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<p>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 [...].</p>	<p style="text-align: center;">PUBLIC VERSION</p> <p style="text-align: center;">WORKING LANGUAGE</p> <p style="text-align: center;">This document is made available for information purposes only.</p>
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Subject: SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) – Italy

State aid to the companies of the former Tirrenia Group and their acquirers

(SA.33709 (CP/2011), SA.33791 (CP/2011), SA.33830 (CP /2011), SA.33922 (CP/2011), SA.34000 (CP/2011), SA.34196 (NN/2012, ex-N/2012), SA.34197 (NN/2012, ex-N/2012), SA.34292 (CP/2012), SA.34392 (CP/2012), SA.34434 (CP/2012), SA.35577 (N/2012))

Sir,

The Commission wishes to inform Italy that, having examined the information supplied by your authorities on the measures referred to above, it has decided to extend the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter *TFEU*).

1. PROCEDURE AND GROUNDS FOR EXTENSION

1.1. Background

- (1) 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*) and initially included six companies, namely Tirrenia, Adriatica, Caremar, Saremar,

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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*).

- (2) 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 with 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.
- (3) 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.
- (4) Article 19^{ter} of Decree Law no. 135 of 25 September 2009, converted into Law no. 166 of 20 November 2009 (hereinafter *the 2009 law*), further prolonged the initial Conventions until 30 September 2010, when Italy intended to finalise the privatisation process of the Tirrenia Group companies.
- (5) Law no. 163 of 1 October 2010 converting Decree-Law no. 125 of 5 August 2010 (hereinafter *the 2010 law*) finally provided for a further prolongation of the initial Conventions up to the end of the privatisation process. The acquirers of the companies will be entrusted with the public service through new Conventions/public service contracts.

1.2. 2011 opening decision

1.2.1. Procedure leading to the 2011 opening decision

- (6) 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 Marittima S.p.A. (hereinafter *Caremar*), one of the regional companies of the former Tirrenia Group.¹
- (7) On 1 December 2010, the Italian authorities notified to the Commission the compensation paid in 2009 and 2010 by the Italian State to Saremar - Sardegna Regionale Marittima S.p.A (hereinafter *Saremar*) and Toremar - Toscana Regionale Marittima S.p.A. (hereinafter *Toremar*), two other regional companies of the former Tirrenia Group. In addition, the Italian authorities resubmitted the notification of the public compensation paid to Caremar in 2009 and 2010.
- (8) By letter dated 15 December 2010, the Italian authorities informed the Commission that the same level of the compensation to Caremar, Saremar and Toremar notified for 2010 is also applicable in 2011 and extended the previous notifications accordingly. In addition, the Italian authorities withdrew the first formal notification of the amounts paid to Caremar, in accordance with Article 8 paragraph 1 of Council Regulation (EC)

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 Marittima S.p.A.

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

- (9) No notification within the meaning of Article 108(3) TFEU of the public compensation paid to Tirrenia di Navigazione S.p.A. (hereinafter *Tirrenia*) and Siremar – Sicilia Regionale Marittima S.p.A. (hereinafter *Siremar*) had at that time been submitted.
- (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. The complaints concerned the public service compensation granted to the companies of the former Tirrenia Group after the expiry of the initial Conventions, additional support measures laid down by several legislative acts adopted in the context of the privatisation process of the companies, as well as the certain issues regarding the privatisation procedure of Tirrenia and Siremar.
- (11) On 5 October 2011 the Commission opened the formal investigation procedure in respect of several measures adopted by the Italian State in favour of the companies of the former Tirrenia Group.³

1.2.2. *Scope of the opening*

1.2.2.1. **The public service compensation**

- (12) The Commission took the preliminary view that the four conditions set out by the Court of Justice judgement in the *Altmark* case⁴ (hereinafter *the Altmark judgement*) in order to conclude on whether or not the compensation for the discharge of public service obligations paid to the companies during 2009-2011 confers an economic advantage on the recipients within the meaning of Article 107(1) TFEU, are not cumulatively met in the present case. Consequently, the Commission considered that the compensation granted to Caremar, Toremar and Saremar during 2009-2011 provided them with an economic advantage. The Commission's grounds are summarised hereunder.
- (13) First, Italy had not submitted to the Commission any legal act and/or formal document issued by the competent authorities laying down a clear description of the public service obligations imposed on the beneficiaries. In the absence of a precise prior definition of the level of services required, the Commission could not conclusively assess whether the definition of the public service mission was manifestly wrong.
- (14) Second, the Commission noted that the parameters at the basis of the calculation of the compensation had been established in advance and appeared to observe the transparency requirements. However, the Commission further noted that, as regards the discharge of the public service obligations as from 2010, the risk premium had

² OJ L 83, 27 March 1999, page 1.

³ OJ C 28 of 01.02.2012.

⁴ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

been fixed at 6.5%. The Commission expressed doubts as to whether this level reflected an appropriate level of risk taking into account that *prima facie* the operators did not assume the risks normally borne in the operation of such services. Consequently, the Commission took the preliminary view that the operators have been over-compensated for the performance of the public service tasks as from 2010.

- (15) Last, the Commission noted that the different legislative measures merely prolonged the system already in force thereby entitling the pre-established operators to continue receiving compensation for the discharge of public service obligations, with no public selection procedure being organised. In addition, the Italian authorities had not provided to the Commission any indication that the compensation paid to the undertakings in this case for the provision of services of general economic interest (SGEI) had been determined on the basis of the costs of an efficient undertaking.
- (16) Hence the Commission considered that the compensation paid to Caremar, Saremar and Toremar under the prolongation of the initial Conventions up to 2011 involved State resources that may have conferred an economic advantage upon the recipients. Since such advantage was liable to affect EU trade and distort competition within the internal market, the Commission considered it may therefore amount to State aid within the meaning of Article 107(1) TFEU.
- (17) In addition, insofar as the initial Conventions concluded by the Italian State with Tirrenia and Siremar, the remaining companies of the former Tirrenia Group, had also been prolonged by the same legislative measures, the Commission took the view that the public compensation provided to these companies for the same period also constituted aid within the meaning of Article 107(1) TFEU.

1.2.2.2. The asset sale

- (18) 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 acquisition offer, Fintecna declared closed the procedure.
- (19) Tirrenia and Siremar have subsequently been admitted to the collective insolvency procedure foreseen under the Italian law for large companies, i.e. the extraordinary administration procedure ("*amministrazione straordinaria*") in August and September 2010, and declared insolvent by the competent Court.
- (20) After Tirrenia and Siremar have been declared insolvent, on 16 November 2010 the Commission adopted a state aid decision⁵ by which it authorised rescue aid to Tirrenia and its regional subsidiary, Siremar (hereinafter *the rescue decision*). In accordance with recital (32) thereof, the Italian authorities have undertaken to communicate to the Commission, no later than six months after the rescue aid measure has been

⁵ Commission decision of 16 November 2010, State aid case N 418/2010 - IT - Rescue aid to Tirrenia di Navigazione in *amministrazione straordinaria*, OJ C 102, 2.04.2011.

authorized, a restructuring/liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.

- (21) The second privatisation attempt (following the failed share deal mentioned in recital (18) above) concerned the sale of the going concerns required to provide the public services and, for Tirrenia, the routes operated outside the public service regime, 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. On 15 September 2010 and 4 October 2011 respectively, the call for expressions of interest in the acquisition of Tirrenia and Siremar's going concerns was published.
- (22) The Commission considered that the special rules introduced by Decree Law 134/2008 amending the Marzano law as concerns the extraordinary administration of companies providing essential public services, applicable in this case, reduced the transparency requirements laid down by the ordinary regime, notably by allowing private negotiations between the Extraordinary Commissioner and potential acquirers.
- (23) Moreover, the Commission noted that certain conditions as regards the workforce level have been imposed on the potential acquirers, in addition to the obligation concerning the continuity of the service. The Commission considered that the obligation to maintain employment levels would not have been imposed by a private vendor under normal market conditions. Without prejudice to the right of public authorities to require that the public services meet certain quality standards, the Commission observes that, by imposing an obligation to provide the public service subject to the same quality, frequency and tariffs, the first objective of the State was not seek to obtain the highest price, but rather to pursue a public objective based on social and regional development considerations. The Commission took the preliminary view that these obligations imposed on potential bidders may have had the effect of lowering the sale price of Tirrenia and Siremar assets.

1.2.2.3. The berthing priority

- (24) As regards the priority in berthing in favour of Tirrenia Group companies, foreseen by paragraph 21 of Article 19^{ter} of the 2009 law, the Commission considered that, to the extent that it was not remunerated under the applicable national rules, the measure would merely constitute a regulatory advantage which does not involve any transfer of State resources and could therefore not qualify as State aid within the meaning of Article 107(1) TFEU. However, to the extent that the berthing priority resulted in a loss of State resources, the measure would constitute aid.

1.2.2.4. Other support measures

- (25) The Commission took the view that additional State aid elements stemmed from the 2009 and 2010 laws, namely:
- (a) the possibility to use on a temporary basis the EUR 49 million and EUR 7 million which had been earmarked for the upgrading of the fleet, to cover current expenses (Article 1(1) of D.L. 125/2010);
 - (b) fiscal exemption for all operations concerning the privatisation process (Article 1, paragraph 5^{bis}, letter g) of Law no. 163/2010);

- (c) the possibility for the Tirrenia Group companies to use FAS resources⁶ in order to meet current liquidity needs (Article 1, paragraph 5^{ter} of Law no. 163/2010).
- (26) In its opening decision the Commission considered that all the above mentioned measures involved a transfer of State resources conferring a selective economic advantage to the beneficiaries and that the measures were liable to affect EU trade and distort competition within the internal market.

1.3. Procedure following the adoption of the 2011 opening decision

- (27) By their comments to the 2011 opening decision, the Italian authorities *inter alia* detailed the main phases of the Tirrenia sale procedure and of the Compagnia Italiana di Navigazione's (hereinafter *CIN*) successful offer. Based on this information, the Commission became aware that the payment of the purchase price by CIN is deferred for the entire duration of the new Convention with the Italian State.
- (28) Furthermore, following the adoption of the 2011 opening decision, the Commission has received several additional complaints on alleged state aid measures to former Tirrenia Group companies, concerning in particular (i) certain measures taken by the Sardinian Region in favour of Saremar, (ii) alleged aid to Compagnia delle Isole (hereinafter *CdI*), the buyer of the Siremar business branch in the context of the sale procedure⁷, (iii) the compensation to be paid out to CIN, selected buyer of Tirrenia, for the 8-year duration of the future Convention, and iv) the privatisation of Toremar and the compensation to be paid to Moby S.p.A. (hereinafter *Moby*), its selected buyer, under the new public service contract awarded by the regional authorities to the latter in the tender for the privatisation of Toremar.
- (29) As concerns potential new aid to Saremar, the complainants contend that, rather than immediately proceeding with the sale of the company endowed with the new public service contract, as laid down by the 2009 law, the Region further entrusted to Saremar the operation of new maritime routes connecting Sardinia to mainland Italy. The complainants argue that the newly activated routes cannot be qualified as SGEI inasmuch as competitors offer substitutable services on commercial terms. In any event, the complainants stress that the new routes to/from mainland Italy operated by Saremar have not been adequately entrusted to the beneficiary.
- (30) The complainants further refer to various other measures adopted by the Sardinian Region allegedly aiming to favour Saremar over its private competitors, in particular (i) the alleged reimbursement of travel costs for Saremar's passengers (under the so-called *Bonus Sardo-Vacanza* project); (ii) EUR 3 million subsidy for promotional activities; (iii) the issuance of a letter of comfort (*lettera di patronage*) concerning a EUR 3 million credit line; (iv) EUR 5 773 201.80 recapitalisation of the company.

⁶ The Fund for Under-utilised Areas (*Fondo Aeree Sotoutilizzate*) is a national fund that supports the implementation of Italian Regional policy. Its resources are mainly earmarked for regions identified as under-utilised by the Italian authorities.

⁷ See recitals (18) – (23). The sale procedure and any potential aid to either the sold entity or CdI resulting from Siremar's sale at a price lower than the market price is currently assessed in the context of the formal investigation procedure.

