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PUBLIC VERSION
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Subject: State aid SA.35843 (2012/NN) – Italy – Additional PSO compensation for Buonotourist

Madam,

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

1. PROCEDURE

(1) By electronic notification of 5 December 2012, the Italian authorities notified, in accordance with Article 108(3) TFEU, the additional compensation awarded by the Consiglio di Stato (Italy’s Supreme Administrative Court) to Buonotourist Srl (hereinafter: Buonotourist), for the provision of passenger transport services by bus based on concessions granted by the Italian Campania Region (hereinafter: the Region) during the period 1996-2002 (hereinafter: the period under review).

(2) The notification was registered under case number SA.35843 and from 13 December 2012 treated as a non-notified measure since, according to the information available to the Commission, the Region was only obliged to pay the additional compensation due to Buonotourist on 7 December 2012, that is, after the Italian government had notified the measure to the Commission.

(3) Following a request for information sent by the Commission on 19 March 2013, further information was provided by the Italian authorities on 19 April 2013. However, those authorities failed to reply to the Commission's request for information of 27 June 2013, despite that two reminders for information were sent by the Commission on 6 August 2013 and 26 September 2013.

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2. DESCRIPTION OF THE MEASURE

2.1. The company

(4) Buonotourist is a private company providing local public transport services based on concessions and private commercial transport services. More specifically, according to the Italian authorities, Buonotourist operated a network of bus connections as concessionaire of the Region throughout the period under review covering approximately 1.8 million km per year.

(5) From the information provided by the Italian authorities, the Region has already paid EUR 19,507,121.54 to Buonotourist for the above-mentioned service during the period 1996 to 2002, of which EUR 17,036,021.13 for the operation and management of the service and EUR 2,471,100.41 for investments. Since it appears that this compensation was awarded to Buonotourist more than ten years before the Commission sent its first request for information to the Italian State, this compensation will not be subject to an assessment in the current proceedings.

(6) In addition to the above-mentioned sums already received, Buonotourist requested from the Region additional compensation of EUR 5,567,582.57 on the basis of Regulation (EEC) No 1191/69 for the economic disadvantages it allegedly suffered as a result of public service obligations (hereinafter: PSOs) allegedly being imposed upon it. It is unclear when this request was first made, but after the Region rejected this request, Buonotourist started proceedings before the Italian administrative courts in 2007.

(7) In 2008, the Regional Administrative Court in Salerno rejected Buonotourist's claim for additional compensation on the basis of Regulation (EEC) No 1191/69. That court held that, in accordance with Article 4 of Regulation (EEC) No 1191/69, Buonotourist could not request compensation for economic disadvantages resulting from the imposition of PSOs without having previously demanded the termination of those PSOs.

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


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

(8) By judgment of 27 July 2009 (Sentenza no. 4684/09), the Consiglio di Stato upheld the appeal by Buonotourist of the judgment of the Regional Administrative Court in Salerno and concluded that Buonotourist was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of the Regulation (EEC) No 1191/69. That judgment does not precisely define from which legal act and in which form the imposition of the PSOs took place, but stresses that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The Consiglio di Stato further considered that Buonotourist was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs.

(9) According to the Consiglio di Stato, the precise amount of the additional compensation owed to Buonotourist had to be determined by the Region on the basis of reliable data taken from the accounts of the company, showing the difference between the costs attributable to the portion of Buonotourist's activities associated with the PSO and the corresponding revenues. However, the Region claimed that it was unable to do so, due to a lack of clear and reliable data.

(10) By order (ordinanza) no. 8737/2010 of 13 December 2010, the Consiglio di Stato appointed an expert to undertake that task (hereinafter: the first expert). According to the Italian authorities, that expert was also unable to determine the economic disadvantage to be compensated. By order (ordinanza) no. 5880/2011 of 7 November 2011, the Consiglio di Stato appointed a second expert (hereinafter: the second expert). It appears from the judgment of the Consiglio di Stato (giudizio per l'ottemperanza) no. 5650/2012 of 7 November 2012, para 9, that both experts excluded the existence of a right to compensation pursuant to Article 10 of the Regulation (EEC) No 1191/1969, but both concluded that Buonotourist suffered an economic disadvantage in the form of an undercompensation as concerns 1998, 1999 and 2000 as a result of the application of the formula provided in Article 11 of the Regulation (EEC) No 1191/69. Implicitly, the experts thus assumed that a tariff obligation had been imposed upon Buonotourist by the Region.

