EUROPEAN COMMISSION

Bruxelles, 5.10.2011
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In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 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, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].		**PUBLIC VERSION** **WORKING LANGUAGE** **This document is made available for information purposes only.**

Subject: **State aid SA.32014 (2011/C) (ex 2011/NN), SA.32015 (2011/C) (ex 2011/NN), SA.32016 (2011/C) (ex 2011/NN) – Italy**

State aid to the companies of the former Tirrenia Group (potential State aid under the form of public service compensation and potential aid in the context of the privatisation)

(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))

Sir,

The Commission wishes to inform Italy that, having examined the information supplied by your 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 29 July 2010 the Italian authorities notified to the Commission, in accordance with Article 108(3) TFEU, the public compensation paid by the Italian State in 2008, 2009 and 2010 to Caremar - Campania Regionale Maritima S.p.A. (hereinafter *Caremar*), one of the regional companies of the former

S.E On. Franco FRATTINI
Ministro degli Affari esteri
P.le della Farnesina 1
I - 00194 Roma

Tirrenia Group.[1] The notification was registered under case number N 338/2010. Since the State support had been put in place before the Commission could take a position on its compatibility with the internal market, the measure has been subsequently registered as un-notified aid under case number NN 51/2010.

(2) On 24 September 2010 the Commission requested additional information on the notified measure. By the same letter, the Commission informed the Italian authorities that a complete notification, covering the compensation paid to each of the companies of the former Tirrenia Group starting with 1 January 2009 should be submitted.

(3) On 20 October 2010 the Italian authorities provided the information requested but did not formally notify the compensation paid by the Italian state to the remaining companies of the former Tirrenia Group, namely Tirrenia di Navigazione S.p.A. (hereinafter *Tirrenia*), Saremar - Sardegna Regionale Marittima S.p.A (hereinafter *Saremar*), Toremar - Toscana Regionale Marittima S.p.A. (hereinafter *Toremar*) and Siremar – Sicilia Regionale Marittima S.p.A. (hereinafter *Siremar*).

(4) On 1 December 2010, the Italian authorities notified to the Commission the compensation paid in 2009 and 2010 by the Italian State to Saremar and Toremar, two regional companies of the former Tirrenia Group. In addition, the Italian authorities resubmitted the notification of the public compensation paid to Caremar. The compensation paid up to 2008 to the companies of the former Tirrenia group falls under the scope of the 2004 decision (see paragraphs (11) - (18) below) and is thus subject to separate assessment. The new notification only covered the compensation paid to Caremar in 2009 and 2010.

(5) By letter dated 15 December 2010, the Italian authorities informed the Commission that the same level of the compensation notified for 2010 to the three abovementioned regional companies, namely Caremar, Saremar and Toremar, is applicable in 2011 and extended the previous notifications accordingly. In addition, the Italian authorities proceeded to the withdrawal of the first formal notification of the amounts paid to Caremar, in accordance with Article 8 paragraph 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 108] of the EC Treaty[2] (thereinafter *the Procedural Regulation*).

(6) Inasmuch as the measure had been implemented prior to notification to and formal approval by the Commission, Italy has not observed the stand-still provision in Article 108(3) TFEU. Hence the measures have been registered as un-notified aids under case numbers SA 32014, SA 32015 and SA 32016.

(7) On 23 February 2011 the Commission requested additional information from the Italian authorities. In addition, the Commission urged the Italian authorities to formally notify to the Commission the public compensation paid during 2009 - 2011 to the remaining companies of the former Tirrenia Group, namely Tirrenia and Siremar.

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[1] The former Tirrenia Group was formed by Tirrenia di Navigazione S.p.A, Saremar - Sardegna Regionale Marittima S.p.A., Toremar - Toscana Regionale Marittima S.p.A., Siremar – Sicilia Regionale Marittima S.p.A. and Caremar - Campania Regionale Maritima S.p.A.

[2] OJ L 83, 27 March 1999, page 1.

(8) The Italian authorities provided the information requested on 6 April 2011. Although the reply of the Italian authorities included certain information, mostly concerning the routes served by Tirrenia and Siremar, as well as the services provided by competitors on the routes in question, no formal notification in the meaning of Article 108(3) TFEU of the public compensation paid to the latter has been submitted.

(9) In this sense, the Commission recalls that the fact that the services of the Commission might have been aware of a certain measure does not mean that such measure has been formally notified under State aid rules. The information provided by the Italian authorities in respect of the public services provided by Tirrenia and Siremar cannot be qualified as formal notification in the meaning of Article 108(3) TFEU. Consequently, to the extent that the compensation paid to these companies during 2009 – 2011 amounts to aid, this aid is illegal in that it has not been duly notified and it has been implemented before the Commission declaring it compatible.

(10) On 23 March 2009, 9 December 2009, 21 December 2009, 6 January 2010, 27 September 2010 and 12 October 2010, the Commission received six complaints concerning various support measures adopted by the Italian State in favour of the companies of the former Tirrenia Group, i.e. the public service compensation granted to the companies after the expiry of the initial Conventions (see paragraph (11) below), additional support measures laid down by several legislative acts adopted in the context of the privatisation process of the companies, as well as certain issues regarding the privatisation procedure of the companies. The Commission took into consideration the information submitted by the complainants for the purpose of the current decision.

2. DESCRIPTION OF THE FACTS

2.1. The initial Conventions

(11) The Tirrenia Group has been owned by the Italian State through the company *Fintecna - Finanziaria per i Settori Industriale e dei Servizi S.p.A.* (hereinafter *Fintecna*)[3] and initially included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar, providing maritime transport services under separate public service contracts concluded with the Italian State in 1991, in force for 20 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 Caremar, Siremar, Saremar and Toremar.[4]

(12) The purpose of these public service contracts was to guarantee the regularity and reliability of the maritime transport services with no disruptions, 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 Group.

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[3] Fintecna 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.

[4] After the adoption of the 2004 decision, Tirrenia di Navigazione merged with Adriatica.

(13) On 6 August 1999, the Commission decided to initiate the procedure laid down in Article 108(2) TFEU in respect of aid paid to the six companies of the Tirrenia Group on the basis of the initial Conventions.

(14) During the investigation phase, the Italian authorities requested that the Tirrenia Group case to 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.

(15) The Commission decided that it could accede to the Italian authorities' request, and by Decision 2001/851/EC of 21 June 2001 it closed the procedure initiated in respect of the aid awarded to Tirrenia[5] (hereinafter *the 2001 decision*). The aid was declared compatible subject to certain commitments by the Italian authorities.

(16) By Decision 2005/163/EC of 16 March 2004[6] (hereinafter *the 2004 decision*), the Commission declared the compensation granted by Italy to the Tirrenia Group companies other than Tirrenia to be partially compatible with the internal market, partially compatible conditional upon the respect of a number of undertakings 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.

(17) By Judgement of 4 March 2009 in cases T-265/04, T-292/04 and T-504/04[7] (hereinafter *the 2009 Judgment*) the General Court annulled the 2004 decision of the Commission.

(18) The current decision is without prejudice to the ongoing procedure pursuant to Article 266 TFEU in order to comply with the 2009 Judgement which concerns the compensations granted to the companies of the former Tirrenia Group, other than Tirrenia, until the termination of the initial Conventions i.e. up to December 2008.

2.2. The reorganisation of the Tirrenia Group and the prolongation of the initial Conventions

(19) The initial Conventions were concluded for a period of 20 years, between January 1989 and December 2008. These Conventions have been subsequently prolonged up to the end of the privatisation of the companies of the Group 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 up to the end of 2009;

(b) Article 19*ter* of Decree law no. 135/2009 converted into Law no. 166/2009 (hereinafter *the 2009 law*) laid down inter alia the prolongation of the initial

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5 OJ L 318, 04.12.2001, p. 9.

6 OJ L 053, 26.02.2005, p. 29.

7 Joined cases T-265/04, T-292/04 and T-504/04, *Tirrenia di Navigazione v Commission*, [2009] ECR II-21.

Conventions until 30 September 2010, by which date Italy intended to finalise the privatisation process of the Tirrenia Group companies; and

(c) Law no. 163 of 1 October 2010 converting Decree law no. 125 of 5 August 2010 (hereinafter *the 2010 law*) provided for a further prolongation of the initial Conventions up to the end of the privatisation process.

(20) According to the Italian law, the prolongation of the initial Conventions until the privatisation of the companies of the former Tirrenia Group has been motivated by the need to ensure the best value of those companies in the light of their privatisation.[8]

(21) The process of reorganisation of the Tirrenia Group implied the approval of new Conventions/public service contracts with the companies of the former Tirrenia Group and subsequently the carrying out of a tender procedure for the privatisation of the companies, to which these new contracts form an integral part. The new Conventions/public service contracts would enter into force upon finalisation of the privatisation of each of the company of the former Tirrenia Group.[9]

2.2.1. Tirrenia and Siremar

(22) On 23 December 2009 Fintecna published the first call for expression of interest aimed at selling the entire share capital of Tirrenia and its controlled company Siremar. On 4 August 2010, after the failure of the negotiations with the only bidder which had made a binding offer, Fintecna declared closed the procedure.

(23) After the failure of the first privatisation attempt, the companies, facing severe financial difficulties, have been admitted into the collective insolvency procedure foreseen under the Italian law for large companies, i.e. the extraordinary administration procedure (*ammministrazione straordinaria*) in August and September 2010, and declared insolvent by the competent Court.

(24) The second call for expression of interest was published on 15 September 2010 for Tirrenia and 4 October 2011 separately for Siremar.

(25) The privatisation of Tirrenia and Siremar has been carried out by the sale of the going concerns required to provide the public service and additionally, for Tirrenia, the services provided on the routes operated outside the public service regime set up by the initial Conventions, in accordance with the provisions of Decree Law no. 347 of 23 December 2003 converted into Law no. 39 of 18 February 2004 (hereinafter *the Marzano law*) as subsequently amended.

2.2.2. The regional companies

(26) Caremar, Saremar and Toremar have been transferred to the Regions and, according to the Italian law, should be privatised.[10] The Commission does not at present have sufficient information on the state of the privatisation procedure as regards these companies.

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8 Article 19*ter*, paragraph 6 of the 2009 law.

9 Article 19*ter*, paragraph 10 of the 2009 law.

10 Following the transfer of shareholding of the regional companies to the Regions, Tirrenia Group has been made up by Tirrenia and Siremar.

2.3. The scope of the decision

2.3.1. The compensation paid to the companies of the former Tirrenia Group for the period 2009 – 2011 (measure 1)

(27) As mentioned in paragraphs (4) and (5) above, the notification only concerns the compensations paid by Italy to Caremar, Saremar and Toremar in the context of the prolongation of the initial Conventions expired at the end of 2008.

(28) The aim of the notified measure is to ensure the continuity of the services operated by the beneficiaries in order to meet the mobility requirements of the local communities and the social and economic development of the island regions.

(29) Nevertheless, insofar as the initial Conventions with Tirrenia and Siremar have been prolonged concomitantly pursuant to the legal acts detailed below, the compensation paid for the operation of the public service during 2009 – 2011 to these companies is also subject to the present decision.

2.3.1.1. National legal basis

(30) The relevant provisions of the national legal framework at the basis of the State financial support for the performance of maritime transport services by Caremar, Saremar and Toremar, Tirrenia and Siremar are summarised thereafter.

Law no. 856/1986

(31) Law No 856 of 5 December 1986 *Regulations for the restructuring of the public fleet (Finmare Group) and measures regarding private shipping* provided for certain alterations to the maritime PSO system in Italy.

(32) Regarding the connections with minor and major islands, Article 11 thereof amended the criteria for the calculation of the public service compensation. Indeed, according to letter d), the balancing subsidy had to be calculated on the basis of 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 of invested capital. The public service contracts had to include specific details about the cost elements to be taken in consideration in the calculation, as well as the list of the subsidized routes. The subsidies were to be approved by the Ministers of Merchant Shipping, Public Participations and Treasury.

Article 26 of Decree Law no. 207/2008, converted into Law no.14/2009

(33) Article 26 of Decree Law no. 207/2008, converted into Law no.14/2009 laid down the prolongation of the initial Conventions concluded by each of the former Tirrenia Group companies with the Italian State up to the end of 2009.

The 2009 law

(34) Article 19*ter* of 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 Tirrenia as follows:

(a) Caremar to the Region of Campania. Subsequently, the Region of Campania would transfer to the Region of Lazio the going concern entitled to provide the transport connections with the Pontino archipelago;

(b) Saremar to the Region of Sardinia;

(c) Toremar to the Region of Tuscany.

(35) The 2009 law also specified that new *Conventions* would be concluded between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in *Public Service Contracts*, to be concluded between Saremar, Toremar, and Caremar with the regional authorities by 31 December 2009 and 28 February 2010 respectively. The new Conventions/new public service contracts would enter into force upon finalisation of the privatisation of each of the company of the former Tirrenia Group.[11]

(36) To that end, the 2009 law prolonged the initial Conventions until 30 September 2010.

(37) The annual compensation ceiling for the operation of the services provided under the initial Conventions, as prolonged, as well as under the new Conventions and Public Service Contracts has been set at a total EUR 184 942 251 as of 2010, as follows:

Company	**Annual compensation**
Tirrenia	EUR 72 685 642
Siremar	EUR 55 694 895
Saremar	EUR 13 686 441
Toremar	EUR 13 005 441
Caremar	EUR 29 869 832, out of which EUR 19 839 226 from Campania region and EUR 10 030 606 from Lazio region

Table 1 – Compensation ceilings as of 2010

(38) Furthermore, paragraph 19 thereof lays down that additional public financing amounting to EUR 7 million would be allocated to ensure the upgrade of the Tirrenia Group fleet in order to comply with maritime safety standards.

(39) Pursuant to paragraph 21 therein the companies would also keep the berthing already allocated and the priority in the allocation of new slots pursuant to the procedures set forth by the Maritime Authorities as established by Law No. 84 of 28 January 1994 and the Maritime Code.