- (31) In addition, the complainants claim that the Sardinian Region has subsequently granted and/or intends to grant further aid to Saremar. In particular, by Decision No. 52/119 of 23 December 2011 the regional authorities decided to issue a new letter of comfort to provide the latter with a credit line amounting to EUR 1 million.
- (32) One of the complaints received following the adoption of the 2011 opening decision alleges that CdI has been declared successful in the tender for the sale of Siremar going concern on the basis of a guarantee to the latter by Unicredit S.p.A. According to the complainant, such guarantee has been made subject to a counter-guarantee granted by the Sicilian Region.
- (33) Another complaint refers to the future Conventions and claims that the compensation to be paid to CIN, the purchaser of the Tirrenia business branch, under the 8-year future Convention with the Italian State, constitutes State aid. This aid is allegedly incompatible with the internal market inasmuch as the maritime services in question cannot be qualified as genuine SGEI. In particular, the complainant contends that only one island port served by Tirrenia/CIN under the public service regime, namely Arbatax, is not served by the private operators on commercial terms.
- (34) As concerns the privatisation of Toremar, one complainant alleges that: (i) the sale procedure has conferred an advantage on Moby, declared successful in the tender, (ii) the merger between Toremar and Moby results in a monopoly on the Piombino - Elba island routes, and (iii) the compensation granted to Moby for the operation of the public service throughout the 12-year duration of the new public service contract is incompatible with the internal market to the extent that similar services are already provided on commercial terms by the complainant itself.
- (35) On 10 January 2012, the Italian authorities have formally notified, for reasons of legal certainty, the compensation to be paid under the new Conventions to the acquirers of the Tirrenia and Siremar business branches. On 24 January 2012, 4 February 2012 and 3 July 2012, the Commission requested additional information from the Italian authorities on the notified measures. The information was provided by the Italian authorities by letters dated 9 February 2012, 11 May 2012 and 19 July 2012.
- (36) By letter dated 19 July 2012, the Italian authorities informed the Commission that the new Convention between the Italian State and CIN had been signed. On 30 July 2012 the Italian authorities also confirmed that the future Convention between the Italian State and CdI, buyer of Siremar, would be signed by 31 July 2012. The signed Conventions have not to date been provided to the Commission.
- (37) In parallel, the Italian authorities have provided additional information on the privatisation of the remaining regional companies of the former Tirrenia Group, namely Toremar, Caremar, Saremar and Laziomar.⁸ Such information, which includes a detailed description of the conditions imposed by the latter on potential bidders, had not been made available to the Commission at the time the 2011 opening decision was adopted.

⁸ The going concern entitled to provide the transport connections with the Pontino archipelago, transferred from Campania to Lazio.

- (38) On 12 October 2012 the Italian authorities have notified, for reasons of legal certainty, a public financing amounting to EUR 10 million to Saremar as compensation for the operation of two routes linking Sardinia to mainland Italy in 2011/2012, namely Civitavecchia - Golfo Aranci and Porto Torres - Vado Ligure. According to the notification submitted by the Italian authorities, the measure would be put into effect on 1 December 2012.

1.4. Scope of the extension

- (39) First, the initial notification submitted by the Italian authorities on 15 December 2010 (see recital (8) above) only concerned the compensation paid to Caremar, Toremar and Saremar under the initial Conventions prolonged during 2009-2011. To the extent that the companies have continued to be compensated for the operation of the routes after the end of 2009, it is appropriate that the formal investigation procedure is extended in respect of the public service compensation paid to all companies of the former Tirrenia Group until the completion of the privatisation process, i.e. until the formal award of the new Conventions/public service contracts to the buyers.
- (40) The privatisation process has not yet been completed in respect of all companies of the former Tirrenia Group. According to the information available to the Commission at this stage, only the privatisations of Tirrenia, Siremar and Toremar have been completed so far.⁹ According to the information submitted by the Italian authorities the new Conventions between the Italian State and the acquirers of Tirrenia and Siremar have already been signed. However, the Commission is not at this stage aware of whether the new public service contract with the buyer of Toremar has entered into force.
- (41) Apart from the notification mentioned above in recital (38) concerning the compensation to Saremar for the temporary operation of two additional routes, the Italian authorities have not informed the Commission of any substantial change as regards the conditions applicable to the public service, including the compensation granted to the companies for the discharge of public service obligations as compared to 2011. Consequently, according to the information available at this stage, the Commission assumes that the companies of the former Tirrenia Group, with the exception of Saremar, have continued operation of the public service under the same conditions as in 2011.
- (42) It follows that the same doubts already expressed by the Commission in its 2011 opening decision also apply to the compensation granted to the companies of the former Tirrenia Group as from January 2012 and until the completion of the respective privatisations and the entering into force of the new Conventions/public service contracts.
- (43) Second, the 2011 opening decision did not include an assessment of the additional measures undertaken by the Sardinian Region in favour of Saremar following the transfer of the shareholding of the latter from Tirrenia. At the time of adoption of the

⁹ The Italian Competition authority has authorised the merger operations by its decisions dated 23 November 2011 (Siremar) and 19 July 2011 (Toremar).

2011 opening decision, the Commission was in fact not aware of these measures adopted at regional level.

- (44) Third, on the basis of the information available at this stage the Commission considers that the Italian authorities have misused the rescue aid mentioned in recital (20) above given that Tirrenia and Siremar did not cease to benefit from the rescue aid after the expiry of the 6-months period as laid down in the rescue aid decision.
- (45) Fourth, in its 2011 opening decision the Commission did not assess under State aid rules the compensation to be paid for the operation of the public service to the buyers of the companies of the former Tirrenia Group. That decision only included a preliminary assessment of the procedure for the sale of assets of Tirrenia and Siremar, leading to the award of the future Conventions to the acquirers. Therefore, the compensation to be paid under the new Conventions was not covered by the 2011 opening decision.
- (46) In the light of the recent complaints, the Commission considers appropriate to investigate more in-depth to which extent these subsidies would qualify as state aid.
- (47) Fifth, as mentioned above, one of the complaints received following the adoption of the 2011 opening decision claims among others that CdI has been declared successful in the tender for the sale of Siremar business branch on the basis of a guarantee of payment of part of the purchase price that it had received from a commercial bank, namely Unicredit S.p.A. Such guarantee has allegedly been made conditional on a counter-guarantee being provided by the Sicilian Region. The complainant argues that the counter-guarantee, which did not foresee the payment of any premium to the Sicilian Region, constitutes aid to CdI.
- (48) An appeal was brought by the complainant before national courts against the decision to award the tender to CdI. On the basis of the information available to the Commission at this stage, the Regional Administrative Tribunal (hereinafter TAR) of Lazio ruled on 7 June 2012 that the counter-guarantee by Sicily of part of the purchase price by the successful bidder constituted State aid, irrespective of whether it has been ultimately executed or withdrawn. Consequently, it declared the sale procedure of the Siremar business branch partially void. By interim order issued on 18 July 2012, the Consiglio di Stato (hereinafter *CdS*) suspended the execution of the TAR judgment, temporarily ruling out the renewal of the procedure.
- (49) Although the Siremar sale procedure has been included in the 2011 opening decision, the Commission was not aware at that stage of any guarantee/counter-guarantee granted to any of the bidders.
- (50) Sixth, by their comments to the 2011 opening decision, the Italian authorities detailed the main phases of the Tirrenia sale procedure and CIN's successful offer. The payment of the purchase price is payable by CIN in instalments over the 8-year duration of the new Convention. Considering the present value of such payments, the actual purchase price by CIN is lower than the market value set by the expert appointed by the Ministry of Economic Development (hereinafter *the competent Ministry*).

- (51) Lastly, the Commission became aware that certain conditions have been imposed by the Italian authorities on potential bidders in the procedures for the sale of the regional companies of the former Tirrenia Group entrusted with new public service contracts.
- (52) Hence the following section will describe in detail the following measures:
- (a) Compensation paid under the prolongation of the initial Conventions up to the completion of the privatisation process (*measure 1*);
 - (b) Additional measures adopted by the Sardinian region in favour of Saremar (*measure 2*);
 - (c) Misuse of rescue aid (*measure 3*);
 - (d) Compensation to be paid for the operation of the public service under the future Conventions/public service contracts (*measure 4*);
 - (e) Counter-guarantee by the Sicilian Region of part of the purchase price by CdI for the Siremar going concern entitled to provide the public service and increase in CdI's capital (*measure 5*);
 - (f) Deferred payment of the payment price of Tirrenia (*measure 6*);
 - (g) Privatisation of the regional companies (*measure 7*).
- (53) The present decision does not address the observations of interested parties, nor the entirety of Italy's comments submitted in the context of the formal investigation procedure referred to in recitals (11) - (26) above, with the exception of the information submitted with regard to the purchase price of the Tirrenia business branch.

2. DETAILED DESCRIPTION OF THE MEASURES SUBJECT TO THE PRESENT DECISION

2.1. Compensation paid under the prolongation of the initial Conventions up to the completion of the privatisation process (*measure 1*)

- (54) The initial Conventions had been concluded for a period of 20 years and expired at the end of December 2008. As mentioned in recitals (3) to (5) above, these initial Conventions have been subsequently prolonged up to the end of the privatisation process of the companies of the former Tirrenia Group as follows:
- (a) Decree Law no. 207 of 30 December 2008, converted by Law no.14 of 27 February 2009 laid down the prolongation of the initial Conventions up to the end of 2009;
 - (b) the 2009 law laid down *inter alia* the prolongation of the initial Conventions until 30 September 2010; and
 - (c) the 2010 law provided for the prolongation of the initial Conventions up to the end of the privatisation process.
- (55) The 2011 opening decision only concerned the public compensation paid to all companies of the former Tirrenia Group from 2009 until the end of 2011. The

Commission assumes that the companies of the former Group have continued to be compensated for the discharge of public service obligations after that date under the same conditions applicable in 2011.

2.2. Additional measures adopted by the Sardinian Region in favour of Saremar (measure 2)

2.2.1. Extension in scope of the public service

- (56) According to the information submitted by the Italian authorities, at the moment of the transfer of Saremar from Tirrenia to the Sardinian Region on the basis of the 2009 law, the former was operating connections between Sardinia and the islands to the north-east and south-west of Sardinia (namely the La Maddalena – Palau, Carloforte – Portovesme, Carloforte – Calasetta routes), as well as an international connection between Sardinia and Corsica. According to the information previously submitted by the Italian authorities, the entirety of these services has been traditionally included within the scope of the public service system.
- (57) According to the information submitted by various complainants after the adoption of the 2011 opening decision, pursuant to Regional Decision ("*Delibera*") No. 20/57 of 26 April 2011, Saremar has been entrusted the operation of new cabotage connections starting on 15 June 2011 and until 15 September 2011, namely at least two of the following connections (mixed services):
- (a) North-East Sardinia (Olbia or Golfo Aranci) - Central-Southern Italy (Civitavecchia or Naples) and return;
 - (b) North-East Sardinia (Olbia or Golfo Aranci) - Central-Northern Italy (La Spezia, Carrara or Livorno) and return;
 - (c) North-West Sardinia (Porto Torres) - Northern Italy (Genoa or Savona) and return.
- (58) In addition, on the basis of the provisions of that Regional Decision, the company could freely increase the number of international connections.
- (59) Acting on the abovementioned Decision, the routes operated by Saremar were Civitavecchia - Golfo Aranci, operated daily from 15 June 2011 and 15 September 2011 and Porto Torres - Vado Ligure, with four connections per week from 22 June 2011 to 15 September 2011.
- (60) Regional Decisions No 25/69 of 19 May 20 and No. 27/4 of 1 June 2011 regulated the pricing system for Saremar's services between Sardinia and the mainland. In particular, Decision No. 25/69 concerned the launch of the Golfo Aranci - Civitavecchia route and the corresponding pricing system. By Decision No. 27/4, the launch of the Porto Torres-Vado Ligure (Savona) route was decided. In addition, it was decided to *apply a discount of no less than 15% to fares applicable to Sardinian residents and people born on the island.*
- (61) Furthermore, according to Regional Decision No. 36/6 of 1 September 2011, the Sardinian Region laid down: (i) that Saremar would operate from 30 September 2011 to 30 September 2012 at least one of the following mixed freight/passenger lines: Olbia - Livorno, Porto Torres - Livorno and Cagliari - Piombino; (ii) that Saremar

would schedule from 15 May 2012 to 15 September 2012 the reopening of the following tourist lines: Golfo Aranci (or Olbia) - Civitavecchia, Porto Torres - Vado Ligure (or Genoa); (iii) that Saremar would be recapitalised for an amount equal to that claimed by the latter from Tirrenia in receivership.

- (62) According to the Italian authorities, on 16 January 2012 Saremar resumed operation of the Olbia - Civitavecchia route. Operation of the Porto Torres - Vado Ligure route was resumed on 1 June 2012. The services have been interrupted on 15 September 2012.
- (63) By Regional Law No. 15 of 7 August 2012, the regional authorities decided to grant Saremar an amount of EUR 10 million to cover operational losses incurred in the operation of the services between Sardinia and the mainland. According to the information submitted by the Italian authorities, on these routes Saremar's losses amounted to EUR 9 030 690.75.

2.2.2. *Bonus Sardo-Vacanza*

- (64) Pursuant to Regional Decision No. 20/58 of 26 April 2011, *Agenzia Sardegna Promozione* (hereinafter *the Agency*) would partially finance the so-called Bonus Sardo-Vacanza project by EUR 2 million, as well as the required promotional activities by EUR 3 million.
- (65) The Sardo-Vacanza bonus project had been approved with a view to promote and support Sardinian tourism. Under the project, costs of transport by ferry were reimbursed to all passengers (capped at 90 EUR, applicable for groups of two-three passengers) travelling to/from Sardinia requiring at least three nights accommodation in Sardinia during 2 May 2011 and 3 July 2011.
- (66) By Regional Decision No. 25/53 of 19 May 2011, the Sardinian Region decided to mandate Saremar to carry out the required promotional activities, which essentially consisted in carrying logos and advertising messages on its vessels. To that end, the Regional Decision also mandated the Agency to allocate to Saremar an amount of EUR 3 million, provided for by Regional Decision No. 20/58 of 26 April 2011, with an immediate advance payment of 80%.
- (67) According to Regional Decision No. 20/58, the system should have been discontinued as of July 2011.