(11) However, while the first expert concluded that it would have been inappropriate to use an "inductive method" to calculate the additional costs borne by the undertaking due to tariff costs and recommended to calculate the additional compensation by means of equity appreciation ('in via equitativa'), the second expert calculated the sum to be compensated by the Region to the company through the use of such an "inductive method", observing that the Consiglio di Stato held that the choice of the "inductive method" was to be considered definitive, having been used in various judgments without being challenged.

(12) The second expert was nevertheless unable to calculate the compensation pursuant to Article 11 of the Regulation (EEC) No 1191/69 due to a lack of essential data on both the anticipated and the actual number of units of measure of transport. The second expert therefore calculated the possible amount of undercompensation as the difference between the potential revenues that the company could have obtained by operating the service on a commercial basis (estimate) and the sum of the actual revenues and the public contributions received. For Buonotourist, those calculations result in an undercompensation for 1998, 1999 and 2000 only, totalling
EUR 1 111 572 including interests. The expert concluded that this amount could be taken as the amount of the under compensation.

(13) Accordingly, the Consiglio di Stato issued judgment no. 5650/2012 of 7 November 2012 quantifying the additional compensation the Region was obliged to pay to Buonotourist at EUR 1 111 572 and ordered payment of this sum to take place by 7 December 2012. Payment of this sum was made by the Region to Buonotourist on 21 December 2012.

(14) It is the payment of this additional compensation by the Region to Buonotourist as a consequence of judgment no. 5650/2012 that constitutes the notified measure and the subject matter of the present decision.

2.3. Additional information/observations provided by the Italian authorities

(15) According to the Italian authorities, Buonotourist, similar to other providers of regional scheduled bus transport services, operated on the basis of provisional licences (concessions) which had to be renewed annually upon the request of the company. These concessions provided the company with the exclusive right to furnish the relevant services.

(16) The Italian authorities further maintain that Buonotourist requested concessions to provide services on the relevant routes from the Region in each year of the period under review and that those concessions always stipulated that the services were carried out entirely at the risk of the undertakings in question and, specifically, "without the performance of the service constituting a right to a subsidy or compensation of any kind". The Italian authorities provided a copy of a model concession from 1973 and claimed that this was the one used with Buonotourist as regards the period under review. However, the Italian authorities did not provide any concession contracts actually concluded with Buonotourist during the period under review.

(17) The Italian authorities maintain that under those concessions Buonotourist was free to propose the substitution of the forms of transport to be used by it or to apply for the termination in whole or in part of its PSOs where such obligations entailed an economic disadvantage to it, but that the company never exercised that right. The Italian authorities further allege that the company never notified to the Region that it was suffering economic disadvantages or that it was carrying out obligations that it would not have performed if not obliged to do so under PSO. Finally, according to the Italian authorities, Buonotourist has never requested the termination of the PSO as required by Article 4(1) of Regulation (EEC) No 1191/69.

(18) The Italian authorities also doubt whether Buonotourist has demonstrated that it had efficiently and correctly operated the PSOs in accordance with the requirements of Regulation (EEC) No 1191/69 and submit that Buonotourist did not have an account separation system as required by Article 1(5) of that same regulation.

2.4. Amount of compensation

(19) As explained above, the Consiglio di Stato appointed two experts to determine the additional compensation owed to Buonotourist by the Region on the basis of
Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. On 27 September 2012, the two experts each issued their reports but only the second expert was able to individualize the additional compensation due to Buonotourist by the Region.

(20) In its report, the second expert often reiterates that the parties submitted data that did not match or that were not precise enough, constituting only an approximation. In particular, the second expert observes that the parties have provided contradictory documentary evidence regarding the compensation paid in the past. In contrast to the claim made by the Italian authorities, the second expert notes that Buonotourist kept separate accounts for its public and private transport activities, but explains that no verification could be made of the correct imputation of some costs to the one or the other sector of activity. The second expert further explains that it was not possible to acquire reliable data on the costs that would not have been incurred in case of termination of the public service obligation – even using the "inductive method" prescribed by the Consiglio di Stato.

