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**Subject: State aid SA.33037 (C/2012) – Italy**

**Retroactive compensation of SIMET SpA for public transport services  
provided between 1987 and 2003**

**Sir,**

The Commission wishes to inform Italy that, having examined the information supplied by the Italian authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>.

**1. PROCEDURE**

- (1) By electronic notification of 18 May 2011, the Italian authorities notified, in accordance with Article 108(3) TFEU, the retroactive compensation to Simet SpA (hereinafter: Simet), for the provision of inter-regional bus transport services under a public service obligation in the period 1987-2003, as ordered by the *Consiglio di Stato*, Italy's Supreme Administrative Court (hereinafter: the notified measure). The notification was registered under case number SA.33037.
- (2) Further information was provided by the Italian authorities in submissions of 12 July 2011, 5 October 2011, 20 February 2012, 2 and 28 March 2012, and 17 April 2012.

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<sup>1</sup> With effect from 1 December 2009, Articles 73, 87 and 88 of the EC Treaty have become Articles 93, 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 93, 107 and 108 of the TFEU should be understood as references to Articles 73, 87 and 88, respectively, of the EC Treaty where appropriate.

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## 2. DESCRIPTION OF THE MEASURE

### 2.1. The company

- (3) Simet is a private company providing passenger transport services by bus based on service concessions granted by the Italian State under Law 1822/1939. More specifically, Simet operates a network of inter-regional scheduled bus connections between the Calabria Region and other Italian regions. In addition to these services, which account for approximately 2/3 of its revenues, Simet also provides other services, including international travel services, tourism services and bus rental services<sup>1</sup>, accounting for the remaining 1/3 of its total revenues.
- (4) From the information provided by the Italian authorities, Simet appears to have requested from the Ministry for Infrastructure and Transport in October 1999 retroactive public service compensation for its inter-regional bus service with respect to years starting from 1987. This request was denied by the Ministry. It considered that it had not issued any document entrusting Simet with carrying out a public service obligation. In response to this refusal, Simet brought legal action before the Italian administrative courts requesting retroactive compensation of EUR 66 891 982 in annual payments for the discharge of the public service obligations.

### 2.2. The judgements by *Consiglio di Stato*

- (5) Following a number of subsequent appeals, the *Consiglio di Stato*, by judgment of 9 March 2010 (*decisione 1450/2010*), recognised Simet's right to receive payment for its scheduled (predominantly inter-regional) bus services, covered by concessions issued by the Italian State, on the basis of Council Regulation (EEC) No 1191/69<sup>2</sup>. The precise amount of the compensation was left to be determined on the basis of reliable data from the company's accounts.
- (6) The judgement of the Court does not precisely define from which legal act and in which form the imposition of the public service obligations followed.
- (7) The Court refers, *inter alia*, to retroactive payments Simet benefited from in the past:
- in 1981, the company received retroactive subsidies for alleged tariff obligations<sup>3</sup> imposed in 1972-1974. The legal basis for this payment was presidential decree DPR 1227 of 29 December 1969 which, in turn, referred to Council Regulation (EEC) No 1191/69,
  - on the basis of a law of 1986<sup>4</sup>, the company benefited from retroactive payments per kilometer for the period 1975 to 1986 paid "in proportion to the liabilities deemed acceptable".
- (8) The Court then stresses that the underlying public service obligations were maintained or new obligations imposed without any compensation being provided.

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<sup>1</sup> see <http://ngs.simetspa.it/portale/azienda/>

<sup>2</sup> Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway

<sup>3</sup> Tariff obligations are obligations to provide services at tariffs which go against the commercial interests of a company.

<sup>4</sup> Law No 877.