2.2.3. *EUR 3 million loan and the letter of comfort*

- (68) Pursuant to Regional Government Decision No. 23/2 of 12 May 2011, in view of the "*insufficient funding available to Saremar*", the Sardinian Region approved the latter's request of a EUR 3 million loan, bearing interest at "*the market average rate*", with an indicative maturity of eight months.
- (69) Pursuant to Regional Decision No. 31/24 of 20 July 2011, the Sardinian Region decided to provide Saremar with a formal letter of comfort to obtain the loan referred to above from Banco di Sardegna S.p.A.
- (70) The comfort letter issued by the Sardinian Region to Saremar makes statements about the Region's current intentions and likely reaction to certain eventualities, such as the potential sale in whole or in part of its shareholding in Saremar. In particular, the

President of the Region commits to inform the lender of any potential change in its shareholding in the company and to seek that the company be managed in an efficient way so that mutual interests are preserved.

2.2.4. *The recapitalisation*

- (71) Regional Decision No. 36/6 of 1 September 2011 laid down that Saremar would be recapitalised for an amount equal to that claimed by the latter from Tirrenia in receivership.
- (72) According to the abovementioned Decision, Saremar had to reduce its claim of EUR 11 546 403.59 in respect of Tirrenia in insolvency proceedings, duly registered by the Bankruptcy Chamber of the Civil Court of Rome and declared enforceable on 1 April 2011. The subsequent reduction of the claim by EUR 5 773 201.80, i.e. 50%, when the company balance sheet for 2010 was approved, has led to a EUR 5 253 530.05 loss and a consequent drop in the company's capital, which has fallen to EUR 4 890 950.36.¹⁰
- (73) Under Article 2446 of the Italian Civil Code, when a company's equity capital has been reduced by more than one third, the shareholders are required to recapitalise the company.
- (74) Given the above, the regional authorities decided to recapitalise Saremar for the amount equal to its claim against Tirrenia, as registered by the Bankruptcy Chamber of the Civil Court of Rome.
- (75) On the basis of information more recently submitted by the complainants, it appears that, pursuant to a corporate resolution of 11 July 2012, the amount of the recapitalisation has been reduced to EUR 6 099 961, of which EUR 824 309.69 already paid.

2.2.5. *Other measures*

- (76) By Decision No. 52/119 of 23 December 2011, the Sardinian regional authorities decided to issue a new letter of comfort to enable Saremar to obtain a new credit line amounting to EUR 1 million.

2.3. Misuse of rescue aid (*measure 3*)

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

¹⁰ After the use of the legal reserve of EUR 258 000.00 and earnings from previous financial years of EUR 104 579.69.

- (78) By letter dated 16 May 2011, the Italian authorities informed the Commission that, given that the first instalment of the guaranteed loan had been disbursed to the beneficiary only on 28 February 2011, the loan would be reimbursed by 28 August 2011. No other clarifications were provided.
- (79) Not having received any information on the reimbursement of the loan, by letters dated 5 October 2011 and 28 November 2011, the Commission requested the Italian authorities to confirm the observance of the condition laid down by paragraph 25(a) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty¹¹ (hereinafter *the R&R Guidelines*) and recitals (32) and (47) of the rescue decision.
- (80) By letter dated 9 December 2011, the Italian authorities informed the Commission that the selected financial institutions, namely *Banca Infrastrutture Innovazione e Sviluppo S.p.A.* (hereinafter *BIIS*) and *Unicredit S.p.A.* (hereinafter *Unicredit*) had authorised a credit line of EUR 40 million to Tirrenia and Siremar (EUR 25 million for Tirrenia and EUR 15 million for Siremar) with deadline on 30 June 2011. By a Decree dated 15 February 2011, the State guaranteed the loan.
- (81) Subsequently, the financing had been disbursed as follows:
- (a) on 28 February 2011, the first instalment of the loan (EUR 20 million for Tirrenia and EUR 12 million for Siremar);
 - (b) on 23 March 2011, the second instalment of the loan (EUR 5 million for Tirrenia and EUR 3 million for Siremar).
- (82) Given that Tirrenia was unable to reimburse the loan by 30 June 2011, on 11 July 2011 the State guarantee was called with the result that Tirrenia and Siremar held a EUR 25 203 063.89 and EUR 15 121 838.33 debt towards the State.
- (83) According to the information submitted by the Italian authorities, the Bankruptcy Court subsequently authorised the inclusion of the Ministry for Economy and Finance amongst the preferential ("*prededucibili*") creditors of Tirrenia and Siremar. According to the Italian authorities, as previously communicated to the Commission, the Extraordinary Commissioner at that time considered that the recovery of the aid was possible by 28 August 2011. In particular, it was considered that the financing would be fully reimbursed following the asset sale (see recitals (18) – (23) above).
- (84) On 25 July 2011 the contract for the sale of Tirrenia business branch to CIN was signed.¹² Nevertheless, the transfer of the assets has been further delayed, allegedly on

¹¹ OJ C 244, 1.10.2004, pages 2-17.

¹² By decision of 27 April 2012 the Commission has closed the in-depth investigation opened in January 2012 on the merger concerning Tirrenia's sale to CIN, after the parties abandoned the notified transaction. CIN has subsequently changed the original parties of the joint-venture (Grimaldi, Marininvest and Onorato Partecipazioni) and notified to the national competition authority a new transaction.

account of the lengthy merger authorisation proceedings. The merger was approved by the National Competition Authority on 21 June 2012.

- (85) On 24 October 2012, the Italian authorities have informed the Commission that the amount due by Tirrenia and Siremar respectively as a result of the guarantee being called had been reimbursed. In particular, the Italian authorities have provided proof that an amount of EUR 25 852 548.93 for Tirrenia and EUR 15 511 529.35 for Siremar had been paid back to the State on 18 September 2012.

2.4. Compensation to be paid under the future Conventions/public service contracts (*measure 4*)

- (86) 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, i.e. Laziomar;
 - (b) Saremar to the Region of Sardinia;
 - (c) Toremar to the Region of Tuscany.
- (87) 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 (Sardinia and Tuscany) and 28 February 2010 respectively (Campania and Lazio). The new Conventions/new public service contracts would enter into force upon finalisation of the privatisation of each company of the former Tirrenia Group.
- (88) Hence 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, of which these new contracts form an integral part.
- (89) The 2009 law also clearly laid down the annual compensation ceiling applicable as of 2010 for the operation of the services provided under the initial Conventions as prolonged, as well as throughout the duration of the new Conventions and public service contracts, 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 19 839 226

Laziomar ¹³	EUR 10 030 606
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Table 1 – Annual compensation ceilings as of 2010

- (90) As mentioned in recital (35) above, to date the Italian authorities have only notified the compensation to be paid under the future Conventions to the buyers of Tirrenia and Siremar business branches.
- (91) However, insofar as the sale procedures have been initiated concomitantly for Caremar, Toremar, Saremar and Laziomar pursuant to the 2009 and 2010 laws, the compensation paid for the operation of the public service under the future public service contracts to the acquirers of these companies of the former Tirrenia Group is also subject to the present decision, although these measures have not been formally notified by the Italian authorities. The Commission also notes that the compensation to be paid under the future public service contract to Moby, buyer of Toremar, has been subject to a complaint by a competitor, bidder in the final step of the procedure for the privatisation of Toremar (see recital (34) above).

2.4.1. CIN

The beneficiary

- (92) CIN is the successful bidder for the Tirrenia business branch, created for this purpose by Onorato Partecipazioni S.r.l. and Clessidra SGR S.p.A.

The routes

- (93) According to the draft Convention between the State and CIN, the following routes would be operated by the latter under the public service regime:

Mixed routes	Freight routes
Napoli – Palermo (winter season)	Napoli – Cagliari
Genova - Porto Torres (winter season)	Genova/Livorno – Cagliari
Genova – Olbia - Arbatax	Ravenna – Catania
Civitavecchia –Olbia (winter season)	
Napoli – Cagliari	
Cagliari - Palermo	
Cagliari -Trapani	
Civitavecchia – Cagliari - Arbatax	
Termoli - Tremiti	

Table 2 – Routes to be operated by CIN under the future Convention

- (94) The Napoli – Palermo, Genova – Porto Torres, Civitavecchia – Olbia routes will be operated on commercial terms during the high season.

¹³ Formerly a branch of Caremar, entrusted with the operation of the links with the Pontino Archipelago under the public service regime.

- (95) The Italian authorities have submitted information on the services provided by Tirrenia's competitors in 2012 on the mixed routes. No information has been provided regarding the competitive situation on the freight routes operated by Tirrenia under the public service regime in 2012, which will be taken over by CIN. The Commission is at this stage not aware of the possible modifications in the features of the services provided by competitors, if any, following the entry into force of the new Convention between the State and CIN.

Budget and duration

- (96) According to the Italian authorities, the new Convention signed between the Italian State and CIN will be in force for 8 years. Nevertheless, no specific duration is foreseen in the draft Convention submitted by the Italian authorities in the context of the notification.
- (97) The yearly compensation to be received by CIN under the new Convention is capped at EUR 72 685 642.

The public service obligations

- (98) According to the draft Convention submitted by the Italian authorities, the public service obligations imposed on CIN concern the type and capacity of the vessels assigned to the maritime connections operated under the public service regime, the frequency of service and the corresponding fares.

The public service compensation

- (99) The compensation for the operation of the public service under the new Convention will be calculated on the basis of the methodology laid down by the CIPE Directive of 9 November 2007 (hereinafter *the CIPE Directive*)¹⁴. The methodology is the same as the one applied for the compensation paid in 2010 and 2011 to the companies of the former Tirrenia Group.

2.4.2. *CdI*

The beneficiary

- (100) CdI is the successful bidder for the Siremar going concern entitled to provide the public service. CdI is controlled by Mediterranea Holding di Navigazione S.p.A. (hereinafter *Mediterranea*), holding 65.32% of the shares. 43% of the shareholding in Mediterranea is owned by Sicily.

The routes

- (101) According to the new Convention, CdI will provide mixed services on multiple routes in the following sectors:

Milazzo – Isole Eolie – Napoli

¹⁴ GURI no. 50 of 28 February 2008.

Trapani – Isole Egadi
Porto Empedocle – Linosa – Lampedusa (Isole Pelagie)
Trapani – Pantelleria
Palermo – Ustica

Table 3 – Sectors of routes to be operated by CdI under the future Convention

- (102) The Italian authorities have provided information on the services provided by Siremar's competitors on the routes operated by Siremar under the public service regime in 2012, which will be taken over by CdI. The Commission is at this stage not aware of the possible modifications in the features of the services provided by competitors, if any, following the entry into force of the new Convention between the Sicilian Region and CdI.
- (103) 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 Sicilian Region on the basis of tender procedures, which are compensated accordingly. The latter provide services in the following sectors:

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

Table 4 - Services provided by Siremar's competitors under the prolongation of the initial Convention

Budget and duration

- (104) According to the Italian authorities, the new Convention between the Sicilian Region and CdI will be in force for 12 years. The term of the new Convention is clearly foreseen in the draft Convention submitted by the Italian authorities.
- (105) The yearly compensation to be received by CdI under the new Convention is capped at EUR 55 694 895.

The public service obligations

- (106) According to the draft Convention submitted by the Italian authorities, the public service obligations imposed on CdI concern the type and capacity of the vessels assigned to the maritime connections operated under the public service regime, the frequency of service and the fares to be paid.

The public service compensation

- (107) Pursuant to the 2009 law and the CIPE Directive (see recital (99) above), the compensation is calculated on the basis of the same methodology employed as of 2010 for all companies of the former Tirrenia Group.

2.4.3. Buyers of Toremar, Caremar, Laziomar and Saremar

- (108) According to the information available to the Commission at this stage under the ongoing procedure mentioned in recitals (11) – (26) above, these public service contracts will each be concluded for a 12-year period.
- (109) The annual compensation will be calculated on the basis of the same methodology laid down by the CIPE Directive. The annual compensation ceilings under the new public service contracts as detailed above are the following:

Company	Annual compensation
Saremar	EUR 13 686 441
Toremar	EUR 13 005 441
Caremar	EUR 19 839 226
Laziomar	EUR 10 030 606

Table 5 - Annual compensation ceilings for the regional companies

2.5. The counter-guarantee by the Sicilian Region of the deferred payments of the purchase price of Siremar and increase in CdI's capital (measure 5)

- (110) In what follows the Commission will describe the main successive phases of the Siremar sale procedure as detailed by the Italian authorities.
- (111) After the publication of the call for tenders on 4 October 2010, 5 interested parties were admitted to the due diligence phase. The Extraordinary Commissioner submitted the letter of procedure to the interested parties and requested the latter to submit binding offers by 15 March 2011. Such offers necessarily had to include a business plan and the purchase price proposed, namely a minimum price not inferior to the one set by an independent valuer appointed by the competent Ministry, and a maximum price not superior to 10% of the latter.
- (112) The valuation of the independent expert was delivered on 8 March 2011. The estimated value of Siremar business branch was EUR 55 million.
- (113) Only one offer was submitted by the deadline, namely that of Ustica Lines S.p.A. (hereinafter *Ustica Lines*). The minimum price offered was EUR 60 million. The company also undertook to take over the costs for the termination of employees' work contracts. The Extraordinary Commissioner decided to launch a further step of the procedure, presumably considering that the offer in question was not coherent with the requirements set in the call for tenders, in particular because it lacked a guarantee of the purchase price by a financial institution and did not detail the financing means of the purchase.

