial Decree.

(68) Decree 134/2008 also introduced the possibility to pursue – in the immediate – an asset disposal plan, as compared to the previous regime, which required first a restructuring plan being submitted to the Ministry. Finally, Decree 134/2008 lays down that, in case neither an asset disposal plan nor a restructuring plan can be implemented or approved by the Ministry, the ordinary bankruptcy procedure is initiated.

2.3.3.2. *The sale procedure*

(69) On 15 September 2010, the call for tenders for the sale of the Tirrenia business branch[31] bundled together with the new eight-year Convention was published. The aim of this call was to check whether there were any potential national or international entities interested in acquiring the Tirrenia business branch that were able to guarantee the continuity of the transport services.

(70) This call was published on Tirrenia's website, in several newspapers[32] and also on selected specialist websites[33]. The deadline for this call for expressions of interest was originally set on 29 September 2010 but was then extended until 20 October 2010 by a public notice published in the same aforementioned national and international newspapers and websites in order to allow for a reasonable time period for the submission of expressions of interest.

(71) A total of 21 expressions of interest to participate in this tender were made by national, European, and non-European entities. The Extraordinary Commissioner then invited the sixteen entities whose expressions of interest had demonstrated that they could guarantee the continuity of the maritime transport service[34] to perform an in-depth due diligence check on the Tirrenia business branch. Access to the relevant documentation was granted on the condition that the interested parties signed confidentiality agreements.

(72) The eleven parties[35] that eventually chose to carry out this due diligence were given access to virtual data rooms containing the following:

(a) all technical, legal and financial information, including details of the business branch put up for sale;

(b) the business plan of the Tirrenia business branch prepared by the Extraordinary Commissioner;

(c) the vendor's due diligence report and the balance sheet of the company on the date of admission to the extraordinary administration procedure;

(d) the new draft eight-year Convention to be signed between the successful bidder and the State;

(e) all other information required so that potential buyers may valuate correctly the object of the sale.

(73) By Ministerial Decree of 4 February 2011, the Minister for Economic Development appointed Banca Profilo as the independent expert tasked with performing a valuation of the Tirrenia business branch under Article 4(4-*quater)* of Decree-Law No 347/2003. On 8 March 2011, Banca Profilo estimated the value of the Tirrenia business branch (including the new eight-year Convention) as equal to EUR 380 000 000. This information was uploaded to the data room for all potential bidders before expiry of the deadline for the submission of binding offers.

(74) On 15 March 2011, after the last deadline for submitting binding offers had passed, the Extraordinary Commissioner noted that only CIN – a company comprising Onorato Partecipazioni S.r.l., Grimaldi Compagnia di Navigazione S.p.A. and Marinvest S.r.l. – had submitted a binding offer pursuant to the terms of the letter of procedure of 2 February 2011[(36)].

(75) On 14 April 2011, following a request for clarifications by the Extraordinary Commissioner, CIN made a final binding offer for the acquisition of the Tirrenia business branch. Specifically, this offer, supplemented by (i) a business plan consistent with the public service obligations laid down in the Convention; and (ii) bank guarantees for a total amount of EUR 20 000 000, provided for the following:

(i) the price offered for purchasing the Tirrenia business branch including the new eight-year Convention totalling EUR 380 100 000;

(ii) the payment of the offer by paying EUR 200 100 000 following the transfer of the business branch and the remaining amount to be paid over time as follows:

(a) EUR 55 000 000 by 15 December of the third year following the transfer of the business branch;

(b) EUR 60 000 000 by 15 December of the sixth year following the transfer of the business branch;

(c) EUR 65 000 000 by 15 December of the eighth year following the transfer of the business branch.

(76) In view of the above, the Extraordinary Commissioner entered the binding offer submitted by CIN into the data room, and on 2 May 2011, sent all tenderers considered for the due diligence phase a letter inviting them to submit a better offer than the one submitted by CIN on 14 April 2011, by 12 May 2011. Following a request by one of the potential buyers, the deadline for submitting better offers was then extended by the Extraordinary Commissioner to 19 May 2011. However, the Extraordinary Commissioner received no other offers by that date.

(77) On the basis of the assessment carried out by the Extraordinary Commissioner and its advisers, the purchase offer submitted by CIN on 14 April 2011

was deemed consistent with the value of the Tirrenia business branch as determined by Banca Profilo. The business plan included with the offer was found to comply with what was requested in the letter of procedure of 2 February 2011 (see recital 74) and was considered appropriate proof of the tenderer's ability to guarantee the seamless continuation of the maritime connection public service.

(78) On 23 May 2011, the Ministry of Economic Development then authorised the Extraordinary Commissioner to sell the Tirrenia business branch to CIN in accordance with the terms and conditions of the offer submitted on 14 April 2011. Following some further consultations, the Extraordinary Commissioner signed the contract with CIN on 25 July 2011.

(79) On 21 November 2011, the resulting transaction was notified for approval to the Commission. On 18 January 2012, the Commission opened an in-depth investigation under the EU Merger Regulation[37].

(80) The Commission's initial market investigation indicated serious competition concerns, in particular because the parties to the merger had very high, if not monopolistic, combined market shares on a number of maritime routes in Italy, and in particular on certain routes to and from Sardinia. Initially, CIN was a joint-venture between Tirrenia's main competitors: Grimaldi, Marinvest (which for instance controls Grandi Navi Veloci and SNAV) and Onorato Partecipazioni (which controls Moby). In light of the Commission's concerns, Grimaldi and Marinvest withdrew from CIN by selling their shares to Onorato Partecipazioni. The latter then attracted new shareholders so that eventually, CIN was owned for 40 % by Moby (itself being controlled by Onorato Partecipazioni), for 30 % by Clessidra Società del Risparmio, for 20 % by Gruppo Investimenti Portuali and for 10 % by Shipping Investment S.r.l..

(81) On 27 April 2012, the Commission closed its in-depth investigation after the parties had abandoned the notified transaction. On 7 May 2012, the revised merger transaction, which no longer required approval at European level, was notified to the AGCM. By its resolution n. 23670 of 21 June 2012, the AGCM authorised the transaction subject to certain conditions[38]. Ownership of the Tirrenia business branch was finally transferred to CIN on 19 July 2012.

(82) On 6 July 2015, Onorato Partecipazioni notified its intention to acquire full control over Moby and CIN by acquiring shares from the other shareholders of both companies. The AGCM approved this operation – which effectively amounted to a concentration between Moby and CIN – with its resolution n. 25773 of 10 December 2015, also subject to conditions for the Civitavecchia – Olbia and Genova – Olbia routes[39]. As a result of this reorganisation, CIN is currently fully owned by Moby, and both companies are therefore fully owned by Onorato Partecipazioni.

(83) On April 26, 2018, Moby's Board of Directors approved the plan to merge with CIN. Provided that the necessary approvals were obtained, this merger

was planned to be completed by end 2018 but was delayed following an intervention by Tirrenia in EA.

2.3.3.3. *The sale contract*

(84) The sale contract of 25 July 2011 defines the Tirrenia business branch transferred as the branch of Tirrenia dedicated to the provision of transport services under the ongoing public service obligations. In particular, Article 4 of the contract spells out that the assets of the business branch are listed in an annex to the sale contract, and cover all intangible[(40)] and tangible assets[(41)] used by the company in the discharge of its public service obligations.

(85) Article 11(3) of the sale contract stipulates that the sale is conditional on the signing of the new Convention between CIN and the Ministry of Transport within a certain predefined time period. In other words, the signing of the new Convention is a necessary condition for the definitive conclusion of the sale.

(86) Article 7(9) of the sale contract further spells out that CIN will make new job offers (on the basis of new employment contracts) to all the administrative and crew personnel employed by Tirrenia for the operation of the public service obligations, taking into account the qualifications acquired and/or the equivalence of the job descriptions, as well as possible agreements with the trade unions. As required by Article 63(2) of Decree Law 270/1999, CIN has to refrain from any non-disciplinary dismissals for a two-year period. Under Articles 7(11) and 7(12) of the sale contract, CIN is obliged to regularly inform the seller on the observance of these obligations, with significant penalty amounts to be paid in case of breaches.

(87) Article 7(6)(d) of the sale contract lays down that the buyer is capable, in compliance with Article 4, paragraph 4-*quater* of the Marzano law, to guarantee the medium term continuity of the service and the observance of the national and international applicable legislation.

(88) Under Article 5 of the sale contract the EUR 380 100 000 sale price is payable as follows:

(a) EUR 200 100 000 (the so-called Fixed Price) within three working days of adoption by the Ministry of Economic Development of a decree which removes any entry related to the pre-emptive rights and registration of seizures and attachments on the Tirrenia business branch;

(b) The remaining EUR 180 000 000 (the so-called Deferred Price) deferred as follows: EUR 55 000 000 on 30 April of the fourth year following the initial date of entering into force of the new Convention; EUR 60 000 000 on 30 April of the seventh year following the initial date of entering into force of the new Convention, EUR 65 000 000 on 30 April of the ninth year following the initial date of entering into force of the new Convention[(42)].

(89) Article 8(23) of the sale contract spells out that, in accordance with Art. 63(5) of Decree Law 270/1999, the new owner will not be liable to repay any of the debts incurred by Tirrenia before the transfer of the business branch.

(90) An Addendum to the sale contract was signed by the parties on 16 July 2012 amending among others the means of payment of the Fixed Price of EUR 200 100 000 (see recital 88(a)). In particular, EUR 138 200 000 remains payable within three days from the adoption of the decree referred to in recital 88(a), and the remaining EUR 61 900 000 will be paid, with interest[43], on 1 March of the eighth year after the entry into force of the new Convention (i.e., 2020). The parties agreed that two years after the entry into force, they would consult each other to determine whether it is possible to renegotiate the terms and conditions of payment of the remaining EUR 61 900 000. As a result, the latter amount was paid earlier than initially foreseen (i.e. in February 2016 instead of in March 2020). No change occurs in the payment of the Deferred Price of EUR 180 000 000.

2.3.3.4. *The Banca Profilo Study*

(91) As described above (see recital 73), Banca Profilo was appointed by the Minister for Economic Development as the independent expert tasked with performing a valuation of the Tirrenia business branch under Article 4(4-*quater)* of Decree-Law No 347/2003. On 8 March 2011, Banca Profilo issued a report in which it described the valuation methodologies and data it had used, which included Tirrenia's own business plan for the period 2011-2018. This report included an estimated range of values for the Tirrenia business branch.

(92) Banca Profilo's valuations are based on several assumptions including, most notably, that the new public service contract would apply until its expiry and that as a result the Tirrenia business branch would receive public service compensation for operating the maritime transport connections laid down in that contract. In its valuation report, Banca Profilo refers to the Discounted Cash Flow ('DCF') and the Economic Added Value ('EAV') as its main methodologies and to the Market Multiples and Equity Method as secondary methodologies for the purpose of control.

(93) Under the DCF methodology, Banca Profilo takes into account: (i) the cash flows generated until the expiry date of the new Convention; (ii) the liquidation value of the Tirrenia business branch on the moment of expiry of the new Convention, based on the assumption that it will not be possible to continue the operations after that date; and (iii) the equity value of some limited minority shareholdings of the Tirrenia business branch. Under the EAV methodology, Banca Profilo assesses: (i) the adjusted book value; (ii) the goodwill; (iii) the liquidation value of the Tirrenia business branch on the moment of expiry of the new Convention (for the same reason as under the

DCF approach). This assessment relies on data from the company's industrial plan and Banca Profilo's calculations using those data.

(94) With regard to the secondary methodologies, these entailed the following. The Market Multiples analysis is based on Banca Profilo's calculations using Bloomberg data for nine comparable maritime transport companies. The Equity Method consists of an appraisal of the net value of the assets as recorded in the balance sheet but with some adjustments where appropriate (e.g. value of the fleet, public service contract, etc.).

(95) Banca Profilo concluded, on the basis of the above methodologies, that the value of the Tirrenia business branch would be in the range of EUR 380 to 426 million. As a result, the minimum price for this company would have to be set at EUR 380 000 000.

2.3.3.5. *The Ecorys Report*

(96) In the course of the formal investigation procedure, the Commission entrusted an independent consultant (Ecorys) with the task of establishing the market value of the Tirrenia business branch put up for sale (see recital 8). The consultant was asked (i) to confirm the validity of the valuation carried out by Banca Profilo; and (ii) to establish the market value of the business unit without any conditions attached.

(97) To determine the value of the Tirrenia business branch bundled with the new Convention, Ecorys applied the main methodologies also used by Banca Profilo. In particular, Ecorys used the Discounted Cash Flow and the Economic Value Added methodologies but modified the relevant assumptions where it considered this appropriate[(44)]. Ecorys assumes that the new Convention will not be prolonged[(45)] at its expiry date and that therefore the public service routes will no longer be operated after that date. On this basis, Ecorys determined that the minimum market value of the Tirrenia business branch as sold amounted to EUR 409,5 million (i.e., almost 8 % higher than Banca Profilo's valuation).

(98) Ecorys also concluded that, had the Tirrenia business branch been sold without any condition attached, and in particular without the new public service contract for the operation of the public service (and hence also without the obligation to ensure the continuity of said public service), the company would have been sold at its liquidation value[(46)], i.e. EUR 303,5 million. Ecorys based this conclusion on the assumption that the Tirrenia business branch could not profitably continue its operations without public service compensation. Ecorys characterised the public-service routes operated by both Tirrenia and Siremar as 'heavily loss-making operations characterised by low passenger volumes and fully dependent on funding from the Conventions'. Furthermore, Ecorys considered that 'the possibility to change the quality of the services and more headroom to set ticket prices are not sufficient conditions to make these routes economically viable from a business point of view'. Ecorys observed

that this liquidation value is lower than the value that resulted from the tender and indicated that therefore immediate liquidation (in essence a sale of the ships) was not a viable alternative for a market economy operator.

(99) Moreover, Ecorys compared the staffing of the Tirrenia business branch with that of several comparable ferry companies and concluded that Tirrenia's staff number and personnel cost structure are 'not dissimilar from these comparable companies, with reference to the labour cost's share of total revenues[47] and the labour cost/staff ratio'[48]. The analysis showed no substantive difference between the Tirrenia business branch and comparable companies which could have suggested overstaffing or excessive labour costs. A potential buyer would thus have had little margin of manoeuvre in terms of dismissing or replacing part of the workforce. On this basis, Ecorys concluded that there are no elements showing that the workforce condition had any significant impact on the value of the Tirrenia business branch.

2.3.4. *The new Convention between the Italian State and CIN*

2.3.4.1. *The beneficiary*

(100) CIN is the successful bidder for the Tirrenia business branch, initially created for this purpose by Onorato Partecipazioni S.r.l., Grimaldi Compagnia di Navigazione S.p.A. and Marinvest S.r.l. although the latter two parties had to be replaced by three other investors to obtain merger approval (see recital 80). As explained above (see recital 82), CIN is since July 2015 controlled solely by Onorato Partecipazioni S.r.l..

2.3.4.2. *The routes*

(101) According to the new Convention of 18 July 2012 between Italy and CIN, the following routes would be operated by the latter under the public service regime:

TABLE 3

Routes operated by CIN under the new Convention

Mixed service routes	**Freight service routes**
Napoli – Palermo (low season only): Daily service (over-night) from both ports.	Livorno – Cagliari (all year round): Five departures per week from each port.
Genova – Porto Torres (low season only): Daily service (over-night) from both ports.	
Genova – Olbia – Arbatax (all year round):	Napoli – Cagliari (all year round): One to three departures per week from each port. One of

To Sardinia: three (five) departures per week from Genova to Olbia in the low (high) season with two extensions per week from Olbia to Arbatax. To mainland: two departures per week from Arbatax to Genova with a stop in Olbia. One (three) additional departures from Olbia to Genova in the low (high season).	the three departures can be carried out on the route Cagliari – Palermo in function of traffic requirements.
Civitavecchia – Olbia (low season only): Daily service (over-night) from both ports.	Ravenna – Catania (all year round): Three departures per week from each port.
Napoli – Cagliari (all year round): One (two) departure(s) per week from each port in the low (high) season.	
Palermo – Cagliari (all year round): One departure per week from each port in the low and high season.	
Trapani – Cagliari (all year round): One departure per week from each port in the low and high season.	
Civitavecchia – Cagliari – Arbatax (all year round): To Sardinia: daily service (over-night) from Civitavecchia to Cagliari with two extensions per week to Arbatax. To mainland: daily service (over-night) from Cagliari to Civitavecchia with two extensions per week to Arbatax.	
Termoli – Tremiti Islands (all year round): Daily service from both ports plus two additional connections	

per week from both ports. One weekly connection for the transport of hazardous goods. In the high season one additional connection per week.	

(102) CIN will operate the routes Napoli – Palermo, Genova – Porto Torres, Civitavecchia – Olbia on commercial terms during the high season. Annex A to the new Convention details how each of the routes in Table 3 are to be operated (e.g. type of ships, hour of departure for some of the routes, etc.). In addition, the fares charged to the users (respectively to island residents and to other passengers) cannot exceed the limits set by Article 6 of the new Convention and detailed in the same Annex A.

(103) By letter of 7 November 2013, CIN applied for a review of the economic-financial balance conditions, as foreseen by Article 9 of the new Convention (see recital 107). On 7 August 2014, the Italian Ministry of Infrastructure and Transport and CIN on this basis agreed to a number of amendments to the Convention of 18 July 2012. To restore the economic-financial balance of operations, the amendment agreement laid down that:

— The mixed route Trapani – Cagliari would be abolished,

— The freight route Napoli – Cagliari would be abolished,

— The freight route Ravenna – Catania would be modified to enable departures from either Ravenna, Venice or Monfalcone to Catania and to allow for a possible stop in Brindisi and vice versa,

— The freight routes (as amended) would no longer have to be operated during specific periods of the year[49] (mainly public holidays and holiday periods),

— The service frequency and minimum frequencies on some routes would be modified. The most notable changes are the following:

(a) on the mixed route Genova – Olbia – Arbatax the connection to Arbatax would be abolished in the low season (but kept in the high season);

(b) on the mixed route Civitavecchia – Cagliari – Arbatax the frequency in the low season was reduced from daily to three departures per week with two connections per week to Arbatax with no changes in the high season;

(c) on the mixed route Napoli – Cagliari the frequency in the low season was increased from one to two departures per week with no changes in the high season;

(d) on the mixed route Palermo – Cagliari the frequency in the high season was increased from one to two departures per week with no changes in the low season;

(e) on the freight route Livorno – Cagliari the frequency was amended from five weekly departures to four to six weekly departures,

— The maximum amount of annual public service compensation would be kept at EUR 72 685 642 and could under no circumstances be increased.

2.3.4.3. *Duration*

(104) The new Convention signed between the Italian State and CIN on 18 July 2012 will be in force for eight years and will hence expire on 18 July 2020.

2.3.4.4. *The public service obligations*

(105) The public service obligations imposed on CIN concern the maritime transport links to be operated (see recital 101), the type and capacity of the vessels assigned to the respective maritime routes operated, the availability of a backup ship to ensure continuity of service, the frequency of service, and the maximum fares charged to users of the service on each of the respective routes.

2.3.4.5. *The compensation*

(106) The yearly compensation to be received by CIN under the new Convention is capped at EUR 72 685 642. The amount of compensation is to be determined based on the methodology laid down by the CIPE Directive (see recitals 41-51).

(107) Article 8 of the new Convention provides for a regular three-year review of the scope of the subsidised activities, to verify that there is no financial imbalance. Additionally, Article 9 of the new Convention lays down that, under very specific circumstances of unexpected and structural changes to the revenues or the costs, and in any event, only after the first year of each three-year period, the parties may trigger such a review earlier (the 'safeguard clause').

2.3.5. *The berthing priority*

(108) Article 19-*ter*, paragraph 21 of the 2009 Law laid down that, in order to guarantee the territorial continuity with the islands and in light of their public service obligations, the companies of the former Tirrenia Group, including Tirrenia, would keep the berthing already allocated and the priority in the allocation of new slots in line with the procedures set forth by the Maritime Authorities as established by Law No 84 of 28 January 1994 and the Italian Maritime Code.

2.3.6. *The measures laid down by the 2010 Law*

(109) The 2010 Law laid down the possibility for the undertakings of the former Tirrenia Group to use, on a temporary basis, the financial resources already committed[(50)] to the upgrade and modernisation of the fleet to cover pressing liquidity needs. The undertakings of the former Tirrenia Group that made use of this possibility were however required to replenish these dedicated funds,

so that they could still undertake the necessary upgrades to their ships. These upgrades were necessary to meet new international safety standards following the 1996 Stockholm Agreement[51].

(110) In particular, drawing from two facilities[52], EUR 23 750 000 were set aside to pay for the upgrades of the entire Tirrenia Group. Of this amount, EUR 12 051 900 were deposited into a dedicated bank account at Banca Carige specifically for Tirrenia, still with the aim of using these funds as originally intended, i.e. to carry out the required upgrades to respect international safety standards. However, on 12 August 2010 Banca Carige executed an offset between this deposit and two debts owed to it by Tirrenia, for an amount of EUR 4 657 005,35. Therefore, Tirrenia did effectively take advantage of the possibility laid down in the 2010 Law to use the funds earmarked for upgrading the fleet to meet liquidity demands, even if it remained under an obligation to repay this aid to the Italian state by replenishing the account dedicated to the upgrade works.

(111) In addition, Article 1 of the 2010 Law also laid down the following:

(a) The initial Conventions are prolonged as from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar (see also recital 26);

(b) Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law, is amended by the introduction of paragraph 24 bis. According to that paragraph, all official acts and operations in the implementation of the provisions of paragraphs 1-15 of the 2009 Law benefit from fiscal exemption. These paragraphs relate to the liberalisation of the maritime cabotage sector through the privatisation of the Tirrenia group, including its preparatory step, i.e. the transfer of the regional companies to the respective regions;

(c) In order to ensure the continuity of the public service and to support the privatisation process of the former Tirrenia group companies, the regions in question may make use of the resources of the *Fondo Aree Sottoutilizzate* ('FAS')[53] pursuant to CIPE Directive No 1/2009 of 6 March 2009[54].

2.4. **Infringement procedure No 2007/4609**

(112) Following earlier exchanges between the Commission's services and the Italian authorities, the Commission's Director-General responsible for energy and transport on 19 December 2008 sent a request for information to Italy. This request concerned among other things, an overview of the public service routes at that time and the public service remit that Italy envisaged under the proposed new Conventions. Furthermore, Italy was asked to provide more details about the privatisation plans for the Tirrenia Group.

(113) In their letter of 28 April 2009, the Italian authorities provided a detailed reply to the Commission's request of 19 December 2008. In that letter, Italy among other things:

— Noted that the extension of the initial Conventions until 31 December 2009 was necessary to achieve the liberalisation of the maritime cabotage sector in Italy through the privatisation of the Tirrenia Group;

— Argued that the public service compensation granted to the Tirrenia Group was necessary to ensure territorial continuity with the islands through maritime links which were not satisfactorily provided by private operators on the market;

— Pointed out that a thorough rationalisation process of the routes had been concluded on 10 March 2009. This process took into account the relevant social, employment and economic aspects, as well as the need to safeguard essential links for territorial continuity and included a consultation of the six regions concerned. This rationalisation would result in the reduction of the net cost of the public service of approximately EUR 66 million and the redundancy of some 600 crew members for the entire Tirrenia Group. Italy also recalled that the 2009 rationalisation complemented earlier efforts (in 2004, 2006 and 2008) to reduce the services operated by the Tirrenia Group;

— Explained that the rationalisation's objectives were to (i) maintain the links necessary to ensure territorial continuity with and between islands and the mainland, and the right to health, study and mobility; (ii) rationalise links where there were private operators who provided the same connections over the same time period, with similar guarantees of quality and continuity; and (iii) rationalise summer and high-speed connections which transport only persons;

— Gave an overview of the routes operated by the companies of the Tirrenia Group during 2008 and the reduced number of routes the Tirrenia Group companies would operate in 2009. According to the Italian authorities, the latter routes would form the basis for the new Conventions that were to be concluded with the new owners of the Tirrenia Group companies.

(114) On 21 December 2009, the Commission's Director-General responsible for energy and transport sent a letter to the Italian authorities noting *inter alia* that:

— In the light of the radical overhauling of the maritime cabotage sector in Italy, and because of the sizable social impact the privatisation would have entailed, according to the Italian authorities, if the tenders were carried out on a simple public service contract basis, tendering out the shipping companies endowed with such contracts was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the criterion of non-discrimination among Community ship-owners laid down in Council Regulation (EEC) No 3577/92[55] ('the Maritime Cabotage Regulation');

— Public service compensation had to be restricted to those lines in which the continuous presence of other operators all the year round was limited and thus unsatisfactory to respond to the market needs. In that regard, clarifications were asked about the market failure on the routes Genova – Porto Torres, Genova – Olbia – Arbatax and Civitavecchia – Olbia. Furthermore, Italy was asked to explain if Tirrenia received compensation for the operation of these

three routes in the high season. Questions were also asked about lines operated by Caremar. The letter also pointed out that only the inclusion of domestic lines (and not international lines) in a public service contract may be justified on the basis of the Maritime Cabotage Regulation;

— The public service contracts of the Tirrenia group expired on 31 December 2008 and the privatisation planned by Italy may have taken longer than foreseen. The letter therefore pointed to the possibility of sending a letter of formal notice for wrong implementation of the Maritime Cabotage Regulation.

(115) On 22 January 2010, the Italian authorities replied to the Commission services' letter of 21 December 2009. In their letter, the Italian authorities:

— Took note that the Commission agreed in principle to the proposed approach for privatising the Tirrenia Group together with new public service contracts;

— Provided detailed explanations on the routes Genova – Porto Torres, Genova – Olbia – Arbatax and Civitavecchia – Olbia for which the Commission had raised a number of questions. Italy also confirmed that the routes Genova – Porto Torres and Civitavecchia – Olbia are only operated under the public service regime during the low season;

— Mentioned that the call for expressions of interest for the sale of Tirrenia (including Siremar) had been published on 23 December 2009. Italy indicated that it intended to complete the privatisation of the entire Tirrenia Group by 30 September 2010;

— Asked the Commission to expressly confirm whether the arguments provided with regard to the market failure were sufficient.

(116) On 29 January 2010[(56)], the Commission sent a letter of formal notice regarding the wrong implementation of the Maritime Cabotage Regulation. In this letter, the Commission recalled that this Regulation requires that whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners. According to Article 4(3) of that Regulation, existing public service contracts may remain in force up to the expiry date of the relevant contract. However, the Commission noted that the companies of the Tirrenia Group continued to operate maritime transport services after the expiry of the respective public service contracts (the initial Conventions). In particular, these Conventions were due to expire at the end of 2008 but were repeatedly prolonged by Italy. Therefore, the Commission invited the Italian authorities to present their observations.

(117) Also on 29 January 2010, the Commission's Director-General responsible for energy and transport replied to the Italian authorities' letter of 22 January 2010. The Director-General emphasised that his reply only concerned the compliance with the Maritime Cabotage Regulation and not State aid issues. Against this background, the Director-General indicated that the justifications provided concerning the lines Genova – Porto Torres, Genova – Olbia –

Arbatax and Civitavecchia – Olbia were sufficient to remove the doubts expressed earlier. Furthermore, the Director-General noted positively that, following his earlier request, Italy had removed an international connection from the new draft Convention for Tirrenia. With respect to the questions raised concerning routes operated by Caremar, only for some of these routes the justifications were considered sufficient. Italy was therefore asked to provide further clarifications about some of Caremar's routes. The Director-General recalled that public service contracts can only cover routes for which there is market failure.

(118) On 29 March 2010, the Italian authorities replied to the Commission's letter of formal notice of 29 January 2010. In their reply, the Italian authorities:

— Recalled that the Commission services, by their letter of 21 December 2009 (see recital 114), in principle agreed to the privatisation of the Tirrenia Group by means of the bundling of the companies with new public service contracts;

— Noted that the prolongation of the initial Conventions was motivated only by the need to ensure continuity in the operation of the maritime public service until completion of the respective privatisation processes;

— Confirmed their intention to carry out the privatisation process by 30 September 2010 so as to liberalise the maritime cabotage sector by that date.

— Provided an overview of the privatisation process for Tirrenia (including Siremar). In particular, Italy indicated that following the publication of the call for expressions of interest, 16 expressions of interest had been submitted on 19 February 2010 by 19 entities. As part of the due diligence phase, a data room had been opened on 22 March 2010 and would remain open until end of May 2010. At that time, Italy expected that the sale contract could be signed by mid-July 2010 and that the ownership would be transferred by September 2010.

— Clarified that in the tender procedure for Toremar, 11 interested parties would take part in the next phases of that procedure.

— Pointed out that the continued uncertainty that arises as a result of continuing the infringement procedure could jeopardise the privatisation processes and also negatively affect the value of the companies put up for tender.

— Offered full cooperation with the Commission to clarify any remaining doubts with respect to both the infringement procedure and possible State aid issues.

(119) On 10 September 2010, the Italian authorities informed the Commission during an *ad hoc* meeting, that the procedure for the privatisation of Tirrenia and Siremar had been cancelled at the final stage and that, consequently, the deadline of 30 September would not be met. In addition, the Italian authorities reported that the competitive procedures for the contracts of Caremar, Saremar, Siremar and Toremar were also delayed. Subsequently, Law No 163 of 1 October 2010 further prolonged the initial Conventions until the completion of the privatisation processes of Tirrenia and Siremar (see also recital 26).

(120) In light of these developments, the Commission adopted a complementary letter of formal notice on 24 November 2010. In this letter, the Commission:

— Noted that the initial Conventions of Tirrenia, Siremar, Caremar, Saremar and Toremar were extended automatically and without any competitive procedure;

— Pointed out that while the public service contracts in question continued to be applied, no competitive procedure had been completed, either for Tirrenia, nor for Siremar, Caremar, Saremar or Toremar;

— Indicated that it reserved its right to issue a reasoned opinion if necessary (taking into account any comments Italy might make).

(121) On 21 June 2012, the Commission adopted a reasoned opinion concerning the delay of privatisation of three companies (Caremar, Laziomar and Saremar) of the former Tirrenia Group. Since the tender procedures for the other three companies (Tirrenia, Toremar and Siremar) had been completed in the course 2011[57] these companies were not covered by the reasoned opinion. The Commission noted that Italy had not put in place competitive procedures for the award of public service contracts for maritime cabotage operated by the companies Caremar, Laziomar and Saremar, more than three years after the normal expiry of the respective initial Conventions. Those Conventions had been extended automatically and indefinitely thereby preventing other Community ship-owners from competing for the award of these contracts.

(122) On 8 August 2012, the Italian authorities replied to the reasoned opinion stating that tender notices for the award of the companies endowed with new public service contracts were or would be published in the Official Journal of the EU. In particular, for Caremar the notice was published on 20 July 2012 and for Laziomar the notice was sent for publication on 1 August 2012. Finally, for Saremar a law was adopted on 2 August 2012 that required publication of such a notice by 2 October 2012.

(123) On 13 January 2014, Compagnia Laziale di Navigazione became the new owner of Laziomar and signed a ten-year public service contract for links with the Pontine archipelago. On 16 July 2015, ATI SNAV-Rifim took ownership of Caremar and was entrusted with a nine-year public service contract. Finally, following the 2014 Decision, Saremar was put into liquidation and the public service contract for the routes between Sardinia and small islands was awarded to Delcomar in March 2016.

(124) By letter of 15 July 2016, the Italian authorities informed the Commission that the privatisation of all companies of the former Tirrenia Group had been completed. On 8 December 2016, the Commission decided to close the infringement procedure.

3. GROUNDS FOR INITIATING AND EXTENDING THE PROCEDURE

3.1. The prolongation of the initial Convention between the State and Tirrenia

3.1.1. *Observance of Altmark and existence of aid*

(125) In its 2011 Decision the Commission took the preliminary view that the definition of the public service obligations was not sufficiently clear and hence did not allow the Commission to definitely conclude whether it contained manifest error. In particular, the Commission did not have a complete view on the actual obligations imposed on Tirrenia for the operation of the routes in question as compared to the services offered by competitors on some of those routes. In addition, the Commission had doubts on whether the freight routes operated by Tirrenia could be seen as aiming to satisfy general economic interests within the meaning of Union law.

(126) The Commission took the preliminary view that the second criterion of the Altmark judgment[58] was met as the parameters at the basis of the calculation of the compensation had been established in advance and observed the transparency requirements. In particular, the Commission noted that these parameters are described in the initial Convention (for compensation concerning the year 2009) and in the CIPE Directive (for compensation from 2010 onwards).

(127) The Commission however considered that the third Altmark criterion did not seem to be met and that the operators might have been over-compensated for the performance of the public service tasks. In particular, the Commission expressed doubts whether the risk premium of 6,5 %, which applies from 2010 onwards, reflects an appropriate level of risk since *prima facie* Tirrenia did not seem to assume the risks normally borne in the operation of such services.

(128) The Commission also took the preliminary view that the fourth Altmark criterion was not met inasmuch as the prolongation of the initial Convention had not been tendered out. The Commission moreover noted it had not received any evidence to support the argument that Tirrenia in fact provided the services at stake at the least cost to the community.

(129) In the 2011 Decision, the Commission therefore came to the preliminary conclusion that the public service compensations paid to Tirrenia during 2009-2011 constitute State aid within the meaning of Article 107(1) TFEU. In addition, the Commission took the view that this aid should be considered as new aid.

(130) In the 2012 Decision, the Commission considered that, to the extent all conditions had remained unchanged in 2012 and until the entry into force of the new Convention, the compensation granted to Tirrenia since 1 January 2012 under the further prolongation of the initial Convention also constitutes State aid.

3.1.2. *Compatibility*

(131) In the 2011 Decision, the Commission took the preliminary view that the public service compensation for the years 2009-2011 falls outside the scope of both Commission Decision 2005/842/EC[(59)] (2005 SGEI Decision) and the 2005 SGEI Framework[(60)]. The Commission therefore assessed this measure directly under Article 106(2) TFEU and found it had doubts on whether the applicable compatibility conditions were fulfilled.

(132) In the 2012 Decision, the Commission noted that on 31 January 2012, a new SGEI package consisting of Commission Decision 2012/21/EU[(61)] (2011 SGEI Decision) and 2011 SGEI Framework[(62)] had entered into force. The Commission however took the preliminary view that the public service compensation under the prolongation of the initial Convention could not be considered compatible with the internal market and exempted from the notification requirement under the 2011 SGEI Decision.

(133) The 2010 Law provided for the prolongation of the initial Convention from 30 September 2010 up to the end of the privatisation process. Tirrenia was in difficulty at the moment of adoption of the 2010 Law (see recital 61). As a result, the compensation received by the company as of 1 October 2010 until its privatisation could not be assessed on the basis of the 2011 SGEI Framework. Instead, following paragraph 9[(63)] of the 2011 SGEI Framework, the Commission took the preliminary view that this aid should be assessed on the basis of the 2004 Rescue and Restructuring Guidelines.

(134) The Commission noted that the compatibility criteria laid down by the 2004 Rescue and Restructuring Guidelines were not met in this case and therefore took the preliminary view in the 2012 Decision that the compensation paid to Tirrenia in difficulty would amount to incompatible restructuring aid.