The 2010 law

(40) Article 1(1) of Decree Law no. 125 of 5 August 2010 (hereinafter *D.L. 125/2010*) laid down the possibility for the undertakings of the former Tirrenia group, to make use, on a temporary basis, of the financial resources already committed to upgrade and modernise the fleet, as laid down by Article 19, paragraph 13*bis* of Decree Law no. 78/2009, converted into Law 102/2009, as well as those laid down by paragraph 19 of Article 19*ter* of the 2009 law, to cover current liquidity needs.

[11] Article 19 *ter*, paragraph 10 of the 2009 law.

(41) Article 19, paragraph 13*bis* of Decree Law no. 78/2009 converted by Law 102/2009 laid down inter alia that EUR 49 million of the State resources provisioned by Law no. 296 of 27 December 2006 and Law no. 222 of 29 November 2007, amounting to EUR 50 million and EUR 14.5 million respectively, are granted to the former Tirrenia Group companies as compensation for the discharge of public service obligations in 2009, as well as for the upgrading of the fleet in order to observe safety standards.

(42) In addition, Article 1 of the 2010 law converting D.L. 125/2010 laid down inter alia the following:

(a) The initial Conventions are prolonged as from 1 October 2010 until the end of the privatisation process;

(b) Article 19*ter* of Decree Law 135/2009 (hereinafter *D.L. 135/2009*), converted with modifications into the 2009 law is amended. A provision to the effect that all operations in the implementation of the provisions of paragraphs 1-15 of the 2009 law benefit from fiscal exemption is introduced;

(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 Fund for Under-utilised Areas (hereinafter *FAS*)[12] pursuant to Directive of the Interministerial Committee for Economic Planning (*Comitato interministeriale per la programmazione economica*, hereinafter *CIPE*) no. 1/2009 of 6 March 2009, GURI no. 137 of 16 June 2009.

2.3.1.2. The public service obligations

(43) Article 1 of the initial Conventions concluded in 1991, subsequently prolonged as detailed in paragraph (19) above, provided for five-year plans to detail the ports to be served, the type of vessels to be used and the required frequency of service.

(44) However, the Italian authorities informed the Commission, in the context of the ongoing procedure mentioned in paragraph (18) above that, rather than adopting five-year plans for the 2000-2004 and 2005-2008 periods, ad-hoc rationalisation measures have been taken, 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.

2.3.1.3. The beneficiaries

2.3.1.3.1. Caremar

(45) Caremar operates a network of maritime connections between ports of the Gulf of Naples (Naples, Sorrento and Pozzuoli) and Capri, Ischia and Procida islands and maritime connections from the mainland to the Archipelago Pontino.

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[12] The Fund for Under-utilised Areas (*Fondo Aeree Sotoutilizate*) 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.

(46) According to the information provided by the Italian authorities, Caremar does not develop unsubsidised commercial activities.

(47) Caremar has 293 employees and an annual turnover of EUR 60 million.

2.3.1.3.2. Saremar

(48) Saremar operates purely local cabotage connections between Sardinia and the islands to the north-east and south-west of Sardinia, as well as an international connection between Sardinia and Corsica.

(49) According to the information provided by the Italian authorities, Saremar does not operate any routes outside the scope of the public service system.

(50) Saremar has 160 employees and an annual turnover of EUR 21 million.

2.3.1.3.3. Toremar

(51) Toremar operates a network of maritime connections in the Tuscan archipelago, between the mainland and the island ports of Gorgona, Capraia, Elba, Pianosa and Giglio.

(52) According to the information provided by the Italian authorities, Toremar does not develop commercial activities unsubsidized by the State.

(53) Toremar has 181 employees and an annual turnover of EUR 37.6 million.

2.3.1.3.4. Tirrenia and Siremar

(54) As mentioned above, the subsequent prolongations of the initial Conventions also applied to Tirrenia and Siremar.

(55) The Italian authorities have not informed the Commission on whether these companies operate maritime connections outside the public service regime. However, based on the information available at this stage (see the call for expression of interest for Tirrenia, paragraph (266) below), there are indications that certain maritime routes are currently operated by Tirrenia on purely commercial terms. Moreover, in 2006 Adriatica merged with Tirrenia. The former used to operate a number of routes between Italy and Greece/Albania/Croatia.

2.3.1.4. Budget and duration

(56) As detailed in paragraphs (4) and (5) above, the Italian authorities have notified the compensation paid to Caremar, Saremar and Toremar during 2009-2011.

(57) The notified budget of the measure is as follows:

	2009	2010	2011
Caremar	32.47 million	28.32 million	28.32 million
Saremar	13.17 million	12.33 million	12.33 million
Toremar	13.5 million	12.33 million	12.33 million

Table 2 – The annual subsidies 2009-2011 (EUR)

(58) As mentioned above, the compensations to Tirrenia and Siremar have not been formally notified and therefore the Italian authorities have not provided the Commission with the annual breakdown of the public funds these companies are entitled to receive for the operation of the public service during 2009 - 2011.

2.3.1.5. The market failure[13]

2.3.1.5.1. Caremar

2.3.1.5.1.1. Maritime cabotage links in the Gulf of Naples

(59) As mentioned above, in the Gulf of Naples, Caremar operates maritime routes connecting mainland Italy with Capri, Ischia and Procida islands. The Italian authorities underline that for these services the demand is very high due to the high number of the island's residents travelling on the mainland for professional or study reasons.

(60) In particular:

- On the Capri-Sorrento route the beneficiary provides all year round mixed services (passengers, cars and lorries) on a daily basis. According to the Italian authorities, no other operator provides similar services on this route, insofar as the private operators mainly provide high-speed passenger services.
- On the Capri-Naples route Caremar ensures year-round mixed services on a daily basis, being the only operator which also ensures freight transport services to the island. Hence on this route the other operators exclusively provide high-speed passenger services. The Italian authorities submit that on this route Caremar provides the first daily departure from the island meeting essential mobility requirements of the island communities. The Italian authorities also underline that on this route Caremar provides solely mixed services, i.e. the Italian State has ceased payment of the compensation for the high speed passenger services, in accordance with the 2004 decision. Caremar is obliged to maintain the craft in Capri overnight.
- On the Ischia – Procida – Naples and Ischia – Procida - Pozzuoli routes, Caremar provides mixed services.

(61) The Italian authorities underline the fact that while operating these routes, Caremar has traditionally been the only operator offering a transitory stop in Procida to and from Ischia. According to the Italian authorities, this additional stop results in both an increase in operational costs, as well as a significantly longer overall transit time (by

[13] This section is based on the information provided by the Italian authorities.

approximately 50% as compared to the direct connection). According to the Italian authorities, Caremar is the only company connecting Procida island to Pozzuoli and Naples on the mainland, and to Ischia island. The Italian authorities allege that the operation of these routes is essential to the local communities as the residents of Ischia need to travel to Procida for study reasons whilst the residents of Procida are thus ensured permanent access to the health institutions in Ischia.

(62) Moreover, the Italian authorities state that, in 2007, due to repeated requests from the island communities, the Campania Region set up two additional night connections (mixed services), as follows:

- Naples-Procida-Ischia;
- Ischia-Procida-Pozzuoli.

(63) The Italian authorities argue that no private operator undertook to provide these services on a purely commercial basis. Consequently, the operation of the services has been tendered out and as a result, the services are currently provided under a PSO system by a private operator. The latter has been imposed the obligation to provide the same reduced tariffs for certain categories of passengers as Caremar. It is thus argued that only the services provided by the abovementioned private operator are comparable with those of the beneficiary inasmuch as the former is the only private undertaking operating the route with a transitory stop in Procida. It is also underlined that for the operation of this route, the private carrier is compensated accordingly by the regional authorities.

(64) Finally, the Italian authorities underline that essential differences exist between the services provided by Caremar and those provided by the private operators on the Naples - Ischia and Pozzuoli - Ischia routes:

(a) The services provided by Caremar always provide for a transitory stop in Procida whilst the private operators largely provide direct connections (the only exception being the night connections operated by a private operator). The direct Naples - Ischia and Pozzuoli - Ischia routes are operated by several private operators. Public service obligations have been imposed to that effect by the Region.

(b) Secondly, the services provided by Caremar have been based on a Convention with the Italian State and, as from 30 September 2010, as pursuant to Article 19*ter* of the 2009 law, on a new public service contract concluded by the Campania Region.[14] On the other hand, the services provided by the private operators are provided on the basis of public service obligations assumed unilaterally by the operators. According to the Italian authorities, the operation of the public service by the latter may be ceased at any time with prior 60-day notice.

(c) Thirdly, the tariffs applied by Caremar are imposed by the public authorities both as regards the islands residents, residents of the mainland who are

[14] However, Article 1 of Law 163 of 1 October 2010 adopting D.L. 125/2010 laid down the prolongation of the initial Conventions as from 1 October 2010 until the end of the privatisation process.

working on the island, as well as other passengers and also apply to the transport of vehicles (cars and lorries). On the opposite, the private operators have been imposed obligations regarding tariffs only as regards residents and people working on the island. Tariffs applied to other passengers, as well as those applied for the transport of vehicles are freely imposed by the private operator itself.

(d) Lastly, the Italian authorities underline the fact that in case of Caremar, the schedule remains essentially invariable throughout the year, regardless of the season. On the contrary, the schedule of private operators evidences a significant imbalance between the low and the high season, notably by an increase in peak services.

(65) The Italian authorities state that the direct Naples - Ischia passenger link is the only route operated simultaneously by public and private operators. According to the Italian authorities, two private operators provide maritime services on this route: Medmar providing mixed services and Alilauro providing passenger only services. The Italian authorities have confirmed that Medmar also provides mixed services on the Ischia - Pozzuoli route.

(66) The Italian authorities underlines that on this route Caremar provides passenger services at hours essential for the public interest, aiming to guarantee territorial continuity. In fact, the Italian authorities state that the operation of the Naples - Ischia route is clearly not commercially viable insofar as the average number of passengers transported varies between 51 and 82 per crossing as regards high speed connections and between 133 and 31 per crossing for mixed services, thus only representing up to 25% of the capacity of the ship. Furthermore, the high speed craft is obliged to remain in the island overnight to ensure permanence in case of a medical emergency.

(67) As regards the operation of the Naples - Procida passenger service, the Italian authorities underline that the high speed craft is obliged to remain in the island overnight in case of a medical emergency. Moreover, Caremar provides the first daily departure from the island, thus enabling the island's inhabitants to travel to the mainland for professional or study reasons.

2.3.1.5.1.2. Maritime cabotage links in the Archipelago Pontino

(68) The beneficiary is in principle the only operator ensuring the year-round connection of Ponza and Ventotene islands with the mainland.

(69) The Italian authorities underline the specific geographical and economic realities of the Pontino Archipelago. In particular, the Italian authorities stress that the distance between the islands and the mainland and the scarcity of the population, make the latter extremely dependant on the mainland both as regards supplies as well as basic necessities.

(70) In particular:

- On the Ponza - Formia route Caremar ensures two daily connections providing mixed services and one daily passenger service. The ship, leaving the island at 5:30 a.m., guarantees the residents the connection with the mainland for study and work reasons (with the last return at 17:30 p.m.). According to the Italian authorities, Caremar

operates the only high speed service and is compelled to maintain the ship on the island overnight.

- On the Anzio - Ponza the beneficiary ensures a daily high speed mixed service in the high season from Monday to Saturday. The service is however increased on Sundays and holidays. The service is justified on social and economic development grounds (tourism is basically the only source of income of the island).

- On the Ventotene - Formia route Caremar ensures all year round a daily service using mixed vessels and one daily high speed connection for passengers in the off-season (from 1 January to 30 March and from 1 January to 31 December) which is increased in the high season (from 1 April to 30 September). The mixed service is, also in this case, the only regular connection for transport of passengers, freight and vehicles throughout the year. The high speed ship departs at 6:45 a.m., thus enabling the residents to travel to the mainland for professional or study reasons, and remains overnight on the island to ensure permanence in case of a medical emergency.

2.3.1.5.1.3. Conclusion

(71) The Italian authorities underline that keeping the ship on the island overnight represents an additional public service obligation only imposed on Caremar and which no private operator would provide under normal market conditions. The Italian authorities thus argue that the granting of public service compensation is necessary in order to guarantee a regular service on all routes detailed above and that the operation of the abovementioned routes under the same conditions would not be undertaken by private operators on purely commercial grounds.

2.3.1.5.2. Toremar

(72) Toremar operates connections in the Tuscan archipelago in order to ensure territorial continuity between the mainland and the Gorgona, Capraia, Elba, Pianosa and Giglio islands.

(73) On some of the routes Toremar operates in competition with private operators. The Italian authorities underline the fact that, contrary to the private operators, Toremar is the sole undertaking operating under a public service regime and receiving compensation for the services provided. In this sense, the Italian authorities submit that the public mission is justified in connection to the mobility requirements of the island communities, as well as by the summer tourist flows between the mainland and the island.

(74) On certain routes served however Toremar has virtually no competition.

2.3.1.5.2.1. Elba island

(75) Toremar ensures the following connections all year round, more than once per day:

- Piombino - Portoferraio. On this route Toremar provides mixed services. The Italian authorities confirm that on this route Toremar operates in competition with two private undertakings.

- Piombino - Rio Marina - Porto Azzuro - Pianosa. On this route Toremar is the only operator providing mixed services more than once per day to the port of Rio Marina

and weekly connections to Pianosa port. The Porto Azzurro service is currently discontinued for technical reasons.

- Piombino - Cavo - Portoferraio. On this route Toremar operates the only high speed passenger connection.

(76) The Italian authorities maintain that Toremar is the only operator being consistently present on the abovementioned routes throughout the year at hours essential for the island communities, thereby allowing the residents to travel to the mainland for professional or study reasons.

