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Subject: State aid SA.35842 (2012/NN) – Italy – additional PSO compensation for CSTP

Madam,

The Commission wishes to inform Italy that, having examined the information supplied by the Italian authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

1. PROCEDURE

- (1) By electronic notification of 5 December 2012, the Italian authorities notified, in accordance with Article 108(3) TFEU, the additional compensation awarded by the *Consiglio di Stato* (Italy's Supreme Administrative Court) to Consorzio Salernitano Trasporti Pubblici SpA (hereinafter: CSTP), for the provision of passenger transport services by bus based on concessions granted by the Italian Campania Region (hereinafter: the Region) during the period 1997-2002 (hereinafter: the period under review).
- (2) The notification was registered under case number SA.35842 and from 13 December 2012 treated as a non-notified measure, since according to the information available to the Commission the Region was only obliged to pay the additional compensation due to CSTP as from 7 December 2012, that is, after the Italian government had notified the measure to the Commission.

Signora Emma BONINO
Ministro degli Affari Esteri
Piazzale della Farnesina, 1
00135 Roma

- (3) The Italian authorities provided additional information on 30 January 2013 as well as on 19 April 2013, following a request for information sent by the Commission on 19 March 2013. However, those authorities failed to reply to the Commission's request for information of 27 June 2013, despite two reminders for information sent on 6 August 2013 and 26 September 2013.

2. DESCRIPTION OF THE MEASURE

2.1. The company

- (4) CSTP is a private company providing local public transport services based on regional and municipal concessions. More specifically, according to the Italian authorities, CSTP operated a network of bus connections as concessionaire of the Region throughout the period under review covering approximately 9 million km per year.
- (5) From the information provided by the Italian authorities, the Region has already paid EUR 131 632 525.80 to CSTP for the above-mentioned service during the period 1997 to 2002, of which EUR 125 869 212.47 for the operation and management of the service and EUR 5 763 313.32 for investments. Since it appears that this compensation was awarded to CSTP more than ten years before the Commission sent its first request for information to the Italian State, this compensation will not be subject to an assessment under the current proceedings¹.
- (6) In addition to the above-mentioned sums already received, CSTP requested from the Region additional compensation of EUR 14 545 946 on the basis of Regulation (EEC) No 1191/69² for the economic disadvantages it allegedly suffered as a result of public service obligations (PSOs) allegedly being imposed upon it. It is unclear when this request was first made, but after the Region rejected this request CSTP started proceedings before the Italian administrative courts in March 2007.
- (7) In 2008, the Regional Administrative Court in Salerno rejected CSTP's claim for additional compensation on the basis of Regulation (EEC) No 1191/69. That court held that, in accordance with Article 4 of Regulation (EEC) No 1191/69³, CSTP could

¹ The Commission recalls that pursuant to Article 15 of the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules of application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1), the powers of the Commission to recover aid shall be subject to a limitation period of ten years. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period.

² Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway as amended, OJ 1969 L 156, p. 1.

³ According to Article 4(1) of Regulation (EEC) No 1191/69: "It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them". Article 6(3) provides: "*The competent authorities of the member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards tariff obligations. The right to compensation shall arise on the date of the decision by the competent authorities [...]*".

not request compensation for economic disadvantages resulting from the imposition of PSOs without having previously demanded the termination of those PSOs.