(21) Accordingly, the second expert concluded that no additional compensation for the obligation to operate or carry, calculated on the basis of Article 10 of Regulation (EEC) No 1191/69, could be determined. As regard additional compensation in relation to tariff obligations – Article 11 of Regulation (EEC) No 1191/69 – the second expert acknowledges that it could not be calculated on the basis of paragraph 1 of that provision, because of missing and/or unreliable data. Therefore, the "inductive method" prescribed by the Consiglio di Stato was applied.

(22) Article 11 of Regulation (EEC) No 1191/69 provides, inter alia, that the amount of the compensation must, in the case of a tariff obligation, be equal to the difference between the following two amounts:

- The first amount shall be equal to the difference between, on the one hand, the product of the anticipated number of units of measure of transport and:
  - either the most favourable existing rate which might be claimed by users if the obligation in question did not exist; or,
  - where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied;

and, on the other hand, the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

- The second amount shall be equal to the difference between the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis and the costs actually incurred under the obligatory rate.

(23) In the absence of the data required to determine those amounts, the second expert calculated the amount of compensation due as the difference between the two amounts as interpreted below:

- In the absence of the anticipated and the actual number of units of measure of transport, the first amount shall be equal to the amount necessary to cover the
real costs (or the "standard costs" if lower)\(^4\), minus the revenues obtained from the traffic carried\(^5\).

- As regards the second amount, the expert considered that it should be equal to the real costs (or the "standard cost" if lower)\(^6\) minus the difference between the real costs (or the 'standard costs' if lower) and the amount of compensation already received\(^7\).

(24) According to the second expert, it follows from those calculations that during the period under review Buonotourist could only claim to have been undercompensated in 1998, 1999, and 2000 as a result of alleged tariff obligations being imposed upon it. The amount of undercompensation for those three years was calculated by the second expert to amount to EUR 838,593.21, to which legal interest of EUR 272,979.13 was added, resulting in an additional compensation of EUR 1,111,572. It is this amount which the Consiglio di Stato ordered the Region to pay to Buonotourist, which it effectively paid on 21 December 2012.

3. ASSESSMENT OF THE AID

3.1. Existence of aid

(25) 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".

(26) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all of the following conditions:

- it must be granted by the State or through State resources,
- it must confer a selective advantage by favouring certain undertakings or the production of certain goods,
- it must distort or threaten to distort competition, and
- it must affect trade between Member States.

\(^4\) Instead of the difference between, on the one hand, the product of the anticipated number of units of measure of transport and: - either the most favourable existing rate which might be claimed by users if the obligation in question did not exist; or, - where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied.

\(^5\) Instead of the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

\(^6\) Instead of the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis.

\(^7\) Instead of the costs actually incurred under the obligatory rate.
3.1.1.  Imputability and State resources

(27) The Commission notes that the judgment of the Consiglio di Stato requires the Region to pay additional compensation to Buonotourist with respect to the provision of scheduled bus services from 1996 to 2002 on routes in the competence of the Region. The second expert calculated that Buonotourist suffered an economic disadvantage in the form of an undercompensation only as concerns 1998, 1999, and 2000 in the amount of EUR 1 111 572 as a result of alleged tariff obligations being imposed upon it. On 21 December 2012, the Region effectively paid this sum to Buonotourist in order to comply with this judgment.

(28) The measure is thus imputable to the State and the resources from which this compensation has been paid are State resources.

3.1.2.  Selective economic advantage

(29) The Commission notes at the outset that Buonotourist is engaged in an economic activity, namely passenger transportation against remuneration. Therefore, Buonotourist should be considered as an “undertaking” within the meaning of Article 107(1) TFEU.

(30) 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 cumulative conditions are satisfied:

- first, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- 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.

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8 Case C-280/00 Altmark Trans v Regierungspräsidium Magdeburg [2003] ECR I-7747, points 87 and 88.
In its final analysis of the measure, the Commission will have to consider whether these conditions have been cumulatively fulfilled in the present case.