2.3.1.5.2.2. Gorgona and Capraia islands

(77) Toremar provides throughout the year mixed services to Livorno, with twice weekly stops in Gorgona island and at least daily at Capraia island.

(78) The Italian authorities underline that the connection with Capraia has been operated since 2005 also by a private operator. The latter however only provides passenger services during July and August. Given the scarce population of the island during winter and the distance to the mainland, the permanence of the service is considered essential to enable residents access to basic necessities.

2.3.1.5.2.3. Giglio island – Porto S. Stefano

(79) On this line Toremar ensures throughout the year more than one connection daily. The service is operated in competition with a private undertaking. Nevertheless, the Italian authorities maintain that the beneficiary provides the service at hours essential for the public interest, enabling a reliable transfer to and from the island. In this sense, it is argued that the service could not be provided by private operators on purely commercial considerations.

2.3.1.5.3. Saremar

(80) Saremar operates connections between Sardinia and the minor islands to the north-east and south-west of Sardinia and an international connection between Sardinia and Corsica.

(81) More specifically, Saremar provides mixed services on the following cabotage routes:

- La Maddalena - Palau
- Carloforte - Portovesme
- Carloforte - Calasetta

(82) Saremar also operates the international route from Teresa di Gallura (Sardinia) to Bonifacio (Corsica).

2.3.1.5.3.1. Cabotage routes

(83) On the La Maddalena - Palau route the beneficiary ensures 21 daily connections (mixed services) throughout the year. The first departure from la Maddalena is scheduled for 7:00 a.m. and the last return from Palau at 19:30 p.m. To operate this route Saremar uses two ferries specifically built as to minimize the time of loading and unloading a high number of cars and lorries.

(84) The Italian authorities underline the fact that Saremar has been operating this route for over 70 years.[15] In addition, the Italian authorities submitted that in 2006 Saremar had already reduced by 25% the number of daily connections on this route[16] due to the presence on the market of private operators.

(85) According to the Italian authorities, three private operators provide maritime services on the same route: Enermar, Maddalena Ferry and Delcomar. According to the Italian authorities, the latter is compensated by the Region for the services provided on this route from midnight to 5:30 a.m.

(86) On the Carloforte - Portovesme route Saremar ensures 17 daily connections during the summer season (the first departure at 5:00 a.m. from Carloforte and the last return at 24:00 p.m.) and 15 daily connections during the rest of the year (the first departure at 5:00 a.m. from Carloforte and the last return at 22:20 p.m.). According to the Italian authorities, Saremar is the only operator consistently operating the route throughout the year.

(87) The Italian authorities further underline the fact that this route is essential for both tourists and mainland and island residents because of the better connection of Portovesme with the motorway to Cagliari (port and airport), and to Porto Torres and Olbia (port and airport). In addition, the Italian authorities underline the importance of this route with regard to the integration with the public transport, i.e. the bus connections operated by ARST S.p.A., owned by the Sardinian regional authorities.

(88) On the Carloforte – Calasetta route Saremar provides nine daily connections during the summer season (the first departure at 6:55 a.m. and the last return at 20:20 p.m.) and 7 daily connections (the first departure at 6:55 a.m. and the last return at 17:50 p.m.) with an additional connection on holidays during the rest of the year.

(89) To operate on this route Saremar uses two ferries (*Arbatax* and *Maddalena*) with transport capacity of 20 cars and 178 passengers.

(90) The Italian authorities state that on this route Saremar operates in competition with one private operator, Delcomar, which provides maritime services using one ferry. Delcomar also guarantees integrative night connections from 18:45 to 5:15 a.m., compensated accordingly by the regional authorities.

(91) According to the Italian authorities this route is highly important in terms of territorial continuity. The Italian authorities argue that Portovesme port is constantly subject to high winds from South and East, conditions which make safe sailing more difficult. Thus the Carloforte – Calasetta route becomes the only available alternative.

2.3.1.5.3.2. The international route

(92) On the S. Teresa di Gallura (Sardinia) – Bonifacio (Corsica) route the beneficiary provides two/three daily connections (mixed services) throughout the year. No other operator provides similar services on this route, insofar as the only private competitor operates exclusively during the high season (April – September).

(93) The Italian authorities stress the fact that Tirrenia has been operating this route since 1937, as the latter was included in the list of national interest routes (*linee di interesse*

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15 Until 1987 the route was operated by the Tirrenia di Navigazione S.p.A.

16 According to Italian authorities, the five-year plans previously set the frequency of Caremar's service on the La Maddalena - Palau route at 28 connections per day.

nazionale) set up by Royal Decrees No 2081 of 7 December 1936. Following the establishment by Article 15 of Law No 856/1986 of Saremar as a regional company of Tirrenia, the operation of the route in question has been entrusted to the latter.

(94) The Italian authorities underline the fact that, during the high season (April – September), Saremar only uses one ferry to operate the service. Consequently, Saremar may be compelled, for lack of sufficient capacity, to invite potential passengers travelling by car to board with the private competitor.

(95) According to the Italian authorities, the services provided by Saremar during the low season, when it is the sole operator of the route, are essential as regards the transport of lorries, especially those transporting building materials, lumber and cork, fish. The service enables the lorries to depart from S. Teresa di Gallura (Sardinia) at 7:30 am on Monday, Wednesday and Friday and return from Bonifacio (Corsica) at 17:00 pm after the delivery of the merchandise in different Corsican cities.

(96) In addition to that, the Italian authorities underline that the services provided by Saremar on this route are paramount to facilitate the access from Corsica to Sardinia thereby ensuring the mobility of Sardinian workers across borders.

(97) Lastly the Italian Authorities refer to the cross-border cooperation program INTERREG Italia – Francia "*Isole*" approved by the Commission with the aim of promoting a balanced development and integration of the European territory, as proving the importance of the support to the services provided by Saremar on this route.

2.3.1.5.4. Tirrenia

2.3.1.5.4.1. Genova - Porto Torres

(98) The Genova – Porto Torres route is operated by Tirrenia under the public service regime only in the low season. According to the Italian authorities, on this route the private operators, albeit operating both in the high and low seasons, do not provide comparable services in terms of frequencies. In fact, Tirrenia provides daily services with evening departures from both ports, according to the pre-established schedule in order to provide reliable links to the rail network in Sardegna.

(99) One competitor operates the route throughout the year. However, in the low season, the latter only guarantees three weekly departures, whilst the frequencies are increased in the high season to ensure one daily service but does not however ensure evening departures from both ports. Another competitor only operates in the high season and thus its services cannot be considered comparable to those provided by Tirrenia.

(100) It is thus submitted that Tirrenia is the only operator capable of guaranteeing the territorial continuity.

2.3.1.5.4.2. Genova – Olbia - Arbatax

(101) Tirrenia operates the Genova – Olbia – Arbatax route throughout the year under the public service regime and is only subject to competition from private operators in the high season.

(102) The private operators only operate the route for four months (June-September) and do not provide a link to Arbatax.

2.3.1.5.4.3. Civitavecchia- Olbia

(103) The Civitavecchia – Olbia route is operated by Tirrenia under the public service only in the low season.

(104) On this route private operators are only present in the high season (June-September), providing daily departures (at night) from both ports.

2.3.1.5.4.4. Napoli - Palermo

(105) The Napoli - Palermo route is operated by Tirrenia under the public service regime only in the low season. Tirrenia provides one daily service (at night) throughout the year according to the pre-established schedule.

(106) It is argued that the only competitor, SNAV, does not ensure the required quality of the service and regularly reduces the frequency of the service in order to carry out fleet maintenance works. According to the Italian authorities, the service provided by SNAV on this route cannot thus be considered to observe the continuity, regularity and quality requirements.

2.3.1.5.4.5. Other routes (mixed services)

(107) On the Civitavecchia - Arbatax - Cagliari, Napoli - Cagliari, Palermo - Cagliari, Trapani - Cagliari and Termoli - Tremiti islands routes, no other operator is present.

2.3.1.5.4.6. Freight routes

(108) On the Livorno/Genova – Cagliari route Tirrenia provides freight services throughout the year five times per week. The service provided by competitors is limited to one weekly departure and is suspended during the high summer season and the Christmas holidays.

(109) No private operators are present on the Napoli - Cagliari and Ravenna - Catania routes.

2.3.1.5.5. Siremar

(110) According to the Italian authorities, the competitors of Siremar on the routes operated on the basis of the initial Convention, as prolonged, are operators selected by the Region on the basis of open tender procedures. The latter provide the following services:

Service	**Operator**
High speed service (Aeolian Islands)	Ustica Lines
Mixed service (Aeolian Islands)	NGI
Mixed service (Egadi Archipelago)	Traghetti Del Mediterraneo
High speed service (Egadi Archipelago)	Ustica Lines
Mixed service (Island of Pantelleria)	Traghetti Del Mediterraneo
Mixed service (Island of Ustica)	NGI
High speed service (Pelagie Archipelago and Island of Ustica)	Ustica Lines
High speed service – high season (Pelagie Archipelago)	Ustica Lines

Table 3 - Services provided by Siremar's competitors

2.3.1.6. The subsidies

2.3.1.6.1. Compensation granted in 2009

(111) In 2009, the compensation for the discharge of public service obligations has been granted in accordance with the system in place at the end of 2008. 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.

(112) On the basis of the initial Conventions, 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.

(113) The return on invested capital was calculated on the basis of the banks interest rates and the reference average borrowing rates for naval credits.

2.3.1.6.2. Compensation granted in 2010 and 2011

(114) The compensation for the operation of the public service starting with 2010 has been calculated on the basis of the new methodology to be applied after the entering into force of the new Conventions and public service contracts referred to in paragraph (35) above. The method of calculation of the public service compensation has been detailed in CIPE Directive of 9 November 2007 (hereinafter *the CIPE Directive*), GURI no. 50 of 28 February 2008.

(115) According to the CIPE Directive the combination of the scope of services provided, the tariff constraints detailed in paragraph (118) below and the level of public service compensation is such as to grant the public service operator coverage of the entirety of admissible costs. More specifically, 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.

(116) The CIPE Directive lays down that, in case the above formula cannot be used, the scope of the subsidised activities would be reduced, or alternatively the assets would be reviewed or the fare constraints would be modified.

(117) The cost elements taken into consideration in order to calculate the compensation have been defined as follows:

1) Operating costs

(a) costs directly linked to the operation of the public service (i.e. staff directly employed, equipment directly used, maintenance);

(b) costs indirectly linked to the operation of the public service, such as the relevant proportion of general costs.

2) *Investment costs and return on invested capital*. The following are admissible for the purpose of calculating the compensation for the discharge of the public service obligations:

(a) the costs of repaying the invested capital, taking into account depreciation;

(b) an appropriate return on invested capital, calculated by multiplying the net capital invested by the established rate of return on invested capital.

The fares

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

$$\Delta T = \Delta P - X, \text{ where}$$

- ΔT is the annual percentage change in the maximum fare;
- ΔP is the rate of inflation forecast for the year of reference;
- X is a real annual rate for maximum fare adjustments, laid down in the Conventions/public service contracts, which remains constant over the whole of the regulatory period and is differentiated for various services.

(119) The CIPE Directive also specifies that a further input can be added to the maximum fare to reflect trends in fuel costs, taking standard publicly available prices as reference. In addition, the Conventions/public service contracts may provide for further components adding to or subtracting from the maximum fare in view of the extent to which quantitatively measurable service quality targets, laid down in the contracts themselves, are attained.

The return on invested capital

(120) The rate of return on invested capital is calculated on the basis of the weighted average cost of capital, pre-tax:

$$r = (1 - g)\ \frac{k_e}{1 - T_e} + g\ \frac{k_d\,(1 - T_{rs})}{1 - T_e}$$

where $k_e = k_f + B * k_r$

$k_d = k_f + k_p$

and

- g: ratio of debt on capital;
- k_e: cost of equity;
- k_d: cost of debt;
- k_f: risk free;

- k_r: risk premium;
- B: beta;
- K_p: premium to debt;
- T_{rs}: tax rate on debt;
- T_e nominal tax.

(121) The cost of debt is defined as the sum of the rate of return on risk-free activities plus the premium to debt. The rate of return on risk-free activities corresponds to the average gross yield on benchmark ten year bonds with reference to the previous 12 months for which available data exists. The premium to debt is determined from the market values indicated by a sector analysis.

(122) The cost of equity is calculated by applying a premium to the rate of return on risk-free activities, calculated as the premium acknowledged for risk capital multiplied by a beta reflecting the non-diversifiable risk characterising the activity carried out by the operator.

(123) The beta is estimated from the correlation between the expected return on the equity market and the expected return on risk capital for a group of companies with a comparable risk profile, with reference to the standard financial position. Failing that, the beta is estimated using the standard market beta.

(124) The established premium for risk capital is 4%. However, in case of a service which is not operated on an exclusive basis, the greater risk borne by the operator is remunerated by the addition of an extra 2.5 percentage points to the risk premium.

2.3.1.6.2.1. Caremar

(125) The level of the return on invested capital was 6.3 % in 2009.

(126) For 2010, the rate of return on invested capital has been set at 9.6%, on the basis of the formula below:

Return on invested capital (pre-tax) 2010

Risk-free rate	[…]*%
Risk premium	[…]%
Beta	[…]
Applicable tax	[…]%
Cost of equity – CoRC (gross)	**[…]%**
Risk-free rate	[…]%
Spread (premium to debt)	[…]%
Total	[…]%
Tax rate on debt ([…]%)	[…]%
Applicable tax ([…]% + […]%)	[…]%
Cost of debt - CoD (gross)	**[…]%**
(A) – Net assets/(liabilities + net assets)	[…]%
(B) – Liabilities/(liabilities + net assets)	[…]%
Return on invested capital - ROIC (gross)	**9.6%**

ROIC = (CoRC * A)+(CoD * B) = ([…]% * […]%) + ([…]% * […]%) = 9.6%

(127) The Italian authorities clarified that in 2010 the return on invested capital (at a rate of 9.6%) comes before taxes. Conversely, the return for 2009 (at a rate of 6.3%) was net of taxes which, based on the new methodology, were considered as admissible costs. For the sake of completeness, the Italian authorities underline that, if the method laid down for 2010 had been used in 2009, the return would have been 9.00% (see table below).