- (114) By the newly set deadline of 5 April 2011, a binding offer from CdI was submitted, as well as a letter of intent from Ustica Lines by which the latter requested an extension of the deadline.
- (115) The price offered by CdI amounted to EUR 60.1 million, payable EUR 10 million upfront and the remaining deferred as follows:
- EUR 4.1 million and EUR 6 million at the end of the first and second years following that when the transfer of the assets has effectively taken place;
 - EUR 20 million on the condition that the trade union's agreement would be obtained before the end of the third year;
 - EUR 20 million at the end of 2013, however reduced in case the financial results during 2011-2013 would be inferior to those forecasted in the business plan made available to potential acquirers in the sale procedure.
- (116) According to the Italian authorities, the Extraordinary Commissioner, having regard in particular to the fact that CdI's offer was made conditional on the financial performances of the company, invited the participants to submit better offers. The launch of this subsequent phase of the procedure was authorised by the competent Ministry on 10 May 2011.
- (117) By the new deadline of 23 May 2011, two offers were received:
- Improved offer from CdI;
 - Binding offer by Societa Navigazione Siciliana S.p.A. (hereinafter *SNS*) structured as follows: EUR 55.1 million purchase price, payable EUR 30.1 million upfront and the remaining deferred as follows:
 - EUR 10 million at the end of the third year after the transfer of the assets would effectively take place;
 - EUR 7.5 million at the end of the sixth year and EUR 7.5 million at the end of the eighth year, with a 1.5% interest rate.
- (118) The Extraordinary Commissioner requested further clarifications. Following this request, a new offer was submitted by CdI. SNS submitted an addendum to the previous offer.
- (119) According to the information submitted by the Italian authorities, at the meeting of the Supervisory Board on 6 July 2011, after having proposed to award the tender to CdI, the Extraordinary Commissioner stated that he had become aware of certain difficulties in connection to the guarantee granted by Consorzio Fidi in support of CdI's offer.
- (120) Subsequently, following the recommendation of the Supervisory Board, the Commissioner invited both parties to supplement their offers and to provide for the prolongation of the corresponding guarantees. By the set deadline of 18 July 2011, both parties provided the prolongation of such guarantees until 15 September 2011 and submitted further documentary evidence in reply of the clarifications requested.

(121) The CdI offer was structured as follows:

- purchase price of EUR 69 million, payable EUR 20 million upfront and the remaining deferred as follows: EUR 10 million at the end of the first year, EUR 6.5 million at the end of the sixth year, EUR 7 million at the end of the seventh year, EUR 8 million at the end of the eighth year, EUR 8 million at the end of the ninth year and EUR 9.5 million at the end of the tenth year;
- An annual 1.5% interest on the deferred payments;
- As guarantees of the price offered:
 - Commitment of MPS Capital Services to grant CdI a credit line amounting to EUR 18 million on the long term;
 - Commitment of Commercial Fidi Consorzio di Garanzia Collettiva to guarantee the deferred amounts up to EUR 50 million;
 - Letter from Unicredit by which the letter expresses its interest in granting CdI a credit line of EUR 20 million;
 - Letter of Royal Luxemburg Soparfi, by which the latter offers to grant CdI funding up to EUR 40 million conditional on the acquisition of a shareholding of up to 30% in the company.

(122) The SNS offer was structured as follows:

- EUR 55.1 million purchase price, payable EUR 30.1 million upfront and the remaining deferred as follows: EUR 10 million at the end of the third year with 1.5% annual interest without capitalising, EUR 7.5 million with 1.5% annual interest without capitalising at the end of the sixth year, EUR 7.5 million with 1.5% annual interest without capitalising at the end of the eighth year;
- A 10% reduction in the purchase price in case the compensation for the provision of the SGEI is reduced;
- As guarantee of the price offered:
 - letter of intent from Unicredit, Bnl and Banca Popolare di Lodi;
 - a decision by the shareholders to increase the capital in the future.

(123) On 5 August 2011, CdI submitted further documents to express its availability to replace the commitment made by Commercial Fidi by a guarantee provided by Unicredit, counter-guaranteed by the Sicilian Region on 3 August 2011. On 7 September 2011, the offer was supplemented by a Note of the President of the Sicilian Region by which the latter submitted directly to the Ministry the counter-guarantee of the General Accountant, together with the confirmation of his legitimacy to release the counter-guarantee in question.

(124) In the meantime, on 1 September 2011, after having consulted the Supervisory Board, the Extraordinary Commissioner, following the valuation of the two binding offers received, had decided to declare SNS as the successful bidder in the tender. On 8

September 2011, the competent Ministry asked the Commissioner to provide further information and clarifications, in particular in the light of the further documentation submitted by CdI.

- (125) On 28 September 2011, the Extraordinary Commissioner requested authorisation for an additional phase of the procedure aiming to enable the submission of binding offers compliant with the instructions given to the participants. In case of failure of this additional phase, the Commissioner requested the authorisation to award the tender to SNS on the basis of the offer already received. On 29 September 2011, the Supervisory Board authorised the launch of the additional phase.
- (126) By the newly set deadline of 13 October 2011, CdI's offer was structured as follows:
- EUR 69.150 million purchase price, payable EUR 34.650 million upfront and the remaining deferred as follows: EUR 13.8 million at the end of the third year, EUR 10.35 million at the end of the sixth year, EUR 10.35 million at the end of the eighth year; an annual 1.5% interest payable on the deferred payments;
 - As guarantee of the price offered:
 - Letter from Unicredit undertaking to guarantee the deferred payments with no counter-guarantee by Sicily;
 - Letter of MPS Capital Services committing to finance the beneficiary for the first instalment of the purchase price up to EUR 20 million;
 - Notary authentication of the shareholders' decision to increase capital up to EUR 21 480 236, EUR 20 800 000 subscribed and EUR 14 687 500 paid-in.
- (127) The SNS confirmed the offer previously submitted on 23 May 2011 supplemented by the requested clarifications.
- (128) On 14 October 2011, the Supervisory Board authorised the Commissioner to accept the offer of CdI received on 13 October 2011.
- (129) In its appeal lodged before the national Courts, SNS has claimed to be in the possession of documentary evidence of a counter-guarantee granted by Sicily on 12 October 2011 of the deferred payments by CdI of the purchase price.
- (130) According to the Italian authorities, on 3 February 2012 CdI submitted to the competent Ministry i) the Note of the Sicilian Region dated 31 January 2012 by which the Region states that a counter-guarantee granted to CdI on 12 October 2011 should be considered withdrawn and ii) the Note by Unicredit dated 3 February 2012 addressed to the Region, by which the former acknowledges that the counter-guarantee has been recalled and thus that its guarantee of part of the purchase price is unconditional.
- (131) The two documents laying down the alleged counter-guarantees, referred to in recitals (123) and (129) above, dated 3 August 2011 and 12 October 2011 respectively, are

signed by the General Accountant of Sicily, who is also the President of the Supervisory Board of Mediterranea, the parent company of Cdi.¹⁵

2.6. Deferred payment of the payment price by Tirrenia (*measure 6*)

- (132) By their comments to the 2011 opening decision, the Italian authorities *inter alia* provided information to the Commission on the main phases of the Tirrenia sale procedure and detailed the structure of the CIN's offer, declared successful in the tender.
- (133) On the basis of this information, it appears that CIN's offer was structured as follows:
- EUR 380.1 million as purchase price, EUR 200.1 million payable upfront;
 - the remaining in instalments over the 8-year duration of the new Convention, as follows: EUR 55 million at the end of the third year, EUR 60 million at the end of the sixth year, EUR 65 million at the end of the eighth year.

2.7. Privatisation of the regional companies (*measure 7*)

- (134) The Italian authorities provided the Commission with detailed information concerning the privatisation of the regional companies of the former Tirrenia Group, namely Toremar, Caremar, Laziomar and Saremar.

Toremar

- (135) The procedure has been concluded with the selection of Moby. The call for tenders concerned the sale of 100% of Toremar's share capital and the entrustment of a new 12-year public service contract.
- (136) According to the information submitted by the Italian authorities certain so-called *technical* and *economic-financial requirements* were imposed on potential bidders, concerning in particular (i) the minimum volume of maritime transport services operated between 2006-2009 (at least 450 000 nautical miles); (ii) the total turnover in the previous three years not below EUR 150 million, out of which at least EUR 75 million from the operation of maritime passenger services.
- (137) According to the Italian authorities, the main selection criterion was the economically most advantageous offer.

Caremar

- (138) The Italian authorities clarified that Caremar would be fully privatised. Two successive draft calls for tenders for the acquisition of 100% of Caremar's share capital and the

¹⁵ According to the rules governing the company, the Supervisory Board has voting powers as concerns strategic decisions, namely decisions on industrial and strategic plans proposed by the Managing Board.

entrustment of the new 9-year public service contract have been submitted to the Commission.

- (139) According to the original call for tenders, similar minimum *technical and financial requirements* had also been imposed in the Caremar tender (i) the minimum volume of maritime cabotage services operated between 2006-2009 (at least 300 000 nautical miles); (ii) at least EUR 75 million from the operation of maritime cabotage services in the last three years; (iii) net assets of at least EUR 3 million.
- (140) In addition, certain so-called *economic requirements (valori economici)* had also been imposed, in particular:
- as regards the acquisition of the shareholding: minimum of EUR 4 470 008 (value of Caremar's net assets), and
 - as regards the entrustment of the new public service contract: maximum EUR 178 553 034, i.e. the ceiling of the compensation laid down ex ante by the 2009 law.
- (141) According to the original draft submitted to the Commission, the main selection criterion was the economically most advantageous offer, *in accordance with the best economic offer (also considering the provision of the public service), as well as with the business plans presented by the bidders, [...] with the primacy of the maximum scoring attributed to the technical offer rather than the economic offer.* The economically most advantageous offer would be obtained by adding the scores obtained by the bidders for technical and economic offers.
- (142) Following discussions with the Commission, the Italian authorities have subsequently confirmed that the call for tenders has been amended to lay down the economically most advantageous offer based on the highest price as the selection criterion. In this case, the highest price would equal the lowest difference obtained by subtracting the offered shares price from the value of the compensation requested (any reference to a call for tenders for the privatisation of Caremar made hereinafter refers to this last version of the call).
- (143) The formula used for the calculation of the highest net price incorporates a certain adjustment rate based on the return on nine-year Government bonds, in order to take into account the duration of the contract.
- (144) The Italian authorities also confirmed that the scoring of the technical criteria had been removed and replaced by financial requirements concerning adequate economic and financial capacity of the bidders, evidenced by either:
- a confirmation by at least two financial institutions of an economic and financial capacity of at least EUR 6 million; or
 - net assets of at least EUR 6 million.

Laziomar

- (145) The transfer of the going concern operating the links between the Archipelago Pontino and the Lazio Region has been formalised on 1 June 2011.

- (146) According to the information submitted by the Italian authorities, a tender has been organised at regional level for the sale of 100% of Laziomar's share capital and the entrustment of the new 10-year public service contract. The Italian authorities clarified that the requirements imposed on potential bidders concern in particular the total turnover in the previous three years, which could not be below EUR 60 million.
- (147) The Italian authorities have clarified that the economically most advantageous bid would be selected, with the following weighting of the economic and technical offers:
- economic offers: 30 points;
 - technical offers: 70 points, as follows:
 - Maximum of 10 points for measures to improve effective management;
 - Maximum 40 points for measures to upgrade Laziomar's fleet;
 - Maximum 20 points for employment of new ships in addition to Laziomar's fleet.
- (148) The base for the tender was as follows:
- maximum EUR 14 300 550 per year, i.e. the ceiling of the compensation laid down ex ante by the 2009 law as compensation for the discharge of public service obligations under the new 10-year public service contract;
 - fixed price of EUR 2 272 000 for 100% of Laziomar's shareholding.

Saremar

- (149) According to the Italian authorities, the Sardinian Region intends to proceed to the sale of its entire shareholding in Saremar together with the entrustment of the new public service contract. The draft call for tenders has not been submitted to the Commission.
- (150) However, pursuant to a corporate resolution of 11 July 2012, it would appear that the regional authorities would maintain a 49% stake in the company.

