II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 21 June 2001
on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy

(notified under document number C(2001) 1684)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2001/851/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having, pursuant to the aforementioned Articles, called on interested parties to submit their comments [1],

Whereas:

1. PROCEDURE

(1) Having received several complaints, the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of aid paid to six companies in the Tirrenia Group, namely Tirrenia di Navigazione, Adriatica, Caremar, Saremar, Siremar and Toremar. This aid takes the form of subsidies paid directly to each of the companies in the group to support the maritime transport services those companies provide under six agreements concluded with the State in 1991; these agreements are designed to ensure the provision of maritime transport services, for the most part consisting of connections between mainland Italy, on the one hand, and Sicily, Sardinia and other, smaller Italian islands, on the other.

(2) By letter dated 6 August 1999, the Commission informed Italy that it had decided to initiate the procedure. By letter dated 28 September 1999, the Italian authorities forwarded their comments on this decision.

(3) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. Following that publication, a number of private operators who offer maritime transport services in competition with the companies of the Tirrenia Group forwarded their comments to the Commission. These comments were in turn forwarded to the Italian authorities to give them the opportunity to react.

(4) During the investigation procedure, the Italian authorities asked for the Tirrenia Group case to be split up so that a final decision concerning the Tirrenia di Navigazione company could be reached as a priority. This request was made on the grounds that the Italian authorities wish to privatise the group, beginning with Tirrenia di Navigazione, and intend to speed up the process where this company is concerned.

(5) With regard to this request, the Commission first of all notes that, while Tirrenia di Navigazione assumes the role of group leader with respect to the group's financial and commercial strategy, the six member companies are legally independent and operate in geographically distinct market segments which are subject to varying degrees of competition, both from private Italian operators and from operators from other Member States. In addition, the subsidies paid by the Italian authorities under the agreements referred to in recital 1 are calculated to cover the net operating loss on the routes served by each of the abovementioned companies and are awarded directly to those companies without going through Tirrenia di Navigazione. Finally, the other parts of the aid referred to in the initiation of the procedure

[1] OJ C 306, 23.10.1999, p. 2.

[2] See footnote 1.

— investment aid and aid of a fiscal nature — call for separate analysis of each company in the group. Consequently, the Commission can accede to the Italian authorities' request. This Decision therefore only concerns the Tirrenia di Navigazione company.

2. DETAILED DESCRIPTION OF AID SCHEME

2.1. *MARKET IN QUESTION*

(6) At present, Tirrenia di Navigazione's main commercial activity is in providing connections with the largest Italian islands, Sardinia and Sicily; its secondary activity is in the international market, with connections between mainland Italy, Sicily and Tunisia. The services offered involve goods and passenger transport.

Cabotage with the Mediterranean islands was temporarily exempted from application of the principle of freedom to provide services until 1 January 1999 by virtue of Article 6(2) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) ([3]).

Tirrenia holds 67,3 % of the market share of passenger transport and 55,3 % of the market share for goods transport in the medium and long-distance cabotage market ([4]). The recent arrival of competing private operators has reduced Tirrenia's market share appreciably: the company had a virtual monopoly on most of the routes in 1990. The opening of the market to the free provision of services should serve to increase in competition over the next few years.

2.2. *SUBSIDIES PAID IN RESPECT OF PUBLIC SERVICE OBLIGATIONS*

2.2.1. THE LEGAL CONTEXT

(7) According to Article 8 of Law No 684 of 20 December 1974, maritime connections with the larger and smaller Italian islands must satisfy the requirements connected with the economic and social development of the regions concerned, particularly the Mezzogiorno. To this end, the Law provides for operators entrusted with providing such services to be paid subsidies pursuant to public service contracts of 20 years' duration.

Article 9 of Law No 160 of 5 May 1989 stipulates that the routes to be served and the frequency of service to be guaranteed are to be determined by the public authorities on the basis of technical proposals from the concessionary companies, which must to that end submit a service programme every five years.

In accordance with Law No 169 of 19 May 1975, the concessionary companies, including Tirrenia di Navigazione, also provide the service of transporting post and packages and commercial services of a purely local character as an accessory activity.

Presidential Decree No 501 of 1 June 1979 specifies the various elements (proceeds and costs) which enter into the calculation of the subsidy paid to concession holders. It also stipulates that the times of departure and arrival on each of the routes served by the abovementioned companies are to be approved by ministerial decree. As far as vessels are concerned, the presidential decree stipulates that concessionaries must use ships not more than 18 years old, of which they must be the owners, unless this is expressly waived by the Ministry. This constraint, which obliges concession holders to renew their fleet periodically, constitutes a specific obligation imposed on these shipping companies. The vessels used must in addition be assigned individually to each of the public service routes. In addition to the ordinary services, Article 40 empowers the Minister for Merchant shipping to arrange for the provision of additional services to satisfy extraordinary requirements in the public interest or for reasons of traffic.

Law No 856 of 5 December 1986 stipulates that fares are to be set by Ministerial Decree on a proposal from the concession-holding companies. Different fares apply for ordinary travellers and for residents and migrant workers, the latter two categories enjoying preferential rates.

2.2.2. PUBLIC SERVICE AGREEMENTS

(8) In July 1991, the Italian State concluded identical agreements of 20 years' duration (Article 2), to run from 1 January 1989, with each of the six Tirrenia group undertakings, including Tirrenia di Navigazione.

These agreements state that the first five-year period begins on 1 January 1990.

Under the terms of Article 3 of these agreements, the amount of the annual subsidy is established on the basis of an application which the company makes in the month of February every financial year. The application is the subject of interministerial consultations and is approved in the following month of May by ministerial decree. The purpose of the annual subsidy is to enable the undertaking to cover the losses resulting from the shortfall between its operating costs and income. Article 5 lists in detail the economic parameters used to calculate the various cost elements taken into consideration, pursuant to Presidential Decree No 501/79, to determine the amount of the subsidy.

([3]) OJ L 364, 12.12.1992, p. 7.
([4]) *Source:* Conto Nazionale dei Trasporti 1997.

2.2.3. THE FIVE-YEAR PROGRAMMES

(9) In accordance with Article 1 of the public service agreements, the five-year programmes specify the routes and the ports to be served, the type and capacity of vessels to be used for the maritime connections in question, the frequency of service and the fares to be paid, including subsidised fares, particularly for the residents of island regions.

The first five-year programme (1990 to 1994) was approved by Ministerial Decree of 29 May 1990, which was enacted to enter into force on 1 January 1990.

The second programme, covering the years 1995 to 1999, and approved by Decree of 14 May 1996, left the routes and frequencies substantially unaltered but made some changes regarding the vessels assigned to service the routes, in particular the acquisition of two high-speed vessels for passenger and vehicle transport on the Civitavecchia/Olbia line as from June 1998 and the entry into service of two new ferries on the Naples/Palermo line to replace old ships (mixed transport and cargo) of broadly equivalent capacity.

The third programme (covering the years 2000 to 2004), submitted to the Italian authorities in September 1999, has not yet been approved. Pending the adoption of this programme, a Decree of 8 March 2000 ordered the undertakings of the Tirrenia group to maintain the services referred to in Article 9 of Law No 160/89, using the vessels at their disposal on the date of 31 December 1999.