- (9) An order of the *Consiglio di Stato* (*ordinanza* 2072/2011), rendered on 18 January 2011 following the failure of the administration to comply with its judgment of 9 March 2010 (*decisione* 1450/2010), provides additional indications as to what the public service obligation could have entailed. In that order, the *Consiglio di Stato* states that “*the Ministry has repeatedly denied the company the opportunity to change the routes, times, stops, as well as ordered to keep transportation tariffs at a level not exceeding those charged by Ferrovie dello Stato (Italian State Railways) – these are elements symptomatic of carrying out a public service, according to the company*”.
- (10) The *Consiglio di Stato* considered that the company was entitled to receive public service compensations even in the absence of a prior request for the elimination of the public service obligations or for a corresponding compensation<sup>5</sup>. In the Court’s opinion, these prior requests were not needed as “*it is left to the initiative of the Member States themselves to take measures to terminate public service obligations, in public transport services of a local character as elsewhere [...]. Not only did the Italian legislature choose not to avail itself of that power, but it laid down, in Law No 59/97 and in Legislative decree No 422/97, that public service contracts must include an obligation to grant compensation for discharging public service obligations*”.
- (11) In its judgment of 9 March 2010, the *Consiglio di Stato* refers, *inter alia*, to the judgment of the Court of Justice of 24 July 2003 in Case C-280/00 (the *Altmark* judgement<sup>6</sup>) which “*identified the conditions which must be fulfilled in order for compensation to be granted under Council Regulation (EEC) 1191/69*”. The Court also refers to the judgment of the Court of Justice of 12 July 2007 in case C-504/07 (the *Antrop* judgement<sup>7</sup>) “*according to which the purpose of [Council Regulation (EEC) 1191/69] is the termination of obligations arising from the concept of public service*”.
- (12) While the judgment mentions the new Regulation (EC) No 1370/2007<sup>8</sup> governing public service compensations, explaining that “*it lays down compensation criteria which are not dissimilar to those laid down in previous Community regulations*”, the *Consiglio di Stato* ordered the responsible authorities to pay the compensation on the basis of Articles 6, 10 and 11 of Council Regulation (EEC) No 1191/69.
- (13) The Italian authorities have decided to await the assessment of the notified measure by the Commission before executing the judgments of the *Consiglio di Stato* (*decisione* 1450/2010 and *ordinanza* 2072/2010) and pay the compensation ordered to Simet.

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<sup>5</sup> According to Article 4(1) of Council Regulation (EEC) No 1191/69: “It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them”. Article 6(3) provides: “The competent authorities of the member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards tariff obligations. The right to compensation shall arise on the date of the decision by the competent authorities [...]”.

<sup>6</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>7</sup> Case C-504/07 *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)*. [2009] ECR I-03867

<sup>8</sup> Regulation (EC) no 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70

### 2.3. Additional information/observations provided by the Italian authorities

- (14) According to the Italian authorities, Simet, similar to other providers of inter-regional scheduled bus transport services, operated on the basis of provisional licences which had to be renewed annually upon the request of the company<sup>9</sup>. Over time, the company submitted a number of requests to change the modalities of the services provided, which were always approved in accordance with the law and the procedure described in Presidential Decree 369/94<sup>10</sup>. The Italian authorities were unable to find any records which indicate that, as alleged by Simet and held in *ordinanza* 2072/2010 of the *Consiglio di Stato* that “the Ministry has repeatedly denied the company the opportunity to change the routes, times, stops”. The Italian authorities consider that the only reason for the rejection of proposed changes, if any, could have been the provisions embedded in Article 5 of Law 1822/39<sup>11</sup> which provides for preferential rights, under certain conditions, to provide new services for the rail-based transport operators and existing bus service providers in a given area to provide new services. Also, the related presidential decree, decree 369/1994 (in particular Articles 4 and 5 thereof), provided for a detailed procedure for the assessment and comparative analysis of applications related to the introduction of any new service on the basis of a concession. Any rejections should therefore normally be the result of balancing the interests of the different companies involved and not the imposition of public service obligations.
- (15) The Italian authorities also state that the licences granted have always specified that the service was operated at the company’s own risk and that the operation of the service did not give the company any right to a subsidy or compensation of any kind. As an example, the Italian authorities have provided a copy of the ministerial regulations concerning the licence to provide scheduled services on the Cariati – Rome route (1984 license, subsequently renewed annually upon the company’s request).
- (16) According to the Italian authorities, the tariffs proposed by the company itself were reflected in the annual licence regulations accepted by the Ministry for Infrastructure and Transport. As an example, the Italian authorities have submitted copies of the license request (1997) and approval (1998, as subsequently renewed) with respect to the Cosenza-Verona route.
- (17) The Italian authorities admit, however, that until the end of 1991 Circular 13/74 of 30 April 1974 provided that the tariffs of long-distance scheduled bus services had to be similar to those of second-class rail transportation to avoid interference between the two systems of transport. In particular, in relation to any planned price increases by the *Ferrovie dello Stato* (Italian Railways) a coordination was deemed appropriate with respect to fares charged on bus routes in State competence. The tariffs of *Ferrovie dello Stato* were regularly revised upwards. It therefore seems questionable to the Italian authorities to what extent the above Circular could be considered as providing a technical cap on price. Most likely, “coordination” tariff levels were achieved for the two modes. Subsequently, from 1992 to 2000, fare increases had to be contained

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<sup>9</sup> These licences provided the company with the exclusive right (concession) to furnish the relevant services.