3. POSITION OF THE ITALIAN AUTHORITIES

3.1. Compensation paid under the prolongation of the initial Conventions up to the completion of the privatisation (*measure I*)

- (151) In the framework of the formal investigation procedure referred to in recitals (11) - (26) above, the Italian authorities have claimed that the services provided by the companies constitute genuine SGEI inasmuch as they aim to ensure territorial continuity and no comparable services are provided by competitors on the routes in question.
- (152) As mentioned above, at this stage the Commission has not been informed of any material alteration of the conditions governing the public service regime as prolonged in 2012. Therefore, it assumes that the conditions governing the public service obligations and the compensation for their discharge have remained the same.

3.2. Additional measures adopted by the Sardinian region in favour of Saremar (measure 2)

- (153) The Italian authorities notably consider that the compensation to Saremar for the operation of the two routes between Sardinia and the mainland does not amount to aid. The Italian authorities claim that such measures have been adopted at regional level only as a result of the significant increase in prices by Saremar's competitors operating on routes to and from Sardinia. The Italian authorities underline that this state of facts is investigated by the Italian Competition Authority, which on 11 May 2011 launched an in-depth investigation under Article 101 TFEU.
- (154) With regard specifically to the EUR 3 million granted by the Agency referred to in recital (64) above to Saremar, the Italian authorities claim that this amount merely represents the value of the promotional activities carried out by the beneficiary on behalf of the Sardinian Region and does not therefore confer any undue advantage to the latter.
- (155) In respect of the alleged guarantees granted to Saremar, the Italian authorities contend that it is normal business practice that the majority shareholder guarantees the credit lines of its controlled companies, even directly by means of shareholders loans.
- (156) Furthermore, the Italian authorities clarified that the comfort letter issued in July 2011 did not produce any effects inasmuch as the guaranteed credit line has not and will not be contracted by Saremar. With regard to the second letter of comfort, the Italian authorities have confirmed that, irrespective of the explicit provisions to that effect laid down by Regional Decision, such letter has not been ultimately issued and the Sardinian Region has no longer any intention to implement the measure in the future. Consequently, the Italian authorities consider that the regional authorities did not effectively guarantee any financial obligation undertaken by Saremar.
- (157) The Italian authorities state that the Bonus Sardo-Vacanza project aimed at counterbalancing the negative effect of the increase in prices of maritime services as mentioned above and was based on objective and transparent criteria.
- (158) Lastly, concerning the recapitalisation, the Italian authorities clarified that it is limited to Saremar's claim against Tirrenia and is justified in view of Saremar's privatisation, given that Tirrenia's creditors had not at that stage been paid out.

3.3. Misuse of the rescue aid (measure 3)

- (159) The Italian authorities informed the Commission that Tirrenia's debt towards the State would be reimbursed after the transfer of the assets has been completed, i.e. following the formal authorisation of the merger operation between Tirrenia and CIN. No updated information had at that time been provided as concerns Siremar's debt.
- (160) As regards specifically the claim that the State has towards Tirrenia and Siremar following the execution of the guarantee, the Italian authorities have stated that such debt is qualified as "*prededucibile*", meaning that the State enjoys a preferential position as compared to ordinary creditors for the recovery of its debt.

(161) As mentioned in recital (82) above, the merger was approved by the National Competition Authority on 21 June 2012. On 24 October 2012 the Italian authorities confirmed the reimbursement of the public financing to the Italian State.

3.4. Compensation to be paid under the future Conventions/public service contracts (*measure 4*)

(162) The Italian authorities have been repeatedly reminded of their stand-still obligation under Article 108(3) TFEU as concerns the compensation to be paid to the acquirers of the Tirrenia Group companies under the future Conventions/public service contracts. On several occasions the Commission has informed Italy that the method chosen to privatise the companies, i.e. the sale of the companies already endowed with new contracts could raise State aid concerns.

(163) The Italian authorities have previously communicated to the Commission that they do not consider the compensation paid under the new contracts would constitute aid. On 10 January 2012, the Italian authorities have formally notified under Article 108(3) TFEU, for reasons of legal certainty, the compensation to be paid under the new Conventions to the acquirers of the Tirrenia and Siremar business branches.

(164) The Italian authorities have exclusively commented on the qualification of the compensation to be paid to the acquirer of the Tirrenia business branch. In this respect, they have underlined the following:

- (a) Article 3 and Annex A to the new Convention clearly lay down the public service obligations; the Annex identifies in particular the ships to be used, the schedule of the crossings and the tariff ceilings; the first Altmark criterion is thus observed;
- (b) The parameters to calculate the compensation have been established in advance and are based on transparent and objective criteria; the second Altmark criterion is thus observed;
- (c) The costs taken into account for the calculation of the compensation are clearly laid down in Annexes B and C to the Convention and are limited to those incurred in the discharge of the public service obligations; the profit should be considered reasonable given that the compensation is significantly reduced as compared to 2009, the beneficiary incurs the risk of potential increases in operating costs (salary, fuel or port related operations), as well as the risk connected to traffic volumes. This allegedly holds true irrespective of the quarterly review of the scope of the public service in case of financial imbalance of the Convention, namely in case of insufficient public funds.
- (d) The privatisation of the companies has been carried out through an open, transparent and non-discriminatory tender procedure, having as object only the assets required for the operation of the public service, with the economically most advantageous offer based on the highest price as the selection criteria. The fourth Altmark criterion is therefore also fulfilled.

(165) In addition, the Italian authorities have underlined that under the new Convention the operation of the Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres routes is compensated only in the low season. Nevertheless Tirrenia is still obliged to keep the pre-agreed frequencies and maintain the tariff levels during the high season.

- (166) The Italian authorities also submitted that the conditions laid down by the Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest¹⁶ (hereinafter *the 2011 SGEI Decision*) are fully observed in the case of the new Convention to be signed by the Italian State with CIN.
- (167) As regards specifically the compensation to be paid under the new public service contract to Moby, the Italian authorities have claimed, in the context of the complaint referred in recital (34) above, that all conditions laid down by the Altmark judgement in order to assess whether or not the compensation of the discharge of public service obligations constitutes State aid are observed. The Italian authorities have also submitted that the regional authorities have awarded the public service contract in full compliance with 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)¹⁷ (hereinafter *the Maritime Cabotage Regulation*). They have also recalled that the merger operation had been already approved by the National Competition Authority.

3.5. Counter-guarantee by the Sicilian Region of the deferred payments of the purchase price of Siremar and increase in CdI's capital (*measure 5*)

- (168) The Italian authorities submit that the documents issued by the Sicilian Region and Unicredit, respectively dated 31 January 2011 and 3 February 2012, render irrelevant the allegations of SNS concerning the alleged new counter-guarantee of 12 October 2011. The documents clearly show that the counter-guarantee had been withdrawn with the effect that the guarantee provided by Unicredit of the deferred payments of the purchase price was unconditional.
- (169) The Italian Authorities also claim that at the last stage of the sale procedure, with deadline 13 October 2011, the Extraordinary Commissioner explicitly advised the bidders against submitting offers backed by guarantees contrary to State aid rules.
- (170) The Italian authorities did not explicitly comment on the qualification of the capital increase mentioned in recital (126) above.

3.6. Deferred payments of the Tirrenia purchase price by CIN (*measure 6*)

- (171) The Italian authorities did not provide any specific comments on the State aid qualification of the measure in question.

3.7. Privatisation of the regional companies (*measure 7*)

- (172) The Italian authorities have considered that the minimum technical and financial requirements imposed in the tenders, referring in particular to a minimum volume of maritime services operated, minimum turnover and/or revenues from the operation of

¹⁶ OJ L 7, 11.1.2012.

¹⁷ OJ L 364, 12.12.1992.

maritime services and/or minimum net assets) are essential to the delivery of the public service defined by the public authorities and thus justified given the sale of the companies endowed with new public service contracts.

- (173) The Italian authorities did not specifically comment on the scoring of the technical offers.
- (174) As concerns specifically the privatisation of Toremar, the Italian authorities submitted that the procedure fully complied with public procurement rules and the complainant has been rightfully excluded in the final phase.

4. ASSESSMENT

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

- (175) 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*".
- (176) 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 above mentioned 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. Compensation paid under the prolongation of the initial Conventions up to the completion of the privatisation process (measure 1)

- (177) In order to conclude on whether or not the compensation for the operation of public services constitutes an advantage within the meaning of Article 107(1) TFEU, the Court set out the following criteria in its judgement in the *Altmark* case:
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*);
 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*).

- (178) In its 2011 opening decision, the Commission concluded that the compensation paid to the companies of the former Tirrenia Group during 2009-2011 under the prolongation of the initial Conventions constituted State aid within the meaning of Article 107(1) TFEU to the extent that the *Altmark* criteria were not cumulatively fulfilled.
- (179) The Commission notes that, according to the 2010 law laying down the prolongation of the initial Conventions up to the completion of the privatisation of the companies, all the rules governing the public service system remain the same as assessed by the Commission in its 2011 opening decision. The only change in the public service regime communicated by the Italian authorities concerns the operation by Saremar of the two additional routes linking Sardinia to mainland Italy. The State aid qualification of the compensation granted to Saremar for their operation is assessed under Heading 4.1.2. below. Apart from the temporary operation by Saremar of these routes, the Commission considers that all relevant aspects of the public service system have remained in place in 2012 and will remain unchanged up to the entry into force of the new Conventions/public service contracts concluded with the acquirers of the companies.
- (180) Consequently, for reasons similar to those set out in recitals (183) to (248) of the 2011 opening decision, the Commission takes the preliminary view that:
- (a) the definition of the public service obligations under the prolongation of the initial Conventions after end 2011 has not been sufficiently clear and does not allow the Commission to definitely conclude whether it contains manifest error;
 - (b) the second condition of the *Altmark* judgment is observed as the parameters at the basis of the calculation of the compensation have been established in advance and observe the transparency requirements;
 - (c) the third condition of the *Altmark* judgment is not observed with the effect that the operators may be over-compensated for the performance of the public service tasks in 2012 as well and until the completion of the privatisation process and the entry into force of the new Conventions/public service contracts;
 - (d) the fourth *Altmark* condition is not observed inasmuch as the prolongation of the initial Conventions has not been tendered out and 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.
- (181) The Commission therefore considers that, to the extent that all conditions have remained unchanged in 2012 and until the entry into force of the new

Conventions/public service contracts, the compensation granted to all companies of the Tirrenia Group under the prolongation of the initial Conventions constitutes aid inasmuch as it provides the recipients with a selective economic advantage which is liable to distort competition and affect trade between Member States. The Commission invites the Italian authorities to further clarify the state of the privatisation procedures in respect of all companies concerned.

- (182) The Commission also invites the Italian authorities to provide documentary evidence of the annual compensation paid per line to each of the former Tirrenia Group companies, for the period of the prolongation of the initial Conventions.

4.1.2. Additional measures adopted by the Sardinian region in favour of Saremar (measure 2)

- (183) *State resources*: The measures detailed above in recitals (56) - (76) involve additional State financing mostly granted to Saremar directly by the Sardinian Region. These measures involve the use of State resources. As concerns specifically the measures taken by the Agency concerning the Bonus Sardo-Vacanza, the Commission considers that such measures are imputable to the State given that the Agency is wholly owned by the regional authorities and serves to implement regional policies in terms of tourism and regional development.
- (184) *Selective economic advantage*: The measures referred to in recitals (56) - (63), (68) - (70), (71) - (75) and (76) above favour one undertaking. They are therefore selective. Given that it is directed to the maritime sector, the Bonus Sardo-Vacanza measure is in any event sector selective.
- (185) The Commission notes that the operation of new maritime routes has not been tendered out. The Sardinian Region merely entrusted Saremar with the operation of the two routes connecting Sardinia with mainland Italy. The Commission notes that the entrustment act does not explicitly qualify the services in question as SGEIs, nor does it refer to any compensation to Saremar for the discharge of public service obligations. In addition, contrary to the Italian authorities' allegations, the Commission notes that, based on the information included in the notification, the EUR 10 million compensation decided by Regional Law No. 15 of 7 August 2012 exceeds the operational losses incurred by Saremar in the operation of the two routes. Consequently, at this stage the Commission takes the preliminary view that the four Altmark criteria are not cumulatively fulfilled and consequently that the measure provides Saremar with an economic advantage.
- (186) With regard to the EUR 3 million loan, the Commission considers that, to the extent that the financing was granted to Saremar on market terms, the latter did not benefit of any undue economic advantage. The Commission invites the Italian authorities to detail the financing conditions and to submit evidence that the loan was granted on market conditions. Concerning the letters of comfort, on the basis of the information available at this stage it appears that they did not confer undue advantages to Saremar to the extent that they were not used to guarantee any loan or other financial obligations of the beneficiary.
- (187) Finally, the Commission takes the preliminary view that Saremar recapitalisation confers the latter an economic advantage given that it is unlikely that, in similar

circumstances, a private shareholder, leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.