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

As noted above, it is neither clear whether Buonotourist was actually required to discharge a PSO nor under which conditions. No concessions involving Buonotourist have been provided by the Italian authorities, apart from one sample concession entrusted to another company, which the Italian authorities claim to be the standard one in use in the Region during the period under review. However, the sample concession provided was only valid from April 1972 to December 1973, which is more than 20 years removed from the period under review, and before the entry into force of national law no. 151/1981, as enacted by regional law no. 16/1983, on which basis Buonotourist was compensated in the first place. Point 17 of that document clearly establishes that the service is operated at the company's own risk, without any right for subsidy or compensation. Point 27 lays down applicable tariffs, but it is unclear whether a tariff obligation was actually imposed upon Buonotourist.

Even if the sample concession would seem to provide for some PSOs (e.g. at point 2, 9 and 10), including the duty to operate discounts for students, workers, teachers, and private and public employees and the duty to transport certain categories of passengers for free, the Commission has doubts as to whether the same obligations were actually applicable to Buonotourist during the period under review. In any event, the method used to calculate the alleged undercompensation for those PSOs never refers to those obligations.

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."

As regards the second condition, the parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings. However, the need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined.

As regards the notified measure, the Consiglio di Stato held that Buonotourist was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. According to that court, the additional compensation was to be determined on the basis of an ex post calculation using an "inductive method" in the absence of necessary and reliable data. In light hereof, the Commission considers, at this stage, that that the parameters on the basis of which the alleged undercompensation was calculated by the second expert
were not established in advance and that therefore the second Altmark condition does not appear to have been complied with as regards the notified measure.

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

At this stage, the Commission considers that the method of calculation proposed by the second expert and the underlying accounting data cannot exclude the risk of overcompensation as required by the third Altmark criterion. This is so for the following reasons:

- It is not clear whether account separation was implemented during the period under review so that any retroactive compensations could entail a risk of overcompensation (see recital (20) above).

- The absence of reliable data prevented the experts from calculating any compensation under Article 10 of the Regulation (EEC) No 1191/1969. The experts explain that the documentation they received from the parties was inadequate and could affect any estimation even if based on the "inductive method" prescribed by the Consiglio di Stato.

- The Commission also has doubts as to whether the absence of reliable data for the calculation of the amount of compensation pursuant to Article 11 of the Regulation (EEC) no. 1191/1969 could have impaired the correct calculation of the additional compensation for the tariff obligation, if any. In particular, in light of the calculations conducted by the second expert, as explained in recitals (23) and (24) above, the Commission cannot exclude that the use of the "inductive method" as prescribed by the Consiglio di Stato could entail a risk of overcompensation. More specifically:
  
  - In the absence of a clear indication of how the "standard costs per unit" and consequently how the "standard costs" were calculated, the Commission is not able to take a view on the use of "standard costs" as the basis for the calculation of additional compensation pursuant to Article 11 of the Regulation (EEC) No 1191/69.
  
  - The second expert explained that it appeared impossible to estimate the anticipated and the actual number of units of measure of transport. However, according to that expert this is not a problem, as the calculation is done ex post, and the final product is therefore already available. Consequently, that expert assumes that the rate which an undertaking operating on a commercial basis would have applied is equal to the amount necessary to cover the real costs (or the "standard costs" if lower). Similarly, that expert assumes that the product of the actual number of units of measure of transport and the rate imposed for the period under consideration is equal to the incomes arising from the operation of the service. As regards the costs which would be incurred applying either the most favourable existing rate or the rate which the
undertaking would have applied if operating on a commercial basis, the experts assumed they were equal to the lowest of either the 'standard cost' or the real costs. The experts also assumed that the costs actually incurred under the obligatory rate were equal to the difference between the real costs (or the "standard costs" if lower) and the amount of compensation received. The amount of additional compensation to be paid by the Region is equivalent to the amount that Buonotourist was undercompensated during the period under review. According to the expert's calculations, that was only the case in 1998, 1999, and 2000, for a total amount of alleged undercompensation of EUR 838 593.21. It should nevertheless be observed that the period under review covers seven years and that according to the second expert's calculations Buonotourist appears to have been overcompensated during the remaining years in the total amount of EUR 643 449.97. It is unclear to the Commission why the experts did not take this overcompensation into account when determining whether Buonotourist was undercompensated during the period under review – thus why 1998, 1999 and 2000 were considered in isolation. In fact, assuming that these calculations were reliable, the alleged undercompensation should have been reduced by EUR 643,449.97.

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

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

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

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

(40) As observed in the *Altmark* judgment, since 1995 several Member States have started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin.

