DECISIONS

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COMMISSION DECISION (EU) 2022/348

of 17 June 2021

on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Tuscany for Toremar and its acquirer Moby

(notified under document C(2022) 4271)

(Only the Italian version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 23 March 2009, 9 December 2009, 21 December 2009, 6 January 2010, 27 September 2010 and 12 October 2010, the Commission received six complaints concerning various support measures adopted by Italy in favour of the companies of the former Tirrenia Group [2]. The complaints concerned the public service compensation granted to these companies after the expiry of the initial public service contracts concluded with Italy for the period between January 1989 and December 2008 ('the initial Conventions'), additional support measures laid down by several legislative acts adopted in the context of the privatisation process of the companies, as well as certain issues regarding particularly the privatisation procedure of Tirrenia di Navigazione S.p.A. ('Tirrenia') and Siremar – Sicilia Regionale Marittima S.p.A. ('Siremar').

(2) On 1 December 2010, Italy notified to the Commission the compensation paid in 2009 and 2010 by Italy to Toscana Regionale Marittima S.p.A. ('Toremar').

(3) On 5 October 2011, the Commission opened the formal investigation procedure in respect of various measures adopted by Italy in favour of the companies of the former Tirrenia Group ('the 2011 Decision'). The investigation concerned, inter alia, the compensation granted to Toremar – for the operation of a number of maritime routes as of 1 January 2009 and a number of other measures granted to that company (see recital (33)).

(4) The 2011 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation [3].

(5) By letter dated 28 September 2011, Italy had already informed the Commission of the intention to privatise the regional companies of the former Tirrenia Group, including Toremar. On 26 October 2011, the Commission sent a request for information to Italy concerning the privatisation procedure. On 30 November 2011, Italy submitted a reply to the Commission's request for information of 26 October 2011.

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[1] OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.

[2] The former Tirrenia group consisted of the companies Tirrenia di Navigazione S.p.A., Adriatica S.p.A., Caremar – Campania Regionale Marittima S.p.A., Saremar – Sardegna Regionale Marittima S.p.A., Siremar – Sicilia Regionale Marittima S.p.A., and Toremar – Toscana Regionale Marittima S.p.A.

[3] State aid – Italian Republic – State aid SA.32014 (2011/C) (ex 2011/NN), SA.32015 (2011/C) (ex 2011/NN), SA.32016 (2011/C) (ex 2011/NN) – State aid to the companies of the former Tirrenia Group – Invitation to submit comments pursuant to Article 108(2) of the Treaty of the Functioning of the European Union (OJ C 28, 1.2.2012, p. 18).

(6) On 15 November 2011, Italy submitted comments on the measures covered by the 2011 Decision.

(7) By fax sent on 28 February 2012, the company Toscana di Navigazione S.r.l. submitted a complaint alleging unlawful State aid as a result of the privatisation of Toremar and the compensation paid to Moby S.p.A. ('Moby'), Toremar's selected buyer. Specifically, the complainant alleges that: (i) the sale procedure has conferred an advantage on Moby, (ii) the merger between Toremar and Moby results in a monopoly on the Piombino – Elba island routes, and (iii) the compensation granted to Moby for the operation of the public service through the 12-year duration of the new public service contract is incompatible with the internal market to the extent that similar services are already provided on commercial terms by the complainant itself.

(8) By letter dated 19 July 2012, Italy provided additional information on the privatisation of the regional companies of the former Tirrenia Group, including Toremar.

(9) On 7 November 2012, the Commission extended the investigation procedure, inter alia, in respect of certain additional support measures granted by the Region of Tuscany to Toremar in respect of the public compensation granted to Toremar under the new public service contract. An amended version of that Decision was adopted by the Commission on 19 December 2012 ('the 2012 Decision').

(10) The 2012 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation ([4]).

(11) On 11 December 2012, Italy submitted its comments and on 22 April 2013, the Commission received comments from Toremar and its buyer, Moby.

(12) By its decision of 22 January 2014 ('the 2014 Decision') ([5]), the Commission closed the formal investigation procedure as concerns various measures adopted by the Sardinian Region in favour of Saremar. The appeal lodged by Saremar and the Region against that decision was dismissed by the General Court in 2017 ([6]).

(13) On 25 January 2018, 29 March 2018, 31 August 2018, 12 February 2019, 5, 14 and 17 February 2020, and 12 October 2020, the Commission requested additional information from Italy. Italy provided this information on 26 April 2018, 31 May 2018, 2 November 2018, 11 December 2018, 8 April 2019, 16 and 28 October 2019, 7, 16 and 23 February 2020, 21 April 2020, 9 November 2020, and 1 and 10 December 2020.

(14) This Decision only concerns possible aid to Toremar as specified in Section 2.3. All remaining measures subject to the 2011 and 2012 Decisions are being investigated separately under cases SA.32014, SA.32015 and SA.32016 and are not therefore covered by this Decision. In particular, those remaining measures concern other companies of the former Tirrenia Group.

2. BACKGROUND AND DESCRIPTION OF THE MEASURES SUBJECT TO INVESTIGATION

2.1. General framework

2.1.1. *The initial Conventions*

(15) The Tirrenia Group was traditionally owned by Italy through the company Fintecna ([7]) and initially included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded with Italy in 1991, in force for

([4]) State aid – Italian Republic – State aid SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) – State aid to the companies of the former Tirrenia Group and their acquirers – Invitation to submit comments pursuant to Article 108(2) of the TFEU (OJ C 84, 22.3.2013, p. 58).

([5]) Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22).

([6]) See Judgment of 6 April 2017 in Case T-219/14 *Regione autonoma della Sardegna (Italy) v Commission*, ECLI:EU:T:2017:266.

([7]) Fintecna (Finanziaria per i Settori Industriale e dei Servizi S.p.A.) is wholly owned by the Italian Ministry of the Economy and Finance and is specialised in managing shareholding and privatisation processes, as well as dealing with projects to rationalise and restructure companies facing industrial, financial or organisational difficulties.

20 years between January 1989 and December 2008 ('the initial Conventions'). Fintecna held 100 % of Tirrenia's share capital, which in turn wholly owned the regional companies Adriatica, Caremar, Siremar, Saremar and Toremar. Adriatica, which used to operate a number of routes between Italy and Albania/Croatia/Greece/Montenegro, was merged with Tirrenia in 2004.

(16) The purpose of these initial Conventions was to guarantee the regularity and reliability of the maritime transport services, the majority of them connecting mainland Italy with Sicily, Sardinia and other smaller Italian islands. To that effect, Italy granted financial support in the form of subsidies paid directly to each of the companies of the Tirrenia Group.

(17) Toremar traditionally operated a series of maritime cabotage ([8]) routes between the Region of Tuscany and the smaller neighbouring islands. The exact routes concerned are described under recital (38).

(18) On 6 August 1999, the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of aid paid on the basis of the initial Conventions to the six companies that then formed the Tirrenia Group.

(19) During the investigation phase, Italy requested that the Tirrenia Group case would be split up so that priority could be given to reaching a final decision concerning Tirrenia. This request was motivated by Italy's plan to privatise the Group, beginning with Tirrenia, and its intention to speed up the process in relation to that company.

(20) The Commission decided that it could accede to Italy's request, and by Commission Decision 2001/851/EC ([9]) it closed the procedure initiated in respect of the aid awarded to Tirrenia ('the 2001 Decision'). The aid was declared compatible subject to certain commitments by Italy.

(21) By Commission Decision 2005/163/EC ([10]) ('the 2004 Decision'), the Commission declared the compensation granted by Italy to the Tirrenia Group companies other than Tirrenia to be partially compatible with the internal market, partially compatible but conditional upon the respect of a number of undertakings by Italy, and partially incompatible with the internal market. The Decision was based on accounting data spanning from 1992 to 2001 and contained certain conditions aimed at ensuring the compatibility of the compensation throughout the duration of the initial Conventions.

(22) By Judgment of 4 March 2009 in cases T-265/04, T-292/04 and T-504/04 ([11]) ('the 2009 Judgment') the General Court annulled the 2004 Decision.

(23) By Commission Decision (EU) 2020/1411 ([12]), the Commission concluded the investigation on the Tirrenia Group companies other than Tirrenia, including Toremar, for the period 1992-2008 (the '2020 Tirrenia Group Decision'). The Commission concluded that the aid granted for the provision of maritime cabotage transport services constituted existing aid, while the aid granted for the provision of international maritime transport services was compatible with the 2011 services of general economic interest ('SGEI') Framework (the '2011 SGEI Framework') ([13]).

([8]) See 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) (OJ L 364, 12.12.1992) ('the Maritime Cabotage Regulation').

([9]) Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9).

([10]) Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (OJ L 53, 26.2.2005, p. 29).

([11]) Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

([12]) Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 332, 12.10.2020, p. 1).

([13]) Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

(24) By Commission Decision (EU) 2020/1412 ([14]), the Commission closed the formal investigation procedure as concerns the measures granted to Tirrenia and its acquirer CIN, for the period 2009-2020.

2.1.2. *The prolongation of the initial Conventions*

(25) Article 26 of Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions (including the one applicable to Toremar) which were initially to expire on 31 December 2008, for 1 year until 31 December 2009.

(26) Article 19-*ter* of Decree Law No 135 of 25 September 2009, converted into Law No 166 of 20 November 2009 ('the 2009 Law'), laid down that, in view of the privatisation of the Tirrenia Group companies, the shareholding of the regional companies (except for Siremar) would be transferred from parent company Tirrenia without any consideration being paid as follows:

(a) Caremar would initially be transferred to the Region of Campania. The latter would subsequently transfer to the Region of Lazio the Caremar's business operating the transport connections with the Pontino archipelago on a standalone basis under the name Laziomar ([15]);

(b) Saremar would be transferred to the Region of Sardinia; and

(c) Toremar would be transferred to the Region of Tuscany.

(27) The 2009 Law also specified that new Conventions would be agreed between Italy and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in draft Public Service Contracts, to be agreed between the regional authorities of Sardinia and Tuscany and Saremar and Toremar respectively by 31 December 2009 and between the regions of Campania and Lazio and Caremar and Laziomar respectively by 28 February 2010. The draft new Conventions/Public Service Contracts would be put up for tender with the companies themselves and signed with the buyers upon finalisation of the privatisation of each of those companies ([16]).

(28) To that end, the 2009 Law further prolonged the initial Conventions (including the one applicable to Toremar) from 1 January 2010 until 30 September 2010.

(29) The 2009 Law also set annual compensation ceilings for the operation of the services as of 2010 (under the prolongation of the initial Conventions, as well as under the new Conventions and Public Service Contracts), at a total of EUR 184 942 251, as follows:

Company	**Maximum annual compensation**
Tirrenia	EUR 72 685 642
Siremar	EUR 55 694 895
Saremar	EUR 13 686 441
Toremar	EUR 13 005 441
Caremar	EUR 29 869 832 ([1])

([1]) Out of which EUR 19 839 226 from Campania and EUR 10 030 606 from Lazio.

Table 1 – Compensation ceilings as of 2010

([14]) Commission Decision (EU) 2020/1412 of 2 March 2020 on the the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45).
([15]) This transfer was formalised on 1 June 2011.
([16]) Article 19-*ter*, paragraph 10 of the 2009 Law.

(30) Finally, Article 1 of Law No 163 of 1 October 2010 converting Decree-Law No 125 of 5 August 2010 ('the 2010 Law') laid down the further prolongation of the initial Conventions (including the one applicable to Toremar) from 1 October 2010 until the completion of the privatisation processes of Tirrenia and Siremar, which took place on 19 July 2012 and 31 July 2012 respectively.

2.1.3. *The privatisation of Toremar and the conclusion of the new service contract*

(31) In January 2010, a tender procedure was launched (see Section 2.3.2) to find a buyer for Toremar bundled together with the new public service contract for the provision of maritime services over a period of 12 years in exchange for public service compensation.

(32) Following its successful offer in the tender procedure, Moby became the new owner of Toremar. The sale contract between the Region of Tuscany and Moby was signed on 2 January 2012. On the same date, the parties (including Toremar) signed the new service contract for the provision of maritime services. On this basis, the ownership of all Toremar's shares was transferred from the Region of Tuscany to Moby on 2 January 2012.

2.2. **Measures in scope of the 2011 and 2012 Decisions**

(33) The following measures have been subject to assessment in the formal investigation procedure opened by the 2011 and 2012 Decisions:

(a) Compensation for the provision of services of general economic interest ('SGEI') under the prolongation of the initial Conventions (*measure 1*);

(b) Illegal prolongation of rescue aid by Tirrenia and Siremar (*measure 2*);

(c) The privatisation of the companies of the former Tirrenia Group ([17]) (*measure 3*);

(d) Compensation paid for the operation of SGEI under the future Conventions/Public Service Contracts (*measure 4*);

(e) The berthing priority (*measure 5*);

(f) The measures laid down by the 2010 Law converting Decree Law 125/2010 (*measure 6*);

(g) Additional measures adopted by the Sardinian Region in favour of Saremar *(measure 7*);

(34) By its 2014 Decision the Commission closed the formal investigation procedure as concerns the measures adopted by the Sardinian Region in favour of Saremar referred to above as Measure 7 with the exception of one measure ([18]).

2.3. **Detailed description of the measures subject to the present Decision**

(35) This Decision only deals with measures 1, 3, 4, 5 and 6 as listed in recital (33) in so far as they involve Toremar and Moby. These measures are described in more detail in the following sections.

2.3.1. *The prolongation of the initial Convention between Toremar and Italy*

2.3.1.1. The public service obligations

(36) Article 1 of the initial Convention with Toremar provided for 5-year plans to detail the ports to be served, the type of vessels to be used, the required frequency of the service and the fares to be paid.

(37) The first 5-year plan (1990-1994) for Toremar was approved by Ministerial Decree of 29 May 1990, and applied retrospectively as of 1 January 1990. The second plan, covering the period 1995-1999 and approved by Ministerial Decree of 14 May 1996, left the routes and frequencies unchanged. As for the periods 2000-2004 and 2005-2008, a plan was drawn up but never formally approved by the competent ministries. Instead, *ad hoc* decisions have been taken by the government with a view to bringing the services more closely into line with the needs of the local communities, without however making substantive changes to the public service system.

([17]) This includes the deferred payment by CIN of part of the purchase price for its acquisition of the Tirrenia business branch and several alleged additional aid measures in the context of the privatisation of the Siremar business branch (e.g. counter-guarantee and capital increase by the State for CdI, the entity that initially acquired the Siremar business branch).

([18]) In particular, the Bonus Sardo – Vacanza project, which forms part of Measure 7, was not assessed in the 2014 Decision and will also not be assessed in this Decision.

(38) Based on the initial Convention, as prolonged with subsequent legal acts mentioned above in recitals (25) to (30), Toremar operated the following routes throughout the year:

— On the Livorno – Gorgona – Capraia route Toremar provided passenger and mixed services (passengers and vehicles), with a bi-weekly service to the island of Gorgona and a daily service to the island of Capraia. Another operator, Piccola Società Cooperativa Marittima Ligure Tirrena A.R.L., had also been present on the route during the months of July and August using a high-speed passenger only vessel. However, that company stopped operating the route in 2010.

— On the Piombino – Portoferraio (island of Elba) Toremar provided daily mixed services. Moby has been also competing on this route with frequent mixed sailings all year round, as well as two new entrants, Blu Navy, which began sailings in 2010 (from April to October) and Elba Ferries, which operated only during the summer season.

— On the Piombino – Cavo – Portoferraio route (island of Elba) Toremar operated the only passenger service, with the use of a fast hydrofoil vessel.

— On the Piombino – Rio Marina – Porto Azzurro – Pianosa route (island of Elba) Toremar was the only operator providing daily mixed services to the port of Rio Marina and a weekly service to the port of Pianosa.

— On the Porto S. Stefano – Island of Giglio route Toremar provided daily mixed services all year round. The operator Maregiglio was also present on the route providing mixed services during the period April – November, with an average of 2 to 4 sailings per day during October and November and six to eight between April and September.

2.3.1.2. Budget and duration

(39) Table 2 below shows the annual amount of compensation paid to Toremar by Italy for the period 2009 – 2011.

(40) In addition to this, the Region of Tuscany had reserved an additional annual budget of EUR 3 000 000 to be paid to Toremar after reporting of the actual revenues and costs incurred during the period 2010-2011. In those years, as a result of the economic and financial crisis, the number of passengers fell substantially, whilst there had been an increase in fuel costs. In the view of the Region of Tuscany, the compensation paid from the central State budget was therefore not sufficient to cover the totality of the public service cost.

Year	Compensation	Reserve	Total
2009	13 572 035		13 572 035
2010	13 005 441	3 000 000	16 005 441
2011	13 005 441	3 000 000	16 005 441

Table 2 – Compensation granted for the period 2009-2011 (EUR)

(41) The initial Convention provides for the annual public service compensation to be paid as follows: an initial advance payment is made in March of each year, equivalent to 70 % of the compensation paid the previous year. A second payment, made in June, is equal to 20 % of the compensation. The difference between the amounts paid and the shortfall between operating costs and revenue during the year in progress constitutes the balance, which is paid by 30 November. If it turned out that Toremar has received a sum greater than the net cost of the services provided (revenue minus losses), the initial Convention provides that Toremar is required to reimburse the difference ([19]).

— Compensation granted in 2009

([19]) After 25 November 2010, by decision of the Interdepartmental Conference on the establishment of the annual subsidy set up under Article 11 of Law No 856/1986 between the Ministry of Infrastructure and Transport, the Ministry of Economy and Finance, and the Ministry of Economic Development (the 'Interdepartmental Conference'), any amount of overcompensation is deducted from future advance subsidy payments.

(42) Presidential Decree No 501 of 1 June 1979 ('Decree No 501/79') specifies the various elements (revenues and costs) which enter into the calculation of the subsidy paid to maritime public service operators. Furthermore, Law No 856 of 5 December 1986 ('Law 856/86') provided for certain alterations to the system of maritime public service obligations in Italy. Regarding the connections with minor and major islands, Article 11 thereof amended the criteria for the calculation of the public service compensation. Indeed, the subsidy had to be calculated based on the difference between the revenues and the costs of the service as determined with reference to average and objective parameters, and had to include a reasonable return on invested capital. Article 11 also lays down that the public service contracts had to include the list of the subsidised routes, the frequency and the types of ships to be used. The subsidies were to be approved by the responsible Ministers. The principles laid down in Presidential Decree No 501/79 and Law No 856/86 were reflected in the initial Conventions.