<sup>10</sup> Regulations on simplifying the concession procedure for ordinary bus lines under government jurisdiction.

<sup>11</sup> Rules governing bus services for passengers, baggage and agricultural packages on the basis of a concession awarded to private industry (rules subsequently replaced by Legislative Decree 285/2005).

within the rate of inflation, which at the time was indicated by the inter-ministerial pricing committee. This stems from official memorandum No 801 of 17 March 1992.

- (18) The Italian authorities consider that the above measures might be classified as a restriction on complete autonomy of pricing, which would not be considered tariff obligations subject to mandatory compensations. According to the Italian authorities, these could be considered measures of a type described in Article 2(5) of Regulation (EEC) No 1191/69, namely "*obligations arising from general measures of pricing policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof*".
- (19) The Italian authorities also enquire to what extent it would be appropriate to apply the common compensation procedure of Articles 10 and 11 of Regulation (EEC) No 1191/69 if the services in respect of which compensation was ordered are inter-regional services. More specifically, the Italian authorities consider that, as of July 1992, Article 1(5) of Regulation (EEC) No 1191/69 implicitly prohibits the unilateral imposition/maintenance of public service obligations in relation to such services<sup>12</sup>.
- (20) The Italian authorities also refer to the judgment of the General Court of 16 March 2004 in Case T-157/01 (the *Combus* judgment),<sup>13</sup> which clearly differentiates between public service contracts and unilateral public service impositions and concludes that the common compensation procedures of Articles 10 and 11 of Regulation (EEC) No 1191/69 referred to by *Consiglio di Stato* apply only to unilateral public service impositions. In this respect, the Italian authorities doubt to what extent Simet can be considered to have had unilaterally imposed upon it a public service obligation, given that the company itself asked every year for the renewal of the licences to provide inter-regional services in the knowledge that those licences always contained the clause that the service was operated at the company's own risk and that the operation of the service did not give Simet a right to any kind of subsidy or compensation.
- (21) The Italian authorities also enquire whether the requirement of Article 4 of Regulation (EEC) No 1191/69, to submit a prior application in case a company wishes to receive public service compensations, can be waived/does not apply in Simet's circumstances, as decided by the *Consiglio di Stato*. In this context, the Italian authorities note, *inter alia*, that Law No 59/97 and Legislative decree No 422/97, which were quoted amongst other considerations explaining why Simet did not have to proceed with the prior application pursuant to Article 4 of Regulation (EEC) No 1191/69, apply only to local and regional bus services, whereas Simet provides inter-regional services.
- (22) Furthermore, the Italian authorities note that the compensations ordered by the *Consiglio di Stato* concern, *inter alia*, the period between 1987 and 1999, a period during which the company did not have the account separation system that is needed for the precise identification of the costs and revenues involved. Therefore, the Italian authorities enquire as to whether compensation for the period when the negative impact of the alleged public service obligations was not properly documented, i.e. compensation based on assumptions rather than real data, is acceptable.

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<sup>12</sup> the change introduced by Regulation 1893/91

<sup>13</sup> The Court judgment in Case T-157/01 (*Danske Busvognmænd v Commission*), in particular article 77.

(23) The Italian authorities could not provide any details as to the compensations/subsidies enjoyed by the company prior to 1986, as no records were preserved.

#### **2.4. Amount of compensation - Outside consultant's evaluation**

(24) With respect to the amount of the compensation which, according to the judgement of the *Consiglio di Stato*, had to be subsequently determined on the basis of reliable data from the company's accounts, the Italian authorities have submitted an opinion contracted by Simet and prepared by an outside consultant – professor of Business Administration at Rome's Sapienza University – without, however, endorsing that opinion.

(25) While the opinion covers the period between 1987 and 2013, the Italian authorities consider that the relevant period for the purposes of the notified measure should be 1987 to 2003 (see Section 2. 5 of the present decision).