2.2.4. THE ANNUAL BALANCING SUBSIDY

(10) The agreement provides for the annual balancing subsidy to be paid in the following manner: an initial advance payment equivalent to 70 % of the subsidy paid the previous year is made in March of each year. A second payment, made in June, is equal to 20 % of this subsidy. The difference between the amounts paid and the shortfall between the operating costs and revenue during the year in progress constitutes the balance, which is paid at the end of the year. If it turns out that the company has received a sum higher than the net cost of the services provided (income minus losses), the company is required to reimburse the difference in the 15 days following approval of the balance sheet.

(11) The annual subsidy corresponds to the accumulated net loss on the services referred to in the five-year plan, to which must be added a variable amount corresponding to the return on capital invested. The amount of the subsidy awarded to Tirrenia di Navigazione pursuant to the public service agreement of 1991 has evolved as follows ([5]):

(in million ITL)

Year	Operating costs (a)	Operating revenue (b)	Net deficit (cumulated losses – cumulated income) (a – b)	Return on capital invested	Amount of annual subsidy
1992	[...] (*)	[...]	[...]	[...]	[...]
1993	[...]	[...]	[...]	[...]	[...]
1994	[...]	[...]	[...]	[...]	[...]
1995	[...]	[...]	[...]	[...]	[...]
1996	[...]	[...]	[...]	[...]	[...]
1997	[...]	[...]	[...]	[...]	[...]
1998	[...]	[...]	[...]	[...]	[...]
1999	[...]	[...]	[...]	[...]	[...]
2000	[...]	[...]	[...]	[...]	[...]

(*) Business secret.

([5]) Data taken from the PriceWaterhouseCoopers' study *Valutazione dei criteri di predisposizione dei conti economici gestionali per linea e stagionalità relativi agli esercizi 1992-1999*, completed for the year 2000 by the Italian authorities. The study reproduces the analytical accounts of the Tirrenia company and assesses the operating costs and income for each of the routes.

Efforts by Tirrenia di Navigazione to lower its operating costs and optimise its results with the prospect of the cabotage market being opened up and the company being privatised in the future have led since 1997 to a steady fall in the overall annual subsidy. The increase observed in 2000 is a direct consequence of the impact of rising fuel costs on the company's accounts, while fares remained unchanged pursuant to a decision by the public authority ([6]). The net operating loss is derived from the difference between accumulated losses (usually generated during the winter season, between 1 October and 31 May) and recorded revenue, earned mainly in the summer period (1 June to 30 September). According to the Italian authorities, the loss of revenue directly attributable to the preferential rates applied to island residents and migrant workers (rates imposed on the companies) is higher than the overall amount of the annual subsidy.

With regard to the return on capital invested, information received from the Italian authorities shows this to represent, as a percentage of such capital, a return which, varying from year to year, ranges from […] in 1992 to […] in 2000, in line with the market rates applied in those years. On the same question, the Commission observes that the Community guidelines on State aid to maritime transport ([7]) state that the amount of subsidy awarded as compensation for public service obligations should take account of a 'reasonable return on capital employed', which is applicable in the case under examination.

2.3. *INVESTMENTS PROVIDED FOR IN THE FIVE-YEAR PROGRAMMES AND THE COMPANY'S BUSINESS PLAN*

(12) Apart from specifying which routes are to be served and with what frequency, the five-year programmes also determine the investments which the concession-holder intends to make in the period concerned in order to guarantee service on the routes in question. During its investigation, the Commission sought to ascertain in particular in what way the costs of vessel acquisition and depreciation were taken into account for the purposes of calculating the annual subsidy.

The Commission also wanted to check whether the additional investments planned on behalf of the undertakings in the group, according to the business plan adopted in March 1999 by Tirrenia for the period 1999 to 2002, did not contain any other element of aid. The plan has the following main objectives:

— to enable the companies of the group to cope with the changed conditions of the Italian cabotage market which have resulted from its liberalisation (1 January 1999) and prepare themselves for the termination, in 2008, of the scheme under the agreements signed with the State,

— to reduce the costs of the services provided pursuant to the abovementioned agreements,

— to sustain the group's development and make best use of available resources,

— to create the conditions for privatisation of the group companies.

The business plan provides, in particular, for a change in the investments needed for the services referred to in the public service agreements; this should take the form of decommissioning old ships, transferring other vessels within the group and new investments totalling ITL 700 billion.

2.4. *PREFERENTIAL FISCAL TREATMENT*

(13) Decree Law No 504 of 26 October 1995 introduced a preferential fiscal scheme for mineral oils used as fuel for shipping. In accordance with Article 63(3) of this Decree, excise duties are reduced for lubricants used on board.

In its decision to initiate the procedure, the Commission had expressed some doubts about the way this fiscal relief was being applied to vessels laid up in Italian ports for maintenance purposes. The Commission wanted reassurance that this measure was not discriminatory to other maritime operators whose ships were in the same situation.

3. **COMMENTS FROM INTERESTED PARTIES**

3.1. *COMMENTS BY TIRRENIA DI NAVIGAZIONE*

(14) Tirrenia di Navigazione submitted its comments on the decision to initiate the procedure by letter dated 22 November 1999. Primarily, the company contested the notion that the compensation paid pursuant to the agreements signed with the State can be qualified as 'new aid' and hence the legitimacy of the decision to initiate the formal investigation procedure. According to the company, the Commission had known for a long time of the existence of a scheme for public service obligation compensations and had never raised any objections to the scheme. The company also contended

([6]) Expenditure on fuel, which amounted to ITL 74 179 million in 1999, soared to ITL 113 142 million in 2000.
([7]) OJ C 205, 5.7.1997.

that the value of the annual compensation payments paid to the public operator is strictly necessary and proportional to cover the additional net cost of the public service obligations. Tirrenia concluded, therefore, that there was no obstacle to competition with other market operators.

At the same time, Tirrenia di Navigazione instituted proceedings before the Court of First Instance pursuant to Article 230(4) of the Treaty ([8]) against the Commission's decision to initiate the procedure.

3.2. *COMMENTS FROM PRIVATE OPERATORS*

(15) The Commission received a number of comments from various private operators competing with the concession-holders, which stressed above all the following aspects:

— Tirrenia is practising an aggressive commercial policy on the routes where competition from private operators is focused, characterised by voyages at dumped prices, rebates and deferred payment systems, the only explanation for which is the public aid it receives,

— the public service obligations lack transparency, and Tirrenia's ability to change the extent of the obligations incumbent upon it, particularly regarding the routes it serves and the imposed timetables and frequencies, is contrary to the very nature of public service obligations,

— given that services are being offered by private operators on some routes served by Tirrenia, the need for a public service appears contestable,

— the financing arrangements for investments carried out since 1995, or scheduled in the business plan, contain elements of aid, particularly as regards two vessels acquired by Viamare in 1996 and Tirrenia's generally more favourable access to bank loans,

— like other companies in the group, Tirrenia benefits from preferential fiscal treatment for mineral oils used on board its vessels when laid up in Italian ports.

4. **COMMENTS FROM THE ITALIAN AUTHORITIES**

4.1. *SUBSIDIES PAID IN RESPECT OF PUBLIC SERVICE OBLIGATIONS*

(16) By letter of 29 September 1999, the Italian authorities forwarded their comments on the initiation of the procedure. In their opinion, Article 4 of Council Regulation (EEC) No 3577/92 (cabotage) allows the agreements signed with each company of the Tirrenia group to remain fully in force until their expiry date, namely 2008. Consequently, the public service obligations scheme which derives from these agreements may not be questioned by the decision to initiate the procedure.