(43) Indeed, in 2009, the compensation for the discharge of SGEI was calculated in accordance with the methodology laid down by the initial Convention in force since 1991 and prolonged after its initial expiry date of 31 December 2008. In particular, the compensation corresponded to the accumulated net loss on the services operated under the public service regime, to which a variable amount corresponding to the return on invested capital was added.

(44) The various cost elements taken into consideration in order to calculate the compensation defined by the public authorities were the following: acquisition, advertising and accommodation costs, loading, unloading and manoeuvring costs, cost of shore administrative personnel, ship maintenance costs, administrative costs, insurance costs, rent and leasing costs, fuel, taxes and depreciation costs.

— Compensation granted in 2010 and 2011 and as from 2012

(45) As from 2010, the compensation for the operation of the SGEI has been determined by the application of a new methodology laid down in the CIPE ([20]) Directive of 9 November 2007 titled 'Criteria for the definition of the public service obligations and the fare dynamics in the sector of maritime cabotage of public interest' ('the CIPE Directive') ([21]). According to the preamble, the CIPE Directive was issued in view of the privatisation of the public companies operating maritime services under a public service regime ([22]). The provisions of the CIPE Directive were applied in respect of the services provided by the companies of the Tirrenia Group as of 2010, even prior to the entry into force of the respective new Conventions and Public Service Contracts following the respective privatisations.

(46) The method laid down in the CIPE Directive allows the companies operating the maritime public service to make an appropriate return. The rate of return on capital is calculated on the basis of the weighted average cost of capital ('WACC').

(47) The required return to equity ([23]) is calculated using the Capital Asset Pricing Model ('CAPM'). On the basis of the CAPM, the cost of equity is derived as a function of (i) the risk-free rate, (ii) the Beta (an estimate of risk profile of the company relative to equity market) and (iii) the equity risk premium assigned to the equity market.

(48) In particular, the cost of equity would be calculated by applying a premium for bearing extra risk to the rate of return on risk-free activities. This premium is calculated as the risk premium of the market multiplied by its Beta, which measures how risky a specific activity is relative to the market.

(49) The CIPE Directive provides that the rate of return on risk-free activities corresponds to the average gross yield on benchmark 10-year bonds with reference to the previous 12 months for which available data exists.

(50) The CIPE Directive sets a 4 % market risk premium. However, in case of a service that is operated on a non-exclusive basis, the presumably greater risk borne by the operator is remunerated by the addition of an extra 2,5 % to the market risk premium.

([20]) Comitato Interministeriale per la Programmazione Economica.
([21]) Gazzetta Ufficiale della Repubblica Italiana ('GURI') No 50 of 28 February 2008.
([22]) As pursuant to Article 1, letter 999 of Law No 296 of 27 December 2006 and Article 1, letter e) of Decree Law 430/1997.
([23]) The desired rate of return for an equity investor given the risk profile of the company and associated cash flows.

(51) In practice, the amount of compensation paid to Toremar can however not exceed the ceiling of EUR 13 005 441 per year as laid down by the 2009 Law (see recital (29)). Although the 2009 Law caps the annual compensation paid to all Tirrenia companies for the operation of the maritime services subject to the public service regime, the CIPE Directive also contains certain safeguards that enable those operators to sufficiently cover their operating costs.

(52) In particular, according to the CIPE Directive the scope of the services, the maximum fares set out by the new public service contract and the compensation actually granted must be defined such as to grant the service provider coverage of the entirety of admissible costs. The following formula is applicable:

$$VA(RSP) + VA(AI(X)) = VA(CA)$$

where:

— *VA*(*RSP*) is the discounted value of the compensation for the discharge of the public service obligations;

— *VA*(*AI*(*X*)) is the discounted value of other revenue (fare receipts and other);

— *(VA*(*CA*)*)* is the discounted value of the admissible operating costs, debt repayment and return on invested capital.

(53) In case the above equation does not hold, the scope of the subsidised activities could be reduced, or alternatively the service organisation (e.g. type of ships) would be reviewed or the fare constraints would be modified.

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

$$\Delta T = \Delta P - X$$

where:

— ΔT is the annual percentage change in the fare ceiling;

— ΔP is the rate of inflation for the year of reference;

— X is a real annual rate of adjustment of the fare ceiling, laid down in the public service contract, which remains constant over the duration of the contract.

(55) The CIPE Directive also specifies that the fare ceiling may be adjusted to reflect variations in fuel costs, taking standard publicly available prices as reference.

2.3.2. *Toremar's privatisation*

(56) On 13 January 2010, the Region of Tuscany published in its Official Journal ([24]) and the Official Gazette of the Italian Republic ([25]) the call for tenders for the sale of Toremar and the award of a public service compensation for the discharging of public service obligations on the maritime routes identified above under recital (38). This notice was furthermore published in the *Official Journal of the European Union* ([26]) on 14 January 2010 and in several national newspapers ([27]).

(57) Italy chose the procedure referred to in Article 20(1) of the Code of Public Contracts – Legislative Decree No 163/2006 (il Codice dei Contratti pubblici), which resembles Article 21 of Directive 2004/18/EC of the European Parliament and of the Council ([28]) that states that '[c]ontracts which have as their object services listed in Annex II B [such as water transport services] shall be subject solely to Article 23 [technical specifications] and Article 35(4) [notices]'. The chosen award criterion was that of the most economically advantageous offer.

([24]) Bolletino Ufficiale della Regione Toscana (BURT) No 2, 13 January 2010.
([25]) GURI, No 4, 13 January 2010.
([26]) OJ No S/9/010860/2010.
([27]) Corriere della Sera, Il Sole 24Ore, La Repubblica and La Nazione.
([28]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

2.3.2.1. The sale procedure and final award

(58) Following the publication of the call for tenders, on the expiry of the deadline, 11 parties expressed an interest to participate, namely: Moby, Toscana di Navigazione S.r.l., Pigreco S.r.l., Sinven S.r.l., Vector S.r.l., Forship S.r.l., Medmar Navi S.p.a., Grandi Navi Veloci S.p.a., Buquebus Italia S.r.l., Loss Cipreses S.p.a. and Blu Navy/Transeuropa Ferries.

(59) The documentation submitted by all 11 companies confirmed that they all met the requirements set out in the tender notice and they were therefore all invited to submit a tender.

(60) The invitation to submit a tender contained the new draft 12-year contract to be signed between the successful bidder and the Region of Tuscany, and more detailed information concerning the tendering procedure. Particularly, the invitation letter confirmed that the most economically advantageous offer would be chosen for the service contract with price scoring 20 points, quality 70 points and additional services 10 points. As regards the price for the sale of Toremar's business, the invitation letter mentioned a fixed amount corresponding to EUR 10 258 397, calculated on the basis of an independent study, which assessed the total value of Toremar's assets (see recitals (65) to (73)). This price was non-negotiable and was not subject of the financial offer of the tenderers

(61) Therefore, all potential tenderers were requested to include the above fixed amount for the sale of Toremar in their financial offer, while the Region of Tuscany would choose the most economically advantageous offer for the tender as a whole based on the price and other, mainly quality, criteria concerning the service as set out in the invitation letter (see recital (60)).

(62) The 11 tenderers were also given access to virtual data rooms containing the following:

(1) All legal, technical, financial and commercial information about Toremar;

(2) Information on the fleet, the intangible assets and the immovable property of the company;

(3) All information concerning contracts for the supply of services and purchase of goods;

(4) The scoring procedures and the technical tender form;

(5) All other information required so that the potential buyers may valuate correctly the object of the sale.

(63) Two companies submitted a bid, namely Moby and Toscana di Navigazione, both established shipping operators in Italy. The remaining nine companies did not submit a bid at the expiry of the deadline.

(64) After the evaluation of the tenders, Toscana di Navigazione S.r.l. was excluded from the procedure, as its economic offer submitted was inconsistent with the technical offer and financial capacity requirements of the tender documentation. The tender was therefore awarded to Moby both as regards the privatisation of Toremar business and the operation of the maritime services (see Section 2.3.3).

2.3.2.2. The sale contract

(65) Given the nature of the tender, it was the Region of Tuscany's choice, with a view to identify the best competitive bid, to define a fixed amount for the price of Toremar's share capital.

(66) The sale contract was signed on 2 January 2012 and defines the transfer of Toremar shares to Moby for the fixed price of EUR 10 258 397. This amount is paid in ten annual instalments starting from the end of the first year of the contract, i.e. 2 January 2013.

(67) The fixed price of EUR 10 258 397 for 100 % of Toremar's shares was determined on the basis of an independent expert evaluation commissioned by the Region of Tuscany and prepared by Fidi Toscana S.p.A. ('the Fidi report').

(68) The amount refers to the value of tangible assets, buildings, vessels, other tangible fixed and financial assets and other receivables of the company at 30 June 2010. The intangible assets (e.g. concessions, authorisations, licences, trademarks etc.) were excluded from the evaluation, and left to the discretion of the bidders. The amount was then subjected to amendments deriving from the difference between the net book value of the shares on 30 June 2010 and the market value of the shares ([29]).

(69) This aforementioned amount also includes a credit of EUR 9 772 572 claimed from Tirrenia ('the credit').

(70) Under Article 1(5) and (6) of the sale contract, with reference to the first instalment, Moby declares that it has paid in advance to the Region of Tuscany the amount of EUR 485 825, which equals the difference between the sale price and the credit.

(71) Under Article 1(3) of the sale contract, the payment of the set price – except of what is paid in advance – is subject to the condition that the amount of EUR 9 772 572 that is owed to Toremar by Tirrenia is paid off ([30]). Under Article 4(3) of the sale contract, in case the credit amount is not recovered, Moby remains obliged to transfer the credit (or any residual credit) to the Region of Tuscany at any time until the expiry of the service contract ([31]).

(72) According to Article 4 of the sale contract, Moby is obliged to notify the Region of Tuscany of any sale of the Toremar shares to third parties remaining, however, jointly responsible with the new purchaser of the Toremar, with respect to the obligations of the service contract.

(73) Finally, according to Article 5 of the sale contract, the Banca Popolare di Milano has provided a guarantee in favour of the Region of Tuscany covering the total sale price of the Toremar shares (including the buyer's obligation to transfer any credit amount not yet recovered from Tirrenia).

2.3.2.3. Proceedings at national level

(74) The result of the tender proceeding awarding the Toremar business and the public service contract to Moby was the subject of several proceedings before national courts.

(75) Toscana di Navigazione S.r.l., the excluded bidder and complainant in these proceedings, challenged the legality of its exclusion from the tender procedure before the national courts. Initially, the complainant brought an application for interim relief before the Regional Administrative Court of Tuscany. The latter, by Order No 774 of 14 July 2011, rejected the application. This ruling was upheld at appeal by the Council of State by its Order No 3666 of 31 August 2011, which stressed in particular that the economic bid presented by the company was incomplete, as regards the additional services to be performed and the fact that it was not set on an annual basis, and as such, the re-evaluation mechanism provided for in the tender documentation, could not be applied.

(76) Toscana di Navigazione S.r.l. then appealed the outcome of the tender procedure before the Regional Administrative Court of Tuscany, which rejected the appeal by Order No 414 of 1 March 2012, confirming that the company's bid was inconsistent with the requirements of the contracting authority.

([29]) Given the time needed for the tender procedure, the Fidi report worked on the assumption that the actual transfer of the shares could not take place before the end of 2010. As a result, the net book value of the assets as set on 30 June 2010 would need to be modified to take account of the market value of the assets at the time of the actual transfer. The market value of the assets was carried out by another independent expert evaluator. That evaluation did not relate to the calculation of the sale price of Toremar's shares, but to the calculation of the value of Toremar's assets.

([30]) According to Italy, the 2009 Law (see recital (26)), provided in its Article 4 for a commitment by the Italian Ministry of Finance to ensure that, during the privatisation process, provision was made for 'commitments on the part of the buyer of Tirrenia SpA and Siremar SpA to settle any debts to Toremar SpA within 60 days of the transfer'. When Tirrenia went into special administration (see in this regard Commission Decision (EU) 2020/1412 of 2 March 2020 in cases SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione, the Region of Tuscany, in order to avoid the negative impact on privatisation process of Toremar, included this clause in the sale contract making the payment of the part of the price corresponding to the claim, conditional upon payment of the claim by Tirrenia. This clause was made known to all the participants in the tender procedure.

([31]) On the basis of the latest information received by Italy, this claim has not been recovered to date. It has been admitted to the list of unsecured claims by the Civil Court of Rome, as part of the extraordinary administration procedure.

(77) This judgement was appealed by Toscana di Navigazione S.r.l. before the Council of State, which, by Order No 83/2015, decided in favour of the company, requesting the Region of Tuscany to revisit its tender procedure and review its requirements. Following an audit undertaken by the Region of Tuscany, Decree No 1312 of 30 March 2015 was adopted, upholding the decision of the Region of Tuscany to exclude the company from the tender procedure, as the technical, economic and financial capacity requirements for participation in the tender had not been proved.

(78) Toscana di Navigazione S.r.l. appealed against Decree No 1312 of 30 March 2015 before the Regional Administrative Court of Tuscany, which rejected the appeal by Order No 1446 of 26 October 2015. The latter was finally upheld by the Council of State with Order No 3347/2016.

2.3.3. *The new service contract between the Region of Tuscany and Moby/Toremar*

2.3.3.1. The beneficiary

(79) As mentioned in recital (63), Moby and Toscana di Navigazione submitted a bid for the new public service contract. Following the exclusion of the latter company, Moby/Toremar ([32]) signed the new public service contract with the Region of Tuscany for the operation of maritime routes on 2 January 2012.

(80) According to Article 1(2) of the new service contract, Moby shall carry out the services stipulated in the contract exclusively through Toremar.

2.3.3.2. The routes

(81) Moby/Toremar provides passenger and mixed (passenger and cars) services under the public service regime on multiple maritime cabotage routes as follows:

Livorno – Gorgona – Capraia **(Line A1)**
Piombino – Portoferraio (island of Elba) **(Line A2)**
Piombino– Cavo – Portoferraio (island of Elba) **(Line A2 fast)**
Piombino – Rio Marina – Porto Azzurro – Pianosa (island of Elba) **(Line A3)**
Porto S. Stefano – Island of Giglio **(Line A4)**
Porto S. Stefano – Giannutri **(Line A5)**

Table 3 – Network of routes operated by Moby/Toremar under the new service contract

2.3.3.3. Duration

(82) The new service contract between the Region of Tuscany and Moby/Toremar has a duration of 12 years (2012-2024).

2.3.3.4. The public service obligations

(83) The requirements laid down in the contract with Moby/Toremar concern among others the ports served, the type and capacity of the vessels assigned to the maritime routes operated, the frequency of service and the maximum fares.

([32]) The contract for the award of the maritime cabotage services linking the islands of the Tuscan Archipelago has been concluded between the Region of Tuscany on the one hand and both Moby and Toremar on the other. Consequently, the decision will make reference to both companies (as 'Moby/Toremar'), throughout the sections relating to the new public service contract.

2.3.3.5. The compensation provisions and final award

(84) In the tender procedure, the amount of the yearly compensation under the new contract for the discharging of public service obligations in the maritime routes identified under recital (81) was capped at EUR 14 550 400 (totalling EUR 174 604 810 over the 12 years contract period). This value was determined by the sum of the following: EUR 13 005 441 as set by the 2009 Law (see recital (29)) plus an increase of EUR 1 544 959, as envisaged in Article 19-*ter*, paragraph 16(d), of the 2009 Law) due to the significant investments required to be carried out by the operator over the whole contract period.

(85) This amount of compensation was determined on the basis of the methodology laid down by the CIPE Directive (see recitals (45) to (55)). The safeguards laid down by the CIPE Directive have been reflected in the new service contract.

(86) Pursuant to Article 4(2) of the service contract, the annual compensation to be paid to Moby/Toremar was estimated to amount EUR 13 333 318. Nevertheless, according to Article 4(3) of the service contract, the actual compensation paid to Moby/Toremar is determined as the outcome of the service actually carried out (i.e. price per mile for each route), taking into account the risks involved (commercial and industrial) as laid down in the contract (e.g. compensation reduction in case of the company not sailing, penalties in case of services being disconnected etc.).

(87) The service contract provides for a payment of compensation that does not exceed what is necessary to cover the net costs incurred for the fulfilment of the public service obligations (economic-financial balance). In case of deviations from this contractual equilibrium, the service contract provides in Article 26 for a rebalancing mechanism that evaluates all the parameters linked to the payment of the compensation. Should, therefore, as a result of a material change ([33]) in the economic parameters on which it is based, the compensation amount prove insufficient to cover all costs incurred in the provision of the service, the new service contract allows for a revision of the key parameters of the compensation namely: (i) the tariff system; (ii) the level of the public services offered; (iii) the level of the annual price cap; and (iv) the capital grants for investments.

(88) Under Article 4(4), (5) and (6) of the service contract, the compensation paid to the operator shall be reduced by 80 % in the case of interruption of services because of employees' strike and 30 % in the case of unforeseen events, whereas failure to perform the services would result in the payment of penalties by the operator.

(89) Pursuant to Article 24 of the service contract, the operator is required to implement a system of technical, economic and management monitoring, according to which the profit and loss annual accounts related to the service provided on the basis of the service contract are sent to the regional authorities for verification.

2.3.4. *The berthing priority*

(90) Article 19-*ter*, paragraph 21, of the 2009 Law laid down that, in order to guarantee the territorial continuity with the islands and in light of their public service obligations, the companies of the former Tirrenia Group, including Toremar, would keep the berthing already allocated and the priority in the allocation of new slots in line with the procedures set forth by the Maritime Authorities as established by Law No 84 of 28 January 1994 and the Italian Maritime Code.

([33]) Article 26(2) states: 'A positive or negative deviation in the economic and financial balance can be caused by:
(a) Management inefficiencies;
(b) Erroneous communication by the Company of the services actually produced for determining the annual price;
(c) Exceptionally unfavourable market conditions not dependent on the Company, which result in the worsening of the operating conditions and as a consequence in higher operating costs or lower tariff revenues, such as to result in a negative change of operating profit of more than 10 %.
(d) Financial modifications;
(e) Amendments of laws or regulations that establish new conditions for the service provided for in the contract;
(f) New investments required by the Region to be carried out with public resources provided for by Article 20;
(g) Modification of the tariff system pursuant to Article 13;
(h) Exceptionally favourable market conditions which result in an increase of the operating profit higher than the 10 %;
(i) Increases in the unit cost of personnel for compliance with the CCNL [National Collective Labour Agreement] and with the Company's bargaining power for supplementary pensions'. (Commission's unofficial translation).