(26) The opinion confirms that Simet implemented account separation allowing for the identification of the costs associated with inter-regional scheduled bus transport services only as from 2000. As regards revenues, the actual entries for each year for inter-regional bus services appear to be reasonably well identifiable, also including the period before the introduction of account separation.

(27) To determine the operating costs related to the inter-regional scheduled bus services in years prior to 2000, the consultant took the average operating cost to revenue ratio for the period from 2001 to 2008 (114:100) and replicated it for the years 1987 to 1999.

(28) The financial charges connected with the inter-regional scheduled bus services were determined proportionally to the share of the inter-regional scheduled bus services in the total revenue.

(29) In addition, the consultant also calculated the sum of the reasonable profit, which was defined as required return on the capital invested by shareholders in the inter-regional scheduled bus services, based on the following assumptions:

- the capital invested in the inter-regional scheduled bus services as annual depreciation of the vehicles attributed to the relevant activity multiplied by 5.5, which corresponds to the average expected working life of the vehicles. No justifications were provided with respect to the assumptions chosen;
- it was then assumed that financing of the company's capital requirements related to inter-regional transport services were met at 30% from debt and at 70% from equity. Again, no justification was provided;
- based on the formula chosen by the consultant for calculating required return on equity<sup>14</sup>, the relevant rate fluctuated at a high of between 20% to 36% during the period 1987 to 2003. No detailed justification was provided for the underlying assumptions.

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<sup>14</sup> The required return % on the invested capital was, in turn, calculated for each year as follows: 1) 10 year interest swap rate swap was taken (risk free rate); 2) market interest premium was added (each year 6%) as it was considered that the relevant activity is as risky as the market; 3) further 2% premium was added to reflect "illiquidity"; 4) the result of the above additions was considered as the % of return required net of taxes; 5) subsequently, the result obtained was revised upwards, on the basis of 40% corporate income tax rate.

- (30) The annual compensation was determined as a sum of the deficit stemming from the operating losses, financial charges and return on equity. As the relevant annual compensations were not paid in years for which they were calculated, the consultant calculated the net present value (NPV) of the relevant compensation, without, however, properly justifying the method used for this purpose<sup>15</sup>.
- (31) Based on the consultant's calculation carried out in 2010, the amount due as compensation to Simet for the provision of inter-regional bus transport services under a public service obligation in the period from 1987 to 2003 is approximately 59.4 million EUR.

## 2.5. Duration

- (32) Although SIMET claims compensation for services provided until the end of 2013<sup>16</sup>, the Italian authorities consider that the relevant period for the purposes of this notification covers only 1987 to 2003, as judgement 1405/2010 of the *Consiglio di Stato* relates only to the appeal covering this period. In particular, Point 3.1 of judgment 1405/2010 clearly refers to compensation for the years 1987 to 2003.

## 3. ASSESSMENT OF THE AID

### 3.1. Existence of aid

- (33) According to Article 107(1) TFEU, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- (34) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all of the following conditions:
- it must be granted by the State or through State resources,
  - it must confer a selective advantage by favouring certain undertakings or the production of certain goods,
  - it must distort or threaten to distort competition,
  - it must affect trade between Member States.

#### 3.1.1. State resources

- (35) The Commission notes that the judgment of the *Consiglio di Stato*, as described above, requires the Ministry for Infrastructure and Transport to pay compensation to Simet

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<sup>15</sup> The NPV was calculated as follows: 1) the amount of the compensation for the inter-regional scheduled bus services was written up on the basis of the ISTAT consumer price index; 2) on the non-written-up amount the interest has been calculated based on the net required return on the undertaking's capital invested in the relevant activity (the latter was capitalised as simple interest); 3) the result under 1) and 2) was counted together.

<sup>16</sup> Based on Article 9 of the Legislative Decree 285/2005 which replaced law 1822/39, the licensing arrangements under the former law 1822/1939 can be prolonged till end-2013.

with respect to the provision of scheduled bus services from 1987 to 2003 on routes in State competence (inter-regional services). The resources at the disposal of the Ministry from which this compensation would be paid are State resources.

### 3.1.2. *Selective economic advantage*

- (36) The Commission notes at the outset that Simet is engaged in an economic activity, namely passenger transportation against remuneration. Therefore, Simet should be considered as an “undertaking” within the meaning of Article 107(1) TFEU.
- (37) As regards the granting of a selective economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through State resources to undertakings in consideration for public service obligations imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State Aid within the meaning of Article 107(1) TFEU, provided four conditions are satisfied<sup>17</sup>:
- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
  - second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
  - third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
  - fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (38) The Commission will consider whether each condition has been fulfilled in turn.