2.2. The judgments of the *Consiglio di Stato*

- (8) By judgment of 27 July 2009 (*Sentenza* no. 4683/09), the Consiglio di Stato upheld the appeal by CSTP of the judgment of the Regional Administrative Court in Salerno and concluded that CSTP was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. That judgment does not precisely define from which legal act and in which form the imposition of the PSOs took place, but stresses that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The *Consiglio di Stato* further considered that CSTP was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs.
- (9) According to the *Consiglio di Stato*, the precise amount of the additional compensation owed to CSTP had to be determined by the Region on the basis of certain data, taken from the accounts of the company, showing the difference between the costs attributable to the portion of CSTP's activities associated with the PSO and the corresponding revenues. However, the Region claimed that it was unable to do so, due to a lack of clear and reliable data.
- (10) By order (*ordinanza*) no. 8736/2010 of 13 December 2010, the *Consiglio di Stato* appointed an expert to undertake that task. According to the Italian authorities, that expert was also unable to determine the economic disadvantage to be compensated and it was only with the help of an additional expert, appointed by the *Consiglio di Stato* by order no. 5897/2011 of 7 November 2011, that an individualized sum of compensation was calculated using an "inductive method", as prescribed by the *Consiglio di Stato*'s decision no. 3244/2011 of 25 July 2011. On the basis of those calculations, the experts concluded that CSTP suffered an economic disadvantage in the form of an undercompensation only as concerns 1998 as a result of the application of the formula provided in Article 11 of the Regulation (EEC) No 1191/69. The experts could not use an inductive method to calculate the undercompensation (if any) on the basis of Article 10 of the same regulation because of the lack of reliable data and the risk that the use of such a method would duplicate the compensation calculated under Article 11. Implicitly, the experts assumed that a tariff obligation had been imposed upon CSTP.
- (11) Accordingly, the *Consiglio di Stato* issued judgment no. 5649/2012 of 7 November 2012, quantifying the amount the Region was obliged to pay to CSTP at EUR 4 951 838, which represented the amount of undercompensation it suffered in 1998, and ordered payment of this sum to take place by 7 December 2012. Payment of this sum was made by the Region to CSTP on 21 December 2012.
- (12) It is the payment of this additional compensation by the Region to CSTP as a consequence of judgment No 5649/2012 that constitutes the notified measure and the subject matter of the present decision.

2.3. Additional information/observations provided by the Italian authorities

- (13) According to the Italian authorities, CSTP, similar to other providers of regional scheduled bus transport services, operated on the basis of provisional licences (concessions) which had to be renewed annually upon the request of the company. These concessions provided the company with the exclusive right to furnish the relevant services.
- (14) The Italian authorities further maintain that CSTP requested concessions to provide services on the relevant routes from the Region in each year of the period under review and that those concessions always stipulated that the services were carried out entirely at the risk of the undertakings in question and, specifically, "without the performance of the service constituting a right to a subsidy or compensation of any kind". The Italian authorities provided a copy of a model concession from 1973 and claimed that this was the one used with CSTP as regards the period under review. However, the Italian authorities did not provide any concession contracts actually concluded with CSTP during the period under review.
- (15) The Italian authorities maintain that under those concessions CSTP was free to propose the substitution of the forms of transport to be used by it or to apply for the termination in whole or in part of its PSO where such obligations entailed an economic disadvantage to it, but that the company never exercised that right. The Italian authorities further allege that the company never notified to the Region that it was suffering economic disadvantages or that it was carrying out obligations that it would not have performed if not obliged to do so under PSO. Finally, according to the Italian authorities, CSTP never requested the termination of the PSO as required by Article 4(1) of Regulation (EEC) No 1191/69.
- (16) The Italian authorities also doubt whether CSTP has demonstrated that it had efficiently and correctly operated the PSOs in accordance with the requirements of Regulation (EEC) No 1191/69 and submit that CSTP did not have an account separation system as required by Article 1(5) of that same regulation.

2.4. Amount of compensation

- (17) As explained above, the *Consiglio di Stato* appointed two experts to determine the additional compensation owed to CSTP by the Region on the basis of Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. On 27 September 2012, these experts issued their report.
- (18) As regards additional compensation for the obligation to operate or carry – Article 10 of Regulation (EEC) No 1191/69) – the experts often reiterate in their report that CSTP's additional compensation claims were not supported by sufficient documentary data to calculate this amount precisely. Moreover, the parties (i.e. CSTP and the Region) also submitted data that did not match or that were not precise enough, constituting only an approximation. Accordingly, the experts conclude in their report that the parties have provided inadequate documentary evidence for the assessment of unprofitable bus transport lines, which makes it impossible to have any reliable estimate in their regard, even if the "inductive method" prescribed by the *Consiglio di Stato* is used. The experts therefore conclude that the additional compensation for the

obligation to operate or carry, calculated on the basis of Article 10 of Regulation (EEC) No 1191/69⁴, should be zero.