(41) Accordingly, any compensation granted to Buonotourist should be considered liable to distort competition for the provision of passenger transportation services by bus and liable to affect trade between Member States to the extent that it negatively impacts on the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of Buonotourist.

(42) The Commission also notes that Buonotourist is active on other markets, such as international travel services, private transport services on demand, and bus rental services, and thus clearly competes with other companies within the Union on those
markets. Any compensation granted to Buonotourist would necessarily also distort competition and affect trade between Member States on those markets as well.

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

3.1.4. Conclusion

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

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

According to the reasoning of the Consiglio di Stato, Buonotourist would have acquired the right to obtain additional compensation for the provision of the transport services in question at the point in time at which it carried out those services. For this reasoning to hold, the compensation payments must have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69. Otherwise, to the extent the compensation constitutes State aid within the meaning of Article 107(1) TFEU, failure to notify that compensation would have rendered that compensation illegal in accordance with Article 108 of the Treaty.

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.

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\(^9\). The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that regulation which are calculated using the method described in Articles 10 to 13 of the regulation (the common compensation procedure), and not to public service contracts as defined by Article 14 of that regulation. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which entails State aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed illegally implemented aid.

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

However, on the basis of the information available to it, the Commission cannot at this stage reach a definitive conclusion as to whether the compensation ordered by the Consiglio di Stato results from the unilateral imposition of a PSO by the Region on

\(^9\) Case T-157/01 Danske Busvognmænd [2004] ECR II-917, points 77 to 79
Buonoturist or whether a contractual scheme existed between Buonoturist and the Region. In particular, Buonoturist's apparent initiative in requesting the renewal of concessions for all seven years during the period under review cannot be reconciled with the unilateral imposition of a public service obligation. The purpose of those concessions was to provide Buonoturist with the exclusive right to furnish the relevant services for the period under review. Despite the fact that, according to the Italian authorities, each of those regulations apparently stipulated that the operation of the service was not subject to compensation and was operated entirely at the company’s own risk, Buonoturist apparently repeatedly requested the prolongation of those rights.

(50) Furthermore, even if it can be shown that a public service obligation was in fact unilaterally imposed on Buonoturist by the Italian authorities, it is not clear what its precise scope was or what constituted the underlying legal act/document for its imposition. In particular, the calculation of additional compensation by the second expert concerns only tariff obligations, but it is not at all clear that such obligations were in fact imposed on Buonoturist. According to Article 2(5) Regulation (EEC) No 1191/69 the latter is limited to “obligation[s] imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions”. By contrast, the definition of tariff obligations “shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof”.

(51) The Commission therefore invites observations from interested parties on the question of whether a PSO was in fact unilaterally imposed on Buonoturist during the period under review and what its scope was.

(52) Assuming the compensation ordered by the Consiglio di Stato results from the unilateral imposition of a PSO, the Commission nevertheless has doubts, based on the information currently available to it, that the compensation complies with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69.

(53) First, the Commission notes that as of 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, requires transport undertakings, which operate not only services subject to PSOs but also engage in other activities, to operate the public services as separate divisions whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking’s activity.

(54) Moreover, the Commission notes that the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69 set out a method for calculating the amount of

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10 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.
compensation to be granted in respect of the financial burdens resulting from the imposition of a public service obligation. The Commission further notes that, according to the Court of Justice in the Antrop judgment, the requirements set out by that procedure are not fulfilled where “it is not possible to ascertain on the basis of reliable data [from the company’s accounts] the difference between the costs imputable to the parts of [its] activities in the areas covered by the respective 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]”\textsuperscript{11}.

(55) The Commission has received conflicting information at its disposal on whether Buonotourist ensured to implement a proper account separation for the different services provided by it during the period under review and therefore invites observations from interested parties on this question.

(56) Second, the Commission has doubts as to whether the absence of reliable data for the calculation of the amount of compensation pursuant to Article 11 of the Regulation (EEC) No 1191/1969, the second expert could have inferred the correct amount of the compensation for the tariff obligation imposed upon Buonotourist, if any. In particular, the Commission finds it difficult to conclude whether the use of the "standard costs" as an indicator of efficient management of the undertaking and of the provision of services of an adequate quality is compliant with Article 12 of the Regulation (EEC) No 1191/1969. The Commission has no indications regarding the methodology used by the Region for the calculation of the "standard cost per unit" on which basis the second expert calculated the "standard costs".