*A: First condition: "The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined".*

- (39) As noted above, it is not clear which action could have constituted a public service obligation and how it was imposed. Therefore, the Commission cannot take a definitive position at this stage on whether the first *Altmark* condition has been fulfilled.

*B: Second condition: "The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner."*

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<sup>17</sup> Judgment C-280/00 *Altmark*, points 87 and 88.

- (40) The compensation awarded by the judgment of the *Consiglio di Stato* appears to be based solely on the *ex post* estimate of the net cost involved in the provision of inter-regional services. Therefore, the Commission considers at this stage that the parameters on the basis of which the compensation was to be calculated were not established in advance and therefore the second *Altmark* condition might not have been complied with.

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

- (41) At this stage, the Commission considers that the method of calculation proposed by the consultant and the underlying accounting data cannot exclude the risk of overcompensation:
- Given that no account separation was implemented for the period up to 2000, retroactive compensations with respect to the period 1987 to 1999 would seem to entail a risk of overcompensation. At this stage, the Commission doubts, in particular, to what extent it is justified to assume that throughout the whole period of 1987 to 1999 the cost/revenue ratio related to scheduled inter-regional bus services was the same as observed during the subsequent period.
  - Based on the information at its disposal, the Commission also finds it difficult to conclude whether the operating loss from inter-regional scheduled bus services for the period 2000 to 2003 was calculated correctly. In particular, it has doubts as to whether the costs have been correctly attributed between the activity covered by the alleged public service obligations and Simeat's other activities. These doubts stem from the fact that, based on the data submitted, it would appear that the company had a rather high profit margin<sup>18</sup> as regards its other activities.
  - The Commission also notes that a detailed justification is missing with respect to the approach chosen to calculate financial charges connected with the inter-regional scheduled bus routes.
  - The Commission also has doubts as to whether the amount of reasonable profit that the company could claim was calculated correctly:
    - The Commission notes that the assumptions underlying the calculation of the sum equity financing related to public service obligations<sup>19</sup> were not properly justified. In particular, the Commission has doubts regarding the assumption concerning the share of equity financing in the total financing of the company's capital requirements related to inter-regional scheduled bus transport services (70% equity share). No evidence was provided confirming that that ratio corresponds to the actual financing structure of the company. The Commission also notes that companies usually finance a much lower share of capital requirements from equity. Therefore, it is questionable if the amount of equity financing was calculated correctly.

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<sup>18</sup> 38%

<sup>19</sup> A parameter needed for calculation of the reasonable profit.

- Similarly, the Commission also has doubts as to the required rate of return on equity as calculated by the consultant. This rate seems very high by comparison e.g. with the safe harbour rate of the new package concerning services of general economic interest adopted on 20 December 2011<sup>20</sup>. As the costs the company incurred in the operation of the service would be compensated in full based on the *ex post* calculation, the Commission considers at this stage that the rate of return on equity exceeding the benchmark of the relevant swap rate plus 100 basis points should not be viewed as reasonable.
  - Finally, the Commission also has doubts concerning the methodology used to calculate NPV of the compensation sums which were not paid in the years for which they were calculated<sup>21</sup>. As the company appears to have cross-subsidised shortfall in services allegedly covered by public service obligations with revenues from its other activities<sup>22</sup>, it seems appropriate to use the required rate of return on equity for calculating NPV of the compensations to be paid and to make the calculation on the basis of compound interest. As mentioned above, the Commission considers at this stage that the return on equity should be limited to the relevant swap rate plus 100 basis points.
- (42) Consequently, at this stage the Commission considers that the third *Altmark* condition might not have been complied with.

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

- (43) As the licences for inter-regional transport services issued pursuant to law No. 1822 of 28.9.1939 and Presidential Decree No 369 of 22.4.1994 were awarded without a public tendering procedure, the Commission expresses doubts as to whether the fourth *Altmark* criterion has been complied with. In particular, the Commission does not have at this stage at its disposal information to evaluate whether the calculation of the compensation as established by the outside consultant corresponds to the level of costs of a typical well-run undertaking providing means of transport.