The Italian authorities also contest the notion that the aid referred to by the Commission Decision constitutes new aid within the meaning of Article 88(3) of the Treaty and that it could have affected trade between Member States before the opening of the Italian market to cabotage on 1 January 1999.

Apart from these general comments, the Italian authorities stress that the presence of private operators on the routes served by Tirrenia di Navigazione is a recent and limited phenomenon, being confined to a small number of routes and concentrated in the summer season. Moreover, the method of calculating the annual compensation, which consists in deducting losses accumulated during the winter from revenue accrued during the summer, helps keep the amount of compensation to its strict minimum. Consequently, according to the Italian authorities, the compensation is necessary and strictly proportionate in respect of the public service obligations, whose characteristics it is for the Member State to define.

4.2. *INVESTMENTS SCHEDULED IN THE BUSINESS PLAN*

(17) The Italian authorities stress that the investments scheduled in the business plan are designed to reduce the costs of the service while maintaining a high level of quality. They also insist that the methods for financing the planned investments do not contain any aid element. Investments will be financed partly from the company's own resources and partly by means of loans contracted under normal market conditions.

4.3. *PREFERENTIAL FISCAL TREATMENT*

(18) The Italian authorities have given details of the legal framework governing the fiscal treatment of mineral oils used as fuels for shipping. The information provided to the Commission shows that, through a general decision of 2 March 1996, taken pursuant to Decree Law No 504/1995, the preferential fiscal treatment provided for by this text is extended to fuels and lubricants used by any vessel laid up in a port for maintenance operations.

([8]) Case T 246/1999, in progress.

(19) At the same time, Italy went before the Court of Justice to contest the decision to initiate the procedure in respect of the part containing the injunction to suspend the grant of unlawful aid ([9]).

5. **ASSESSMENT OF THE AID**

5.1. *SUBSIDIES PAID IN RESPECT OF PUBLIC SERVICE OBLIGATIONS*

5.1.1. EXISTENCE OF A NEW AID MEASURE

(20) Pursuant to Article 87(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

The Commission notes that the annual balancing subsidy which the State grants directly to Tirrenia di Navigazione within the framework of the 1991 agreement confers on that company an advantage not enjoyed by other competing companies offering or likely to offer comparable services in the market in question. The fact that this market was temporarily exempted, up to 1 January 1999, from the application of Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) does not rule out the possibility that the subsidies paid to Tirrenia under the agreement could have affected trade between Member States and distorted competition. In this respect, the Commission notes, firstly, that operators from other Member States were present on the routes served by Tirrenia even before the cabotage market was opened up; secondly, it records that, again before that date, some competing companies were also operating in the liberalised markets, such as the market for maritime services between Member States or between Member States and non-member countries, in which Tirrenia di Navigazione was also operating before 1 January 1999 and still is. The Commission also points out the risk of cross-subsidies between the services provided by Tirrenia di Navigazione on the cabotage market and those provided on the international market, particularly as the company does not keep separate accounts for these different categories of services. Finally, the Commission notes that the annual balancing subsidy scheme provided for by the 1991 agreement was instituted for a period of 20 years and that it is continuing, therefore, to have an effect even after the market for the cabotage services concerned has been opened up to competition.

(21) The Commission does not share Tirrenia di Navigazione's view that the subsidies in question are existing aid. Firstly, the Commission notes that they do not predate the entry into force of the Treaty. The annual balancing subsidy scheme was only in fact set up in its present form by Laws No 684/74 and No 169/75. In addition, Decree No 501/79 and Law No 856/86 established in detail various public service obligations and the cost elements entering into the calculation of the balancing subsidy which Tirreniadi Navigazione enjoys under the terms of the 1991 agreement. Secondly, the Commission notes that it has never authorised the aid in question. In particular, the fact that the Commission may have had knowledge of the various legislative texts instituting the annual subsidy scheme and the 1991 agreement does not mean, in the absence of prior notification within the meaning of Article 88(3), that tacit authorisation was given to the annual subsidy scheme (see judgment in the Lorenz case ([10])). The Commission considers, therefore, that the subsidies to Tirrenia di Navigazione constitute new aid within the meaning of Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([11]).

5.1.2. APPRAISAL OF THE COMPATIBILITY OF THE AID

(22) The ban on aid laid down in Article 87(1) of the Treaty is not absolute. Article 87(2) and (3) and Article 86(2) of the Treaty provide for exemptions.

None of the exemptions provided for in Article 87(2) of the Treaty apply to the aid awarded to Tirrenia under the heading of the annual subsidy, which is neither aid having a social character, granted to individual consumers, nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas of the Federal Republic of Germany. With particular regard to aid of a social character, the application of Article 87(2) presupposes that the measure benefiting individual consumers does not favour certain undertakings or types of production directly or indirectly. In this respect, the Commission notes that the loss of revenue Tirrenia di Navigazione sustains by charging reduced fares for island residents and migrant workers is taken into account in the calculation of the annual compensation. The Italian authorities cover these fare reductions, which benefit individual consumers, only when the consumers concerned travel with the public operator, benefiting the latter vis-à-vis its private competitors.

([9]) Case C 400/1999, in progress.

([10]) European Court of Justice, Case 120/73 *Lorenz* [1973] ECR 1471.
([11]) OJ L 83, 27.3.1999, p. 1.

Nor does this aid qualify for any of the exemptions listed in Article 87(3) of the Treaty. The aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, as described under (b), nor is it intended to promote culture and heritage conservation as described in (d). Nor can the aid in question be qualified as regional aid, within the meaning of points (a) or (c), as it is not part of a multisectoral aid scheme which is open in a given region to all the undertakings of the sectors concerned ([12]). Nor can the aid in question be regarded as facilitating the development of certain activities as referred to in (c), since this is aid intended to cover the operating costs of a specific maritime operator and does not fall within a general plan enabling the beneficiary undertaking to become economically and financially efficient without recourse to further aid.

(23) Article 86(2) of the Treaty states that undertakings entrusted with the operation of services of general economic interest […] are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

(24) In accordance with Community case-law, as this provision lays down a derogating rule it must be interpreted restrictively ([13]). It is not therefore sufficient in this respect that the company in question has been entrusted by the public authorities with the operation of a service of general economic interest; the application of the rules of the Treaty, specifically those of Article 87, must also obstruct the performance of the particular tasks assigned to the company and the interests of the Community must not be affected ([14]).

(25) To assess whether the subsidies paid to Tirrenia di Navigazione under the 1991 agreement qualify for the exemption referred to in Article 86(2) of the Treaty, the Commission must first verify the existence and extent of the public service obligations imposed on the company in order to appraise the need for a public service and for a subsidy to compensate for its cost.

The existence of public services

(26) The abovementioned Community guidelines on State aid to maritime transport stipulate that 'public service obligations may be imposed for scheduled services to ports serving peripheral regions of the Community or thinly served routes considered vital for economic development of that region, in cases where the operation of market forces would not ensure a sufficient services level'.