(57) Third, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires that the administration fixes the amount of the compensation in advance. The calculation of the additional compensation on the basis of an \textit{ex post} assessment, as prescribed by the Consiglio di Stato, seems at odds with this provision.

(58) In order to be able to take a definitive position on the doubts expressed above in relation to whether the additional compensation complies with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69, the Commission invites interested parties to submit their observations.

3.3. \textbf{Compatibility of the aid}

(59) If the Commission finds the additional compensation to constitute State aid which was not exempted from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/1969, it must assess whether that aid can be declared compatible with the internal market.

(60) Article 93 TFEU contains rules for the compatibility of State aid in the area of coordination of transport and PSOs in the field of transport and constitutes a \textit{lex specialis} with respect to Article 107(3), as well as Article 106(2), as it contains special

\textsuperscript{11}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.
The Court of Justice has ruled that this Article "acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the Union".


The Commission considers that the examination of the compatibility of the notified measure should be conducted under Regulation (EC) No 1370/2007, since that is the legislation in force at the time the present decision is adopted. It further notes that the additional compensation awarded to Buonotourist by the Consiglio di Stato was paid on 21 December 2012, so that Regulation (EC) No 1370/2007 had already been in effect for more than three years at the date at which the effects of the disbursed aid occurred.

According to Article 9(1) of Regulation (EC) No 1370/2007 "public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the internal market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty".

For the reasons set out below, the Commission has doubts whether the notified compensation complies with the conditions of Regulation (EC) No 1370/2007.

First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of PSOs, it shall do so within the framework

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12 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.


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

of a public service contract, unless the public service obligation aims at establishing maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area (general rules).

(66) In the present case, it is not clear whether a contractual scheme existed between Buonotourist and the Region or whether general rules establishing maximum tariffs for all passengers or certain categories of passengers were put in place. The Commission has only received one sample concession concerning another company for the year 1972/1973, from which it is not possible to extract reliable information on the contractual scheme existing between Buonotourist and the Region in the period under review (1996-2002). Moreover, there is no indication that general rules were put in place and, if they were, whether they complied with the principles set out in Articles 4 and 6 of the regulation and in its Annex and that the Region compensated Buonotourist in a way that prevents overcompensation. Indeed, as noted in recital (37) above, while the amount of additional compensation calculated by the court appointed experts is equivalent to the amount that Buonotourist was allegedly undercompensated in 1998, 1999, and 2000, the period of review covers seven years during the remainder of which Buonotourist appears to have been overcompensated in the amount of EUR 643 449.97 according to the methodology used for the calculation.

(67) The Commission can therefore not conclude at this stage whether Article 3 of Regulation (EC) No 1370/2007 has been complied with.

(68) Second, the Commission notes that regardless of whether Buonotourist concluded a public service contract or it was subject to tariff obligations by way of general rules, not all the provisions of Article 4 of that regulation, which establishes the mandatory content of public service contracts and general rules, appear to have been respected.

- Article 4(1)(a) – Clearly defined public service obligation: on the basis of the limited information available to it, the Commission takes a preliminary view that Buonotourist may have concluded "public service contracts" in the form of concessions to provide the public transport services. However, at this stage the Commission is not able to take a preliminary view on the existence of PSOs, particularly in the form of tariff obligations, as no evidence has thus far been provided.

- Article 4(1)(b) – The parameters on the basis of which the compensation is calculated has to be established in advance in an objective and transparent manner in a way that prevents overcompensation: as explained in relation to the Commission’s examination of the second criterion of the Altmark judgment, the model concession regulation that was submitted for 1972/1973 specified that the operation of the services does not give any right to a subsidy or compensation of any kind and that the service is operated entirely at the company’s own risk. Such an exclusion of compensation, if it shown to have existed during the period under review, would necessarily entail that the compensation parameters have not been established in advance.

- Article 4(1)(c) and Article 4(2) – Arrangements with regard to the allocation of costs and revenues: the Commission has not received evidence showing that, in accordance with Article 4(1)(c), “the arrangements for the allocation of costs
connected with the provision of services” have been determined in advance. In this respect, the Commission notes that it is not clear whether the company had account separation in place. As to the requirement that the general rules determine the “arrangements for the allocation of revenue from the sale of tickets” (Article 4(2)), the Commission assumes at this stage that the concessions issued to Buonotourist implicitly suggested that the company would keep all such revenues.