* Covered by the obligation of professional secrecy.

Return on invested capital 2009

Risk-free rate	[…]%
Risk premium	[…]%
Beta	[…]
Applicable tax	[…]%
Cost of equity – CoRC (gross)	**[…]%**
Risk-free rate	[…]%
Spread (premium to debt)	[…]%
Total	[…]%
Tax on debt […]%	[…]%
Applicable tax ([…]% + […]%)	[…]%
Cost of debt – CoD (gross)	**[…]%**
(A) – Net assets/(liabilities + net assets)	[…]%
(B) – Liabilities/(finanial liabilities + net assets)	[…]%
Return on invested capital – ROIC (gross)	**9.0%**

ROIC = (CoRC * A)+(CoD * B) = ([…]% * […]%)+([…]% * […]%) = 9.0%.

2.3.1.6.2.2. Toremar

(128) The level of the return on invested capital was 5.46 % in 2009.

(129) In 2010, the rate of return on invested capital has been set at 9.95%, on the basis of the formula below:

Return on invested capital (pre-tax) 2010

Risk-free rate	[…]%
Risk premium	[…]%
Beta	[…]
Applicable tax	[…]%
Cost of equity – CoRC (gross)	**[…]%**
Risk-free rate	[…]%
Spread (premium to debt)	[…]%
Total	[…]%
Tax rate on debt ([…]%)	[…]%
Applicable tax ([…]% + […]%)	[…]%
Cost of debt - CoD (gross)	**[…]%**
(A) – Net assets/(liabilities + net assets)	[…]%
(B) – Liabilities/(liabilities + net assets)	[…]%
Return on invested capital - ROIC (gross)	**9.95%**

(130) In 2010 the return on invested capital comes before taxes. On the contrary, the return for 2009 (at a rate of 5.46%) was net of taxes which, based on the new methodology, were considered as admissible costs.

2.3.1.6.2.3. Saremar

(131) The level of return on invested capital was 3.88% in 2009.

(132) Starting with 2010, the return on invested capital has been set at 9.72%, on the basis of the formula below:

Return on invested capital (pre-tax) 2010	
Risk-free rate	[…]%
Risk premium	[…]%
Beta	[…]
Applicable tax	[…]%
Cost of risk capital – CoRC (gross)	**[…]%**
Risk-free rate	[…]%
Spread (premium to debt)	[…]%
Total	[…]%
Tax rate on debt ([…]%)	[…]%
Applicable tax ([…]% + […]%)	[…]%
Cost of debt - CoD (gross)	**[…]%**
(A) Net assets/(liabilities + net assets)	[…]%
(B) Liabilities/(liabilities + net assets)	[…]%
Return on invested capital - ROIC (gross)	**9.72%**

(133) In 2010 the return on invested capital comes before taxes. Conversely, the return for 2009 (at a rate of 3.88%) was net of corporate income tax which, based on the new methodology, was considered as admissible cost.

2.3.1.6.2.4. Tirrenia and Siremar

(134) The Italian authorities have not informed the Commission on the level of the compensation paid to Tirrenia and Siremar for the discharge of public service obligations during 2009-2011.

2.3.2. The privatisation of Tirrenia and Siremar (measure 2)

(135) The description of the sale procedure in the following paragraphs, as well as the subsequent assessment provided in paragraphs (258) - (277) and (316) - (318) below only concern the privatisation of Tirrenia and Siremar. On the basis of the information currently at the disposal of the Commission, the privatisation of the regional companies of the former Tirrenia Group is currently underway, and falls outside the scope of the present decision.

(136) As mentioned above, following the failure of the first attempt to privatise the companies, both Tirrenia and Siremar have been admitted to the extraordinary administration procedure as set out by the Marzano law as subsequently amended.

(137) According to the Italian authorities, the privatisation of Tirrenia and Siremar has been carried out through sale of the going concerns entitled to provide the public service, following the procedure set out by Article 4, paragraph 4-*quarter,* of the Marzano Law as subsequently amended.

2.3.2.1. The extraordinary administration procedure

(138) Unlike the normal bankruptcy procedure, whose 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[17], is a specific insolvency procedure for large insolvent companies that aims to safeguard the productive assets of the company by ensuring the prosecution, reactivation or conversion of the productive activity.

(139) The management of the insolvent company is transferred to the Extraordinary Commissioner(s). The latter will propose a recovery plan of the business in question, either by the *restructuring* or the *sale of assets* of the insolvent company. The competent Ministry may ask for any clarification, amendment or integration to the program drawn up by the Commissioner(s). The plan is subject to previous authorisation by the Ministry, considering the opinion of a Supervisory Board (composed by experts appointed by the Ministry itself).

(140) The Marzano law, i.e. 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, regulates the extraordinary administration procedure applicable to insolvent companies that intend to undergo the restructuring procedure mentioned in the previous paragraph and cumulatively satisfy certain criteria concerning the number of employees in the preceding year and total debts of the company.

(141) The procedure requires that the insolvent company files both an application to the Italian Minister for Economic Development, and a petition to the competent bankruptcy Court. The Ministry 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.

(142) Within 180 days of his appointment, the Commissioner has to submit a restructuring plan to the Ministry. The ordinary bankruptcy procedure is only triggered in case the abovementioned restructuring plan is not approved by the Ministry and the asset sale procedure is not possible.

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[17] The so - called Prodi-*bis* Decree.

(143) Decree Law 134/2008[18] (hereinafter *D.L. 134/2008*) introduced several amendments to the Marzano law. These amendments are applicable to *companies providing essential public services*, inter alia the possibility for the Extraordinary Commissioner to identify a buyer of the company's assets through a negotiation procedure with parties that guarantee continuity of the public service on the medium term and an expeditious intervention. The sale price cannot be lower than the market value of the assets as set by an independent expert appointed by Ministerial decree. Article 4, paragraph 4-*quarter*, of the Marzano Law as amended by D.L. 134/2008 reads:

"Whilst observing the transparency requirements, in derogation from the provisions of Article 62 of D.L. 270, […] the Extraordinary Commissioner selects the acquirer by means of private negotiations, amongst the bidders which guarantee the continuity of the service on the medium term, the rapidity of the intervention and the observance of the requirements set by the national and international treaties subscribed by Italy. The sale price cannot be lower than the market price resulted on the basis of the valuation carried out by a financial institution of repute appointed by Ministerial Decree as independent expert".

(144) Furthermore, D.L. 134/2008 introduced the possibility to alternatively file the application for admission to the procedure with the President of the Council of Ministers and not only the Ministry. It also allowed the possibility to apply for the procedure therein 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. Under D.L. 134/2008 the ordinary bankruptcy procedure is initiated in case neither an asset disposal plan nor a restructuring plan can be implemented or approved by the Ministry.

2.3.2.2. The asset sale

(145) According to the Italian authorities, the different phases of the procedure under the Marzano law are the following:

(a) Publication of the call for expression of interest;

(b) *Invitation to due diligence*: once the observance of the requirements set out in the Call is assessed, the Extraordinary Commissioner sends to all of the parties admitted to the subsequent phases procedure a notice of admission indicating the modalities and timetable for the completion of the due diligence;

(c) *Due diligence*: the parties interested in the purchase admitted to the due diligence phase have access to all technical, legal and financial information as regards the assets in question, including inter alia in this case information concerning the assets subject to the sale procedure and the draft Conventions to be signed with the successful bidders; upon completion of the due diligence, an additional notice is sent to the admitted parties indicating the terms and modalities applicable to the submission and evaluation of binding offers;

[18] 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*"), so-called the *new Marzano law*.

(d) *Deadline for the valuation of the independent expert* appointed by the Ministry;

(e) *Presentation of the binding offers (first phase) and of the business plan*: the admission of potential acquirers to the final phase is subject to (i) the presentation to an offer superior to the value set by the independent expert for the assets in question; and (ii) the positive assessment of the business plan submitted and, in this case, the conformity of the underlying assumptions therein with the public service obligations laid down by the new Conventions;

According to the Italian authorities, in this case the business plan had to include:

a. The presentation of the routes and frequencies in accordance with the public service obligations set by the new Conventions;

b. The tariffs foreseen;

c. The ships to be used on each line and potential withdrawals or acquisition of new ships and the afferent timeframe.

(f) *Second phase of the due diligence*: upon completion of the due diligence, an additional notice is sent to the admitted parties indicating the terms and modalities applicable to the submission and evaluation of the binding offers;

(g) *Presentation of the binding offers (second phase)*: the bidders may submit increased offers, by at most 10%; in case more than one bid is admitted to the final phase, the most advantageous offer is selected;

(h) *Selection and closing of the deal.*

(146) According to the information submitted by the Italian authorities, the timing of the main phases of the procedure in this case was as follows:

Phases of the procedure	**Tirrenia**	**Siremar**
Publication of the call for expression of interest	15 September 2010	4 October 2010
Letters of intent received	21	5
Invitation to due diligence	10 November 2010 (16 parties)	24 November 2010 (5 parties)
Due diligence (details on the object of the sale, the new Conventions and all relevant financial information made available to the bidders)	26 November 2010	16 December 2010
Invitation to submit a binding offer	2 February 2011	2 February 2011
Expert appointed by the Ministry	4 February 2011	4 February 2011
Presentation of the binding offers (second phase)	19 May 2010 Compagnia Italiana di Navigazione (CIN)	23 May 2010 Compagnia delle Isole Società di Navigazione Siciliana
Selection and closing of the deal	23 May 2011	-

Table 4 – The sale procedures

2.3.3. The berthing priority (measure 3)

(147) As mentioned above, paragraph 21 of the 2009 law stipulates that the companies would also 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 Maritime Code.

2.3.4. The measures laid down by the 2010 law converting Decree Law 125/2010 (measure 4)

(148) As mentioned above, the 2010 law laid down that an additional public financing of EUR 7 million and EUR 49 million already earmarked for the upgrading of the fleet would be made available to the companies of the former Tirrenia Group to cover operating costs.

(149) In addition, Article 1 of the 2010 law converting with amendments D.L. 125/2010 laid down certain fiscal advantages in the context of the privatisation process, namely the right to tax exemption for all operations concerning the privatisation process.

(150) Furthermore, the 2010 law laid down the possibility for the Tirrenia Group companies to use FAS resources in order to meet current liquidity needs.

2.4. The complaints

(151) The Commission received several complaints from competitors in relation to various measures undertaken by the Italian State in favour of the Tirrenia Group companies. The main allegations of the complainants are summarised thereafter.

2.4.1. The measures laid down by the 2009 law

(152) The complainants are private operators competing with Tirrenia Group companies on certain routes operated by the latter under the public service regime. They essentially argue that the 2009 law lays down three State aid measures in favour of companies of the former Tirrenia Group. Most of the complaints however effectively refer to the support measures laid down by the 2009 law in favour of Caremar.

(153) The complainants basically contend that the measures therein:

(a) *Infringe the principle of transparency and non-discrimination laid down by the* 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)[19] (hereinafter *the Maritime Cabotage Regulation*) by means of: a) the extension (without tender) until 30 September 2010 of the initial Conventions; b) the priority in the allocation of new slots. It is argued that the priority in the allocation of slots is applicable to all routes operated by the companies, including those which do not fall within the scope of the public service system and confers on the companies an additional advantage which distorts competition;

(b) *Infringe the State aid rules by means of:* a) the prolongation of the compensation in favour of Caremar for the provision of maritime cabotage services until 30 September 2010; b) the compensation to be granted under the new public service contract to be concluded with the Region, up to twelve

[19] Official Journal L 364 of 12.12.1992.

years, for the performance of the public service obligations; c) the berthing priority.

(154) In addition, one of the complainants states that the duration of the new public service contracts, up to twelve years, to be concluded by the regional companies of the former Tirrenia Group with the Regions for the performance of those obligations beyond September 2010 is excessive.

(155) One complainant alleges that the compensation paid to Caremar as from 1 January 2009 for the operation of the abovementioned route constitutes new aid granted unlawfully to the beneficiary.

(156) As regards in particular the services currently provided by Caremar under the public service regime, the complainants argue that the compensation paid for the operation of certain routes in the Gulf of Naples constitutes incompatible State aid insofar as similar services are provided by the market on purely commercial terms. Thus, it is alleged that the operation of the routes in question cannot be considered as a genuine and legitimate public service.

(157) In this sense, one competitor submits that only the following obligations imposed on Caremar are not currently undertaken by the private operators: the operation of three daily connections from Pozzuoli to Ischia with a transitory stop at Procida by means of one traditional ship and one high speed craft, and the permanence of the ship in the island overnight. In addition, one complainant argues that the obligation to keep the ship on the island at night, introduced several years earlier, is currently obsolete given the start up of the medical public service operated by helicopter in case of medical emergency.

(158) Furthermore, one of the complainants argues that it could reasonably assume to provide the operation of both the Naples-Capri and Naples-Procida-Ischia routes under the same terms as Caremar, including the obligation to maintain the ship in the island ports overnight, if it were to be compensated accordingly.

(159) Ultimately, one of the complainants argues that Caremar abuses its dominant position on the market for provision of mixed transport services by means of abnormal low tariffs as a result of the State subsidies it receives.

2.4.2. The measures laid down by the 2010 law

(160) Two complainants refer to the measures laid down by the 2010 law and allege that Article 1(1) of D.L. 125/2010 and Article 1 of the 2010 law amount to State aid in favour of the companies of the former Tirrenia Group.

(161) The complainants state, in principle, that the public financing in question amounts to operating aid to the companies of the former Tirrenia group inasmuch as will be used to cover losses incurred by the companies in the operation of the public services. The complainants allege that this financing is additional to the public service compensation paid to the companies for the discharge of the public service obligations.