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

- (44) As regards this criterion, it needs to be verified whether the measure notified is likely to distort competition to the extent that it affects trade between Member State. In this respect, as reflected in the *Altmark* judgment, *several Member States have since 1995 started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin*. This tendency is even more pronounced for inter-regional scheduled transport services provided by Simet.

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<sup>20</sup> Official Journal C8, 11.01.2012

<sup>21</sup> As the compensation amounts calculated for specific years were not paid in these years, it is necessary to recalculate how much the company is entitled to get if the compensation is to take place just now.

<sup>22</sup> i.e. normally no additional credits had to be taken for financing the relevant deficits.

(45) The Commission also notes that Simet is active on other markets, such as international travel services, tourism services and bus rental services, and thus clearly competes with other companies within the EU.

(46) Accordingly, the Commission is of the opinion that the measure distorts competition and affects trade between Member States.

#### 3.1.4. Conclusion

(47) At this stage, the Commission considers that the notified measure is likely to constitute State aid within the meaning of Article 107(1) TFEU.

### 3.2. Exemption from notification obligation

(48) According to the reasoning of the *Consiglio di Stato*, Simet would have acquired the right to obtain the compensation payments at the point in time when it carried out the public services. It is implicit in this reasoning that the compensation payments were exempted from prior notification pursuant to Article 17 (2) of Regulation (EEC) No 1191/69.

(49) The question of whether Article 17 (2) of Regulation (EEC) No 1191/69 indeed dispensed the Italian authorities from prior notification in the present case depends, first, on whether a public service obligation was in fact unilaterally imposed on Simet by the Italian authorities and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69.

(50) This is because, in accordance with Article 17(2) of that regulation, compensation paid pursuant to this regulation is exempted from the preliminary information procedure laid down in Article 108(3) TFEU and thus from notification.

(51) Moreover, it follows from the *Combus* judgment that the concept of "*public service compensation*" within the meaning of that provision must be interpreted in a very narrow manner<sup>23</sup>. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for public service obligations imposed unilaterally on an undertaking pursuant to Article 2 of that regulation which are calculated using the method described in Articles 10 to 13 of the regulation.

(52) However, on the basis of the information available to it, the Commission cannot at this stage reach a definitive conclusion as to whether the compensation ordered by the *Consiglio di Stato* results from the unilateral imposition of a public service obligation by the Italian authorities on Simet or whether a contractual scheme existed between Simet and those authorities.

(53) Furthermore, even if it can be shown that a public service obligation was in fact unilaterally imposed on Simet by the Italian authorities, it is not clear what its precise scope was or what constituted the underlying legal act/document for its imposition<sup>24</sup>.

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<sup>23</sup> Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, points 77 to 79

<sup>24</sup> This implies issues with Article 2(1) and Article 4(1)a of Regulation 1370/2007 or issues with Article 2(1) of Regulation 1191/1969.

- (54) The Commission therefore invites observations from interested parties on these questions.
- (55) Assuming the compensation ordered by the *Consiglio di Stato* results from the unilateral imposition of public service obligations, the Commission nevertheless has doubts, based on the information currently available to it, that the compensation complies with the requirements of Regulation (EEC) No 1191/69.
- (56) In particular, the Commission notes, first, that there does not appear to have been any prior application by Simet for the elimination of the public service obligations or for compensation in accordance with Article 4 of Regulation (EEC) No 1191/69, at least not until October 1999. The arguments of the *Consiglio di Stato*, in its judgment of 9 March 2010, as to why such an application was not needed do not appear relevant.
- (57) Second, the Commission tends to agree with the Italian authorities that as of July 1992, inter-regional bus services should not be subject to unilaterally imposed public service obligations<sup>25</sup>. Therefore application of the common compensation procedures with respect to the period after July 1992 is questionable in relation to such services.
- (58) Third, the Commission notes that Article 10 of Regulation (EEC) No 1191/69 provides, *inter alia*, that the amount of the compensation must, in the case of an obligation to operate or to carry, be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration. It notes further that, according to the Court of Justice in the *Antrop* judgment, the requirement set out in that provision is not fulfilled where “*it is not possible to ascertain on the basis of reliable data [from the company’s accounts] the difference between the costs imputable to the parts of [its] activities in the areas covered by the respective concessions and the corresponding income and consequently it is not possible to calculate the additional cost deriving from the performance of public service obligations by [that undertaking]*”<sup>26</sup>.
- (59) Moreover, as of 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, requires transport undertakings, which operate not only services subject to public service obligations but also engage in other activities, to operate the public services as separate divisions whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking’s activity. However, as noted above, Simet only introduced account separation in 2000.
- (60) Fourth, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires that the administration fixes the amount of the compensation in advance. The calculation of the compensation exclusively on the basis of an *ex post* assessment, as prescribed by the *Consiglio di Stato*, seems at odds with this provision.