By virtue of the legal acts and the provisions of the agreement described above, Tirrenia di Navigazione is subject, on all its routes, to a series of obligations regarding the ports to be served, voyage frequencies, times of departure and arrival, type of vessel to be used and fares to be charged, which obligations the company would not assume (or would not assume to the same extent or under the same conditions) if it could act solely in its own commercial interests.

The purpose of these obligations is to guarantee that the principle of territorial continuity is upheld and that a sufficient number of scheduled maritime transport services are provided for passengers and goods to and from the Italian island regions in order to meet the social and economic development requirements of those regions. The Commission concedes that this objective, which is the expression of a legitimate public interest, could not be achieved by the simple operation of market forces. Indeed, in 1991, Tirrenia di Navigazione found itself in a de facto monopoly situation on almost all the routes concerned, even though the law conferred no exclusivity on it in this respect.

The purpose of the agreement concluded with the State was precisely to guarantee that these obligations would be met and, in return, to allow compensation for the costs directly related to the loss the company incurred in satisfying the obligations.

(27) However, for the obligations in question to be able to give rise to compensation and for the Commission to be able to verify that the compensatory amount is limited to what is strictly necessary, these obligations need to be set out in advance and in a precise manner by the competent public authorities. The Court, too, has recognised the need to predetermine public service obligations in a precise fashion ([15]).

The Commission notes here that the system introduced by the Italian authorities to define the extent of the public service obligations allows the concession-holder a margin of flexibility on the routes where competition

([12]) See the Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

([13]) Judgment of the Court of First Instance of 27 February 1997, Case T-106/95 *Fédération française des sociétés d'assurances* (FFSA et al.) v *Commission* [1997] ECR II-229, paragraph 173 of the grounds.

([14]) See the judgment referred to in the previous footnote and the judgment of the Court of 10 December 1991 in Case C-179/90 *Merci convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 26.

([15]) Judgment of the Court of 20 February 2001, Case C-205/1999 'Spanish maritime cabotage', not yet published.

from private operators is concentrated, particularly in the high season, and that this margin enables the company to adapt its service offer to demand. This flexibility, expressed sometimes as the simple fixing of a maximum number of voyages and sometimes by the total absence of references to the number of frequencies to be offered, must be seen in conjunction with the Italian public authorities' power to change the routes, the ports to be served and the required frequency of services in order to adapt the regulatory framework to market trends within each five-year period.

The Commission considers that, in view of the flexibility allowed Tirrenia di Navigazione in terms of the extent of its obligations, the services in question cannot be considered to be meeting public service requirements connected with a particular task conferred on a company entrusted with a service of general economic interest and consequently conferring a right to compensation. Indeed, in accordance with the above-mentioned case law of the Court ([16]), in order to confer the right to compensation, public service obligations must be fixed in advance by the public authorities in a precise manner. Such is not the case when the company concerned may determine, on its own initiative, the frequency of service to operate and even judge whether or not to operate the service at all depending on market circumstances. Additional services of this kind, provided by Tirrenia on routes where there is competition and in the profitable periods ([17]) of the high season, cannot be taken into consideration for the purposes of calculating the annual compensation.

(28) In the matter of verifying the existence and extent of the public service obligations currently entrusted to Tirrenia di Navigazione and the need to compensate the cost of such services, the Commission must ascertain that competing operators do not offer services similar or comparable to those offered by the public operator and which would meet the requirements laid down by the Italian authorities; this can be ascertained by carrying out a comparative examination, route by route, of the total demand for services and available supply.

To this end, the routes served by Tirrenia di Navigazione can be grouped into two categories:

(a) those on which the company operates without any competition;

(b) those on which the competition of private operators is focused, both in the high season only and throughout the year.

([16]) Ibid.
([17]) See recital 30.

(29) The routes on which there is competition from private operators represent a significant percentage of Tirrenia's traffic (80 % of passengers, 77 % of linear metres carried on mixed ferries, 56 % of freight carried on cargo vessels) ([18]). Competition on these routes is a relatively recent phenomenon; it has emerged essentially over the last five years, during which time the market has experienced a sharp increase in demand on these same routes.

(30) With regard to the routes where competition exists from private operators, the Commission has ascertained the following:

(a) **Naples/Palermo**

No competitors meet the requirements of annual regularity and frequency of service as set out in the agreement, for either passenger or goods transport. Since 1997 a private company has been operating the route during the high season (April to October); however, it offers services of limited capacity and involving only rapid passenger transport, and is therefore unable to meet the service requirements laid down by the Italian public authorities, which are basically for a year-round daily night-time sailing from each of the two ports.

(b) **Civitavecchia/Olbia**

A private operator operating between Civitavecchia and Golfo Aranci ([19]) has been competing with Tirrenia on this route during the high season since 1996, and year-round since 1998. Competition increased in June 2000 with the arrival of another operator ([20]). The Commission nevertheless notes that only Tirrenia di Navigazione meets all the requirements of the agreement, in terms both of frequencies (seven days a week, year-round) and of ports to be served and departure times, including a night-time sailing from both ports during the high season. The Commission notes in particular that neither of the two competing operators provides a year-round daily link and that, in the low season, the cumulated service supplied by these operators does not guarantee the daily frequency required by the agreement.

The Commission also notes that Tirrenia di Navigazione offers additional services on this route, the frequency of which may vary according to changes in demand. Pursuant to the Ministerial Decree of 13 March 1998, these services may be carried out from

([18]) The data refer to 1997 and have been taken from the 'Azzurra' study.
([19]) The port of Golfo Aranci, situated 15 km from Olbia, may be regarded as interchangeable with the latter.
([20]) The services provided by this operator in the low season were suspended in the autumn of 2000.

June to September, alternating departures from Fiumicino and Golfo Aranci ([21]), thus giving Tirrenia additional operational flexibility. The Commission would stress once again that, in the absence of a precise prior definition of the level of services required, these latter services cannot be regarded as meeting public service requirements.

(c) **Genoa/Porto Torres**

For the passenger segment on this route, Tirrenia di Navigazione has faced competition from private operators since 1994 in the high season and since 1999 in the low season. The Commission notes, however, that in both the high and the low season, no competing operator meets all the regularity, frequency and timetable requirements laid down by the agreement, including in particular a year-round daily night-time sailing from each of the two ports. The Commission also notes that as the private operators do not have replacement vessels they are sometimes forced to suspend services for maintenance reasons and sometimes deploy their ships on more profitable services, such as cruises.

The Commission also notes that, in the high season, Tirrenia di Navigazione offers additional high-speed services, the precise frequency of which is laid down by the current rules. The same is true of additional freight services, performed using a ro-ro ferry according to traffic requirements. As the Commission has already indicated, in the absence of a precise prior definition of the level of services required, these services cannot be regarded as meeting public service requirements.

(d) **Genoa/Olbia/Arbatax**

Only since 1998, and only in the high season, has Tirrenia faced competition from private operators on this route. The Commission notes in this respect that only Tirrenia di Navigazione meets all the regularity, frequency and timetable requirements laid down by the agreement, which provides for a year-round daily night-time sailing from each of the two ports and two weekly extensions to the port of Arbatax, which no competing operator offers. The Commission also notes that the high-speed services Tirrenia offers on this route during the summer, as laid down in the agreement, are not offered by its competitors.