2.4.3. The privatisation

(162) Two complainants refer to the privatisation process of Tirrenia and Siremar, mainly alleging lack of transparency of the procedure.

(163) One of the complainants submits that the call for tenders for the sale of Tirrenia's assets infringes the principle of transparency and non-discrimination imposed by the Maritime Cabotage Regulation. The complainant mainly argues that the new call for tenders is not transparent with regard to:

(a) The object of the procedure and the sale price;

(b) The scope of the future Convention between Tirrenia and the Italian State;

(c) The selection criteria.

(164) In addition, another complainant argues that the lack of transparency of the sale procedure may favour certain national transport operators well established on the market.

3. POSITION OF THE ITALIAN AUTHORITIES

3.1. The compensation

(165) According to the Italian authorities the services detailed under paragraphs (59) – (110) above constitute genuine SGEI inasmuch as they aim to ensure territorial continuity and no comparable services are provided by competitors on the routes in question.

3.2. The privatisation

(166) As mentioned above, pursuant to the 2009 law, the companies of the former Tirrenia Group already endowed with new Conventions/public service contracts are being privatised.

(167) As regards the procedures for the sale of the assets of Tirrenia and Siremar, the Italian authorities state that all potential acquirers have been treated in an equal, non-discriminatory way, given that:

(a) the calls for tender have been widely advertised in the press;

(b) all bidders have been provided with adequate information at the same level during the due diligence phase;

(c) the procedure is designed in such a way as to assure a market oriented price is paid for the assets subject to the sale.

(168) As regards the imposition of conditions of a public nature in the sale process, the Italian authorities submit that no automatic transfer of employees will take place. They further allege that the only legal obligation imposed on the acquirers is the maintenance of the workforce levels which ensure operational continuity of the services in full convergence with the public service obligations imposed by the new Conventions. Such obligation is however limited to two years and only to those workers which are indispensable for the operation of the services.

(169) The Italian authorities have also indicated that the Extraordinary Commissioner has clearly defined the object of the sale deal as the transfer of the assets (ships) and the corresponding workforce for the discharge of the public service obligations in accordance with the new Conventions. Thus it is argued that the assets which are not

required to provide the public service on the specified routes have been carved out from the asset deal.

3.3. The berthing priority

(170) The Italian authorities underlined that the berthing priority may be granted exclusively in respect of the routes subject to the public service regime and is provided in full compliance with the provisions of Law No. 84 of 28 January 1994 and the Maritime Code.

3.4. Measures laid down by the 2010 law converting D.L. 125/2010

(171) As regards the EUR 49 million and the additional EUR 7 million for the *upgrading of the fleet* to meet safety standards, the Italian authorities clarified that a total of EUR 23 750 000 has been allocated to the five companies depending on the upgrades required by the fleet, as follows:

Company	Subsidies (EUR)
Tirrenia	12 051 900
Caremar	2 115 000
Toremar	1 617 300
Siremar	7 215 800
Saremar	750 000

Table 5 – Subsidies for the upgrading of the fleet

(172) According to the Italian authorities, so far only Tirrenia has requested to use the public financing in question to cover liquidity needs and has received to that effect EUR 12 051 900.

(173) As regards specifically the EUR 49 million, the Italian authorities allege that, since the measure only provides the companies with access to financing already earmarked for other purposes in order to cope with temporary liquidity constraints, subject to the reimbursement of such resources by the company so they can be used for their original purpose, the measure does not constitute State aid.

(174) As regards the use of EUR 7 million, the Italian authorities clarified that the measure aims to ensure compliance with the requirements of several European Directives which lay down certain mandatory technical adjustments to vessels, obligatory if the ship is used to provide a public service and/or is effectively put up for sale as part of the privatisation procedure. The Italian authorities consider that, since the measure aims to ensure compliance with EU legislation and is essential to ensure the continuity of public service (failure to implement these measures would allegedly immediately have led to the complete withdrawal of several vessels, resulting in serious disruption of the public service) it does not represent State aid.

(175) As regards the *tax exemption*, the Italian authorities clarified the following:

(a) As regards corporate income tax and VAT, the measure has not been applied since the transfer of the companies to the Regions has not been remunerated and is exempted from VAT;

(b) With respect to other taxes, the effects of the law can be regarded as merely symbolic.

(176) As regards *the possibility of using FAS funds*, Italy considers that they do not amount to State aid insofar as they are available to the Regions concerned to encourage the completion of the ongoing privatisation process and to guarantee territorial continuity pending the outcome of this process.

(177) The Italian authorities state that to date no Region has used FAS funds for this purpose.

4. ASSESSMENT

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

(178) 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*".

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

4.1.1. The compensation (measure 1)

(180) *State resources*: Since the notified measure refers to financial compensation granted to the beneficiaries by the Italian State, it involves the use of State resources.

(181) *Selectivity*: The relevant subsidies only benefit certain undertakings. They are therefore selective.

(182) *Economic advantage:* In order to conclude on whether or not the compensation for the operation of the public service constitutes an advantage within the meaning of Article 107 TFEU, the Court set out the following criteria in its judgement in the Altmark case[20]:

1. the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined (hereinafter *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 (hereinafter *Altmark 2*);

[20] Case C-280/00 - *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

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 (hereinafter *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 (hereinafter *Altmark 4*).

4.1.1.1. Altmark 1

(183) There is no uniform and precise definition of what service can constitute a service of general economic interest (hereinafter *SGEI*) under EU law, either within the meaning of the first Altmark condition or within the meaning of Article 106(2) TFEU.[21]

(184) Point 22 of the Communication from the Commission on services of general interest in Europe[22] is worded as follows:

"Member States' freedom to define [services of general economic interest] means that Member States are primarily responsible for defining what they regard as [such] services (…) on the basis of the specific features of the activities. This definition can only be subject to control for manifest error (…)

In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally."

(185) In the light of the above, the Commission considers, in essence, that the national authorities are entitled to take the view that certain services are in the general interest and must be provided by means of public service obligations when market forces are not sufficient to ensure that they are provided at the level or conditions required. Thus, with the exception of sectors in which EU rules governing the matter are in force, the Commission's task in such cases is to ensure that this margin of discretion is applied without manifest error as regards the definition of SGEI. In the field of maritime transport, detailed EU rules governing public service obligations have been laid down in the Maritime Cabotage Regulation.

(186) In this case, the public mission as defined by the Italian authorities mostly covers island cabotage routes mainly connecting mainland Italy to island ports. In addition, one international route is operated by Saremar. According to the Italian authorities, a

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21 Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraph 96. See also Opinion of Advocate General Tizzano in case C-53/00 *Ferring*, ECR I-9069 and Opinion of Advocate General Jacobs in Case C-126/01, *GEMO* [2003] ECR I-13769.

22 OJ C17, 19.01.2001, p. 4.

satisfactory service in terms of regularity and frequency on the routes in question is paramount for the economic development of the islands while meeting essential mobility requirements for the local communities.

(187) Cabotage connections fall within the scope of Article 4 of the Maritime Cabotage Regulation and, for the purpose of examining potential State aid, the Community guidelines on State aid to maritime transport (hereinafter *the Maritime Guidelines*).[23] Section 9 of the Maritime Guidelines specifies that "*public service obligations (PSOs) 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. Compensation for the operation of such services is therefore subject to the rules indicated in the quoted provision and to the rules on State aid as laid down by the Treaty and interpreted by the Court of Justice. It results from the established case-law that public service obligations may only be imposed if they meet a real need which cannot be met by market forces alone.[24]

(188) The Communication on interpretation of the maritime Cabotage Regulation[25] confirms that *"it is for the Member States (including regional and local authorities where appropriate) 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.

(189) Therefore the Commission has to assess whether the subsidies paid to the companies of the former Tirrenia Group are granted in respect of services which would not be provided under normal market conditions either to the same extent or at similar fares and whether these services meet a real need.

(190) At the outset, the Commission acknowledges that the objective pursued in the case under scrutiny, namely to ensure the adequacy of regular maritime transport services between mainland Italy and the islands can be considered as of general interest.

(191) The Commission also notes that historically, the territorial continuity objective pursued by Italy has not been achieved through the interplay of market forces alone. In fact, the adequacy of these services has been traditionally ensured by public service obligations imposed to that effect on the companies of the former Tirrenia Group and enshrined in the initial Conventions, subsequently extended as detailed above.

(192) However, the Commission has to assess whether the services are geared to actual needs. In order to verify the existence and scope of the public service obligations

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[23] Commission Communication C(2004)43 – Community Guidelines on State aid to maritime transport, OJ C 13, 17.01.2004, p. 3.

[24] Judgment of the Court in Case C-205/1999 Analir and others [2001] ECR I-1271.

[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication 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), COM(2003) 595 final, 22.12.2003.

entrusted to the beneficiaries and whether it was necessary to compensate the latter for the cost they incurred in meeting these obligations, the Commission is required to examine whether other operators offer similar services to those provided by the beneficiaries which meet the obligations laid down by the act of entrustment.

(193) Firstly, the Commission notes that in this case the compensation for the operation of the maritime services in 2009 is based on the prolongation of the initial Conventions concluded in 1991, as pursuant to the 2009 and 2010 laws. Nevertheless, as mentioned above, the initial Conventions merely laid down that public service obligations regarding the routes and ports to be served, the capacity of the vessels assigned to the maritime connections in question, the frequency of service and the fares would be defined in detail by the five-year plans.

(194) As mentioned in paragraph (44) above, no plan has been adopted for the 2000-2004 and 2005-2008 periods. Instead, according to the Italian authorities, alterations to the obligations imposed on the operators have been agreed on an ad-hoc basis. No such document outlining the scope of the public service obligations imposed has been provided to the Commission. Consequently, at this stage the Commission cannot conclusively assess whether the public service obligations imposed on the beneficiaries have been clearly defined and whether there was a real need for a public service in that respect.

(195) Secondly, the Commission notes that the compensation for the operation of the services as of 2010 has been calculated on the basis of the new methodology to be applied after the entering into force of the new Conventions and public service contracts referred to in paragraph (35) above. The method of calculation of the public service compensation has been detailed in the CIPE Directive (see paragraph (114) above). The latter in fact details the content of the new Conventions/public service contracts and stipulates that the latter should clearly specify the obligations imposed on the beneficiaries. Nevertheless, the Commission notes that these contracts are not yet in force and the 2009 and 2010 laws themselves do not provide any details about the obligations imposed on the beneficiaries to that end.

(196) In the absence of a precise prior definition of the level of services required, the Commission cannot fully assess whether the definition of the public service mission reflects a real need which cannot be met by market forces, i.e. by reference to competing services. However, on the basis of the information currently available, it appears that the situation on the routes in question is as follows:

4.1.1.1.1. Caremar

4.1.1.1.1.1. Gulf of Naples

(197) According to the Italian authorities, on the Capri-Sorrento and Capri-Naples routes, the beneficiary is the only operator providing mixed services all year round.

(198) However, the Commission notes that certain routes operated by Caremar are also operated by private undertakings. Indeed, competition on these routes is not a recent phenomenon. On the basis of the information available to the Commission, competition unquestionably existed on certain of the routes in the Gulf of Naples long before 2008. In fact, as detailed above, as regards certain of the subsidised services the complainants maintain that there is no need to impose public service obligations given that these routes are currently served adequately by private undertakings operating

them commercially and offering similar services in terms of frequency, continuity, regularity and rates.

(199) According to the information submitted by the Italian authorities, on the Ischia – Procida – Naples and Ischia – Procida – Pozzuoli routes, the beneficiary provides mixed passengers and freight services, with a transitory stop in Procida to and from Ischia. As detailed above, the Italian authorities allege that only one other private operator provides similar services, the latter receiving compensation from the regional authorities. The Italian authorities argue that the service provided by the private carrier is complementary to that provided by the beneficiary and is the result of the request of the island communities.

(200) On the basis of the information from the Italian authorities, on this route the definition of the public service essentially lies in the connection between Procida and the mainland on one hand, and Procida and Ischia on the other hand. Indeed, the justification of the Italian authorities for the imposition of PSO on this route largely relies on the significance for the local communities of the connection between Procida and Ischia.

(201) On the basis of the information available at this stage, the Commission notes that it appears that no competitor provides transport of freight on the Ischia – Procida – Naples and Ischia – Procida – Pozzuoli routes on purely commercial terms. However, it seems that such services are provided by competitors on the direct Ischia - Naples and Procida - Naples routes. In addition, the Commission notes that Procida is well connected to the mainland by both private operators and Caremar itself. Thus, on the basis of the information currently available, it would appear that the only services not provided by the market forces are transport of freight on Ischia-Pozzuoli route and mixed services on the Ischia - Procida route.

(202) As concerns the imposition of public service obligations on these routes in parallel to the public service contract concluded with Caremar, the Commission considers that this cannot be regarded as an indication that the services provided by the latter are not in fact necessary. Indeed, nothing prevents Member States from imposing public service obligations and concluding public service contracts simultaneously in order to address a market failure in the operation of certain services. The mere fact that at the same time several operators have been imposed public service obligations cannot in itself undermine the legitimacy of the public mission.

(203) However, at this stage, the Commission takes the view that it may be questionable whether the service provided by Caremar on these routes constitutes a genuine SGEI, taking into account the fact that comparable services are provided by several private operators that operate on adjacent routes without subsidy. On the basis of the available information, the Commission therefore raises doubts as to the appropriateness of the scope of the public service as defined by the Italian authorities.

(204) The direct Ischia/Naples connection is operated with high-speed craft by Caremar and various private operators. Italy underlines that on this route Caremar provides passenger services at hours essential for the public interest, aiming to guarantee territorial continuity. Furthermore, the beneficiary is compelled to maintain the ship on the island overnight to ensure permanent access to the mainland in case of a medical emergency. On the Procida - Naples route, it is argued that Caremar provides the first daily departure from the island of Procida all year round thus enabling the

island’s residents transfer to the mainland for professional or study reasons. Similarly to the Ischia - Naples route, the high speed craft remains in the island overnight.