2.3.5. *The measures laid down by the 2010 Law*

(91) The 2010 Law laid down the possibility for the undertakings of the former Tirrenia Group to use, on a temporary basis, the financial resources already committed ([34]) to the upgrade and modernisation of the fleet to cover pressing liquidity needs. The undertakings of the former Tirrenia Group that made use of this possibility were however required to replenish these dedicated funds, so that they could still undertake the necessary upgrades for their ships. These upgrades were necessary to meet new international safety standards following the 1996 Stockholm Agreement ([35]).

(92) In particular, drawing from two facilities ([36]), EUR 23 750 000 were set aside to pay for the upgrades of the entire Tirrenia Group. Toremar was allocated EUR 1 617 300 out of this amount, which it used to upgrade its fleet (see recital (138)).

(93) In addition, Article 1 of the 2010 Law also laid down the following:

(a) The initial Conventions are prolonged as from 1 October 2010 until the end of the privatisation process of Tirrenia and Siremar (see also recital (30));

(b) Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law is amended by the introduction of paragraph 24a. According to that paragraph, all official acts and operations in the implementation of the provisions of paragraphs 1-15 of the 2009 Law benefit from fiscal exemptions. These paragraphs relate to the liberalisation of the maritime cabotage sector through the privatisation of the Tirrenia group, including its preparatory step, i.e. the transfer of the regional companies to the respective regions;

(c) In order to ensure the continuity of the public service and to support the privatisation process of the former Tirrenia group companies, the regions in question may make use of the resources of the *Fondo Aree Sottoutilizzate* ('FAS') ([37]) pursuant to the CIPE Directive ([38]).

2.4. **Infringement procedure No 2007/4609**

(94) Following earlier exchanges between the Commission's services and Italy, the Commission's Director-General responsible for energy and transport on 19 December 2008 sent a request for information to Italy. This request concerned among other things, an overview of the public service routes at that time and the public service remit that Italy envisaged under the proposed new Conventions. Furthermore, Italy was asked to provide more details about the privatisation plans for the Tirrenia Group.

(95) In its letter of 28 April 2009, Italy provided a detailed reply to the Commission's request of 19 December 2008. In that letter, among other things Italy stated the following:

(1) the extension of the initial Conventions until 31 December 2009 was necessary to achieve the liberalisation of the maritime cabotage sector in Italy through the privatisation of the Tirrenia Group;

(2) the public service compensation granted to the Tirrenia Group was necessary to ensure territorial continuity with the islands through maritime links which were not satisfactorily provided by private operators on the market;

([34]) As laid down by Article 19, paragraph 13a, of Decree Law 78/2009, converted into Law 102/2009 ('Law 102/2009'), and by paragraph 19 of Article 19-*ter* of the 2009 Law.

([35]) These safety standards were then detailed in Council Directive 98/18/EC of 17 March 1998, transposed by Legislative Decree No 45 of 4 February 2000, of Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003, transposed by Legislative Decree No 52 of 8 March 2005 and of Directive 2003/25/EC of the European Parliament and of the Council, transposed by Legislative Decree No 65 of 14 March 2005.

([36]) All the funds (i.e. EUR 7 000 000) provisioned by paragraph 19 of Article 19-*ter* of the 2009 Law and EUR 16 750 000 from the funds provisioned by Law 102/2009.

([37]) The Fund for Under-utilised Areas (*Fondo Aree Sottoutilizzate*) is a national fund that supports the implementation of Italian Regional policy. Its resources are mainly earmarked for regions identified as such by Italy.

([38]) *Gazzetta Ufficiale della Repubblica Italiana*, No 137 of 16 June 2009.

(3) a thorough rationalisation process of the routes had been concluded on 10 March 2009. This process took into account the relevant social, employment and economic aspects, as well as the need to safeguard essential links for territorial continuity and included a consultation of the six Regions concerned. This rationalisation would result in the reduction of the net cost of the public service of approximately EUR 66 million and the redundancy of some 600 crew members for the entire Tirrenia Group. Italy also recalled that the 2009 rationalisation complemented earlier efforts (in 2004, 2006 and 2008) to reduce the services operated by the Tirrenia Group;

(4) the objectives were to (i) maintain the links necessary to ensure territorial continuity with and between islands and the mainland, and the right to health, study and mobility, (ii) rationalise links where there were private operators who provided the same connections over the same time period, with similar guarantees of quality and continuity, and (iii) rationalise summer and high-speed connections which transport only persons;

(5) in the letter, Italy gave an overview of the routes operated by the companies of the Tirrenia Group during 2008 and the reduced number of routes the Tirrenia Group companies would operate in 2009. According to Italy, the latter routes would form the basis for the new Conventions that were to be concluded with the new owners of the Tirrenia Group companies.

(96) On 21 December 2009, the Commission's Director-General responsible for energy and transport sent a letter to Italy noting, inter alia, that in the light of the radical overhauling of the maritime cabotage sector in Italy, and because of the sizable social impact the privatisation would have entailed, if the tenders were carried out on a simple public service contract basis, tendering out the shipping companies endowed with such contracts was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the criterion of non-discrimination among Community ship-owners laid down in Council Regulation (EEC) No 3577/92 ([39]) ('the Maritime Cabotage Regulation').

(97) On 29 January 2010 ([40]), the Commission sent a letter of formal notice regarding the wrong implementation of the Maritime Cabotage Regulation. In this letter, the Commission recalled that that Regulation requires that whenever a Member State concludes public service contracts or imposes public service obligations, it is to do so on a non-discriminatory basis in respect of all Community shipowners. The Article 4(3) of that Regulation provides that existing public service contracts may remain in force up to the expiry date of the relevant contract. However, the Commission noted that the companies of the Tirrenia Group continued to operate maritime transport services after the expiry of the respective public service contracts (the initial Conventions). In particular, these Conventions were due to expire at the end of 2008 but were repeatedly prolonged by Italy. Therefore, the Commission invited Italy to present its observations.

(98) Also on 29 January 2010, the Commission's Director-General responsible for energy and transport replied to Italy's letter of 22 January 2010. The Director-General emphasised that his reply only concerned the compliance with the Maritime Cabotage Regulation and not State aid issues. Against this background, the Director-General indicated that the justifications provided concerning certain routes were sufficient to remove the doubts expressed earlier. The Director-General recalled that public service contracts can only cover routes for which there is market failure.

(99) On 29 March 2010, Italy replied to the Commission's letter of formal notice of 29 January 2010. In its reply, among other things Italy clarified that in the tender procedure for Toremar, 11 interested parties would take part in the next phases of that procedure.

(100) On 10 September 2010, Italy informed the Commission during an *ad hoc* meeting, that the competitive procedure for the contract of among others Toremar was also delayed. Subsequently, Law No 163 of 1 October 2010 further prolonged the initial Conventions until the completion of the privatisation processes of Tirrenia and Siremar (see also recital (30)).

([39]) 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). The Commission notes that the Maritime Cabotage Regulation does not require Member States to privatise their maritime transport companies but only to liberalise this specific market.

([40]) The letter of formal notice was adopted on 28 January 2010 but only notified to Italy the next day.

(101) In light of these developments, the Commission sent a complementary letter of formal notice on 24 November 2010. In this letter, the Commission stated the following:

(a) the initial Convention of among others Toremar was extended automatically and without any competitive procedure;

(b) while the public service contracts in question continued to be applied, no competitive procedure had been completed, for Toremar among others;

(c) it reserved its right to issue a reasoned opinion if necessary (taking into account any comments Italy might make).

(102) By letter of 15 July 2016, Italy informed the Commission that the privatisation of all companies of the former Tirrenia Group had been completed. On 8 December 2016, the Commission decided to close the infringement procedure.

3. GROUNDS FOR INITIATING AND EXTENDING THE PROCEDURE

3.1. The prolongation of the initial Convention between Toremar and Italy

3.1.1. *Observance of Altmark and existence of aid*

(103) In its 2011 Decision, the Commission took the preliminary view that the definition of the public service obligations had not been sufficiently clear and hence did not allow the Commission to definitely conclude whether it contained manifest errors. In particular, the Commission did not at that stage have a complete view on the actual obligations imposed on Toremar for the operation of the routes in question as compared to the services offered by competitors on some of those routes.

(104) The Commission took the preliminary view that the second condition of the *Altmark* judgment ([41]) was observed as the parameters at the basis of the calculation of the compensation had been established in advance and observed the transparency requirements. In particular, the Commission noted that these parameters are described in the initial Convention (for compensation concerning the year 2009) and in the CIPE Directive (for compensation from 2010 onwards).

(105) The Commission however considered that the third condition of the *Altmark* judgment did not seem to have been observed and that the operators might have been over-compensated for the performance of the public service tasks. In particular, the Commission expressed doubts whether the risk premium of 6,5 %, which applies from 2010 onwards, reflects an appropriate level of risk since *prima facie* Toremar did not seem to assume the risks normally borne in the operation of such services.

(106) The Commission also took the preliminary view that the fourth *Altmark* condition was not observed inasmuch as the prolongation of the initial Convention had not been tendered out. The Commission moreover noted that it had not received any evidence to support the argument that Toremar in fact provided the services at stake at the least cost to the community.

(107) In the 2011 Decision, the Commission therefore came to the preliminary conclusion that the public service compensation paid to Toremar during 2009-2011 constitutes State aid within the meaning of Article 107(1) TFEU. In addition, the Commission took the view that this aid should be considered as new aid.

3.1.2. *Compatibility*

(108) In the 2011 Decision, the Commission took the preliminary view that the public service compensation for the years 2009-2011 falls outside the scope of both the 2005 SGEI Decision ([42]) and the 2005 SGEI Framework ([43]). The Commission therefore assessed this measure directly under Article 106(2) TFEU and found it had doubts on whether the applicable compatibility conditions were fulfilled.

([41]) See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

([42]) Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

([43]) Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

(109) In the 2012 Decision, the Commission noted that on 31 January 2012, a new SGEI package consisting of the 2011 SGEI Decision ([44]) and 2011 SGEI Framework ([45]) had entered into force. The Commission however took the preliminary view that the public service compensation under the prolongation of the initial Convention could not be considered compatible with the internal market and exempted from the notification requirement under the 2011 SGEI Decision.

(110) The 2010 Law provided for the prolongation of the initial Convention from 30 September 2010 up to the end of the privatisation process. As a result, the compensation received by the company as of 1 October 2010 until its privatisation could be assessed on the basis of the 2011 SGEI Framework which, according to its paragraph 69, also applies to aid granted before 31 January 2012 (see recitals (283) and (284)).

3.2. **Toremar's privatisation**

(111) At the moment the 2012 Decision was adopted, the Commission had doubts that the tender procedure for the sale of Toremar had been sufficiently transparent and unconditional so as to ensure that the sale took place at market price.

(112) In the 2012 Decision, the Commission considered that certain conditions imposed in the privatisation might have restricted the number of bidders or influenced the sale price. The Commission restated its established practice concerning sales of assets of State owned undertakings by the State (or in this case imputable to the State): non-economic considerations which a private seller would not make, such as public policy reasons, employment requirements or regional development, point to the existence of State aid if they impose onerous obligations on the potential buyer and are therefore liable to reduce the sale price.

(113) Likewise, on the basis of the information available at that stage, the Commission considered that the so called *technical and financial requirements* as imposed in the Toremar tender effectively disrupted the tender by restricting potential bidders to existing maritime companies, given that in the present case, the company itself, endowed with the public service contract, was put up for sale ([46]).

(114) For the above reasons, the Commission preliminarily concluded that the privatisation procedure of Toremar had not been sufficiently transparent and unconditional so as to ensure by itself that the sale took place at market price. The Commission could therefore at that stage not exclude that an economic advantage was conferred to the buyer.

(115) The Commission also considered, on the basis of the information available when issuing its 2012 Decision, that any aid that might have arisen in the course of the privatisation process would be incompatible.

3.3. **The new service contract between the Region of Tuscany and Moby/Toremar**

3.3.1. *Observance of Altmark and existence of aid*

(116) In the 2011 and 2012 Decisions, the Commission took the preliminary view that the compensation paid to Toremar (and its acquirer, Moby) did not fulfil the criteria laid down in the *Altmark* judgment and therefore amounted to aid within the meaning of Article 107(1) TFEU. The Commission came to this conclusion given that: (i) competitors who seemed to be offering similar services were present at least on certain routes operated by Toremar and there was no sufficient information submitted that would enable the Commission to conclude on whether the SGEI reflected a real public service need which could not be met by market forces alone; (ii) the calculation of the compensation pursuant to the CIPE Directive appeared to have resulted in the operator being overcompensated for

([44]) Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

([45]) Communication from the Commission: European Framework for State aid in the form of public service compensation.

([46]) The invitation to submit a tender provides that the participants show that they executed, in the period between 30 November 2006 and 30 November 2009, a volume of maritime services of not less than 450 000 nautical miles and that they reported a turnover for maritime transport services, in the last 3 financial years, of no less than EUR 150 million, out of which at least EUR 75 million from the operation of maritime passenger services.

the provision of the public service for the same reasons as expressed in the 2011 Decision; and (iii) the fourth criterion of the *Altmark* judgment was seemingly not observed, given that the public service was tendered out on the condition that the successful bidder would acquire the whole Toremar company. The Commission took the preliminary position that had the public service contract been tendered out without the purchase requirement, it would have resulted in a lower cost for the community.

3.3.2. *Compatibility*

(117) With respect to the compatibility of the compensation to Toremar, the Commission noted that, on the basis of the information provided by Italy, the 2011 SGEI Decision appeared not to be applicable for this service contract because of its long (12 years) entrustment period. In any event, the Commission could at that stage not conclude on the application of the 2011 SGEI Decision because the signed contract had not yet been provided. The Commission did not receive any information (e.g. number of passengers transported in the 2 financial years preceding the entrustment) to examine the remaining compatibility conditions of the 2011 SGEI Decision. The Commission then assessed the aid based on the 2011 SGEI Framework but found that it had doubts on whether the compatibility conditions of that Framework were fulfilled and invited Italy to demonstrate that this was the case.

3.4. **The berthing priority**

(118) In the 2011 Decision, the Commission took the preliminary view that to the extent that the berthing priority is not remunerated, the measure is a regulatory advantage, which does not involve any transfer of State resources and cannot therefore qualify as State aid. Alternatively, if the berthing priority is remunerated, the Commission considered that to the extent Toremar provides a genuine SGEI and that this priority is only granted in relation to routes covered by the SGEI, it would not result in an additional economic advantage since it would be intrinsic to the provision of the SGEI. Nevertheless, the Commission invited Italyand third parties to provide further information on this measure.

(119) Since it had raised doubts on the legitimacy of the SGEI mission, the Commission could not conclude on the compatibility of the measure if it were to be aid.

3.5. **The measures laid down by the 2010 Law**

(120) In the 2011 Decision, the Commission took the preliminary view that all measures laid down by the 2010 Law constituted State aid in favour of the companies of the former Tirrenia Group, including Toremar. These included: (1) the possible use for liquidity purposes of the funds earmarked for the upgrade of the ships; (2) the fiscal exemptions related to the privatisation process; and (3) the possible use of FAS resources. The Commission invited Italy to clarify if and how each of these measures was necessary to provide the public service.

(121) The Commission also took the preliminary view that these measures likely constituted operating aid reducing the costs that Toremar, and the other companies of the former Tirrenia Group, would otherwise have to bear themselves and thus these measures should be considered as incompatible with the internal market.

4. **COMMENTS FROM ITALY**

4.1. **On the public service obligations and the competitive environment**

(122) Italy provided a list of the routes (supported by the corresponding legal documentation) operated by Toremar that are subject to public service obligations, including the seasonal frequency and timetables, the competitive environment and the reasons leading to these public service obligations.

(123) As regards the existence of a genuine SGEI, Italy notes that the above public service obligations were laid down in order to maintain the territorial continuity and the connection of the mainland with the islands. This service also contributes to the economic development of the islands and the facilitation of intermodal transportation, while at the same time it guarantees the essential mobility needs of the islands' communities throughout the year and ensures that the constitutional right to territorial continuity is respected.

(124) As far as the competitive environment is concerned, Italy submitted information showing that Toremar is the only operator sailing most of the routes throughout the year. Although there has been some competition over the years, especially on the Piombino – Portoferraio route **(Line A2)** with the participation of Moby, Italy is of the view that the service offered by Toremar cannot be substituted and that the guarantee for territorial continuity could not have been achieved by the market forces alone.

4.2. **On the privatisation of Toremar**

4.2.1. *On the sale price of Toremar*

(125) According to Italy, the privatisation of Toremar involved the transferring of the entire share capital of the company via a public tender procedure launched by the Region of Tuscany. This procedure additionally entailed the simultaneous entrustment of maritime public services in the Tuscany archipelago for a period of 12 years, in order to maintain territorial continuity.

(126) The Region of Tuscany commissioned an independent expert evaluation (see recitals (67) and (68)) to assess the legal and economic issues of Toremar's sale. According to Italy, this evaluation ('the Fidi report') sets out clearly and concisely the procedures followed to determine the market value of Toremar's share capital.

4.2.2. *On the transparent and non-discriminatory character of the procedure*

(127) Italy stresses that the procedures were conducted in compliance with the legal principles of transparency and non-discrimination. It defended that all 11 parties that expressed an interest were given the relevant information necessary to submit their bid through access to a data room, where all documentation was provided. Italy further states that at this stage of the procedure it did not have any control over the potential tenderers, as the replies to the call for an expression of interest were not binding. Competitors were also granted the right to submit questions and receive replies from the contracting authority.

(128) Concerning the Commission's doubts on the technical and financial requirements imposed on bidders for the participation in the tender, Italy argues that such requirements are not discriminatory but are based on the need to select an operator able to provide specific know-how in view of the quantitative and qualitative development of the public services required. This is more pertinent in the context of a tender such as the one at issue in these proceedings, where the sale of Toremar was combined with the conclusion of a new public service contract ([47]). According to Italy, the provision of technical and financial requirements in the tender does not run counter to the maximum opening of the tender to all potential bidders, but it is a direct and necessary consequence of this particular tender structure.