Finally, the Commission notes that, pursuant to the Ministerial Decree of 9 October 1998, Tirrenia also serves the ports of La Spezia and Golfo Aranci ([22]) with one daily sailing from June to September.

(e) **Livorno/Cagliari**

Tirrenia di Navigazione carries freight on this route in competition with two private operators, whose cumulated service offer appears to meet the agreement's requirements in terms of regularity, frequency and capacity. One of these operators has been operating the route since 1995, and the other since 1998. The established presence of these operators calls into question the need to provide compensation for the loss made by the public operator on this route. The Commission notes, however, that only Tirrenia di Navigazione guarantees uninterrupted year-round services as specified in the current rules; in other words, Tirrenia maintains a replacement ship, on a route on which the ship must be less than 20 years old. The Commission notes that these requirements involve specific additional costs for the public operator not incurred by the private operators. The Commission therefore considers that these additional costs, and only these, may give rise to compensation. None the less, the Italian authorities need to ensure that the amount of the compensation paid is strictly proportionate to the additional costs generated by the said public service requirements.

(f) **Voltri/Termini Imerese**

Tirrenia uses ro-ro vessels on this route to provide cargo transport services, in competition with services offered by a private operator using mixed passenger/goods vessels on the parallel route Genoa/Palermo ([23]). The Commission notes that the services offered by the private operator satisfy the public service requirements set out in the agreement in terms of capacity and frequency. While the need for compensation has been established for the earlier five-year periods, before the private operator became established and thus before it was able properly to meet all these requirements, the same cannot be said for the new five-year period. In this context, the Commission notes the Italian authorities' undertaking to cancel the services offered by Tirrenia on this route for that period; these will accordingly no longer be taken into account when calculating the public service compensation amount.

([21]) The ports of Fiumicino and Civitavecchia may be regarded as interchangeable, as is the case with the ports of Golfo Aranci and Olbia.

([22]) The ports of La Spezia and Genoa may be regarded as interchangeable, like those of Olbia and Golfo Aranci.

([23]) The ports of Voltri and Genoa may be regarded as interchangeable, as may those of Termini Imerese and Palermo.

(31) With regard to the services provided by Tirrenia on routes without any competition, the Commission notes that these concern both goods and passenger transport. The following table indicates the routes and services operated by Tirrenia without competition in the last five-year period (1995 to 1999), most of which were also provided in the previous five-year period (1990 to 1994):

(in million ITL)

Lines	Type of service	Financial year results (costs – income 1999) (1)
Naples/Cagliari	Passengers/goods	[...]
Genoa/Cagliari	Passengers/goods	[...]
Civitavecchia/Cagliari	Passengers/goods	[...]
Fiumicino/Arbatax	Passengers/goods	[...]
Palermo/Cagliari	Passengers/goods	[...]
Cagliari/Trapani (2)	Passengers/goods	[...]
Livorno/Catania	Goods	[...]

(1) The sums recorded in this column are accounted for in Table I in recital 38, which gives the costs and income of all the routes considered as a whole, operated by Tirrenia di Navigazione in 1999, whether or not subject to competition.
(2) With extension to Tunis.

The absence of competition on these routes over the last decade shows that the free play of market forces alone has not been sufficient to guarantee the transport services which Tirrenia has provided in accordance with the agreement. Consequently, compensation is necessary to allow the company to offset the extra costs generated by supplying these services.

(32) The Commission also notes that, under the system introduced by the 1991 agreement, Tirrenia operates on international routes, the net operating deficits of which have been taken into account when calculating the annual subsidy. This applies to the Italy/Malta route and the Cagliari/Trapani/Tunis route.

The Commission would point out that these routes are in the international maritime transport market and not the Italian cabotage market. As this market is subject to actual or potential competition from other Community operators, such compensation is to be analysed as operating aid, which may only be authorised pursuant to Article 86(2).

Information supplied by the Italian authorities shows that the Italy/Malta route was operated on a year-round basis until 1992. The arrival on the market of competitors during the summer season led the Italian authorities to restrict the service obligation to the winter period from 1993 to 1994 and to suspend services on this route entirely as from June 1994. Under these circumstances, the Commission considers that, in the absence of comparable services offered by other Community or non-member country operators, the compensation paid to Tirrenia up to that date was needed to meet the service requirements laid down by the Italian authorities. In addition, in the absence of proven competition from other Community operators, the compensation paid to Tirrenia to cover the net deficit for operating this route was not of a nature to affect trade between Member States to an extent contrary to the common interest.

As for the Cagliari/Trapani/Tunis route, the Commission observes that the link to Tunisia is an extension of the Cagliari/Trapani cabotage route on which Tirrenia operates without competition. Information forwarded by the Italian authorities shows that the services performed on the international part of the route do not entail any additional financial burden which may be taken into account when calculating the annual compensation. The figures supplied for the years 1993 to 1996 inclusively show a net positive result for the Trapani/Tunis connection, which itself helped reduce the deficit recorded for the Cagliari/Trapani link and in turn the negative sum taken into account to calculate the annual compensation.

Need for compensation

(33) To determine whether the annual compensation paid to Tirrenia corresponds to the minimum needed to provide services which meet the public service requirements laid down by the Italian authorities, the Commission needs to examine all the parameters which generate additional costs for the public operator for the services it has provided.

The Commission notes that the compensation calculation mechanism provides for income made during the high season to help reduce the deficits accumulated in the low season, with the result that the resulting level of annual compensation remains lower overall than it would be if the accumulated deficits alone were added together, route by route. The Commission also notes that the company's proceeds are subject to a dual constraint in terms of fares, namely the preferential fares for certain social categories and the need for the company to obtain the public authorities' approval for any change in the fares. The information forwarded by the Italian authorities shows that Tirrenia is not free to adapt its fares to take account, in particular, of changes in operating costs. This dual constraint, which leads to an appreciable reduction in the company's income, and which is reflected in the amount of the annual compensation, cannot be described under such circumstances as an aggressive commercial policy, characterised by predatory pricing.

Secondly, the Commission notes that the cost elements taken into consideration in order to calculate the compensation have been defined by the public authorities, leaving the company with no margin of discretion. These elements reflect all the fixed and variable costs directly linked to providing the services classified by the public authorities as services of general interest and which, as such, are covered by the agreement previously cited (see Table I, recital 38). These cost elements include depreciation of vessels and expenditure on fuel and mineral oils. Regarding ship depreciation, the Commission considers that, to the extent that the ships in question are used exclusively for the services covered by the agreement, this cost element may be regarded as necessary for the provision of those services, and may thus legitimately enter into the calculation of the annual compensation. Regarding the cost of fuels and mineral oils used by these ships, the Commission has found no discriminatory element reducing the cost of such fuels and lubricants to the benefit of Tirrenia di Navigazione compared with other maritime operators.

(34) To enable the Commission to check that the compensation paid has been proportional to the public service requirements, the Italian authorities sent it an analysis of the operating accounts for each of the routes served by the public operator over the last 10 years. The analysis showed some routes to be profitable overall on an annual basis, even if they sometimes present a somewhat substantial deficit in the winter period, while others are loss-making overall. The routes which are profitable overall are essentially those on which the competition of private operators is focused.

The Commission notes that the mechanism for calculating the annual compensation described above is such that the net positive result of the routes which show an overall profit helps to reduce the amount of compensation awarded, and thus to ensure its proportionality.