- 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 concessions adopted by the Region included information as to the itinerary, stops to be served and the frequency of the service, but has no information on compliance with quality standards.

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

(69) Third, Article 6(1) provides that in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the public service obligation minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, the Annex requires that costs and revenues be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be a separation of accounts (Point 5 of the Annex).

(70) As regards the avoidance of overcompensation, the Commission cannot definitely exclude at this stage the possibility of overcompensation being present. As noted in recital (55) above, the Commission has doubts as to whether Buonotourist applied a proper account separation during the period under review. This makes it difficult to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect (Point 2 of the Annex).

(71) Fourth, the Annex requires the method of the compensation to promote the maintenance or development of an effective management by the public service operator, which can be the subject of an objective assessment. It also requires promoting the provision of passenger transport services of a sufficiently high standard.
There is no indication in the information transmitted by the Italian authorities thus far that this requirement has been respected.

(72) In light of the doubts expressed above with respect to compliance with Articles 3, 4(1)(b), 4(1)(c), 4(5) and 6(1), as well as the Annex of Regulation (EC) No 1370/2007, the Commission invites observations from interested parties on these questions.

(73) Finally, the Commission invites observations from interested parties on the question of whether the judgment of the Consiglio di Stato concerns an award for damages for alleged breach of law as opposed to an award of public service compensation based on the applicable Council regulations. The Commission notes in this respect that, under certain circumstances, compensation for damages does not provide for an advantage and therefore it is not to be considered as State Aid.\(^{17}\)

(74) However, the Commission further notes that the Consiglio di Stato's judgment refers to Buonotourist's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data.

(75) In any event, the Commission considers that if the Commission concludes that the concession regulations governing the services in question were not exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, an award of damages in favour of Buonotourist, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, is likely to contravene Articles 107 and 108 of the Treaty. This is because such an award would produce the exact same result for Buonotourist as an award of public service compensation for the period under review, despite the fact that, as demonstrated above, the mandatory requirements for obtaining such compensation have not been complied with. The availability of such an award would thus effectively enable the circumvention of the State aid rules and the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for costs incurred in return for the discharge of PSOs.

4. CONCLUSION

(76) For the reasons set out in sections 3.2. and 3.3 above, the Commission has several doubts at this stage concerning the existence of State aid within the meaning of Article 107(1) TFEU, the exemption from the notification obligation under Regulation (EEC) No 1191/69, and the possible compatibility of the notified measure under Regulation (EC) No 1370/2007.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Italy to submit its comments and provide all such information as may help to assess the measure, within one month of receipt of this letter. Should its submission contain confidential information, the Commission invites Italy to also

\(^{17}\) Joined cases 106 to 120/87, Asteris AE and others v Hellenic Republic and European Economic Community, [1988] ECR 5515.
submit a non-confidential version of its observations. The Commission requests the Italian authorities to forward a copy of this letter to the potential recipient of the aid.

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

The Commission warns the Italian Republic that it will notify interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also notify interested parties in the EFTA countries which are signatories of the EEA Agreement by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will notify the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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

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

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

Yours faithfully,  
For the Commission  

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

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

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

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

[Text of summary]

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

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

In 2009, the case reached the Italian supreme administrative court, which upheld the claim advanced by the company and ordered the Campania Region to pay additional compensation to Buonotourist for the provision of public services starting in 1996 covering the period up to 2002. The Campania Region paid EUR 1.1 million to the company in December 2012. However the Italian government considered that the conditions of the applicable EU rules were not met.

At this stage the Commission doubts that the conditions are met to declare the additional public compensations to Buonotourist compatible for the following reasons:
1) It is not certain whether Buonotourist has been entrusted with public service obligations (PSO) within the meaning of Regulation 1370/2007 and on the basis of which legal instrument.

2) Even if an entrustment could be identified, the presence of overcompensation is very difficult to exclude in the absence of reliable information.

3) Even if at the end of the procedure the Commission would arrive at the conclusion that the company was entrusted with PSOs and incurred net costs as a result, other formal requirements of the Regulation 1370/2007 would prevent the legality of the additional compensations that were already paid out.

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

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