- (19) As regards additional compensation in relation to tariff obligations – Article 11 of Regulation (EEC) No 1191/69) – the experts conclude that its calculation could not be carried out on the basis of paragraph 2 of that provision, since the parties never defined the state of the market, and that, accordingly, any compensation should be calculated on the basis of paragraph 1 of that provision. However, the experts acknowledge that a calculation on the basis of paragraph 1 is not a possibility either because of missing or unreliable data. Therefore, the "inductive method" as prescribed by the *Consiglio di Stato* was applied, whereby the concept of "standard costs" based on "standard cost per unit" and the number of kilometres concerned by the concession were used to calculate whether CSTP was undercompensated during the period under review for tariff obligations imposed upon it.
- (20) On that basis, the experts calculated the amount of additional compensation on the basis of the formula provided in Article 11 of Regulation (EEC) No 1191/69, assuming that a tariff obligations was imposed on CSTP during the period under review, as summarized in the table below:

	1997	1998	1999	2000	2001	2002
A) Revenues attributable to a commercial management	40.303.387,71	42.312.390,51	41.174.023,85	42.399.523,59	42.010.059,97	42.010.059,97
B) Actual revenues attributable to the management in the present case	9.484.545,48	8.705.924,03	8.577.234,29	9.254.374,76	9.447.735,00	9.430.225,00
C) Contributions already paid	34.106.026,86	29.935.681,81	34.124.760,15	35.199.742,20	33.496.192,00	33.869.048,00
A-(B+C)	-3.287.184,64	3.670.784,68	-1.527.970,59	-2.054.593,37	-933.867,03	-1.289.213,03
Tariff based compensation		3.670.784,68				

- (21) It follows from those calculations that only in 1998 could CSTP claim to have been undercompensated as a result of alleged tariff obligations being imposed upon it. The amount of undercompensation was EUR 3,670,784.68, to which legal interest of EUR 1 281 053.57 was added, resulting in an additional compensation of EUR 4 951 838.25. It is this amount which the *Consiglio di Stato* ordered the Region to pay to CSTP, which it effectively paid on 21 December 2012.

3. ASSESSMENT OF THE AID

3.1. Existence of aid

- (22) 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 provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

⁴ Article 10 of Regulation (EEC) No 1191/69 provides that the amount of compensation related to an obligation of providing transport services must be determined as the difference between the reduction of revenues and the reduction of costs resulting from the termination of the corresponding obligation during the period concerned.

- (23) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all of the following conditions:
- it must be granted by the State or through State resources;
 - it must confer a selective advantage by favouring certain undertakings or the production of certain goods;
 - it must distort or threaten to distort competition; and
 - it must affect trade between Member States.

3.1.1. *Imputability and State resources*

- (24) The Commission notes that the judgment of the *Consiglio di Stato* requires the Region to pay additional compensation to CSTP with respect to the provision of scheduled bus services under the period under review on routes in the competence of the Region. The court appointed experts calculated that CSTP suffered an economic disadvantage in the form of an undercompensation only as concerns 1998 in the amount of EUR 4 951 838 as a result of alleged tariff obligations being imposed upon it. On 21 December 2012 the Region effectively paid this sum to CSTP in order to comply with this judgment.
- (25) The measure is thus imputable to the State and the resources from which this compensation has been paid are State resources.

3.1.2. *Selective economic advantage*

- (26) The Commission notes at the outset that CSTP is engaged in an economic activity, namely passenger transportation against remuneration. Therefore, CSTP should be considered as an "undertaking" within the meaning of Article 107(1) TFEU.
- (27) As regards the granting of a selective economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through State resources to undertakings in consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) TFEU, provided four cumulative conditions are satisfied⁵:
- First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined;
 - Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
 - Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

⁵ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* [2003] ECR I-7747, points 87 and 88.

- Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (28) In its final analysis of the measure, the Commission will have to consider whether these conditions have been cumulatively fulfilled in the present case.
- A: First condition: "The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined".*
- (29) As noted above, it is neither clear whether CSTP is actually required to discharge a PSO nor under which conditions. No concession contracts involving CSTP have been provided by the Italian authorities, apart from one sample concession which the Italian authorities claim to be the standard one in use in the Region during the period under review. However, that sample concession contract was only valid from April 1972 to December 1973, which is more than twenty years removed from the period under review and before the entry into force of law no. 151/1981, as enacted by regional law no. 16/1983, on which basis CTSP was compensated in the first place. Point 17 of that document clearly establishes that the service is operated at the company's own risk, without any right for subsidy or compensation. Point 27 lays down applicable tariffs, but it is unclear whether a tariff obligation was actually imposed upon CTSP.
- (30) Even if the sample concession contract would seem to provide for some PSOs (e.g. at point 2, 9 and 10), including the duty to operate discounts for students, workers, teachers, and private and public employees, and the duty to transport certain categories of passengers for free, the Commission has doubts as to whether the same obligations were actually applicable to CSTP during the period under review. In any event, the method used to calculate the alleged undercompensation for those PSOs never refers to those obligations.
- (31) Therefore, the Commission cannot take a definitive position at this stage on whether the first *Altmark* condition has been fulfilled.
- B: Second condition: "The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner."*
- (32) As regards the second condition, the parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings. However, the need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined.
- (33) As regards the notified measure, the *Consiglio di Stato* held that CSTP was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. According to that court,