(35) The Commission considers that, generally, only costs directly linked to the burdens resulting from the public service obligations laid down by the Italian authorities may be taken into consideration when calculating the annual compensation. Consequently, the net cost of additional services which

are not subject to the specified regularity, frequency and capacity requirements may not be taken into account for the annual compensation figure. The Commission notes, however, that, where they have been provided, such services, most of which are operated during the high season and on routes where there is competition, have proved profitable and have thus not contributed to the overall operating deficit which the compensation is intended to offset.

(36) Regarding the services for which a comparable level of competition has been shown to exist (namely on the Livorno/Cagliari route), information provided by the Italian authorities shows that this route is operated at loss, which is taken into account for the purposes of calculating the annual compensation amount. The Commission notes that the arrival on the market of competing operators post-dates the approval of the first five-year plan. With respect to the second five-year period, the Commission considers that the Italian authorities could have still deemed it necessary to continue compensating for the loss incurred by Tirrenia on this route, since the only competitor then present in the market could not yet be considered to be established. Consequently, until the end of 1999, the annual compensation amount could include all the net costs of the services offered by Tirrenia on this route, namely total costs minus income generated by the service. The situation is different for the new five-year period. Indeed, the Commission considers that only the additional costs engendered for the public operator by the need to maintain a replacement vessel in order to ensure regularity of service year-round and the obligation to use a vessel less than 20 years old and to charge the fares imposed by the Italian authorities may henceforth be taken into account for the purposes of calculating the annual compensation. To take operating costs into account would constitute overcompensation and be incompatible with Article 86(2) of the Treaty.

(37) In examining the proportionality of the aid paid to Tirrenia, the Commission became aware of a study by an independent consultant (hereinafter the 'Azzurra study') ([24]), commissioned by a complainant, regarding the projected profitability of the routes operated by Tirrenia within the terms of the agreement. The analysis is based on the projected operating results of a fictitious company, Azzurra di Navigazione, subject to the same regularity, frequency, capacity and vessel-type requirements to which Tirrenia was subject in 1997, on the medium- and long-distance national connections operated by Tirrenia. The study divides the routes operated by Azzurra into three categories: clearly profitable, more or less in balance and loss-making. Taking 1999 as the reference year, the study also shows that Azzurra would have obtained a positive net operating result, for its routes as a whole, of ITL 21 722 million. However, information forwarded by the Italian authorities, which supplied analytical accounts for Tirrenia, drawn up by an independent expert, revealed that for the same year, 1999, the public operator made a net operating loss of ITL 21 252 million. Moreover, while for certain routes Tirrenia's operating results are quite close to those of Azzurra, the situation is quite different on the other routes. In the light of these discrepancies, the Commission called on an independent consultant to pinpoint the reasons for them and establish or rule out the existence of any overcompensation.

(38) The study by the Commission's consultant ([25]) highlighted the difficulty of drawing working conclusions from comparing the operating results projected for a fictitious company such as Azzurra supposedly entering the market to provide services comparable to those of Tirrenia, with the results the public operator actually recorded.

The tables below show the various cost elements taken into consideration to calculate the annual compensation, both for Tirrenia and for Azzurra, using 1999 as a reference year in both cases ([26]). Table I shows the costs and revenue actually recorded by the public operator on all the routes referred to in the agreement, whether or not they are subject to competition; Table II gives an estimate of the costs and revenue of a fictitious operator providing comparable services all year round on all the routes operated by Tirrenia, in a situation of competition or de facto monopoly, with the exception of the international segment of the Cagliari/Trapani/Tunis route.

([24]) *Analisi della redditività di alcune linee di cabotaggio italiane*, June 2000.
([25]) *Analisi comparativa dei conti economici gestionali di Tirrenia di Navigazione e Azzurra di Navigazione*, PriceWaterhouseCoopers, December 2000.
([26]) 1999 is the reference year both for the Azzurra study and for the comparative study performed by the Commission's consultant. It is also the first year in which the Italian cabotage market was open to the free provision of services and the year in which the private operators stepped up their presence compared with previous years. 1999 is also the last year for which the Commission has all the relevant economic data.

Table I

(in million ITL)

Tirrenia Economic accounts 1999	Winter season (a)	Summer season (b)	Annual total (a + b)
Cost elements (i) Agency fees/acquisition expenses (ii) Port taxes/port transit expenses and other (iii) Operating costs (iv) Depreciation (v) Net financial charges (vi) Administration (vii) Other costs			
Total costs	[...]	[...]	[...]
Operating revenue	[...]	[...]	[...]
Result (costs — income)	[...]	[...]	[...]
Return on capital employed			[...]
Annual subsidy			[...]

Table II [1]

(in million ITL)

Azzurra Economic accounts 1999	Annual total
Operating income	468 434
Cost elements:	
— Agency fees	(28 501)
— Cost of operating vessels (*)	(235 398)
— Depreciation of vessels	(70 833)
— Structural costs	(40 550)
— Financial management	(49 185)
Total costs	(424 467)
Result before taxation	43 967
Net result (income – costs)	21 722

[1] Table taken from the abovementioned study *Analisi della redditività di alcune linee di cabotaggio italiane.*
(*) Fuels, mineral oils, staff, ship maintenance, supplies and services, insurance, port and other taxes, decommissioning costs).

The fact that the Commission's consultant pinpointed the main sources of the discrepancies between Azzurra's and Tirrenia's results in terms of costs and revenue makes it possible to rule out the theory that Tirrenia's costs were overestimated, both on certain routes and in general. Indeed, the study shows that:

— Azzurra's service offer for the reference year 1999 proves insufficient to meet traffic demand, particularly during the high season, as demonstrated by the underestimation of the cost of hiring ships (put at ITL 23 billion),

— the cost of the fuel and mineral oils needed for Azzurra's fleet was underestimated by ITL 16 billion,

— Azzurra's personnel costs were calculated net of the reliefs provided for by Law No 522/1999 ([27]), whereas for Tirrenia these reliefs were accounted for in the year 2000. According to the Commission's consultant, these reliefs may be estimated at ITL 30 billion.

In economic terms, the overall impact of the calculation discrepancies referred to above is a reduction in Azzurra's operating costs of around ITL 69 billion for the reference year 1999.

The Commission also notes that, in the case in question, the cost of the public service was not determined in the context of a public procurement procedure; which would have allowed an assessment to be made of the additional cost deriving from the public service. In the circumstances, the Commission needs to determine which costs are to be taken into consideration for calculating the compensation, in other words those of the concession-holder's costs which are directly connected to and strictly necessary for the provision of public services. The Commission notes in this respect that, as the tables below show, the various cost elements taken into account for Tirrenia on the one hand and for Azzurra on the other are essentially the same, albeit accounted for in a different way.

The structure of the costs borne by the two companies is therefore comparable. The same may be said for the overall level of those costs, taking account of the explanations provided above regarding the divergent results obtained by the two companies. For 1999, the Commission deduces that Tirrenia is meeting reasonable profitability criteria, corresponding to those of the market. Given that, and seeing that the losses (confined essentially to the winter) are compensated for by profits (made essentially in the summer) and that Tirrenia's profitability, compared with Azzurra's, corresponds to the profitability of the market, the excess cost to be compensated may be considered to correspond to Tirrenia's net losses.