(129) As concerns specifically the assets transferred and the obligation to maintain employment levels, Italy stresses that the sale of Toremar did not include any obligation concerning employment levels.

4.3. **On the compliance of the prolongation of the initial Convention and of the new public service contract with the *Altmark* conditions**

(130) Italy argues that the four *Altmark* criteria are complied with both for the period 2009-2011 and for the period 2012-2024 for the following reasons:

— Toremar has been effectively entrusted with the fulfilment of public service obligations. The prolongation of the initial Convention, as well as the new public service contract clearly set out the obligations regarding the routes to be served, the time schedule, the sailing frequencies, the quality of the vessels to be used and the quality of the service in general, the tariff obligations with respect to the ports served and the obligations regarding passengers' rights in line with Union legislation. Therefore, Italy considers that the public service obligations are clearly defined and that the first *Altmark* criterion is complied with;

([47]) Italy refers in this regard to the Commission's (DG for Energy and Transport) letter D(2009) 75213 of 21 December 2009 (see recital (96)).

— The parameters on the basis of which the compensation was calculated have been defined in advance in an objective and transparent manner. These are explained in detail in the CIPE Directive that applies for the compensation granted as from 2010 onwards, and have been also applied in the new public service contract (and annexes thereto). Therefore, Italy considers that these parameters were established in advance in an objective and transparent manner and that the second *Altmark* criterion is respected;

— With reference to the third *Altmark* criterion, the compensation, both in the prolongation of the initial Convention, and in the new public service contract, does not exceed what is necessary to cover the costs arising from the discharging of the public service obligations. This clearly emerges from the company's income statements, which show a loss of EUR 372 008 for the 3-year period 2009-2011 and a loss of EUR 353 960 for the 5-year period 2012-2016. In addition, due to the rebalancing mechanism introduced in Article 26 of the new public service contract, measures have been taken to ensure that any deviations are corrected and thus overcompensation is avoided;

— Italy considers that also the fourth *Altmark* criterion is fulfilled. During the 2-year period 2010-2011, the Region of Tuscany was monitoring the company's efficiency, whereas under the period covered by the new public service contract, the choice of the company in charge of the fulfillment of the public service obligations was made through a tender procedure in compliance with Union rules.

4.4. **On the 9,95 % rate of return used for 2010 and on the 6,5 % risk premium laid down in the CIPE Directive as of 2010**

(131) In the 2011 Decision, it is mentioned that that the rate of return on invested capital for 2010 was set at 9,95 % before taxes. Italy was asked to justify this given that the CIPE Directive provides that the risk premium of 6,5 % would be used to determine the return on capital using the WACC formula (see recital (46)).

(132) Italy submits that the reference to the 9,95 % rate relates to the draft new Conventions/Public Service Contracts that would be put up for tender with the companies themselves and signed with the buyers upon finalisation of the privatisation of each of the companies of the Tirrenia group (see recital (27)).

(133) Italy also stresses that, because the tender amount of compensation (i.e. the basis for the invitation to tender) was capped by the 2009 Law ([48]), it was decided indeed to simplify the calculation of the compensation by applying a flat rate return on capital. In particular, for the period covering the prolongation of the initial Convention (i.e. 2010-2011), the flat rate return on capital has been *de facto* calculated at 6,9 %. As from 2012, under the new public service contract with Moby/Toremar a flat return on capital of 6,5 % has been applied. Italy has argued that these flat rate returns on capital are still commensurate with the risks involved and that in any event they are below the 9,95 % that was initially communicated to the Commission.

(134) Italy also explains that applying the full methodology as laid down in the CIPE Directive might have resulted in a return on capital that could have exceeded 6,5 %. For this reason, Italy considers that its simplified approach is conservative and does not allow in principle for higher compensation for Moby/Toremar than was established under the CIPE Directive.

4.5. **On the berthing priority**

(135) Italy refers to Article 19-*ter*, paragraph 21, of the 2009 Law, which entitles Toremar to keep the berthing already allocated to it and the priority in the allocation of new slots in line with national law (see above recital (90)).

(136) Italy argues that no State resources were foregone through the allocation of the berthing priority. According to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing. Italy also claims that this berthing priority has been applicable only to the public service routes, and that Toremar and later Moby/Toremar, did not and do not pay any additional fee for this berthing priority, as ports would give them the first choice of berthing slots even in the absence of a formal berthing priority on account of their public service mission.

([48]) According to Italy, the tender amount of compensation constitutes a limit exclusively for the purpose of assessing the tenders and does not set any limit for the actual compensation paid during the contract.

(137) Italy considers that the berthing priority would not confer a meaningful advantage to the companies of the former Tirrenia Group, including Toremar and its acquirer Moby. In particular, they argue that in practice the berthing priority is only applied in very limited circumstances. The size of most of the ports and the advance scheduling of arrivals and departures ensures that in normal circumstances – barring any delays or extreme weather conditions – there would be no overlap in the use of specific berths by different operators. Additionally, since Toremar and Moby operate their services all year long (contrary e.g. to operators who operate only in the high season), it would be natural for ports to give them first choice of berthing slots even in absence of a formal berthing priority. For these reasons, Italy considers that the berthing priority cannot have awarded any meaningful advantage to Toremar and Moby.

4.6. **On the measures laid down by the 2010 Law**

(138) As regards the measures laid down by the 2010 Law (see above recitals (91) and (92)), Italy submits that Toremar has been allocated and effectively used the financial resources already committed by Law 102/2009 for the initial purpose. In particular, Toremar used EUR 1 617 300 to upgrade its fleet in order to respect international safety standards (i.e. EUR 808 650 for the upgrade of the vessel Aethalia and EUR 808 650 for the upgrade of the vessel Liburna). It is also submitted that these funds have not been used for liquidity purposes.

(139) With regard to the fiscal exemptions related to the privatisation process, Italy argues that as regards corporate income tax, the measure has not been applied since the transfers of Caremar, Saremar and Toremar to the regions were made free of charge. Therefore, in the absence of any remuneration, Article 86(1)(a) of the Consolidated Income Tax Law concerning capital gains in the event of asset transfers against payment does not apply. With respect to VAT, Italy notes that the transfers of Caremar, Saremar and Toremar constitute transactions which are exempt from VAT under Article 10(1)(4) of Presidential Decree No 633 of 26 October 1972. With respect to indirect taxes other than VAT, Italy emphasises that the exemption provided for by the 2010 Law was designed with a view to administrative simplification. From the taxation perspective, its effects can be regarded as negligible and of little impact in relation to taxes which are charged at flat rates. More specifically, it concerns the registration duty (EUR 168 per document), land registry and mortgage registration fees (EUR 168 each) and stamp duty (EUR 14,62 for four sides).

(140) Concerning the FAS resources, Italy submits that Toremar has not received any benefit thereof. In addition, they clarified that the FAS resources were not used to give an additional compensation to the companies of the former Tirrenia Group, including Toremar. Instead, these resources were made available to supplement the budget appropriations set up for the payment of the public service compensations to the companies of the former Tirrenia Group, in case those budget appropriations proved to be insufficient. Italy notes that Article 1, paragraph 5-*ter* of Decree Law 125/2010 enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. Moreover, Italy clarifies that, under Article 26 of Decree Law 185/2008, EUR 65 million for each of the years 2009, 2010 and 2011 were earmarked to the Tirrenia group and EUR 195 million were accordingly drawn from the FAS resources. Those funds were then transferred to the account of the Ministry of Transport earmarked for the payment of the public service compensation to the companies of the former Tirrenia Group (Tirrenia, Siremar, Caremar, Toremar and Saremar). Therefore, this measure would merely concern an allocation of resources in Italy's budget for payment of the public service compensations.

4.7. **On the compliance of the prolongation of the initial Convention and of the new public service contract with the 2011 SGEI Decision**

(141) Even if Italy considers that the public service compensation paid under the new public service contract to Toremar does not constitute State aid, it has also argued why this measure would comply with the 2011 SGEI Decision, if it were aid.

(142) In its reply, Italy provides the average annual traffic during the period 2010-2016, based on the routes altogether. On this basis, Italy presented passenger traffic data to demonstrate that the threshold of 300 000 passengers as laid down in Article 2(1)(d) of the 2011 SGEI Decision has not been breached on any of the routes operated by Toremar until the end of 2011 and as from 2012 by Moby/Toremar.

4.8. **On the compliance of the initial Convention and of the new public service contract with the 2011 SGEI Framework**

(143) Italy further argues that no overcompensation has taken place in favour of Moby/Toremar and that the conditions of the 2011 SGEI Framework are fulfilled.

(144) In order to justify the above, Italy provided information showing the amounts of return on invested capital for 2010-2017 and the methodology used to verify that no overcompensation exists for the services provided by Toremar and Moby/Toremar, the costs and revenues per route for 2010-2017 and the depreciation period of the fleet for 2009-2017 ([49]).

(145) In addition, Italy submits that Toremar (and Moby/Toremar) have not carried out any commercial activities during the period 2009 to date.

5. **COMMENTS FROM MOBY/TOREMAR**

5.1. **On the public service obligations and the competitive environment**

(146) Moby/Toremar argue that the new public service contract and its annexes define concretely the public services obligations concerning the maritime routes involved. These obligations concern among others the quality and characteristics of the service (journeys to be made, timetables, service conditions) and the applicable tariffs.

(147) In replying to the complainant's allegation of a monopoly being created on the Piombino – Elba island routes following the merger between Toremar and Moby, the latter parties point to the authorisation provided by the Italian National Competition Authority of the said merger by means of Decision No 22622 of 19 July 2011, subject to compliance with certain conditions aimed precisely at ensuring the existence of competition on that route.

(148) Further, Moby/Toremar submit that the routes in question could not be served without public support and the market alone could not provide the services with the minimum requirements entailed by the public contract.

5.2. **On the privatisation of Toremar**

5.2.1. *On the price paid for Toremar's shares*

(149) Moby/Toremar submit that the privatisation of Toremar does not entail any State aid elements, given that the price agreed was certified by an independent evaluator.

5.2.2. *On the transparent and non-discriminatory character of the procedure and on the bundling of the assets of Toremar with a new public service contract*

(150) In replying to the Commission's preliminary position in the 2012 Decision that the technical and financial requirements of the tender may have limited the number of competitors potentially interested to submit a bid, Moby/Toremar argue that these requirements were indeed necessary, considering the particular structure of Toremar that resulted from it having been part of the Tirrenia group.

(151) According to Moby/Toremar, Toremar did not have all the facilities to ensure alone the maritime services required and in the past it has always used the services of the Tirrenia group, in particular services of a commercial nature (e. g. coordination of the activities of the port ticket offices, call centres and communication), of technical nature (e.g. management of information systems) and certain more specialised services (e.g. supply management).

(152) Therefore, Moby/Toremar argue that the tender as designed could not be held discriminatory and that the request of the Region of Tuscany that the buyer of Toremar is already active in the maritime passenger transport sector is prompted by industrial policy considerations to ensure the service continuity.

([49]) See further analysis in Section 6.3.1.

(153) Moby/Toremar submit that, if the service contract were to be awarded without the sale of Toremar, the latter would not have any further reason to continue functioning nor would it be easy to resell it on the market, given the specificity of the fleet. Further, according to the parties, the Region of Tuscany would probably have to pay a higher compensation amount for the service, considering that the operator would have needed to equip itself with the necessary vessels and personnel. Moreover, the Region of Tuscany would have had to bear the costs of the decommissioning of the Toremar fleet and of the management and liquidation of the company. Therefore, bundling the assets of Toremar with a new public service contract also minimises the costs of State intervention.

(154) Finally, Moby/Toremar, in replying to the complainant's allegation that the tender procedure conferred an advantage on Moby, refer to the proceedings at national level (see Section 2.3.2.3), which upheld the result of the tender procedure concerning the privatisation of Toremar and the award of the service contract.

5.3. **On the compliance of the new public service contract with the *Altmark* conditions**

(155) Moby/Toremar submit that the new public service contract satisfies all the *Altmark* criteria.

(156) According to the parties, the public service obligations are clearly defined and the parameters of the compensation are in advance established in an objective and transparent manner. Moreover, by virtue of the mechanism for awarding the service (discount auction) and the monitoring system established, according to which Toremar obtains the compensation only for the activities actually performed, this compensation does not exceed what is necessary to cover the costs arising from the fulfillment of public service obligations.

(157) Finally, Moby/Toremar argue that the choice of the company in charge of the fulfillment of the public service obligations has been carried out through a tender procedure in compliance with Union law.

5.4. **On the prolongation of the initial Convention between Toremar and Italy**

(158) Moby/Toremar refer to Commission Decision 2005/163/EC ('the 2004 Decision'), by which the Commission had declared the compensation granted by Italy to the Tirrenia Group companies, other than Tirrenia itself, to be partially compatible with the internal market, partially compatible conditional upon the respect of a number of undertakings by Italy, and partially incompatible with the internal market.

(159) They argue that on the basis of that decision the Commission had confirmed the compatibility of the initial Convention until its expiry date at the end of 2008 and that its prolongation for the years 2009 to 2011 constitutes simply a continuation of a compatible measure, hence an existing aid measure. Such prolongation does not contain any substantial changes and it was necessary for the organisation of the privatisation procedure of the companies belonging to the Tirrenia Group.

(160) Moby/Toremar further submit that even if the Commission were to consider that Toremar received State aid in the past through the prolongation of the initial Convention, this shall be negated by the fact that Toremar was sold under a public procurement procedure, thus on market conditions to Moby, at a price that included among others an assessment of that aid element. As a result, and on the basis of settled case law ([50]), the prolongation of the initial Convention is not State aid relevant.

([50]) The parties refer to the following cases to justify this argument: Case C-390/98 *Banks*, ECLI:EU:C:2001:456; Joined Cases C-74/00P and C-75/00P *Falck*, ECLI:EU:C:2002:524; and Case C-277/00 *Germany v Commission*, ECLI:EU:C:2004:238.

6. **ASSESSMENT**

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

(161) According to Article 107(1) TFEU 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

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

(a) be granted by a Member State or through State resources,

(b) favour certain undertakings or the production of certain goods,

(c) distort or threaten to distort competition, and

(d) affect trade between Member States.

(163) The Commission notes that the berthing priority, which only applies to the public service routes, is inextricably linked with the performance of the SGEI by Toremar and its acquirer Moby. Therefore, this measure will be assessed jointly with the public service compensation granted to these companies (see Sections 6.1.1 and 6.1.2).

(164) Furthermore, the Commission notes that the new public service contract between Italy and Moby/Toremar should be assessed jointly with the privatisation of Toremar. Such joint assessment is appropriate because in essence Italy organised the new public service contract whereby the winning bidder had to acquire the entire share capital of Toremar in order to discharge the public service obligations laid down in that public service contract.

6.1.1. *The prolongation of the initial Convention between Toremar and Italy*

6.1.1.1. State resources

(165) Toremar was entrusted by Italy with the operation of maritime routes as detailed by the initial Convention, as prolonged. The initial Convention was concluded with the State and the resulting public service compensation for Toremar is paid by the State from its own budget. Therefore, the public service compensation to Toremar is imputable to the State and is given through State resources.

(166) The Commission takes note that, according to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing but that Toremar did not pay any additional fee for the berthing priority. Nevertheless, the Commission considers that in principle Italy could have chosen to impose an additional fee for the berthing priority and that by not doing so, it has foregone State revenues. Furthermore, since the berthing priority is granted by law (see recital (90)) it is imputable to the State.

6.1.1.2. Selectivity

(167) In order to be qualified as State aid, a measure must be selective. The public service compensation for the provision of the maritime services in question is only granted to Toremar, thus it is selective. Since the berthing priority was only granted to the companies of the former Tirrenia Group, including to Toremar, it is also selective.

6.1.1.3. Economic advantage

(168) The Commission recalls that public service compensations granted to a company may not constitute an economic advantage under certain strictly defined conditions.

(169) In particular, in its *Altmark* judgment ([51]), the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not within the scope of Article 107(1) TFEU.

(170) However, the Court of Justice also made clear that for such public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria (the '*Altmark* criteria'), summarised below, must be satisfied:

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

— the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('*Altmark* 2');

— the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations ('*Altmark* 3');

— where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations ('*Altmark* 4').

(171) The Commission specified how it applies the *Altmark* criteria in its Communication on the application of State aid rules to compensation granted for the provision of services of general economic interest (the 'SGEI Communication') ([52]).

(172) Given that the *Altmark* criteria have to be complied with cumulatively, non-observance of either one of these criteria would lead the Commission to the conclusion that the measure under assessment provides an economic advantage to the beneficiary. The Commission will then first assess observance of *Altmark* 4.

(173) *Altmark* 4 provides that the compensation must be the minimum necessary in order for it not to qualify as State aid. This criterion is deemed to be fulfilled if the recipient of the public service compensation has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the services at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

(174) For none of the prolongations of the initial Convention in the period 1 January 2009 until 1 January 2012 Toremar was selected following a public tender procedure. Italy merely prolonged the system already in force thereby entitling the pre-established operator to continue receiving compensation for the discharge of the public service obligations.

(175) Moreover, Italy has not provided the Commission with any indication that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations. Italy's argument that the Region of Tuscany was monitoring Toremar's efficiency during the period 2010-2011 is not sufficient for compliance with this criterion, as it does not show whether the costs actually incurred by Toremar in the provision of its public service obligations were in line with those of a typical undertaking, well run and adequately provided with means of transport.

(176) The Commission therefore concludes that *Altmark* 4 has not been complied with in the present case.

([51]) See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

([52]) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

(177) Given that the four *Altmark* conditions are not cumulatively observed in the present case, the Commission concludes that the compensation for the operation of maritime routes under the prolongation of the initial Convention provided Toremar with an economic advantage.

(178) With respect to the berthing priority, the Commission first recalls that the Italian competition authority AGCM has at least on two occasions considered that this measure has economic value ([53]). Nevertheless, Toremar does not pay any fee for the berthing priority (see recital (136)). Furthermore, the Commission observes that the berthing priority has at least in theory the potential to lower the operator's costs (e.g. because the guaranteed berthing could reduce waiting times in ports and hence result in lower fuel costs) or increase its revenues (e.g. because some timings possibly attract more demand from passengers). Indeed, to the extent the berthing priority allows for a faster docking procedure, users of the ferry service may prefer the ferry operator that benefits from this measure. Even if these effects would only materialise in limited circumstances or would be relatively small, the berthing priority could nevertheless constitute an economic advantage for Toremar.