(205) As regards the operation of these two routes, the Commission does not, at this stage, have sufficient information on the existence of comparable services. The Italian authorities have not provided information on the type and the schedule of the services provided by competitors.

(206) Furthermore, the Commission takes note of the Italian authorities' submission that keeping the ship overnight represents an additional obligation which no private operator would provide under normal market conditions. However, on the basis of the information submitted by the complainants the Commission has doubts as to the legitimacy of considering the permanence in the island ports at night as a genuine public service and invites the Italian authorities to specify if certain pathologies do not allow transportation by helicopter and to provide information about the availability and capacity of alternative medical transportation services.

4.1.1.1.1.2. Archipelago Pontino

(207) According to the Italian authorities, on the Ponza - Formia, Anzio - Ponza and Ventotene - Formia routes Caremar is essentially the only operator providing reliable connections throughout the year. In addition, the same obligation regarding the permanence of the ship on the island overnight is applicable. The Commission thus notes that no similar services appear to be provided by competitors on the routes in question.

4.1.1.1.1.3. Conclusion

(208) Given the lack of a precise definition of the SGEI mission entrusted and thus of the level of the services required, and a clear description of the services provided by competing undertakings on some of the routes considered above, the Commission does not at this stage have sufficient information to conclude on whether such definition reflects a real need for a public service on the routes operated by Caremar in the Gulf of Naples and the Archipelago Pontino, which cannot be met by market forces alone.

4.1.1.1.2. Toremar

4.1.1.1.2.1. Elba island

(209) According to the information provided by the Italian authorities, Toremar is the only operator providing maritime services on the Piombino - Rio Marina - Porto Azzuro - Pianosa route. Furthermore, it is the sole operator providing a high speed services on the Piombino – Cavo - Portoferraio link.

(210) However, on the direct Piombino - Portoferraio route Toremar operates in competition with two private operators. The Italian authorities maintain that Toremar is the only operator being consistently present throughout the year including in the low season. In addition, it is stated that the beneficiary provides the service at hours essential for the island communities.

(211) Given that the Italian authorities have not sufficiently clarified the obligations imposed on Toremar for the abovementioned routes, the Commission does not at this

stage have sufficient information to conclude on whether the services provided by competitors could be considered substitutable and therefore whether the public service mission imposed by Italy satisfies a real need that market forces alone would not be able to satisfy.

4.1.1.1.2.2. Gorgona and Capraia islands

(212) According to the Italian authorities, Toremar is the only operator providing year-round mixed services on the routes to Gorgona and Capraia islands.

4.1.1.1.2.3. Giglio island – Porto S. Stefano

(213) On this route the service is operated in competition with a private undertaking. However, the Italian authorities maintain that the beneficiary provides the service at hours essential for the public interest, allowing residents a regular connection to the mainland.

(214) Insofar as the Commission does not, at this stage, have sufficient relevant information on the actual public service obligations imposed on Toremar and the services provided by competitors, it cannot conclude whether the public service mission imposed by Italy satisfies a real need that market forces alone would not be able to satisfy.

4.1.1.1.2.4. Conclusion

(215) The Commission does not have sufficient information to conclude whether the operation by Toremar of the abovementioned routes meets a genuine need which could not be met by the market alone, in the absence of a clear definition of the public obligations imposed on the operator and the services provided by competitors.

4.1.1.1.3. Saremar

4.1.1.1.3.1. Cabotage routes

(216) According to the information provided by the Italian authorities, on the Carloforte – Portovesme route the beneficiary is the only operator providing mixed services all year round.

(217) However, the Commission notes that certain routes operated by Siremar are also operated by private undertakings. According to the information submitted by the Italian authorities, three private operators are present on the La Maddalena - Palau route, namely Enermar, Maddalena Ferry and Delcomar. For the operation of night connections from midnight to 5:30 a.m. the latter is compensated by the Region.

(218) On the Carloforte – Calasetta route, the Italian authorities underline the presence of one private operator, Delcomar, which also provides night connections from 18:45 to 5:15 am. For the latter the operator is compensated by the Region.

(219) In the light of the above, it appears that on the routes mentioned in paragraphs (217) and (218) above, Saremar operates in competition with other operators. In fact, as mentioned above, the Italian authorities have acknowledged the fact that on the La Maddalena - Palau route competition is not a recent occurrence (see paragraph (84) above).

4.1.1.1.3.2. The international connection between S. Teresa di Gallura (Sardinia) and Bonifacio (Corsica)

(220) According to Article 1(1) of Regulation 4055/86[26], "*freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*".

(221) The Commission takes the view that, irrespective of the lack of an explicit provision regulating the possibility by the Member States to conclude public service contracts as regards maritime transport services between Member States or between Member States and third countries, Regulation 4055/86 does not prevent Member States from taking such actions. In fact, in accordance with paragraph 9, second subparagraph of the Maritime Guidelines[27] "*the Commission accepts that if an international transport service is necessary to meet imperative public transport needs, public service obligations may be imposed or public service contracts may be concluded, provided that any compensation is subject to the above-mentioned Treaty rules and procedures [Treaty rules and procedures governing State aid, as interpreted by the Court of Justice]*".

(222) Saremar operates only one international route under the public service regime, being the only operator consistently present on this route all year round (two round trips a day). The information supplied by the Italian authorities shows this to be a short-distance (10 nautical miles) cross-border connection of mainly local interest, both for the Sardinian communities and for the neighbouring Corsican communities. The scheduled connection between Santa Teresa and Bonifacio ensures the mobility of cross-border workers and a regular flow of goods between southern Corsica and northern Sardinia.

(223) As indicated above, Saremar operates this route in competition with a private operator only during the high season (April - September).

4.1.1.1.3.3. Conclusion

(224) Given that the Italian authorities have not provided the Commission with a clear definition of the scope and nature of the obligations imposed on Saremar as concerns the operation of the abovementioned routes as compared to the services offered by competitors on some of those routes, the Commission does not at this stage have sufficient information to conclude on the existence of a real public service need on the routes served by Saremar.

4.1.1.1.4. Tirrenia and Siremar

<u>Tirrenia</u>

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[26] 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.

[27] See footnote 23.

(225) According to the Italian authorities, no competitor provides similar services in terms of continuity and frequency to those provided by Tirrenia on the Genova – Porto Torres and Napoli-Palermo routes.

(226) Tirrenia is the only operator operating the Genova – Olbia - Arbatax route constantly throughout the year. The services provided by competitors are discontinued in the low season and do not include a link to Arbatax. Similarly, no competitors operate the Civitavecchia - Olbia route in the low season.

(227) Tirrenia is the only operator present on the Civitavecchia - Arbatax - Cagliari, Napoli - Cagliari, Palermo - Cagliari, Trapani - Cagliari and Termoli - Isole Tremiti routes.

(228) The Commission considers that the operation of maritime routes can be considered as a legitimate SGEI only to the extent that similar services are not provided by other operators on purely commercial terms. Inasmuch as at present the Commission does 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, it cannot definitely conclude on the legitimacy of the SGEI qualification in respect of the abovementioned routes.

(229) As regards the freight routes operated by Tirrenia, the Italian authorities submit that no other operators are present on the Napoli - Cagliari and Ravenna - Catania routes. No similar service in terms of frequency and continuity is provided on the Livorno/Genova – Cagliari route.

(230) Nevertheless, the Commission notes that Tirrenia provides exclusively freight services on the routes in question.

(231) The Court has held that, when Member States rely on the existence of and the need to protect an SGEI mission, they have to ensure that this mission satisfies certain minimum criteria and to demonstrate that those criteria are indeed complied with in a particular case. As explained by the case law, these are, notably, the presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission.

(232) As regards the universal nature of such services, the General Court has already established[28] 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[29] but rather to serve the interests of society as a whole.

(233) 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, providing that the principles laid down by the Maritime Cabotage Regulation are complied with.

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[28] Case T-289/03 BUPA and Others v Commission [2008] ECR II-0000, paragraph 186.

[29] Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, paragraph 55; Case C-266/96 Corsica Ferries France [1998] ECR I-3949, paragraph 45; Case T-17/02 Fred Olsen v Commission [2005] ECR II-2031, paragraph 186.

(234) Nevertheless, on the basis of the information available at this stage, the Commission has doubts on whether the operation of Napoli – Cagliari, Ravenna - Catania and Livorno/Genova – Cagliari freight routes may be considered as aiming to satisfy general economic interests within the meaning EU law. By opening the formal investigation procedure, the Commission invites the Italian authorities and third parties to provide comments in this respect.

Siremar

(235) According to the Italian authorities, on the routes falling within the scope of the SGEI mission, Siremar's competitors are only operators equally providing maritime services under a PSO system. These operators are also entitled to receive public compensation for the discharge of public service obligations.

(236) In the absence of the prior definition of the level of the services required, the Commission cannot conclude on whether there is a real need for a public service on these routes.

4.1.1.1.5. Conclusion

(237) In the light of the above, the Commission takes the preliminary view that the definition of the public service obligations has not been sufficiently clear and does not allow the Commission to definitely conclude whether it contains manifest errors.

(238) The Commission invites the Italian authorities to provide all information required for a complete assessment of the legitimacy of the SGEI qualification (notably the documents outlining the scope of the public service obligations imposed on the aid beneficiaries for the period as of 2009, so as to clarify the level of services required and all relevant information about the services provided by competitors of the aid beneficiaries which would allow to assess whether or not those services already fulfil the public service needs identified by the Italian authorities), including as regards the services provided under the public service regime by Tirrenia and Siremar, and to further substantiate this claim. The Commission further invites the Italian authorities to clarify whether the operation of any international routes by the companies of the former Tirrenia Group (such as those previously operated by Adriatica between Italy and Albania, Greece and Croatia) has been discontinued and when, and if not, whether any public service compensation has been paid out as of 2009 for the operation of those routes.

4.1.1.2. Altmark 2

(239) As regards the second condition of the Altmark judgement, 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.

(240) More specifically, the initial Conventions contained an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return for the operator. As regards the compensation for the discharge of the public service obligations in 2010 and beyond, the Commission notes that its level has been established on the basis of the CIPE Directive mentioned in paragraph (114) above, published already in 2008. The method of calculation of the compensation, i.e. the cost elements taken into account and the return on invested capital, are detailed therein.

(241) Therefore the Commission takes the preliminary view that the second condition of the Altmark judgment is observed.

4.1.1.3. Altmark 3

(242) According to the third Altmark condition, the compensation received for the discharge of the public service obligations 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.

(243) However, the Altmark ruling does not provide a precise definition of the reasonable profit. The Maritime Guidelines[30] foresee that the amount of subsidy awarded as compensation for public service obligations should take account of a "*reasonable return on capital employed*".

(244) At this stage, the Commission has doubts as to the proportionality of the compensation paid to the beneficiaries as from 2009, on the basis of several considerations examined in detail below.

(245) A fundamental principle of the assessment of proportionality of the compensation is that only the net costs incurred by the public operator for the discharge of the public service obligations may give rise to compensation. As detailed above, at this stage the Commission has doubts whether the definition of the public service always reflects a real need which cannot be met by market forces alone and on the exact scope of the public service obligations imposed on the aid beneficiaries. In the absence of a clear definition of the obligations imposed on the beneficiaries, the Commission cannot unequivocally conclude on the costs which should have been taken into account in the calculation of the compensation.

(246) In respect of the reasonableness of the profit margins, the Commission considers that reasonable profit should be taken to mean a rate of return on employed capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. The return should thus reflect the level of risk incurred by the beneficiaries while providing the public service in question.

(247) As regards the discharge of the public service obligations as from 2010 the Commission notes that the risk premium has been fixed at 4%. The methodology also allows for an additional 2.5 percentage points to the risk premium to remunerate the higher risk borne by the operators not benefiting from exclusive rights. The risk premium thus amounts to 6.5%. At this stage the Commission has doubts whether this level reflects an appropriate level of risk taking into account that prima facie the operators do not 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. Furthermore, variations in fuel prices and ports operations costs have been taken into account. Hence the risk profile may not justify the level of the compensation paid to the undertakings.

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[30] See footnote 23.

(248) Consequently, at this stage the Commission raises doubts as to the proportionality of the compensation for the operation of the services and takes the preliminary view that the operators may have been over-compensated for the performance of the public service tasks starting with 2010.

4.1.1.4. Altmark 4

(249) The fourth criterion provides that the compensation must be the minimum necessary in order for it not to qualify as aid. This criterion is deemed to be fulfilled if the recipients of the compensation have been chosen following a tender procedure which allows for the selection of the tenderer capable of providing the services at the least cost or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

(250) In this case the beneficiaries have not been chosen following a public tender procedure. The Italian State merely prolonged the system already in force thereby entitling the pre-established operators to continue receiving compensation for the discharge of the public service obligations.

(251) 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.

(252) Consequently, at this stage the Commission has no evidence to support the argument that the beneficiaries in fact provide the services at stake at the least cost to the community. In the absence of any elements to the contrary, the compensation paid to the undertakings in this case for the provision of the SGEI cannot be found to have been determined on the basis of the costs of an efficient undertaking. The Commission therefore takes the preliminary view that the fourth Altmark criterion has not been complied with in the present case.

4.1.1.5. Conclusion

(253) The Commission takes the preliminary view that the four conditions set out by the Court of Justice in the Altmark case are not cumulatively met in the present case. Consequently, on the basis of the information available at this stage, the Commission considers that the measure confers an economic advantage on all companies of the former Tirrenia Group.

(254) *Distortion of competition and effect on trade*: 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.[31] It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.[32] In the present case, the beneficiaries operate in competition

[31] See, in particular, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; Case C-372/97 *Italy v Commission*, [2004] ECR I-3679, paragraph 44 .