the additional compensation was to be determined on the basis of an *ex post* calculation using an "inductive method" in the absence of necessary and reliable data. In light hereof, the Commission considers, at this stage, that the parameters on the basis of which the alleged undercompensation was calculated by the court appointed experts were not established in advance and that therefore the second *Altmark* condition does not appear to have been complied with as regards the notified measure.

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

(34) At this stage, the Commission considers that the method of calculation proposed by the court appointed experts and the underlying accounting data cannot exclude the risk of overcompensation as required by the third *Altmark* criterion. This is so for the following reasons:

- It is not clear whether account separation was implemented during the period under review so that any retroactive compensation could entail a risk of overcompensation.
- The absence of reliable data prevented the experts from calculating any compensation under Article 10 of the Regulation (EEC) No 1191/1969. The experts explain that the documentation they received from the parties was inadequate and could affect any estimation even if based on the "inductive method" prescribed by the *Consiglio di Stato*.
- The Commission also has doubts as to whether the absence of reliable data for the calculation of the amount of compensation pursuant to Article 11 of the Regulation (EEC) No 1191/69 could have impaired the correct calculation of the additional compensation for the tariff obligation, if any. At this stage, the Commission cannot exclude that the use of the "inductive method" as prescribed by the *Consiglio di Stato* could entail a risk of overcompensation. In particular,
 - in the absence of a clear indication of how the "standard costs per unit" and consequently how the "standard costs" were calculated, the Commission is not able to take a view on the use of "standard costs" as the basis for the calculation of additional compensation pursuant to Article 11 of the Regulation (EEC) No 1191/69; and
 - the experts calculated the additional compensation due to CSTP for tariff obligations imposed upon it by the Region as set out in the table below:

	1997	1998	1999	2000	2001	2002
A) Revenues attributable to a commercial management	40.303.387,71	42.312.390,51	41.174.023,85	42.399.523,59	42.010.059,97	42.010.059,97
B) Actual revenues attributable to the management in the present case	9.484.545,48	8.705.924,03	8.577.234,29	9.254.374,76	9.447.735,00	9.430.225,00
C) Contributions already paid	34.106.026,86	29.935.681,81	34.124.760,15	35.199.742,20	33.496.192,00	33.869.048,00
A-(B+C)	-3.287.184,64	3.670.784,68	-1.527.970,59	-2.054.593,37	-933.867,03	-1.289.213,03
Tariff based compensation		3.670.784,68				

The amount of additional compensation to be paid by the Region is equivalent to the amount that CSTP was undercompensated during the period under review. According to the experts' calculations, that was only the case in 1998. It should nevertheless be observed that the period under review covers six years and that according to the calculation of the experts during the remaining years CSTP appears to have been overcompensated in the amount of EUR 9 092 828.66. It is unclear to the Commission why the experts did not take this overcompensation into account when determining whether CSTP was undercompensated during the period under review – thus why 1998 was considered in isolation. In fact, assuming that these calculations were reliable, they would demonstrate that the overall compensation received exceeded what was necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

- (35) Consequently, at this stage the Commission has doubts as to whether the third *Altmark* condition was complied with in the present case.

D: Fourth condition: "Public procurement procedure in order to choose the operator or costs limited to the the costs of a typical undertaking".

- (36) As the concessions for regional transport were awarded without a public tendering procedure and the Commission lacks the information to evaluate whether the additional compensation corresponds to the level of costs of a typical well-run undertaking providing means of transport, the Commission has doubts as to whether the fourth *Altmark* condition has been complied with in the present case.