With reference to earlier years, seeing that the cost structure of the two companies Tirrenia and Azzurra is comparable, as is the level of such costs at a given moment, the Commission notes that changes in external factors over time (inflation, interest rate movements, taxes, fuel prices and so on) would have a comparable impact on both companies' costs.

The following table shows the evolution of Tirrenia's costs ([28]):

Cost elements (see Table I, recital 38)	1992	1993	1994	1995	1996	1997	1998	1999
(i) Agency fees etc.	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(ii) Port taxes etc.	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(iii) Operating costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(iv) Depreciation	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(v) Net financial charges	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(vi) Administration	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(vii) Other costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

([27]) Reliefs authorised by the Commission by letter SG/D6875 of 18 August 1999 (N 396/1999).
([28]) Data taken from the abovementioned study by PriceWaterhouseCoopers.

Information from the Italian authorities shows that changes over time in Tirrenia's individual cost elements are due, above all, to external factors such as inflation and changes in interest rates, as seen from the data in the two tables below:

Year	Costs	Variation (%)	Variation in inflation rate (1)
1992	[...]	0	
1993	[...]	4,3	4,2
1994	[...]	3,5	3,9
1995	[...]	5,9	5,4
1996	[...]	4	3,9
1997	[...]	1,9	1,7
1998	[...]	– 1,7	1,8
1999	[...]	0,6	1,6

(1) ISTAT official index.

Year	Short-term rates	Medium- and long-term rates
1992	[...]	[...]
1993	[...]	[...]
1994	[...]	[...]
1995	[...]	[...]
1996	[...]	[...]
1997	[...]	[...]
1998	[...]	[...]
1999	[...]	[...]

The change over time in the compensation awarded to Tirrenia relates directly to changes in the company's costs (see table) and income (see recital 11, Table I). These in turn reflect factors external to the company (e.g. inflation) and the upgrading of the Tirrenia fleet, which led to a more rational use of the same. The Commission would point out here that this upgrading is directly linked to the obligation imposed on Tirrenia by the agreement to use vessels less than 20 years old on its public service routes. This trend over time in costs and income explains the parallel course followed by the compensation awarded to Tirrenia di Navigazione. Under these circumstances and given the considerations outlined above, the Commission considers that, as in 1999, Tirrenia's total net loss in previous years corresponds to the amount to be compensated. Consequently, the compensation paid to Tirrenia, corresponding to the company's net loss plus a reasonable return on capital invested, is strictly proportional to the additional cost entailed by the public service task entrusted to the concession-holder.

Effect of the aid on trade — Commitments entered into by the Italian authorities for the period 2000 to 2004

(39) The Commission notes that Article 4(3) of Regulation (EEC) No 3577/92 (maritime cabotage) states that a public service contract may remain in force up to the expiry date, in this instance 31 December 2008. The Commission also notes that the agreement covers the main sea connections to and from Sicily and Sardinia, i.e. the greater part of the cabotage with the Italian islands of the Mediterranean and a large part of the cabotage with all the island regions of the Western Mediterranean. Under these circumstances, and given that the Italian cabotage market has been open without restrictions since 1 January 1999, the Commission considers that the payment of the balancing subsidy to Tirrenia di Navigazione provided for by the 1991 agreement could affect the development of trade to an extent contrary to the interests of the Community if the subsidy had the effect of strengthening the position of the company in the market in question by enabling it to eliminate current or potential competition in that market. The Commission believes this would be the case if the application of the agreement in the future and particularly in the new 2000 to 2004 five-year period were to lead to an increase in the capacity offered by Tirrenia di Navigazione as part of the public service agreement scheme on profitable lines where competition from private operators is concentrated. The data forwarded by the Italian authorities indeed show that, at the present time, the overall capacity offered on the market, i.e. by Tirrenia plus the private operators, is sufficient to satisfy the overall demand for transport, including seasonal peaks, in both the passenger and goods segments.

(40) In response to the concerns expressed on this topic by the Commission, by letters dated 13 and 19 March 2001 the Italian authorities forwarded a draft regulatory framework concerning the routes Tirrenia is required to serve and the services it must provide for the 2000 to 2004 five-year period. It includes the routes, frequencies, types of vessel and capacities offered by the public operator in both the high and the low season under the agreement. The draft shows that these are the only services which may be taken into consideration for the purpose of calculating the annual balancing subsidy. The Italian authorities have undertaken to formalise their commitment in a ministerial decree which will approve the 2000 to 2004 five-year plan. It is clear from this draft decree that Tirrenia's service offer will be lower than at present.

The Commission notes, in particular, that the Italian authorities have undertaken to reduce the overall offer of the public operator's services on the main routes where competition from private operators is focused in order to leave more room for the other operators. This undertaking is of particular significance on the Genoa/Porto Torres and Civitavecchia/Olbia routes, where the capacity reduction, concentrated on the high season, will represent around 30 % of the overall capacity Tirrenia di Navigazione currently offers on these two lines. The new configuration of services offered by Tirrenia di Navigazione on these two lines thus provides primarily for maintaining a daily night-time sailing in each direction all year round and, secondly, an additional activity, strictly defined in advance, from the beginning of June until the end of September, to meet on a continuous and regular basis the additional needs resulting from tourism in the regions concerned.

The Commission also notes that the capacity reduction proposed by the Italian authorities will lead to a fall in the public operator's overall offer, all routes taken together, to a level which is as a whole lower than the service offer provided for by the first five-year plan which, when the 1991 agreement was concluded, constituted the reference framework for services which could be subsidised.

With more particular regard to the routes where there is competition, this capacity reduction will have the effect of stabilising the overall offer at its 1994 level, i.e. before private operators appeared on the long- and medium-distance cabotage market.

The Italian authorities' commitment needs to be appraised with reference to market trends on the main routes subject to competition. Data communicated by the Italian authorities shows that between 1992 and 2000 demand evolved as follows:

Genoa/Porto Torres	+ 16 % in high season	+ 18 % over the year
Genoa/Olbia/Arbatax	+ 48 %	+ 33 %
Civitavecchia/Olbia	+ 33 %	+ 21 %

Most of this increase in overall demand on these routes was met by private operators taking advantage of this trend to enter the market or to step up their offer of services, particularly in the high season. The reduction in the public operator's service offer over the period 2000 to 2004 will increase this favourable trend for competition.

As far as the Genoa/Olbia/Arbatax route is concerned, the Commission notes that the Italian authorities plan to maintain Tirrenia's offer for the 2000 to 2004 period at more or less the current level. On the other hand, they have undertaken to end the parallel La Spezia/Golfo Aranci summer sailings, thus bringing the overall offer of services between Liguria and northern Sardinia back down to a level equal to that of the first five-year period.

The Commission also notes that the commitments entered into by the Italian authorities for the 2000 to 2004 period remove the margin of discretion the company previously enjoyed regarding the level of services offered on certain routes, and that they provide a full and accurate picture of the network of services the public operator is required to supply during the new five-year period under the terms of the agreement. Consequently, the Commission considers that the new reference framework for subsidised services will help make the agreement scheme more transparent for all operators in the market. It is important, however, to guarantee the permanency of this framework throughout the whole period under consideration. To this end, the Commission considers that any new adaptation of the offer of subsidised services during the said period should be notified to it in advance in order that it may examine the need for such an adaptation, particularly in relation to an insufficient supply of services available from the other operators in the event of an increase in overall demand.