[32] Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

with other undertakings providing maritime transport services in the EU, in particular since the entry into force of the Council Regulation (EEC) No 4055/86[33] and Council Regulation (EEC) No 3577/92,[34] liberalising the market of the international maritime transport and maritime cabotage, respectively. Therefore, the measure under scrutiny is liable to affect EU trade and distort competition within the internal market.

(255) *Conclusion:* On the basis of the above, the Commission takes the preliminary view that the public service compensations paid to the companies of the former Tirrenia Group during 2009 - 2011 constitute State aid within the meaning of Article 107(1) TFEU.

(256) Article 4, paragraph 3 of the Maritime Cabotage Regulation stipulates that "*existing public service contracts may remain in force up to the expiry date of the relevant contract"*. Therefore, only the compensation paid for the discharge of public service obligations on cabotage routes, with reference to public contracts in force at the moment of the liberalisation of the cabotage market and which is strictly proportional to the cost incurred may be considered as existing aid within the meaning of Article 108 TFEU.

(257) The initial Conventions expired at the end of 2008 and have been further prolonged by the Italian authorities rather than being tendered out. Thus to the extent that the compensation paid on the basis of this prolongation amounts to aid, such aid should be considered as new aid. This assessment complies with Article 4, paragraph 2(b) of Regulation 794/2004[35] according to which the simple extension in time of an aid scheme creates a new aid. The General Court has also confirmed that the amendment of the duration of an aid scheme should be regarded as new aid.[36]

4.1.2. The privatisation (measure 2)

(258) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.[37]

(259) *Imputability to the State*: In this case the asset sale is carried out in the context of an insolvency procedure. Although following admission to the specific procedure the management of insolvent company is transferred to the Extraordinary Commissioner, the latter is appointed by the competent Ministry and acts under the supervision of the Supervisory Board (composed by experts appointed by the Ministry).

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33 See footnote 26.

34 See footnote 19.

35 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 93 of the EC Treaty, Official Journal L 140, 30.04.2004.

36 Joined Cases T-127/99, T-129/99 and T-148/99 Territorio Histórico de Álava - Diputación Foral de Álava and others v Commission [2002] ECR II-1275, paragraph 175.

37 Case C-482/99 *France v Commission* [2002] ECR I-4397.

(260) Furthermore, the asset disposal plan, or alternatively the restructuring plan, is drafted under the supervision of the Ministry and in accordance with its overall policy guidelines, and is subject to formal authorisation by the latter. In addition, in case an asset sale is pursued, the choice of the purchaser of the company's assets is made by the Extraordinary Commissioner on the basis of the criteria defined by the law itself.

(261) On the basis of the above, the Commission considers that the supervision exercised by the public authorities over the asset sale process as established by the Marzano law subsequently amended by D.L. 134/2008, is such as to imply the imputability of the decisions taken by the Extraordinary Commissioner to the State.

(262) *State resources and selective economic advantage*: When the States sells its own assets below market price it foregoes State resources and at the same time grants an advantage to either the buyer of the assets or the privatised undertaking, which it would not have obtained under normal market conditions. This advantage is necessarily selective as it is granted only to the buyer of the assets or the economic activity in question. If a company is privatised not through a share sale on the stock exchange, but rather by a trade sale (by a sale of the company as a whole or in parts to other companies), the Commission considers it is sufficient that the following principles be observed to conclude that a fair market price was obtained and thus no State aid is involved:

(a) a competitive tender must be held that is open to all interest parties, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses;

(b) the company must be sold to the highest bidder;

(c) bidders must be given enough time and information to carry out a proper evaluation of the assets as the basis for their bid.[38]

(263) On the basis of the information available at this stage, the Commission considers that the sale process cannot be regarded as sufficiently transparent, unconditional and non-discriminatory so as to rule out by itself the presence of State aid.

(264) At the outset, the Commission notes that the special rules introduced by D.L. 134/2008 as regards *essential public services* as defined by the Italian authorities[39], and applicable in the present case, significantly reduced the transparency requirements laid down by the general regime, notably by means of allowing private negotiations between the Extraordinary Commissioner and potential acquirers.

(265) Although the call for expression of interest for Tirrenia and Siremar assets has been published in several newspapers, the call did not detail the assets subject to the sale deal and did not give bidders any clear instructions as to the subsequent phases of the

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38 XXIIIrd Report on Competition Policy 1993, paragraphs 402 and seqq.

39 Pursuant to Article 1 of Law 12 June 1990, No. 146, *essential public services* are all those services aimed at granting and protecting the exercise of the fundamental individual right of the person recognized by the Italian Constitution, such as the right to life, healthcare, freedom, safety, freedom of circulation, social pensions, education and freedom of communication.

procedure. The call did not contain any pre-qualification or selection criteria or any other conditions which had to be met by the bidders apart from the mandatory condition to continue to provide the public service under the conditions imposed by the entrustment acts. All relevant information as regards the assets subject to the sale procedure has been made available to the bidders only during the due diligence phase. According to the Italian authorities the data room documentation included the draft Conventions to be signed with the successful bidders.

(266) As explained above, the Italian authorities allege that the object of the sale only included those assets and contracts required to provide the public service in accordance with the new Conventions, whilst non-core assets would be hived off. However, as regards Tirrenia, the call for expression of interest published on 15 September 2010 lays down the following:

"[…] according to what is stated by art. 4, par. 4, Law Decree n. 347/2003, Tirrenia di Navigazione in extraordinary administration will proceed with the disposal of the business going concern, entitled of providing the connection service through the Conventional regime, as well as the services provided on different routes directly operated by Tirrenia di Navigazione, outside the Conventional regime […] The assets not directly attributable to Tirrenia di Navigazione S.p.A. aforementioned business going concern as well as its shareholding in Siremar S.p.A. (or the business going concern of Siremar entitled of providing the transport service established by the Conventional regime) will be disposed through additional procedures".

(267) The Commission thus notes that the wording of the call for expression of interest for Tirrenia would seem to suggest that the intention of the Extraordinary Commissioner is to bundle the assets required to provide the public services with those assets which are not essential to that end. By opening the formal investigation procedure, the Commission invites the Italian authorities to provide clarifications in this respect and to specify the routes operated by Tirrenia outside the Conventional regime and the assets employed to that end. Indeed, bundling assets that do not have a common economic destination may have the effect of depressing the market value of those assets as compared to an unbundled sale of the same assets.

(268) As for Siremar, the call for expression of interest lays down the following:

"[…] according to what is stated by art. 4, par. 4, Law Decree n. 347/2003, Siremar – Sicilia Regionale Marittima S.p.A. in extraordinary administration will proceed with the disposal of the business going concern entitled of providing the connection service through the Conventional regime".

(269) In addition, the Commission notes that in accordance with the provisions of D.L. 134/2008, the award criteria are not necessarily such as to obtain the highest price for the assets subject to the sale inasmuch as the procedure is no longer designed to maximise the revenues from the asset sale. D.L. 134/2008 explicitly deviates from the provisions of Article 62 of D.L. 270/1999, laying down that the procedure governing the sale of assets of insolvent undertakings has to be value-maximising. However, it states that the sale price cannot be lower than the market price resulted on the basis of the valuation carried out by an independent expert appointed by Ministerial Decree.

(270) Furthermore, when conditions are attached to a privatisation, even if a company was sold to the highest bidder for a price higher than its estimated value with the conditions attached, there may be State aid involved if the price the private investor

paid is lower than it would have been in the absence of such conditions.[40] The underlying reason for that is that such conditions would not have been imposed by a private investor. To the extent that the consideration obtained is lower than the price that would have been achieved without these conditions, the Commission normally considers that the difference may confer an advantage to the economic activity transferred. Moreover, such conditions may disadvantage certain investors at an early stage of the procedure and deter them from submitting a bid, so that the competitive effect of the tender is affected, in which case there may be aid to the buyer.[41]

(271) In this case the Commission notes that certain conditions as regards the workforce level have been imposed on the potential acquirers. This fact is not disputed by the Italian authorities. The Commission further notes that the calls for expression of interest explicitly identified the continuity of the public service for the duration of the new Conventions as mandatory condition.

(272) The Commission prima facie considers that potential investors who might have considered a different use of the assets in question might have been deterred from submitting a bid at the early stages of the procedure. It is questionable that by imposing the obligation to provide the public service, the State has sought to obtain the highest price, but rather pursued a public objective based on social and regional development considerations. The Commission has doubts that a private vendor would have given the same significance to the uninterrupted operation of the public service. At this stage the Commission cannot exclude that a private seller would have attempted to sell off the assets unbundled and would not have had an interest in defining any strategic lines of the future activity provided with these assets.

(273) Thus the Commission takes the preliminary view that this condition is liable of hampering the competitive environment of the sale process since in itself it could prevent a bidder, even offering the highest price, from being declared successful unless it undertakes a business strategy which is fully compliant with the declared public objectives.

(274) The Commission considers that in principle the obligation to maintain employment levels would not have been imposed by a private vendor under normal market conditions either because the latter would risk not receiving the highest price for the assets it sells.

(275) In the light of the above, the Commission considers at this stage that the privatisation procedure of Tirrenia has not been sufficiently transparent and unconditional so as to ensure by itself that the sale takes place at market price. On the basis of available information, it cannot be excluded that the offers would have been higher or that other bidders would have participated in the tender had the selection criteria been more transparent and had the tender been unconditional. By opening the formal investigation procedure the Commission invites the Italian authorities and interested parties to provide all the information relevant to assess the conformity of the sale price with the market value of the assets transferred to the purchaser. What is essential indeed is a case by case assessment of whether those conditions have lowered the

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40 Commission decision in State aid No C 56/2006 (ex NN 77/06) – Austria - *Privatisation of HYPO Bank Burgenland AG*, paragraph 114.

41 Commission decision of 27.02.2008 on the State aid No C 46/07 (ex NN59/07).

market value of the sold assets and thus conferred an economic advantage to either the sold economic activity or the buyer.

(276) Moreover, at this stage the Commission does not have sufficient elements to assess whether the sale of a business going concern entitled to providing public services on the basis of the Conventional regime and under the abovementioned conditions implies that there is economic continuity between Tirrenia and its purchasers. Based on settled case law, in order to assess whether the obligation to repay the aid granted to an undertaking in difficulty may be extended to another undertaking, to which the beneficiary's assets have been transferred, and thus to assess the extent to which this transfer entails the continuity of the business, the following factors may be taken into consideration: object of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the timing of the transaction (after the start of the investigation, the opening of the formal procedure or the final decision) or the economic logic of the transaction.[42] The finding of the Commission that there is economic continuity may imply that any incompatible aid granted to the companies of the former Tirrenia Group may be recovered from the entities that continued the economic activity of the former.

(277) The same reasoning applies to the privatisation of Siremar which has followed the same procedure.

4.1.3. The berthing priority (measure 3)

(278) As regards the priority in berthing, laid down by paragraph 21 of Article 19*ter* of the 2009 law, the Commission considers that, to the extent that the berthing priority is not remunerated, the measure is a regulatory advantage which does not involve any transfer of State resources and cannot therefore qualify as State aid within the meaning of Article 107(1) TFEU.

(279) If the berthing priority is remunerated, the Commission considers that, to the extent that it accepts the definition of the public service proposed by the Italian authorities, any entitlement to berthing slots and any priority in this respect are intrinsic to the public mission, to the extent that it is granted only in relation to routes covered by the public service. According to the information submitted by the Italian authorities, the berthing priority appears not to apply to routes operated by the companies outside the public service regime. On the basis of this information, the Commission considers that this right does not result in an additional economic advantage to the companies.

(280) However, by opening the formal investigation procedure, the Commission invites the Italian authorities and third parties to provide information on whether the advantage involves a loss of State resources and, if this is the case, on the services provided by Tirrenia and Siremar, if any, outside the public service regime and to further clarify whether the berthing priority is limited to the routes operated under the public service system in respect of all companies of the former Tirrenia Group.

(281) As regards the alleged abuse of dominant position mentioned in paragraph (159), the Commission notes that the tariffs applied by Caremar have been imposed by the public

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[42] Joined cases C-328/99 and C-399/00 Italy and SIM 2 Multimedia v. Commission [2003] ECR I-4035.

authorities and constitute an inherent feature of the public mission as defined by the Italian authorities, to the extent this is defined without manifest error.

4.1.4. The measures laid down by the 2010 law converting Decree Law 125/2010 (measure 4)

(282) D.L. 125/2010 converted with amendments into the 2010 law laid down various support measures in favour of the companies of the former Tirrenia group, namely:

(a) the possibility to use on a temporary basis the EUR 49 million and EUR 7 million respectively which had been partially earmarked for the upgrading of the fleet, to cover current expenses;

(b) certain fiscal advantages in the context of the privatisation process; and

(c) the possibility for the Tirrenia Group companies to use FAS resources in order to meet current liquidity needs.

(283) *State resources:* Insofar as all the abovementioned measures involve additional State financing granted to the companies of the former Tirrenia Group by the Italian State, the measures unquestionably involve the use of State resources. Similarly, the decision of the Italian authorities to grant financing to certain undertakings from FAS funds constitutes a transfer of State resources.

(284) *Selective economic advantage:* The public financing is directed to certain undertakings. It is therefore selective. The Commission notes that, for the purpose of concluding whether the measure confers an economic advantage on the beneficiaries, the fact that the above mentioned additional public financing aims to cover the liquidity needs of the former Tirrenia Group companies or to support investments in the upgrading of the fleet, is in itself irrelevant.

(285) The Commission notes that, according to the Italian authorities, the EUR 7 million financing was provided to ensure compliance with certain mandatory technical adjustments to vessels required if the ship is used to provide a public service and/or is effectively put up for sale as part of the privatisation procedure. To the extent that a technical adjustment was requested to perform the public service, it would constitute a public service cost that may be compensated accordingly. In the alternative, the financing of technical adjustments necessary to put the ship up for sale as part of the privatisation procedure is a normal cost that any private seller should bear and its financing confers an economic advantage to the sold undertakings. The same applies to the EUR 49 million financing.