3.2. Illegal prolongation of rescue aid to Tirrenia

(135) In the 2012 Decision, the Commission took the preliminary view that the rescue aid had been illegally prolonged from 28 August 2011 until 18 September 2012 and that the prolongation of the rescue aid during this period constituted incompatible aid to Tirrenia and Siremar and possibly also to their respective buyers. In particular, the Commission noted that Italy had not submitted a restructuring or liquidation plan within six months after the disbursement of the first instalment of the rescue aid to these companies as required by the 2004 Rescue and Restructuring Guidelines. The Commission considered that the conditions for an extension of the rescue aid as laid down in the 2004 Rescue and Restructuring Guidelines were also not fulfilled.

3.3. Tirrenia's privatisation and the deferred payment of the purchase price by CIN

(136) In the 2011 Decision, the Commission expressed its doubts that the tender procedure for the sale of the Tirrenia business branch had not been sufficiently

transparent and unconditional so as to ensure that the sale took place at market price.

(137) First, the Commission noted that although the call for expression of interest was published in several newspapers and on a number of websites, that call did not seem to detail the scope of the sale and did not give bidders any clear instructions as to the subsequent phases of the procedure. The call also did not seem to contain any pre-qualification or selection criteria or any other conditions that had to be met by the bidders apart from the mandatory condition to continue to provide the public service. Furthermore, all relevant information as regards the assets subject to the sale procedure was made available to the bidders only during the due diligence phase.

(138) Second, the Commission also considered that certain requirements imposed in the privatisation might have restricted the number of bidders and/or influenced the sale price. The Commission restated its established practice concerning sales of assets of publicly owned undertakings by the State or imputable to the State: non-economic considerations which a private seller would not make, such as public policy, employment or regional development concerns, suggest the existence of State aid if they impose onerous obligations on the potential buyer and are therefore liable to reduce the sale price.

(139) The sale procedures of the Tirrenia and Siremar business branches were based on the procedure laid down by the Marzano law (see recital 64). Therefore, the Commission assessed the two procedures together. It considered that the sale of the business branches entrusted with new Conventions resulted in an obligation on the buyers to provide the public service subject to the pre-established quality, frequency and fare obligations as laid down by the new Conventions. By imposing such obligations, it seemed to the Commission that the State did not seek to obtain the highest price, but rather to pursue public interest objectives. The Commission considered it was highly unlikely that a private vendor would have given the same significance to the uninterrupted operation of the public service.

(140) Likewise, the Commission considered that a private vendor, operating under normal market conditions, would not have imposed the obligation to maintain employment levels for two years.

(141) For the above reasons, the Commission preliminarily concluded that the privatisation procedure of the Tirrenia business branch had not been sufficiently transparent and unconditional so as to ensure by itself that the sale took place at market price. Therefore, the Commission could not exclude that an economic advantage was conferred either to the sold economic activity or to the buyer.

(142) The Commission also considered, based on the available information, that any aid that might have arisen in the course of the privatisation process would have been incompatible.

(143) In the 2012 Decision, the Commission took the preliminary view that the deferred payment by CIN of the purchase price for the Tirrenia business branch could constitute State aid to CIN. In particular, the Commission noted that the real value of the purchase price, obtained by discounting the deferred payments at their value at the moment of the sale, is lower than the market value set by the independent expert appointed by Italy. The Commission therefore considered that CIN may have benefited from an advantage represented by at least the difference between the price set by the independent expert and the future payments discounted at their present value. Based on the available information, the Commission considered that this measure might have constituted operating aid, which is in principle incompatible with the internal market.

3.4. The new Convention between the Italian State and CIN

(144) In the 2012 Decision the Commission took the preliminary view that the compensation to the purchaser of the Tirrenia business branch (i.e., CIN) did not fulfil the criteria laid down in the Altmark Judgment and therefore amounted to aid within the meaning of Article 107(1) TFEU.

(145) The Commission came to this conclusion given that:

— competitors who seemed to be offering similar services were apparently present at least on certain routes operated by CIN,

— the calculation of the compensation pursuant to the CIPE Directive appeared to have resulted in the operator being overcompensated for the provision of the public service for the same reasons as expressed in the 2011 Decision, and

— the fourth criterion of the Altmark Judgment[64] was seemingly not observed, given that the Tirrenia business branch endowed with a new Convention, rather than the public service contract in itself, had been tendered out and it had not been shown that this enabled the selection of the tenderer capable of providing the services at the least cost to the community.

(146) With respect to the compatibility of the compensation to CIN, the Commission noted that, on the basis of the information provided by the Italian authorities, it appeared that for the links operated by CIN under the public service regime, the number of passengers transported in the two previous years to that of the entrustment does not exceed the threshold laid down by the 2011 SGEI Decision, namely 300 000 passengers. However, in light of its doubts on the genuine nature of the SGEI and on there being possible overcompensation to CIN, the Commission took the preliminary view that the compensations could not be considered compatible on the basis of the 2011 SGEI Decision. The Commission then assessed the aid on the basis of the 2011 SGEI Framework but found it had doubts on whether the compatibility conditions of that Framework were fulfilled and invited Italy to demonstrate that this was the case.

3.5. The berthing priority

(147) In the 2011 Decision, the Commission took the preliminary view that to the extent that the berthing priority is not remunerated, the measure is a regulatory advantage that does not involve any transfer of State resources and cannot therefore qualify as State aid. If the berthing priority is remunerated, the Commission considered that to the extent Tirrenia provides a genuine SGEI and that this priority is only granted in relation to routes covered by the SGEI, it would not result in an additional economic advantage since it would be intrinsic to the provision of the SGEI. Nevertheless, the Commission invited the Italian authorities and third parties to provide further information on this measure.

(148) Since it had raised doubts on the legitimacy of the SGEI mission, the Commission could not conclude on the compatibility of the measure if it were to be aid.

3.6. The measures laid down by the 2010 Law

(149) In the 2011 Decision, the Commission took the preliminary view that all measures laid down by the 2010 Law constituted State aid in favour of the companies of the former Tirrenia Group, including Tirrenia. These included (1) the possible use for liquidity purposes of the funds earmarked for the upgrade of the ships; (2) the fiscal exemptions related to the privatisation process; (3) the possible use of FAS resources. The Commission invited the Italian authorities to clarify if and in what way each of these measures were necessary to provide the public service.

(150) The Commission also took the preliminary view that these measures likely constituted operating aid reducing the costs that Tirrenia, and the other companies of the former Tirrenia Group, would otherwise have to bear themselves and thus these measures should be considered as incompatible with the internal market.

4. COMMENTS FROM ITALY

4.1. On the public service obligations and the competitive environment

(151) Italy provided a list of routes operated by Tirrenia that are subject to public service obligations, including the seasonal frequency and timetables, the competitive environment and the reasons leading to the imposition of public service obligations.

(152) As regards the existence of a genuine SGEI, Italy noted that the public service obligations it imposed on Tirrenia and later CIN ensure, in terms of regularity, continuity and quality, a satisfactory service connecting the mainland with the ports on the islands. This service contributes to the economic development of the islands, while at the same time guaranteeing the essential mobility needs of the island communities and ensuring that the constitutionally guaranteed

right to territorial continuity is respected. In this context, Italy noted that the public service obligations are fully in line with the objectives of Articles 174 *et seq*. TFEU and Declaration No 30 on island regions (annexed to the Final Act of the Amsterdam Treaty). Italy also referred to the jurisprudence of the Court of Justice of the European Union (the 'Court of Justice') which confirms that the aim of ensuring that there are sufficient regular shipping services to islands, from islands and between islands, is covered by a legitimate public interest objective[65].

(153) Italy claimed that the services operated by companies subject to public service obligations and those managed by companies carrying out business activity freely are not fully comparable. In particular, the regularity, continuity and quality of the services provided by the former would be fully guaranteed thanks to clear obligations laid down in Conventions while the latter would be dependent solely on the calculation by the operator of its return on investment. In this regard, Italy gave the example of the route La Maddalena – Palau for which Enermar, operating this route on commercial terms, decided to discontinue the service without prior notice. Saremar, on the contrary, which operated this route under a public service contract, was required to continue its service and hence effectively ensured territorial continuity. Italy also referred to the private operator Go In Sardinia which due to financial difficulties unexpectedly suspended its services in August 2014. This caused distress for thousands of passengers who had already paid their tickets and who would not have reached their destinations without Tirrenia's intervention.

4.2. **On the potential illegal prolongation of rescue aid to Tirrenia**

(154) The Italian authorities recalled that they had informed the Commission, by letter of 16 May 2011, that Tirrenia in EA would reimburse the State-guaranteed loans after completion of the sale of the Tirrenia and Siremar business branches, using the funds from these sales[66]. Given that on 25 July 2011 CIN signed the contract for the sale of the Tirrenia business branch, both the Italian authorities and Tirrenia in EA legitimately believed that the aid could be repaid by the deadline of 28 August 2011.

(155) Italy highlighted that the subsequent events unexpectedly delayed the completion of the sale of the Tirrenia and Siremar business branches. As a result, Tirrenia in EA had to continue to operate its services for considerably longer than planned bearing the related costs. According to Italy, the liquidation plan for Tirrenia was available on the website of Tirrenia in EA long before the expiry of the six-month time limit established by the 2004 Rescue & Restructuring Guidelines. Italy added that the Commission was at all times kept up to date of the progress of the privatisation process. The entire amount due from both Tirrenia and Siremar, including interest, was paid back to the State a mere 48 days after payment by CIN of the first instalment of the price for the Tirrenia business branch.

4.3. On the privatisation of the Tirrenia business branch

4.3.1. *On the transparent and non-discriminatory character of the procedure*

(156) Italy stressed that the procedures were conducted in full compliance with the Marzano law. Although the law in question refers to the possibility of identifying the buyer through private negotiation, this would not preclude observance of the principles of openness, transparency and non-discrimination. Moreover, in this case other legal provisions that explicitly require transparent and non-discriminatory competitive procedures to be organised would rule out the possibility of resorting to any form of private negotiation. In particular, Article 1(5-*bis*)(b) of the 2010 Law would require the Extraordinary Commissioner to restrict proceedings to 'the minimum time that is possible under the extraordinary administration procedure while complying with the competitive, transparent and non-discriminatory procedure required for the sales'.

(157) The procedure provided for in Article 4 (4-*quater*) of Decree Law 347/2003, according to Italy, offered additional guarantees in terms of transparency and non-discrimination, in particular given the valuation of the market price of the business unit put up for sale by an independent expert and the selection of the most advantageous offer in terms of price.

(158) Italy claimed that all parties had equal access to all the information necessary to clearly identify the assets put up for sale and prepare an offer. Indeed, the sale was confined to the assets and contractual relations inherent in the provision of the public service, as follows:

(a) vessels and auxiliary equipment necessary for the discharge of the public service obligations;

(b) contracts with strategic suppliers for the services necessary for the normal running of the business;

(c) a legal requirement to make a proposal for the re-employment of the staff necessary to perform the public service obligations on the basis of the fleet manning tables (see recital 160 for more detail).

(159) Italy also clarified that six of Tirrenia's vessels, which were not necessary for the provision of the public service, were sold under separate sale procedures. Separate sales procedures were also launched for the disposal of real estate and art works belonging to Tirrenia. These assets were hence not included in the tender for the Tirrenia business branch (see also section 4.3.2).

(160) As concerns specifically the obligation to maintain employment levels, Italy stressed that the sale of the Tirrenia and Siremar business branches does not fall within the scope of Article 2112 of the Civil Code and thus there is no automatic transfer of staff (with their existing contracts) to the successful

bidders. The only legal obligation on the successful bidders was to re-employ the staff of the seller (on the basis of new contracts) and maintain employment levels for two years, as required by Article 63(2) of Decree Law 270/1999, which applies to all large companies in extraordinary administration. This however did not mean that Tirrenia's employees would be automatically transferred to the buyer. In addition, this obligation was confined to staff that, according to the business plan and the manning tables of the vessels of the business branch, were deemed essential for the continued operation of the public service.

(161) Italy claimed that such obligation, imposed by general domestic law, and which serves to ensure the continuity of business and the performance of the public service, would have been imposed on the same terms by a private vendor.

(162) Following the publication of the call for expressions of interest in Italian and in English on the website of Tirrenia and in a number of national and international newspapers and specialist websites, 21 expressions of interest were made by Italian, European and non-European entities. Italy considered that this demonstrates that the content of this call made it possible to clearly identify what was being sold and the nature of the procedure to be followed, while at the same time safeguarding commercially sensitive information (primarily to protect the interests of potential buyers). During the due diligence phase, the entities were then provided with detailed information concerning among others the specific assets for sale, the business plan, the draft new Convention (see recital 72).

(163) Therefore, Italy claimed that all entities interested in acquiring the Tirrenia business branch were provided in a transparent and non-discriminatory manner with the information required to make a purchase offer in full knowledge of the facts.

4.3.2. *On the sale of the assets not in scope of the Tirrenia business branch*

(164) Italy explained that the Extraordinary Commissioner launched independent, transparent and non-discriminatory tender processes for the sale of the six ships[(67)] which Tirrenia did not need to operate the public service. On 10 December 2010, calls for expression of interest were published in national and international newspapers and also in some specialised publications. On the expiry of the deadline, which had been extended twice, only offers for demolition purposes had been received for the five so-called fast ferries. However, on the expiry of the deadline for the procedure concerning the Domiziana motor ship, two bids were received for the purchase of this vessel for commercial (i.e. shipping purposes). Attempts were made to acquire higher offers (both from the two initial bidders as from potential additional bidders) but no such offers were received. The tender was therefore awarded to the bidder who had made the highest offer.

(165) Italy also indicated that several real estate properties owned by Tirrenia were planned to be sold via independent separate tender procedures as they were not necessary for the operation of the public service and therefore not included in the Tirrenia business branch. Italy referred to the sale of the Palazzo Molin in Venice to illustrate the safeguards that had been taken to ensure the highest possible sale price could be obtained (e.g. by having an independent expert value the property, by inviting bidders to improve their offers). Finally, Italy explained that Tirrenia's art collection would also be sold via a separate public auction through a major auction house.

4.3.3. *On the bundling of the assets of the Tirrenia business branch with a new Convention*

(166) Firstly, Italy argued that the decision to privatise the assets together with the entrustment of the public service obligation was taken with a view to ensure a smooth liberalisation of the maritime cabotage sector. Italy mentions that this strategy was discussed with the Commission in advance (see section 2.4) and was deemed to be in principle in line with the Maritime Cabotage Regulation.

(167) Additionally, Italy considered that, given the prevailing market conditions at the time, it was appropriate to bundle the assets of the Tirrenia business branch with a new Convention. In a time of recession and significant decline in demand for the maritime transport sector, the possibility to use the fleet of the Tirrenia business branch to operate the public service routes laid down in the new Convention would constitute a viable business opportunity rather than a factor that would depress the market value of the Tirrenia business branch. Therefore, Italy considers that this cannot have negatively affected the tender procedure and the resulting price.

(168) In this regard, Italy recalled that of the six ships not included in the scope of the Tirrenia business branch (see recital 164), five had to be sold for demolition purposes. Italy considers that in light of the complexity of the maritime transport market and the economic downturn at the time, it was impossible to achieve a better price for the company's assets, even if the tender process had been repeated or if the assets had not been bundled with the new Convention. Finally, Italy refers to the observation made by one potential bidder for the Tirrenia business branch in the context of the European merger approval procedure. In particular, that bidder indicated that the minimum price set by the independent expert appointed by Italy was actually too high.

4.3.4. *On the appointment of the independent expert*

(169) Italy claimed that, on 16 December 2010, five leading financial institutions with no exposure to the Tirrenia Group were invited to submit offers for the valuation of the Tirrenia business branch. None of the institutions invited submitted a bid by the deadline set.

(170) Banca Profilo subsequently expressed an interest in taking on the task of independent advisor under the same conditions as laid down in the selection procedure. By Decree of 4 February 2011, the Minister identified Banca Profilo as the independent expert for the purpose of assessing the market value of the Tirrenia and Siremar business branches.

4.3.5. *On the award criteria*

(171) Italy underlined that on 2 February 2011 the Extraordinary Commissioner sent the interested entities a letter on the procedure, clearly setting out the award criteria. This letter set out the legislation applicable to the sale process and clarified that the sale price could not be lower than the value set by the independent expert, whilst the business plan proposed had to be in line with the public service obligations laid down by the new Convention.

(172) Italy also confirmed that the award criterion in case of multiple bids was the highest price, as set out in the specific rules applicable to the procedure.

4.3.6. *On the Ecorys report*

(173) In the course of the investigation Italy was invited to comment (see recital 8) on the findings of the independent consultant selected by the Commission (Ecorys). Italy agreed with the conclusions of Ecorys that neither the bundling of the privatisation with the award of the new Convention, nor the workforce condition would have depressed the market value of the Tirrenia business branch.

(174) With respect to the aforementioned bundling, Italy referred to several statements of Ecorys including its consideration that, at the time of the sale, the only viable alternative to a sale of the assets under the public service regime (i.e. through bundling the privatization of the assets with the new Convention) was the liquidation of the Tirrenia business branch. Italy also reiterated that at a time of crisis in the ferry sector, characterised by a significant drop in demand, the possibility of using Tirrenia's fleet for the public service routes identified in the Convention constituted a valid business opportunity, rather than a factor likely to reduce the value of the assets. In addition, Italy recalled that of the six ships not included in the scope of the Tirrenia business branch, five could only be sold for demolition purposes (see recital 168). Finally, Italy claimed that, in view of the actual price resulting from the tender procedure, the level of fuel prices, and the poor economic circumstances, it would not have been possible to achieve a better valuation of the assets, even if the tender procedure had been repeated or the perimeter of the assets for sale had been changed.

(175) With respect to the workforce condition, Italy highlighted Ecorys' conclusion that there are no elements showing that this condition had any significant impact on the value of the Tirrenia business branch. Italy further recalled that this condition derived from Article 63(2) of Decree Law 270/1999 and only

concerned those employees that are required to guarantee the operation of the business concerned in compliance with the fleet manning tables. The fleet manning tables (i) lay down the qualitative and quantitative composition of the crew required to operate the vessel in accordance with maritime safety laws; (ii) are set by Ministerial Decree; and (iii) are prepared by a committee that includes, in a consultative role, organisations representing workers and ship-owners. A vessel can be sailing for 365 days a year and the ship's crew needs to alternate periods on board with periods on shore. Consequently, when determining the workforce levels required to ensure the Tirrenia business branch is operational, the minimum workforce level must include the number of crew stated in the manning tables plus a reserve crew. The new owner of the Tirrenia business branch would have had to respect these minimum workforce levels, irrespective of any workforce condition. Moreover, Italy added that while the buyer of the Tirrenia business branch had to offer employment to all employees that are required to guarantee the operation of the public service, this was based on different employment contracts than those that had been in place before[68].

(176) The Ecorys report concluded that the estimated value of the Tirrenia business branch could have been approximately 7,8 % higher than the value put forward by the expert appointed by the Italian authorities, Banca Profilo. Italy considered that this difference could be explained because both experts had to rely on forecasts for several technical parameters and that by nature there is a margin of difference in such forecasts. The Italian authorities submitted a counter-valuation prepared by Banca Profilo, which explains the differences[69] with the Ecorys report in detail. Italy considered that this counter-valuation offers robust and objective grounds for the differences between the two valuations. Indeed, Banca Profilo claimed that its assumptions were more conservative[70] than those of Ecorys and better reflected the situation under examination.

(177) Additionally, Italy pointed out that the transfer of ownership over the Tirrenia business branch took place more than two years after the reference date used by both Banca Profilo and Ecorys for their valuations. According to Italy, during that period the value of the assets of the Tirrenia business branch would have depreciated and the economic climate would have worsened significantly. For this reason, Italy concluded that there could be no doubts that, on the date when the sale of the Tirrenia business branch was completed, the price conditions agreed by the parties fully reflected the market value of the corporate assets.

4.4. On the compliance of the new Convention with the Altmark criteria

(178) Italy reiterated that it had notified the public service compensation to be paid under the new Convention only for reasons of legal certainty, since it considered this measure not to constitute State aid (see recital 4). In particular,

the Italian authorities argued that the four Altmark criteria are complied with for the following reasons:

— The maritime transport services as defined by the Italian authorities in the new Convention are essential for the economic development of islands while also meeting the essential transport needs of island communities, ensuring respect of the right to territorial continuity, enshrined in the Italian Constitution. The new Convention clearly sets out the services, the ships, the time schedules and tariff constraints. Therefore, Italy argued that the public service obligations are clearly defined and that the first Altmark criterion is complied with;

— The parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the New Convention (and annexes thereto) while the maximum compensation amounts are laid down in the 2009 Law. Therefore, Italy argued that these parameters were established in advance in an objective and transparent manner and that the second Altmark criterion is respected.

— The operator of the public service bears all the risks of the activity (see also section 4.5) against a fixed amount of subsidy, providing no certainty of full coverage of their costs. For this reason, Italy argued that the rate of return of 6,5 % is in line with the activity, without resulting in overcompensation of the public service. Therefore, also the third Altmark criterion is deemed to be complied with.

— The Tirrenia business branch was privatised by means of an open tender procedure, covering the assets necessary to provide the public service and bundled together with a new eight-year Convention for the operation of that service. Since the tender procedure respected the principles of competition, transparency and non-discrimination and the award criterion was the highest price, Italy argued that also the fourth Altmark criterion is fulfilled.

4.5. **On the 6,5 % risk premium laid down in the CIPE Directive as of 2010**

(179) Italy pointed out that in 2009, the compensation paid to Tirrenia amounted to EUR 80 010 000. From 2010 onwards, the maximum amount of compensation has been fixed at EUR 72 685 642. Italy noted that this amount is significantly lower than the company's historic level of deficits. This would presumably force the buyer of the Tirrenia business branch to make operations more efficient in order to bring deficits within the limits of the fixed subsidy amount over the whole duration of the new Convention and to offset inflation over a long period in the future.

(180) The CIPE Directive foresees that the risk premium of 6,5 % would be used to determine the return on capital using the WACC formula (see recital 42). However, Italy clarified that, because the amount of compensation is capped by the 2009 Law, it was decided to simplify the calculation by applying the 6,5 % as a flat rate return on capital. This simplified approach was applicable during the prolongation of the initial Convention and still applies under the new Convention. The Italian authorities also demonstrated that applying the

full methodology as laid down in the CIPE Directive might have resulted in a return on capital that, at least in some years, would have exceeded 6,5 %. For this reason, Italy considers that their simplified approach is conservative and does not allow for higher compensation for Tirrenia or CIN than what was established by the CIPE Directive.

(181) Italy also claimed that a return on capital of 6,5 % reflects the risk of the activities entrusted to Tirrenia respectively to CIN, without leading to overcompensation of the public service for the reasons set out in the following recitals.

(182) Italy first recalled that during the prolongation of the initial Convention and due to the company's difficult financial situation, Tirrenia had to be put in Extraordinary Administration on 5 August 2010. According to Italy, it was *de facto* impossible to fully cover the net cost (i.e. costs minus revenues) of the public service with the maximum compensation amount set by the 2009 Law. Therefore, Tirrenia would in practice not have received any return on capital during the period 1 January 2010 until 18 July 2012. Italy submitted Tirrenia's route-by-route accounts for the years 2010 and 2011 and quarterly financial statements for 2012 to substantiate this claim.

(183) The new Convention for the buyer of the Tirrenia business branch provides that the level of compensation be calculated based on the forecasted evolution of revenues and costs. According to Italy, unlike the initial Conventions, the new Convention does not lay down any full and automatic compensation for the increase in operating costs (such as labour, fuel, chartering, etc.). The risks associated with such increase in costs as well as the risks connected with the traffic volumes would therefore be fully borne by the operator. Therefore, Italy argued that the operator bears all risks associated with the service and has no guarantee of being compensated up to a level sufficient to cover all costs. According to Italy this remains true even taking Articles 8 and 9 of the new Convention into account, since the operator is still exposed to the risk of delays between the occurrence of any such imbalances and the point at which adjustments may be made. Moreover, any such adjustments are the outcome of negotiations and are not applied retroactively but only for the future. Italy submitted CIN's yearly route-by-route accounts for the period 18 July 2012 until end 2018 to show that there had not been any overcompensation under the new Convention.

4.6. **On the compliance of the new Convention with the 2011 SGEI Decision**

(184) Even if Italy considered that the public service compensation paid under the new Convention to CIN does not constitute State aid, it has also argued why this measure would comply with the 2011 SGEI Decision if it were aid.

(185) Italy recalled that the Commission's assessment of the genuine nature of an SGEI is limited to checking whether the Member State has made a manifest error when defining a service as an SGEI. Against this background, Italy

described the routes specified in the new Convention and pointed out that on several of these routes, CIN is the only operator. Furthermore, for three more routes CIN only receives public service compensation in the low season while it remains subject to restrictions (e.g. on fares) during the high season.

(186) Italy provided annual passenger traffic data for the two financial years preceding that in which the SGEI was assigned (i.e. 2010 and 2011), to argue that the threshold of 300 000 passengers as laid down in Article 2(1)(d) of the 2011 SGEI Decision had not been breached on the routes operated by Tirrenia. Furthermore, since the new Convention has a duration of eight years, Italy noted that Article 2(2) of the 2011 SGEI Decision is also respected. Finally, Italy claimed that Article 2(4) of the 2011 SGEI Decision is complied with since by selling the Tirrenia business branch via a competitive, transparent and non-discriminatory tender procedure, the requirements of the Maritime Cabotage Regulation were fully respected.

(187) Italy claimed that the new Convention fulfils all the conditions that apply to entrustment acts as specified in Articles 4 to 6 of the 2011 SGEI Decision. In particular, this Convention sets out in detail the public service obligations, their duration, the compensation mechanism (based on the CIPE Directive and 2009 Law), and the mechanisms to avoid and recover any overcompensation. Finally, Italy pointed to the measures (including a system of remedies and sanctions) that are in place to ensure strict compliance with the terms of the new Convention.

4.7. **On the deferred payment of part of the purchase price by CIN**

(188) With respect to the payment by CIN of part of the sales price in instalments over the duration of the Convention, Italy noted the following. The binding bid submitted by CIN on 14 April 2011, which provided for the deferred payment of part of the price, was put in the data room. On 2 May 2011, the Extraordinary Commissioner sent all the parties admitted to the due diligence phase a communication inviting them to submit better bids than the one submitted by CIN. The fact that no final bids were received that were better than the one submitted by CIN, is due to the competitive dynamics of the tender procedure. Because of this, the deferred payment of the purchase price could not be considered as a selective intervention in CIN's favour but instead reflects the market price. In particular, possible other bidders could have also made a bid including deferred payment but they chose not to make such bids.

(189) In this context, Italy referred to the case law[71] of the European Courts, according to which binding offers validly submitted in the context of a proper tender procedure for the privatisation of a particular company constitute a better indicator of the market price of that entity than for instance expert valuations. Italy also emphasized that the European Courts found that this approach should also be taken when the tender procedure in question is characterized by unlawful conditions even if the Italian authorities consider

that there were no such conditions attached to the tender procedure for the privatisation of the Tirrenia business branch. The Italian authorities also referred to the Commission's decision in the Sandretto case[72]. In that Decision, the Commission accepted Italy's argument that while the sale price of Sandretto's assets was lower than the price at which these had been valued, it was nevertheless the highest value expressed by the market and therefore it could not be ruled out that the price offered by the buyer was the market price.

4.8. **On the berthing priority**

(190) The Italian authorities have argued that no State resources were foregone through the allocation of the berthing priority. According to the Italian authorities, all ferry operators pay regular fees to the relevant port authorities for berthing. The Italian authorities also claim that this berthing priority has been applicable only to the public service routes, and that Tirrenia and later CIN, did and do not pay any additional fee for this berthing priority, as ports would give them first choice of berthing slots even in absence of a formal berthing priority on account of their public service mission.

(191) The Italian authorities consider that the berthing priority would not confer a meaningful advantage to the companies of the former Tirrenia Group, including Tirrenia and its acquirer CIN. In particular, they argue that in practice the berthing priority is only applied in very limited circumstances. The size of most of the ports and the advance scheduling of arrivals and departures ensures that in normal circumstances – barring any delays or extreme weather conditions – there would be no overlap in the use of specific berths by different operators. Additionally, since Tirrenia and CIN operate their services all year long (contrary e.g. to operators who operate only in the high season), it would be natural for ports to give them first choice of berthing slots even in absence of a formal berthing priority. For these reasons, Italy considers that the berthing priority cannot have awarded any meaningful advantage to Tirrenia and CIN.

4.9. **On the measures laid down by the 2010 Law**

(192) Italy did not dispute that Tirrenia received about EUR 12 051 900 to carry out ship upgrades required to respect international safety standards. Furthermore, the Italian authorities confirmed that Tirrenia effectively only used EUR 630 600 of these funds to pay for upgrades to the vessel Clodia. The remaining funds (i.e. EUR 11 421 300) were neither used to pay for upgrades nor were they repaid to the State. According to Italy, the new owner of the Tirrenia business branch (i.e. CIN) had to pay for the remaining upgrades from its own funds (and this liability of EUR 11 421 300 was hence also taken into account in the valuation prepared by Banca Profilo).

(193) With regard to the fiscal exemptions related to the privatisation process, the Italian authorities argued that as regards corporate income tax, the measure has not been applied, since the transfers of Caremar, Saremar

and Toremar to the regions were made free of charge. Therefore, in the absence of any remuneration, Article 86(1)(a) of the Consolidated Income Tax Law concerning capital gains in the event of asset transfers against payment does not apply. With respect to VAT, Italy noted that the transfers of Caremar, Saremar and Toremar constitute transactions which are exempt from VAT under Article 10(1)(4) of Presidential Decree No 633 of 26 October 1972. With respect to indirect taxes other than VAT, Italy emphasised that the exemption foreseen by the 2010 Law was designed with a view to administrative simplification. From the taxation perspective, its effects can be regarded as negligible and of little impact in relation to taxes which are charged at flat rates. More specifically, it concerns the registration duty (EUR 168 per document), land registry and mortgage registration fees (EUR 168 each) and stamp duty (EUR 14,62 for four sides).

(194) The Italian authorities clarified that the FAS resources were not used to give an additional compensation to Tirrenia. Instead, these resources were made available to supplement the budget appropriations set up for the payment of the public service compensations to the companies of the former Tirrenia Group, in case they proved to be insufficient. Italy notes that Article 1, paragraph 5-*ter* of the 2010 Law enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. Therefore, this measure would merely concern an allocation of resources in the Italian State budget for payment of the public service compensations.

4.10. **On the (absence of) economic continuity between Tirrenia in EA and CIN**

(195) Italy submitted that there is no economic continuity between Tirrenia in EA and CIN based on the following grounds:

(a) *Scope of the sale*: Italy pointed out that, following a failed privatisation attempt for Tirrenia in its entirety, including its subsidiary Siremar, before the company entered into Extraordinary Administration, separate tenders were organized for part of the respective company's assets (i.e. respectively the Tirrenia and Siremar business branches). In addition, the sale concerned a limited number of assets of Tirrenia in EA, which previously had no functional autonomy; assets not essential to the public service, including six ships, real estate and an art collection, were sold separately. Moreover, debts incurred by Tirrenia in EA before the transfer were not taken over by CIN;

(b) *Economic activity*: the conditions for carrying out the public service obligations set out by the new Convention for CIN are substantially different from those set out by the Initial Convention for Tirrenia. In particular, the new Convention provides for completely different criteria for calculating the compensation for the provision of the public service (which is fixed at a maximum amount, instead of entirely covering losses from the public service) and introduces more flexibility in the rates offered to the passengers

(with the use of price caps instead of fixed prices). Italy considered that the significant change to the compensation method necessarily obliged the purchaser to increase the organizational efficiency of the Tirrenia business branch. Additionally, Italy claimed that the mere transfer from a public to a private owner entails a drastic change in the organisation and management, and that the conditions imposed by the AGCM with its decision n° 23670 of 21 June 2012 further ensure a discontinuity in the economic activity of CIN vis-à-vis Tirrenia in EA;

(c) *Discontinuity of labour force*: Italy pointed out that there was no automatic transfer of employees to the purchaser. Tirrenia in EA dismissed its employees and was fully liable for any remaining cost linked to the old contracts. Then, the purchaser made new employment proposals to the former employees, to the extent that they were deemed necessary for the operation of the transferred business (i.e. the public service). If the former employees accepted the offer, they were hired under a new, different contract;

(d) *Different shareholding of the vendor and purchaser*: Italy noted that the buyer was identified via a public tender process open to the widest possible number of potential bidders. This tender was based on the principles of competition, transparency and non-discrimination and the tender was awarded using the criterion of the highest price. The identity of the seller is completely different from that of the buyer and the two have no shareholding relationships.

(e) *The economic logic of the transaction*: the objective of the transaction was to liberalise the maritime transport activities operated by Tirrenia to comply with the Maritime Cabotage Regulation. Moreover, the first call for expressions of interest was published in September 2010 and the sale contract with CIN was signed on 25 July 2011, while the Commission's formal investigation procedure was opened with its Decision of 5 October 2011. For these reasons, Italy claimed that the transaction did not have the aim of circumventing State aid rules, but was planned and executed with the intention of realising an important industrial project.

5. COMMENTS FROM INTERESTED PARTIES

(196) The Commission received comments from four interested parties (i.e. Tirrenia in EA, CIN, Pan Med and Grandi Navi Veloci), as summarised below:

5.1. Comments from Tirrenia in EA

(197) The replies to the 2011 Decision and the 2012 Decision submitted by Tirrenia in EA are summarized below.

5.1.1. *On the infringement procedure No 2007/4609*

(198) In its reply to the 2012 Decision, Tirrenia in EA first referred to the Commission's infringement procedure No 2007/4609 concerning misapplication of the Maritime Cabotage Regulation (see also section 2.4). In

this context, Tirrenia in EA referred to the letter of 21 December 2009 (see recital 114) concerning Italy's intention to launch tenders not for the public service contracts but for the sale of the shipping companies holding such contracts. In that letter, the Commission's Director-General responsible for energy and transport noted that in the light of the radical overhaul of the sector planned by the Italian authorities, and given the social impact that, according to the same authorities, would be felt if the tenders did not include the purchase of the companies, the procedure chosen was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the principle of non-discrimination among Community ship-owners.

(199) On 21 June 2012 (see recital 121), the Commission sent Italy a reasoned opinion concerning the delay in implementing competitive procedures for the awarding of the maritime cabotage public services operated by Caremar, Laziomar and Saremar, more than three years after the normal expiry of the relevant contracts. Since the Italian authorities had completed the competitive procedures for awarding the maritime cabotage public services operated by the Tirrenia, Siremar and Toremar companies, the reasoned opinion did not concern those companies. On this basis and in light of the earlier exchanges between the Italian authorities and the services of the Commission, Tirrenia in EA claimed that the Commission had found that the privatisation of the Tirrenia business branch was compliant with Article 4 of the Maritime Cabotage Regulation.