- (188) In particular, Regional Decision 36/6 laying down the recapitalisation underlines the urgency to ensure, in respect of Saremar, *financial and economic viability, reconciling demand for transport with the economic and financial sustainability of the operations*, given the existence of an alleged cartel on routes to and from Sardinia, with serious consequences on territorial continuity and thus on consumers. At this stage, the Commission has doubts that a private investor would have given the same significance to the operation of the public service and would have subscribed the capital in question. The Commission invites the Italian authorities to confirm the amount of the recapitalisation. The Italian authorities are also invited to detail the financial situation of the company at the moment of the recapitalisation and clarify whether the decision to recapitalise the company has been based on a business plan prepared ex-ante.
- (189) The same considerations apply to the new measures described in recital (76) above.
- (190) The Commission considers that even if part or all costs covered by public financing were to be qualified as public service costs, on the basis of the conclusion in recital (181) above, the compensation granted to cover such costs would provide an economic advantage to Saremar.
- (191) As regards specifically the Bonus Sardo - Vacanza project, the Commission takes the preliminary view that, to the extent that the measure is directed to all passengers travelling to and from Sardinia and requiring accommodation, regardless of the shipping company used, and the applicable conditions concerning the price cap are such that the measure is not restricted to Saremar passengers, the measure might not favour Saremar over competing shipping lines. At this stage however the Commission does not have sufficient information to assess whether the measure de facto conferred an economic advantage to Saremar. It invites the Italian authorities to provide a comprehensive list of the shipping lines providing transport services to the beneficiaries. The Commission also invites the Italian authorities to clarify how the price of the promotional activities has been established and to submit evidence that they have been priced at market value, for instance by providing benchmarks available on the market. In addition, the Commission invites the Italian authorities to clarify whether in application of Regional Decision 25/53, the Sardo - Vacanza bonus project has been discontinued as of July 2011.
- (192) *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.¹⁸ It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.¹⁹ In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the EU, in particular since the

¹⁸ 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.

¹⁹ Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717.

entry into force of 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 countries²⁰ and the Maritime Cabotage Regulation, 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.

- (193) *Conclusion*: The Commission takes the preliminary view that the measures detailed above, with the exception of the letters of comfort, could amount to aid to Saremar.
- (194) However, the Commission invites the Italian authorities and other interested parties to provide comments concerning the comfort letters and of the EUR 3 million loan provided by the Sardinian Region to Saremar.

4.1.3. Misuse of rescue aid (measure 3)

- (195) For the reasons set out in recitals (34)–(40) of the 2010 rescue decision, the Commission considers that the rescue aid measure constitutes state aid within the meaning of 107(1) TFEU.

4.1.4. Compensation to be paid under the future Conventions/public service contracts (measure 4)

- (196) *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.
- (197) *Selectivity*: The relevant subsidies will only benefit certain undertakings, i.e. the purchasers of the Tirrenia and Siremar business branches or the remaining regional companies of the former Tirrenia Group. They are therefore selective.
- (198) *Economic advantage*: In order to conclude on whether or not the compensation for the operation of the public service under the future Conventions/public service contracts constitutes an advantage within the meaning of Article 107(1) TFEU, the Commission has to assess whether the Altmark criteria are fulfilled.

Altmark 1

- (199) The Commission notes that the public service obligations imposed on the beneficiaries have been detailed in the future Conventions/public service contracts.
- (200) Nevertheless, on the basis of the information available at this stage, it appears that competitors offer similar services with comparable frequencies at least on the Napoli-Palermo (low season), Genova-Olbia, Civitavecchia-Olbia (low season), Genova/Livorno-Cagliari routes operated by CIN. As regards the Genova-Porto Torres route, the Italian authorities have stated that competitors only provide mixed services in the high season.

²⁰ OJ L 378, 31.12.1986, p. 1.

- (201) Furthermore, at this stage it appears that competitors offer similar services with comparable frequencies at least on the Milazzo – Isole Eolie (mixed service), Trapani-Pantelleria (mixed service) and Palermo-Ustica (mixed service) routes to be operated by CdI.
- (202) The Italian authorities have not provided further justifications, apart from the general need to ensure territorial continuity and the dependency of the island regions on tourism activities, as to the need to impose public service obligations on CIN and CdI, given that the maritime links in question seem to be already operated by competitors. The Commission invites the Italian authorities and any interested parties to provide comments in this respect.

Altmark 2

- (203) As regards Altmark 2, 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.
- (204) More specifically, the compensation for the discharge of the public service obligations under the new Conventions/public service contracts is calculated on the basis of CIPE Directive. The method of calculation of the compensation, i.e. the cost elements taken into account and the profit allowed to the operator, are detailed therein.
- (205) Therefore the Commission takes the preliminary view that the second condition of the Altmark judgment is observed.

Altmark 3

- (206) The Commission notes that the rules for calculating the compensation to the acquirers of the Tirrenia Group companies for the discharge of public service obligations under new Conventions/public service contracts remain have not changed as compared to those applicable to Tirrenia Group companies from 2010 onwards.
- (207) As mentioned above in recital (14), in its 2011 opening decision the Commission took the preliminary view that the 6.5% risk premium does not reflect an appropriate level of risk. Consequently, for the same reasons as developed in recitals (242) to (248) of the 2011 opening decision, at this stage the Commission considers that the acquirers would be overcompensated for the duration of the new Conventions/public service contracts.

Altmark 4

- (208) Almark 4 is 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 to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.
- (209) In this case the companies endowed with new public service contracts, rather than the contracts themselves, have been tendered out. The Commission has to assess, based on the specific circumstances of the case, whether the tender procedure whereby an operator interested in providing the public service must also take over the company

itself, enables the selection of the tenderer capable of providing the services at the least cost to the community.

- (210) After analysis of the information available to it, the Commission notes in particular that, to the extent bidding companies were already adequately endowed with vessels and crews, they would have incurred lower costs if they had not been obliged to take over the capital assets and the employees of the Tirrenia companies. The Commission therefore takes the preliminary view that, in this specific case, the tendering out of the public service contracts without the obligation to take over the business branches or the companies themselves that were previously providing those services, would have resulted in a lower cost for the community. This assessment does not prejudice any assessment carried out under public procurement rules.
- (211) Moreover, at no time had the Italian authorities claimed 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.
- (212) The Commission therefore takes the preliminary view that the fourth Altmark criterion is not complied with in the present case.
- (213) Given that the four conditions set out by the Court of Justice in the Altmark case are not cumulatively met in this case, the Commission takes the preliminary view that in the present case the compensation to the acquirers of the Tirrenia Group companies confers an economic advantage on the latter.
- (214) *Distortion of competition and effect on trade:* As explained in recital (192) above, the Commission considers that the measure is liable to affect EU trade and distort competition within the internal market.
- (215) *Conclusion:* On the basis of the above, the Commission takes the preliminary view that the public service compensations to be paid to CIN and CdI under the new Conventions with the Italian State may constitute State aid within the meaning of Article 107(1) TFEU.
- (216) To the extent that new public service contracts have been/will be concluded by the Italian State with the buyers of the remaining companies of the former Tirrenia Group, the Commission takes the view that the public compensation provided to these companies for the duration of the new contracts also constitutes aid within the meaning of Article 107(1) TFEU.

4.1.5. Counter-guarantee by the Sicilian Region of the deferred payments of the purchase price of Siremar and increase in CdI's capital (measure 5)

- (217) *State resources and imputability:* The counter-guarantee is financed by the Sicilian Region, and thus undoubtedly by a Member State and through State resources. The guarantee by Unicredit of the deferred payments of the purchase price of Siremar is not financed by State resources. For the reasons mentioned in recital (221) below, the

Commission takes the preliminary view that the capital increase by Mediterranea is financed by State resources and is imputable to the State.

- (218) *Selective economic advantage*: The capital increase is directed to one undertaking, CdI whereas the counter-guarantee to both CdI and Unicredit. The measures are therefore selective.
- (219) Under paragraph 2.2. of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (*hereinafter the Guarantee Notice*)²¹, risk-carrying should normally be remunerated by an appropriate premium.
- (220) Based on the information available to the Commission at this stage it would appear that the counter-guarantee was not remunerated. The counter-guarantee provided CdI with access to a guarantee which otherwise would not have been granted or would have been granted on less favourable terms. Thus the Commission would normally consider that the counter-guarantee procures an advantage to CdI.
- (221) The Commission notes that the letter of CdI does not contest the existence of a counter-guarantee dated 12 October 2011, nor the fact that such counter-guarantee would have procured an advantage to CdI, but merely states that, since it has finally been withdrawn, it did not influence Unicredit's decision to guarantee CdI's financial obligations.
- (222) Furthermore, the Commission notes that the position of the General Accountant appears to be such as to influence the decision making process at regional level. Given its involvement in the day-to-day management of Mediterranea, and the latter's significant share in CdI's capital, the Commission considers it is highly likely that the counter-guarantee was granted with the very aim of favouring the latter in the sale process, rather than on market terms.
- (223) Nevertheless, in order to conclude whether the counter-guarantee dated 12 October 2011 and subsequently withdrawn by Sicily conferred an advantage on CdI, the Commission has to assess whether such guarantee had already produced effects at the moment it was recalled.
- (224) First and foremost, the Commission recalls that, as explicitly laid down by the Guarantee Notice, the aid is granted at the moment when the guarantee is given, not when the guarantee is invoked, nor when payments are made under the terms of the guarantee.
- (225) Second, the Commission notes that the documents submitted by Italian authorities in support of their allegations that the counter-guarantee did not produce effects given that it had been recalled by Sicily, do not predate the award of the tender to CdI. In fact the Commission notes that both documents have been issued at a later date, after SNS had submitted the complaint to the Commission. The Italian authorities provided their comments on SNS allegations only on 2 March 2012, after the counter-guarantee had been recalled.

²¹ OJ C 155, 20.06.200, p. 10.

- (226) Furthermore, the Commission takes the preliminary view that the counter-guarantee also procured an economic advantage to Unicredit, as first guarantor, by decreasing the risks associated with its own guarantee, or rather increasing its security. Unless the counter-guarantee is remunerated by an appropriate premium, it conferred an economic advantage to Unicredit. However, the Commission does not at this stage have sufficient information on the conditions of granting this counter-guarantee by the Sicilian Region. As mentioned above, based on the information available at this stage it would appear that the counter-guarantee was in no way remunerated. The Commission invites the Italian authorities and interested parties to provide information in this respect.
- (227) The Commission also notes that the TAR ruled on 7 June 2012²² that the counter-guarantee by Sicily in the Siremar procedure constituted State aid, irrespective of whether it has been ultimately executed or subsequently withdrawn. In fact, the Court considered that the mere withdrawal of such counter-guarantee implies that the latter had been initially granted. Moreover, the Court considered that the counter-guarantee was such as to decisively influence the sale procedure. Consequently, it declared partially void the sale procedure of the Siremar business branch. By interim order issued on 18 July 2012, the CdS suspended the execution of the TAR judgment, temporarily ruling out the renewal of the procedure.
- (228) Ultimately, the Commission notes that capital increase mentioned in recital (126) above would also confer an advantage to CdI to the extent the Region did not behave like a private market investor. The Commission invites the Italian authorities to provide further details concerning the conditions of such capital increase.
- (229) *Distortion of competition and effect on trade:* On the grounds detailed in recital (192) above, the Commission considers that the counter guarantee and the capital increase are liable to affect EU trade and distort competition within the internal market.
- (230) On the basis of the considerations above, the Commission takes the preliminary view that the capital increase may constitute aid to CdI. The counter-guarantee may also constitute aid to Unicredit and CdI. On the other hand, the guarantee by Unicredit to CdI does not constitute aid given that it is not financed by State resources.

4.1.6. *Deferred payment of the Tirrenia purchase price by CIN (measure 6)*

- (231) *State resources:* When the State sells assets below market price it foregoes State resources and at the same time grants an advantage to the buyer.
- (232) *Selective economic advantage:* The deferral of the purchase price benefits only one undertaking. It is therefore selective.
- (233) Furthermore, it is at this stage uncertain whether all bidders had been aware at the early phases of the procedure of the possibility to effectively pay the purchase price over the whole duration of the future Conventions with no interests applicable.

²² Decision of TAR no. 5172 of 7 June 2012 in the case no. 9686/2011.

- (234) The Commission notes that the real value of the purchase price, obtained by discounting the deferred payments at their value at the moment of the sale, is considerably lower. In fact, the actual value of the purchase price offered by CIN is below the market value set by the valuer appointed by the competent Ministry. The Commission thus takes the preliminary view that CIN may have benefited from an advantage represented by at least the difference between the price set by the independent expert and the future payments discounted at their present value.
- (235) This assessment is without prejudice to the ongoing assessment of the market value of the assets in question under the formal investigation procedure referred to in recital (11) above. Any potential aid resulting from the sale of the going concerns below their market value resulting from the imposition of unreasonable conditions of a public nature is in addition to any aid resulting from the deferral of the purchase price.
- (236) *Distortion of competition and effect on trade*: On the basis of the considerations in recital (192) above, the Commission considers that the deferral of the payment of the Tirrenia purchase price by CIN is liable to affect trade between Member States and distort competition within the internal market.
- (237) Considering the above the Commission takes the preliminary view that the measure may constitute aid to CIN.