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<sup>25</sup> See Article 1(5) of Regulation 1191/69 as amended by Regulation 1893/91.

<sup>26</sup> Case C-504/07 Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (*Antrop*) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (*Carris*) and Sociedade de Transportes Colectivos do Porto SA (*STCP*). [2009] ECR I-03867

- (61) Fifth, the Commission notes that, whereas the judgement of the *Consiglio di Stato* was based on Regulation (EEC) No 1191/69, the subsequent calculation of the compensation sooner follows the principles set out in Regulation (EC) No 1370/2007 (calculation by an outside consultant). Even if the basic principles underlying the calculation methods included in the two regulations are similar, the Commission still needs to receive evidence that the calculation based on the relevant rules fixed in Section IV of the Regulation (EEC) No 1191/1969 would have produced the same result.
- (62) In order to be able to take a definitive position on the doubts expressed above (in particular, doubts with respect to compliance with Articles 1(5) and 4, and Section IV of the Regulation (EEC) No 1191/1969), the Commission invites interested parties to submit their observations.

### **3.3. Compatibility of the aid**

- (63) If the compensation was not exempted from prior notification pursuant to Article 17 (2) of Regulation (EEC) No 1191/1969, the Commission needs to assess whether it can be declared compatible with the internal market.
- (64) Article 93 TFEU contains rules for the compatibility of State aid in the area of coordination of transport and public service obligations in transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of State aid<sup>27</sup>.
- (65) Prior to 3 December 2009, Council Regulation (EEC) No 1191/69 provided detailed rules for calculating the financial burden resulting from the imposition of public service obligations in the provision of public transport by rail, road and inland waterway. On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulation (EEC) No 1191/69. Regulation (EC) No 1370/2007 applies to the compensation of public service obligations concerning public passenger transport services by rail and by road.
- (66) If during the subsequent investigation the Commission comes to the conclusion that the compensation ordered by the *Consiglio di Stato* does not result from the unilateral imposition of a public service obligation or it determines that the compensation ordered does not fulfil the requirements of Regulation (EEC) No 1191/69, Article 17(2) thereof will not apply and the compensation not benefit from the exemption for notification under Regulation (EEC) No 1191/69.
- (67) In that case, Regulation (EC) No 1370/2007 will apply to the notified measure. This is because, according to the case law of the Court of Justice<sup>28</sup>, the rules to assess whether an aid is compatible with the internal market are those which are in force at the moment the Commission decides on the measure. Accordingly, although the

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<sup>27</sup> See *inter alia* recital 23 of the Commission Decision 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 interest.

<sup>28</sup> See Cases C-465/09 P to C-470/09 P *Territorio Historico de Vizcaya and Others v Commission*, not yet published, paragraphs 120 et seq.; see also Order of the Court of Justice in Case C-167/11 P *Cantiere navale De Poli/Commission*, not yet published, paragraph 51 and the case-law cited.

compensation covers a period before its entry into force, the Commission would be required to apply Regulation (EC) No 1370/2007 to the notified measure.