6.1.1.4. Effect on competition and trade

(179) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ([54]). It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ([55]).

(180) In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the Union, in particular since the entry into force of Council Regulation (EEC) No 4055/86 ([56]) and the Maritime Cabotage Regulation, liberalising the market of the international maritime transport and maritime cabotage, respectively. The fact that on some routes Toremar was at that time the only operator does not mean that other (international) operators could not be interested to offer similar maritime transport services. Therefore, the compensation for the operation of maritime routes under the prolongation of the initial Convention is liable to affect Union trade and distort competition within the internal market. For the same reasons that conclusion also holds for the berthing priority.

6.1.1.5. Conclusion

(181) Since all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that both the public service compensation paid on the basis of the successive prolongations of the initial Convention and the berthing priority for the public service routes constitutes State aid to Toremar.

6.1.1.6. New or existing aid

(182) The Commission first notes that the compensation paid to Toremar for the operation of maritime public service obligations until the end of 2008 will not be assessed in this Decision. The assessment of that compensation, and whether or not it can be classified as existing aid on the basis of Article 4(3) of the Maritime Cabotage Regulation, is the subject of a separate Commission decision ([57]).

(183) According to Article 1(c) of Council Regulation (EU) 2015/1589 ([58]), new aid means 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Furthermore, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision ([59]). In line with the position of the

([53]) Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione, recital 265.

([54]) See, in particular, Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, paragraph 11; Case C-53/00 *Ferring*, ECLI:EU:C:2001:627, paragraph 21; Case C-372/97 *Italy v Commission*, ECLI:EU:C:2004:234, paragraph 44.

([55]) Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

([56]) Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

([57]) Commission Decision (EU) 2020/1411 of 2 March 2020 on State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group).

([58]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

([59]) Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, ECLI:EU:C:2016:797, paragraph 45.

European Courts ([60]), the Commission considers that amending (i.e. prolonging) the duration of an aid scheme that had a clear expiry date (i.e. 31 December 2008) is sufficient to make it a new aid irrespective of whether or not other characteristics of the measure were changed.

(184) For the above reasons, the Commission considers that regardless of the fact that the compensation awarded to Toremar up until end 2008 has been classified as existing aid ([61]), the public service compensation paid on the basis of the prolongation of the initial Convention should be considered as new aid. This conclusion also holds for the berthing priority.

6.1.2. *The award of the new public service contract bundled with Toremar's business to Moby/Toremar*

(185) In order to conclude on whether the award of the new public service contract bundled with Toremar's business constitutes an advantage to Moby/Toremar within the meaning of Article 107(1) TFEU, the Commission must assess observance of the *Altmark* criteria (see recital (170)).

6.1.2.1. Altmark 1

(186) The Commission recalls that there is no uniform and precise definition of a service that may constitute an SGEI under Union law, either within the meaning of the first *Altmark* condition or within the meaning of Article 106(2) TFEU ([62]). Paragraph 46 of the SGEI Communication is worded as follows:

'In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation. Where specific Union rules exist, the Member States' discretion is further bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.'

(187) National authorities are therefore entitled to take the view that certain services are in the general interest and must be operated by means of public service obligations to ensure that the public interest is protected when market forces do not suffice to guarantee that they are provided at the level or conditions required.

(188) In the field of cabotage, detailed Union rules governing public service obligations have been laid down in the Maritime Cabotage Regulation and, for the purpose of examining potential State aid to undertakings engaged in maritime transport, in the Community guidelines on State aid to maritime transport ('the Maritime Guidelines') ([63]).

(189) Article 4(1) of the Maritime Cabotage Regulation provides:

'A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands. Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.'

([60]) Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava – Diputación Foral de Álava and others v Commission*, ECLI:EU:T:2002:59, paragraph 175.

([61]) Commission Decision (EU) 2020/1411 of 2 March 2020 on State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group).

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

([63]) Commission Communication C(2004) 43 – Community Guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

(190) Article 2(3) of the Maritime Cabotage Regulation sets out that a public service contract may cover: transport services satisfying fixed standards of continuity, regularity, capacity and quality, additional transport services, transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes and adjustments of services to actual requirements.

(191) In accordance with Section 9 of the Maritime Guidelines, 'public service obligations may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92', i. e. scheduled services to, from and between islands.

(192) It results from established case-law that public service obligations may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone ([64]). The Communication on interpretation of the Maritime Cabotage Regulation ([65]) confirms that 'it is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services'. Moreover, Article 2(4) of the Maritime Cabotage Regulation defines public service obligations as obligations, which 'the ship-owner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions'.

(193) In line with the case-law ([66]), in order to examine whether the first *Altmark* criterion is met, the Commission will carry out a three-step assessment to verify whether there is a real public service need (steps one and two) and whether it was necessary and proportional (step three). The Commission will assess:

(1) Whether there was **user demand**;

(2) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);

(3) Whether simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(1) User demand

(194) In this case, Toremar was entrusted with the provision of mixed services (passenger and vehicles) on multiple lines presented in Table 3. The public service obligations of Toremar concerned the ports served, the type and capacity of the vessels assigned to the maritime connections operated under the public service regime, the frequency of service and the maximum fares to be charged.

(195) As described in recital (123), Italy has imposed the public service obligations laid down in the new Convention mainly to (i) ensure the territorial continuity between the mainland and the islands and (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission considers that these are indeed legitimate public interest objectives.

(196) Historically, the objectives pursued by Italy have not been achieved through the interplay of market forces alone. In fact, the adequacy of these services has been traditionally ensured by public service obligations imposed to that effect on the companies of the former Tirrenia Group and enshrined in the initial Conventions. Indeed, the Commission notes that the routes in question have been operated, largely unaltered, for many years i.e. at least since the entry into force of the initial Convention. Italy, and in particular the regional authorities concerned, considered that these services were (and continued to be) necessary to meet user demand.

([64]) See Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others and Administración General del Estado*, ECLI:EU:C:2001:107.

([65]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), Brussels, COM(2014) 232 final, 22.4.2014.

([66]) See Case T-454/13 *SNCM v Commission*, ECLI:EU:T:2017:134, paragraphs 130 and 134.

(197) To illustrate the genuine demand from users for the services, Italy provided aggregated statistics which show that in 2010 Toremar transported 1 462 570 passengers and 317 488 vehicles on the five public service routes combined. The numbers for 2011 were slightly lower (i.e. 1 437 613 passengers and 294 433 vehicles). This shows that in the 2 years before Moby/Toremar was entrusted with its public service obligations, there was a significant aggregate demand for maritime transport services on the routes concerned (see recital (297) for route-by-route statistics for the years 2009 until 2011).

(198) To further demonstrate that user demand remained present when Moby/Toremar started operating on the basis of the new public service contract in all six routes, Italy also provided aggregated statistics until the end of 2018 (see Tables 4 and 5). This confirms that user demand remained present, with some slight deviations, upwards or downwards, with the exception of 2012 that saw a higher upwards deviation, which is mainly due to the structural renewal of the sales network, which has had a positive impact on the increase of traffic during the high season of that year. In any case, an analysis of the route-by-route statistics for each year until end 2018 did not provide any indications that the user demand on specific routes would have disappeared.

Year	Line A1	Line A2	Line A2 fast	Line A3	Line A4	Line A5	Total No of passengers
2012	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2013	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2014	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2015	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2016	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2017	[…]	[…]	[…]	[…]	[…]	[…]	[…]
2018	[…]	[…]	[…]	[…]	[…]	[…]	[…]

Table 4 – Passengers' statistics for the years 2012-2018

Year	Line A1	Line A2	Line A2 fast	Line A3	Line A4	Line A5	Total No of vehicles
2012	[…]	[…]		[…]	[…]		[…]
2013	[…]	[…]		[…]	[…]		[…]
2014	[…]	[…]		[…]	[…]		[…]
2015	[…]	[…]		[…]	[…]		[…]
2016	[…]	[…]		[…]	[…]		[…]
2017	[…]	[…]		[…]	[…]		[…]
2018	[…]	[…]		[…]	[…]		[…]

Table 5 – Vehicles' statistics for the years 2012-2018 ([67])

(199) The Commission considers that the above statistics clearly demonstrate that there is a genuine demand for passenger and mixed services on each of the six public service routes in question. It can therefore be concluded that these services address real public needs and meet a genuine user demand.

(2) Existence of market failure

([67]) The ships used on line A2 fast and line A5 cannot transport vehicles.

(200) According to paragraph 48 of the SGEI Communication, 'it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions ([68])'. Therefore, the Commission must examine whether the service would be inadequate if its provision were left to the market forces alone in the light of the public service requirements imposed by the Member State by virtue of the new public service contract. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

(201) The Commission notes that during the time period leading up to the signature of the new public service contract with Moby/Toremar, other operators offered ferry services on some routes subject to the new public service contract albeit not necessarily throughout the year and with the same frequency. On the basis of the competitive situation leading up to the moment of entrustment on 2 January 2012 (as described in recital (38)), the Commission will assess for each of the routes concerned whether the services provided by other operators were equivalent to those that Moby/Toremar had to provide under the new public service contract.

(202) The table below describes the competitive situation on the routes operated by Moby/Toremar:

Route	**Moby/Toremar (all year round sailings per day)**	**Competitors (sailings per day)**
Livorno – Gorgona – Capraia **(Line A1)**	Mixed service (passengers and vehicles)	None
Portoferraio –Piombino (island of Elba) **(Line A2)**	Mixed service with an average of: — From January to April 8 sailings — From April to September 15 sailings — From September to December 8 sailings	**Moby** (mixed service all year round) with an average of: — From January to March 6 sailings — In April 8 sailings, in May 12 sailings and in September 10 sailings — From June to August 12 sailings — In October 8 sailings — In November and December 6 sailings **Blu Navy** (mixed service) — In 2012 (all year round) with an average of 5 sailings — Since 2013, only between March to October, with an average of 5 sailings **Elba Ferries** (mixed service from June to September) with an average of 5 to 6 sailings
Piombino –Cavo – Portoferraio (island of Elba **(Line A2 fast)**	Fast passenger service	None
Piombino – Rio Marina – Pianosa (island of Elba) **(Line A3)**	Mixed service	None
Porto S. Stefano – Island of Giglio **(Line A4)**	Mixed service with an average of: — From January to March 3 to 4 sailings	**Maregiglio** (mixed service all year round) with an average of: — From January to March 0,5 to 1 sailing — In April and May 2 sailings

([68]) See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107, paragraph 71.

	— From April to September 4 to 5 sailings — From September to December 4 sailings	— In June and July 5 to 6 sailings — In August and September 3 to 4 sailings — In October 1 to 2 sailings — In November and December 1 sailing
Porto S. Stefano – Giannutri **(Line A5)**	Passenger service offered by Maregiglio on subcontract with Moby/Toremar [1]	None

[1] The tender documentation has provided for subcontracting possibilities. Italy has supplied the Commission with the specific amounts – being the net cost for the service – paid annually to Moby/Toremar by the Region of Tuscany for the provision of the public service on the Porto S. Stefano – Giannutri route. Toremar pays Maregiglio a lump-sum on the basis of a subcontract. The latter transaction, which involves a private contract, is outside the scope of this Decision.

Table 6 – Competitive situation on the routes operated by Moby/Toremar

(203) The Commission considers, as it is clearly shown in Table 6, that the services offered by Moby/Toremar are not substitutable to those offered by other competitors, as the latter do not serve or do not serve in full the public service obligations laid down by the new public service contract, notably in terms of the continuity throughout the year of the service operated by Toremar. That said, on three of the six routes, there is no other operator apart from Moby/Toremar offering the service (Lines A2 fast, A3 and A5). As a result, the public service obligations laid down in the contract with Moby/Toremar for operating those three routes are justified by a genuine public need to ensure territorial continuity, when this cannot be offered by the market alone.

(204) As regards the routes where other operators also offer services (Lines A2, and A4), the Commission considers that there are major differences concerning the regularity of the services offered. Moby/Toremar sails those routes throughout the year continuously, whereas all the other operators mentioned above in the table (i.e. Blu Navy, Elba Ferries and Maregiglio) do not offer this continuous service all year round (in the case of Blu Navy and Elba Ferries) nor do they do so at the same level of frequency as Moby/Toremar. For example, Blu Navy started sailing in 2010 between April and November. Then in 2012 it sailed all year round with an average of 5 sailings and in 2013 it returned to its initial schedule of sailing only during March and October. Maregiglio sails the Line A4 all year round, nevertheless with a reduced number of sailings compared to Moby/Toremar. In particular, during the period January to February and November to December, Maregiglio does not sail every day, with the monthly sailings varying between 20 and 30. As a result, without the service of Moby/Toremar on those particular routes, the need for regular and frequent connectivity of those islands with the mainland all year round would be materially jeopardised, as both Blu Navy and Elba Ferries could not have provided the service under the same conditions as Moby/Toremar over the whole contract period.

(205) Particularly as regards the service operated by Moby (as a competitor to Moby/Toremar) on Line A2, the Commission notes that Moby sails regularly throughout the year as well as frequently on a daily basis (e.g. from 5 sailings during the winter period to 17 sailings during the summer period), performing thus a very similar service to that of Moby/Toremar.

(206) Nevertheless, Italy has provided information showing that the continuation of the public service by Moby/Toremar was necessary and responded to a real public service need and that this public need for maritime connectivity could not be met by Moby alone.

(1) First, the timetable of Moby/Toremar had been adjusted in the context of the new public service contract in order to ensure intermodal transportation, notably a better integration of maritime services with the railway services offered at the Piombino and Campiglia Marittima railway stations;

(2) Second, Italy has demonstrated that the existence of an operator entrusted with public service obligations would enable effective maritime service continuity throughout the winter period and reduce substantially and at the interest of the general population, the waiting time at the dock by almost one hour and a half (e.g. from three hours in Piombino in the absence of Toremar to one hour and a half in the case of both Toremar and Moby);

(3) Third, on the basis of the public service contract Moby/Toremar performs an additional daily all year round evening sailing within the time span between 30 minutes after its last (at the time of entrustment) sail and 00.30 am (see recital (258)). Moby/Toremar thus runs the last time slot daily on Line A2 (22.00 pm or 22.30 pm depending on day and month). The timetables assessed also show that Moby/Toremar has the first sailing from Portoferraio to the mainland. Therefore, the vessels of Moby/Toremar dock in the island port at night, with higher costs, to provide the very first connection in the morning for residents commuting for either education or work and to ensure connections in case of medical emergencies;

(4) Fourth, it has been submitted that Moby alone could not be in a position to satisfy the high volume of passengers in need of transportation between Piombino and Portoferraio and *vice versa*. Although, much higher volume of passengers is evidently transported during the summer months, the figures observed in the first 3 months of 2012 (i.e. during the low season) indicate that there has been a constant presence of passengers on board for either vessel (Moby/Toremar or Moby) that needed to commute in both directions for work, study or other personal purposes.

(207) In light of the above, the Commission concludes that at the moment of the entrustment, market forces alone were insufficient to meet the public service needs. Indeed, on a number of routes Moby/Toremar was the only operator while on the other routes the services provided by the competitors in the Tuscany archipelago were not equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service requirements laid down in the new service contract with Moby/Toremar.

(3) Least harmful approach

(208) The Commission notes that Italy has chosen to conclude a public service contract with one operator (Moby/Toremar) rather than to impose public service obligations on all operators interested in serving the routes at stake. Based on the information provided by Italy, the Commission accepts that user demand could not have been met by imposing public service obligations (see recital (196)). In particular, on several routes Moby/Toremar is the only operator and where this is not the case, the offer provided by the other operators does not meet (all) the requirements of regularity, continuity and quality. Further, the operation of most routes, especially in the low season, is loss-making, so that without public service compensation they would not be operated at all. In addition, the Commission takes note of Italy's and the beneficiaries' argument that the choice for a public service contract was also necessary in view of the privatisation of Toremar. More specifically, Italy argues that tendering out Toremar together with a new public service contract allowed to (i) ensure continuity of the maritime public service and (ii) maximise value for the State. It is for these reasons that the Commission agreed (see recital (96)) that Italy would tender out Toremar business together with a new public service contract. In doing so, the Commission also accepted, and reiterates in this Decision, that Italy could not rely on public service obligations that apply to all operators but that it would rather conclude a public service contract with Moby/Toremar only.

Conclusion

(209) On the basis of the above assessment, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Moby/Toremar as SGEI. The doubts expressed by the Commission in the 2012 Decision are hence dispelled.

(210) In order to conclude that *Altmark* 1 is complied with, the Commission must still check whether Moby/Toremar was entrusted with public service obligations which were clearly defined. In this regard, the Commission notes that the public service obligations are clearly described in the new public service contract and its annexes (which include for instance ship specifications for each route). Likewise, the rules regulating the compensation are detailed in the new public service contract, the 2009 Law and the CIPE Directive. The new public service contract also has a clear duration (12 years), identifies Moby/Toremar as the public service operator and contains the arrangements for avoiding and recovering any overcompensation (see also recital (228)). Therefore, the Commission concludes that the first *Altmark* criterion is observed.

Berthing priority

(211) Article 19-*ter*, paragraph 21, of the 2009 Law clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Moby/Toremar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are specific time scheduling obligations in the new public service contract for the departure of public service routes, the berthing priority helps to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations. This berthing priority was transferred to Moby/Toremar when Toremar was acquired. Against this background, the Commission considers that this measure is awarded to enable Moby/Toremar to perform their public service obligations which constitute genuine SGEI (see recital (209)). Furthermore, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime. Therefore, the berthing priority also complies with the first condition of the *Altmark* judgment.

6.1.2.2. Altmark 2

(212) The Commission recalls that in the 2012 Decision (see its paragraph 205), it had taken the preliminary view that the second criterion of the *Altmark* judgment is observed.

(213) Against this background, the Commission notes that the parameters at the basis of the calculation of the compensation have been established in advance and observe the transparency requirements in line with the second *Altmark* criterion.

(214) More specifically, the parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the new public service contract (and annexes thereto). The method of calculation of the compensation, including for instance the cost elements taken into account, are detailed in the CIPE Directive. Since the berthing priority does not entail financial compensation for Moby/Toremar, the Commission considers that this measure complies with *Altmark* 2.