3.1.3. Distortion of competition and effect on trade between Member States

- (37) As observed in the *Altmark* judgment, since 1995 several Member States have started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin.
- (38) Accordingly, any compensation granted to CSTP should be considered liable to distort competition for the provision of passenger transportation services by bus and liable to affect trade between Member States to the extent that it negatively impacts on the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of CSTP.
- (39) The Commission also notes that CSTP is active on other markets, i.e. the commercial transport of persons, and thus clearly competes with other companies within the Union on those markets. Any compensation granted to CSTP would necessarily also distort competition and affect trade between Member States on those markets as well.
- (40) Accordingly, the Commission is of the opinion that the measure distorts competition and affects trade between Member States.

3.1.4. Conclusion

- (41) At this stage, the Commission considers that the notified measure is likely to constitute State aid within the meaning of Article 107(1) TFEU, but invites observations from interested parties on whether the *Altmark* conditions have been fulfilled in the present case.

3.2. Exemption from notification obligation under Regulation (EEC) No 1191/69

- (42) According to the reasoning of the *Consiglio di Stato*, CSTP acquired the right to obtain additional compensation for the provision of the transport services in question at the point in time at which it carried out those services. For this reasoning to hold, the compensation payments must have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69. Otherwise, to the extent the compensation constitutes State aid within the meaning of Article 107(1) TFEU, failure to notify that compensation would have rendered that compensation illegal in accordance with Article 108 of the Treaty.
- (43) This is because, in accordance with Article 17(2) of that regulation, compensation paid pursuant to this regulation is exempted from the preliminary information procedure laid down in Article 108(3) TFEU and thus from notification.
- (44) Moreover, it follows from the *Combus* judgment that the concept of "public service compensation" within the meaning of that provision must be interpreted in a very narrow manner⁶. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that regulation which are calculated using the method described in Articles 10 to 13 of the regulation (the common compensation procedure), and not to public service contracts as defined by Article 14 of that regulation. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which entails State aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed illegally implemented aid.
- (45) The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed dispensed the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on CSTP by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69.
- (46) However, on the basis of the information available to it, the Commission cannot at this stage reach a definitive conclusion as to whether the compensation ordered by the *Consiglio di Stato* results from the unilateral imposition of a PSO by the Region on CSTP or whether a contractual scheme existed between CSTP and the Region. In particular, CSTP's initiative in requesting the renewal of concessions for all six years during the period under review cannot be reconciled with the unilateral imposition of a public service obligation. The purpose of those concessions was to provide CSTP with the exclusive right to furnish the relevant services for the period under review. Despite

⁶ Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, points 77 to 79

the fact that, according to the Italian authorities, each of those regulations apparently stipulated that the operation of the service was not subject to compensation and was operated entirely at the company's own risk, CSTP repeatedly requested the prolongation of those rights.

- (47) Furthermore, even if it can be shown that a PSO was in fact unilaterally imposed on CSTP by the Italian authorities, it is not clear what its precise scope was or what constituted the underlying legal act/document for its imposition⁷. In particular, the calculation of additional compensation by the court appointed experts concerns only tariff obligations, but it is not at all clear that such obligations were in fact imposed on CSTP. According to Article 2(5) Regulation (EEC) No 1191/69 the latter is limited to “*obligation[s] imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions*”. By contrast, the definition of tariff obligations “*shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof*”.
- (48) The Commission therefore invites observations from interested parties on the question of whether a PSO was in fact unilaterally imposed on CSTP during the period under review and what its scope was.
- (49) Assuming the compensation ordered by the Consiglio di Stato results from the unilateral imposition of a PSO, the Commission nevertheless has doubts, based on the information currently available to it, that the compensation complies with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69.
- (50) First, the Commission notes that as of 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, requires transport undertakings, which operate not only services subject to PSOs but also engage in other activities, to operate the public services as separate divisions whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.
- (51) Moreover, the Commission notes that the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69 set out a method for calculating the amount of compensation to be granted in respect of the financial burdens resulting from the imposition of a public service obligation. The Commission further notes that, according to the Court of Justice in the *Antrop* judgment, the requirements set out by that procedure are not fulfilled where “*it is not possible to ascertain on the basis of reliable data [from the company's accounts] the difference between the costs imputable to the parts of [its] activities in the areas covered by the respective*

⁷ This implies issues with Article 2(1) and Article 4(1)a of Regulation (EC) No. 1370/2007 or issues with Article 2(1) of Regulation (EEC) No. 1191/1969.

concessions and the corresponding income and consequently it is not possible to calculate the additional cost deriving from the performance of public service obligations by [that undertaking]”⁸.