- (68) According to Article 9(1) of Regulation (EC) No 1370/2007 "*public service compensation for the operation of public passenger transport services [...] paid in accordance with this Regulation shall be compatible with the common market.*" At this stage, the Commission has doubts as to whether the measure notified complies with the provisions of this regulation.
- (69) First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of public service obligations, it shall do so within the framework of a public service contract, unless the public service obligation aims at establishing maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area. In the present case, it is not clear by what means the public service obligations were imposed by the Italian authorities or whether a contractual scheme existed between Simet and those authorities. The Commission can therefore not conclude at this stage whether Article 3 of Regulation (EC) No 1370/2007 has been complied with.
- (70) Second, Article 4 of Regulation (EC) No 1370/2007 establishes the following mandatory content of public service contracts and general rules:
- Article 4(1)(a) – Clearly defined public service obligation: Based on the limited information available to it, the Commission takes a preliminary view that the licence regulations were precise as to the scope of the exclusive right (concession).
  - Article 4(1)(b) – The parameters on the basis of which the compensation is calculated has to be established in advance in an objective and transparent manner in a way that prevents overcompensation: The Commission takes the preliminary view that the parameters on the basis of which the compensation, if any, was to be calculated were not established in advance.
  - Article 4(1)(c) and Article 4(2) – Arrangements with regard to the allocation of costs and revenues: The Commission has not received evidence showing that, in accordance with Article 4(1)(c), "*the arrangements for the allocation of costs connected with the provision of services*" have been determined in advance. In this respect, the Commission notes that until 2000 the company did not have account separation in place. As to the requirement that the general rules determine the "*arrangements for the allocation of revenue from the sale of tickets*" (Article 4(2)), the Commission considers at this stage that the licenses issued to Simet implicitly suggested that the company would keep all such revenue. It therefore appears that the relevant requirement was respected.
  - Article 4(3) – Duration of public service contracts shall be limited to 10 years for bus and coach services and 15 years for passenger transport services by rail or other track-based modes: As explained above, the service concessions were issued on the annual basis. It therefore appears that the relevant requirement was respected.

- Article 4(5) – The requirement to comply with certain social standards: The Commission has received no information relating to this requirement.
- Article 4(6) – The requirement to comply with certain quality standards: The Commission notes that the concession regulations adopted by the responsible ministry included precise information as to the itinerary, stops to be served and the frequency of the service. Those regulations also specified that only vehicles approved as suitable for the relevant purpose by the Provincial Vehicle Licensing Office could be used..

In the light of these observations, the Commission cannot determine at this stage whether the act of entrustment/contract includes all mandatory provisions provided for by Article 4 of Regulation (EC) No 1370/2007.

- (71) Third, Article 5 of Regulation (EC) No 1370/2007 contains provisions on the award of public service contracts. However, according to the transitional provisions in Article 8(2) of Regulation (EC) No 1370/2007 the award of public service contracts by rail and by road must comply with Article 5 only as from 3 December 2019. The Commission would nevertheless remind the Italian authorities that during this transitional period Member States must take measures to gradually comply with Article 5 of Regulation (EC) No 1370/2007.
- (72) Fourth, according to Article 6(1) of Regulation (EC) No 1370/2007, where there has been no competitive award of the public service obligation, all compensation must also comply with Annex to the Regulation as well as with the provisions laid down in Article 4 of the Regulation. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the public service obligation minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, the Annex requires that costs and revenue be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be a separation of accounts. As regards the avoidance of overcompensation, the Commission cannot definitely exclude at this stage the possibility of overcompensation being present. In particular, the risk of overcompensation stems from the fact that Simet introduced account separation only in 2000. Finally, the Annex requires the structure of the compensation payment to promote the maintenance or development of an effective management by the public service operator, which can be the subject of an objective assessment. There is no indication in the information transmitted by the Italian authorities thus far that this requirement has been respected.
- (73) In light of the doubts expressed above (in particular, doubts with respect to compliance with Articles 3, 4(1)(b), 4(1)(c), 4(5) and 6(1), as well as the Annex of Regulation (EC) No 1370/2007), the Commission invites interested parties to provide their observations on these matters.

#### **4. CONCLUSION**

- (74) For the reasons set out in sections 3.2. and 3.3 above, the Commission has several doubts at this stage concerning compliance of the notified measure with Regulation (EEC) No 1191/69, alternatively, Regulation (EC) No 1370/2007.

## 5. DECISION

- (75) The Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Italy to submit its comments and provide all such information as may help to assess the measure, within one month of receipt of this letter. Should its submission contain confidential information, the Commission invites Italy to also submit a non-confidential version of its observations. The Commission requests the Italian authorities to forward a copy of this letter to the potential recipient of the aid.
- (76) The Commission wishes to remind the Italian Republic that Article 108(3) TFEU has suspensory effect, and would like to draw the attention of the Italian authorities to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (77) The Commission informs the Italian Republic that it will notify interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also notify interested parties in the EFTA countries which are signatories of the EEA Agreement by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will notify the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication. Should their submissions also contain confidential information, the Commission invites interested parties to also submit non-confidential versions of their observations.

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

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

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

Yours faithfully,

For the Commission

*Joaquín ALMUNIA*

Vice-President of the Commission