(286) The costs with the upgrading of the fleet would appear as incurred in the discharge of public service obligations. The Commission considers however that on the basis of the conclusion in paragraph (253) above, the compensation granted to cover such costs would provide an economic advantage to the beneficiaries as the Italian authorities have not in any way demonstrated that the four Altmark conditions are satisfied. The Italian authorities are therefore invited to specify which technical adjustments were required to provide the public service and which for effectively putting the ships up for sale as part of the privatisation procedure.

(287) The Commission considers that all the abovementioned measures, including the fiscal advantages in the context of the privatisation process, and the FAS resources to cover current expenses, allow the beneficiaries to avoid costs which would ordinarily have

to be borne by means of their own financial resources, and thereby prevent market forces from having their normal effect.[43] As a consequence, the beneficiaries are able to improve their overall financial situation.

(288) *Distortion of competition and effect on trade:* The considerations exposed in paragraph (254) above apply to all measures under scrutiny.

(289) *Conclusion:* The Commission takes the preliminary view that all measures detailed above and laid down by D.L. 125/2010 converted with amendments into the 2010 law, constitute aid in favour of the companies of the former Tirrenia Group.

4.1.5. Conclusion

(290) On the basis of the arguments set out above, the Commission considers at this stage that both the compensation paid to the undertakings of the former Tirrenia Group for the operation of the maritime services (*measure 1*), as well as the measures laid down by the 2010 law (*measure 4*) constitute State aid to Tirrenia Group companies within the meaning of Article 107(1) TFEU.

(291) Furthermore, at this stage the Commission takes the preliminary view that the asset sale carried out in accordance with the provisions of the Marzano law, as subsequently amended (*measure 2*), may involve aid to the purchasers of Tirrenia and/or Siremar assets and/or the privatised economic activity and may imply the liability of the purchasers for the repayment of the incompatible aid measures previously granted to Tirrenia and/or Siremar to the extent that there is economic continuity between the latter and their purchasers.

(292) The berthing priority (*measure 3*) laid down by paragraph 21 of Article 19*ter* of the 2009 law, does not constitute State aid to the extent is not normally remunerated. To the extent that the berthing priority results in a loss of State resources, the measure constitutes aid. The Commission invites the Italian authorities to provide clarifications in this respect.

4.2. Lawfulness of the aid

(293) Since the measures have been put into effect before formal approval by the Commission, the Italian authorities have not fulfilled their stand-still obligation under Article 108(3) TFEU. The same applies for the subsidies paid for the discharge of public service obligations to Tirrenia and Siremar, which have not been formally notified to the Commission.

(294) The Commission further notes that none of the measures considered in paragraph (282) of this decision has been notified to the Commission in accordance with Article 108(3) TFEU. However, according to the information submitted by the Italian authorities, only Tirrenia has been granted an additional public funding of EUR 12 051 900. The Commission considers at this stage that this public financing constitutes unlawful aid to Tirrenia.

(295) The Commission reminds the Italian authorities that any aid measure should be notified to the Commission in advance, and not be paid out before its approval by the

[43] Judgement of 14 February 1990, case C-301/87 *France/Commission* [1990] ECR I-307, paragraph 41.

Commission. Consequently, any subsidy or any other form of advantage further granted in the implementation of the measures mentioned in paragraph (282) above should be formally notified to the Commission prior to its implementation, and not be implemented prior to its approval.

(296) Furthermore, following the completion of the sale process as detailed above, any aid involved in the asset sale also constitutes illegal aid.

4.3. Compatibility of the aid

4.3.1. The compensation (measure 1)

4.3.1.1. Legal basis

(297) To the extent that the Commission accepts the qualification of the services as SGEIs, the compatibility assessment has to be carried out in light of Article 106(2) TFEU.

(298) Article 106(2) provides that "*undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*."

(299) This Article provides a derogation from the prohibition of State aid contained in Article 107 TFEU to the extent that the aid is necessary and proportional in that the lack of aid would hinder the performance of the SGEI under acceptable economic conditions. Under Article 106(3) TFEU it is for the Commission to ensure the application of this Article, including inter alia by specifying under which conditions it considers the criteria of necessity and proportionality to be fulfilled.

(300) Following the Altmark ruling the Commission specified those conditions in the Community framework for State aid in the form of public service compensation (hereinafter *the SGEI Framework*)[44] and the Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now 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 (*hereinafter the SGEI Decision*)[45], which therefore represent the Commission's policy of applying the derogation of Article 106(2) of the TFEU. In particular paragraph 8 of the SGEI Framework clarifies that the Commission considers the aid measure to be proportional and necessary under Article 106(2) TFEU if the conditions laid down by the SGEI Framework are complied with.

(301) Aid to maritime transport undertakings specifically falls within the scope of application of the SGEI Decision, which declares compatible with the internal market and exempted from the notification requirement the public service compensation that

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44 OJ C 297 of 29.11.2005.

45 OJ L 312, 29.11.2005, p. 67.

fulfils the conditions set out therein; accordingly the compatibility of the present aid would have to be examined in light of the SGEI Decision's criteria.

(302) However, Article 2(2) thereof stipulates the following:

"In the field of air and maritime transport, this Decision shall only apply to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 106(2) of the Treaty which complies with Regulation (EEC) No 2408/92 and Regulation (EEC) No 3577/92, when applicable".

(303) The Maritime Cabotage Regulation specifies that public service contracts which had not been awarded via a call for tenders could be kept in force until their expiry, i.e. in this case 31 December 2008. The legislation in force therefore imposed their allocation by tender on 1 January 2009.

(304) The Commission takes the view that by maintaining in force the initial Conventions beyond their expiry and thus beyond the deadline laid down by the Maritime Cabotage Regulation, Italy failed to comply with the obligation imposed by Article 4 of the said Regulation, stipulating 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.* Therefore the Commission should examine whether this infringement is such as to affect the compatibility of the public service compensations in that it is necessary for the attainment of the object or proper functioning of the aid and exacerbates the distortion produced by the aid[46] or it is an infringement of other rules of European law that should be dealt with under the appropriate legal and procedural framework. The Commission doubts that the prolongation of the initial Conventions up to the end of the privatisation process may be considered indispensable in order to allow the maximisation of the value of Tirrenia Group companies' assets in the context of the above sale.

(305) It follows that at this stage the Commission considers that the public service compensation subject to the current assessment falls outside the scope of the SGEI Decision.

(306) Furthermore, the SGEI Framework stipulates the compatibility criteria of measures subject to the notification requirement. According to paragraph 3 thereof the SGEI Framework explicitly excludes the transport sector and is therefore not applicable in the present case. However, the Commission can take into account the basic principles defined therein for its assessment in specific cases not falling within its scope of application insofar as they reflect the Commission practice and the case law of the EU Courts in the application of Article 106 TFUE.[47]

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[46] Case 74/76 Iannelli &Volpi [1977] ECR p. I-557, point 14 and case C-225/91, Matra v Commission [1999] ECR p. I-3203, point 41.

[47] See decision of the Commission in State aid case C 16/2008, OJ L 45 of 18.02.2011.

4.3.1.2. Assessment

(307) Under Article 106(2) TFEU, the subsidised services must correspond to genuine services of general economic interest, they must be adequately entrusted to the beneficiaries and the recipients must not be overcompensated for their performance.

(308) Consequently, it must be assessed whether:

(a) The maritime transport services under assessment constitute genuine SGEI;

(b) The beneficiaries are explicitly entrusted by the Italian State with the provision of the services, which are clearly defined;

(c) The compensation is proportionate to the net cost of providing the public services.

4.3.1.2.1. Genuine SGEI

(309) On the basis of the assessment in paragraphs (183) - (238) above, the Commission considers that the definition of the public service has not been sufficiently precise to allow the Commission to conclude whether it contains manifest error.

4.3.1.2.2. Entrustment

(310) The beneficiaries have been explicitly entrusted with the provision of the services in question. The parameters of the compensation have to be set in advance in an objective and transparent manner. However, insofar as at this stage the public service obligations have not been precisely defined, on the basis of the information available the Commission considers that the public mission has not been adequately entrusted to the beneficiaries.

(311) The 2009 law makes clear that the public service providers are the undertakings of the former Tirrenia Group. As mentioned above, the Commission considers that the act of entrustment does not provide for a comprehensive description of the nature of the public service obligations. The fact that the same companies have been providing the services for a long period and that assumingly the scope and nature of these services have not suffered significant alterations over time, cannot be sufficient to conclude that the current act of entrustment has defined precisely those public service obligations.

(312) In fact, as mentioned in paragraphs (44) and (194), the Commission is well aware that the public service obligations should have been defined in detail by the five-year plans. In this regard, the Commission accepts the fact that different elements of the entrustment may be placed in several acts without questioning the appropriateness of the definition of the obligations. Nevertheless, the Italian authorities informed the Commission that no five year plan has been adopted for the period 2005–2008. Thus at this stage the Commission cannot assess whether the definition of the public service obligations has been clear and precise.

4.3.1.2.3. Proportionality

(313) Since the Commission does not have a clear picture regarding the definition of the SGEI obligations, it is not even in a position to assess the costs resulting from those obligations and the level of compensation that would be proportional.

4.3.1.2.4. Compatibility with the Maritime Guidelines

(314) Moreover, the Maritime Guidelines set out that in the field of maritime cabotage, Member States may conclude public service contracts for the services indicated in Article 4 of the Maritime Cabotage Regulation. It adds that public service contracts and any compensation granted on their basis must fulfil the conditions of that provision and the rules on State aid. The Commission should therefore assess the observance of the provisions of Article 4 of the Maritime Cabotage Regulation concerning the public service compensation for the purposes of ensuring compliance with the Maritime Guidelines.

(315) *Conclusion:* In view of the foregoing assessment of compatibility, at this stage the Commission raises doubts as to the compatibility with the internal market of the aid under the form of public service compensation under Article 106(2) TFEU.

4.3.2. The privatisation (measure 2)

(316) As the Italian authorities consider that the sale procedure does not involve aid, no arguments have been brought forward in support of its compatibility.

(317) At this stage of the investigation, the Commission considers that any aid that might have arisen in the course of the privatisation process would be incompatible as it would not seem to fall within any of the derogation provided for by Article 107(2) and (3) TFEU.

(318) Moreover, as already mentioned, Article 4 of the Maritime Cabotage Regulation stipulates 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. The Commission notes that putting out to tender the assets of the former Tirrenia Group together with new public service contracts might be interpreted as meaning that those new public service contracts have been allocated on a non discriminatory basis. In particular, all operators potentially interested are treated in the same way and, as regards Tirrenia and Siremar, there is no risk of favouring the incumbent as the sale occurs in the context of a procedure that leads to their liquidation. In any case, if there is an infringement, the Commission should examine whether it affects the compatibility of any aid that might result from the privatisation of Tirrenia in that it is necessary for the attainment of the object or proper functioning of that aid and exacerbates the distortion it produces.

4.3.3. The berthing priority (measure 3)

(319) As detailed above, the Commission considers that the advantage conferred by the measure is inherent in the public mission character of the services provided by the beneficiaries to the extent it is limited to those services provided under the public service regime. Nevertheless, since at this stage the Commission raises doubts as to the legitimacy of the SGEI mission as regards certain services operated by the beneficiaries, it cannot on the basis of the information available conclude on the compatibility of the measure with the internal market.

4.3.4. The measures laid down by the 2010 (measure 4)

(320) Insofar as at this stage the Commission has doubts both as to the legitimacy of the public mission, as well as to the proportionality of the compensation to the costs

incurred by the companies in the operation of the services, it cannot consider that the measures laid down by the 2010 law (*measure 4*) are necessary to finance public service obligations. Therefore the entirety of the measures is likely to constitute operating aid reducing the costs that the companies of the former Tirrenia Group would otherwise have to bear from their own resources and thus be considered as incompatible with the internal market.[48]

4.3.5. Conclusion on compatibility

(321) At this stage of the procedure the Commission concludes that the disputed measures in favour of the companies of the former Tirrenia group appear incompatible with the internal market.

(322) Therefore the Commission has decided to open the formal investigation procedure provided for in Article 108(2) TFEU in relation to measures 1, 2, 3 and 4.

5. DECISION

(323) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests the Italian Republic to submit its comments and provide all such information as may help to assess the abovementioned measures, within one month of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

(324) In particular, the Commission requests the Italian authorities to submit comments and to provide further information on the following non exhaustive list of issues:

- all information required to assess the compatibility with the internal market of the compensation paid to each of the companies of the former Tirrenia Group, including Tirrenia and Siremar during 2009-2011 (clear description of the services provided and of the public service obligations imposed). For Tirrenia and Siremar, such information should also include the exact amount of compensation, including the profit allowed, and justification that the profit level should be considered as reasonable taking into account the risk incurred by the companies in the operation of the service;

- a clear description of the services provided, if any, by Tirrenia and Siremar outside the scope of the public service;

- all information required to assess whether the sale procedure resulted in a market price being paid for Tirrenia's and Siremar's assets: the methodology of selection of the independent expert, the valuation produced by the expert, an overall description of the negotiations leading to the selection of the successful offer and all offers received, in order to allow the Commission to carry out a comparison of the purchase prices offered by all bidders.

(325) The Commission reminds the Italian authorities that that, in accordance with Article 108(3) TFEU, the aid measures detailed in paragraph (282) above, as well as any aid

[48] See footnote 43.

granted in the context of the privatisation to the purchasers of the companies or to the economic activity carried out by the former Tirrenia Group for the discharge of the public service obligations under the new Conventions/public service contracts has to be notified to the Commission in advance.

(326) The present decision only concerns State aid aspects and does not in any way prejudge any possible further assessment by the Commission of the observance of other Treaty provisions.

(327) The Commission would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipients.

(328) The Commission warns the Italian Republic that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform 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 European Union* and will inform 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. If the Commission does not receive a reasoned request by that deadline, you 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