- (52) From the information available to it, the Commission has doubts whether CSTP properly ensured to implement a proper account separation for the different services provided by it during the period under review.
- (53) Second, the Commission has doubts whether in the absence of reliable data for the calculation of the amount of compensation pursuant to Article 11 of the Regulation (EEC) No 1191/1969, the experts could have inferred the correct amount of the compensation for the tariff obligation imposed upon CSTP, if any. In particular, the Commission finds it difficult to conclude whether the use of the "standard costs" as an indicator of efficient management of the undertaking and of the provision of services of an adequate quality is compliant with Article 12 of the Regulation (EEC) No 1191/1969. The Commission has no indications regarding the methodology used by the Region for the calculation of the "standard cost per unit" on which basis the Court appointed experts calculated the "standard costs".
- (54) Third, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires that the administration fixes the amount of the compensation in advance. The calculation of the additional compensation on the basis of an *ex post* assessment, as prescribed by the *Consiglio di Stato*, seems at odds with this provision.
- (55) In order to be able to take a definitive position on the doubts expressed above in relation to whether the additional compensation complies with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69, the Commission invites interested parties to submit their observations.

3.3. Compatibility of the aid

- (56) If the Commission finds the additional compensation to constitute State aid which was not exempted from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/1969, it must assess whether that aid can be declared compatible with the internal market.
- (57) Article 93 TFEU contains rules for the compatibility of State aid in the area of coordination of transport and PSOs in the field of transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of State aid. The Court of Justice has ruled that this Article "*acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]*"⁹.
- (58) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulations (EEC) Nos 1191/69 and 1107/70. Regulation (EC) No 1370/2007 applies

⁸ Case C-504/07 *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)* [2009] ECR I-03867.

⁹ Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraph 10.

to the compensation of PSOs concerning public passenger transport services by rail and by road¹⁰.

- (59) The Commission considers that the examination of the compatibility of the notified measure should be conducted under Regulation (EC) No 1370/2007, since that is the legislation in force at the time the present decision is adopted¹¹. It further notes that the additional compensation awarded to CSTP by the *Consiglio di Stato* was paid on 21 December 2012, so that Regulation (EC) No 1370/2007 had already been in effect for more than three years at the date at which the effects of the disbursed aid occurred¹².
- (60) According to Article 9(1) of Regulation (EC) No 1370/2007 “[p]ublic service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty”.
- (61) For the reasons set out below, the Commission has doubts whether the notified compensation complies with the conditions of Regulation (EC) No 1370/2007.
- (62) First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of PSOs, it shall do so within the framework of a public service contract, unless the public service obligation aims at establishing maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area (general rules).
- (63) In the present case, it is not clear whether a contractual scheme existed between CSTP and the Region or whether general rules establishing maximum tariffs for all passengers or certain categories of passengers were put in place. The Commission has only received one sample concession contract for the year 1972/1973, from which it is not possible to extract reliable information on the contractual scheme existing between CSTP and the Region in the period under review (1997-2002).

¹⁰ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

¹¹ The Commission refers in this respect to the reasoning developed in recitals (307) to (313) of its Decision of 24 February 2010 in Case C 41/08 (ex NN 35/08) concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner, OJ L 7 of 11.1.2011, p.1. This decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v European Commission* [2013] not yet published, which judgment is currently on appeal before the Court of Justice in Case C-303/13 P. The outcome of this appeal is not relevant for the outcome of the present case, since the General Court confirmed in the judgment under appeal that it is the date at which the effects of the disbursed aid occurred which determines which set of rules applies. In this case, the aid has been paid on 21 December 2012 so that the rules, principles and criteria for assessing the compatibility of State aid which are in force at the date on which the Commission takes its decision should be applied (see, paragraph 39 of that judgment).

¹² Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraphs 50 to 53; Case T-3/09 *Italy v Commission* [2011] ECR II-95, paragraph 60.