(215) Therefore, the Commission concludes that the second condition of the *Altmark* judgment is observed.

6.1.2.3. Altmark 3

(216) According to the third *Altmark* condition, the compensation received for the discharge of the SGEI cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(217) However, the *Altmark* ruling does not provide a precise definition of the reasonable profit. According to the SGEI Communication, reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.

(218) In the 2012 Decision, the Commission expressed doubts as to the proportionality of the compensation paid to the companies of the former Tirrenia Group, including Moby/Toremar as from 2012. In particular, the Commission took the preliminary view that the 6,5 % fixed risk premium did not reflect an appropriate level of risk because *prima facie* Moby/Toremar did not appear to assume the risks normally borne in the operation of such services. More specifically, the cost elements for the purpose of calculation of the compensation include all costs involved in the provision of the service and variations in e.g. fuel prices have been taken into account. As a result, the Commission considered at that stage that Moby/Toremar may have been overcompensated.

(219) The Commission notes that certain aspects of the compensation method as laid down in the new public service contract, indeed seem to reduce the commercial risk incurred by Moby/Toremar. In particular, the maximum fares that Moby/Toremar can charge are adjusted annually to take into account inflation and reflect variations in the consumer price index. Moreover, the new public service contract contains certain clauses (see recital (87)) that aim

at maintaining the economic-financial equilibrium of the public service. In particular, in case the public service compensation would be insufficient to cover the cost of the services entrusted by the new public service contract, these clauses allow to revise (i) the tariff system, (ii) the level of the public services offered, (iii) the level of the annual price cap, and (iv) the capital grants for investments.

(220) According to Article 26 of the contract, when there is a discrepancy in its economic and financial balance, Moby/Toremar may request a rebalancing by submitting a proposal to the Region of Tuscany. This proposal is then submitted to the Technical Committee responsible of managing the contract. Italy has supplied the Commission with information (see Table 7) showing the rebalancing contributions, due to higher VAT costs borne by Moby/Toremar and fuel price increases, during the period 2012-2018.

EUR	**Public compensation under the contract**	**Rebalancing contribution**	**Total**
2012	13 291 109	2 033 145	15 324 254
2013	13 234 326	-	13 234 326
2014	13 287 102	1 150 000	14 437 102
2015	13 366 507	677 052	14 043 559
2016	13 212 118	-	13 212 118
2017	13 523 598	-	13 523 598
2018	13 706 440	-	13 706 440

Table 7 – Rebalancing contributions

(221) As illustrated in the table above and further explained by Italy, in order to maintain the economic balance of the contract, the compensation was adjusted for 2012, whereas from 2013 until the end of the contract, action was taken on the tariff system, adjusting the fare pricing. A further adjustment of the compensation took place in 2014 and 2015 resulting in an additional rebalancing contribution due to the inadequate tariff system of 2013 and 2014 respectively, while no adjustment was necessary for 2016 to 2018.

(222) Although these safeguards seem to reduce the commercial risk incurred by Moby/Toremar, the Commission considers that the company remains exposed to the risk that the compensation may not be sufficient to cover the costs of running the service. The rebalancing proposal may not always be accepted, as the Region of Tuscany shall rule on the merits and adopt its decision having obtained the Technical Committee's opinion within 90 days of Moby/Toremar submitting its request. Until a decision is adopted, Moby/Toremar must continue to operate the public service unaltered. Indeed, in one instance, such rebalancing request has been rejected because the conditions of Article 26 of the public service contract were not met ([69]).

(223) In addition, the Commission notes that not all cost categories are subjected to a rebalancing contribution. Particularly, according to Article 26 of the public service contract, the costs related to managerial inefficiencies, the borrowing costs and increases in staff unit costs to meet labour legal requirements should be borne by Moby/Toremar. Therefore, Moby/Toremar remains incentivised to perform its services efficiently and at the least cost to the community.

(224) As mentioned above in recitals (46) to (50), the CIPE Directive provides that a risk premium of 6,5 % would be used to determine the return on capital using the WACC formula. However, in practice the 6,5 % was applied as a flat rate return on capital (see also recital (133)).

([69]) Letter of 3 April 2012, ref. AOOGRT-0096174/O.80.

(225) As illustrated in Table 8, the figures for the period 2012-2018 show that the actual public service compensation was insufficient to cover the net cost of the service including the 6,5 % return on capital. In line with paragraph 47 of the 2011 SGEI Framework, the Commission assesses whether there was overcompensation over the whole duration of the contract. For the period 2012-2018, Moby/Toremar received slightly over EUR 4 million less than the eligible amount. In essence, over this period the compensation paid to Moby/Toremar covered the net cost of the public service but there was hardly any (i.e. slightly over EUR 30 000 in total) return on capital in practice. These figures confirm that the rebalancing provisions of Article 26 of the contract do not protect Moby/Toremar from all the risks related to the operation of the public service.

Toremar public service remit	2012	2013	2014	2015	2016	2017	2018	Grand total
Total revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
- Total costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
- Amortizations	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
= Net cost of public service	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Return on capital (6,5%)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
= Eligible for compensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Actual compensation	15.324.255 €	13.234.327 €	14.437.102 €	14.043.559 €	13.212.118 €	13.523.598 €	13.706.440 €	97.481.399 €
= Over/under compensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	- 4.169.085 €

Table 8 – Net cost of the public service operated by Toremar for the period 2012-2018

(226) In the course of the formal investigation (see recital (133)), Italy has clarified that, because the tender amount of compensation was capped by the 2009 Law, the decision was taken to simplify the calculation by applying the 6,5 % as a flat rate return on capital. Italy considers that its simplified approach is conservative (see recital (134)) and does not allow for higher compensation for Moby/Toremar than what was established under the CIPE Directive.

(227) Against this background, the Commission has compared the return on capital employed of 6,5 % % that has been applied to Moby/Toremar with the median return on capital generated by a benchmark group in 2011 (the year before Moby/Toremar's entrustment). The benchmark group consists of selected ferry operators that offered maritime connections within Italy or between Italy and other Member States ([70]). The analysis shows that the return on capital realised by Moby/Toremar is just below the median return generated by the benchmark group. This comparison illustrates that in the year before Moby/Toremar's entrustment, a 6,5 % return on capital was not unreasonable.

(228) The Commission further notes positively that the new public service contract requires Moby/Toremar to send its management accounts (sub-divided per route and certified by an independent auditor) every year to the Region of Tuscany to enable the latter to check if there was any overcompensation. This provides an additional safeguard to ensure that Toremar cannot benefit from any overcompensation. In addition, since Toremar performed only commercial activities, cross-subsidisation is in any event excluded. Italy also submitted these management accounts for the period 2012-2018 thereby enabling the Commission to make the calculations in Table 8.

(229) In light of the above, the Commission concludes that the public service compensation granted to Toremar does not exceed what is necessary to cover the costs incurred in the discharge of its public service obligations, taking into account the relevant receipts and a reasonable profit. More specifically, the Commission considers that the risk premium of 6,5 % laid down by the CIPE Directive, has to be assessed in combination with the maximum compensation amount laid down in the 2009 Law. With this in mind, the return on capital that Toremar could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the public service contract. The Commission's doubts concerning compliance with the third condition of the *Altmark* judgment are therefore dispelled.

([70]) In particular, it concerns Minoan Lines Shipping, La Méridionale, Moby, Grandi Navi Veloci, Libertylines, Grimaldi Group, Corsica Ferries, SNAV, and Caronte Tourist. Other companies of the former Tirrenia Group (e.g. Caremar, Laziomar) have been excluded from the benchmark group.

(230) With respect to the berthing priority and any possible overcompensation that might result from it, the Commission notes the following. Italy argues that any possible monetary advantage from the berthing priority would be limited (see recital (137)). As a result, also the risk of overcompensation stemming from this measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. The Commission's analysis above (see recital (228)) confirmed that in the period 2012-2018 Moby/Toremar did not receive overcompensation. Therefore, the Commission concludes that also the berthing priority complies with the third *Altmark* criterion.

6.1.2.4. Altmark 4

(231) The fourth *Altmark* criterion is fulfilled if the recipient of the compensation for the operation of an SGEI has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the SGEI at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

(232) According to paragraph 63 of the SGEI Communication, the simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council ([71]) and Directive 2004/18/EC of the European Parliament and of the Council ([72]).

(233) The Commission observes that in the present case, the tender procedure was launched before the entry into force of Directive 2014/24/EU of the European Parliament and of the Council ([73]) (which applies to public contracts awarded for the operation of maritime transport services) and Directive 2014/25/EU of the European Parliament and of the Council ([74]). At that time, Directive 2004/17/EC and Directive 2004/18/EC were applicable. However, Directive 2004/17/EC does not apply to maritime transport services, such as those provided by Moby/Toremar. Indeed, Article 5 of Directive 2004/17/EC makes clear that only transport services by railway, automated systems, tramway, trolley bus, bus or cable are included in its scope.

(234) Public contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport fall instead within the scope of Directive 2004/18/EC on the basis of its paragraph 20. However, water transport services are also listed in Annex II B to that Directive which implies ([75]) that they are only subject to its Articles 23 and 35(4). This means that, under Directive 2004/18/EC, a public contract for maritime transport services is subject only to the obligations concerning technical specifications (Article 23) and to the obligation to publish a contract award notice (after the contract has been awarded and, therefore, at the end, not at the beginning, of the award procedure: Article 35(4)). All the other rules dictated by Directive 2004/18/EC – including the provisions on the content of notices to be published (Article 36(1)) and the provisions on selection criteria (Articles 45 to 52) – are not applicable to public contracts for maritime transport services.

(235) Furthermore, Directive 2004/18/EC does in any case not apply to service concessions as defined in its Article 1(4) ([76]). The Commission notes that service concessions (and public contracts), which have certain cross-border interest nevertheless remain subject to the general Treaty principles of transparency, non-discrimination and equal treatment.

([71]) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

([72]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

([73]) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

([74]) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

([75]) Under Article 21 of Directive 2004/18/EC.

([76]) Article 1(4) of Directive 2004/18/EC reads: '"Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

(236) On the basis of the above, the Commission concludes that Directive 2004/18/EC can only apply in case of a public contract but not when it concerns a service concession. In addition, since the present case concerns water transport services subjected to a public service contract, only some of that Directive's requirements, as aforementioned, would be applicable. Against this background, the Commission considers that it cannot rely solely on compliance with the Public Procurement Directives to demonstrate compliance with the fourth *Altmark* criterion. For this reason, the Commission assesses below whether the tender procedure used by Italy was competitive, transparent, non-discriminatory and unconditional. To make this assessment, the Commission relies on the relevant guidance set out in its Notion of Aid Communication ([77]) (in particular in its paragraphs 89 *et seq*.) and the SGEI Communication (in particular in its paragraphs 63 *et seq*.).

Competitive and transparent nature of the tender

(237) Paragraph 90 of the Notion of Aid Communication specifies that a tender procedure has to be competitive ([78]) to allow all interested and qualified bidders to participate in the process. Furthermore, according to paragraph 91 of that Communication, the procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. That paragraph also emphasises that accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure and indicates that a tender has to be sufficiently well-publicised, so that all potential bidders can take note of it.

(238) In the present case, the call for expression of interest was published in the *Official Journal of the European Union*, as well as in the national and regional Official Journal and in national newspapers (see recital (56)). This call invited anyone who could 'guarantee the continuity of the maritime transport service' to express its interest and did not impose any further conditions. Potential bidders were given sufficient time to adequately express their interests allowing them to participate in the further process. The Commission therefore considers that the intention of the Region of Tuscany to sell Toremar and award the public service contract was made available widely in a way reaching all possible bidders.

(239) Further, bidders need to be provided with all documents and information required for the participation in the bidding process enabling them to properly assess the company put up for sale. Such information has to be made available to potential bidders in a transparent and non-discriminatory manner with all interested participants having equal access to relevant information.

(240) First, the call for expressions of interest mentioned that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. This was the only selection criterion that Italy applied to determine whether or not interested parties would be allowed to participate in the tender procedure. While the call did not specify how bidders could prove they met this requirement, by default this meant that any appropriate means of evidence could be used ([79]). As none of the 11 parties that expressed an interest in participating in the tender process was excluded, the Commission considers that this selection criterion was clear to all interested bidders and was also justified in light of the objective pursued.

(241) Second, the 2009 Law made clear to interested parties that a new convention/public service contract would be concluded upon completion of the tender procedure and that the annual amount of public service compensation had been set at maximum EUR 13 005 441 million per year. In addition, the call for expressions of interest indicated that the objective was to sell Toremar with a fixed price of EUR 10 258 397. Furthermore, as confirmed by Italy, all relevant information as regards the scope of the sale, including the draft public service contract to be concluded between the buyer and Italy, was made available to the 11 parties who expressed an interest in

([77]) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

([78]) In the Notion of Aid Communication, the Commission observes that the Union Courts often refer, in the context of State aid to an 'open' tender procedure. The use of the word 'open', however does not refer to a specific procedure under the Public Procurement Directives. Therefore, the Commission considers that the word 'competitive' appears more appropriate. In this Communication, the Commission also notes that this is not intended to deviate from the substantive conditions set out in the case law.

([79]) Furthermore, as explained above (see recital (234)) Article 36(1) of Directive 2004/18/EC did not apply to this tender. Therefore, Italy had actually no obligation to provide in the call selection criteria.

participating in the tender process. This allowed these parties to decide whether or not to bid and if so how much to bid. On this basis, the Commission considers that it was sufficiently clear from the call for expressions of interest that the sale concerned the Toremar business bundled with a new public service contract. After having expressed their interest, parties were given access to all necessary information to decide on a possible bid.

(242) Third, the Commission considers that the call for expression of interest attracted a substantial number of potential tenderers. All 11 companies that submitted an expression of interest, received thereafter detailed information from the Region of Tuscany about the process. Further, in compliance with the provisions of Directive 2004/18/EC, it appears that Italy had no obligation to provide, in the call, any more information about the contract to be awarded apart from the mere mention of the continuation to provide the public service and the reference to the legal rules regulating that service (see recital (234)).

(243) Fourth, the call contained the minimum necessary information needed in order to submit an expression of interest (i. e. the continuation of the public service), and it could not have prompted the exclusion of otherwise interested maritime operators. It was the decision of the planning authorities to ensure continuity of the public service and connectivity of the islands of the Tuscany archipelago with the mainland. This condition was made known in advance, as above explained, to all potential operators expressing an interest to participate in the tender procedure. The Commission hence agrees with Italy that at that stage there was no control over the potential tenderers (see recital (127)), which shows that it was not the intention of the planning authorities, as a result of the inclusion of the mandatory requirement to continue the public service, to selectively favour any potential tenderer, to be awarded the contract for the public service and the ownership of the Toremar business. The Commission also notes that all relevant information on the selection criteria and the further development of the procedure was provided for in the invitation letter sent to all 11 parties having expressed an interest to participate in the procedure ([80]).

(244) Finally, the Commission considers that the initiative of the Region of Tuscany to set up a special digital platform or data-room, containing all the necessary documentation has allowed all potential tenderers to be equally, fully and duly aware of all information needed for the preparation of their bid.

(245) In the 2012 Decision, the Commission expressed doubts that certain *technical and financial requirements of the tender* (see recital (113)) needed to be imposed on tenderers, in addition to the standard qualitative conditions that are in any event imposed as public service obligations. Further, the Commission doubted that such requirements could be accepted in a situation, as the present one, where the whole company is put up on sale.

(246) In the course of the investigation, the Commission received information that alleviated its concerns. The Commission considers that the technical and financial requirements have not resulted in the exclusion of any potential tenderer, for the following reasons.

(247) First, the technical and financial requirements were included in the tender documentation and known thus to all potential tenderers at the very early stages of the process. Particularly, these requirements were included in the contract notice that was internationally published, inviting all interested operators meeting these requirements, to submit an expression of interest.

(248) Second, the Commission notes that the specific requirements were expressed as objective conditions for participating in the procedure and did not hence constitute award criteria nor were they attributed scoring points. As a result, the contracting authorities did not have any discretion as regards the selection of tenderers to the next phase of the procedure.

([80]) The invitation letter among others includes information regarding the credit of EUR 9 772 572 claimed from Tirrenia (see recitals (69) to (71)).

(249) Third, considering the way the tender was conducted (i.e. bundling the sale of the company with the conclusion of a new public service contract), the Commission is of the view that the Region of Tuscany's objective to ensure the continuity of the public service at the highest possible quality standards, constitutes a legitimate public interest objective ([81]), which could not have been achieved without the said requirements. The fact, further, that the publication of the contract notice with the said requirements resulted in the submission of 11 expressions of interests evidently shows that the inclusion of these requirements did not have a deterrent effect.

(250) On the basis of the above, the Commission considers that, taken as a whole, the tender procedure was competitive and transparent. In particular, the intention of the Region of Tuscany to divest the Toremar business and to conclude a new public service contract with a duration of 12 years with the winning tenderer was made available widely in a way reaching all possible bidders in the relevant regional or international market. Furthermore, the Commission takes into account that potential bidders could easily express their interest and did not have to commit themselves to anything at that stage. Provided that they could show they fulfilled the sole selection criterion of guaranteeing the continuity of the service, these parties were then given all the necessary information and time to allow them to decide if and how much they wanted to bid for the service. For these reasons, the Commission considers that its doubts that the tender procedure was not sufficiently transparent due to possible deficiencies in the call for expressions of interest are dispelled.

Non-discriminatory nature of the tender

(251) Paragraph 92 of the Notion of Aid Communication highlights that non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. Furthermore, that paragraph specifies that to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.

(252) As indicated above (see recital (240)), the call for expressions of interest contained the sole condition that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. All 11 parties that responded to the call and expressed an interest were aware of that obligation. The Commission considers that this condition was objective and had been made sufficiently clear to all interested parties in the call for expressions of interest.

(253) The 11 interested bidders were then invited to submit a bid and were all given access to a virtual data room containing all relevant information (see recital (62)) allowing them to assess the Toremar business and the new public service contract put up for sale. All bidders hence received the same information and were treated equally at all times.

(254) The Commission's doubts in the 2011 Decision that the call for expression of interest was non-discriminatory are therefore resolved. All parties were correctly and equally informed throughout the various steps of the tender procedure enabling them to make a bid with full knowledge of the procedure and requirements. The Commission also considers that the award criteria allowed for an objective comparison and assessment of the tenders.