4.1.7. Privatisation of the regional companies (measure 7)

- (238) 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.²³
- (239) *State resources and imputability*: The sale procedures are carried out by the regional authorities. The latter have full discretion when defining the selection criteria and deciding to award the tender to a specific bidder. The decision to privatise the companies is thus imputable to the State.
- (240) *Selective economic advantage*: When the State 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.
- (241) 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 was 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;

²³ Case C-482/99 France v Commission [2002] ECR I-4397.

- (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.²⁴
- (242) On the basis of the information available at this stage, the Commission considers that the sale procedures cannot be regarded as sufficiently transparent, unconditional and non-discriminatory so as to rule out by itself the presence of State aid.
- (243) The Commission notes that, according to the Italian authorities, no obligation to maintain employment levels has been imposed on bidders in any of the sale procedures. However, for the reasons developed in recitals (270)–(273) of the 2011 opening decision, the Commission considers that the concomitant sale of the companies with the entrustment of the new public service contracts might deter certain bidders with a different business strategy from submitting a bid and thus might hinder the competitive environment of the sale process. The Commission cannot therefore definitely exclude that the offers would have been higher or that other bidders would have participated in the tenders had the tenders been unconditional.
- (244) Furthermore, the Commission notes that the so-called *technical and financial requirements* as imposed in the Toremar tender effectively disrupted the tender by restricting potential bidders to maritime companies. Whilst such qualitative criteria may be required to ensure the delivery of the public service at the required standards and thus in principle be acceptable for tendering of public service contracts in general, in the present case the companies themselves, endowed with the public service contracts, are put up to sale. In such a case, the Commission considers that the Italian authorities need not impose additional qualitative conditions on the bidders. Moreover, qualitative requirements are in any event imposed as public service obligations by means of the public service contract itself which is eventually entrusted to the buyer.
- (245) Moreover, the Commission notes that in the specific case of Laziomar, the technical offers are scored, carrying a significantly higher weight than economic offers, whilst the shares price is fixed by the public authorities. The Commission considers that in this case the procedure is not designed as to obtain the highest price for the shares.
- (246) Given the above, the Commission considers, at this stage, that the privatisation procedure of the regional companies has not been designed as to ensure that the share sales take place at market price. The Commission invites the Italian authorities to further detail the state of the privatisation procedures in respect of each of the regional companies. The Italian authorities are also invited to clarify the shareholding retained by the regional authorities in Saremar.

4.2. Lawfulness of the aid

- (247) The Italian authorities have been repeatedly reminded of their stand-still obligation under Article 108(3) TFEU as concerns the compensation to be paid to the acquirers of the Tirrenia Group companies under the future Conventions/public service contracts. On several occasions the Commission has informed Italy that the method chosen to

²⁴ XXIIIrd Report on Competition Policy 1993, paragraphs 402 and seqq.

privatise the companies, i.e. the sale of the companies already endowed with new contracts could raise State aid concerns.

- (248) The Italian authorities have notified the compensations to be paid to CdI and CIN under the new Conventions with the Italian State. On 19 July 2012 and 30 July 2012 respectively, the Italian authorities informed the Commission that the new Conventions between the Italian State and CIN and CdI had already been signed. Any aid under the form of public service compensation paid to CIN and CdI as of the date of signature of the Conventions constitutes illegal aid. The same applies for the subsidies for the discharge of public service obligations to be paid to Moby, buyer of Toremar, to the extent that the new public service contract, not yet notified to the Commission, has entered into force. Given that 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.
- (249) The Commission reminds the Italian authorities that any aid measure should be notified to the Commission in advance and should not be implemented before the Commission declares it compatible with the internal market. Consequently, any subsidy granted to the buyers of any of the remaining companies of the former Tirrenia Group for the discharge of public service obligations, inasmuch as it amounts to State aid, should be notified to the Commission beforehand.
- (250) Furthermore, any aid resulting from the sale below market price of the public authorities' shareholding in Toremar constitutes illegal aid. Similarly, following the completion of the Caremar, Saremar and Laziomar sale procedures, any aid involved in the sale also would constitute illegal aid.
- (251) The same applies to the remainder of the measures subject to the present decision, including the compensation to Saremar for the temporary operation of the two additional routes linking Sardinia to the mainland, to the extent such measures have been put into effect before authorisation by the Commission.

4.3. Compatibility of the aid

4.3.1. Compensation paid under the prolongation of the initial Conventions up to the completion of the privatisation (measure 1)

- (252) To the extent that the Commission accepts the qualification of the services as SGEIs, their compatibility has to be assessed in light of Article 106(2) TFEU.
- (253) 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.*"
- (254) This Article provides a derogation from the prohibition of State aid contained in Article 107(1) 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.

- (255) On 31 January 2012 the new SGEI package, including the European Union framework for State aid in the form of public service compensation (2011)²⁵ (hereinafter *the 2011 SGEI Framework*) and *the 2011 SGEI Decision* entered into force. As of this date, the compatibility of the aid under the form of public service compensation would have to be examined in light of the 2011 SGEI Decision and the 2011 SGEI Framework's criteria.

Applicability of the 2005 and 2011 SGEI Decisions

- (256) 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 2005 SGEI Decision*)²⁶ was only applicable to State aid in the form of public service compensation granted to undertakings in connection with SGEI which complied with the Maritime Cabotage Regulation. For the reasons detailed in recitals (303) – (305) of the 2011 opening decision, the Commission considers that the 2005 SGEI Decision was not applicable at any given moment to the compensation granted to the Tirrenia Group companies under the prolongation of the initial Conventions.
- (257) However, given that a similar requirement of compliance with the Maritime Cabotage Regulation has been laid down by the 2011 SGEI Decision, the Commission considers that aid in the form of public service compensation paid to the companies of the former Tirrenia Group under the prolongation of the initial Conventions as of 31 January 2012 cannot be considered compatible with the internal market and exempted from the notification requirement under the 2011 SGEI Decision either.

Applicability of the 2011 SGEI Framework

- (258) The 2011 SGEI Framework applies retroactively to any illegal aid granted before its entering into force on which the Commission takes a decision after 31 January 2012, with the exception of the provisions of paragraphs 14, 19, 20, 24, 39 and 60 thereafter. Consequently, the compatibility of the compensation granted to the Tirrenia Group companies, namely Tirrenia, Siremar, Saremar, Caremar, Toremar, Laziomar, as of 2009 and until the completion of the privatisation process normally falls within the scope of application of the 2011 SGEI Framework.
- (259) Nevertheless, according to paragraph (9) thereof, aid for providers of SGEI in difficulty would be assessed under the R&R Guidelines. The Commission notes that, in the present case, the prolongation of the initial Conventions after the end of 2008 has been carried out by subsequent legal acts, as follows:

²⁵ OJ C 8, 11.1.2012.

²⁶ OJ L 312, 29.11.2005, p. 67.

- (a) Law no.14 of 27 February 2009 laid down the prolongation of the initial Conventions up to the end of 2009;
 - (b) The 2009 law laid down inter alia the prolongation of the initial Conventions until 30 September 2010; and
 - (c) The 2010 law provided for a further prolongation of the initial Conventions from 30 September 2010 up to the end of the privatisation process.
- (260) As detailed in recital (19) above, Tirrenia and Siremar have been admitted to the collective insolvency procedure in August and September 2010 respectively, and thus were already in difficulty at the moment of the prolongation laid down by the 2010 law. There is currently no indication that the companies would have been in difficulty within the meaning of the R&R Guidelines before this date. Considering that Tirrenia and Siremar were in difficulty only at the moment of adoption of the last entrustment, the Commission takes the view that the compensation received by the latter as of 1 October 2010 and completion of the privatisation would necessarily have to be assessed on the basis of the R&R Guidelines.
- (261) Given that the compatibility criteria laid down by the R&R Guidelines are not observed in this case (see in particular the grounds developed in recitals (275) – (276) below) the Commission takes the preliminary view that the compensations paid to Tirrenia and Siremar in difficulty would amount to incompatible restructuring aid.
- (262) The Commission has at present no indication that Saremar, Caremar, Toremar and Laziomar were in difficulty within the meaning of the R&R Guidelines at any time. Consequently, the compatibility of the compensation granted to these four regional companies has to be assessed on the basis of the relevant provisions defined by the 2011 SGEI Framework:
- (a) the aid should granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty;
 - (b) the responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. Such act should clearly specify the content and duration of the public service obligations; the undertaking entrusted with these obligations and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking; the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and the arrangements for avoiding and recovering any overcompensation.
 - (c) the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit. Where duly justified, the net avoided cost methodology for calculating the net cost necessary to discharge the public service obligations, may be replaced by the methodology based on cost allocation. In such case the net cost necessary to discharge the public service obligations would be calculated as the difference between the costs incurred in and the revenues resulted from the operation of the SGEI.

- (263) On the basis of the grounds developed in recitals (197) – (224) of the 2011 opening decision, the Commission cannot at this stage conclude whether the definition of the public service contains manifest error.
- (264) As regards the second compatibility condition, the Commission notes that the beneficiaries have been explicitly entrusted with the provision of the services in question.
- (265) As regards the reasonableness of the compensation, on the basis of the considerations in recitals (242) – (248) of the 2011 opening decision at this stage the Commission considers that the beneficiaries may have been overcompensated for provision of the public service.
- (266) Finally, the Commission notes that the provisions of paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework apply to illegal aids granted after 31 January 2012. Consequently, after 31 January 2012 in order to be deemed compatible with the internal market, SGEIs have to also observe the following conditions:
- (a) The Member State has to provide evidence that due account of the interests of the users and providers have been taken into account by means of a public consultation or other appropriate instrument (paragraph 14);
 - (b) The responsible authorities have to comply with public procurement rules, including requirements of transparency, equal treatment and non-discrimination (paragraph 19);
 - (c) Where the provision of the same SGEI has been assigned to several undertakings, the compensation should be calculated on the basis of the same method (paragraph 20);
 - (d) The net cost necessary for the discharge of the public service obligations should be calculated using the net avoided cost methodology where this is required by the Union or national legislation and in other cases where this is possible (paragraph 24);
 - (e) Member States have to introduce incentives for the efficient provision of the SGEI to a high standard, unless they can duly justify that it is not feasible or appropriate to do so (paragraph 39);
 - (f) Member State has to publish the following information: the result of the public consultation; the content and duration of public service obligations, the undertaking and the territory concerned; the amount of aid granted on a yearly basis (paragraph 60).
- (267) Given that at present there is no indication that the Italian authorities have in fact carried out a public consultation, nor published the required information concerning the public service obligations and the compensation paid for their discharge, the Commission takes the preliminary view that the compensation granted to former Tirrenia companies for the operation of the services after the entry into force of the 2011 SGEI Framework would be incompatible with the internal market. The Commission invites the Italian authorities to detail observance of these criteria.

4.3.2. *Additional measures adopted by the Sardinian region in favour of Saremar (measure 2)*

(268) Insofar as, at this stage, the Commission has doubts both as to the legitimacy of the public mission entrusted to companies of the former Tirrenia Group, including Saremar, under the prolongation of the initial Conventions, as well as to the proportionality of the compensation to the costs incurred by the latter in the operation of the public service as of 2010, it cannot consider that the additional support measures provided by the Sardinian Region are necessary to finance public service obligations. As concerns specifically the compensation granted to Saremar for the operation of the two additional routes, the Commission notes that, on the basis of the grounds in recital (257) above, the measure cannot be considered compatible on the basis of the 2011 SGEI Decision. Furthermore, on the basis of the grounds developed in recital (185) above, the Commission cannot conclude that the compensation is granted for the provision of a correctly defined SGEI, appropriately entrusted to the beneficiary, and that it does not go beyond what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit. For these reasons, and also considering the arguments in recitals (266) - (267) above, the Commission takes the preliminary view that the measure cannot be deemed compatible on the basis of the 2011 SGEI Framework. Therefore at this stage the Commission considers that the entirety of the additional measures in favour of Saremar is likely to constitute operating aid reducing the costs that the company would otherwise have to bear from its own resources and thus to be considered as incompatible with the internal market.²⁷

4.3.3. *Misuse of rescue aid (measure 3)*

(269) In November 2010 the Commission approved rescue aid to Tirrenia. On the basis of paragraph 25(a) of the R&R Guidelines, rescue aid must come to an end within a period of not more than 6 months after the disbursement of the first instalment to the firm. When notifying the rescue aid, Italy undertook to terminate the guarantee at the latest 6 months after its disbursement.

(270) According to the information submitted by the Italian authorities, the financing should have been reimbursed by 28 August 2011, six months following the disbursement of the first instalment of the loan to the recipients. As detailed above, the Italian authorities have confirmed that the guarantee subject to the rescue decision has been called on 11 July 2011 and Tirrenia and Siremar were at that date debtors to the State. As mentioned above, on 24 October 2012 the Italian authorities have informed the Commission that an amount of EUR 25 852 548.93 for Tirrenia and EUR 15 511 529.35 for Siremar had been paid back to the State on 18 September 2012.