- (64) Moreover, there is no indication that general rules were put in place and, if they were, whether they complied with the principles set out in Articles 4 and 6 of the regulation and in its Annex and that the Region compensated CSTP in a way that prevents overcompensation. Indeed, as noted in recital (34) above, while the amount of additional compensation calculated by the court appointed experts is equivalent to the amount that CSTP was allegedly undercompensated in 1998, the period of review covers six years during the remainder of which CSTP appears to have been overcompensated in the amount of EUR 9 092 828.66 according to the methodology used for the calculation.
- (65) The Commission can therefore not conclude at this stage whether Article 3 of Regulation (EC) No 1370/2007 has been complied with.
- (66) Second, the Commission notes that regardless of whether CTSP concluded a public service contract or it was subject to tariff obligations by way of general rules, not all the provisions of Article 4 of that regulation, which establishes the mandatory content of public service contracts and general rules, appear to have been respected.
- Article 4(1)(a) – Clearly defined public service obligation: on the basis of the limited information available to it, the Commission takes a preliminary view that CSTP may have concluded "public service contracts" in the form of concessions to provide the public transport services. However, at this stage the Commission is not able to take a preliminary view on the existence of PSOs, particularly in the form of tariff obligations, as no evidence has thus far been provided.
 - Article 4(1)(b) – The parameters on the basis of which the compensation is calculated has to be established in advance in an objective and transparent manner in a way that prevents overcompensation: as explained in relation to the Commission's examination of the second criterion of the *Altmark* judgment, the model concession that was submitted for 1972/1973 specified that the operation of the services does not give any right to a subsidy or compensation of any kind and that the service is operated entirely at the company's own risk. Such an exclusion of compensation, if it shown to have existed during the period under review, would necessarily entail that the compensation parameters have not been established in advance
 - Article 4(1)(c) and Article 4(2) – Arrangements with regard to the allocation of costs and revenues: the Commission has not received evidence showing that, in accordance with Article 4(1)(c), "*the arrangements for the allocation of costs connected with the provision of services*" have been determined in advance. In this respect, the Commission notes that it is not clear whether the company had account separation in place. As to the requirement that the general rules determine the "*arrangements for the allocation of revenue from the sale of tickets*" (Article 4(2)), the Commission considers at this stage that the concessions issued to CSTP implicitly suggested that the company would keep all such revenues. It therefore appears that the relevant requirement was respected.
 - Article 4(3) – Duration of public service contracts shall be limited to 10 years for bus and coach services and 15 years for passenger transport services by rail or other track-based modes: as explained above, the service concessions were

issued on an annual basis. It therefore appears that the relevant requirement was respected.

- Article 4(5) – The requirement to comply with certain social standards: the Commission has received no information relating to this requirement.
- Article 4(6) – The requirement to comply with certain quality standards: the Commission notes that the concessions adopted by the Region included information as to the itinerary, stops to be served and the frequency of the service. However, the Italian authorities have expressed doubt whether CSTP has demonstrated that it had efficiently and correctly complied with the required standards.

In the light of these observations, the Commission cannot determine at this stage whether all mandatory provisions provided for by Article 4 of Regulation (EC) No 1370/2007 were respected in the present case.

- (67) Third, Article 6(1) provides that in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the public service obligation minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, the Annex requires that costs and revenues be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be a separation of accounts (Point 5 of the Annex).
- (68) As regards the avoidance of overcompensation, the Commission cannot definitely exclude at this stage the possibility of overcompensation being present. As noted in recitals (50) to (52) above, the Commission has doubts as to whether CSTP applied a proper account separation during the period under review. This makes it difficult to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect (Point 2 of the Annex).
- (69) Fourth, the Annex requires the method of compensation to promote the maintenance or development of effective management by the public service operator, which can be the subject of an objective assessment. It also requires promoting the provision of passenger transport services of a sufficiently high standard. There is no indication in the information transmitted by the Italian authorities thus far that this requirement has been respected.
- (70) In light of the doubts expressed above with respect to compliance with Articles 3, 4(1)(b), 4(1)(c), 4(5) and 6(1), as well as the Annex of Regulation (EC) No 1370/2007, the Commission invites observations from interested parties on these questions.
- (71) Finally, the Commission invites observations from interested parties on the question of whether the judgment of the *Consiglio di Stato* concerns an award for damages for alleged breach of law as opposed to an award of public service compensation based on

the applicable Council regulations. The Commission notes in this respect that, under certain circumstances, compensation for damages does not provide for an advantage and therefore it is not to be considered as State Aid¹³.