Ensuring that the services are provided at the least cost to the community

(255) Paragraph 65 of the SGEI Communication provides that based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at 'the least cost to the community'.

(256) In this case, the new public service contract bundled with the Toremar business, rather than only the public service contract itself, has been tendered out. Italy decided that the price for the sale of the Toremar business was fixed (based on the valuation performed by an independent expert) and not negotiable, whilst for the service contract Italy chose the most economically advantageous offer with price scoring 20 points, quality 70 points and additional services 10 points (see recitals (60) and (61)).

([81]) Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others and Administración General del Estado*, ECLI:EU:C:2001:107, paragraph 37.

(257) In relation to the use of the most economically advantageous offer, paragraph 67 of the SGEI Communication indicates that the 'most economically advantageous offer' is deemed also (in addition to the 'lowest price') sufficient to satisfy fourth *Altmark* criterion '[…] provided that the award criteria […], are closely related to the subject matter of the service provided and allow for the most economically advantageous offer to match the value of the market' ([82]).

(258) The Commission notes that Italy gave emphasis on choosing an operator that would provide the service at high quality standards taking into account certain requirements. The invitation letter to submit a tender included all necessary information needed in order to fill out the financial and technical offers. Especially as regards the technical offer (which was scored with 80 points in total, with the remaining 20 points allocated to the price criterion), all 11 maritime operators that expressed an interest were invited to submit information related to the average age of the vessels provided for each line and for each contractual year, the capacity and structural facilities provided for disabled passengers, as well as information related to the possibility for the selected operator to schedule additional sailings on specific time slots (including night sailings) all year round. These quality criteria are evidently closely related to and confer added value to the provision of the maritime service. Therefore, the Commission considers that the use of the most economically advantageous tender for the service concerned bundled with the sale of the Toremar business enabled Italy to create effective competition and obtain a service with the highest possible value at the least cost to the community.

(259) As far as the bundling of the service with the sale of the Toremar business is particularly concerned, in the 2012 Decision, the Commission took the preliminary view that the tendering of the new public service contract without an obligation to take over the vessels of Toremar necessary to perform the public service, would have resulted in a lower cost to the community.

(260) The Commission has already concluded above that the tender procedure has been sufficiently transparent and non-discriminatory to enable the participation of as many potential tenderers as possible. Indeed, following the widespread publication of the call for expression of interest, 11 maritime operators responded affirmatively. All relevant information concerning the tender procedure was provided for in the invitation letter sent to all 11 participants. The Region of Tuscany, further, set up a special digital platform or data-room, containing all the necessary documentation to allow all potential tenderers to be equally informed.

(261) Following the expression of interest stage, two competitive bids were submitted (Moby and Toscana di Navigazione S.r.l.), which the Region of Tuscany evaluated, taking into account their technical and financial offers. As mentioned in recitals (62) and (64), during the evaluation phase, the Region of Tuscany detected some inconsistencies pertaining to differences between the technical and economic offers submitted by Toscana di Navigazione S.r.l. resulting to the latter being further excluded from the process, and the contract was thus ultimately awarded to Moby.

(262) The mandatory condition to guarantee the continuity of the public service and the bundling of the assets with the public service obligations are interrelated. In particular, by having bundled the sale of Toremar with a new public service contract, the acquirer, Moby, automatically becomes subject to the requirement to ensure the continuity of the public service and is awarded the berthing priority. The Commission considers that the bundling of the Toremar business with the new public service contract and the award of the berthing priority do not result in a lower price than if the assets and this contract would have been sold separately, for the following reasons.

(263) The Toremar business has been solely purposed for the delivery of the public service and to ensure the territorial continuity. Indeed, all of Toremar's vessels have been and currently are used for the public service. The Commission is of the view that a private vendor would not have been able to obtain a higher price for the vessels on the market. Indeed, according to the Fidi report, out of the eight vessels of Toremar, three were budgeted for the residual value, whereas the remaining five, which have been completely amortised, were budgeted to their scrap values. However, it seems unlikely that these vessels could have been sold for shipping purposes, other than that including the condition to continue the public service, for a higher price than that which they were budgeted for. This is because when a ship is not yet at the end of its useful life, its value for shipping purposes would be higher than its scrap

([82]) See also paragraph 96 of the Notion of Aid Communication.

value. In the scenario where the ships are sold separately, it is likely that at least some ships would have to be sold at their scrap value if they could be sold at all. Therefore, by bundling the ships with the public service contract, all ships keep operating and can hence be sold at a higher price than their scrap value.

(264) Moreover, the Commission agrees with the comments submitted by the beneficiary, concerning the substantial costs that the Region of Tuscany would need to bear, had Toremar been sold separately for any shipping purpose without the public service (i.e. liquidation costs, costs of equipping itself with necessary vessels etc.). In addition, had Toremar been sold separately, the Commission considers it unlikely that potential bidders could have had the necessary eight vessels readily available for redeployment to operate the public service obligations laid down in the new public service contract. This is particularly true since the new contract contains specific requirements (e.g. size) about the vessels to be used on the different public service routes. Any operator who had the required resources would likely have employed them already on other routes and their redeployment in line with the new public service contract would inevitably have led to losing the revenues from their previous use.

(265) The Commission considers therefore that bundling those ships with the public service contract allowed obtaining a higher price for Toremar's vessels since in return for operating the vessels on the public service routes, their acquirer would receive public service compensation for a period of 12 years. In addition, any market economy vendor would have decided to sell Toremar along with a new public service contract in order to obtain the highest price. On this basis, the Commission concludes that Italy has not attached conditions that were likely to depress the price or which a private seller would not have demanded.

(266) The Commission concludes that its doubt that tendering out the new public service contract together with the Toremar business could not result in a lower cost to the community, is dispelled.

(267) In view of the above, the Commission considers that the use of the most economically advantageous tender for the new public service contract bundled with the Toremar business created genuine competition until the end of the tender procedure with the submission of two competitive and binding bids. The exclusion of Toscana di Navigazione S.r.l. only took place during the subsequent evaluation of the bids and did not thus alter the competitive nature of the tender process. As a result, the Commission concludes that *Altmark* 4 is complied with in the present case.

(268) Given that the four conditions set out by the Court of Justice in the *Altmark* case are cumulatively met, the Commission concludes that the award of the public service contract bundled with the Toremar business and the berthing priority to Moby/Toremar does not confer an economic advantage on the latter.

6.1.2.5. Conclusion

(269) Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the award of the public service contract bundled with the Toremar business and the berthing priority to Moby/Toremar do not constitute State aid within the meaning of article 107(1) TFEU.

6.1.3. *The measures laid down by the 2010 Law*

(270) The Commission took the preliminary view in the 2011 Decision that all measures laid down by Decree Law 125/2010 converted with amendments into the 2010 Law constituted State aid in favour of the companies of the former Tirrenia Group, as long as the respective beneficiaries were able to use these measures to cover liquidity needs and thereby improve their overall financial position.

(271) Based on the information received during the formal investigation, the Commission considers that the three measures should be assessed separately.

6.1.3.1. Possible use of funds to upgrade ships for liquidity purposes

(272) State resources: The funds in question were granted by the State from its own budget (see recital (91)) and their use for liquidity purposes was enabled by the 2010 Law. The measure is therefore imputable to the State and is given through State resources.

(273) Selectivity: this measure was only granted to the companies of the former Tirrenia Group, including to Toremar, and is therefore selective. For completeness, the Commission points out that this measure was not granted to Moby.

(274) Economic advantage: the Commission notes that Toremar used EUR 1 617 300 to upgrade its fleet in order to respect international safety standards (EUR 808 650 for the upgrade of the vessel Aethalia and EUR 808 650 for the upgrade of the vessel Liburna). According to Italy, these funds were never used for liquidity purposes (see recital (138)) and the Commission did not find evidence to support the opposite.

(275) Since Toremar did not use these funds for liquidity purposes in order to avoid costs, which it would ordinarily have to cover itself by means of its own financial resources, the doubts expressed in the 2011 Decision are no longer valid and the Commission considers that no economic advantage has thus been conferred to Toremar through the use of the said funds.

(276) Conclusion: since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the funds granted to Toremar to upgrade its fleet do not constitute State aid within the meaning of article 107(1) TFEU.

6.1.3.2. Fiscal exemptions related to the privatisation process

(277) As described in recital (93), pursuant to Article 1 of the 2010 Law, certain acts and operations undertaken to privatise the Tirrenia group and described in paragraphs 1 to 15 of Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law, are exempt from any taxes ordinarily due on those acts and operations.

(278) The Commission first notes that two separate sets of transfers have to be assessed: (1) the transfers of Tirrenia's former subsidiaries Caremar, Saremar and Toremar from Tirrenia to the Regions of Campania, Sardinia and Tuscany respectively, and (2) the transfer of the Toremar business from the Region of Tuscany to Moby. The taxes exempted are in particular registration duty, land registry and mortgage registration fees, stamp duty (together, 'the indirect taxes'), VAT and corporate income tax. The beneficiaries of this aid measure would be the seller, the buyer, or both. Only the second set of transfers will be assessed in this Decision ([83]).

(279) At the outset, the Commission also notes that under Presidential Decree No 633 of 26 October 1972, transfers of going concerns or business units to another company are not considered a supply of goods and therefore are exempt from VAT. Therefore, as transactions such as the sale of the Toremar business to Moby are not subject to VAT, the tax exemption cannot have conferred an advantage to Toremar with regard to VAT. Furthermore, the Commission notes that the sale contract for the Toremar business clearly states that the purchaser, i.e. Moby, has to bear all costs related to the sale (i.e. registration fees, notarial costs, land registry etc.), without reference to any exemption enjoyed by Moby on these costs. As regards the exemption from corporate income tax, the Commission considers that such tax would only apply to the proceeds of a sale. In this case, however, Moby purchased Toremar from the Region of Tuscany which means that this transaction constituted an expense for Moby and as a result no corporate income tax could be due. Therefore, this measure does not apply to Moby. The Commission, in view of the above, concludes that neither Toremar nor Moby have benefited from these fiscal exemptions.

(280) For these reasons, none of the aforementioned tax exemptions constitutes State aid within the meaning of Article 107(1) TFEU.

6.1.3.3. Possibility of using FAS resources to meet liquidity needs

(281) In the 2011 and 2012 Decisions, the Commission mentioned the possibility for the (former) Tirrenia Group companies to use FAS resources in order to meet current liquidity needs. However, in the course of the formal investigation procedure, Italy clarified that the FAS resources were not meant as an additional compensation for Toremar or Moby (or any other of the companies of the former Tirrenia Group or their respective acquirers). Instead, these resources were made available to supplement the budget appropriations for the payment of the public service compensations to the companies of the former Tirrenia Group, in case they proved insufficient. Indeed,

([83]) The first set of transfers was assessed in the Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione.

Article 1, paragraph 5-*ter*, of the 2010 Law enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. In other words, this measure merely concerns an allocation of resources in the Italian budget for payment of the public service compensations.

(282) In light of the above, the Commission concludes that the FAS resources are only a funding source to allow the State to pay the public service compensations (granted on the basis of the prolonged initial Convention) and do not constitute a measure which Toremar can benefit from in addition to these public service compensations. Therefore, the possible use of FAS resources does not constitute State aid within the meaning of Article 107(1) TFEU.

6.1.4. *Conclusion on the existence of aid*

(283) Based on the assessment above, the Commission finds that:

— the compensation to Toremar for the operation of maritime routes in the period 1 January 2009 – 1 January 2012 constitutes State aid within the meaning of Article 107(1) TFEU;

— the award of the new public service contract for the period 2 January 2012 – 31 December 2023, bundled with the Toremar business and the berthing priority to Moby/Toremar, complies with the four *Altmark* conditions and therefore does not constitute State aid within the meaning of Article 107(1) TFEU;

— Toremar's funds to upgrade ships have not been used for liquidity purposes and thus does not constitute State aid to Toremar within the meaning of Article 107(1) TFEU;

— The fiscal exemptions related to the privatisation process of Toremar and the possibility to use FAS resources to meet liquidity needs as laid down by the 2010 Law, do not constitute State aid to Toremar within the meaning of Article 107(1) TFEU.

6.2. **Lawfulness of aid**

(284) The aid measure referred to in this Decision has been put into effect before any formal approval by the Commission. Therefore, insofar as the aid measure was not exempted from notification under the 2005 SGEI Decision or the 2011 SGEI Decision, it was granted by Italy in violation of Article 108(3) TFEU ([84]).

6.3. **Compatibility of aid**

(285) The compatibility of the State aid measure identified above must be assessed in the light of Article 106(2) TFEU.

6.3.1. *The prolongation of the initial Convention between Toremar and Italy*

6.3.1.1. Applicable rules

(286) The extension of the initial Convention after the end of 2008 has been carried out by subsequent legal acts, as follows:

(a) Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the extension of the initial Conventions from 1 January 2009 until 31 December 2009;

(b) Decree Law No 135 of 25 September 2009, converted into the 2009 Law, laid down, inter alia, the extension of the initial Conventions from 1 January 2010 until 30 September 2010;

([84]) Italy has only notified (see recital (2)) the public service compensation granted under the prolongation of the initial Convention. Furthermore, Italy argues that the public service compensation granted to Toremar under the prolongation of the initial Convention is compatible and exempt from notification under the 2011 SGEI Decision. The Commission will assess whether this was indeed the case in Section 6.3.1.

(c) Decree-Law No 125 of 5 August 2010, converted into the 2010 Law provided for a further extension of the initial Conventions from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar.

(287) Against this background, the Commission notes that the granting of the public service compensation under the prolongation of the initial Convention, pre-dates the entry into force of the 2011 SGEI Decision and 2011 SGEI Framework. However, the 2011 SGEI package – in Article 10 of the 2011 SGEI Decision and paragraph 69 of the 2011 SGEI Framework – contains rules that provide for its application also to aid granted before the entry into force of the 2011 SGEI package on 31 January 2012. In particular, the 2011 SGEI Decision provides in its Article 10(b):

'any aid put into effect before the entry into force of this Decision [i.e., before 31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempted from the requirement of prior notification.'

(288) As regards the 2011 SGEI Framework, paragraphs 68 and 69 of that Framework specify that the Commission will apply the principles set out in that Framework to all notified aid projects, whether the notification took place before or after the start of application of that Framework on 31 January 2012, as well as to all unlawful aid on which it takes a decision after 31 January 2012, even if that aid was granted before 31 January 2012. In the latter case, the provisions of paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework are not applicable.

(289) As a result, the rules on the application of the 2011 SGEI Decision and the 2011 SGEI Framework as described above mean that the public service compensation granted to Toremar during the prolongation period can be assessed pursuant to the 2011 SGEI package. If the relevant conditions of either the 2011 SGEI Decision or the 2011 SGEI Framework are complied with, this aid measure is compatible with the internal market for the entire period from 1 January 2009 until 1 January 2012 ([85]).

(290) The Commission notes that both the 2005 SGEI Decision, which entered into force on 19 December 2005, and the 2011 SGEI Decision are only applicable to State aid in the form of public service compensation for maritime links to islands on which average annual traffic during the 2 financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers. However, Italy provided the average data for all five routes together, and not separately per route, to show that in the years 2010 and 2011 the number of passengers on all those routes operated by Toremar under the initial Convention, as prolonged, did not exceed the threshold of 300 000 passengers per year. Therefore, the Commission can neither assess the compatibility of the public service compensation paid to Toremar under the extension of the initial Convention until 1 January 2012 on the basis of the 2005 SGEI Decision nor on the basis of the 2011 SGEI Decision.

(291) Consequently, the compatibility of the public service compensation granted to Toremar as of 2009 and until the completion of the privatisation process would normally fall within the scope of application of the 2011 SGEI Framework.

(292) The Commission will assess whether the public service compensation granted to Toremar during the prolongation period complies with the conditions of the 2011 SGEI Framework, with the exception of the conditions in its paragraphs 9, 14, 19, 20, 24, 39 and 60.

([85]) For completeness, the Commission notes that the transitional provision contained in Article 10(a) of the 2011 SGEI Decision, according to which any aid scheme put into effect before the entry into force of this Decision (i.e. before 31 January 2012) that was compatible with the internal market and exempted from the notification requirement in accordance with the 2005 SGEI Decision shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of 2 years (i.e. until 30 January 2014 included). This means that aid which was granted under such a scheme in the period between the entry into force of the 2005 SGEI Decision on 19 December 2005 and the entry into force of the 2011 SGEI Decision on 31 January 2012 will be considered compatible with the internal market but only from the date on which it was granted until 30 January 2014 included. In any event, for aid granted in the time from 31 January 2012 onwards, the transitional provision of Article 10(a) of the 2011 SGEI Decision is not applicable and the compatibility assessment has to be made pursuant to the 2011 SGEI Decision.

6.3.1.2. Genuine service of general economic interest as referred to in Article 106 TFEU

(293) According to paragraph 12 of the 2011 SGEI Framework, '[t]he aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty'. Paragraph 13 clarifies that 'Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard'. Finally, paragraph 56 of the 2011 SGEI Framework, refers to the 'Member State's wide margin of discretion' regarding the nature of services that could be classified as being services of general economic interest.

(294) The assessment of whether the SGEI are genuine must also be performed in light of the SGEI Communication (see recitals (186) and (200)), the Maritime Cabotage Regulation (see recitals (188) to (190)) and the case-law (see recitals (192) to (193)). Therefore, the Commission must assess for the prolongation period:

(a) Whether there was **user demand**;

(b) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);

(c) That simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(295) The Commission points out that the public service routes operated by Toremar during the prolongation period are the same as those entrusted to Moby/Toremar under the new public service contract, with the exception, as regards the sailings, that the number of routes during the prolongation period were five (see recital (36)), whereas the new public service contract has added one connection to the island of Giannutri (**Line A5**). In addition, the Commission has already described and assessed the competitive situation on those routes during the extension period. Against this background, the following assessment will rely on and refer to the relevant parts of the assessment made for the new public service contract above (see Section 6.1.2.1).

(296) Against this background, the Commission first recalls (see recital (123)) that Italy has imposed the public service obligations laid down in the initial Convention mainly to (i) ensure the territorial continuity between the mainland and the islands and to (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission already concluded (see recital (195)) that these are indeed legitimate public interest objectives.