5.2. *INVESTMENTS SCHEDULED IN THE FIVE-YEAR PLANS AND THE BUSINESS PLAN*

(41) With regard to the investments scheduled in the five-year plans, the Commission had, in its decision initiating the investigation procedure, expressed doubts regarding the arrangements for financing the investments needed to provide the subsidised services under the 1991 agreement. In particular, it wanted to check the extent to which the costs of ship acquisition and depreciation entered into the calculation of the annual compensation. In addition, the fact that Tirrenia was guaranteed a subsidy which included the cost of depreciation of its fleet until 2008 could, according to the Commission, be assimilated to an implicit guarantee on the part of the Italian State, enabling the public operator not to shoulder the economic risk inherent in any investment.

The first point to be borne in mind is that Tirrenia is obliged under the agreement to use vessels less than 20 years old on its subsidised routes and that it must normally own these vessels unless an exemption is expressly granted by the public authorities. This obligation, which constitutes a public service obligation, has led Tirrenia to renew a substantial part of its fleet in the last few years, given the age reached by the vessels used on the routes referred to in the first five-year plan (1990 to 1994). In addition, the type of vessels to be used on each of the different routes served by Tirrenia is laid down by a ministerial decree approving or amending each five-year plan. The acquisition of any new ship, just like the transfer or decommissioning of the oldest ships, has to be authorised by ministerial decree, which also specifies the service to which the vessel is to be assigned. Tirrenia's investments must also be in line with its strategy to develop the services provided by the public operator during the five-year reference period, a strategy provided for in the five-year plan approved by the public authority.

Given this legal context, the Commission has checked whether, during the 1990 to 1994 and 1995 to 1999 five-year periods, the costs of acquiring new ships and the depreciation costs of the vessels used by Tirrenia di Navigazione on the public service lines (a) fulfilled the requirements set by the Italian authorities and (b) were taken into account in a proportionate manner when calculating the annual compensation.

The Commission observes that, when Tirrenia introduced new vessels, older vessels were at the same time decommissioned, with the result that there was no overall increase in capacity linked to the renewal of the public operator's fleet.

As far as the cost of acquiring the new vessels is concerned, information provided by the Italian authorities shows that these purchases were made partly with the company's own resources and partly by means of bank loans. It also appears that the rates charged by the credit institutions involved are in line with rates enjoyed during the same period by companies of comparable size and turnover in other sectors of the economy ([29]). It appears, moreover, that Tirrenia di Navigazione did not enjoy any direct guarantee from the Italian authorities regarding the repayment of these loans. The Commission acknowledges that the very existence of an agreement with the State assured investors that their commitments would be honoured and enabled Tirrenia to modernise its fleet without bearing the economic risks which would have been borne by a commercial operator. This advantage, which could be assimilated to an implicit guarantee ([30]) and thus constitute State aid within the meaning of Article 87(1) of the Treaty, is, however, intrinsic to the agreement, concluded for a duration of 20 years before the entry into force of Regulation (EEC) No 3577/92 and the Community guidelines on State aid to maritime transport (OJ C 207, 5.7.1997). In addition, as already noted, the new vessels acquired by Tirrenia pursuant to the agreement are assigned exclusively to the line services provided for under the five-year plans. Consequently, this advantage, which is an integral part of the public service agreement, qualifies for the exemption referred to in Article 86(2) of the Treaty.

Regarding the depreciation costs of ships used by Tirrenia on the routes referred to in the five-year plans, the Commission notes that these are one of the cost elements which, under the terms of Article 5 of the agreement, enter into the calculation of the annual subsidy. Depreciation is calculated linearly over a 20-year period, with the exception of ultra-high-speed vessels, for which the duration is limited to 15 years. As the depreciation of vessels used to serve connections recognised as being of general interest by the Italian authorities is calculated according to criteria laid down in the agreement, and as examination of the analytical accounts of these routes has revealed no element of overcompensation in this respect in the two five-year periods considered, the Commission believes that the mechanism the agreement introduced to take vessel depreciation into account when calculating the annual compensation may be authorised under Article 86(2) of the Treaty. The provision of services recognised as being of general interest presupposes the use of vessels of a type and capacity predetermined by the public authorities and whose depreciation may thus be taken into account when calculating the annual compensation provided the vessels in question were acquired by the company under normal market conditions and in order to meet the obligations placed on it and are used exclusively for regular transport services on the routes covered by the agreement. In the case of Tirrenia di Navigazione, the Commission notes that all the vessels in question are used exclusively for services on routes recognised as being of general interest and that, as a result, their depreciation may be taken into account in its totality when the annual subsidy is calculated. The same is true for the investments needed to provide the services prescribed by the Italian authorities for the 2000 to 2004 five-year period and which correspond, in terms of type and capacity, to the commitments entered into by these same authorities concerning the requisite service level.

(42) Regarding the additional investments scheduled in the business plan for 1999 to 2002, it must be pointed out that implementation of this plan was suspended following the initiation of the procedure. The Commission notes that the commitments entered into by the Italian authorities for the 2000 to 2004 period exclude, for Tirrenia di Navigazione, the additional investments provided for under the plan, with the exception of two new vessels which will replace old ones on the routes covered by the agreement scheme. The information forwarded by the Italian authorities shows that these ships are being purchased under conditions similar to those described in the previous paragraph concerning investments set out in the 1990 to 1994 and 1995 to 1999 five-year plans and, since they are intended exclusively for services on a route acknowledged as being of general interest, their depreciation may be taken into account in its totality when calculating the annual subsidy.

([29]) For instance, the recent acquisition of two high-speed vessels was financed via a loan taken out with the Banco di Napoli in 1999 for ITL 160 billion at a variable rate equal to the six-month Euribor rate, raised by 0,40 % and repayable over 10 years. Information forwarded by the Italian authorities shows that the same credit institution granted loans at the same time to other large companies under very similar conditions.

([30]) See Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000).

6. **CONCLUSION**

(43) On the basis of the foregoing, the Commission notes that there are no further doubts regarding the compatibility of the aid awarded to Tirrenia di Navigazione under the 1991 agreement,

HAS ADOPTED THIS DECISION:

Article 1

The aid awarded by Italy to Tirrenia di Navigazione between 1 January 1990 and 31 December 2000 as compensation for providing a public service is compatible with the common market.

Article 2

Between 1 January 2001 and 31 December 2004, the aid awarded by Italy to Tirrenia di Navigazione shall be limited to covering the additional costs arising from the loss incurred during the provision of services corresponding to the commitments entered into by Italy for the abovementioned period.

Italy shall notify the Commission in advance of any change to the level of these services during the abovementioned period.

Article 3

The public service obligations imposed on Tirrenia di Navigazione for the 2005 to 2008 five-year period must be notified to the Commission in advance.

Article 4

As from 1 January 2001, the additional costs deriving from the loss incurred during the provision of services imposed by Italy on Tirrenia di Navigazione must be the subject of separate accounts for each of the lines concerned.

Article 5

Italy shall inform the Commission, within three months of the date of notification of this Decision, of the measures taken to comply therewith.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 June 2001.

For the Commission
Loyola DE PALACIO
Vice-President