- (72) However, the Commission further notes that the *Consiglio di Stato's* judgment refers to CSTP's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data.
- (73) In any event, the Commission considers that if the Commission concludes that the concession governing the services in question were not exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, an award of damages in favour of CSTP, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, is likely to contravene Articles 107 and 108 of the Treaty. This is because such an award would produce the exact same result for CSTP as an award of public service compensation for the period under review, despite the fact that, as demonstrated above, the mandatory requirements for obtaining such compensation have not been complied with. The availability of such an award would thus effectively enable the circumvention of the State aid rules and the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for costs incurred in return for the discharge of PSOs.

4. CONCLUSION

- (74) For the reasons set out above, the Commission has several doubts at this stage concerning the existence of State aid within the meaning of Article 107(1) TFEU, the exemption from the notification obligation under Regulation (EEC) No 1191/69 and the possible compatibility of the notified measure under Regulation (EC) No 1370/2007.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Italy to submit its comments and provide all such information as may help to assess the measure, within one month of receipt of this letter. Should its submission contain confidential information, the Commission invites Italy to also submit a non-confidential version of its observations. The Commission requests the Italian authorities to forward a copy of this letter to the potential recipient of the aid.

The Commission wishes to remind the Italian Republic that Article 108(3) TFEU has suspensory effect, and would like to draw the attention of the Italian authorities to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Italian Republic that it will notify interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also notify interested parties in the EFTA countries which are signatories of the EEA Agreement by publication of a notice in the EEA Supplement to the *Official Journal of the*

¹³ Joined cases 106 to 120/87, *Asteris AE and others v Hellenic Republic and European Economic Community* [1988] ECR 5515.

European Union and will notify the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. In this context and for the establishment of a non-confidential version of the decision, Italy is invited to consult the company mentioned in this decision to ensure that the latter does not contain information covered by professional secrecy in meaning of the Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions.

If the Commission does not receive a reasoned request by that deadline, the Italian authorities will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
B-1049 Brussels
Fax No: 0032 (0) 2 296 12 42.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President

NOTICE FOR PUBLICATION IN THE OJ, C SERIES
(decisions to initiate the formal investigation procedure)

STATE AID – Member State

STATE AID SA.35842 (2012/NN) – Italy – PSO compensation for CSTP

**Invitation to submit comments pursuant to Article 108(2) of the Treaty on the
Functioning of the European Union.**

Text with EEA relevance

By means of the letter dated [date to be inserted by originating department] reproduced in the authentic language on the pages following this summary, the Commission notified Italy of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union concerning the abovementioned measure.

Interested parties may submit their comments on the measure in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Greffe
1049 Brussels
Belgium
Fax No: + 32 2 296 1242

These comments will be communicated to Italy. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

[Text of summary]

CSTP SpA is a private company that provided passengers transport services by bus based on concessions granted by the Italian Campania Region. In particular, it operated networks of mainly regional bus connections in relation to the Campania Region.

Before 2007 the company tried to obtain additional (in addition to what it has already been paid) public service compensation for its services. As the Campania Region refused this request, it brought legal action before the Italian administrative courts.

In 2009, the case reached the Italian supreme administrative court, which upheld the claim advanced by the company and ordered the Campania Region to pay additional compensation to CSTP for the provision of public services starting in 1997 covering the period up to 2002. The Campania Region paid EUR 4.9 million to the company in December 2012. However the Italian government considered that the conditions of the applicable EU rules were not met.

At this stage the Commission doubts that the conditions are met to declare the additional public compensations to CSTP compatible for the following reasons:

1) It is not certain whether CSTP has been entrusted with public service obligations (PSO) within the meaning of Regulation 1370/2007 and on the basis of which legal instrument.

- 2) Even if an entrustment could be identified, the presence of overcompensation is very difficult to exclude in the absence reliable information.
- 3) Even if at the end of the procedure the Commission would arrive at the conclusion that the company was entrusted with PSOs and incurred net costs as a result, other formal requirements of the Regulation 1370/2007 would prevent the legality of the additional compensations that were already paid out.

In accordance with Article 14 of Council Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

[Text of letter]****