(271) The prolongation of the rescue aid after the 6-month period needs to be assessed on the basis of the R&R Guidelines in order to verify whether it constitutes an illegal and incompatible aid or rather a compatible restructuring aid.

(272) In accordance with paragraph 25(c) of the R&R Guidelines, the Italian authorities undertook to communicate to the Commission, no later than six months after the

²⁷ Judgement of 14 February 1990, case C-301/87 *France/Commission* [1990] ECR I-307, paragraph 41.

rescue aid measure has been authorized, a restructuring/liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated. According to the information submitted by the Italian authorities, in the present case Italy granted the rescue aid 3 months after its approval by the Commission. Therefore, the deadline for terminating the guarantee or submitting a restructuring/liquidation plan expired on 28 August 2011, as confirmed by the Italian authorities by letter dated 16 May 2011.

- (273) However, Italy did not submit to the Commission a restructuring (or liquidation) plan. Rather, one month prior to the expiry of the prescribed 6 months, the guarantee was called.
- (274) Further, the conditions for an extension as laid down in paragraph (26) of R&R Guidelines are not fulfilled either. Under this provision, a rescue aid can be extended until the Commission has adopted a decision on a restructuring plan, only if such plan was submitted within the 6 months period, which is not the case.
- (275) The Commission must also assess whether the illegally prolonged rescue aid can be found compatible with the internal market on other grounds. Pursuant to paragraph (20) of the R&R Guidelines, aid to firms in difficulty may only be found compatible on the basis of these Guidelines. The prolongation of a rescue aid can be a compatible restructuring aid in case it fulfils the conditions for authorisation stipulated in paragraphs (32) to (51) thereof. In particular, the approval of a restructuring aid is conditional on the implementation of a viable, reasonable and realistic restructuring plan which must be submitted for endorsement to the Commission.
- (276) Considering that Italy has not submitted such a restructuring plan, the Commission, at this stage, finds it unlikely that the prolongation of the rescue aid could be found compatible as a restructuring aid. It therefore appears that the rescue aid has been granted in breach of the authorising decision and moreover cannot be considered as compatible restructuring aid since the conditions of the R&R Guidelines were not observed.
- (277) Furthermore, since the beneficiary did not cease to benefit from the rescue aid after the expiry of the 6-month period as laid down in the rescue aid decision, the Commission concludes at this stage that the aid measure at stake must be considered as illegal and possibly misused from 28 August 2011 until 18 September 2012, given that it has been used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) of the Procedural Regulation.
- (278) According to paragraph (15) of the Procedural Regulation "*misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful aid and should thus be treated according to similar procedures*".
- (279) On the basis of the considerations above, the Commission takes the preliminary view that from 28 August 2011 and until 18 September 2012 Tirrenia and Siremar have benefitted from incompatible aid.
- (280) In the present case an asset deal took place after the granting of the rescue aid. Consequently, the Commission has to verify whether the advantage inherent in the aid was passed on to the buyer of the Tirrenia and Siremar business branches. The Commission notes that in case Tirrenia and Siremar's assets have been sold at a price

which is lower than their market value, the potential recovery of any misused aid would have to be extended to the buyers.

4.3.4. Compensation to be paid under the future Conventions/public service contracts (measure 4)

Compatibility under the 2011 SGEI Decision

- (281) The 2011 SGEI Decision entered into force on 31 January 2012. Accordingly, the compatibility of the aid in the form of public service compensation to the buyers of the Tirrenia Group companies would first have to be examined in light of the 2011 SGEI Decision's criteria.
- (282) According to Articles 2(2) and 2(4) thereof, the 2011 SGEI Decision is only applicable where the entrustment period does not exceed 10 years and, as concerns maritime services, to State aid in the form of public service compensation which complies with the Maritime Cabotage Regulation. The Commission notes that in this case, although the new Conventions/public service contracts have not been directly tendered out, the companies themselves entrusted with new contracts have been put up to tender.
- (283) Nevertheless, the Commission further notes that, apart from the future Convention between the Italian State and CIN, and the contracts to be signed with the acquirers of Caremar and Laziomar, the remaining Convention and public service contracts seem to have a 12-year duration. The Commission considers that in such cases the 2011 SGEI Decision would not be applicable. In any event, given that the signed contracts have not been provided to the Commission, at this stage it cannot be ascertained whether the condition concerning the duration of the contracts is complied with. As to the specific case of the CIN Convention, the Commission notes that the Italian authorities have confirmed that, in accordance with the provisions of the 2009 law, its duration will be of 8 years. Nevertheless the Commission also notes that the draft Convention submitted to the Commission does not foresee any specific duration. Furthermore, the decision of the Italian Competition Authority to initiate the proceedings as concerns the merger between CIN and the Tirrenia business branch²⁸ states that the duration of the Convention would be of *at least 8 years*. The signed Convention has not been submitted to the Commission.
- (284) Furthermore, the Commission notes that under the new Convention, CIN will receive more than EUR 15 million per year as compensation for the discharge of public service obligations. The Commission cannot definitely conclude whether, for some of the links to be operated by CIN under the public service regime, the number of passengers transported in the two previous years to that of the entrustment does not exceed the threshold laid down by the 2011 SGEI Decision, namely 300 000 passengers.
- (285) First, the Commission notes that according to the information submitted by the Italian authorities, apart from Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres routes, as concerns all passenger routes operated under the public service

²⁸ See decision of the Italian Competition Authority of 30 May 2012 to open proceedings in case Tirrenia di Navigazione / Compagnia Italiana di Navigazione CIN (www.agcm.it).

regime, the passenger levels in 2010 and 2011 appear to observe the ceiling laid down by the 2011 SGEI Decision. The information submitted by the Italian authorities shows that for the three routes mentioned above the number of passengers has largely exceeded (with the exception of the Napoli – Palermo route in 2011) the abovementioned threshold. The Commission however notes that this information included the passengers carried, under the prolongation of the initial Conventions, during the peak season whereas, under the new Convention, the routes in question are operated under a public service regime only in the low season.

- (286) The Italian authorities have provided to the Commission a breakdown of the passengers carried by Tirrenia in the high and low season respectively in 2010 and 2011. The information shows that, considering only the passengers carried in the low season for the Napoli – Palermo, Civitavecchia – Olbia and Genova – Porto Torres routes, the passenger ceiling laid down by the 2011 SGEI Decision would be observed on all routes.
- (287) However, the 2011 SGEI Decision is only applicable to the extent that the services in question can be legitimately qualified as SGEI. The Commission also notes that the Italian authorities have argued that the passengers ceiling in Article 2(1)(d) of that Decision would not be applicable in the present case, given that the routes in question have not been operated on commercial terms for 2 years prior to the entrustment of the public service to CIN.
- (288) Furthermore, given that the Commission has doubts on the proportionality of the compensation to be paid under the future Conventions/public service contracts, it cannot consider the conditions laid down in Article 6 of the 2011 SGEI Decision are met. The Commission takes the preliminary view that the compensations cannot be considered compatible and exempted from notification on this basis.

Compatibility under the 2011 SGEI Framework

- (289) The 2011 SGEI Framework lays down the compatibility criteria of measures subject to the notification requirement and, unlike the 2005 SGEI Framework, is applicable to maritime transport. The following compatibility conditions have been laid down therein:
- (a) the aid should be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty (paragraph 12);
 - (b) the responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. Such act should clearly specify the content and duration of the public service obligations; the undertaking entrusted with these obligations and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking; the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and the arrangements for avoiding and recovering any overcompensation (paragraphs 15 and 16).
 - (c) the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit (paragraph 21).

- (290) As detailed in recitals (200) – (202) above, on the basis of the information available at this stage, the Commission takes the preliminary view that on some of the routes in question competitors appear to be providing similar services.
- (291) As regards the second compatibility condition, the Commission notes that the beneficiaries have been explicitly entrusted with the provision of the services in question. The parameters of the compensation have been set in advance in an objective and transparent manner. The Commission therefore considers that the services have been adequately entrusted to the beneficiaries.
- (292) As of 2010, the compensation granted to the companies of the former Tirrenia Group has been calculated by the early application of the methodology laid down by the draft new Conventions/public service contracts and detailed in CIPE Directive.
- (293) The upper ceiling of the annual compensation is fixed by law in advance in respect of each of the former Tirrenia companies. An advance payment of 70% is paid in March of each year. A second payment of 20% is made in June. The remaining is paid in November. Interests are applicable in case of late payments of over 30 days.²⁹
- (294) However, according to the CIPE Directive, the scope of public service, the tariff constraints and the level of public service compensation is such as to grant the public service operator coverage of the entirety of admissible costs. The CIPE Directive clearly lays down that, in case the company cannot reach economic balance, the scope of the subsidised activities will be reduced, the assets reviewed or the fare constraints modified. According to provisions of the new Conventions, the compliance with these conditions will be reviewed by the public authorities together with the beneficiary three times per year.
- (295) As concerns specifically the profit allowed, on the basis of the new methodology, when calculating the profit the risk premium is set at 400 basis points. However, if a service is not operated on an exclusive basis, such as in the case under scrutiny, the greater risk borne by the operator is remunerated by the addition of an extra 250 basis points to the risk premium.
- (296) The 2011 SGEI Framework confirms that "*the reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the entrustment act, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism*".
- (297) Given that, in this case, the net cost of discharging public service obligations is basically fully compensated, the Commission considers that the operation of the public service is not linked with substantial contractual risks. Consequently, in the light of the new SGEI Framework, the Commission takes the preliminary view that, in these cases, the risk premium may not exceed 100 basis points.

²⁹ EURIBOR plus 200 bps.

- (298) The same method is applicable for the calculation of the compensation to the acquirers of Caremar, Toremar, Saremar and Laziomar. Consequently, at this stage the Commission doubts the compatibility with the internal market of the aid under the form of public service compensation to the acquirers of all former Tirrenia companies under the future Conventions/public service contracts.
- (299) Furthermore, the Commission notes that the provisions of paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework apply to aids notified or granted after 31 January 2012. Consequently, the compensations to the acquirers of the Tirrenia companies also have to be assessed against the compatibility conditions already mentioned in recital (266) above.
- (300) Given that at present there is no indication that the Italian authorities have in fact carried out a public consultation, nor published the required information concerning the public service obligations and the compensation paid for their discharge, the Commission takes the preliminary view that the compensation to the acquirers of the Tirrenia companies under the future Conventions/public service contracts is incompatible with the internal market. The Commission invites the Italian authorities to detail observance of these criteria. The Italian authorities are also invited to provide to the Commission the signed Conventions with CIN and CdI.

4.3.5. Counter guarantee by the Sicilian Region of the deferred payments of the purchase price to be paid by CdI for Siremar and increase in CdI's capital (measure 5)

- (301) The Commission preliminarily considers that the counter-guarantee granted by Sicily in the context of the sale of Siremar going concern may constitute aid to CdI as the borrower and to Unicredit as the first guarantor.
- (302) Under the Guarantee Notice, the compatibility of such aid has to be assessed on the basis of the criteria provided for in frameworks and guidelines concerning horizontal, regional and sectoral aid. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.
- (303) At this stage of the procedure, the Commission considers that the counter-guarantee may constitute operating aid to both Unicredit and CdI given that it does not appear compliant with any of the guidelines in force. Such aid is in principle incompatible with the internal market. The same applies as concerns the increase in capital mentioned in recital (124) above. The Commission invites the Italian authorities to submit observations in this respect.

4.3.6. Deferred payment of the Tirrenia purchase price by CIN (measure 6)

- (304) Based on the information available at this stage, the Commission considers that the sale below the market price of the Tirrenia going concern may constitute operating aid, which is in principle incompatible with the internal market.

4.3.7. Privatisation of the regional companies (measure 7)

- (305) At this stage, the Commission considers that any aid that might have arisen in the course of the privatisation of the regional companies by sale of the shares below

market price would be incompatible as it would not seem to fall within the scope of any of the derogations provided for by Article 107(2) and (3) TFEU, nor Article 106(2).

- (306) Moreover, as indicated in recital (304) of the 2011 opening decision, 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 non-discrimination obligation imposed by Article 4 of the said Regulation. However, the Commission also noted in recital (308) of the 2011 opening decision that, putting out to tender the companies 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. In any case, if there is an infringement, the Commission should examine whether such infringement affects the compatibility of any aid that might result from the privatisation of such companies in that it is necessary for the attainment of the object or proper functioning of that aid and exacerbates the distortion it produces.

4.3.8. *Conclusion on compatibility*

- (307) At this stage of the procedure, the Commission takes the preliminary view that the disputed measures in favour of the companies of the former Tirrenia Group and/or their acquirers appear to be incompatible with the internal market.
- (308) Therefore, the Commission has decided to extend the formal investigation procedure provided for in Article 108(2) TFEU in relation to measures 1, 2, 3, 4, 5, 6 and 7.

5. DECISION

- (309) 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.
- (310) The present decision only concerns State aid aspects and does not in any way prejudice any possible further assessment by the Commission of the observance of other Treaty provisions.
- (311) 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