(200) Based on case law of the European Courts[(73)], Tirrenia in EA argued that once public service obligations have been established in compliance with the Maritime Cabotage Regulation, they must be considered to comply with Union law without the need to perform further scrutiny pursuant to Article 106(2) TFEU. According to Tirrenia in EA, since the infringement procedure reached the conclusion that the public service obligations imposed on the routes operated by the Tirrenia business branch before the privatisation were justified in light of the Maritime Cabotage Regulation, such conclusion cannot be questioned in the context of the Commission's formal investigation procedure laid down in Article 108(2) TFEU[(74)]. Therefore, any additional action under Article 108(2) TFEU should be limited to other measures, different from the compensation for the additional costs caused by the public service obligations lawfully entrusted and operated under the Maritime Cabotage Regulation.

(201) Finally, Tirrenia in EA referred to the 2009 Judgment that annulled the 2004 Decision and the possibility that the public service compensation assessed in that Decision could be classified as existing aid. Tirrenia in EA claimed that if the aid awarded to the former Tirrenia Group were indeed classified as existing aid, this classification would likely also be applicable to the compensation paid for the public service obligations operated by the Tirrenia business branch in the period covered by the 2011 Decision and by the 2012 Decision, up to

the privatisation. Tirrenia in EA points out that the extension of the initial Convention was strictly necessary to guarantee provision of the public service pending award of the new Convention, in the context of privatisation of the Tirrenia business branch. Therefore, it was deemed justified in light of the outcome of the Commission's infringement procedure. Additionally, the only material changes made from 1 January 2009 had the effect of reducing the overall amount of the public service compensation awarded. For this reason, Tirrenia in EA argues that the measure could not have become new aid.

5.1.2. *On the prolongation of the initial Convention*

(202) Concerning the existence of a real SGEI on the routes served by the Tirrenia business branch under the initial Convention, Tirrenia in EA noted the following. Firstly, on the connections Palermo – Cagliari, Civitavecchia – Cagliari, Napoli – Cagliari, Cagliari – Trapani and the connection with the Tremiti Islands, Tirrenia would be the only operator. On the routes Napoli – Palermo, Civitavecchia – Olbia, and Genova – Porto Torres, public service compensation is only awarded during the low season. During the high season, these three routes have higher traffic volumes, enabling the company to operate on a competitive basis. Tirrenia in EA points out that under the initial Convention any profits made on those routes during the high season were deducted from the amount of public service compensation payable to Tirrenia, while any loss incurred during that period would have to be borne by the company itself[(75)].

(203) Secondly, Tirrenia in EA also included passenger data on the routes operated on a public service basis by Tirrenia in 2010 and 2011. On this basis, Tirrenia in EA argues that the conditions laid down in Article 2(1)(d) of the 2011 SGEI Decision and Article 2(1)(c) of the 2005 SGEI Decision are complied with. Additionally, since the compensation paid on the basis of the prolongation of the initial Conventions was allegedly cleared in the context of the infringement procedure, the condition laid down respectively in Article 2(4) and Article 2(2) of the 2011 and 2005 SGEI Decisions would also be met.

(204) Moreover, Tirrenia in EA claimed that it had not been overcompensated by the State. In particular, the company pointed out that during the period in which it was under extraordinary administration (September 2010 – July 2012) the amount of the subsidy was approximately EUR 20 million lower in absolute terms, and about 25 % lower in relative terms, than the average amount of subsidies received by the company over the previous two years (2008 – 2009). Tirrenia in EA noted that the public service compensation paid until the end of 2009 allowed Tirrenia to balance its income and expenses and to continue to operate despite the gradual deterioration of its economic and financial outlook. Over time, Tirrenia became more reliant on the subsidies as its other revenues did not keep up with the increases in costs incurred for the operation of the public service. However, from 2010 onwards the amount of compensation was capped by the 2009 Law and was therefore significantly lower than in

previous years. Tirrenia in EA argued that because of this the public subsidy would not have been able to cover the operating costs incurred by Tirrenia on the routes in questions. Therefore, Tirrenia in EA concludes that there cannot have been any overcompensation during the years when the initial Convention was prolonged.

5.1.3. *On the potential illegal prolongation of rescue aid to Tirrenia*

(205) Concerning the repayment of the rescue aid approved by the 2010 Decision, Tirrenia in EA recalls that the Italian authorities informed the Commission on 16 May 2011 that the Extraordinary Administrations of Tirrenia and Siremar would reimburse the rescue aid following completion of the sale of the Tirrenia and Siremar business branches, using the receipts from the sale of these branches. Given that on 23 May 2011 the Ministry of Economic Development authorised the awarding of the Tirrenia business branch to CIN and on 25 July 2011 the contract for sale was signed, both the Italian authorities and Tirrenia in EA at that moment legitimately believed that the aid could be repaid by 28 August 2011 as required. Tirrenia in EA noted that the completion of the sale was delayed due to unexpected events and therefore Tirrenia in EA had to continue to operate its services for a considerably longer time than planned, bearing the associated costs. The entire rescue aid was however repaid to the State by Tirrenia in EA in full by means of a single payment on 18 September 2012, i.e. only 48 days after payment of the first instalment by CIN, which was credited on 1 August 2012.

(206) With respect to the requirement laid down in paragraph 25(c) of the Rescue & Restructuring Guidelines, Tirrenia in EA noted the following. The liquidation plan for Tirrenia had been published on the website of the Extraordinary Administration[(76)] long before the expiry of the aforementioned six-month time limit. Tirrenia in EA added that any relevant information on the subsequent progress of the privatisation process – which it claimed to be, in essence, a restructuring plan as defined by the Rescue & Restructuring Guidelines – was regularly submitted to the Commission for both the State aid and merger approval procedures. Tirrenia in EA therefore claimed that the Commission was fully informed and that this plan was feasible, coherent and far-reaching, so as to restore Tirrenia's viability as required by the Rescue & Restructuring Guidelines.

(207) Tirrenia in EA also argued that Tirrenia ceased being an undertaking in difficulty as soon as it received the rescue aid that enabled it to provide the public service regularly, while duly managing the liquidation process. In its view, over the period in question these activities were performed regularly and with none of the disruptions that usually mark out an undertaking in difficulty. Tirrenia in EA added that the completion of the privatisation coincided with the complete implementation of the restructuring plan. This involved structural modifications to Tirrenia's organisation and management, ensuring its return to long-term profitability. Finally, Tirrenia in EA pointed out that

the 2010 Decision confirmed that the 'one time, only time' principle had been complied with also concerning the past, i.e. in relation to the compensation for the public service obligations. Therefore, Tirrenia in EA argued that the Italian authorities may have held legitimate expectations that this compensation did not entail any State aid.

5.1.4. *On the new Convention*

(208) With respect to the procedure followed, Tirrenia in EA claimed that Italy notified the new Convention to the Commission on 10 January 2012 only for reasons of legal certainty. Therefore, Tirrenia in EA disagreed with the Commission's view in the 2012 Decision that this measure could constitute unlawful aid, granted in breach of the standstill obligation under Article 108(3) TFEU.

(209) On substance, Tirrenia in EA addressed the Commission's doubts on the measure's compliance with the conditions laid down in the 2011 SGEI Decision.

(210) In particular, Tirrenia in EA claimed that, on the basis of the passenger data for 2010 and 2011, the passenger threshold set by Article 2(1)(d) of the 2011 SGEI Decision is not breached. Furthermore, since the duration of the new Convention is eight years it does not exceed the maximum of 10 years laid down in Article 2(2) of the 2011 SGEI Decision. Furthermore, Tirrenia in EA argued that in light of the outcome of the infringement procedure (see also section 5.1.1), and following the privatisation of the Tirrenia business branch, the condition in Article 2(4) of the 2011 Decision is also respected.

(211) Tirrenia in EA pointed out that Article 3 of the new Convention clearly sets out the services to be provided while its Annex A identifies in detail the types of ships to be used and the time bands to be covered, specifying the requirements for evening and night service and the fare constraints. Tirrenia in EA also added that the new Convention lays down detailed rules concerning the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and recovering any overcompensation, as well as binding requirements covering essential aspects (price, quality and quantity) of the services provided. For each route, the maximum fares applicable per person or vehicle are laid down in Annex A to the new Convention distinguishing between standard fares and reduced fares for island residents. The annual compensation for the public service obligations is fixed for the duration of the Convention. However, there is a mechanism for revising every three years the reference economic parameters, as well as a safeguarding clause in favour of both parties in the event of unforeseen and structural changes, above a fixed threshold, for certain economic parameters. Finally, Tirrenia in EA pointed out that to ensure full compliance with the requirements described above, the new Convention has introduced a strict and comprehensive system of penalties for the service operator, based on the

principle of deterrence. The supervisory Ministries are also empowered to perform inspections and checks, and obtain information to assess fulfilment of the obligations laid down in the Convention.

5.1.5. *On Tirrenia's privatisation and the deferred payment of the purchase price by CIN*

(212) In its reply to the 2011 Decision, Tirrenia in EA pointed out that the privatisation of the Tirrenia business branch would be fully in line with State aid law. In particular, the company referred to the GRAWE case law[(77)], which states that when a State-owned company is privatised, it can be presumed that the market price corresponds to the highest offer received, if such offer is credible and has economic value.

(213) In its reply to the 2012 Decision, Tirrenia in EA recalled the main steps of the tender procedure and the subsequent developments. It emphasized that the Extraordinary Commissioner designed and conducted the tender procedure in the manner considered most appropriate to ensure the attainment of the highest possible value and that he was required by law to establish safeguards to ensure the transparency, impartiality and fairness of the tender procedure.

(214) Tirrenia in EA also argued that the tender process was not subject to any conditions capable in themselves of causing a reduction in the value of the assets offered for sale, or of reducing the number of potential purchasers. In particular, this applies to the conditions mentioned in the 2011 Decision concerning: (i) the preservation of employment levels; (ii) the bundling of the ships with the public service obligations in a single tender procedure. With respect to the former, Tirrenia in EA pointed out that it concerns a mandatory provision, established by legislative act of general scope and applicable without distinction. On the latter, Tirrenia in EA noted that the possibility of using the business branch's fleet to operate the public service routes established in the Convention seems to constitute a viable business opportunity rather than a negative factor impacting the value of the business branch put up for sale, especially at a time of recession for the maritime transport sector.

(215) On the specific issue of the deferred payment of part of the purchase price by CIN, Tirrenia in EA argued that this issue should not be assessed separately from the privatisation as a whole. Tirrenia in EA emphasized that the tender procedure was designed to fully safeguard the principles of competition, transparency and non-discrimination. Therefore, and based on the case law of the European Courts[(78)], Tirrenia in EA claimed that the outcome of this tender procedure was the market price. The decision to allow staggered payments was part of the dynamics of the tender process and was due to the lack of any other final offers competing with the one submitted by CIN. Tirrenia in EA argued that allowing the deferred payment of part of the purchase price is therefore not a selective intervention in CIN's favour. This would be especially

the case since all potential bidders were made aware about the provision on partial payment in instalments included in CIN's offer and were invited to submit competing offers.

(216) For these reasons, Tirrenia in EA claimed that the Commission's doubts on Tirrenia's privatisation, including the staggered payment of the purchase price, are not justified.

5.1.6. *On the absence of economic continuity between Tirrenia and CIN*

(217) Tirrenia in EA presented the following features of the privatisation of the Tirrenia business branch: the scope of the transfer (assets and liabilities); the economic activity, workforce and identity of the parties; the sale price; the logic and timing of the operation. Tirrenia in EA claimed that in the present case, all of these elements point towards economic discontinuity between the Extraordinary Administration selling the Tirrenia business branch and CIN.

(218) In particular, Tirrenia in EA argued that the scope of the transfer to CIN is more limited than what was initially foreseen, as only the business unit operating the public service was put up for sale and not Tirrenia as a whole (including Siremar). Moreover, upon completion of the sale, all outstanding liabilities linked to the assets of the Tirrenia business branch were cancelled.

(219) Tirrenia in EA also noted that the very nature of the transaction – i.e. achieving privatisation – implied obvious discontinuity of economic activity, in terms of organisational structure, decision-making processes, management criteria and business strategies. Furthermore, after the AGCM examined the transaction, the activity of the new private business has been subjected to restrictive measures[(79)], which apart from their intended goal (i.e., promoting competition) would have also increased the economic discontinuity between the seller and the purchaser of the Tirrenia business branch.

(220) Moreover, as set out by Article 56 (3-*bis*) of Decree Law 270/1999, Article 2112 of the Italian Civil Code does not apply to the sale of companies providing essential public services, ensuring that there is no continuity in the workforce. Additionally, Tirrenia in EA recalled that an independent expert set the minimum sale price and that the sale procedure was transparent and non-discriminatory, with the highest price as the only award criterion.

(221) Finally, Tirrenia in EA pointed out that the tender procedure for the Tirrenia business branch was launched in September 2010 resulting in the signing of the sale contract with CIN on 25 July 2011, while the Commission only opened its formal investigation by its Decision of 5 October 2011. Therefore, the transaction could not have had the purpose of circumventing the rules on State aid. On the contrary, the transaction's objective was to liberalize the maritime transport sector, as imposed by the Maritime Cabotage Regulation, through a privatisation.

5.2. **Comments from CIN**

(222) CIN's replies to the 2011 Decision and the 2012 Decision are summarized in the following sections and mainly focus on the privatization process.

5.2.1. *On the transparency of the sale procedure*

(223) CIN points out that the sale of Tirrenia, which was in extraordinary administration after having been declared insolvent, took place via a competitive, transparent and non-discriminatory procedure in the manner set out in Article 4 (4-*quater*) of Decree Law 347/2003. The possibility provided by Decree Law 134/2008 to select the acquirer by means of private negotiations is, according to CIN, undoubtedly subject to compliance with the principles of competition, transparency and non-discrimination.

(224) Concerning this same issue, CIN refers to a press release issued on 5 October 2011 by Tirrenia in EA, which notes: 'these procedures[80] were carried out on the basis of tender procedures fully complying with the principles of transparency and non-discrimination, ruling out from the outset any possibility of making the sale via private negotiation'; and 'to ensure that the tender procedures would be open to the largest possible number of market operators, the scope of the business branches for sale was limited to the assets and contractual relationships essential for provision of the public service, while separate sale procedures were carried out for any other asset held by the companies. […] no obligation or burden was imposed on the potential buyers other than those provided for by the law'.

(225) As regards the manner in which the tendering procedure was published and subsequently conducted, CIN made the following comments.

(226) Firstly, the call for expressions of interest was published not only on Tirrenia's website and other websites, but also in the major national and foreign newspapers, both in Italian and in English. In addition, the initial deadline for responding to the call was extended by almost one month, to 20 October 2010. Therefore, all potential bidders, both national and international, were given ample time to submit their expressions of interest and obtain the necessary information to prepare an offer for the purchase of the Tirrenia business branch.

(227) More than 20 parties submitted an expression of interest. Therefore, CIN considers the Commission's view that the sale procedure would not be in line with transparency requirements as it would be based on private negotiations to be wholly unfounded. During the due diligence phase, all bidders were given adequate access to the relevant information on the Tirrenia business branch. Specifically, all the technical-legal and economic-financial details necessary to formulate the offer (including the detailed description of the scope of the business being sold, the business plan, the vendor due diligence report, and the draft of the new public service agreement) was made available to the potential bidders.

(228) CIN concludes that it does not seem possible to doubt that all those potentially interested in acquiring the Tirrenia business branch, both in Italy and abroad, were able to express an interest in doing so, and then had access, under transparent and non-discriminatory arrangements, to the documentation necessary to submit a detailed bid.

5.2.2. *On the scope of the privatisation*

(229) In its reply, CIN points out that for the precise purpose of obtaining the highest sale price, the Extraordinary Commissioner limited the object of the Tirrenia business branch sale only to those assets and contracts required to discharge the public service obligations.

(230) In particular, all the ships included in the sale are strictly necessary for discharging the public service obligations, as they are the very same ships used by Tirrenia on the routes covered by the public service obligations under the Convention. With regard to the Civitavecchia-Olbia, Genova-Porto Torres and Napoli-Palermo routes for which public compensation is only awarded during the low season, the same ships are used to operate the service in the high season. CIN argues that as these vessels were linked to and essential for the public service obligations for two-thirds of the year, they were necessarily included within the scope of the business branch for sale.

(231) Finally, CIN notes that the Extraordinary Commissioner launched separate procedures for the sale of those Tirrenia assets that were not necessary for the operation of the public service links. These procedures include both those for the sale of Tirrenia's real estate and artwork and – most importantly – those for the sale of six ships owned by Tirrenia, which were not necessary for the provision of the public service under the Convention.

5.2.3. *On the conditions imposed on the bidders*

(232) As concerns the condition to maintain employment levels, CIN submits that the only obligation imposed in this respect results from the applicable legislation, namely Article 63(2) of Decree Law 270/1999, and has therefore not been imposed by the Extraordinary Commissioner in the specific case of Tirrenia.

(233) CIN underlines that Article 2112 of the Italian Civil Code mandates that in case of transfer of a business, the employment contract continues with the buyer and the employee maintains all resulting rights. However, pursuant to Article 56, 3-*bis* of Decree Law 270/1999, this ordinary regime is not applicable in case of the transfer of business branches under an extraordinary administration procedure. Therefore, in light of both the limited duration of the specific obligation laid down by Article 63(2) of Decree Law 270/1999 (only two years), and the fact that this obligation was limited to the 'essential staff' for discharging the public service obligations, CIN argues that it cannot

be considered that such obligation lowered the market value of the Tirrenia business branch.

(234) Regarding the Commission's concerns on requiring the successful bidder to fulfil the public service obligations, CIN notes the following. There would be no evidence to the effect that a differently designed procedure might have produced a different outcome, specifically a higher purchase price. On the contrary, the choice of awarding the public service contracts, and hence the compensation granted on their basis, together with the assets strictly required for provision of those services, would have ensured a higher degree of competition among potential bidders.

(235) To pursue this objective, the Extraordinary Commissioner would therefore have acted correctly in: (i) limiting the scope of the business branch for sale to the assets and contracts which were functionally essential for provision of the public service; and (ii) imposing on purchasers only the obligations required by law. CIN considers that this objective has certainly been achieved, given that no less than 21 national, European and third-country parties submitted expressions of interest for the purchase of the Tirrenia business branch.

5.2.4. *On the purchase price*

(236) CIN considers that the Commission's doubts on whether the price obtained for the Tirrenia business branch was the best possible are not justified. According to CIN, the purchase price could be considered even higher than the market price. In particular, CIN makes reference to the fact that one of the operators that expressed an interest in buying the Tirrenia business branch, namely […], challenged the price that had been determined by the independent expert appointed by the Ministry on the ground that the figure (EUR 380 000 000) was too high[(81)]. According to CIN this implicitly means that a private investor has considered the purchase price paid by CIN, which was in fact superior to that set by the expert, as excessive. The fact that the procedure resulted in the highest price can in CIN's view therefore not be put into question.

(237) In any event, CIN underlines that in case of multiple bids for the Tirrenia business branch, the award criterion was the highest offered price. In addition, as mandated by Decree Law 347/2003, the purchase price could not in any case be lower than the market price as established by an independent valuation.

(238) On expiry of the 15 March 2011 deadline for submission of the binding offers, CIN was the only company that had submitted a valid binding purchase offer meeting the requirements listed in the letter of procedure. Following a request by the Extraordinary Commissioner, on 14 April 2011 CIN submitted additional clarifications and a final binding offer, in order to fully align its bid with the valuation made by the Ministry-appointed expert. In this context Tirrenia in EA, instead of immediately awarding the tender to CIN, acted with a view to ensuring the highest degree of competition between bidders.

Accordingly, CIN's binding offer was placed in the data room and all bidders admitted to the due diligence phase were invited to submit improved purchase offers. However, on expiry of the deadline (which had been extended to 19 May 2011) set for this last round of offers, no other offers were received.

(239) CIN notes that the above is confirmed by Tirrenia in EA which, in the abovementioned press release of 5 October 2011, also reported that: 'for the purpose of comparing the offers and awarding the tender the only criterion should be that of the highest price. Additionally – in accordance with the provisions of the law – the sale price cannot in any case be lower than the market value of the assets as established by a sworn valuation carried out by a leading financial institution appointed as an independent expert'; and 'as concerns the procedure for the sale of Tirrenia, after Compagnia Italiana di Navigazione submitted a binding purchase offer consistent with the economic value of the assets, in order to ensure the highest degree of transparency of the tender procedure the terms and conditions of such offer were made known to all other bidders, giving them ample time to submit their counterbids; however, no such counterbid was received'.

5.2.5. *On the deferred payment of part of the purchase price*

(240) On this issue, CIN observed the following. The deferral of payment without any interest only concerns EUR 180 000 000, out of the total purchase price of EUR 380 100 000. CIN also points out that the deferred payment is correlated with the nature of the subject of the sale namely a business segment for which the effective value depends on actual payment, over a period of eight years, of the compensation amounts stipulated in the new Convention. CIN argues that this consideration is also taken into account in the independent expert's valuation report on the Tirrenia business branch[(82)].

(241) Furthermore, CIN notes that the partial deferral of payment without application of interest was also part of the tender procedure to the extent that CIN's binding offer, which included this condition, was made available in the data room. All other bidders were invited by the Extraordinary Commissioner to submit a higher bid. Since no such bid was received, CIN argues that the seller has achieved the best payment conditions actually available on the market. In other words, in CIN's view the inclusion of a partial deferral of payment without application of interest represented, in this case, the most favourable option, and in fact the only option able to obtain payment of a price commensurate with the value of the Tirrenia business branch.

5.2.6. *On the public service compensation to be paid to CIN under the new Convention*

(242) CIN notes that, at the moment of its submission (i.e. in March 2013), it was the only operator active on almost all the routes covered by the new Convention. Only on the mixed service route between Napoli and Palermo (which is operated under the Convention only during the low season) is there

another operator present, i.e. Grandi Navi Veloci since 2011 (in collaboration with SNAV which was already active on this route before 2011). However, CIN considers that this operator does not offer services comparable to its own. With the exception of this route, CIN considers that in light of the absence of competitors on the routes covered by the new Convention, there can be no distortion of competition and effect on intra-Union trade. Therefore, the compensation paid on the basis of the new Convention could in its view not possibly constitute State aid (except, conceivably, for the Napoli – Palermo route).

(243) Moreover, CIN also argues that the compensation paid on the basis of the new Convention does not provide it with any economic advantage. In particular, CIN considers that the four Altmark criteria are complied with and that the Commission's doubts in this respect are not justified. CIN points out that there are no competing operators on the relevant routes and that this, by itself, would justify both the need to impose public service obligations on CIN and its corresponding compensation. CIN adds that in any case, any temporary presence of a 'competing' operator[(83)] for CIN on the routes subject to public service compensation under the new Convention would not, by itself, reduce the public service obligations on CIN in relation to the route concerned. While CIN has to guarantee continuity of service on these routes, the 'competing' operators are free to reduce, suspend or cancel their scheduled services. In addition, unlike CIN, these operators can freely decide on the frequency, capacity, quality and tariff of their services.

(244) With respect to the third Altmark criterion, CIN disagrees with the Commission's assessment that the risk premium of 6,5 % would be too high since CIN would allegedly not take on risks that would normally fall on the operator of the service. In this respect, CIN notes that it is required to maintain minimum service frequencies unchanged and to apply the tariff ceilings fixed in the new Convention, even where market demand does not justify these frequencies or the tariff ceilings are shown to be too low and economically unsustainable. Therefore, CIN considers that it takes on a risk, linked to the uncertainty of market demand, which does not affect other operators[(84)]. CIN is also required to bear the cost, for at least three years, of possible changes in the reference economic variables (that were used to set the public compensation) that would result in the public compensation being insufficient to cover the public service obligations. Where there are serious and unforeseen circumstances (such as a sector-specific crisis), CIN must accept reduced revenues or increased costs (net of fuel costs) that affect up to 3 % of expected revenues/costs and, in any case, must accept reduced revenues or increased costs in the first year of each three-year operating period (see recital 107). CIN also points out that the economic parameters, on the basis of which the compensation has been set, have been determined with the market situation in 2009 in mind. According to CIN, the number of passengers transported has since fallen, while costs (e.g. port charges and expenses, insurance and

maintenance costs) have increased. For these reasons, CIN considers that the risk premium it receives cannot result in overcompensation and that therefore the third Altmark criterion is complied with.

(245) Concerning the Commission's doubts on the fourth Altmark criterion, CIN noted the following. The tender procedure only related to the assets of the undertaking strictly required to perform the public service obligations laid down in the new Convention (and not to the undertaking as a whole as suggested in the 2012 Decision). This tender was, according to CIN, undertaken by means of a transparent, unconditional and non-discriminatory tender procedure, which made it possible to achieve the best sale price actually possible. CIN considers that this enabled the winning bidder to fulfil the public service obligations stipulated in the new Convention as efficiently as possible, using (only) those assets necessary and essential for the performance of these services. CIN also disagrees with the Commission's view that potential bidders already equipped with their own vessels and crews could have performed the service at a lower cost. In this respect, CIN notes that such operators would normally have used these ships to operate their own services and that they would therefore not be available to provide additional services, such as those put up for tender. This would all the more be the case where there are strict constraints on the capacity of the vessels and the frequency of services, as required by the new Convention. For all the above reasons CIN concludes that the fourth Altmark criterion is also met.

(246) Even if CIN considers that the compensation paid on the basis of the new Convention does not constitute State aid, it has for the sake of completeness also replied to the Commission's doubts concerning the compatibility of this compensation with the internal market. In particular, CIN points out that this measure, to the extent it would constitute State aid, would meet the conditions of the 2011 SGEI Decision. In this respect, CIN notes that the duration of the new Convention is less than ten years, as required by Article 2(2) of the 2011 SGEI Decision. Furthermore, all the routes operated under the new Convention (where applicable, only during the low season) would have had less than 300 000 passengers in the years 2010 and 2011 (the two years preceding the entrustment) and would hence comply with Article 2(1)(d) of the 2011 SGEI Decision. Finally, CIN refers to its reply concerning the first and third Altmark criteria to address the Commission's doubts regarding the genuine nature of the SGEI and the proportionality of the compensation awarded.

5.2.7. *On the (absence of) economic continuity between Tirrenia and CIN*

(247) CIN notes that the Commission essentially developed the notion of economic continuity between two companies, for the purposes of State aid, with reference to specific cases in which companies benefiting from aid transferred the profit-making part(s) of their business to other companies they owned or controlled, even indirectly. In light of this, CIN considers that the privatisation

of the Tirrenia business branch falls entirely outside the scope of this test, as there are no corporate or other relationships linking Tirrenia (and in general the former Tirrenia Group) to CIN.

(248) Additionally, CIN points out that there would be some cases, albeit few and debatable, where the economic continuity test was also applied by the Commission to the transfer of assets or companies between independent entities, having no shareholding relationships. However, even if the test were to be applied to the case at hand (which CIN contests), CIN argues that no economic continuity would be found for the following reasons.

(249) Firstly, there is no identity or any corporate relationship between CIN and the sole owner of Tirrenia, Fintecna, a company wholly owned by the Italian Ministry of the Economy and Finance. Secondly, the object of the sale only includes those assets and contracts that are functionally essential for provision of the public service. Thirdly, the award criterion was that of the highest price. Fourthly, CIN's purchase of the Tirrenia business branch is said to be part of a peculiar 'business logic' and to be based on a business plan with different underlying assumptions from those of Tirrenia. In particular, CIN intends to pursue a wide-ranging plan to restore efficiency to the Tirrenia business branch. Finally, there is no automatic transfer of employees to CIN, nor the maintenance of the acquired rights of employees, but only the obligation on CIN to maintain for two years the staffing levels needed to fulfil the public service obligations.

5.2.8. *Further submissions from CIN*

(250) Upon request from the Commission, CIN provided detailed data regarding the routes it operated in the period between 20 July 2012 and 31 December 2012, both under the public service regime and as a private operator. The information provided included, among other elements, the following:

(1) The season in which the route is operated (e.g. high or low season, all year);

(2) The name and tonnage of the vessel(s) used to operate this route;

(3) The average number of passengers per voyage;

(4) The average freight volume (in tons) per voyage;

(5) The average total revenues per voyage (in EUR);

(6) Average staff numbers per voyage[(85)].

(251) Additionally, CIN also provided the list of the routes where it had a public service obligation to discharge, including its scope in terms of periods of the year, and minimum gross tonnage for the ship(s) to be employed on each route. Finally, CIN reiterated some of the arguments provided in its reply of 1 March 2012 to the 2011 Decision, in particular concerning the privatisation procedure, claiming that the facts of the case showed that no advantage was

granted to it as a result of the bundling of the public service obligations with the assets necessary for their discharge, and that no conditions detrimental to the sale price were attached[86].

5.3. **Comments from Pan Med**

(252) In its reply to the 2011 Decision, Pan Med alleged that competitors are operating daily services on the Genova – Porto Torres and Napoli – Palermo connections, despite Italy's claims that no competitor of Tirrenia provides similar services in terms of frequency and continuity.

(253) In particular, according to Pan Med, for at least ten years Grandi Navi Veloci has been operating the Genova – Porto Torres connection, while SNAV operates the Napoli – Palermo connection (since 2011, in cooperation with Grandi Navi Veloci). Additionally, Moby would be offering connections between Livorno and Cagliari. Therefore, Tirrenia would not be the sole operator on this connection. Moreover, Pan Med claimed that the freight-only services from Napoli to Cagliari, Ravenna to Catania, and Livorno to Cagliari cannot constitute genuine SGEI inasmuch as they do not ensure territorial continuity but are merely an alternative route for freight vehicles which, in absence of these links, would be routed via other existing freight services. Pan Med mainly focuses on the connections to Sicily and refers to the alternative possibilities for road vehicles to cross the Strait of Messina by ferry. Finally, Pan Med claimed that the allegedly low freight rates applied by Tirrenia on these routes are a barrier for other operators to enter this market.

(254) In its reply to the 2012 Decision, Pan Med claimed that it intended to start operating new routes but alleged that competition was hampered by the incompatible aid granted to the companies of the former Tirrenia Group and their acquirers. The following recitals summarise Pan Med's comments which refer either to Tirrenia exclusively, or to all companies of the former Tirrenia Group.

(255) Regarding the rescue aid granted to Tirrenia and Siremar, Pan Med argued that from 28 August 2011 – the date by which that aid should have been terminated – until its reimbursement approximately one year and two months later, these two companies benefited from illegal and irregular rescue aid. In particular, the rescue aid would not have complied with the Rescue & Restructuring Guidelines and would not have been part of a comprehensive restructuring plan. Therefore, in Pan Med's view it amounted to operating aid to Tirrenia and Siremar.

(256) On the new Conventions, Pan Med expressed its observations concerning the genuine nature of the SGEI performed by CIN and Compagnia delle Isole ('CdI'). Pan Med argued that neither the needs of the areas involved in terms of mobility of the local communities nor those related to economic development could justify any longer the public compensation for these operators. Pan Med pointed out that the objective of ensuring territorial continuity should not be

addressed through arbitrarily selected route bundles, which in this case did not seem to reflect the general interest.

(257) The letter also contained Pan Med's own summary of the competitive situation on the cabotage routes served under the public service regime by CIN and CdI. Pan Med concluded from this overview that on many of these routes[(87)], competing operators are present that would in its view provide comparable services. This would show that the market is indeed capable to meet the public service obligations that have been entrusted to CIN and CdI. Furthermore, Pan Med pointed out that for some routes CIN receives compensation only for services provided in the low season while it would be free to set its tariffs in the high season. According to Pan Med, this would create undue cross-subsidization using public funds.

(258) Pan Med also submitted that the island of Sicily is currently adequately served by six airports[(88)]. In particular, the air links between the Region of Sicily and mainland Italy would be (i) comparable in terms of frequency, continuity and regularity to the maritime transport services that receive public compensation; and (ii) sufficient to ensure the mobility of the local communities. With regard to the economic development argument, Pan Med stressed that the majority of freight transport in Italy is by road, and that links to Sicily are well developed through the Strait of Messina. Furthermore, many of the subsidized maritime links would not be to or from remote areas.

(259) In addition to the above, Pan Med argues that the compensation for the operation of the public service allows the operators to realize profits that are more than reasonable and hence would not meet the third Altmark criterion. Pan Med provided the example of a calculation of the costs and revenues on the Ravenna – Catania route in 2010, which allegedly would have resulted in a profit of EUR 8,3 million[(89)] and hence in overcompensation to its operator Tirrenia. Pan Med also considers that the risk premium of 6,5 % as laid down in the CIPE Directive is not justified given that CIN would not be assuming any business risk.

(260) Pan Med then described a number of new routes it intended to operate, including the Augusta – Ravenna connection. Pan Med claimed that in this way it would offer a continuous service along the Adriatic corridor linking to and from Sicily, providing greater transport capacity for freight and more comprehensive links to the continent. It therefore claimed that market forces are sufficient to provide the SGEI entrusted to CIN on the Ravenna – Catania route. Pan Med among others made a similar argument for its planned Gaeta – Termini Imerese route, which would be in competition with the Napoli – Palermo route operated by CIN.

(261) Concerning the deferred payment of part of the purchase price for the Tirrenia business branch, Pan Med notes that the option to pay in instalments was not set out in the call for expressions of interest for the purchase of the Tirrenia

business branch nor announced by Tirrenia's Extraordinary Commissioner or its adviser(s). If Pan Med had been aware of the possibility to pay the price in instalments, it claims it would have seriously assessed the possibility of acquiring the Tirrenia business branch. In addition, Pan Med notes it had also expressed to Tirrenia in EA its interest to buy only Tirrenia's Adriatica division but received no answer.

(262) Finally, in the conclusions of its reply to the 2012 Decision, Pan Med argued that it considers there is economic continuity between Tirrenia and CIN. For this reason, Pan Med considers that CIN would have to repay the alleged incompatible aid.

5.4. Comments from Grandi Navi Veloci

(263) Grandi Navi Veloci submitted comments concerning the following: (i) the alleged violation of Article 4 of the Maritime Cabotage Regulation; (ii) the annual compensation for the public service obligation; (iii) the privatisation of the Tirrenia and Siremar business branches; (iv) the berthing priority assigned to Saremar; (v) other aid measures granted in the context of the privatisations; (vi) the unlawfulness of the aid already granted and the need to suspend and provisionally recover the aid[(90)]. Most of these comments relate only to the specific case of Saremar, which is outside the scope of this Decision. In the next recitals, the comments most relevant to this Decision are summarised.

(264) On the privatisation of the Tirrenia and the Siremar business branches, Grandi Navi Veloci agreed with the preliminary view of the Commission, as expressed in the 2011 Decision, that the procedure would not have been sufficiently transparent and unconditional so as to exclude the existence of aid. Additionally, the company argued that the Italian authorities were indefinitely delaying the privatisation of the companies of the Tirrenia Group, in spite of the guarantees allegedly given over the years to the Commission and formalised in the 2001 Decision (in its recitals 4 and 12) and 2004 Decision (in its recitals 5 and 45). The company claimed that the prospects of the future privatisation had been used as a bargaining chip vis-à-vis the Commission to allow for the payment of public service compensation to the companies of the Tirrenia Group until 2008.

(265) Regarding the berthing priority, the company quoted two decisions (*segnalazioni*) by the AGCM stating that this priority may have a negative impact on competition, particularly if the beneficiary has an exclusive right over the berthing slots that are most valuable from an economic point of view. The company did not contest the Commission's preliminary view that the measure does not constitute State aid as there is no loss of State resources. However, Grandi Navi Veloci argued that the transfer of the berthing priority to the new owners of the companies of the former Tirrenia Group, as mandated by paragraph 21 of Article 19-*ter* of the 2009 Law, is by itself a breach of Article 4 of the Maritime Cabotage Regulation.

(266) Upon request of the Commission, GNV also provided detailed data regarding its own activity on routes operated by Tirrenia/CIN under the public service regime. In particular, GNV explained it operated the following routes:

— Genova – Porto Torres: all year in 2009 and 2010, from 1 January 2011 until 5 November 2011, and from 30 March 2012 until 16 September 2012,

— Genova – Olbia (high season only): from 22 May 2009 until 5 October 2009, from 28 May 2010 until 3 October 2010, from 27 May 2011 until 18 September 2011, and from 1 June 2012 until 15 September 2012,

— Napoli – Palermo: not active on this route in 2009 and 2010, in 2011 from May to December, and all year in 2012.

(267) With respect to the Genova – Porto Torres route, GNV pointed out that it reduced its services (including their frequency) in 2012 after Saremar entered the market. On the Napoli – Palermo route, GNV in 2012 started to operate two daily connections (one overnight and one day-departure) throughout the year. GNV claimed that its services on these routes are equivalent to those offered by Tirrenia/CIN. GNV's replies also indicated that on the Napoli – Palermo route it used the following ships: SNAV Sardegna (built in 1989), SNAV Campania (built in 1974), SNAV Lazio (built in 1989) and only in 2011 also the Finn Forest (built in 1978).

6. SUBMISSIONS BY GRIMALDI

(268) Grimaldi made several submissions, all beyond the procedural deadlines for interested third parties to make their views known with respect to the 2011 Decision and the 2012 Decision. None of these submissions was made by completing the compulsory complaint form referred to in Article 24(2) of Council Regulation (EU) 2015/1589[91]. Nevertheless, the Commission will summarise these submissions in the following sections and will provide a response to them in section 7.4.

6.1. First submission (February 2016)

(269) On 12 February 2016, Grimaldi made a submission to the Commission concerning both the compensation granted to CIN under the new Convention and an alleged abuse of dominant position (under Article 102 TFEU), without however providing any supporting documentation. The letter was also addressed to the AGCM. The elements most relevant to this Decision are summarised below.

(270) Concerning the State aid elements of the letter, Grimaldi argued that CIN would be overcompensated for the discharging of its alleged public service obligations. Grimaldi offered the following arguments.

(271) Firstly, the fixed amount of compensation was calculated on the basis of allegedly outdated and erroneous assumptions concerning costs, in particular fuel costs. Indeed, Grimaldi considered more specifically that the latter, which

would account for approximately 30 % of transport costs, fell drastically between 2012 and 2016, so the compensation should in its view have been adjusted (i.e. lowered) accordingly[92].

(272) Secondly, Grimaldi also claimed that numerous aggressive marketing initiatives and discounts operated by CIN were made possible only as a result of overcompensation from the new Convention. In particular, Grimaldi highlighted that in February 2016 CIN and Moby made two identical promotional offers, thus suggesting that both CIN and Moby were essentially operating following an integrated business strategy, and that CIN was cross-subsidising the alleged overcompensation arising from the new Convention into Moby's offers and promotions.

(273) Thirdly, Grimaldi pointed out that for some of the routes included under the new Convention, CIN was effectively operating as a monopolist, while on others the main competitor was Moby itself. Grimaldi therefore argues that as a result of the acquisition by Onorato Partecipazioni of exclusive control over both CIN and Moby, allowed by the AGCM with its resolution n° 25773, competition effectively disappeared for CIN on the routes where Moby was previously its only competitor. Therefore, according to Grimaldi, the risk premium included in the calculation of the compensation to CIN under the new Convention should be reduced, as this was intended to remunerate the additional risk taken on by CIN for those routes where it was not discharging the public service obligation under conditions of exclusivity. Additionally, Grimaldi highlighted that in AGCM decision n° 25773, paragraphs 47 and 56, the fact that CIN receives 'sizeable public subsidies' as a result of its public service obligations was considered as representing a barrier to entry for potential competitors, in markets where the CIN/Moby concentration was effectively creating a dominant position verging on monopoly[93].

(274) Grimaldi also considered that there was no real need for an SGEI on at least some of the routes where competitors were present, in particular on the connections Genova – Olbia and Civitavecchia – Olbia, where Moby itself was operating. According to Grimaldi, this suggests that the joint presence of CIN and Moby on both routes was sufficiently stable to call into question the need for an SGEI, at least for those years.

(275) Concerning the alleged abuse of dominant position, Grimaldi outlines several abusive and retaliatory market practices allegedly committed by CIN and Moby against their clients, operating in the transport sector, which were starting to use the services of Moby and CIN's competitors on several routes. Grimaldi also points out that the allegedly excessive compensation granted to CIN under the new Convention gave it the financial means to engage in restrictive practices against potential market entrants.

(276) Finally, Grimaldi argued that the aid granted to CIN is unlawful as Italy did not respect its standstill obligation per Article 108(3) TFEU and suggested that

the Commission should adopt a decision requiring Italy to suspend payment of the aid and to provisionally recover the aid (at least the part related to the alleged overcompensation) under Article 13 of Regulation (EU) 2015/1589.

6.2. **Resolution n° 27053 of 28 March 2018 by the AGCM**

(277) On 28 March 2018 the AGCM issued its resolution n° 27053, also as a result of the letter by Grimaldi (see recital 269), concluding that between 28 September 2015 and the date of adoption of the resolution (i.e., 28 February 2018), both CIN and Moby had abused their dominant position under Article 102(b) TFEU on several freight and mixed routes between mainland Italy and Sardinia, including the following:

(1) Genova – Porto Torres

(2) Olbia – Genova

(3) Olbia – Civitavecchia

(4) Livorno – Cagliari

(5) Cagliari – Civitavecchia

(278) The anticompetitive behaviour took place on the five routes above, which are covered by the new Convention, in the time when the respective public service obligations were in force. This behaviour included denying access to the ships to transport providers, also of perishable goods. For this violation of competition rules, CIN and Moby had to pay a fine of EUR 29 202 673,73.

(279) The AGCM's resolution n° 27 053 was appealed at the regional administrative tribunal (the *Tribunale Amministrativo Regionale*, 'TAR'), and the fine was accordingly suspended. On 4 June 2019, the TAR rendered its judgment n ° 7175/2019, partially annulling resolution n° 27 053 of the AGCM and requesting the AGCM to restart the investigation and recalculate the fine.

6.3. **Second submission (May 2018)**

(280) On 29 May 2018, Grimaldi made another submission to the Commission, largely based on resolution n° 27053 of the AGCM, reiterating the claims already raised with its first submission and presenting some additional arguments in their support, which are summarised below.

(281) Firstly, on the alleged overcompensation under the terms of the new Convention, Grimaldi communicated that the Italian Ministry of Transport had allegedly criticised the practice described in recital 272, as it risked jeopardising the financial sustainability of the new Convention and represented an allegedly inopportune confusion of costs and receipts between the two companies. From this, Grimaldi also inferred that CIN has not been respecting the required separation of accounts.

(282) Secondly, as far as the genuineness of the SGEI is concerned, Grimaldi argued that there are several operators on some of the routes under public service obligations, thus calling into question the existence of a genuine SGEI. In particular, Grimaldi argued that Moby, GNV, Forship, Grendi and Grimaldi itself are operating, at various times over the year, routes that could be considered equivalent to those provided by CIN under the new Convention (sometimes only to alternative ports).

(283) Additionally, Grimaldi argued that CIN has repeatedly violated the terms of the Convention. In particular, according to AGCM decision n° 27 053, on several of the routes to and from Sardinia that are covered by the public service obligations, transport operators were systematically denied boarding or were applied detrimental market conditions as a way to deter the market entrants on some of these routes, including Grimaldi itself and Grendi. The abuse of dominant position notwithstanding, Grimaldi considered that this shows that CIN is not actually operating a genuine SGEI, at least as far as freight is concerned, as it did not provide any territorial continuity to those transport operators. On the contrary, Grimaldi considers that CIN is merely using the public service compensation to abuse its dominant position, together with Moby.

(284) Thirdly, Grimaldi considered that the delay in the payment of the first tranche of the Deferred Price for the Tirrenia business branch, amounting to EUR 55 million, confers a further advantage to CIN (see recital 88(b)).

6.4. Third submission (September 2018)

(285) On 18 September 2018, Grimaldi made another submission, addressed to the Italian Ministry of Transport, the AGCM and the Commission. In that submission, Grimaldi informed the Ministry of Transport and the AGCM about the planned merger between CIN and Moby and asked the Italian authorities to intervene within their respective remits. The Moby Group announced this merger in its biannual report of 30 June 2018, stating that the relevant deed was to be signed by November 2018, and that the merger would take effect from 1 January 2018 onwards (see recital 83).

(286) Grimaldi argued that this merger would contravene the AGCM's decision of 23 September 2013 that allegedly stated that a merger between Moby and CIN violates the 'separation of companies' obligations of CIN under Article 8 (2-*bis*) of Law No 287/90 (which was introduced with Article 11 (3) of Law 57/2001)[94]. Under this rule, SGEI and commercial activities cannot be provided by the same company but should be operated by separate companies (even if part of the same group). For this reason, Grimaldi asked the AGCM to intervene to penalise the two companies under Article 8 (2-*sexies*), also based on previous decision-making practice on similar cases.

(287) In addition, Grimaldi claimed that the merger would result in an infringement of the Convention of 18 July 2012. In particular, Grimaldi argued that the merger would breach the requirement to keep separate and analytical accounts for costs and revenues relating to each public service route. According to Grimaldi, as a result of Article 22 of the new Convention, this requirement must be read in light of Article 8 (2-*bis*) of Law No 287/90 which requires a full separation of companies, and not a mere separation of accounts. Indeed, Grimaldi claimed that the merger would allow CIN to cross-subsidise commercial services operated by itself or by Moby and would prevent the Ministry from properly checking the use of the public subsidies.

(288) Finally, Grimaldi urged the Commission to close its formal investigation procedure.

6.5. **Further submissions (October and November 2018)**

(289) On 9 October 2018, Grimaldi made another submission to the Italian Ministry of Transport and the AGCM, sending a copy to the Commission for information. In that letter, Grimaldi focused on price increases announced by Moby and CIN, allegedly to compensate for the increase in fuel costs. Grimaldi pointed out that the increases are sharper where Moby/CIN allegedly operates as a monopolist (Genova-Olbia, Genova-Porto Torres) and lower where Moby/CIN would compete with Grimaldi (Napoli-Catania, while Grimaldi operates Salerno-Catania). Moreover, Grimaldi noted that the price increases are not proportionate to the length of the route, as they should be if they indeed aimed to address the rise in fuel costs. For these reasons, Grimaldi asked:

(a) The AGCM to verify the alleged abusive and anticompetitive nature of the price increases by Moby and CIN (which would allegedly amount to a violation of the terms of AGCM decision n°27053 of 28 February 2018);

(b) The AGCM to stop the merger by incorporation of Moby in CIN (as already requested in their previous submission of 18 September 2018);

(c) The Ministry of Transport to verify the compatibility of the price increases applicable to CIN with the terms of the New Convention.

(290) On 20 November 2018, Grimaldi made another submission to the AGCM and sent a copy of that letter to the Italian Ministry of Transport and the Commission. In this submission, Grimaldi reiterated its request for the Italian competition authority to stop the planned merger between Moby and CIN. Grimaldi acknowledged that the merger does not require prior authorisation by the AGCM as it is purely a restructuring within a group. Nevertheless, Grimaldi alleged that the confusions of costs and revenues between SGEI and commercial activities would only increase after the merger. To support its claims, Grimaldi referred to two letters sent by the Ministry of Transport to

CIN on the joint marketing offers by the latter and Moby and their potential impact on the financial equilibrium of the New Convention.

7. ASSESSMENT

7.1. Existence of aid within the meaning of Article 107(1) TFEU

(291) According to Article 107(1) TFEU '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'.

(292) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measures in scope of this Decision constitute State aid within the meaning of Article 107(1) TFEU, all the above-mentioned conditions need to be fulfilled. Namely, the measure should:

(a) be granted by a Member State or through State resources,

(b) favour certain undertakings or the production of certain goods,

(c) distort or threaten to distort competition,

(d) affect trade between Member States.

(293) The Commission notes that the berthing priority, which only applies to the public service routes, is inextricably linked with the performance of the SGEI by Tirrenia and its acquirer CIN. Therefore, this measure will be assessed jointly with the public service compensation granted to these companies (see sections 7.1.1 and 7.1.3).

(294) Furthermore, the Commission notes that the new Convention between Italy and CIN should be assessed jointly with the privatisation of the Tirrenia business branch (including the deferred payment of part of the purchase price). Such joint assessment is appropriate because in essence Italy organised a tender for a public service contract (i.e. the new Convention) whereby the winning bidder had to acquire from Tirrenia a number of assets (mainly ships) necessary to discharge the public service obligations laid down in that public service contract.

7.1.1. *The prolongation of the initial Convention between Tirrenia and Italy*

7.1.1.1. *State resources*

(295) In order to be qualified as State aid, a measure must be imputable to the State and granted directly or indirectly by means of State resources.

(296) Tirrenia was entrusted by the Italian State with the operation of maritime routes as detailed by the initial Convention, as prolonged. The initial Convention was concluded with the State and the resulting public service

compensation for Tirrenia is paid by the State from its own budget. Therefore, the public service compensation to Tirrenia is imputable to the State and is given through State resources.

(297) The Commission takes note that, according to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing but that Tirrenia did not pay any additional fee for the berthing priority. Nevertheless, the Commission considers that in principle Italy could have chosen to impose an additional fee for the berthing priority and that by not doing so, it has foregone State revenues. Furthermore, since the berthing priority is granted by law (see recital 108) it is imputable to the State.

7.1.1.2. *Selectivity*

(298) In order to be qualified as State aid, a measure must be selective. The public service compensation for the provision of the maritime services in question is only granted to Tirrenia, thus it is selective. Since the berthing priority was only granted to the companies of the former Tirrenia Group, including to Tirrenia, it is also selective.

7.1.1.3. *Economic advantage*

(299) The Commission recalls that public service compensations granted to a company may not constitute an economic advantage under certain strictly defined conditions.

(300) In particular, in its Altmark judgment[(95)], the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not within the scope of Article 107(1) TFEU.

(301) However, the Court of Justice also made clear that for such public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria (the 'Altmark criteria'), summarized below, must be satisfied:

(1) the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined ('Altmark 1');

(2) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('Altmark 2');

(3) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations ('Altmark 3');

(4) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations ('Altmark 4').

(302) The Commission specified how it applies the Altmark criteria in its Communication on the application of State aid rules to compensation granted for the provision of services of general economic interest (the 'SGEI Communication')[96].

(303) Given that the Altmark criteria have to be complied with cumulatively, non-observance of either one of these criteria would lead the Commission to the conclusion that the measure under assessment provides an economic advantage to the beneficiary. The Commission will then first assess observance of Altmark 4.

(304) Altmark 4 provides that the compensation must be the minimum necessary in order for it not to qualify as State aid. This criterion is deemed to be fulfilled if the recipient of the public service compensation has been chosen following a tender procedure that allows for the selection of the tenderer capable of providing the services at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

(305) For none of the prolongations of the initial Convention in the period 1 January 2009 until 18 July 2012 Tirrenia was selected following a public tender procedure. The Italian State merely prolonged the system already in force thereby entitling the pre-established operator to continue receiving compensation for the discharge of the public service obligations.

(306) Moreover, the Italian authorities have not provided to the Commission any indication that the level of compensation 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 revenues and a reasonable profit for discharging the obligations. Italy has only argued that the public service compensation for Tirrenia decreased significantly from 2010 onwards following the introduction of the maximum compensation amount set by the 2009 Law (see recital 25). However, Italy has not shown that the costs incurred by Tirrenia in the provision of its public service obligations were in line with

those of a typical undertaking, well run and adequately provided with means of transport.

(307) The Commission therefore concludes that Altmark 4 has not been complied with in the present case.

(308) Given that the four Altmark criteria are not cumulatively observed in the present case, the Commission concludes that the compensation for the operation of maritime routes under the prolongation of the initial Convention provided Tirrenia with an economic advantage.

(309) With respect to the berthing priority, the Commission first recalls that the Italian competition authority AGCM has at least on two occasions considered that this measure has economic value (see recital 265). Nevertheless, Tirrenia does not pay any fee for the berthing priority (see recital 190). Furthermore, the Commission observes that the berthing priority has at least in theory the potential to lower the operator's costs (e.g. because the guaranteed berthing could reduce waiting times in ports and hence result in lower fuel costs) or increase its revenues (e.g., because some timings possibly attract more demand from passengers). Indeed, to the extent the berthing priority allows for a faster docking procedure, users of the ferry service may prefer the ferry operator that benefits from this measure. Even if these effects would only materialise in limited circumstances or would be relatively small, the berthing priority could nevertheless constitute an economic advantage for Tirrenia.

7.1.1.4. *Effect on competition and trade*

(310) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid[97]. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition[98].

(311) In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the Union, in particular since the entry into force of Council Regulation (EEC) No 4055/86[99] and the Maritime Cabotage Regulation, liberalising the market of the international maritime transport and maritime cabotage, respectively. The fact that on some routes Tirrenia was at that time the only operator does not mean that other (international) operators could not be interested to offer similar maritime transport services. Therefore, the compensation for the operation of maritime routes under the prolongation of the initial Convention is liable to affect Union trade and distort competition within the internal market. For the same reasons that conclusion also holds for the berthing priority.

7.1.1.5. *Conclusion*

(312) Since all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that both the public service compensation paid on the

basis of the successive prolongations of the initial Convention and the berthing priority for the public service routes constitute State aid to Tirrenia.

7.1.1.6. *New or existing aid*

(313) As explained above (see recital 201), Tirrenia in EA considers that if the public service compensation awarded to Tirrenia up until end 2008 would be classified as existing aid on the basis of Article 4(3) of the Maritime Cabotage Regulation, this classification would also be applicable to the compensation paid on the basis of the prolongation of the initial Convention.

(314) The Commission first notes that the compensation paid to Tirrenia for the operation of maritime public service obligations until end 2008 will not be assessed in this Decision. The assessment of that compensation, and whether or not it can be classified as existing aid, will be the subject of a separate Commission decision[(100)].

(315) According to Article 1(c) of Regulation (EU) 2015/1589, new aid means 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Furthermore, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision[(101)]. In line with the position of the European Courts[(102)], the Commission considers that amending (i.e. prolonging) the duration of an aid scheme or individual aid that had a clear expiry date (i.e. 31 December 2008) is sufficient to make it a new aid irrespective of whether or not other characteristics of the measure were changed.

(316) For the above reasons, the Commission considers that, regardless of whether the compensation awarded to Tirrenia up until end 2008 would be classified as existing aid, the public service compensation paid on the basis of the successive prolongations of the initial Convention should be considered as new aid and the arguments of Tirrenia in EA should thus be rejected.

(317) The Commission notes that neither the Italian authorities nor Tirrenia in EA have argued that the berthing priority is existing aid. The Commission will therefore assess this measure as new aid.

7.1.2. *Illegal prolongation of rescue aid to Tirrenia*

(318) The Commission has already established in recitals 34-40 of the 2010 Decision, that the notified rescue aid measure constituted State aid to Tirrenia within the meaning of Article 107(1) TFEU.

(319) In the 2010 Decision, the Commission declared the notified rescue aid to Tirrenia compatible with the internal market. In accordance with the 2004 Rescue and Restructuring Guidelines, Italy undertook to communicate to the Commission within six months, either a restructuring (or liquidation) plan or

proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.

(320) The first instalment of the guaranteed loan was disbursed to Tirrenia on 28 February 2011 and thus the six-month deadline would expire on 28 August 2011.

(321) Italy did not submit to the Commission a restructuring (or liquidation) plan by this date. Rather, prior to the expiry of the prescribed six months, i.e. on 11 July 2011, the guarantee was called and as of this date Tirrenia became debtor to the State. The amount due by Tirrenia as a result of the guarantee being called was eventually reimbursed to the State on 18 September 2012. Until that date, Tirrenia continued to benefit from the rescue aid measure.

(322) The Italian authorities have neither argued nor demonstrated that the prolongation of the rescue aid would no longer constitute State aid. They have only provided arguments (see section 4.2) for why the measure would have remained compatible even following the expiry of the six-month deadline.

(323) The Commission therefore considers that the extension of the rescue aid beyond the six-month deadline, i.e. from 28 August 2011 until 18 September 2012, also constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU.

7.1.3. *The award of the new Convention bundled with the Tirrenia business branch to CIN including the deferred payment of part of the purchase price by CIN*

(324) In order to conclude on whether the award of the new Convention bundled with the Tirrenia business branch including the deferred payment of part of the purchase price constitutes an advantage to CIN within the meaning of Article 107(1) TFEU, the Commission must assess observance of the Altmark criteria (see recital 299).

7.1.3.1. *Altmark 1*

(325) The Commission recalls that there is no uniform and precise definition of a service that may constitute an SGEI under Union law, either within the meaning of the first Altmark criterion or within the meaning of Article 106(2) TFEU. Paragraph 46 of the SGEI Communication is worded as follows:

> In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation. Where specific Union rules exist, the Member States' discretion is further bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.

(326) National authorities are therefore entitled to take the view that certain services are in the general interest and must be operated by means of public service obligations to ensure that the public interest is protected when market forces do not suffice to guarantee that they are provided at the level or conditions required.

(327) In the field of maritime cabotage, detailed Union rules governing public service obligations have been laid down in the Maritime Cabotage Regulation and, for the purpose of examining potential State aid to undertakings engaged in maritime transport, in the Community guidelines on State aid to maritime transport ('the Maritime Guidelines')[(103)].

(328) Article 4(1) of the Maritime Cabotage Regulation provides:

A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

(329) Article 2(3) of the Maritime Cabotage Regulation sets out that a public service contract may cover:

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

— Additional transport services,

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

— Adjustments of services to actual requirements.

(330) In accordance with section 9 of the Maritime Guidelines, 'public service obligations may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92', i.e. scheduled services to, from and between islands.

(331) It results from established case-law that public service obligations may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone[(104)]. The Communication on interpretation of the Maritime Cabotage Regulation[(105)] confirms that 'it is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services.' Moreover, Article 2(4) of the Maritime Cabotage Regulation defines public service obligations as obligations which the 'shipowner in question, if he were considering his

own commercial interest, would not assume or would not assume to the same extent or under the same conditions'.

(332) In line with the case-law[106], to verify whether there is a real public service need and whether it was necessary and proportional, and hence also whether the first Altmark criterion is met, the Commission will assess:

(1) Whether there was **user demand**;

(2) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);

(3) Whether simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(1) **User demand**

(333) In this case, CIN was entrusted with the provision of mixed services and all-freight services on the twelve lines presented in Table 3. The public service obligations imposed on CIN concern the maritime transport links to be operated, the type and capacity of the vessels assigned to the respective maritime routes operated, the availability of a backup ship to ensure continuity of service, the frequency of service, and the maximum fares charged to users (respectively to island residents and to other passengers) of the service on each of the respective routes.

(334) As described in recital 152, Italy has imposed the public service obligations laid down in the new Convention mainly to (i) ensure the territorial continuity between the mainland and the islands and (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission considers that these indeed can be legitimate public interest objectives.

(335) With respect to the freight-only routes, the Commission recalls that the General Court has already established[107] that in order to be capable of being characterised as a service of general economic interest, the service in question must not necessarily constitute a universal service *stricto sensu*. In effect, the concept of universal service does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory[108] but rather to serve the interests of society as a whole. In addition, it is the Commission's view that Community legislation does not prevent Member States from validly qualifying in the exercise of their discretion certain maritime freight services to and from remote areas as SGEI, provided that the principles laid down by the Maritime Cabotage Regulation are complied with. Nevertheless, the Commission had expressed doubts on whether the operation of freight-only routes may be considered as aiming to satisfy general economic interests within the meaning of Union law.

(336) The Italian authorities have explained that the maritime freight connections under assessment are necessary to provide all kinds of goods to the islands of Sicily and Sardinia. Furthermore, the regular frequency of these freight services throughout the year ensures that also in the low season, when there is less demand from tourists, the inhabitants and companies of these islands remain adequately supplied. In addition, these services also contribute to the economic development of both islands by transporting goods from and to the mainland. In this way, Sardinian or Sicilian companies can for instance sell their products on the mainland. Italy considers that freight-only services are necessary in addition to the mixed services that are also part of the public service contract[109]. In addition, the Italian authorities argue that freight-only services over sea cannot be replaced by air-cargo services. In this respect, the Commission notes[110] that in 2012 the port of Catania processed about 2,7 million tonnes of freight while the airports of Catania, Palermo and Trapani combined only processed 10 309 tonnes. Likewise, in 2012 the port of Cagliari processed more than 12,5 million tonnes of freight while the airports of Alghero, Cagliari and Olbia combined handled only 4 825 tonnes. For these reasons, the Commission concludes that freight-only services can also fulfil legitimate public interest objectives. Pan Med's claim (see recital 253) that the freight-only routes to Sicily and Sardinia cannot constitute genuine SGEI must therefore be rejected.

(337) Before CIN was entrusted with the operation of the maritime links as defined by the new Convention, these routes were operated by Tirrenia (and until 2004[111] also some by Adriatica) on the basis of the initial Conventions. Indeed, the Commission notes that the routes in question have been operated, largely unaltered, for many years i.e. at least since the entry into force of the Initial Convention. The Italian authorities, and in particular the regional authorities concerned, considered that these services were (and continued to be) necessary to meet user demand.

(338) To illustrate the genuine demand from users for the services, Italy provided statistics which show that in 2010, Tirrenia transported 944 225 passengers, 218 779 cars, and more than 2,7 million linear meters of cargo on the twelve public service routes combined during the respective time periods covered by the public service obligations (i.e. not in the high season for three routes). The numbers for 2011 were even slightly higher. This shows that in the two years before CIN was entrusted with its public service obligations, there was a significant aggregate demand for maritime transport services on the routes concerned.

(339) However, in order to establish that there is a real user demand on each of the twelve routes concerned, a more detailed assessment is necessary. For this purpose, Italy provided route-by-route statistics for the period 2007 – 2018. Apart from the total number of passengers or linear meters of cargo transported per year, these statistics allow calculating averages per sailing.

As an illustration, Table 4 shows two such metrics for the years 2010 and 2018. These figures show that throughout these years, each round trip sailing on each of the six (respectively five in 2018) mixed routes concerned carries several hundred passengers. The lower number on the connection with the Tremiti Islands should be seen in light of their very small population and size (i.e. less than 500 inhabitants and about 3 square kilometres in size). On the three routes operated under the public service regime only in the low season, the average number of passengers exceeds 500 per round trip sailing. This illustrates the user demand for these services in the low season. With respect to cargo, the 2010 figures show that on eight of the twelve routes (including the three freight-only routes), the amount of cargo was significant as it exceeded 1 250 linear meters per round trip sailing. In 2018, this threshold was exceeded for seven of the remaining ten routes (including the two freight routes). The Commission recalls that any comparison between the numbers for 2010 and 2018 should take into account the amendment agreement of August 2014 (see recital 103) which abolished some routes and changed the frequency on other routes. In addition, the Commission points out that on the freight-only routes, CIN has been operating with larger vessels than Tirrenia and therefore higher amounts of cargo can be carried than in the past.

TABLE 4

User demand statistics for the years 2010 (operated by Tirrenia) and 2018 (operated by CIN)

	Average number of passengers per sailing[a]		**Average amount of cargo per sailing**[b]	
Mixed service routes:	2010	2018	2010	2018
Napoli – Palermo (low season)	606	583	1 418	1 794
Genova – Porto Torres (low season)	714	678	1 381	1 380
Genova – Olbia – Arbatax	531	704	514	779
Civitavecchia – Olbia (low season)	1 094	617	2 043	1 526

a Total number of passengers divided by the total number of round trip sailings in the period.

b Total amount of cargo (in linear meters) divided by the total number of round trip sailings in the period.

Napoli – Cagliari	260	607	1 533	1 773
Palermo – Cagliari	489	998	1 489	1 284
Trapani – Cagliari	305	abolished	475	abolished
Civitavecchia – Cagliari – Arbatax	427	891	847	1 051
Termoli – Tremiti Islands	146	204	65	31
	Average number of passengers per sailing		Average amount of cargo per sailing	
Freight service routes:	2010	2018	2010	2018
Livorno - Cagliari	3	2	2 046	2 925
Napoli – Cagliari	3	abolished	1 339	abolished
Ravenna – Catania	14	11	2 594	6 498

a Total number of passengers divided by the total number of round trip sailings in the period.

b Total amount of cargo (in linear meters) divided by the total number of round trip sailings in the period.

(340) To further demonstrate that user demand remained present when CIN started operating on the basis of the new Convention, Italy also provided aggregate statistics until end 2018. The figures in Table 5 show that from 2013, respectively 2014, onwards CIN transported more passengers, cars and cargo than Tirrenia had done in 2010, respectively 2011 (see recital 338). This confirms that user demand remained present and even increased significantly since CIN started operating the public service. Finally, an analysis of the route-by-route statistics for each year until end 2018 did not provide any indications that the user demand on specific routes would have disappeared. As an illustration, Table 4 includes the route-by-route statistics for 2018. For reasons of brevity, the Commission does not report the figures for the other years during which CIN operated the service.

TABLE 5

Statistics for the years 2012-2018 (mixed and freight public service routes operated by CIN)

	# of passengers transported	**# of cars transported**	**Cargo transported (in linear meters)**
2012 (July-December)	473 614	118 322	1 132 682
2013	952 323	236 329	2 764 507
2014	1 026 140	261 201	3 039 598
2015	1 112 603	285 853	3 696 237
2016	1 256 403	313 555	3 312 393
2017	1 160 782	279 827	3 604 775
2018	1 071 931	251 300	3 607 283

(341) The Commission considers that the above statistics (see recitals 338-340) clearly demonstrate that there is a genuine demand for passenger and freight services on each of the twelve public service routes in question. It can therefore be concluded that these services address real public needs and meet a genuine user demand.

(2) **Existence of a market failure**

(342) According to paragraph 48 of the SGEI Communication, 'it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions'[(112)]. Therefore, the Commission must examine whether the service would be inadequate if its provision were left to the market forces alone in the light of the public service requirements imposed by the Member State by virtue of the new Convention. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

(343) The Commission notes that during the time period leading up to the signature of the new Convention with CIN, other operators offered ferry services on some routes subject to the new Convention albeit not necessarily throughout the year and with the same frequency. On the basis of the competitive situation leading up to the moment of entrustment on 18 July 2012 (as described

in recital 34) and the comments from interested parties (see section 5), the Commission will assess for each of the routes concerned whether the services provided by other operators were equivalent to those that CIN has to provide under the new Convention.

(344) Although the new Convention imposes specific public service obligations in terms of fares to be charged (including reduced fares for the island residents), Italy has not justified the necessity of the public service by arguing that CIN needs to maintain fares on the routes in question at a level lower than those charged by the other operators. The Commission has therefore not carried out a comparative analysis of the fares charged by all operators on the routes in question. In the course of the investigation Italy has rather claimed that, to the extent other operators provide ferry services on the routes operated by CIN under the public service regime, these competing services would not observe in full the public service obligations laid down by the new Convention. In particular, they would differ in terms of the continuity and frequency throughout the year, would not be equivalent (in terms of ports or type of service, e.g. freight-only instead of mixed) or would not be of the same quality. The Commission will therefore focus on possible differences in terms of continuity, regularity, capacity and quality (see recital 329).

(345) The Commission first observes that up to the moment of CIN's entrustment, no other operators provided mixed services on five of the nine mixed services routes covered by the new Convention. In particular:

— Civitavecchia – Cagliari – Arbatax: Tirrenia was the only operator offering a daily mixed service on this route. The Commission neither received nor found evidence for Pan Med's claim (see footnote 87) that Moby would operate a weekly connection between Civitavecchia and Cagliari. Even if Moby was indeed active on this route, *quod non*, then its offer would have been insufficient to meet the public service need with respect to regularity (i.e. a weekly service is not equivalent to a daily connection) and would not have met the requirement to provide a connection to Arbatax. Therefore, the Commission concludes that Italy did not make a manifest error by considering there was a market failure on this mixed services route.

— Napoli – Cagliari: Tirrenia was the only operator offering a mixed service on this route. In its reply to the 2012 Decision (see footnote 87), Pan Med indicated that Grimaldi was operating a freight service between Salerno and Cagliari. The Commission notes however that, regardless of possible other differences with the specific requirements applicable to CIN under the new Convention, a freight-only service cannot fulfil the public service need in relation to passengers and cars. Therefore, Italy did not make a manifest error by considering there was a market failure on this mixed services route.

— Palermo – Cagliari: Tirrenia was the only operator offering a mixed service on this route. In its reply to the 2012 Decision (see footnote 87), Pan Med indicated that Grimaldi was operating a freight service between these ports. The Commission notes however that, regardless of possible other differences

with the specific requirements applicable to CIN under the new Convention, a freight-only service cannot fulfil the public service need in relation to passengers and cars. Therefore, Italy did not make a manifest error by considering there was a market failure on this mixed services route.

— Trapani – Cagliari: Tirrenia was the only operator offering a mixed service on this route. In its reply to the 2012 Decision (see footnote 87), Pan Med indicated that Grimaldi was operating a freight service between these ports. The Commission notes however that, regardless of possible other differences with the specific requirements applicable to CIN under the new Convention, a freight-only service cannot fulfil the public service need in relation to passengers and cars. Therefore, Italy did not make a manifest error by considering there was a market failure on this mixed services route.

— Termoli – Tremiti Islands: Tirrenia was the only operator on this route. Therefore, the Commission concludes that Italy did not make a manifest error by considering there was a market failure on this mixed services route.

(346) On the remaining four mixed services routes covered by the new Convention, also other operators than Tirrenia were offering mixed services. Nevertheless, the Commission considers that Italy did not make a manifest error by considering there was a market failure on these four routes. In particular, the services provided by the other operators do not satisfy in full the public service need identified by Italy in the new Convention for the reasons set out below:

— Genova – Porto Torres: The only operator that provided services on this route throughout the year during the relevant time period, Grandi Navi Veloci (see recitals 266 and 267), only guaranteed three weekly departures in the low season. However, the new Convention requires that CIN operates a daily service (over-night) from both ports. The offer by Grandi Navi Veloci was therefore insufficient to meet the public service need with respect to regularity in the low season. The Commission recalls that public service compensation is only awarded to CIN for the operation of this route during the low season, i.e. when the market failure arises. Pan Med's reference (see recital 253) to the presence of Grandi Navi Veloci on this route can therefore not be accepted as proof that the market offer was sufficient to meet the public service needs.

— Civitavecchia – Olbia: The only operator that provided services on this route throughout the year during at least part of the relevant time period, SNAV, in 2008 only guaranteed three weekly departures in the low season. However, the new Convention requires that CIN operates a daily service (over-night) from both ports in the low season. While SNAV then seems to have increased the frequency of its services during the low season, it stopped operating on this route after May 2011 and its successor Grandi Navi Veloci decided to only keep operating this service during the high season. The offer by SNAV and the presence of some other operators in the high season (see recital 34) was therefore insufficient to meet the public service need with respect to regularity and continuity of the service in the low season. Grimaldi's reference (see recital 274) to Moby's presence on this route cannot alter this conclusion since

Moby only operated during the high season. The Commission recalls that public service compensation is only awarded to CIN for the operation of this route during the low season, i.e. when the market failure arises.

— Napoli – Palermo: The only operator that provided services on this route throughout the year during the relevant time period, SNAV (in some years in collaboration with Grandi Navi Veloci, see recital 266) provided daily services with evening departures from both ports in both the high and low season. In principle, this frequency corresponds to what is required under the new Convention. However, data submitted by the Italian authorities show a significant difference between the continuity provided by SNAV and the then public service provider Tirrenia. In particular, in the period 2009-2012 SNAV cancelled 76 sailings on this route while Tirrenia only cancelled 19 sailings (i.e. four times less). Furthermore, of these 76 cancellations by SNAV, 19 were due to bank holidays and the remaining 57 due to adverse weather conditions. Despite having almost the same departure time, Tirrenia only cancelled five sailings (or eleven times less than SNAV) due to adverse weather conditions. The remaining cancellations by Tirrenia were due to *force majeure*, i.e. seven were due to staff going on strike and another seven as a result of technical issues. Furthermore, Italy has argued that SNAV would not meet the quality requirements set by the new Convention since it operated on this route with vessels dating from 1973, 1974, 1980 and in only one case 1989. Tirrenia, and later CIN, however used more recent ships (built between 1999 and 2000). When GNV started operating this route in 2011 (in collaboration with SNAV), it used vessels dating from 1974, 1978, and two from 1989 (see recital 267). The Commission considers that, on the basis of these elements, Italy rightly concluded that SNAV could not sufficiently ensure the continuity, regularity and quality of the service on this route and therefore did not make a manifest error by entrusting the operation of this route to CIN. The Commission recalls that public service compensation is only awarded to CIN for the operation of this route during the low season (when there is the highest likelihood of adverse weather conditions) but that CIN also operates with the same frequency in the high season without such compensation (but still subject to tariff constraints). Pan Med's reference (see recital 253) to the presence of SNAV (together with Grandi Navi Veloci since 2011) on this route can therefore not be accepted as proof that the market offer was sufficient to meet the public service needs of continuity, regularity and quality. Finally, Pan Med's claims that it planned to operate on the route Gaeta – Termini Imerese (see recital 260) which would be equivalent to Napoli – Palermo cannot put this conclusion into doubt. In particular, Pan Med referred to its plans in a letter of April 2013 and the evidence it submitted shows that it only took steps to request the necessary authorisations to operate such route several months after CIN was entrusted (i.e. in July 2012) with the SGEI. Pan Med did not submit that it actually started operating the route Gaeta – Termini Imerese. In any event, at the moment of entrustment, Italy did not make a manifest error when considering there was market failure on the route Napoli – Palermo since

Pan Med had yet not filed a request to start operating and because the offer provided by SNAV and Grandi Navi Veloci did not meet the public service needs of continuity, regularity and quality.

— Genova – Olbia – Arbatax: During the relevant time period, Moby operated between Genova and Olbia during only part of the year (in most years from mid-March until mid-October). Pan Med's claim that Moby operated this connection all year round (see footnote 87) is not supported by the evidence. Therefore, also Grimaldi's reference (see recital 274) to Moby's presence on this route cannot be taken as evidence for a lack of market failure. Likewise, GNV (see recital 266) was only operating between Genova and Olbia in the high season. However, the new Convention requires that CIN operates between Genova and Olbia at least three times per week all year long. Furthermore, the new Convention also requires a connection to Arbatax (twice per week) which none of the other operators provide. The offer by Moby and GNV was therefore insufficient to meet the public service need especially in terms of continuity and regularity.

(347) On two of the three freight routes, no other operator provided freight services while on the remaining freight route the services provided by another operator do not satisfy in full the requirements laid down in the new Convention. In particular:

— Livorno – Cagliari[(113)]: During the relevant time period other operators (e.g. Moby as pointed out by Pan Med, see recital 253) on this route only offered one departure per week. However, the new Convention requires that CIN operates a freight service between these ports at least five times a week. The offer by other operators was therefore insufficient to meet the public service need in terms of regularity.

— Napoli – Cagliari: Tirrenia was the only operator offering a freight service on this route. In its reply to the 2012 Decision, Pan Med indicated that Grimaldi was operating a freight service between Salerno and Cagliari. While the ports of Napoli and Salerno are only about 50 kilometres apart by road, the Italian authorities have argued they cannot be considered interchangeable. Italy points out that the CIPE Directive, which is part of the legal basis for the public service compensation under assessment, indicated that one of the objectives of the public service agreements (including the new Convention with CIN) is to provide 'connections capable of reducing the burden of motor vehicle traffic on the already saturated main roads of the peninsular part of the country'. According to the Italian authorities, a freight service operated from Napoli contributes to this objective since the roads between Napoli and Salerno are saturated. Against this background, the Commission also notes that it has referred Italy to the Court of Justice for failure to comply with Directive 2008/50/EC on air quality[(114)]. Reducing road congestion can certainly contribute to improving air quality. Regardless of any possible other differences with the specific requirements applicable to CIN under the new Convention, the Commission considers that, on the basis of these elements,

Italy could conclude that the freight services operated from Salerno were not equivalent to those required under the new Convention and therefore did not make a manifest error by considering there was a market failure on the freight route Napoli – Cagliari.

— Ravenna – Catania: up to the moment of CIN's entrustment, Tirrenia was the only operator offering a freight service on this route. In its reply to the 2012 Decision, Pan Med indicated that Grimaldi started operating a freight service between these ports since the end of 2012. Furthermore, Pan Med indicated (see recital 260) that it planned to operate on the route Augusta – Ravenna which would be equivalent to Catania – Ravenna. Pan Med referred to its plans in a letter of April 2013 and the evidence it submitted shows that it only took steps to request the necessary authorisations to operate such route in November 2012. Pan Med did not prove that it actually started operating the route Augusta – Ravenna. In any event, since at the moment of the entrustment no other operators were present, Italy did not make a manifest error by considering there was a market failure on this freight route[(115)].

(348) In light of the above, the Commission concludes that, at the moment of entrustment, market forces alone were insufficient to meet the public service needs. Indeed, on a number of routes CIN was the only operator while on the other routes the services provided by other operators were not equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service needs identified by Italy in the new Convention.

(3) **Least harmful approach**

(349) The Commission notes that the Italian authorities have chosen to conclude a public service contract with one operator (CIN) rather than to impose public service obligations on all operators interested in serving the routes at stake. Based on the information provided by Italy, the Commission accepts that the user demand (as described above, see recitals 333-341) could not have been met by imposing public service obligations. In particular, on several routes CIN is the only operator (see e.g. recital 345) and where this is not the case, the offer provided by the other operators does not meet (all) the requirements of regularity, continuity and quality. Furthermore, the operation of most (if not all) routes, especially in the low season, is loss-making so that without public service compensation they would most likely not be operated at all. Ecorys drew a similar conclusion in its report (see recital 98). In addition, the Commission takes note of Italy's argument that the choice for a public service contract was also necessary in view of the privatisation of Tirrenia. More specifically, Italy argues that tendering out Tirrenia's assets together with a new public service contract allowed to (i) ensure continuity of the maritime public service, (ii) maximise value for the State, and (iii) safeguard employment. It is for these reasons that the Commission agreed (see recital 114) that Italy would tender out the Tirrenia business branch together with the

new Convention. In doing so, the Commission also accepted, and reiterates in this Decision, that Italy could not rely on public service obligations that apply to all operators but that it would rather conclude a public service contract with CIN only.

Conclusion

(350) On the basis of the above assessment, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to CIN as SGEI. The doubts expressed by the Commission in the 2012 Decision are hence dispelled.

(351) In order to conclude that Altmark 1 is complied with, the Commission must still check whether CIN was entrusted with public service obligations which were clearly defined. In this regard, the Commission notes that the public service obligations are clearly described in the new Convention and its annexes (which include for instance ship specifications for each route). Likewise, the rules regulating the compensation are detailed in the Convention, the 2009 Law and the CIPE Directive. The new Convention also has a clear duration (eight years), identifies CIN as the public service operator and contains the arrangements for avoiding and recovering any overcompensation (see also recital 365). Therefore, the Commission concludes that the first Altmark criterion is observed.

Berthing priority

(352) Article 19-*ter* paragraph 21 of the 2009 Law clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Tirrenia. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are specific time scheduling obligations in the new Convention for the departure of public service routes, the berthing priority helps to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations. This berthing priority was transferred to CIN when it acquired the Tirrenia business branch. Against this background, the Commission considers that this measure is awarded to enable CIN to perform their public service obligations which constitute genuine SGEI (see recital 350). Furthermore, the Italian authorities have confirmed that the berthing priority is only applicable to services provided under the public service regime (and for instance not when CIN operates routes on a commercial basis during the high season). Therefore, the berthing priority also complies with the first condition of the Altmark judgment.

7.1.3.2. *Altmark 2*

(353) The Commission recalls that in the 2012 Decision (see its recital 205), it had taken the preliminary view that the second criterion of the Altmark judgment is observed.

(354) Against this background, the Commission notes that the parameters at the basis of the calculation of the compensation have been established in advance and observe the transparency requirements in line with the second Altmark criterion.

(355) More specifically, the parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the new Convention (and annexes thereto) while the maximum compensation amounts are laid down in the 2009 Law. The method of calculation of the compensation, including for instance the cost elements taken into account, are detailed in the CIPE Directive. Since the berthing priority does not entail financial compensation for CIN, the Commission considers that this measure complies with Altmark 2.

(356) Therefore the Commission concludes that the second condition of the Altmark judgment is observed.

7.1.3.3. *Altmark 3*

(357) According to the third Altmark criterion, the compensation received for the discharge of the SGEI cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(358) However, the Altmark ruling does not provide a precise definition of the reasonable profit. According to the SGEI Communication, reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.

(359) In the 2012 Decision, the Commission expressed doubts as to the proportionality of the compensation paid to CIN. In particular, the Commission took the preliminary view that the 6,5 % risk premium did not reflect an appropriate level of risk because *prima facie* CIN did not seem to assume the risks normally borne in the operation of such services. More specifically, the cost elements taken into account for the purpose of calculation of the compensation include all costs involved in the provision of the service and variations in e.g. fuel prices have been taken into account.

As a result, the Commission considered at that stage that CIN may have been overcompensated.

(360) The Commission notes that certain aspects of the compensation method as laid down in the new Convention, indeed seem to reduce the commercial risk incurred by CIN. In particular, the maximum fares that CIN can charge are adjusted annually to take into account inflation and reflect variations in fuel costs. Moreover, the new Convention contains certain clauses (see recital 107) that aim at maintaining the economic-financial equilibrium of the public service. In particular, in case the public service compensation would be insufficient to cover the cost of the services entrusted by the new Convention, these clauses allow to revise (i) the scope of these services, (ii) the way the services are delivered (e.g. type of ships), or (iii) the maximum fares.

(361) However, the abovementioned clauses are subject to a number of restrictions. In particular, under Article 8 of the new Convention, the economic-financial equilibrium of the public service is only reviewed every three years. If this review shows that the compensation is insufficient to cover the public service cost, then CIN and the Italian authorities can only agree to make changes for the next three-year period. In case the revenues or costs of the public service show unforeseeable structural differences more than 3 % higher or lower than the values laid down in the new Convention, its Article 9 allows the parties to request (subject to a number of conditions) a revision of the economic-financial equilibrium. Under both Articles, such changes (if any) are the outcome of a negotiation procedure and until an agreement is reached, CIN must continue to operate the public service unaltered. As a result, CIN remains partially exposed to the risk that the compensation is insufficient to cover the costs of running the service. While Articles 8 and 9 of the new Convention can be used to restore the economic-financial equilibrium, this is only done on a forward-looking basis and there is no retroactive correction possible.

(362) As explained above (see recital 42), the CIPE Directive foresees that the risk premium of 6,5 % would be used to determine the return on capital using the WACC formula. However, in the course of the formal investigation (see recital 180), Italy has clarified that, because the amount of compensation is capped by the 2009 Law, the decision was taken to simplify the calculation by applying the 6,5 % as a flat rate return on capital. The Italian authorities also demonstrated that applying the full methodology as laid down in the CIPE Directive might have resulted, at least in some years, in a return on capital that exceeds 6,5 %. For this reason, Italy considers that their simplified approach is conservative and does not allow for higher compensation for CIN than what was established under the CIPE Directive.

(363) Against the above background, the Commission has compared the return on capital employed of 6,5 % that has been applied to CIN with the median return on capital employed generated by a benchmark group in 2011 (the year before

CIN's entrustment). The benchmark group consists of selected ferry operators that offered maritime connections within Italy or between Italy and other Member States[116]. The analysis shows that the return on capital employed applied to CIN is just below the median return generated by the benchmark group. This comparison illustrates that in the year before CIN's entrustment a 6,5 % return on capital was not unreasonable.

(364) Most importantly, the Commission notes that regardless of the amount that CIN would be entitled to on the basis of the abovementioned methodology (including the return on capital), CIN can never receive more than the maximum amount set by the 2009 Law (i.e. EUR 72 685 642). This amount, which was set in 2009 and never adjusted for inflation, was most likely conservative as it was almost 10 % lower of what Tirrenia needed to operate the service in that same year[117]. The actual figures for the period 2012-2018 in Table 6 show that in all but one year (2015), the public service compensation was insufficient to cover the net cost of the service including the 6,5 % return on capital. In line with paragraph 47 of the 2011 SGEI Framework, the Commission assesses whether there was overcompensation over the whole duration of the contract. For the period 2012-2018, CIN received approximately EUR 47 million less than the amount as calculated using the methodology including the 6,5 % return. This figure confirms that the review clauses of the new Convention do not protect CIN from all the risks related to the operation of the public service. Indeed, while the perimeter of the public service was modified in August 2014 (see recital 103) following a request from CIN on the basis of Article 9 of the new Convention, this did not affect the undercompensation incurred up to that moment. Even if results improved in some of the following years, CIN's realized return on capital for the period as a whole (up to 2018) was hence only about 3,4 %[118] instead of the 6,5 % initially foreseen by Italy.

TABLE 6

Net cost of the public service operated by CIN for the period 2012-2018

(EUR)

CIN public service remit	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**Grand total**
Total revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
– Total costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
– Amortizations	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

= Net cost of public service	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Return on capital (6,5%)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
= Eligible for compensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Actual compensation	32 707 233	72 685 642	72 685 642	72 685 642	72 685 642	72 685 642	72 685 642	468 821 089
= Over/ under-compensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	– 47 450 022

(365) The Commission further notes positively that the new Convention requires CIN to send its management accounts (sub-divided per route and certified by an independent auditor) every year to the Ministry of Transport to enable the latter to check if there was any overcompensation. This provides an additional safeguard to ensure that CIN cannot benefit from any overcompensation. Since these accounts also distinguish between the routes operated under the public service regime and those operated on a commercial basis, cross-subsidisation of the latter activities is excluded. The Italian authorities also submitted these management accounts for the period 2012-2018 thereby enabling the Commission to make the calculations in Table 6.

(366) In light of the above, the Commission concludes that the public service compensation granted to CIN does not exceed what is necessary to cover the costs incurred in the discharge its public service obligations, taking into account the relevant receipts and a reasonable profit. More specifically, the Commission considers that the risk premium of 6,5 % foreseen by the CIPE Directive, has to be assessed in combination with the maximum compensation amount laid down in the 2009 Law. With this in mind, the return on capital that CIN could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the new Convention. The Commission's doubts concerning compliance with the third condition of the Altmark judgment are therefore dispelled.

(367) With respect to the berthing priority and any possible overcompensation that might result from it, the Commission notes the following. Italy has argued that any possible monetary advantage from the berthing priority would be limited (see above recital 191). As a result, also the risk of overcompensation stemming from this measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. The Commission's analysis above (see recital 364) confirmed that in the period 2012-2018 CIN did not receive overcompensation. Therefore, the Commission concludes that also the berthing priority complies with the third Altmark criterion.

7.1.3.4. *Altmark 4*

(368) The fourth Altmark criterion is fulfilled if the recipient of the compensation for the operation of an SGEI has been chosen following a tender procedure which allows for the selection of the tenderer capable of providing the SGEI at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

(369) According to paragraph 63 of the SGEI Communication, the simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council[(119)] ('Directive 2004/17/EC') and Directive 2004/18/EC of the European Parliament and of the Council[(120)] ('Directive 2004/18/EC').

(370) Furthermore, paragraph 65 of the SGEI Communication notes that based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at 'the least cost to the community'.

(371) The Commission observes that in the present case, the tender procedure took place before the entry into force of Directive 2014/24/EU of the European Parliament and of the Council[(121)] (which applies to public contracts awarded for the operation of maritime transport services) and Directive 2014/25/EU of the European Parliament and of the Council[(122)]. At that time, Directive 2004/17/EC and Directive 2004/18/EC were applicable. However, Directive 2004/17/EC does not apply to maritime transport services, such as those provided by Tirrenia. Indeed, Article 5 of Directive 2004/17/EC makes clear that only transport services by railway, automated systems, tramway, trolley bus, bus or cable are included in its scope.

(372) Public contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport fall instead within the scope of Directive 2004/18/EC on the basis of its recital 20. However, water transport services are also listed in Annex II B to that Directive which

implies[123] that they are only subject to its Articles 23 and 35(4). This means that, under Directive 2004/18/EC, a public contract for maritime transport services is subject only to the obligations concerning technical specifications (Article 23) and to the obligation to publish a contract award notice (after the contract has been awarded and, therefore, at the end, not at the beginning, of the award procedure: Article 35(4)). All the other rules dictated by Directive 2004/18/EC – including the provisions on the content of notices to be published (Article 36(1)) and the provisions on selection criteria (Articles 45 to 52) – are not applicable to public contracts for maritime transport services.

(373) Furthermore, Directive 2004/18/EC does in any case not apply to service concessions as defined in its Article 1(4)[124]. The Commission notes that service concessions which have certain cross-border interest nevertheless remain subject to the general Treaty principles of transparency and equal treatment.

(374) On the basis of the above, the Commission concludes that Directive 2004/18/EC can only apply in case of a public contract but not when it concerns a service concession. In addition, since the present case concerns water transport services, only some of that Directive's requirements would be applicable. Against this background, the Commission considers that it cannot rely solely on compliance with the Public Procurement Directives to demonstrate that compliance with the fourth Altmark criterion. For this reason, the Commission assesses below whether the tender procedure used by Italy was competitive, transparent, and non-discriminatory. To make this assessment, the Commission will rely on the relevant guidance set out in its Notion of Aid Communication[125] (in particular in its paragraphs 89 *et seq.*).

Competitive and transparent nature of the tender

(375) Paragraph 90 of the Notion of Aid Communication specifies that a tender procedure has to be competitive[126] to allow all interested and qualified bidders to participate in the process. Furthermore, according to paragraph 91 of that Communication, the procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. That paragraph also emphasises that accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure and indicates that a tender has to be sufficiently well-publicised, so that all potential bidders can take note of it.

(376) As a preliminary remark, the Commission points out that while Italian law[127] gave the Extraordinary Commissioner the possibility to engage in private negotiations with potential acquirers, this possibility was not availed of in the present case. Indeed, in this case an open tender was preferred so as to ensure that the Tirrenia business branch would be sold at market price and therefore would maximise the proceeds from the sale. Since no private negotiations took place for the privatisation of the Tirrenia business branch, the doubts

expressed by the Commission in the 2011 Decision concerning this possibility are therefore dispelled.

(377) In the present case, the tender procedure was launched by means of the publication of a call for expressions of interest for the acquisition of the Tirrenia business branch in one international and several national newspapers and on selected specialised websites (see recital 70). This call invited 'anyone who can guarantee the continuity of the maritime transport service' to express their interest and did not impose any further conditions. Potential interested parties were also given sufficient time (i.e. 35 days) to express their interest allowing them to participate in the further process. In the following due diligence stage of this process, qualified bidders were given four months to assess all relevant information in order to be able to determine if and how much they wanted to bid for the Tirrenia business branch.

(378) The Commission notes that the call for expressions of interest made clear that the Tirrenia business branch would be sold under the specific rules of the Marzano procedure with the express purpose of ensuring the continuity of the maritime transport service under the public service regime. Furthermore, in the call reference was made to Article 19-*ter* of Decree Law No 135 of 25 September 2009, which specifies that on completion of the tender procedure a new convention would be concluded with Tirrenia's buyer. That Article also indicates that the duration of such new convention would be not more than eight years and describes what it should contain. In addition, that same Article fixes the maximum amount of compensation for Tirrenia at EUR 72 685 642 per year for the entire duration of the new convention. Finally, Article 19-*ter* also specifies that the acquirer of Tirrenia would keep the berthing priority on the public service routes.

(379) As pointed out in the 2011 Decision, the call for expressions of interest did not contain specific details about the exact assets for sale, about the award criterion and about the timing of the next steps of the tender procedure. The Commission considers that the tender process as a whole was nevertheless sufficiently transparent for the reasons set out in the following recitals.

(380) First, the call for expressions of interest mentioned that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. This was the only selection criterion that Italy applied to determine whether or not interested parties would be allowed to participate in the tender procedure. While the call did not specify how bidders could prove they met this requirement, by default this meant that any appropriate means of evidence could be used[128]. The Commission has not received any information showing that one or more of the five excluded interested parties had in fact provided adequate evidence of possessing financial means sufficient to ensure the continuity of the service as required by the call for expressions of interest. The Commission considers that this selection criterion was clear to all interested bidders and was also justified in light of the objective pursued.

(381) Second, as explained in recital 378, the reference to Decree Law No 135 of 25 September 2009 made clear to interested parties that a new convention (with a maximum duration of eight years) would be concluded upon completion of the tender procedure and that the annual amount of public service compensation had been set at maximum EUR 72 685 642 per year. In addition, the call for expressions of interest indicated that the objective was to sell the business branch dedicated to the provision of the public service. Furthermore, as confirmed by Italy, all relevant information as regards the scope of the sale, including the draft convention to be concluded between the buyer and the State, was made available to the eleven parties who eventually decided to participate in the due diligence phase. This allowed these parties to decide whether or not to bid and if so how much to bid. The Commission points out that it is normal practice, in sales procedures between private operators, that commercially sensitive information is only made available in the due diligence phase. For the same reason, the interested parties had to sign confidentiality agreements before they were given access to the relevant documentation (see recital 71). On this basis, the Commission considers that it was sufficiently clear from the call for expressions of interest[(129)] that the sale concerned the Tirrenia business branch bundled with a new convention. After having expressed their interest, parties were given access to all necessary information to decide on a possible bid.

(382) Third, with respect to the timing of the subsequent phases of the tender procedure the Commission notes the following. The interested bidders who met the only selection criterion were invited by letter of 10 November 2010 to participate in the due diligence. The relevant details on the concrete next steps of the procedure, especially the timeline of the procedure and the criteria for admission to the second due diligence phase, were then provided to the remaining interested bidders in the Extraordinary Commissioner's letter of 2 February 2011. The Commission considers that the absence of this information from the call for expressions of interest[(130)] is unlikely to have discouraged potential bidders from expressing their interest.

(383) Fourth, the Commission observes that on the basis of the call 21 parties expressed their interest to acquire the Tirrenia business branch. Those 21 parties included national, European, and non-European entities among which some of Italy's leading ferry operators (e.g. Grandi Navi Veloci, Moby). The Commission considers that this confirms that all potential bidders were given sufficient opportunity to express their interest to participate in the tender procedure. In this context, the Commission points out that interested parties did not have to follow burdensome procedures and would not have had to incur significant costs to express their interest. It was sufficient that they sent a letter in which they demonstrated their ability to guarantee the continuity of the maritime transport service. The sixteen parties who met this selection criterion were then invited to the due diligence phase and eleven of them decided to

take part in it. It was only after this phase that the parties had to decide if they wanted to make a bid or not and if so how high their bid would be.

(384) Finally, the Commission noted in the 2012 Decision that it was uncertain whether all potential bidders had been aware at the early phases of the tender procedure of the possibility to defer payment of part of the purchase price over several years with no interests applicable. This possibility was not mentioned but also not excluded in the call for expressions of interest[131]. On this basis, CIN made a bid that included the staggered payment of almost half the purchase price. The Commission first notes that since the tender included a public service contract with a duration of eight years, the deferment of part of the payment over the lifetime of that contract was not unusual. Indeed, in case of concession contracts, it is common that the concession fee is paid in instalments instead of entirely upfront. In addition, the Commission notes that the real value of CIN's offer, obtained by discounting the deferred payments at their value at the moment of the sale, is only about 4 % lower than in case the full price had been paid upfront. The Commission considers that this relatively small difference is unlikely to have affected parties' willingness to express interest. In this context, it should be recalled that the value of the Tirrenia business branch (including the new Convention) was not known when parties had to express their interest, so knowledge of the deferral option at that stage is unlikely to have affected the decision to participate in the tender procedure. Furthermore, the Commission points out that CIN's binding offer (including the partial deferred payment) was made available in the data room and all other bidders were explicitly invited to make a better offer. Despite being given sixteen days to do so and regardless of the possibility to also include deferred payment in their offers, none of the other bidders came forward. For these reasons, the Commission concludes that the possibility to defer payment of (part of) the purchase price cannot be considered as having negatively affected the competitiveness or the transparency of the tender process.

(385) On the basis of the above, the Commission considers that, taken as a whole, the tender procedure was competitive and transparent. In particular, the intention of Tirrenia to divest the public service business (i.e. the Tirrenia business branch) and to conclude a new convention with a duration of eight years with the winning tenderer was made available widely in a way reaching all possible bidders in the relevant regional or international market. Furthermore, the Commission takes into account that potential bidders could easily express their interest and did not have to commit themselves to anything at that stage. Provided that they could show they fulfilled the sole selection criterion, these parties were then given all the necessary information and time to allow them to decide if and how much they wanted to bid for the Tirrenia business branch. For these reasons, the Commission considers that its doubts that the tender procedure was not sufficiently transparent due to possible deficiencies in the call for expressions of interest are dispelled.

Non-discriminatory nature of the tender and highest price as criterion

(386) Paragraph 92 of the Notion of Aid Communication highlights that non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. Furthermore, that paragraph specifies that to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. Finally, according to paragraph 95 of the Notion of Aid Communication, when public bodies sell assets, the only relevant criterion for selecting the buyer should be the highest price[(132)], also taking into account the requested contractual arrangements (e.g. the vendor's sales guarantee).

(387) As indicated above (see recital 380), the call for expressions of interest only contained one selection condition namely that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. Of the 21 parties who expressed an interest, five were excluded as they were found not to be able to fulfil this condition (see also footnote 34). The Commission considers that the only applicable selection criterion was objective and had been made sufficiently clear to all interested parties in the call for expressions of interest.

(388) The sixteen interested bidders that fulfilled the selection condition were then invited to the due diligence phase but five of these bidders indicated they were no longer interested. During the due diligence phase, which took four months, the eleven remaining parties were given access to a data room containing all relevant information (see recital 72) allowing them to assess the business branch and the draft new Convention put up for sale. All bidders hence received the same information and were treated equally at all times.

(389) On 2 February 2011, the Extraordinary Commissioner sent the eleven remaining interested bidders a letter in which the procedure and requirements to make a bid were detailed. In particular, that letter clearly laid down the conditions to the sale: drawing up a business plan for the discharging of the public service obligations as defined in the draft convention and providing the necessary guarantees to prove the financial robustness of the bidder. Italy has confirmed that in case more than one eligible bid was received, the only award criterion would be the highest price. Indeed, the Commission notes that on 29 April 2011, the Extraordinary Commissioner solicited improved offers from the other interested parties precisely with the aim of achieving the best possible financial return from the sale.

(390) The Commission's doubts in the 2011 Decision that Decree 134/2008 would allow awarding the tender on the basis of other criteria are therefore resolved. All parties were correctly and equally informed throughout the various steps of the tender procedure enabling them to make a bid with full knowledge of the procedure and requirements. The Commission also considers that the award criterion allows for an objective comparison and assessment of the tenders.

The deferred payment of part of the purchase price by CIN

(391) The Commission noted in the 2012 Decision that the actual value[133] of the purchase price offered by CIN is below the market value set by the expert appointed by the competent Ministry. However, in the *Land Burgenland* case, the Court of Justice has ruled that where a public authority proceeds to sell an undertaking belonging to it by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest (binding and credible) offer and that only the price is considered, without the necessity to resort to other valuation methods in order to check the market price, such as independent studies[134]. Furthermore, even the highest bid submitted in a tender procedure which is unlawful on account of the presence of unlawful conditions can nevertheless correspond to the market price where the deficiencies of the conditions of the call for tenders did not affect the amount of that bid by pushing it lower[135].

(392) The Commission notes that since in the present case, the price paid by CIN is the outcome of an open, transparent and non-discriminatory tender procedure, this price can be presumed to be equal to the market price. It is therefore not necessary to compare this price with the valuations determined by the independent experts appointed by respectively Italy and the Commission. Furthermore, the Commission agrees with Italy (see recital 176) that the independent experts necessarily had to make certain assumptions so that the resulting valuations should in any case be interpreted carefully. Finally, as noted by CIN (see recital 236) at least one potential bidder for the Tirrenia business branch indicated that the price set by the independent expert appointed by Italy was too high. While this evidence is anecdotal, it confirms that expert valuations may not always reflect market value as determined by market operators through a tender.

(393) For the sake of completeness, the Commission considers that there is also an economic rationale to the deferred payment. Indeed, as pointed out by CIN (see recital 240), the deferred payment is correlated with the nature of the subject of the sale namely a business branch for which the effective value depends (as confirmed by Banca Profilo, see section 2.3.3.4 and recital 240) on actual payment, over a period of eight years, of the compensation amounts stipulated in the new Convention. The deferred payment (of part of the purchase price) can therefore also be seen as a logical consequence of the nature of the assets (in particular the public service contract and the related compensation) being tendered out.

(394) The Commission concludes on the basis of the above that its doubts concerning the deferral of part of the purchase price are dispelled.

Ensuring that the services are provided at the least cost to the community

(395) In this case, the new Convention bundled with the Tirrenia business branch and subject to certain conditions as regards the workforce level, rather than

only the new Convention itself, has been tendered out. In the 2012 Decision, the Commission took the preliminary position that, to the extent bidders were already adequately endowed with vessels and crews, they would have incurred lower costs had they not been obliged to take over part of Tirrenia's capital assets and employees. The Commission therefore took the preliminary view that the tendering of the new Convention without an obligation to take over those vessels and crew of Tirrenia necessary to perform the public service, would have resulted in a lower cost for the community.

(396) Since Tirrenia was a large company in Extraordinary Administration, general domestic law[(136)] required its acquirer to maintain the same staff level needed to perform the public service obligations as laid down in Tirrenia's business plans for a period of two years. Against this background, the contract for the transfer of the business branch requires CIN to offer employment (on the basis of new contracts) to the former employees of Tirrenia and abstain from dismissals[(137)] for a two-year period. The Commission first observes that this requirement is based on a legal obligation, which the Italian authorities could not disregard in the set-up of the transfer of the business branch, and that this obligation is limited in time, i.e. to two years. The Commission also notes that the Tirrenia business branch will continue operation of the public service on the basis of the public service obligations defined in the new Convention. In this sense, Italy has submitted that only the crew and administrative personnel required for the continuous operation of the public service would be taken over by CIN. Furthermore, Italy argued that CIN would have had to respect these minimum workforce levels, irrespective of any workforce condition. Given that employment costs would be covered by the compensation paid under the new Convention to CIN, the Commission considers that the obligation to maintain employment levels is in practice not onerous on CIN. Therefore, this obligation is unlikely to have depressed the sale price of the business branch and cannot have conferred an advantage to CIN in this way. In addition, this solution was also beneficial for Tirrenia (and therefore for its owner Italy) as the latter would not have to pay severance costs for the staff that was rehired by CIN. The Commission notes that Ecorys estimated that the total severance cost for all of Tirrenia's staff would have amounted to at least EUR 35 million.

(397) By having bundled the assets of the Tirrenia business branch with a new public service contract[(138)], the acquirer automatically becomes subject to the requirement to ensure the continuity of the public service and is awarded the berthing priority. The Commission first observes that only the assets necessary to fulfill the public service obligations were bundled with the public service contract. All other assets (including e.g. real estate, six ships, an art collection) were sold via separate tender procedures. Second, the Commission considers that bundling the assets of the Tirrenia business branch with the new public service contract does not result in a lower price than if the assets and this contract had been sold separately, for the following reasons:

— As indicated above (see recital 164), Tirrenia's Extraordinary Commissioner organised separate tender procedures to sell six ships that were only operated on routes not subject to public service obligations. Of these six ships, only one could be sold to a bidder who intended to continue to use it for shipping purposes. The other five ships could only be sold for demolition purposes. Furthermore, in March 2011, the shipbrokers[(139)] who were asked to determine the value of Tirrenia's ships pointed out that the economic crisis had a significant impact which was reflected in lower values for ships and in an excess of vessels on the market. For these reasons, it seems unlikely that all of Tirrenia's remaining 18 ships could have been sold for shipping purposes (i.e. for a higher price than their scrap value). The Commission considers that bundling those ships with the public service contract allowed obtaining a higher price[(140)] for Tirrenia's ships since in return for operating the ships on the public service routes, their acquirer would receive public service compensation for a period of eight years.

— In the 2012 Decision, the Commission had raised the possibility that bidders could have already been equipped with sufficient vessels and crews and would therefore have preferred not to have to acquire Tirrenia's ships and hire its employees. The Commission observes that when CIN started performing its obligations under the new Convention, it had a total workforce of 1 239 people and 18 ships (which were part of the Tirrenia business branch it acquired). The Commission considers it unlikely that potential bidders could have had such significant resources readily available for (re-)deployment to operate the public service obligations laid down in the new Convention. This is all the more true since the new Convention contains specific requirements (e.g. capacity) about the ships to be used on the different public service routes. Any operator who had the required resources would likely have employed them already on other routes and their redeployment in line with the new Convention would necessarily have led to losing the revenues from their previous use. In this regard, the Commission points out that both Grimaldi and GNV participated in the tender procedure and that neither company has argued to the Commission that they would have preferred not to have to acquire Tirrenia's ships.

(398) To verify that the bundling of the new Convention with the Tirrenia business branch and the workforce condition are not onerous for CIN, the Commission has in the course of the formal investigation commissioned a study with an independent expert (Ecorys). Ecorys was asked (see recital 96 *et seq.*) to establish the market value of the Tirrenia business branch without any conditions attached. Ecorys concluded that, had the Tirrenia business branch been sold without any condition attached, and in particular without being bundled with a new public service contract for the operation of the public service (and hence also without the obligation to ensure the continuity of said public service), the company would have been sold at liquidation value, EUR 303,5 million. Ecorys based this conclusion on the assumption that

the Tirrenia business branch could not profitably continue its operations without public service compensation. Ecorys observed that this liquidation value is lower than the value that resulted from the tender and indicated that therefore immediate liquidation (in essence a sale of the ships) was not a viable alternative for a market economy operator. Moreover, Ecorys compared the staffing of the Tirrenia business branch with that of several comparable ferry companies and concluded that Tirrenia's staff number and personnel cost structure are not dissimilar from comparable companies, with reference to the labour cost's share of total revenues and the labour cost/staff ratio. The analysis showed no substantive difference between the Tirrenia business branch and comparable companies which could have pointed to overstaffing or excessive labour costs. A potential buyer would thus have had little margin of manoeuvre in terms of dismissing or replacing part of the workforce. On this basis, Ecorys concluded that there are no elements showing that the workforce condition has had any significant impact on the value of the Tirrenia business branch. The Commission therefore concludes that the bundling of the new Convention with the Tirrenia business branch and the workforce condition could neither depress the sale price of the business branch nor have conferred an advantage to CIN in this way.

(399) To summarize, the condition to maintain employment levels is imposed by general domestic law rather than by the seller. Furthermore, that condition is not onerous for the acquirer of the Tirrenia business branch as also confirmed by the Commission's independent expert Ecorys. The condition to guarantee the continuity of the public service which is the direct consequence of the bundling of the assets and the public service obligation cannot be considered as depressing the price. On the contrary, as argued above, selling the assets separately would have resulted in a lower price (as confirmed by Ecorys). Furthermore, it is highly unlikely that there would have been potential bidders interested in acquiring the public service contract without taking over the assets given the large number of ships and crew necessary to perform the public service. The Commission therefore concludes that any market economy vendor would have decided to sell the assets of the Tirrenia business branch along with a new public service contract in order to obtain the highest price. On this basis, the Commission concludes that Italy has not attached conditions that were likely to depress the price or which a private seller would not have demanded. On this basis, the Commission concludes that its doubt that tendering out the new Convention together with the Tirrenia business branch and the workforce conditions could not result in the lowest cost to the community, is dispelled.

Strong safeguards in the design of the procedure where only one bid is submitted

(400) On the basis of the assessment described above (see recitals 375-399), the Commission concludes that the tender procedure was open, transparent and non-discriminatory in line with public procurement rules. However, paragraph 68 of the SGEI Communication notes that 'in the case of procedures where

only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community'.

(401) Accordingly, given that only CIN submitted a bid in the tender procedure for the Tirrenia business branch (which included the new Convention), such tender would normally not be sufficient to ensure the absence of an advantage to the winner.

(402) The Commission has however nuanced the position expressed in paragraph 68 of the SGEI Communication in its SGEI Guide[141] by stating that 'it does not mean that there cannot be cases where, due to particularly strong safeguards in the design of the procedure, also a procedure where one bid is submitted can be sufficient to ensure the provision of the service at "the least cost to the community"'.

(403) The Commission considers that in the case under assessment, such safeguards were present. More specifically:

— The tender procedure was organised in such a way as to maximise interest from potential bidders. Furthermore, these potential bidders did not have to follow burdensome procedures and would not have had to incur significant costs to express their interest. As a result, no less than 21 expressions of interest by Italian, European and non-European entities were received of which sixteen were invited to the due diligence phase (see recital 387).

— Genuine competition was possible until the end of the tender procedure. In particular, eleven possible bidders remained in the bidding phase. Three of them (i.e. Onorato Partecipazioni S.r.l., Grimaldi Compagnia di Navigazione S.p.A. and Marinvest S.r.l.) decided to join forces under the name CIN and made a binding offer. The Commission considers that based on their profile, of the remaining eight other possible bidders, at least five were likely able (due to their experience and financial resources) to make bids or had reason to have a genuine interest in making a bid (e.g. already active in the sector and/or Italy).

— A minimum price was set upfront on the basis of the valuation performed by the independent expert appointed by Italy (see recital 73). This minimum price was made available to all potential bidders in the data room and set a relatively high anchor point for starting bids. Indeed, as pointed out above (see recital 168), one potential bidder for the Tirrenia business branch indicated that the minimum price was actually too high. While this high minimum price helped to ensure that the procedure led to the least cost for the community, it may have also discouraged other potential bidders from submitting a bid.

— The binding offer submitted by CIN on 14 April 2011 was made available into the data room, and by letter of 2 May 2011, the Extraordinary Commissioner invited all tenderers considered for the due diligence phase to submit a better offer than the one submitted by CIN, by 12 May 2011. Following a request by one of the potential buyers, the deadline for submitting better offers was then extended by the Extraordinary Commissioner to 19 May 2011. The invitation

to submit better offers is a particularly strong safeguard to ensure that the highest possible bid (and hence the lowest cost for the community) is obtained. Furthermore, the request by one party to extend the deadline shows that there was genuine competition until the very last moment of the tender procedure.

(404) The Commission considers that given the above safeguards, including most notably the minimum price and the invitation to submit higher bids, the tender procedure was sufficient to ensure the provision of the service at the least cost to the community even if only one bid was submitted. For completeness, the Commission notes that the case at hand differs from the following cases where only one bid was submitted:

— In the tender procedure for the operation of a fast passenger maritime connection between Messina and Reggio Calabria, only Ustica Lines submitted a bid. However, this company was also the only one who expressed an interest so there was never genuine competition possible. In that case, the Commission therefore necessarily concluded that the Altmark 4 condition was not met and that the public service compensation constituted State aid[(142)]. The Commission recalls that in the case under assessment, 21 parties expressed their interest and eleven of them participated in the final part of the tender.

— In the tender procedure for the attribution of the press distribution concessions in Belgium, only bpost (the incumbent provider of this SGEI) submitted a bid. While initially three companies had expressed an interest to participate in the tender, one company withdrew before the deadline to submit an offer expired and another company announced that it no longer wished to submit an offer (albeit three days after bpost had submitted its offer). The Belgian authorities nevertheless argued that genuine competition had taken place during the tender procedure and that there were sufficient safeguards to ensure that the tender resulted in the least cost for the community. The Commission however found that in that case the safeguards were insufficient and therefore concluded that the Altmark 4 condition was not met and that the public service compensation constituted State aid[(143)]. While the Italian authorities used an open tender procedure, the Belgian authorities organised a negotiated procedure[(144)] which according to paragraph 66 of the SGEI Communication 'can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases'. The Commission notes that apart from this important difference, also the safeguards in the bpost case were entirely different from those applicable in the case at hand. Finally, it has to be noted that in the bpost case, the incumbent SGEI provider won the tender after having made the only bid with only one possible competing bidder present. In the case under assessment, the tender was won by a bidder that had no connection to the incumbent SGEI provider with several credible possible competing bidders present and with the abovementioned safeguards. For these reasons, the Commission concludes that the circumstances in the bpost case are not comparable to those in the case at hand.

(405) Furthermore, the Commission notes that the tender procedure used for the sale of the Tirrenia business branch differs significantly from the procedure used to select the operator of shipping services between the French mainland and Corsica[145] ('the SNCM case') in the following ways:

— The French authorities awarded the public service delegations on the basis of a negotiated procedure with prior publication. According to paragraph 66 of the SGEI Communication such a procedure 'can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases'. On the contrary, the Italian authorities used an open tender procedure.

— While in the SNCM case two bids were submitted, one bid was rejected on the basis of one selection criterion. The two bids were therefore not even compared on their merits in order to retain the economically most advantageous one. So even if two bids were actually submitted, this was not sufficient to guarantee effective competition. In the Tirrenia tender procedure however, eleven parties participated in the final phase and the Commission considers that genuine competition was possible until the end of the procedure (see recital 403) even if ultimately only CIN submitted a bid.

— In the SNCM case, the incumbent operator SNCM/CMN group was also bidding and had a significant competitive advantage since it already had ships that met the technical requirements laid down in the public service delegation contract. This was crucial since these requirements implied the construction of almost tailor-made vessels similar to some of SNCM's vessels. This meant a high cost for possible interested bidders. In the case under assessment, the incumbent operator Tirrenia in EA did not and could not bid and the winning bidder had no connection to the incumbent. Since the tender included the ships that met the technical requirements to operate the public service, none of the possible bidders had a competitive advantage over the other.

— Furthermore, in the SNCM case the Commission considered that the very short time (i.e. less than one month) set between the date of awarding the public service delegation contract and the date of commencement of services was likely to prove a significant barrier to entry for new entrants. The Commission notes that in the Tirrenia case there was over a year between the conclusion of the tender procedure and the start of the operation of the public service by CIN.

(406) On the basis of the above, the Commission concludes that the fourth Altmark criterion is complied with in the present case.

(407) Given that the four conditions set out by the Court of Justice in the Altmark case are cumulatively met, the Commission concludes that the award of the new Convention bundled with the Tirrenia business branch and the berthing priority to CIN, including the deferred payment of part of the purchase price by CIN, does not confer an economic advantage on the latter.

7.1.3.5. *Conclusion*

(408) Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the award of the new Convention bundled with the Tirrenia business branch and the berthing priority to CIN, including the deferred payment of part of the purchase price by CIN do not constitute State aid to CIN.

7.1.4. *The measures laid down by the 2010 Law*

(409) The Commission took the preliminary view in the 2011 Decision that all measures laid down by Decree Law 125/2010 converted with amendments into the 2010 Law constitute State aid in favour of the companies of the former Tirrenia Group, to the extent that the respective beneficiaries were able to use these measures to cover liquidity needs and thereby improve their overall financial position.

(410) Based on the information received during the formal investigation, the Commission concludes that the three measures should be assessed separately.

7.1.4.1. *Possible use of funds to upgrade ships for liquidity purposes*

(411) State resources: the funds in question were granted by the State from its own budget (see recital 109) and their use for liquidity purposes was enabled by the 2010 Law. The measure is therefore imputable to the State and is given through State resources.

(412) Selectivity: this measure was only granted to the companies of the former Tirrenia Group, including to Tirrenia, and is therefore selective. For completeness, the Commission points out that this measure was not granted to CIN.

(413) Economic advantage: the Commission notes that Tirrenia received approximately EUR 12 051 900 to carry out the ship upgrades required to respect international safety standards and could on the basis of the 2010 Law use these funds temporarily for liquidity purposes (see recital 109). As explained above (see recital 110), part of these funds (i.e. EUR 4 657 005,35) was used by Banca Carige to offset two debts owed to it by Tirrenia. In addition, the Italian authorities confirmed (see recital 192) that Tirrenia effectively only used EUR 630 600 of these funds to pay for upgrades to the vessel Clodia. The remaining EUR 11 421 300 were neither used to pay for upgrades nor were they repaid to the State. Eventually, the new owner of the Tirrenia business branch (i.e. CIN) had to pay for the remaining upgrades from its own funds (and this liability of EUR 11 421 300 was also taken into account in the valuation prepared by Banca Profilo). Italy has not demonstrated that this liquidity was granted on market terms. Furthermore, Tirrenia neither repaid nor used the liquidity for its original purpose (i.e. to pay for ship upgrades) with the exception of the EUR 630 600 used for the upgrades to the vessel Clodia. Since a normal market operator would not be able to benefit

from such a measure, the Commission considers it necessarily conferred an economic advantage to Tirrenia.

(414) Effect on trade: on the grounds set out in recitals 310-311, the Commission considers that the granting of this measure to Tirrenia is liable to affect Union trade and distort competition within the internal market.

(415) Conclusion: The Commission concludes that Tirrenia's use of EUR 11 421 300, which were originally dedicated to the upgrade of ships, for liquidity purposes, as enabled by the 2010 Law, constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU.

7.1.4.2. *Fiscal exemptions related to the privatisation process*

(416) As described in recital 111, pursuant to Article 1 of the 2010 Law, certain acts and operations undertaken to privatise the Tirrenia group and described in paragraphs 1 to 15 of Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law, are exempt from any taxes ordinarily due on those acts and operations.

(417) The Commission first notes that two separate sets of transfers have to be assessed: (1) the transfers of Tirrenia's former subsidiaries Caremar, Saremar and Toremar from Tirrenia (now in EA) to the Regions of Campania, Sardinia and Tuscany; and (2) the transfer of the Tirrenia business branch from Tirrenia in EA to CIN. The taxes exempted are in particular registration duty, land registry and mortgage registration fees, stamp duty (together, 'the indirect taxes'), VAT and corporate income tax. The beneficiaries of this aid measure would be the seller, the buyer, or both.

(418) At the outset, the Commission accepts that the transfers to the Regions were not subject to corporate income tax (since no consideration was paid) and to VAT (which does not apply to such transactions under national law). As far as the indirect taxes are concerned, those that, under national law, were payable only by the acquirers, were payable by the Regions acting in this case within their public services remit, i.e., as State entities. As such, they do not qualify as economic undertakings. Therefore, none of the aforementioned tax exemptions will be assessed further in this Decision.

(419) The Commission also notes that since transactions such as the sale of the Tirrenia business branch to CIN are not in scope of VAT[146], the tax exemption cannot have conferred an advantage to Tirrenia with regard to VAT. Furthermore, the Commission takes note that the sales contract for the Tirrenia business branch clearly states that the purchaser, i.e. CIN, has to bear all taxes, levies and notarial costs related to the transaction, without reference to any exemption enjoyed by CIN on these taxes. Therefore, the Commission concludes that CIN cannot have benefited from this measure. For these reasons, none of the aforementioned tax exemptions will be assessed further in this Decision.

(420) Against the above background, the Commission will therefore only assess whether Tirrenia (in EA) benefited from any exemption from registration duty, land registry and mortgage registration fees, and stamp duty ('the indirect taxes') for both sets of transfers, and from any exemption from corporate income tax on the proceeds of the transfer of the Tirrenia business branch to CIN.

(421) State resources: a tax exemption by definition entails a foregoing of State resources. Furthermore, since these exemptions were granted by means of the 2010 Law (see recital 111(b)), they are also imputable to the State.

(422) Selectivity: since the tax exemptions are only granted for operations and acts related to the privatisation of the former Tirrenia Group, they are selective. Italy has neither argued nor demonstrated that the tax exemptions are not selective.

(423) Economic advantage: concerning the indirect taxes, Tirrenia was exempted from paying them on operations and acts related to both sets of transfers described in recital 416 (to the Regions and to CIN) and therefore benefited from an economic advantage equal to the taxes ordinarily due for these types of operations and acts under national law.

(424) Additionally, concerning the transfer of the Tirrenia business branch to CIN, the Commission notes that this transfer was made in exchange for a consideration (i.e. EUR 380 100 000) paid by CIN. The proceeds of this transaction would therefore normally be subject to corporate income tax. The exemption from this tax constitutes an economic advantage since the proceeds of a sale of assets or of a business would normally be taken into account in the calculation of a company's corporate income tax. The Commission points out that this conclusion is not affected by the fact that it is at this stage not yet possible to determine whether Tirrenia will in practice benefit from the income tax exemption, because it is still unclear whether any income tax will be due at the moment when Tirrenia is fully liquidated[147].

(425) Effect on trade: on the grounds set out in recitals 310-311, the Commission considers that exempting Tirrenia from certain taxes as described above is liable to affect Union trade and distort competition within the internal market.

(426) Conclusion: the exemptions from (i) indirect taxes on operations and acts related to the transfers of Caremar, Saremar, Toremar and the Tirrenia business branch to the respective acquirers; and from (ii) corporate income tax on the proceeds from the sale of the Tirrenia business branch to CIN, that were granted by the 2010 Law constitute State aid to Tirrenia.

7.1.4.3. *Possibility of using FAS resources to meet liquidity needs*

(427) In the 2011 and 2012 Decisions, the Commission mentioned the possibility for the former Tirrenia Group companies to use FAS resources (see recital

111(c)) in order to meet current liquidity needs. However, in the course of the formal investigation procedure, the Italian authorities clarified that the FAS resources were not meant as an additional compensation for Tirrenia (or any other of the companies of the former Tirrenia Group). Instead, these resources were made available to supplement the budget appropriations foreseen for the payment of the public service compensations to the companies of the former Tirrenia Group, in case they proved to be insufficient. Indeed, Article 1, paragraph 5-*ter* of the 2010 Law enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. In other words, this measure merely concerns an allocation of resources in the Italian State budget for payment of the public service compensations.

(428) In light of the above, the Commission concludes that the FAS resources are only a funding source to allow the State to pay the public service compensations (granted on the basis of the prolonged initial Convention) and do not constitute a measure which Tirrenia can benefit from in addition to these public service compensations. In other words, the possible use of FAS resources does not constitute State aid to Tirrenia and will therefore not be assessed further in this Decision.

7.1.5. *Conclusion on existence of aid*

(429) Based on the assessment described above, the Commission finds that:

— the compensation to Tirrenia for the operation of maritime routes in the period from 1 January 2009 until 18 July 2012 and the berthing priority on these public service routes in the same period constitute State aid to Tirrenia within the meaning of Article 107(1) TFEU and qualify as new aid,

— the extension of the rescue aid from 28 August 2011 until 18 September 2012 constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU,

— the award of the new Convention for the period from 18 July 2012 until 18 July 2020, bundled with the Tirrenia business branch and the berthing priority to CIN – including the deferred payment of part of the purchase price by CIN – complies with the four Altmark-criteria and therefore does not constitute State aid to CIN within the meaning of Article 107(1) TFEU,

— Tirrenia's use of funds to upgrade ships for liquidity purposes, as enabled by the 2010 Law, constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU,

— the exemptions from (i) indirect taxes on the transfers of Caremar, Saremar, Toremar to the Regions of Campania, Sardinia and Tuscany and of the Tirrenia business branch to CIN; and from (ii) corporate income tax on the proceeds from the sale of the Tirrenia business branch to CIN, that were granted by the 2010 Law constitute State aid to Tirrenia, and

— the possibility to use FAS resources to meet liquidity needs, as laid down by the 2010 Law, does not constitute State aid within the meaning of Article 107(1) TFEU.

7.2. **Lawfulness of the aid**

(430) All aid measures in scope of this Decision have been put into effect before formal approval by the Commission. Therefore, insofar as these aid measures were not exempted from notification under the 2005 SGEI Decision or the 2011 SGEI Decision, they were granted by Italy in violation of Article 108(3) TFEU[(148)].

7.3. **Compatibility of the aid**

(431) Insofar as the measures identified above constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article and Article 106(2) TFEU.

7.3.1. *The prolongation of the initial Convention between the State and Tirrenia*

7.3.1.1. *Applicable rules*

(432) As already mentioned above, the prolongation of the initial Convention after the end of 2008 has been carried out by subsequent legal acts, as follows:

(a) Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions from 1 January 2009 until 31 December 2009;

(b) Decree Law No 135 of 25 September 2009, converted into the 2009 Law, laid down *inter alia* the prolongation of the initial Conventions from 1 January 2010 until 30 September 2010; and

(c) Decree-Law No 125 of 5 August 2010, converted into the 2010 Law provided for a further prolongation of the initial Conventions from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar.

(433) Against this background, the Commission notes that the granting of the public service compensation under the prolongation of the initial Convention, pre-dates the entry into force of the 2011 SGEI Decision and 2011 SGEI Framework. However, the 2011 SGEI package – in Article 10 of the 2011 SGEI Decision and paragraph 69 of the 2011 SGEI Framework – contains rules that provide for its application also to aid granted before the entry into force of the 2011 SGEI package on 31 January 2012. In particular, the 2011 SGEI Decision provides in its Article 10(b) that

> any aid put into effect before the entry into force of this Decision [i.e., before 31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempted from the requirement of prior notification.

(434) As regards the 2011 SGEI Framework, paragraphs 68 and 69 of that Framework specify that the Commission will apply the principles set out in that Framework to all notified aid projects, whether the notification took place before or after the start of application of that Framework on 31 January 2012, as well as to all unlawful aid on which it takes a decision after 31 January 2012, even if that aid was granted before 31 January 2012. In the latter case, the provisions of paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework are not applicable.

(435) As a result, the rules on the application of the 2011 SGEI Decision and the 2011 SGEI Framework as described above mean that the public service compensation granted to Tirrenia during the prolongation period can be assessed pursuant to the 2011 SGEI package. If the relevant conditions of either the 2011 SGEI Decision or the 2011 SGEI Framework are complied with, this aid measure is compatible with the internal market for the entire period from 1 January 2009 until 18 July 2012[(149)].

(436) The Commission notes that both the 2005 SGEI Decision, which entered into force on 19 December 2005, and the 2011 SGEI Decision are only applicable to State aid in the form of public service compensation for maritime links to islands on which average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers. However, in the years 2007, 2008 and 2009, the number of passengers on three of the twelve routes (i.e. Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres) operated by Tirrenia under the initial Convention, as prolonged, exceeded the threshold of 300 000 passengers per year[(150)]. Therefore, for these three routes the Commission can assess the compatibility of the public service compensation paid to Tirrenia under the prolongation of the initial Convention until 18 July 2012 neither on the basis of the 2005 SGEI Decision nor on the basis of the 2011 SGEI Decision.

(437) Consequently, for three of Tirrenia's routes, the compatibility of the public service compensation granted to Tirrenia as of 2009 and until the completion of the privatisation process would normally fall within the scope of application of the 2011 SGEI Framework. However, according to paragraph 9 of the 2011 SGEI Framework, aid for providers of SGEI in difficulty must be assessed under the 2004 Rescue and Restructuring Guidelines. Tirrenia was admitted to the extraordinary administration procedure on 5 August 2010 and was declared insolvent on 12 August 2010, and thus was already in difficulty within the meaning of point 10 (c) of the 2004 Rescue and Restructuring Guidelines at the moment of the prolongation laid down by the 2010 Law. Therefore, it was an SGEI provider in difficulty, at least for part of the period of the prolongation (from 12 August 2010 until its sale on 18 July 2012).

(438) The 2014 Rescue and Restructuring Guidelines[(151)] in force as of from 1 August 2014 apply retroactively for aid to SGEI providers. Those guidelines

lay down that the compatibility assessment of aid granted before 31 January 2012 (the date of entry into force of the 2011 SGEI Framework) to SGEI providers in difficulty, is assessed under the 2011 SGEI Framework with the exception of the provisions of paragraphs 9, 14, 19, 20, 24, 39 and 60[(152)]. Therefore, the same rules apply for the entire period from 1 January 2009 until the completion of its privatisation on 18 July 2012.

(439) Since three of the Tirrenia's routes under assessment fall outside the scope of the 2005 and 2011 SGEI Decisions and for reasons of brevity and efficiency, the Commission will first assess whether the public service compensation granted to Tirrenia for the operation of all twelve maritime transport routes during the prolongation period complies with the conditions of the 2011 SGEI Framework, with the exception of the conditions in its paragraphs 9, 14, 19, 20, 24, 39 and 60. Only after this first step, will the Commission assess whether that same compensation (only for the nine routes not exceeding the threshold of 300 000 passengers) was possibly compatible with the internal market and exempted from the notification requirement pursuant to the 2005 SGEI Decision since it concerns aid that was granted between 19 December 2005 and 31 January 2012 (see recital 432).

7.3.1.2. *Genuine service of general economic interest as referred to in Article 106 TFEU*

(440) According to paragraph 12 of the 2011 SGEI Framework, '[t]he aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty'. Paragraph 13 clarifies that 'Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard'. Finally, paragraph 56 of the 2011 SGEI Framework, refers to the 'Member State's wide margin of discretion' regarding the nature of services that could be classified as being services of general economic interest.

(441) The assessment of whether the SGEI are genuine must also be performed in light of the SGEI Communication (see recitals 325 and 342), the Maritime Cabotage Regulation (see recitals 327-329) and the case-law (see recitals 331-332). Therefore, the Commission must assess for the prolongation period:

(1) Whether there was **user demand**;

(2) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);

(3) That simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(442) The Commission points out that the twelve public service routes operated by Tirrenia during the prolongation period are the same as those entrusted to CIN under the new Convention. In addition, the Commission has already described and assessed the competitive situation on those routes during the prolongation period. Against this background, the following assessment will rely on and refer to the relevant parts of the assessment made for the new Convention above (see section 7.1.3.1).

(443) Against this background, the Commission first recalls (see recital 152) that Italy has imposed the public service obligations laid down in the initial Convention mainly to (i) ensure the territorial continuity between the mainland and the islands; and to (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission already concluded (see recital 334) that these are indeed legitimate public interest objectives. Furthermore, for the reasons described above (see recitals 335-336) the Commission concludes that Italy has not made a manifest error in defining freight-only services as SGEI.

(444) The routes in question have been operated, largely unaltered, for many years i.e. at least since the entry into force of the initial Convention. The only changes in the scope of the service during the prolongation period compared to the situation at end 2008 (when the initial Convention was initially due to expire), were reductions in terms of the routes operated under the public service regime. In particular:

— The public service route Fiumicino – Arbatax was abolished as from 2009,

— The route Fiumicino – Golfo Aranci (on which Tirrenia had been operating on a commercial basis) was abolished as from 2009,

— From 2010 onwards, the public service route Napoli – Palermo had to be operated on a commercial basis during the high season since public service compensation was only granted for the operation during the low season.

(445) To illustrate the genuine demand from users for the services, the Italian authorities provided detailed statistics which show that in 2009, the first year of the prolongation, Tirrenia transported 1 181 768 passengers, 276 391 cars, and almost 3 million linear meters of cargo on the twelve mixed service routes combined during the respective time periods covered by the public service obligations (i.e. not in the high season for two routes). These figures were slightly lower in 2010 (see recital 338) but the difference is mainly due to the fact that the route Napoli – Palermo was from 2010 onwards no longer

part of the public service remit in the high season. When correcting for this difference, the numbers for 2011 approached those of 2009 which shows that the aggregate user demand was significant and fairly stable.

(446) As indicated above (see recital 339), the Italian authorities also provided detailed statistics at individual route level for the period 2007 – 2018. The Commission has already demonstrated (see Table 4) that there was significant user demand for both mixed and freight services on each of the twelve routes concerned in 2010. The same analysis for the years 2009 and 2011[153] did not provide any indications that the user demand for the ferry services on the routes concerned would have disappeared.

(447) The Commission considers that the above statistics clearly demonstrate that there is a genuine demand for passenger and freight services on each of the twelve public service routes in question. It can therefore be concluded that these services address a genuine user demand and thus satisfy real public needs.

(448) As explained above (see recital 342), the Commission must also examine whether the service would have been inadequate if its provision were left to the market forces alone in the light of the public service requirements imposed by the Member State by virtue of the prolongation of the initial Convention. Paragraph 48 of the SGEI Communication notes in this respect that '*the Commission's assessment is limited to checking whether the Member State has made a manifest error*'.

(449) The Commission notes that during the period 1 January 2009 until 18 July 2012, on some routes that had to be operated by Tirrenia under the prolongation of the initial Convention other operators offered ferry services albeit not necessarily throughout the year and with the same frequency. The Commission has already assessed above (see recitals 343-348) for each of the routes concerned whether the services provided by other operators were equivalent to those that CIN had to provide under the new Convention. The Commission recalls that this assessment was based on the competitive situation on those routes between 1 January 2009 and 18 July 2012. Since the services that CIN has to operate are almost identical in terms of routes served, frequencies and technical requirements to those that Tirrenia had to perform during the prolongation period, the Commission's conclusion (see recital 348) that market forces alone were insufficient to meet the public service needs is also valid for Tirrenia during the entire prolongation period. Indeed, on a number of routes Tirrenia was the only operator while on the other routes the services provided by other operators were not equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service needs imposed on Tirrenia by virtue of the initial Convention (as prolonged).

(450) Finally, in light of the planned privatisation and in order to ensure the continuity of the public services that were operated under the initial Convention, Italy decided to prolong this Convention unaltered (with the limited exceptions described in recital 444 and subject to the change in compensation methodology applicable from 2010 onwards). The Commission accepts that the user demand (as described above, see recitals 445-446) could not have been met by imposing public service obligations applicable to all operators serving the routes at hand. In particular, on several routes Tirrenia was the only operator (see e.g. recital 345) and where this was not the case, the offer provided by the other operators did not meet (all) the requirements of regularity, continuity and quality. Furthermore, the operation of most (if not all) routes, especially in the low season, is loss-making so that without public service compensation they would likely not be operated at all. Ecorys drew a similar conclusion in its report (see recital 98). In addition, the Commission accepts that in view of the process to privatise Tirrenia, prolonging the existing public service contract was the only way to guarantee the continuity of the public services until completion of that privatisation.

(451) Therefore, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Tirrenia as SGEI. The doubts expressed by the Commission in the 2011 and 2012 Decisions are hence dispelled.

7.3.1.3. *Need for an entrustment act specifying the public service obligations and the methods of calculating compensation*

(452) As indicated in the section 2.3 of the 2011 SGEI Framework, the concept of service of general economic interest within the meaning of Article 106 TFEU means that the undertaking in question has been entrusted with the operation of the service of general economic interest by way of one or more official acts.

(453) These acts must specify, in particular:

(a) The precise nature of the public service obligation and its duration;

(b) The undertaking and territory concerned;

(c) The nature of the exclusive rights;

(d) The parameters for calculating, controlling and reviewing the compensation;

(e) The arrangements for avoiding and repaying any overcompensation.

(454) In its 2011 and 2012 Decision, the Commission expressed doubts as to whether the entrustment act provided for a comprehensive description of the nature of Tirrenia's public service obligations during the prolongation period. Furthermore, the Commission emphasized that no five-year plan had been adopted for the period 2005–2008 as established by the initial Convention. Nevertheless, the Commission also recalled that different elements of the

entrustment may be placed in several acts without putting into question the appropriateness of the definition of the obligations. During the prolongation period, Tirrenia's entrustment act included the initial Convention (as amended and prolonged over time), the five-year plans, a series of *ad hoc* decisions by the Italian authorities, the CIPE Directive and the 2009 Law.

(455) Against this background, the Commission first notes that the initial Convention (as amended over time), which forms the core of Tirrenia's entrustment act, remained fully applicable until the completion of the privatisation on the basis of a series of Decree Laws (see recital 432). These documents specify that Tirrenia was entrusted with public service obligations until the completion of its privatisation.

(456) According to the initial Convention, the five-year plans specify the routes and the ports to be served, the type and capacity of vessels to be used for the maritime connections in question, the frequency of service and the fares to be paid, including subsidised fares, particularly for residents of island regions. While the plan for the period 2005-2008 was not formally adopted, the plan for the period 2000-2004 (endorsed by Ministerial Decree of 20 September 2001) continued to apply subject to a number of *ad hoc* changes (see recital 33) decided by the government (usually by the Minister or by the Interdepartmental Conference[(154)]). These changes mainly limited the scope of the public service obligations over time (e.g. by abolishing certain routes, including the changes described in recital 444) while most of the obligations of the 2000-2004 plan (which fully reflects the commitments made by Italy in the context of the 2001 Decision) remained in place unaltered. Therefore, unless a decision was taken to change a specific element (e.g. a route, a frequency, a type of vessel) of the 2000-2004 plan, the provisions of that plan continued to apply in full during the period from 1 January 2009 until 18 July 2012. Before 2009, the original fare scheme provided for in the initial Convention was amended by a number of subsequent acts. However, during the entire prolongation period, no inter-ministerial decrees were issued to further amend the fares to be charged by the companies of the former Tirrenia Group, including Tirrenia. On this basis, the Commission concludes that the public service obligations that Tirrenia had to comply with during the prolongation period were defined in a sufficiently clear way.

(457) The Commission already noted in recitals 239 and 240 of the 2011 Decision that the parameters necessary for the calculation of the amount of compensation have been established in advance and are clearly described. In particular, for the year 2009 the initial Convention (see recitals 38-40) contains an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return on invested capital for the operator. For the period 1 January 2010 to 18 July 2012, the relevant methodology is set out in the CIPE Directive (see recital 41 *et seq.*). More specifically, the CIPE Directive details the cost elements taken into

account and the return on invested capital. Finally, the 2009 Law includes the maximum compensation amount of EUR 72 685 642 that applies from 2010 onwards. Furthermore, the initial Convention laid down that the compensation would be paid out in instalments and ensured that the compensation was based on the actual costs and revenues incurred for the delivery of the public service. In this way, overcompensation could be detected and easily avoided. Where applicable, the State could then recover the overcompensation from Tirrenia.

(458) On this basis, the Commission considers that for the period of prolongation of the initial Convention the entrustment acts laid down a clear definition of the public service obligations, the duration, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and repaying any overcompensation as required under the 2011 SGEI Framework.

7.3.1.4. *Duration of the period of entrustment*

(459) As indicated in paragraph 17 of the 2011 SGEI Framework, 'the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI'.

(460) Italy has argued that the duration of the prolongation is in line with the period required for the depreciation of the most significant assets employed in the provision of the SGEI. In particular, the total duration of the initial Convention as prolonged amounts to just over 23.5 years. The ships used by Tirrenia for the operation of the public service have a useful life[155] of 30 years (for motor ferries) and 20 years (for high-speed passenger crafts) and are depreciated over this period. Furthermore, Italy recalled that the prolongation from 1 January 2009 until 18 July 2012 was necessary to ensure the continuity of the public service until the completion of the privatisation.

(461) On the basis of the above considerations, the Commission concludes that the duration of the period of entrustment is sufficiently justified and therefore that paragraph 17 of the 2011 SGEI Framework is complied with.

7.3.1.5. *Compliance with Commission Directive 2006/111/EC*[156]

(462) According to paragraph 18 of the 2011 SGEI Framework, 'aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC'.

(463) Furthermore, paragraph 44 of the 2011 SGEI Framework requires that: 'Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31'.

(464) Italy recalled that Article 4 of the 2001 Decision required that Tirrenia started drawing up separate accounts for each route from 1 January 2001 onwards. Likewise, Article 1(4) of the 2004 Decision required Adriatica (which merged with Tirrenia in 2004) to keep separate accounts for each of its routes from 1 January 2004 onwards. In the context of the 2001 Decision and at the request of the Commission, PriceWaterhouseCoopers ('PWC') prepared a study reproducing the analytical accounts of Tirrenia for the period 1992-1999. In that context, PWC issued an opinion confirming that the methodology used to prepare these accounts was appropriate and in line with the applicable accounting practice. According to Italy, Tirrenia and Adriatica have continued to produce their analytical accounts on this basis and have therefore complied with the requirements laid down in the 2001 and 2004 Decisions. For the time period under assessment, Italy has also submitted Tirrenia's route-by-route accounts for the years 2009, 2010 and 2011 as evidence.

(465) For the year 2012, route-by-route accounts have been drawn up by CIN from the moment it started operating the service (in line with its obligations under the new Convention). The Extraordinary Commissioner did not prepare such accounts for the period 1 January 2012 until 18 July 2012 as the completion of the privatisation was imminent. However, the Extraordinary Commissioner did submit overall quarterly financial statements throughout 2012 to the Ministry of Economic Development. The Italian authorities have submitted these statements as evidence. The Commission considers that these statements are sufficient to demonstrate that the public service compensation awarded to Tirrenia in EA did not fully cover the net cost of the public service and hence also excluded any possible cross-subsidisation (see also recital 472). The Commission notes that therefore the two main objectives of account separation, i.e. avoiding overcompensation and cross-subsidisation, are achieved.

(466) On the basis of the above and taking into account the specific circumstance of the privatisation, the Commission concludes that the requirements laid down in paragraphs 18 and 44 of the 2011 SGEI Framework have been complied with.

7.3.1.6. *Amount of compensation*

(467) Paragraph 21 of the 2011 SGEI Framework states that '(…) the amount of the compensation must not exceed what is necessary to cover the cost of discharging the public service obligations, including a reasonable profit'.

(468) In the case at hand, since at least part of the compensation constitutes illegal aid granted before its entry into force[157], paragraph 69 of the 2011 SGEI Framework specifically provides that, for the purpose of the State aid assessment, the use of the net avoided cost methodology is not required. Instead, alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost

allocation can be used. Under the latter methodology, the net cost would be calculated as the difference between the costs and the revenues of fulfilling the public service obligations, as specified and estimated in the entrustment act. Paragraphs 28 to 38 of the 2011 SGEI Framework set out in more detail how this methodology should be applied.

(469) In its 2011 and 2012 Decision, the Commission could not conclude whether the amount of compensation was proportionate as it still had doubts regarding the qualification of some of the public services entrusted to Tirrenia as genuine SGEI. Those doubts have been addressed in section 7.3.1.2. However, the Commission also expressed doubts regarding the risk premium of 6,5 %, which applied from 2010 onwards. In particular, the Commission questioned whether this premium reflects an appropriate level of risk, taking into account that *prima facie* Tirrenia did not seem to assume the risks normally borne in the operation of such services.

(470) Against this background, the Commission recalls that in the 2011 Decision it took the preliminary view that Tirrenia might have been over-compensated only for the performance of the public service tasks from 2010 onwards. Even if the Commission did not express such doubts for the year 2009, the Italian authorities have provided the calculation of the compensation amount for 2009 (i.e. EUR 80 million) which was determined on the basis of the methodology laid down in the initial Convention. It is worth pointing out that Tirrenia had requested approximately EUR 93,1 million but that Italy rejected some of the costs as they were not eligible under that methodology. On this basis, the Commission concludes that Tirrenia was not overcompensated for the performance of its public service obligations in 2009.

(471) From 2010 onwards, in principle the risk premium of 6,5 % would have been applied to determine the return on capital using the WACC formula. However, as already explained above (see recital 362) Italy has clarified that, because the amount of compensation is capped by the 2009 Law, it was decided to simplify the calculation by applying the 6,5 % as a flat rate return on capital. Furthermore, Italy pointed out that due to its difficult financial situation, Tirrenia had to be put in Extraordinary Administration on 5 August 2010. According to Italy, it was impossible to fully cover the net cost (i.e. costs minus revenues) of the public service with the maximum compensation amount set by the 2009 Law. Therefore, Tirrenia would not have received any return on capital during the period 1 January 2010 until 18 July 2012.

(472) On the basis of the route-by-route accounts submitted by the Italian authorities, the Commission could verify that both in 2010 and 2011, the net cost of the public services (not taking into account any return on capital) operated by Tirrenia exceeded the maximum compensation amount of EUR 72 685 642. Therefore, Tirrenia indeed did not receive any return on capital in those years. For the first half of 2012, the quarterly accounts prepared by the Extraordinary Commissioner clearly show that even after taking into account

the *pro rata* part of the maximum compensation amount set by the 2009 Law, Tirrenia's operational result[158] (i.e. before extraordinary costs) was negative. Therefore, it can be concluded that also in the period 1 January 2010 until 18 July 2012, Tirrenia did not receive any return on capital. Overall, the Commission concludes that Tirrenia did not receive any overcompensation during the period of prolongation of the initial Convention.

(473) Paragraph 49 of the 2011 SGEI Framework requires Member States to ensure that the compensation granted for operating the SGEI does not result in undertakings receiving overcompensation (as defined in paragraph 47 of that Framework). Among others, Member States must provide evidence upon request from the Commission. Furthermore, they must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. In this regard, the Commission notes that the Italian authorities have provided the necessary evidence as described above (see recitals 464-465). Indeed, each year Tirrenia has submitted its route-by-route accounts to the supervisory ministry allowing the latter to review the compensation amount. In addition, the Commission recalls that the compensation is paid out in instalments (see recital 36) and that the final pay-out is made on the basis of the actual costs and revenues of the year. This ensures that the amount of compensation does not exceed the net costs of the service (to which in principle a return on capital is added, even if in practice this was not the case in the period under assessment). For completeness, the Commission notes that from 5 August 2010 onwards, the presence of the Extraordinary Commissioner appointed by the Italian State, provided another safeguard against overcompensation. The Commission considers that these measures are sufficient to avoid and detect any possible overcompensation.

(474) On the basis of the elements described above (see recitals 467-473), the Commission concludes that the applicable requirements of section 2.8 (Amount of compensation) of the 2011 SGEI Framework are complied with.

7.3.1.7. *The berthing priority*

(475) Article 19-*ter* paragraph 21 of the 2009 Law clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Tirrenia. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are specific time scheduling obligations in the initial Convention (as prolonged) for the departure of public service routes, the berthing priority helps to ensure that

ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations.

(476) Against this background, the Commission considers that this measure is awarded to enable Tirrenia to perform their public service obligations which constitute genuine SGEI (see recital 449). Furthermore, the Italian authorities have confirmed that the berthing priority is only applicable to services provided under the public service regime (and for instance not when Tirrenia operates routes on a commercial basis during the high season). The Commission has already assessed in detail (see recitals 440-474) the compatibility of the SGEI and the related compensation for Tirrenia during the prolongation of the initial Convention. The Commission hence considers that its compatibility assessment of the berthing priority can be limited to establishing whether or not this measure could result in overcompensation.

(477) The Commission takes note of the arguments put forward by Italy that any possible monetary advantage from the berthing priority would be limited (see recital 191). As a result, also the risk of overcompensation stemming from this measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. Therefore, the overcompensation checks that have been applied to Tirrenia as described above (see section 7.3.1.6) are also fit to detect any possible overcompensation resulting from the berthing priority.

(478) The Commission therefore concludes that the berthing priority, which is inextricably linked with the SGEI performed by Tirrenia, is also compatible with the internal market on the basis of Article 106(2) TFEU and the 2011 SGEI Framework

7.3.1.8. *Compliance with the 2005 SGEI Decision*

(479) As explained above (see recital 436), the average annual traffic during the two financial years preceding that in which the SGEI was assigned exceeded 300 000 passengers on the routes Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres. For the remaining nine routes[(159)] operated by Tirrenia under the initial Convention, as prolonged, this threshold was not breached. Therefore, for these nine routes the requirement of Article 2(1)(c) of the 2005 SGEI Decision is met. In addition, the Commission considers that Article 2(2) of the 2005 SGEI Decision that requires compliance with the Maritime Cabotage Regulation is also fulfilled[(160)]. On this basis, the Commission concludes that the remaining nine routes can be assessed on the basis of the 2005 SGEI Decision.

(480) The Commission has already established above (see section 7.3.1.3) that for the period of prolongation of the initial Convention the entrustment acts laid down a clear definition of the public service obligations, the duration, undertaking and territory concerned, the parameters for calculating,

controlling and reviewing the compensation, and also the arrangements for avoiding and repaying any overcompensation. Therefore, for the remaining nine routes Article 4 (Entrustment) of the 2005 SGEI Decision is complied with.

(481) Furthermore, the Commission has concluded (see section 7.3.1.6) that (i) Tirrenia did not receive any overcompensation during the period of prolongation of the initial Convention and that the Italian authorities have carried out regular checks to avoid that Tirrenia received overcompensation. On this basis, the Commission finds that also Article 5 (Compensation) and Article 6 (Control of overcompensation) of the 2005 SGEI Decision are complied with for the remaining nine routes.

(482) Given the inextricable link with the performance of the public service and in view of the assessment above (see section 7.3.1.7), also the berthing priority awarded for the operation of the nine remaining routes complies with the 2005 SGEI Decision.

7.3.1.9. *Conclusion*

(483) Based on the assessment in recitals 432-474 the Commission concludes that the compensation granted to Tirrenia for the provision of the maritime services subject to the prolongation of the initial Convention in the period from 1 January 2009 to 18 July 2012 complies with the applicable conditions of the 2011 SGEI Framework and is therefore compatible with the internal market under Article 106 TFEU.

(484) Furthermore, based on the assessment in recitals 479-481 that the compensation granted to Tirrenia and the berthing priority for the operation of nine routes[(161)] during the prolongation period is also compatible with the internal market and exempted from the obligation of prior notification pursuant to the 2005 SGEI Decision.

7.3.2. *Illegal prolongation of rescue aid to Tirrenia*

(485) On the basis of the 2010 Decision, rescue aid to Tirrenia, as far as it is limited to the six-month period that expired on 28 August 2011, was compatible with the internal market. However, in accordance with the 2004 Rescue and Restructuring Guidelines, Italy was required to communicate to the Commission within six months, either (i) proof that the loan has been reimbursed in full and/or that the guarantee has been terminated; or (ii) a restructuring (or liquidation) plan.

(486) The guarantee was called on 11 July 2011 and Tirrenia only reimbursed the full amount due to the State on 18 September 2012 (see recital 59). Therefore, Italy could not provide proof that the loan was reimbursed in full and/or that the guarantee was terminated within the period of six months that expired on 28 August 2011.

(487) According to the information provided by Italy (see section 4.2) in the course of the formal investigation procedure, a liquidation plan for Tirrenia was available on the website of Tirrenia in EA before the expiry of the six-month time limit foreseen by the 2004 Rescue & Restructuring Guidelines. Furthermore, Italy argues that at all times it kept the Commission up to date of the progress of the privatisation process of the Tirrenia business branch.

(488) The information in the Commission's case file confirms that the Italian authorities indeed updated the Commission about the then ongoing privatisation of the Tirrenia business branch. Furthermore, Italy also confirmed Tirrenia's intention to repay the rescue aid before the expiry of the six-month deadline using the proceeds from this privatisation. However, the Italian authorities did not formally submit a restructuring or liquidation plan to the Commission. The Commission was not aware at the time, that a liquidation plan had been published on Tirrenia in EA's website. Furthermore, the fact that the Commission was informed about the privatisation process of the Tirrenia business branch cannot substitute for the formal submission of a liquidation plan. More specifically, the Commission must be given the opportunity to assess whether the liquidation plan complies with the 2004 Rescue & Restructuring Guidelines and therefore it should have been formally submitted by Italy.

(489) In addition, the Commission notes that on 5 October 2011 it had sent a letter in which it requested Italy to confirm it had complied with the requirements of the 2004 Rescue and Restructuring Guidelines and the 2010 Decision. The Commission sent a reminder letter to Italy on 28 November 2011 and received a reply from the Italian authorities on 12 December 2011. Therefore, as far as the Commission concerns, until the latter date (and hence after the expiry of the six-month period) Italy had not submitted, either (i) proof that the loan had been reimbursed in full and/or that the guarantee had been terminated; or (ii) a restructuring (or liquidation) plan.

(490) In its reply to the Commission's letter of 5 October 2011, Italy confirmed that the intention had been to repay before 28 August 2011 but that the privatisation process had been delayed due to the need to obtain merger approval from the Commission. Since the proceeds of the privatisation were necessary to repay the State, this repayment could hence not be done before expiry of the deadline on 28 August 2011. The Commission points out that in their letter of 12 December 2011, the Italian authorities did not refer at all to the liquidation plan of Tirrenia that according to their later submissions would have already been made publicly available before 28 August 2011. Instead, Italy only tried to explain why the repayment could not be done before expiry of the six-month period. However, if the Italian authorities had submitted a restructuring or liquidation plan to the Commission before 28 August 2011 they would not have had to provide such explanations. The Commission takes this as further

evidence that Italy had not submitted a restructuring or liquidation plan within the required six-month period.

(491) In view of the above, even if the Commission was aware about the privatisation process but not of a detailed liquidation plan, Italy has not complied with its commitment in the 2010 Decision to communicate to the Commission a restructuring (or liquidation) plan within six months after the rescue aid has been authorised. As a result, from the expiry of the six-month period on 28 August 2011, the rescue aid must be considered as illegal and incompatible aid. The Commission considers that the illegally prolonged rescue aid cannot be found compatible on other grounds as it complies neither with the relevant conditions of the Rescue and Restructuring Guidelines nor with those of the 2011 SGEI Framework[(162)].

(492) Indeed, in the case at hand, the Commission notes that the illegally prolonged rescue aid was not granted for a genuine and correctly defined service of general economic interest, as required by paragraph 12 of 2011 SGEI Framework. Tirrenia already received compensation for the operation of public services on the basis of the initial Convention (as prolonged) while the rescue aid was notified and approved as a temporary rescue aid measure and not as compensation for the provision of a SGEI. Therefore, it cannot be declared compatible with the internal market on the basis of the 2011 SGEI Framework.

(493) Against the above background, the Commission notes positively that Tirrenia in EA already reimbursed an amount of EUR 25 852 548.93 on 18 September 2012. This payment exceeded the EUR 25 203 063.89 due to the State on 11 July 2011. However, since the illegally prolonged rescue aid has been found incompatible, the repayment must include at least an amount equal to the applicable recovery interest. If the interest paid by Tirrenia in EA were insufficient, the remaining interest amount would still have to be recovered.

7.3.3. *Possible use of funds to upgrade ships for liquidity purposes*

(494) Given that the possible use of funds to upgrade ships for liquidity purposes constitutes State aid within the meaning of Article 107(1) TFEU, its compatibility is to be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article and Article 106(2) TFEU.

(495) The Commission notes that Tirrenia qualified as a firm in difficulty at least since 5 August 2010, the date at which it was admitted to the extraordinary administration procedure. On that same date, the Decree Law enabling the use of the measure was adopted. To the Commission's knowledge, the funds were first used for liquidity purposes on 12 August 2010 when Banca Carige used EUR 4 657 005,35 to offset two debts owed to it by Tirrenia (see recital 110). Therefore, this measure must in principle be assessed on the basis of the Rescue and Restructuring Guidelines.

(496) Even if this measure was granted before the entry into force of the 2014 Rescue and Restructuring Guidelines on 1 August 2014, according to paragraph 139 of those Guidelines, when examining aid to SGEI providers in difficulty, such as Tirrenia, the Commission will apply the provisions of Chapter 5 of the 2014 Rescue and Restructuring Guidelines, regardless of the date when the aid was granted.

(497) The Commission observes that the possible use of funds to upgrade ships for liquidity purposes was never notified by Italy, unlike the rescue aid measure approved in the 2010 Decision. Furthermore, Tirrenia has in any case not repaid to the State the funds to upgrade ships, used for liquidity purposes, within the six-month period laid down in the 2014 Rescue and Restructuring Guidelines. Finally, as explained above (see section 7.3.2), Italy has not submitted to the Commission a restructuring plan or liquidation plan for Tirrenia. Therefore, the Commission concludes that the use of funds to upgrade ships for liquidity purposes cannot be regarded as compatible restructuring aid on the basis of the 2014 Rescue and Restructuring Guidelines.

(498) Where, by virtue of paragraph 9 of the SGEI Framework, the Commission assesses the compatibility under the 2014 Rescue and Restructuring Guidelines of aid granted to SGEI providers in difficulty before 31 January 2012, date of entry into force of the 2011 SGEI Framework, such aid will be deemed compatible with the internal market if it complies with the provisions of the SGEI Framework, with the exception of its paragraphs 9, 14, 19, 20, 24, 39 and 60[(163)].

(499) In the case at hand, the Commission notes that, under the present measure, Tirrenia could only make temporary use of the funds to cover its liquidity needs. Indeed, Tirrenia was required to replenish these dedicated funds, so that they could be used for their original purpose, i.e. to pay for the necessary upgrades to Tirrenia's ships. These upgrades were required to meet new international safety standards and hence were decisive for the availability of Tirrenia's ships for the performance of its public service obligations. However, in practice Tirrenia did not respect the aforementioned requirement and only paid for the upgrades to the vessel Clodia. As a result, the upgrades to the other ships concerned had to be paid by CIN from its own funds. Hence, even if this measure would constitute public service compensation, which has not been demonstrated by Italy, by neither replenishing the funds to pay for the ship upgrades[(164)] nor by repaying them to the State, Tirrenia would have *de facto* benefited from incompatible overcompensation. Therefore, the Commission considers that this measure cannot be declared compatible on the basis of the 2011 SGEI Framework.

(500) For completeness, the Commission notes that the exceptions laid down in Article 107(3)(a), (b), (d) and (e) of the TFEU are not applicable to this measure either.

(501) The Commission therefore concludes that the amount of EUR 11 421 300[(165)] that was neither used to pay for ship upgrades nor was repaid to the State, constitutes operating aid reducing the costs that Tirrenia would otherwise have had to bear from its own resources and is thus incompatible with the internal market[(166)]. The Commission notes that this aid was effectively at the disposal of the beneficiary as of the date of enter into force of the 2010 law, i.e. 6 October 2010.

7.3.4. *Fiscal exemptions related to the privatisation process*

(502) The Commission has concluded above (see recitals 416-426) that the exemptions from (i) indirect taxes on operations and acts related to the transfers of Caremar, Saremar, Toremar and the Tirrenia business branch to the respective acquirers; and from (ii) corporate income tax on the proceeds from the sale of the Tirrenia business branch to CIN that were granted by the 2010 Law constitute State aid to Tirrenia.

(503) In both instances, the aid is equal to the tax ordinarily due for these types of transaction. The compatibility of this State aid is therefore to be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of Article 107 TFEU and Article 106(2) TFEU.

(504) The Commission considers that none of these exemptions can be found compatible on the basis of any of the derogations provided for by Article 107(2) and (3) TFEU.

(505) Above that, on the transfer of the Tirrenia business branch to CIN, the Commission notes that, at the time of adoption of this Decision, Tirrenia in EA no longer performs an SGEI. Therefore, also the compatibility grounds laid down in Article 106(2) TFEU cannot be invoked.

(506) On the transfers to the Regions, the Commission notes that the aid paid via this tax exemption is a one-off measure related to a transfer of assets in view of the reorganisation and subsequent privatisation of the Tirrenia group. As such, the Commission considers that it is not inextricably linked with the SGEI performed by Tirrenia and should therefore not be assessed on the same compatibility basis. Indeed, such exemption is not related to the operation of services of general economic interest as defined in the initial Convention, in force when the transfers were implemented (November 2009). Therefore, also for these transfers, the compatibility grounds laid down in Article 106(2) TFEU cannot be invoked.

(507) The Commission therefore concludes that Tirrenia's tax exemptions constitute operating aid reducing the costs that Tirrenia in EA would otherwise have

had to bear from its own resources and is thus incompatible with the internal market[167].

7.3.5. *Conclusion on compatibility of the aid*

(508) On the basis of the assessment above, the Commission finds that:

— the compensation granted to Tirrenia and the berthing priority for the operation of maritime routes in the period 1 January 2009 – 18 July 2012 are compatible with the internal market under Article 106 TFEU, the 2011 SGEI Framework, and for nine[168] of the twelve routes also under the 2005 SGEI Decision,

— the rescue aid to Tirrenia was illegally prolonged in the period from 11 July 2011 to 18 September 2012 (when it was repaid) and is incompatible with the internal market,

— the use of funds to upgrade ships for liquidity purposes constitutes operating aid to Tirrenia. That aid is incompatible with the internal market,

— Tirrenia's exemption from indirect taxes on operations and acts related to the transfer of Caremar, Saremar and Toremar and the Tirrenia business branch to the respective acquirers constitute incompatible operating aid to Tirrenia. Tirrenia's exemption from corporate income tax on the proceeds from the sale of the Tirrenia business branch to CIN, also constitutes incompatible operating aid to Tirrenia.

7.4. **Response to Grimaldi's submissions**

(509) As described above (see section 6), Grimaldi has made several submissions to the Commission and the Italian authorities. These submissions were made after the expiry of the deadlines for interested third parties to comment on the 2011 Decision and the 2012 Decision. Furthermore, while Grimaldi has indicated it is a competitor of CIN and therefore might qualify as an interested party, it has not completed the compulsory complaint form referred to in Article 24(2) of Regulation (EU) 2015/1589. In addition, the Commission points out that some of Grimaldi's allegations cannot be addressed in this Decision as they were not included in the scope of the formal investigation procedure.

(510) Notwithstanding the above, the Commission notes the following with respect to the allegations made by Grimaldi in its submissions:

— The allegations regarding the abuse of dominant position under Article 102(b) TFEU were investigated by the national competition authority AGCM and were initially addressed in its resolution n° 27053 of 28 March 2018 (as of the date of adoption of this Decision, the case remains open following the partial annulment of that resolution by the TAR – see recital 279),

— The Commission has found that the public service compensation granted to CIN on the basis of the new Convention does not constitute State aid since it complies with the four Altmark-criteria. The Commission's assessment

has shown that each of the routes operated by CIN under the public service regime qualify as genuine SGEI[169] (see recital 348) and that CIN has not been overcompensated (see recital 366),

— Under the new Convention, CIN is required to submit its management accounts every year to the Ministry of Transport for review. These accounts are sub-divided per route and certified by an independent auditor and ensure that the costs and revenues of the public service activities are separated from the commercial activities. The Commission has received a copy of these accounts,

— The delay in the payment of part of the Deferred Price for the Tirrenia business branch is the subject of national court proceedings launched by Tirrenia in EA,

— The proposed merger between CIN and Moby does not seem to raise any State aid issues as the resulting merged company can still maintain separate accounts for its public service activities and its commercial activities,

— The new Convention foresees penalties for breaches by CIN of its obligations under that Convention and therefore any alleged breaches (e.g. price increases) are an issue for the national authorities to follow up.

8. CONCLUSION

(511) The Commission finds that Italy has unlawfully implemented some of the aid measures under assessment in breach of Article 108(3) of the Treaty on the Functioning of the European Union. On the basis of the foregoing assessment, the Commission has decided that the public service compensation granted to Tirrenia under the prolongation of the initial Convention is compatible with the internal market under Article 106 TFEU. Furthermore, since the berthing priority is inextricably linked with the performance of the SGEI by Tirrenia, that measure is also compatible with the internal market under Article 106 TFEU. For nine of the twelve public service routes concerned, Italy was exempt from the obligation of prior notification provided for in Article 108(3) TFEU because the public service compensation granted to Tirrenia and the berthing priority awarded for the operation of these nine routes complied with the 2005 SGEI Decision.

(512) However, the rescue aid to Tirrenia that was illegally prolonged in the period from 11 July 2011 to 18 September 2012 is incompatible with the internal market. In addition, the use of funds to upgrade ships for liquidity purposes constitutes operating aid to Tirrenia that is incompatible with the internal market. Finally, the exemption from the indirect taxes, on operations and acts related to the transfer of Caremar, Saremar, Toremar and the Tirrenia business branch to the respective acquirers, and from the corporate income tax, on the proceeds from the sale of the Tirrenia business branch to CIN, also constitute operating aid to Tirrenia that is incompatible with the internal market.

(513) This Decision does not concern or prejudge any other issues covered by the 2011 and 2012 Decisions[170] or brought to the attention of the Commission

by interested parties in the course of the investigation opened under those Decisions.

9. RECOVERY

(514) According to the Treaty on the Functioning of the European Union and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market[(171)]. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re#establish the previously existing situation[(172)].

(515) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage, which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored[(173)].

(516) In line with the case law, Article 16(1) of Regulation (EU) 2015/1589 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

(517) Thus, given that the measures in question were implemented in breach of Article 108(3) Treaty on the Functioning of the European Union, and are to be considered as unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery.

(518) In the present case, the aid beneficiary, Tirrenia in EA, is already undergoing insolvency proceedings. Therefore, effective recovery can be achieved through registration of the claim relating to the aid to be recovered in the schedule of liabilities[(174)]. In that case, the registration of the claim must be followed by (i) recovery of the full recovery amount, or, if that cannot achieved, (ii) the winding-up of the undertaking and the definitive cessation of its activities.

(519) The incompatible State aid mentioned in recital 508 granted for Tirrenia must be reimbursed to Italy insofar as it has been paid out. In particular, the aid to be recovered is established as follows:

(a) The principal of the rescue aid, i.e. EUR 25 203 063,89, plus recovery interest, accruing from the dates of payment of the two loan tranches and from the date when the State guarantee was called by BIIS (i.e. 28 February 2011 for the first tranche of EUR 20 000 000, 23 March 2011 for the second tranche of EUR 5 000 000, and 11 July 2011 for the amount of EUR 203 063,89), until

full recovery. The Commission takes note that the principal of the aid and part of the recovery interest have already been repaid by the beneficiary;

(b) The funds to upgrade ships which were used for liquidity purposes, i.e. EUR 11 421 300, plus recovery interest, accruing from the date of entry into force of the 2010 law, i.e. 6 October 2010, until full recovery;

(c) To the extent that the indirect taxes on operations and acts related to the transfers of Caremar, Saremar and Toremar to respectively the Regions of Campania, Sardinia and Tuscany, and to the transfer of the Tirrenia business branch to CIN, are payable by the seller, the aid principal is equal to the taxes ordinarily due for these types of transaction. Italy shall provide a list of all the documents for which taxes were effectively exempted and calculate the taxes ordinarily due. To these amounts, recovery interest shall be added, accruing from the date(s) of the official documents for which taxes were exempted until full recovery.

(520) In addition, Italy shall not exempt the proceeds from the sale of the Tirrenia business branch to CIN from the corporate income tax to be paid by Tirrenia in EA.

10. ECONOMIC CONTINUITY

(521) Where there has been a sale or transfer of the beneficiary of illegal and incompatible State aid, the obligation to repay can be extended to other undertakings to which the beneficiary's shares or business have been transferred[175]. In case of a share deal, where the beneficiary is still existing and active on the market and has merely changed its owners, the obligation to repay the aid stays with the beneficiary. In case of an asset deal, where another undertaking is continuing the business with some or all of the assets of the original beneficiary, that other undertaking should be considered as the beneficiary of the State aid, provided that the transfer or sale structure triggers the conclusion that there is economic continuity between the two companies.

(522) On the contrary, where it can be shown that, notwithstanding a transfer of some or all of the assets, the benefit of the unlawful aid remains with the original recipient and the acquiring company performs a substantially different activity, the repayment obligation will remain with the original recipient of the aid. According to the case-law, in order to assess whether there is economic continuity, the following factors may be taken into account: the scope of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the owners of the acquiring undertaking and of the original undertaking, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and the economic logic of the transaction[176].

(523) Under the same case law, the aforementioned factors may be taken into account to varying degrees, according to the specific features of the case at

hand. It follows that the Commission is not required to take into account the whole of those factors, as is demonstrated by use of the expression 'may be taken into consideration'[177] and by the fact that there is no hierarchy between those factors. In particular, in the case at hand, the Commission considers that the assessment of economic continuity should take into account the peculiar nature of the transaction between Tirrenia in EA and CIN, which concerned the privatisation of part of a public company by means of a tender procedure for an eight-year public service contract, combined with the assets necessary to operate the services of general economic interest spelled out in that contract.

(524) In order to decide whether there is economic continuity between Tirrenia in EA and CIN, and therefore establish whether the latter should be held liable for the reimbursement of the incompatible aid granted to the former, the Commission applied the aforementioned indicators to the specific circumstances of the case at issue.

10.1. **The scope of the transfer**

(525) This indicator concerns the extent of the transfer of the existing assets and liabilities, including contractual relationships with the employees and suppliers, from Tirrenia di Navigazione (later in EA) to CIN. At the outset, it should be noted that none of the existing liabilities were transferred: they remained entirely within Tirrenia in EA, and still do as of the time of adoption of this Decision. Indeed, the transfer entailed the complete write-off of any claim on the assets being transferred, such as mortgages, seizures, and priority claims.

(526) Additionally, as far as the assets are concerned, the Commission firstly notes that the procedure for the sale of the Tirrenia business branch followed a failed privatisation attempt of Tirrenia di Navigazione in its entirety, with all its assets and liabilities, including its subsidiary Siremar. The second, successful, privatisation attempt involved only the assets deemed necessary for the public service obligations and the related contractual relationships with suppliers, with a different and narrower scope when compared with the first attempt (approximately 45 % in terms of the number of ships). Those assets, which were not considered necessary for the provision of the public service obligations, were sold separately, with different and unrelated tenders, and included six ships, real estate properties both in Italy and abroad, and an art collection. In addition, Tirrenia's subsidiary Siremar was sold via a separate tender procedure. As Siremar was operating several routes connecting Sicily to other smaller islands, with a large staff and several ships, this separation further reduces the scope of the activities of the Tirrenia business branch, when compared with the original Tirrenia di Navigazione.

(527) On the other hand, the Commission notes that the Tirrenia brand was included in the scope of the transfer and its value was included in the market price paid by CIN.

(528) Finally, the Commission also notes that, as far as the workforce is concerned, there was no transfer of work contracts from Tirrenia in EA to CIN. Indeed, Article 2112 of the Italian Civil Code requires that, in case of transfer of a business, the existing employment contracts continue with the buyer and each employee maintains all resulting rights. However, pursuant to Decree Law 270/1999, this ordinary regime is not applicable to the transfer of a branch of a company subject to an extraordinary administration procedure and providing essential public services. On the contrary, the new owner is obliged to take over the staff necessary for providing the service and refrain from collective dismissals for two years (see recital 160). The Commission notes that, while the general rule would have provided for a clear continuity in the workforce between Tirrenia in EA and CIN, this exception effectively allowed Tirrenia in EA to terminate all contracts with its employees. Then, CIN negotiated new contractual conditions with the staff unions and offered new contracts, only for those employees that were actually working on the performance of the public service obligations, fully respecting the applicable labour laws.

(529) Indeed, the obligation to maintain the number of employees was set by a general law (see recital 528) and therefore it had to be respected by the Italian authorities in the set-up of the sale procedure. However, even without this legal obligation, the Commission notes that the shipping business requires a mandatory minimum number of employees to operate the ships, with a very particular set of skills, as set out in the manning tables (see recital 175). Indeed, in the present case after being awarded the new Convention, CIN would have had to recruit over 1 200 employees, in a short timeframe, to discharge its obligations. It is therefore highly likely that CIN would have hired most of the employees of Tirrenia in EA even if it were not required to offer employment contracts, for reasons of expediency and to reduce recruitment costs.

(530) Against this background, the Commission concludes that, while there was *de facto* continuity in the workforce, the latter was due to the factual circumstances of the case (i.e., the size of the transfer) and to applicable labour laws. On the other hand, only part of the assets of Tirrenia in EA and none of its liabilities were transferred to CIN.

10.2. **The transfer price**

(531) According to settled case law, the transfer of the assets at a price below market price would also be an indicator of economic continuity between the liquidated company, liable to repay the aid to the State, and the newly created company. In this case, the Commission notes that the assets were transferred as a result of a tender which was sufficiently open, transparent and non-discriminatory so as to obtain a market price, as described in section 7.1.3.4 above. There is no evidence that the joint tendering of the assets and the public service contract had a negative impact on the outcome of the tender. On the contrary, Italy has shown that when separate tenders were organised

for some of Tirrenia's and Siremar's other ships, these could only be sold at scrap value. Indeed, the conditions imposed on the sale, such as the requirement to maintain staffing levels for two years, did not depress the price, as established by the Ecorys report[178]. Additionally, even if the price eventually paid was lower than that identified in the independent expert evaluation provided by Banca Profilo, because part of the payment was deferred, such a deferral was an integral part of the dynamics of the tender procedure, in the context of which all other bidders had the chance to match CIN's bid with similar payment terms[179]. Indeed, it is established case law that the outcome of an open and transparent tender is even more accurate than any expert valuation[180].

(532) In light of the above, the Commission concludes that the circumstances of the transfer exclude the transfer of any economic advantage, received by Tirrenia in EA, to CIN.

10.3. **The identity of the owners**

(533) When the transfer of the assets takes place between two related entities, this is a strong sign that the purpose of the transfer may well be to circumvent the obligation to repay aid identified as unlawful and incompatible in a Commission decision. In the present case, the Commission notes that Tirrenia in EA and CIN had and have no connections of any kind. The former was a public company, ultimately fully owned by the Ministry of Finance and Economics[181]. The latter was originally a private sector consortium, involving both an existing ferry operator (Moby) and three funds. All parties to this consortium were private[182]. Therefore, the Commission notes that no control could be exercised from Tirrenia in EA to CIN or vice versa.

10.4. **The timing of the transfer**

(534) Where the transfer of the assets took place after the adoption of a Commission decision raising doubts as to the compatibility of an aid that had already been granted, this is another indicator that such transfer may have been set up in order to circumvent a recovery order. In the present case, the Commission notes that the publication of the call for expressions of interest took place on 15 September 2010, while the signing of the sale contract with CIN took place on 25 July 2011. The Commission's decision to open a formal investigation, on the contrary, was adopted on 5 October 2011. That decision concerned, *inter alia*, the privatisation of the Tirrenia branch. Additionally, the Commission extended the formal investigation to, *inter alia*, the new Convention signed by CIN on 7 November 2012[183]. Even if the transfer was finalised only on 19 July 2012, this was due to the necessity to obtain approval of the merger from the Commission. However, the Commission notes that on 25 July 2011 the sale contract was already valid and binding, even if the identity of one of the parties partly later changed to eliminate the competition concerns raised in the course of the merger procedure. It cannot be called into question that

when the parties signed the contract, they did not know that the Commission would open a formal investigation a few months later, let alone know its content, gauge the risk it entailed for either party, and decide to transfer the assets to void such investigation of any purpose. This applies to the measures described in the 2011 Decision and even more so to the measures described in the 2012 Decision, which was adopted after the conclusion of the sale and the entrustment of the new Convention to CIN.

(535) Additionally, the Commission notes that Italy had informed the Commission about their intention to sell the Tirrenia business branch in a bundle with the new Convention well ahead of time, in the context of discussions with the Commission for the implementation of the Maritime Cabotage Regulation (see also section 2.4). Moreover, Italy also notified, for reasons of legal certainty, the draft new Convention[(184)]. This is another, strong indication that Italy did not intend to circumvent any future recovery order by organising the transfer of the business branch and the entrustment of the new Convention in the way described and assessed in section 7.1.3.

10.5. **The economic logic of the transfer**

(536) This indicator is concerned with both the intentions of the parties to the asset transfer, and its economic rationale in light of the future business of the company that will operate those assets. In this respect, the Commission firstly notes that, on the one hand, the intention of the Italian authorities was to comply with the obligation to liberalise the maritime transport sector as spelled out in the Maritime Cabotage Regulation by privatising its main public operator, the Tirrenia Group, including Tirrenia in EA, and by entrusting the public service obligation to the acquiring company. While not required by that Regulation, this transfer of both the assets and the public service compensation was indeed one of the options available to Italy (see also recital 114) to implement that liberalisation, and in these circumstances, was also optimal in terms of sale price of the assets, relative to the use of two separate procedures[(185)]. On the other hand, the intention of CIN was to operate the routes under public service obligation in a more efficient manner than did the previous Tirrenia di Navigazione (later in EA), and thereby earn a profit (taking also into account the routes and periods where it operated on the free market).

(537) As far as the future business of the company is concerned, the Commission notes that while it is true that CIN offers the same or very similar routes and frequencies as Tirrenia, this is only the logical consequence of the ongoing need to provide genuine services of general economic interest, as set out in the new Convention. In other words, continuity of the public service should not be confused and conflated with economic continuity under State aid rules. Indeed, the Commission considers that, in order to achieve the very purpose of the new Convention, i.e. to (i) ensure the territorial continuity between the mainland and the islands; and (ii) contribute to the economic development of

the islands concerned, Italy was obliged to model the geographical scope of the new Convention in a similar way to the initial Convention.

(538) Additionally, the Commission notes that the conditions for the day-to-day execution of the public service obligations by CIN are radically different. The amount of compensation is set with a completely different mechanism, which requires the operator to operate efficiently, and indeed CIN set out to: increase the efficiency of the fleet, in terms of maintenance, insurance, fuel costs, and crew management; improve online sales; improve quality and the offer of on-board services; increase the number of passengers and the quantity of goods transported. Indeed, as there is no guarantee of full cost coverage and as the amount of nominal compensation is fixed for several years (i.e., decreasing in real terms), CIN had no choice but to undertake a complete overhaul of the business strategy followed by Tirrenia di Navigazione. The latter, throughout its long history within the Tirrenia group, always and consistently operated as a public service, without any strategy to achieve sustainable profitability, while Tirrenia in EA simply aimed at the orderly winding down of the company while ensuring the continuity of the public service until the transfer of ownership to CIN following the tender procedure.

(539) Hence, CIN executed its public service obligations and its other activities under completely different operating conditions than Tirrenia in EA, on the basis of its own strategy. Indeed, the Italian authorities did not require CIN to follow any specific business model nor to maintain a certain scope of activities, beyond those set out in the new Convention, nor to take over any specific assets or employees that were not intrinsically linked with the operation of the public service obligations as defined in the new Convention. In this respect, CIN was (and still is) free to make any changes to the way the business is run that they see fit.

(540) The Commission notes that while the public service obligations themselves, in terms of routes and frequencies, are inevitably similar as they respond to similar public service needs, the conditions of their execution and the business strategy behind it are different. Indeed, this *de facto* similarity in the activity undertaken was due to the very specific circumstances of the case and was mitigated by the different financial constraints on CIN's operations.

10.6. Conclusion on economic continuity between Tirrenia in EA and CIN

(541) On the basis of the above, the Commission notes that the transfer price, the identity of the owners and the timing of the transactions do not present any indication of economic continuity. Even if the scope of the transaction and its economic logic contain some elements that suggest that there could be economic continuity, for the latter two criteria the Commission notes that any element of potential continuity is motivated by the very specific circumstances of this transaction, i.e. the bundling of the asset transfer and public service contract in a single procedure, the size of the

transaction, and the generally applicable labour laws. In particular, there are no indications of an attempted circumvention to a recovery obligation. Against this background, the Commission concludes that on balance there is no economic continuity between Tirrenia and CIN. This also means that the obligation to repay the illegal and incompatible State aid granted to Tirrenia shall not be extended to CIN,

HAS ADOPTED THIS DECISION:

Article 1

1 The compensation granted to Tirrenia and the berthing priority awarded for the provision of maritime services on twelve routes under the initial Convention, as prolonged in the period 1 January 2009 to 18 July 2012 constitutes State aid within the meaning of Article 107(1) TFEU. The State aid for the operation of the three routes Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2 The aid referred to in paragraph 1 of this Article is compatible with the internal market.

Article 2

1 The prolongation of the rescue aid from 11 July 2011 to 18 September 2012 constitutes aid to Tirrenia within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2 The aid referred to in paragraph 1 of this Article – amounting to EUR 25 203 063,89 – is incompatible with the internal market.

Article 3

1 The exemption from the indirect taxes on the transfer of Caremar, Saremar, Toremar and the Tirrenia business branch to respectively the Regions of Campania, Sardinia and Tuscany, and to CIN, constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2 The exemption from corporate income tax of the proceeds from the sale of the Tirrenia business branch to CIN constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

3 The aid referred to in paragraph 1 and 2 of this Article is incompatible with the internal market.

4 At the time of adoption of this Decision, Italy has not yet paid out the aid referred to in paragraph 2 of this Article.

Article 4

1 The use of funds to upgrade ships for liquidity purposes constitutes State aid to Tirrenia within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2 The aid referred to in paragraph 1 of this Article – amounting to EUR 11 421 300 – is incompatible with the internal market.

Article 5

1 The award of the new Convention for the period from 18 July 2012 until 18 July 2020, bundled with the Tirrenia business branch and the berthing priority to CIN – including the deferred payment of part of the purchase price by CIN – does not constitute State aid within the meaning of Article 107(1) TFEU.

2 The possibility to use resources of the *Fondo Aree Sottoutilizzate* to meet liquidity needs, as laid down by the 2010 Law does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 6

1 Italy shall recover the incompatible aid referred to in Articles 2, 3, and 4 from the beneficiaries, in so far as it has been paid out.

2 The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3 The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004[(186)] and to Commission Regulation (EC) No 271/2008[(187)] amending Regulation (EC) No 794/2004.

4 Based on the information at its disposal, the Commission acknowledges that the beneficiary has already repaid the principal of the aid referred to in Article 2.

5 Italy shall cancel all outstanding payments of the aid referred to in paragraph 2 of Article 3 with effect from the date of adoption of this Decision.

Article 7

1 Recovery of the aid referred to in Article 6 shall be immediate and effective.

2 Italy shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 8

1 Within two months following notification of this Decision, Italy shall submit the following information to the Commission:

— the total amount (principal and recovery interest) to be recovered from the beneficiary,

— a detailed description of the measures already taken and planned to comply with this Decision,

— documents demonstrating that the beneficiary has been ordered to repay the aid.

2 Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 6 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 9

This Decision is addressed to the Italian Republic.

The Commission may publish the amounts of aid and recovery interest recovered in application of this decision, without prejudice to Article 30 of Regulation (EU) 2015/1589.

Done at Brussels, 2 March 2020.

For the Commission

Margrethe VESTAGER

Executive Vice-President

(**1**) OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.

(**2**) The former Tirrenia Group consisted of the companies Tirrenia di Navigazione S.p.A., Adriatica S.p.A., Caremar - Campania Regionale Maritima S.p.A., Saremar - Sardegna Regionale Marittima S.p.A., Siremar – Sicilia Regionale Marittima S.p.A., and Toremar - Toscana Regionale Marittima S.p.A.

(**3**) State aid — Italian Republic — State aid SA.32014 (11/C) (ex 11/NN), SA.32015 (11/C) (ex 11/NN),SA.32016 (11/C) (ex 11/NN) — State aid to the companies of the former Tirrenia Group (potentialState aid under the form of public service compensation and potential aid in the context of theprivatisation) (SA.28172 (CP 103/2009), SA.29989 (CP 393/2009), SA.30107 (CP 414/2009),SA.30206 (CP 3/2010), SA.31645 (CP 234/2010), SA.31715 (CP 248/2010)) — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 28, 1.2.2012, p. 18).

(**4**) All amendments concerned measures in favour of Saremar.

(**5**) State aid — Italian Republic — State aid SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) — Italy — State aid to the companies of the former Tirrenia Group and their acquirers — Invitation to submit comments pursuant to Article 108(2) TFEU (OJ C 84, 22.3.2013, p. 58).

(**6**) Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22).

(**7**) See Judgment of 6 April 2017 in Case T-219/14 *Regione autonoma della Sardegna (Italy) v Commission*, ECLI:EU:T:2017:266.

(**8**) Fintecna (Finanziaria per i Settori Industriale e dei Servizi S.p.A.) is wholly owned by the Italian Ministry of the Economy and Finance and is specialised in managing shareholding and privatisation processes, as well as dealing with projects to rationalise and restructure companies facing industrial, financial or organisational difficulties.

(**9**) Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9).

(**10**) Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 53, 26.2.2005, p. 29).

(**11**) In particular: Adriatica, Caremar, Siremar, Saremar and Toremar.

(**12**) Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

(**13**) This transfer was formalized on 1 June 2011.

(**14**) Article 19-*ter*, paragraph 10 of the 2009 Law.

(**15**) This includes the deferred payment by CIN of part of the purchase price for its acquisition of the Tirrenia business branch and several alleged additional aid measures in the context of the privatisation of the Siremar business branch (e.g. counter-guarantee and capital increase by the State for CdI, the entity that initially acquired the Siremar business branch).

(**16**) In particular, the 'Bonus Sardo – Vacanza' project, which forms part of Measure 7, was not assessed in the 2014 Decision and will also not be assessed in this Decision.

(**17**) Before 2007, this route was also operated under the public service regime in the high season.

(**18**) Before 2008, this route was also operated under the public service regime in the high season.

(**19**) In particular, in the period 2009-2012 SNAV cancelled 76 sailings on this route while Tirrenia only cancelled 19 sailings (i.e. four times less). Furthermore, of these 76 cancellations by SNAV, 19 were due to bank holidays and the remaining 57 due to adverse weather conditions. Despite having almost the same departure time, Tirrenia only cancelled five sailings (or ten times less than SNAV) due to adverse weather conditions. The remaining cancellations by Tirrenia were due to *force majeure*, i.e. seven were due to staff going on strike and another seven as a result of technical issues.

(**20**) More specifically, Tirrenia used two ships built between 1999 and 2000, while SNAV provided its service using vessels dating from 1973, 1974, 1980 and in only one case 1989.

(**21**) The initial Convention also allowed for a freight connection to be operated from Genova to Cagliari but this possibility was only used until July 2008 and not during the prolongation period.

(**22**) After 25 November 2010, by decision of the Interdepartmental Conference on the establishment of the annual subsidy set up under Article 11 of Law No 856/1986 between the Ministry of Infrastructure and Transport, the Ministry of Economy and Finance, and the Ministry of Economic Development (the 'Interdepartmental Conference'), any amount of overcompensation is deducted from future advance subsidy payments.

(**23**) Comitato Interministeriale per la Programmazione Economica.

(**24**) *Gazzetta Ufficiale della Repubblica Italiana* ('GURI') No 50 of 28 February 2008.

(**25**) As pursuant to Article 1, letter 999 of Law No 296 of 27 December 2006 and Article 1, letter (e) of Decree Law 430/1997.

(**26**) The desired rate of return for an equity investor given the risk profile of the company and associated cash flows.

(**27**) Authorisation for State aid pursuant to Articles 107 and 108 of the TFEU — Cases where the Commission raises no objections (OJ C 102, 2.4.2011, p. 1).

(**28**) Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(**29**) See recitals 79-81 for more details.

(**30**) Article 4 (4-*quater*) of Decree Law No 134 of 28 August 2008, converted into Law No 166 of 27 October 2008, concerning urgent measures for the restructuring of large insolvent companies ('*Disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi*').

(**31**) See recital 27 for more background on the use of the term 'business branch' in this context.

(**32**) The Financial Times, Il Corriere della Sera, Il Sole 24 Ore, La Repubblica, Il Giornale, Il Mattino, and Il Giornale di Sicilia.

(**33**) Delloyd, Naftemporiki, Fairplay, Lloyd's List and Tradewinds.

(**34**) Five entities were excluded because they did not provide adequate evidence of being able to ensure the continuity of the public maritime transport service since the natural persons concerned clearly did not have the necessary financial means.

(**35**) According to the Italian authorities, the other five entities invited to participate in the due diligence phase indicated they were no longer interested in participating in the transaction.

(**36**) In that letter of 2 February 2011, the Extraordinary Commissioner invited the interested entities to submit, before 15 March 2011, a final, unconditional and binding offer for the acquisition of the Tirrenia business branch, together with a first-call bank guarantee for an amount of EUR 20 million, covering the obligations undertaken in the offer and a business plan consistent with the public service obligations provided for in the draft new Convention under the 2010 Law.

(**37**) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

(**38**) Including, but not limited to, caps on tariffs, the termination of certain services and the sale of transport capacity on certain routes to other operators.

(**39**) As Moby and CIN were the only companies operating these routes, Onorato Partecipazioni committed to (1) keep or increase the aggregated supply of transport services on the routes Civitavecchia – Olbia and Genova – Olbia; (2) respect a tariff cap, using the high season prices set by Moby in 2014; (3) sell 10 % of transport capacity in the high season, with a 20 % discount on tariffs, to unrelated third parties.

(**40**) Patent and intellectual property rights; concessions, licences, trademarks and similar rights; other intangible assets.

(**41**) Systems and machinery; industrial and commercial equipment; other tangible assets.

(**42**) The day on which the new Convention is signed by CIN and the responsible Ministry.

(**43**) At the legal interest rate on an annual basis without capitalisation accruing from the entry into force until settlement of the balance.

(**44**) Most notably, Banca Profilo assumed that the entire Tirrenia business branch would be liquidated at the expiry of the new Convention. Ecorys on the contrary assumes that the vessels operating both under public service obligations (i.e. in the low season) and on a commercial basis (i.e. in the high season) would continue to operate the latter services and would then be sold at the end of their useful life. Ecorys did however not establish whether it would be viable to continue to operate these services in the high season only (e.g. staff's current employment contracts cover both the high and low seasons).

(**45**) Ecorys notes that while such prolongation cannot be excluded, the uncertainties and lack of any reliable information as to the public service conditions of a future renewal make it reasonable to assess the value of the Tirrenia business branch regardless of a possible future extension of the public service regime.

(**46**) Ecorys calculated this value as the difference between the costs incurred to dismiss all staff and the adjusted net value of the assets of the Tirrenia business branch.

(**47**) Ecorys considers that this ratio indicates whether the labour cost has a significant incidence in the budget of the Tirrenia business branch, in comparison with similar companies.

(**48**) Ecorys considers that this ratio indicates whether the labour cost of the Tirrenia business branch is disproportionate as compared to similar companies.

(**49**) In particular: from 24 December to 6 January, from the Wednesday before Easter to the following Tuesday, on the public holidays of 25 April, 1 May, 2 June, 1 November and 8 December, and two weeks in August following an agreement with the supervisory ministries.

(**50**) As laid down by Article 19, paragraph 13-*bis* of Decree Law 78/2009, converted into Law 102/2009, and by paragraph 19 of Article 19-*ter* of the 2009 Law.

(**51**) These safety standards were then detailed in the Council Directive 98/18/EC of 17 March 1998, transposed in Italian law by Legislative Decree No 45 of 4 February 2000, and in Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003, transposed in Italian law by Legislative Decree No 52 of 8 March 2005 and in Directive 2003/25/EC of the European Parliament and of the Council, transposed in Italian law by Legislative Decree No 65 of 14 March 2005.

(**52**) All the funds (i.e. EUR 7 000 000) provisioned by paragraph 19 of Article 19-*ter* of the 2009 Law and EUR 16 750 000 from the funds provisioned by Law 102/2009.

(**53**) The FAS is a national fund that supports the implementation of Italian Regional policy. Its resources are mainly earmarked for regions identified as such by the Italian authorities.

(**54**) *Gazzetta Ufficiale della Repubblica Italiana*, No 137 of 16 June 2009.

(**55**) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7). The Commission notes that the Maritime Cabotage Regulation does not require Member States to privatise their maritime transport companies but only to liberalise this specific market.

(**56**) The letter of formal notice was adopted on 28 January 2010 but only notified to Italy the next day.

(**57**) Even if the formal transfer of ownership of Tirrenia, Toremar and Siremar only occurred in 2012.

(**58**) See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

(**59**) Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

(**60**) Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

(**61**) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

(**62**) Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

(**63**) This paragraph reads as follows: 'Aid for providers of SGEIs in difficulty will be assessed under the Community guidelines on State aid for rescuing and restructuring firms in difficulty'.

(**64**) For a detailed description of the criterion, see recital 301(4).

(**65**) See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107, paragraphs 27-28.

(**66**) There was one Extraordinary Administration and one Extraordinary Commissioner covering both companies.

(**67**) In particular, two tender procedures were organized. One procedure for Tirrenia's fast ferries Aries, Taurus, Capricorn, Scorpio, Scatto and a separate procedure for Tirrenia's motor ship Domiziana. The former tender procedure also covered Siremar's fast ferry Guizzo.

(**68**) To illustrate that not all of Tirrenia's employees had to be taken over by the buyer, Italy mentions that Tirrenia's workforce numbered 1 414 at the moment when the due diligence took place while after the transfer of ownership to CIN this figure had fallen by 12 % to 1 239 (of which 313 on temporary contracts). In addition, of the 18 managers employed by Tirrenia, only four became employees of CIN.

(**69**) This includes different risk-free rates, betas, cost of debt, and some differences in how to calculate liquidation value (most notably personnel severance costs).

(**70**) For instance, Banca Profilo used the 10-year Italian government bond rates as the risk-free rate since the Tirrenia business branch operates exclusively in Italy. Ecorys however used the lower German government bond rates but which according to Banca Profilo underestimate the capital cost of the business branch.

(**71**) In particular, Italy refers to the judgment of 24 October 2013 in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P *Land Burgenland*, ECLI:EU:C:2013:682, paragraphs 93-96.

(**72**) OJ L 92, 13.4.2010, p. 19.

(**73**) Tirrenia in EA refers in particular to the judgment of 15 June 2005 in Case T-17/02 *Fred Olsen, SA*, ECLI:EU:T:2005:218, paragraph 215.

(**74**) Tirrenia in EA refers to the judgments of 10 May 2005 in Case C-400/99 *Italy v Commission*, ECLI:EU:C:2005:275; and of 4 March 2009 in Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

(**75**) Tirrenia in EA adds that even in the high season, Tirrenia had to comply with the requirements set out in the Convention concerning route frequency and number of ferries and also had to apply reduced fares to residents and special categories of passengers. Tirrenia was however free to determine the fees for all other passengers on a competitive basis.

(**76**) See: http://www.tirreniadinavigazioneamministrazionestraordinaria.it/

(**77**) Judgment of 28 February 2012 in Case T-282/08, *Grazer Wechselseitige Versicherung AG v European Commission*, ECLI:EU:T:2012:91.

(**78**) Tirrenia in EA refers to the judgment in Joined Cases T 268/08 and T 281/08 *Land Burgenland and Austria v Commission*, ECLI:EU:T:2012:90, paragraphs 70, 72 and 87.

(**79**) These measures include: (1) obligation on Moby to terminate the freight service on the Livorno - Cagliari route, in the event that a new operator expresses an interest in operating this service; (2) obligation on Moby to terminate the Genova - Porto Torres service so as to avoid overlapping operations with CIN; (3) obligation on both Moby and CIN to sell 10 % of the mixed passenger and freight transport capacity on each of the Civitavecchia - Olbia and Genova - Olbia routes to other operators; and (4) obligation on both Moby and CIN to avoid signing and terminate any code-sharing or any other type of agreements for the sale of tickets with competitors, or with parties related to competitors, on the Civitavecchia-Olbia, Genova-Porto Torres and Genova- Olbia routes.

(**80**) Concerning the sale of the Tirrenia and Siremar business branches (our note).

(**81**) The Commission has also taken this fact into account in its proceedings concerning the proposed merger between CIN and the Tirrenia business branch (Case M.6362, later closed as the notification was withdrawn by the parties).

(**82**) In particular CIN refers to page 6 of the Report where the expert clarifies that the range relating to the value of the segment 'has been identified based on the assumption of the continued application of the public service Convention between the business segment and the Italian State and on the payment of the corresponding contributions according to the draft Convention applicable and specifically reflected in the Segment Plan on the basis of the Range. […] Merely by way of example, a 10 % reduction in contributions could cause, with all other assumptions in the plan prepared by the

undertaking's management unchanged, a decrease in the Range equal to approximately EUR 35,0 million.'

(**83**) CIN emphasizes that the occasional services actually offered by 'competing' operators are absolutely not comparable, either in terms of the frequency of connections (which, where they exist, are essentially limited to the high season), or of the frequencies offered, to the services guaranteed by CIN on the basis of the public service obligations stipulated in the new Convention.

(**84**) CIN considers that this risk is particularly relevant because it does not have exclusive rights and therefore does not have the certainty of operating the services on an exclusive basis.

(**85**) This included only the number of crew personnel (on-board staff, also when on leave or off-duty), without specifying the number of overhead and on-shore staff allocated to each route. CIN also points out that the applicable regulations provide precise guidance as to working time, security and safety of the staff, to ensure enough quantity and the right quality of the crew for each connection.

(**86**) See sections 5.2.1, 5.2.2, 5.2.3 and 5.2.4 for more details.

(**87**) In particular, Pan Med mentioned that Grimaldi operated freight services on the routes Ravenna – Catania, Salerno – Cagliari, Palermo – Cagliari, and Trapani – Cagliari. According to Pan Med, Moby and Sardinia Ferries operated the route Civitavecchia – Olbia on a seasonal basis while Moby would have operated all year long on the Genova – Olbia route. According to Pan Med, Moby would have also operated a weekly connection between Civitavecchia and Arbatax.

(**88**) Palermo, Catania, Ragusa, Trapani, as well as the airports of Lampedusa and Pantelleria.

(**89**) The Commission will not assess this unsubstantiated claim further in this Decision since the analytical accounts provided by the Italian authorities show that Tirrenia recorded a loss on this route in 2010.

(**90**) Pursuant to Article 11 of 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).

(**91**) 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).

(**92**) Additionally, Grimaldi contests that as the review of the economic and financial balance of the new Convention happens only every three years and allegedly on a voluntary basis, there is essentially no way to take the variations in fuel cost into account when setting the compensation.

(**93**) This point is further developed by the AGCM in its decision N° 27 053, paragraphs 198-207. See section 6.2 for more details.

(**94**) GURI No 240 of 13 October 1990.

(**95**) See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

(**96**) OJ C 8, 11.1.2012, p. 4.

(**97**) See, in particular, Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, paragraph 11; Case C-53/00 *Ferring*, ECLI:EU:C:2001:627, paragraph 21; Case C-372/97 *Italy v Commission*, ECLI:EU:C:2004:234, paragraph 44.

(**98**) Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

(**99**) Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

(**100**) In particular, this measure is assessed under Case SA.15631.

(**101**) Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, ECLI:EU:C:2016:797, paragraph 45.

(**102**) Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava - Diputación Foral de Álava and others v Commission*, ECLI:EU:T:2002:59, paragraph 175.

(**103**) Commission Communication C(2004) 43 – Community Guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

(**104**) See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107.

(**105**) Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), Brussels, COM(2014) 232 final, 22.4.2014.

(**106**) See Case T-454/13 *SNCM v Commission*, ECLI:EU:T:2017:134, paragraphs 130 and 134.

(**107**) See Case T-289/03 *BUPA and Others v Commission*, ECLI:EU:T:2008:29, paragraph 186.

(**108**) See Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, paragraph 55; Case C-266/96 *Corsica Ferries France*, ECLI:EU:C:1998:306, paragraph 45; Case T-17/02 *Fred Olsen v Commission*, ECLI:EU:T:2005:218, paragraph 186 *et seq*.

(**109**) The Commission notes that in any case, for two of the three freight-only routes there is no mixed service operated under a public service regime on the same route. It is only on the route Napoli – Cagliari that CIN had to operate both a mixed service and a freight-only service and the latter had to be abolished in 2014 (see recital 103) to restore the economic-financial balance of operations.

(**110**) Based on data the Commission retrieved from the websites of the Istituto Nazionale di Statistica (for maritime transportation) and the Associazione Italiana Gestori Aeroporti (for air transportation).

(**111**) Up to the merger of Tirrenia and Adriatica (see also recital 13).

(**112**) See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107, paragraph 71.

(**113**) The new Convention also allows for this connection to be operated from Genova instead of Livorno but this possibility has never been used in practice.

(**114**) For background see: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3450

(**115**) For completeness, the Commission notes that even if Italy had been aware (and this has neither been argued nor shown) of Grimaldi's or Pan Med's intentions to start operating on this route, it could still have concluded that Grimaldi's or Pan Med's services would not be sufficient to meet the public service need (e.g. because they would not have been equivalent in terms of ports served, quality or capacity offered, or because the continuity and regularity of this service could not be guaranteed).

(**116**) In particular, it concerns Minoan Lines Shipping, La Méridionale, Moby, Grandi Navi Veloci, Liberty Lines, Grimaldi Group, Corsica Ferries, SNAV, and Caronte & Tourist. Companies of the former Tirrenia Group (e.g. Caremar, Toremar) have been excluded from the benchmark group.

(**117**) The Commission recalls that 2009 was the last year when Tirrenia operated on normal terms (i.e. it had not yet entered the extraordinary administration)

(**118**) The total amount of compensation received by CIN over the period 2012-2018 is equal to the net cost incurred in the provision of the public service, including a return on capital of approximately 3,4 %.

(**119**) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

(**120**) 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, 30.4.2004, p. 114).

(**121**) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

(**122**) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

(**123**) Under Article 21 of Directive 2004/18/EC.

(**124**) Article 1(4) of Directive 2004/18/EC reads: '"Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

(**125**) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

(**126**) In footnote 146 of the Notion of Aid Communication, the Commission observes that the Union Courts often refer, in the context of State aid to an 'open' tender procedure. The use of the word

'open' however does not refer to a specific procedure under the Public Procurement Directives. Therefore, the Commission considers that the word 'competitive' appears more appropriate, without intending to deviate from the substantive conditions set out in the case law.

(**127**) In particular: Decree Law No 134 of 28 August 2008, converted into Law No166 of 27 October 2008.

(**128**) Furthermore, as explained above (see recital 373), Article 36(1) of Directive 2004/18/EC did not apply to this tender. Therefore, Italy had actually no obligation to provide in the call selection criteria.

(**129**) The Commission points out that Italy was also not obliged to provide a detailed description of the exact assets for sale and the new public service contract in the call for expressions of interest since Article 36(1) of Directive 2004/18/EC was not applicable to this tender procedure.

(**130**) In addition, since Article 36(1) of Directive 2004/18/EC was not applicable to this tender procedure Italy was also not obliged to describe in the call for expressions of interest how the subsequent phases of the tender procedure would be organised.

(**131**) In addition, the Commission notes that Italy was not obliged to detail the (possible) payment conditions in the call because Article 36(1) of Directive 2004/18/EC was not applicable to this tender procedure.

(**132**) See Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria v Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87.

(**133**) Obtained by discounting the deferred payments at their value at the moment of the sale.

(**134**) See Judgment of the Court of Justice of 24 October 2013, *Land Burgenland v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94-95.

(**135**) See Judgment of the Court of Justice of 24 October 2013, *Land Burgenland v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 96.

(**136**) Article 63(2) of Legislative Decree 270/1999 requires that any potential acquirer of a business branch of a large company in extraordinary administration must commit to maintain the level of the workforce (i.e., the number of workers) and to continue business activities for at least two years after the acquisition.

(**137**) Except in well-specified circumstances.

(**138**) A draft of this contract was made available in the data room to all bidders. Furthermore, its key provisions were already laid down in Article 19-ter of Decree Law No 135 of 25 September 2009.

(**139**) Ferrando & Massone Srl.

(**140**) This is because when a ship is not yet at the end of its useful life, its value for shipping purposes would be higher than its scrap value. In the scenario where the ships are sold separately it is likely that at least some ships would have to be sold at their scrap value. Therefore, by bundling the ships with the public service contract, all ships keep operating and can hence be sold at a higher price than their scrap value.

(**141**) See more specifically the Commission's reply to question 68 in its Staff Working Document 'Guide on the application of the Union rules on State aid, public procurement and the internal market to services of general economic interest' of 29 April 2013 (see: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf).

(**142**) Commission Decision in Case SA.42710, SGEI – fast passenger maritime connection between Messina and Reggio Calabria – Italy (OJ C 40, 2.2.2018, p. 4).

(**143**) Commission Decision in Case SA.42366, Public service compensations granted to bpost during the period 2016-2020 – Belgium (OJ C 341, 16.9.2016, p. 5).

(**144**) Article 30 of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

(**145**) Commission Decision in Case SA.22843, Public service delegation Corsica 2007-2013 awarded to SNCM and CMN (OJ L 220, 17.8.2013, p. 20).

(**146**) Under Presidential Decree No 633 of 26 October 1972, transfers of going concerns or business units to another company are not considered a supply of goods and therefore are exempt from VAT.

(**147**) In particular, in case of insolvency proceedings such as the one involving Tirrenia in EA, earnings are determined according to the rules laid down in Article 183 of the Consolidated Income Tax Law. Based on that provision, an undertaking's earnings for the period from the start of the bankruptcy proceedings until their conclusion are the difference between the undertaking's assets at the beginning of the proceedings and the residual assets at their end. Before the end of proceedings, it is therefore not possible to anticipate if there is a tax liability and its size. Since the liquidation of Tirrenia in EA is still ongoing, it is impossible to conclude whether any income tax will be due at all.

(**148**) The Italian authorities have only notified (see recital 4) the public service compensation granted under the new Convention, which the Commission has found not to constitute State aid. Furthermore, Italy has argued that the public service compensation granted to Tirrenia under the prolongation of the initial Convention was compatible and exempt from notification under the 2005 SGEI Decision. The Commission will assess whether this was indeed the case in section 7.3.1.

(**149**) For completeness, the Commission notes that the transitional provision contained in Article 10(a) of the 2011 SGEI Decision, according to which any aid scheme put into effect before the entry into force of this Decision (i.e. before 31 January 2012) that was compatible with the internal market and exempted from the notification requirement in accordance with the 2005 SGEI Decision shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of two years (i.e. until 30 January 2014 included). This means that aid which was granted under such a scheme in the period between the entry into force of the 2005 SGEI Decision on 19 December 2005 and the entry into force of the 2011 SGEI Decision on 31 January 2012 will be considered compatible with the internal market but only from the date on which it was granted until 30 January 2014 included. In any event, for aid granted in the time from 31 January 2012 onwards, the transitional provision of Article 10(a) of the 2011 SGEI Decision is not applicable and the compatibility assessment has to be made pursuant to the 2011 SGEI Decision.

(**150**) The Commission notes that while these three routes used to be operated under the public service regime for the entire year, this was gradually reduced to the low season with the service being operated on a commercial basis during the high season (see recital 34). Nevertheless, since both the 2005 SGEI Decision and the 2011 SGEI Decision refer to 'annual traffic', the Commission cannot exclude the number of passengers carried when the service is operated on a commercial basis as suggested by Italy.

(**151**) OJ C 249, 31.7.2014, p. 1.

(**152**) See paragraph 140 of the 2014 Rescue and Restructuring Guidelines.

(**153**) For reasons of brevity, the Commission does not include the detailed figures in this Decision.

(**154**) For the decisions under assessment, this Conference is composed of the Ministry of Infrastructure and Transport, the Ministry of Economy and Finance, and the Ministry of Economic Development.

(**155**) See decision of 30 December 2004 taken by the Interdepartmental Conference. This decision prolonged the initially foreseen depreciation period from 20 to 30 years for motor ferries and from 15 to 20 years for high-speed passenger crafts.

(**156**) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

(**157**) As established in recital 436. The illegality of the aid granted for the other routes will be examined further in section 7.3.1.8.

(**158**) This part of the result is almost entirely driven by the operation of the public service since Tirrenia had hardly any commercial activities in the period 1 January until 30 June 2012. Also, any profits or losses from e.g. sales of assets not related to the public service, were recorded under the extraordinary results.

(**159**) For clarity it concerns the mixed routes Genova – Olbia – Arbatax, Civitavecchia – Cagliari – Arbatax, Napoli – Cagliari, Palermo – Cagliari, Trapani – Cagliari, Termoli – Tremiti Islands, and the freight routes Livorno – Cagliari, Napoli – Cagliari and Ravenna – Catania.

(**160**) The Commission recalls in this context that these nine routes were found to constitute genuine SGEI (see section 7.3.1.2) and meet the requirements for public service obligations as established by the Maritime Cabotage Regulation. Furthermore, the Commission accepted the prolongation of Tirrenia's initial Convention in light of the privatisation process of that company and therefore its reasoned opinion of 21 June 2012 did not concern Tirrenia (see recital 121).

(**161**) See footnote 159 for the exact routes.

(**162**) Even if this aid was granted before the entry into force of the 2014 Rescue and Restructuring Guidelines, according to paragraph 139 of these Guidelines, when examining aid to SGEI providers in difficulty, such as Tirrenia, the Commission must apply the provisions of the 2014 Rescue and Restructuring Guidelines, regardless of the date when the aid was granted. When the Commission assesses the compatibility under the 2014 Rescue and Restructuring Guidelines of aid granted to SGEI providers in difficulty before 31 January 2012, such aid will be deemed compatible with the internal market if it complies with the provisions of the 2011 SGEI Framework, with the exception of paragraphs 9, 14, 19, 20, 24, 39 and 60.

(**163**) See paragraph 140 of the 2014 Rescue and Restructuring Guidelines.

(**164**) With the exception of the upgrades to the vessel Clodia which were paid by Tirrenia.

(**165**) As explained in recital 192, of the EUR 12 051 900 awarded to carry out ship upgrades required to respect international safety standards, Tirrenia effectively only used EUR 630 600 to pay for upgrades to the vessel Clodia.

(**166**) Case C-301/87 *France v Commission*, ECLI:EU:C:1990:67, paragraph 41.

(**167**) See footnote 166.

(**168**) See footnote 159 for the exact routes.

(**169**) Grimaldi's claim that other operators provided services considered equivalent to those provided by CIN under the new Convention cannot be accepted for several reasons. In particular, Grimaldi has not assessed the competitive situation at the moment of CIN's entrustment but instead refers to the AGCM's resolution which mainly focuses on the situation since 2015. Furthermore, even to the extent that another operator may have been present around the moment of CIN's entrustment, Grimaldi has not demonstrated that it concerns services equivalent to those provided by CIN. Indeed, the services offered by these other operators may be limited to the high season only, may have a different frequency or may not connect exactly the same ports. Therefore, it has not been demonstrated that the services provided by other operators are sufficient to meet the public service needs laid down in the new Convention.

(**170**) See recitals 1 and 5 of this Decision.

(**171**) Judgment of 12 July 1973, *Commission v Germany*, C-70/72, EU:C:1973:87, paragraph 13.

(**172**) Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125, paragraph 66.

(**173**) Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraphs 64 and 65.

(**174**) National law governs the ranking of the State aid claim in the schedule of liabilities, provided the ranking complies with the principle of effectiveness and the principle of equivalence. See paragraph 64 of the Commission Notice on the recovery of unlawful and incompatible State aid, C 247/1, 23 July 2019. In any event, the State aid claim cannot be ranked lower than ordinary unsecured claims. The final registration of the State aid claim also stops the accrual of additional recovery interest.

(**175**) Case C-303/88 *Italy v Commission*, ECLI:EU:C:1991:136.

(**176**) Case T-121/15 *Fortischem a.s. v. Commission*, ECLI:EU:T:2019:684, paragraph 208.

(**177**) Case T-123/09 *Ryanair v. Commission*, ECLI:EU:T:2012:164, paragraph 156.

(**178**) See recital 99.

(**179**) See recital 384.

(**180**) See recital 391.

(**181**) See recital 13.

(**182**) The fact that Onorato Partecipazioni later acquired full ownership and control over Moby and CIN (see also recital 82) does not change this fact.

(**183**) An amended version of that Decision was adopted by the Commission on 19 December 2012 (see recital 5).

(**184**) See recital 4.

(**185**) See recital 398.

(**186**) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

(**187**) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision (EU) 2020/1412.