(297) To illustrate the genuine demand from users for the maritime services concerned, Italy provided (see Tables 9 and 10), detailed statistics which show that in 2009, the first year of the extension, Toremar transported 1 622 876 passengers and 347 935 vehicles on the five mixed service routes combined during the respective time periods covered by the public service obligations. These figures were lower in 2010 (1 462 570 passengers and 317 488 vehicles) and 2011 (1 437 613 passengers and 294 433 vehicles).

Year	Line A1	Line A2	Line A2 fast	Line A3	Line A4	Total No of passengers
2009	[…]	[…]	[…]	[…]	[…]	1 622 876
2010	[…]	[…]	[…]	[…]	[…]	1 462 570
2011	[…]	[…]	[…]	[…]	[…]	1 437 613

Table 9 – Passengers' statistics for the years 2009-2011

Year	Line A1	Line A2	Line A2 fast	Line A3	Line A4	Total No of passengers
2009	[…]	[…]		[…]	[…]	347 935
2010	[…]	[…]		[…]	[…]	317 488
2011	[…]	[…]		[…]	[…]	294 433

Table 10 – Vehicles' statistics for the years 2009-2011

(298) Overall, the numbers show that the user demand for the ferry services on each of the routes concerned was significant and fairly stable, and the analysis for the years 2009-2011 did not provide any indications that it would have disappeared. The Commission has already demonstrated that there was significant user demand for the maritime services for the period from 2012 onwards (see recital (198)).

(299) It can therefore be concluded that these services addressed a genuine user demand and thus satisfied real public needs.

(300) As explained under recital (200), the Commission must also examine whether the service would have been inadequate if its provision were left to the market forces alone in the light of the public service obligations imposed by the Member State by virtue of the extension of the initial Convention. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

(301) The Commission notes that during the period from 1 January 2009 until 1 January 2012, on some routes that had to be operated by Toremar under the extension of the initial Convention, other operators offered ferry services albeit not necessarily throughout the year and with the same frequency. The Commission has already assessed in recitals (201) to (207) for each of the routes concerned whether the services provided by other operators were equivalent to those that Moby/Toremar had to provide under the new public service contract. The Commission recalls that this assessment was based on the competitive situation on those routes between 1 January 2009 and 1 January 2012. Since the services that Moby/Toremar has to operate are almost identical in terms of routes served, frequencies and technical requirements to those that Toremar had to perform during the prolongation period, the Commission's conclusion (see recital (207)) that market forces alone were insufficient to meet the public service needs is also valid for Toremar during the entire prolongation period. Indeed, on a number of routes Toremar was the only operator while on the other routes the services provided by other operators were not equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service needs imposed on Toremar by virtue of the initial Convention (as prolonged).

(302) Finally, in light of the planned privatisation and in order to ensure the continuity of the public services that were operated under the initial Convention, Italy decided to extend this Convention unaltered and subject to the change in compensation methodology applicable from 2010 onwards). The Commission accepts that user demand (as described in recitals (297) to (299)) could not have been met by imposing public service obligations applicable to all operators serving the routes at hand. In particular, on several routes Toremar was the only operator (see e.g. recital (202)) and where this was not the case, the offer provided by the other operators did not meet (all) the requirements of regularity, continuity and quality. Furthermore, the operation of most (if not all) routes, especially in the low season, is loss-making so that without public service compensation they would likely not be operated at all. In addition, the Commission accepts that in view of the process to privatise Toremar, prolonging the existing public service contract was the only way to guarantee the continuity of the public services until completion of that privatisation.

(303) Therefore, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Toremar as SGEI. The doubts expressed by the Commission in the 2011 and 2012 Decisions are hence dispelled.

6.3.1.3. Need for an entrustment act specifying the public service obligations and the methods of calculating compensation

(304) As indicated in the Section 2.3 of the 2011 SGEI Framework, the concept of service of general economic interest within the meaning of Article 106 TFEU means that the undertaking in question has been entrusted with the operation of the service of general economic interest by way of one or more official acts.

(305) These acts must specify, in particular:

— The precise nature of the public service obligation and its duration;

— The undertaking and territory concerned;

— The nature of the exclusive rights;

— The parameters for calculating, controlling and reviewing the compensation;

— The arrangements for avoiding and repaying any overcompensation.

(306) In its 2011 and 2012 Decisions, the Commission expressed doubts as to whether the entrustment act provided for a comprehensive description of the nature of Toremar's public service obligations during the prolongation period. Furthermore, the Commission emphasised that no 5-year plans had been adopted for the periods 2000–2004 and 2005–2008 as laid down by the initial Convention. Nevertheless, the Commission also recalled that different elements of the entrustment may be placed in several acts without putting into question the appropriateness of the definition of the obligations. During the extension period, Toremar's entrustment act included the initial Convention (as amended and extended over time), the 5-year plans covering the periods 1990–1994 and 1995–1999, a series of *ad hoc* decisions by Italy, the CIPE Directive and the 2009 Law.

(307) Against this background, the Commission first notes that the initial Convention (as amended over time), which forms the core of Toremar's entrustment act, remained fully applicable until the completion of the privatisation on the basis of a series of Decree Laws (see recital (286)). These legal acts specify that Toremar was entrusted with public service obligations until the completion of its privatisation.

(308) According to the initial Convention, the 5-year plans 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 the service and the fares to be paid, including subsidised fares, particularly for residents of island regions. While the plans for the periods 2000-2004 and 2005-2008 were not formally adopted, the plan for the period 1995-1999 (endorsed by Ministerial Decree of 14 May 1996) continued to apply without any changes as regards the scope of the public service obligations. Therefore, the provisions of that plan continued to apply in full during the period from 1 January 2009 until 2 January 2012. Before 2009, the original fare scheme provided for in the initial Convention was amended by a number of subsequent acts. However, during the entire prolongation period, no inter-ministerial decrees were issued to further amend the fares to be charged by the companies of the former Tirrenia Group, including Toremar. On this basis, the Commission concludes that the public service obligations that Toremar had to comply with during the prolongation period were defined in a sufficiently clear way.

(309) The Commission already noted in recitals 239 and 240 of the 2011 Decision that the parameters necessary for the calculation of the amount of compensation have been established in advance and are clearly described. In particular, for the year 2009 the initial Convention (see recitals (42) and (44)) contains an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return on invested capital for the operator. For the years 2010 and 2011, the relevant methodology is set out in the CIPE Directive (see recitals (41) to (55)). More specifically, the CIPE Directive details the cost elements taken into account and the return on invested capital. Finally, the 2009 Law includes the maximum compensation amount of EUR 13 005 441 that applies from 2010 onwards. Furthermore, the initial Convention laid down that the compensation would be paid out in instalments and ensured that the compensation was based on the actual costs and revenues incurred for the delivery of the public service. In this way, overcompensation could be detected and easily avoided. Where applicable, the State could then recover the overcompensation from Toremar.

(310) On this basis, the Commission considers that for the period of prolongation of the initial Convention the entrustment acts laid down a clear definition of the public service obligations, the duration, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and repaying any overcompensation, as required under the 2011 SGEI Framework.

6.3.1.4. Duration of the period of entrustment

(311) As indicated in paragraph 17 of the 2011 SGEI Framework, 'the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.'

(312) Italy indicated that the duration of the extension has been set in reference to the period required for the depreciation of the assets employed in the provision of the SGEI. In particular, the total duration of the initial Convention as prolonged amounts to just over 22 years. Vessels are the most significant assets required to provide the public service. The depreciation period for vessels used for ferry services is usually long and can exceed 25 years.

(313) Italy has provided the Commission with the depreciation value of Toremar's vessels for the period 2009-2011. The Commission notes that, at the time of the prolongation of the initial Convention, five out of eight vessels had already been fully depreciated, whereas the remaining three vessels, not yet depreciated, had an average age of 21,5 years.

(314) Although, the depreciation period has lapsed for most of the vessels used by Toremar during the extension of the initial Convention, the Commission notes that extending the period for 3 years was necessary to ensure the continuity of the public service until the completion of the privatisation process. Taking into account, additionally, the average age of the remaining vessels whose value had not yet been fully depreciated and the average length of the depreciation of vessels used for ferry services, the Commission concludes that the duration of the entrustment act is sufficiently justified and that paragraph 17 of the SGEI Framework is complied with.

6.3.1.5. Compliance with Directive 2006/111/EC

(315) According to paragraph 18 of the 2011 SGEI Framework, 'aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC' of the Commission on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ([86]).

(316) Furthermore, paragraph 44 of the 2011 SGEI Framework requires that: 'Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31.'

(317) Italy has confirmed that Toremar has only been active in providing public services under the initial Convention.

(318) Therefore, the Commission considers that paragraph 18 of the SGEI Framework is not applicable.

6.3.1.6. Amount of compensation

(319) Paragraph 21 of the 2011 SGEI Framework states that '[…] the amount of the compensation must not exceed what is necessary to cover the cost of discharging the public service obligations, including a reasonable profit'.

(320) In the case at hand, since the compensation constitutes illegal aid granted before its entry into force, paragraph 69 of the 2011 SGEI Framework specifically provides that, for the purpose of the State aid assessment, the use of the net avoided cost methodology is not required. Instead, alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost allocation can be used. Under the latter methodology, the net cost would be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act. Paragraphs 28 to 38 of the 2011 SGEI Framework set out in more detail how this methodology should be applied.

([86]) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

(321) In its 2011 and 2012 Decisions, the Commission could not conclude whether the amount of compensation as from 2009 was proportionate, as it still had doubts regarding the qualification of some of the public services entrusted to Toremar as genuine SGEI. These doubts have been addressed in Section 6.3.1.2 and the Commission considers hence that the compensation granted to Toremar for 2009 is proportionate and compatible with Article 106 TFEU. Italy has provided the calculation of the compensation amount for 2009 (i.e. EUR 13 572 035) which was determined on the basis of the methodology laid down in the initial Convention and corresponded to the accumulated net loss on the services operated under the public service regime, to which a variable amount corresponding to the return on invested capital was added (i.e. EUR 301 000).

(322) The Commission also expressed doubts regarding the risk premium of 6,5 %, which applied from 2010 onwards. In particular, the Commission questioned whether this premium reflects an appropriate level of risk, taking into account that *prima facie* Toremar did not seem to assume the risks normally borne in the operation of such services.

(323) The risk premium of 6,5 % would have been applied to determine the return on capital using the WACC formula. However, as already explained in recital (133), Italy has clarified that, because the tender amount of compensation was capped by the 2009 Law, it was decided to simplify the calculation by applying the 6,9 % as a flat rate return on capital for the years 2010 and 2011.

(324) In this context, on the basis of the route-by-route accounts submitted by Italy and as aggregated in Table 11, the Commission could verify that for 2010 and 2011 together, the public service compensation was about EUR 2 200 lower than the net cost of the service including the 6,9 % flat rate return on capital:

Toremar public service remit	**2010**	**2011**	**Grand total**
Total revenues	21 241 542 €	20 097 049 €	41 338 591 €
- Total costs	35 410 421 €	35 218 639 €	70 629 060 €
- Amortisations	1 064 158 €	985 207 €	2 049 365 €
= Net cost of public service	- 15 233 037 €	- 16 106 797 €	- 31 339 834 €
+ Return on capital (6,9 %)	- 359 417 €	- 313 826 €	- 673 243 €
= Eligible for compensation	- 15 592 454 €	- 16 420 623 €	- 32 013 077 €
+ Actual compensation	16 005 441 €	16 005 441 €	32 010 882 €
= Over/under compensation	412 987 €	- 415 182 €	- 2 195 €

Table 11 – Net cost of the public service operated by Toremar for the period 2010-2011

(325) Paragraph 49 of the 2011 SGEI Framework requires Member States to ensure that the compensation granted for operating the SGEI does not result in undertakings receiving overcompensation (as defined in paragraph 47 of that Framework). Among others, Member States must provide evidence upon request from the Commission. Furthermore, they must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than 3 years.

(326) The Commission has already assessed under *Altmark* 3 that the 6,5 % flat rate return on capital that Moby/Toremar could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the public service contract (see recitals (224) to (229)). In addition, the Commission reiterates that Italy has used a flat rate return on capital (which was set at 6,9 % for the years 2010-2011) for calculation simplification purposes. In fact, in the 2011 Decision, the Commission assumed that the rate of return on invested capital for 2010 was set at 9,95 % before taxes, but Italy explained that this was an estimated value for the purpose of the then forthcoming open tender procedures following the privatisation of the former Tirrenia Group, including Toremar (see recital (132)).

(327) The Commission notes that the submitted CIPE Directive takes into account certain market values applicable in the maritime cabotage sector. It prescribes the eligible costs for the purposes of public service obligations, as well as the calculation principles concerning the rate of return on capital on the basis of the information, conditions and risks relevant for this particular sector.

(328) Further, the Commission notes that for the years 2010 and 2011, the Region of Tuscany has made use of its reserves to cover Toremar's additional public service cost that could not be covered by the central State budget, as a result of a reduction of the number of passengers because of the economic and financial crisis and an increase of the fuel costs in that same period (see recital (40)). Toremar was therefore exposed to the commercial risk of a substantial loss of income without having the certainty that this loss would be covered by the Region of Tuscany. Indeed, the latter would only release the reserves after verifying in detail the actual costs and revenues incurred for the 2010-2011 period. In view of this, the Commission finds that a 6,9 % return on capital is in line with the risks involved.

(329) In addition, as already explained in recital (227) in the context of assessing the new public service contract under *Altmark* 3, the Commission has found that in 2011 (as well as in 2010) the median return on capital generated by a benchmark group of selected ferry operators that offered maritime connections within Italy or between Italy and other Member States has been higher than 6,5 %, at instances in excess of 8 %. Therefore, a 6,9 % return on capital is considered to be in line with the returns on capital observed for the benchmarking group.

(330) In view of the above, the Commission considers that the submitted 6,9 % return on capital remains at a reasonable level.

(331) Italy has lastly provided the necessary evidence showing that all regular checks were carried out to ensure that the amount of the compensation did not exceed the net cost of the service, In addition, the Commission recalls that the compensation is paid out in instalments (see recital (41)) and that the final pay-out is made on the basis of the actual costs and revenues of the year. This ensures that the amount of compensation does not exceed the net costs of the service.

(332) In view of the above, the Commission concludes that the amount of compensation granted to Toremar during the prolongation of the initial Convention has not led to any overcompensation and the applicable requirements of Section 2.8 of the SGEI Framework are complied with.

6.3.1.7. The berthing priority

(333) Article 19-*ter*, paragraph 21, of the 2009 Law clearly specifies that the berthing priority was necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Toremar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the consumers. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since the departure times for the public service routes are fixed by the Convention the berthing priority is necessary to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations.

(334) Against this background, the Commission considers that this measure was awarded to enable Toremar to perform its public service obligations, which constitute a genuine SGEI (see Section 6.3.1.2). Furthermore, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime.

(335) The Commission has already assessed in detail the compatibility of the SGEI and the related compensation for Toremar during the extension of the initial Convention (see Section 6.3.1). The Commission hence considers that its compatibility assessment of the berthing priority can be limited to establishing whether or not this measure could result in overcompensation.

(336) The Commission acknowledges the arguments put forward by Italy that any possible monetary advantage from the berthing priority would be limited (see recital (137)). As a result, also the risk of overcompensation stemming from the measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. Therefore, the overcompensation checks that have been applied to Toremar as described in Section 6.3.1.6 are also fit to detect any possible overcompensation resulting from the berthing priority.

(337) The Commission therefore concludes that the berthing priority, which is inextricably linked with the public service performed by Toremar, is compatible with the internal market on the basis of Article 106(2) TFEU and the 2011 SGEI Framework.

6.3.1.8. Conclusion

(338) Based on the assessment in recitals (286) to (337), the Commission concludes that the compensation granted to Toremar for the provision of the maritime services subject to the prolongation of the initial Convention in the period from 1 January 2010 to 1 January 2012 and the berthing priority complies with the applicable conditions of the 2011 SGEI Framework and are therefore compatible with the internal market under Article 106 TFEU.

6.3.2. *Conclusion on compatibility of aid*

(339) On the basis of the assessment above, the Commission finds that the compensation granted to Toremar and the berthing priority for the operation of maritime routes in the period 1 January 2010 – 1 January 2012 are compatible with the internal market under Article 106 TFEU and the 2011 SGEI Framework.

7. **CONCLUSION**

(340) The Commission finds that Italy has unlawfully implemented the aid measures under assessment in breach of Article 108(3) TFEU. On the basis of the foregoing assessment, the Commission has decided that the public service compensation granted to Toremar under the prolongation of the initial Convention is compatible with the internal market under Article 106 TFEU. Furthermore, since the berthing priority is inextricably linked with the performance of the SGEI by Toremar, this measure is also compatible with the internal market under Article 106 TFEU.

(341) Further, the Commission finds that the following measures do not constitute State aid within the meaning of Article 107(1) TFEU:

(1) the compensation granted to Toremar for the provision of maritime services under the new service contract for the period 2 January 2012 – 31 December 2023, bundled with the Toremar business and the berthing priority to Moby/Toremar, because it complies with the four *Altmark* criteria;

(2) Toremar's use of funds to upgrade ships, because they have not been used for liquidity purposes; and

(3) The fiscal exemptions related to the privatisation process of Toremar and the possibility to use FAS resources in order to meet liquidity needs as laid down by the 2010 Law,

HAS ADOPTED THIS DECISION:

Article 1

The compensation to Toremar and the berthing priority for the provision of maritime services under the prolongation of the initial Convention in the period 1 January 2009 – 1 January 2012 constitutes State aid within the meaning of Article 107(1) TFEU. Italy has implemented the aid to Toremar in violation of Article 108(3) TFEU. This aid is compatible with the internal market.

Article 2

The award of the new public service contract for the period 2 January 2012 – 31 December 2023, bundled with the Toremar business and the berthing priority to Moby/Toremar does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 3

The funds Toremar received to upgrade its ships were not used for liquidity purposes and thus do not constitute State aid to Toremar within the meaning of Article 107(1) TFEU.

Article 4

The fiscal exemptions related to the privatisation process of Toremar and the possibility to use resources of the *Fondo Aree Sottoutilizzate* to meet liquidity needs as laid down by the 2010 Law, do not constitute State aid to Toremar within the meaning of Article 107(1) TFEU.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 17 June 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission