Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

3 March 2016*

(State aid — Retroactive public service compensation granted by the Italian authorities — Inter-regional bus transport services provided between 1987 and 2003 — Decision declaring the aid incompatible with the internal market — Maintenance of a public service obligation — Grant of compensation — Regulation (EEC) No 1191/69)

In Case T-15/14,

Simet SpA, established in Rossano Calabro (Italy), represented by A. Clarizia, C. Varrone and P. Clarizia, lawyers,

applicant,

v

European Commission, represented by G. Conte, D. Grespan and P.-J. Loewenthal, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2014/201/EU of 2 October 2013 on compensation to be paid to SIMET SpA for public transport services provided between 1987 and 2003 (State aid measure SA.33037 (2012/C) Italy) (OJ 2014 L 114, p. 67).

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva (Rapporteur) and C. Wetter, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2015,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 The applicant, Simet SpA, is a company providing road-based passenger transport services. More specifically, it operates a network of inter-regional scheduled bus connections between Calabria and other Italian regions ('the inter-regional connections'). In addition to these services, which account for most of its business, the applicant also provides other services, including international travel services, tourism services and bus hire with driver.

Legislative and regulatory framework governing the applicant's business

2 Over the years, the applicant's business has been governed by successive legislative and regulatory provisions at both national and EU level.

EU law

3 Road transport was given a framework at EU level by, in particular, Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition, Series I, Chapter 1969 (I), p. 276).

4 Article 1 of Regulation No 1191/69 provides:

'1. Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

2. Nevertheless, such obligations may be maintained in so far as they are essential in order to ensure the provision of adequate transport services.

…

4. Financial burdens devolving on transport undertakings by reason of the maintenance of the obligations referred to in paragraph 2 … shall be subject to compensation made in accordance with common procedures laid down in this Regulation.'

5 Article 2 of Regulation No 1191/69 provides:

'1. "Public service obligations" means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions.

2. Public service obligations within the meaning of paragraph 1 consist of the obligation to operate, the obligation to carry and tariff obligations.

3. For the purposes of this Regulation "the obligation to operate" means any obligation imposed upon a transport undertaking to take, in respect of any route or installations which it is authorised to work by licence or equivalent authorisation, all necessary measures to ensure the provision of a transport service satisfying fixed standards of continuity, regularity and capacity. It also includes any obligation to operate additional services and any obligation to maintain in good condition routes, equipment — in so far as this is surplus to the requirements of the network as a whole — and installations after services have been withdrawn.

4. For the purposes of this Regulation, "the obligation to carry" means any obligation imposed upon transport undertakings to accept and carry passengers or goods at specified rates and subject to specified conditions.

5. For the purposes of this Regulation, "tariff obligations" means any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions.

The provisions of the foregoing subparagraph shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof.'

6 Article 4 of Regulation No 1191/69 provides:

'1. It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them.

2. In their applications, transport undertakings may propose the substitution of some other form for the forms of transport being used. Undertakings shall apply the provisions of Article 5 to calculate what savings could be made as a means of improving their financial position.'

7 Article 5 of Regulation No 1191/69 provides:

'1. Any obligation to operate or to carry shall be regarded as imposing economic disadvantages where the reduction in the financial burden which would be possible as a result of the total or partial termination of the obligation in respect of an operation or a group of operations affected by that obligation exceeds the reduction in revenue resulting from that termination.

Economic disadvantages shall be determined on the basis of a statement, actualised if necessary, of the annual economic disadvantages represented by the difference between the reductions in the annual financial burden and in annual revenue that would result from termination of the obligation.

However, where the obligation to operate or to carry covers one or more categories of the passenger or goods traffic on the whole or a substantial part of a network, the financial burden which would be eliminated by terminating the obligation shall be estimated by allocating among the various categories of traffic the total costs borne by the undertaking by reason of its transport activities.

The economic disadvantage will in such case be equal to the difference between the costs allocable to that part of the undertaking's activities affected by the public service obligation and the corresponding revenue.

Economic disadvantages shall be determined taking into account the effects of the obligation on the undertaking's activities as a whole.

2. A tariff obligation shall be regarded as entailing economic disadvantages where the difference between the revenue from the traffic to which the obligation applies and the financial burden of such traffic is less than the difference between the revenue which would be produced by that traffic and the financial burden thereof if working were on a commercial basis — account being taken both of the costs of those operations which are subject to the obligation and of the state of the market.'

8 Under Article 6(2) of Regulation No 1191/69, 'decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13'.

9 Article 10 of Regulation No 1191/69 provides:

'1. The amount of the compensation provided for in Article 6 shall, in the case of an obligation to operate or to carry, be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration.

However, where the calculation of economic disadvantage was made by allocating among the various parts of its transport activities the total costs borne by the undertaking in respect of those transport activities, the amount of the compensation shall be equal to the difference between the costs allocable to that part of the undertaking's activities affected by the public service obligation and the corresponding revenue.

2. For the purposes of determining the financial burdens and revenue referred to in paragraph 1, the effects of the termination of the obligation in question on the undertaking's activities as a whole shall be taken into account.'

10 In accordance with Article 12 of Regulation No 1191/69, costs resulting from the maintenance of obligations are to be calculated on the basis of efficient management of the undertaking and the provision of transport services of an adequate quality. Interest relating to own capital may be deducted from the interest taken into account in the calculation of costs.

11 Article 14 of Regulation No 1191/69 provides:

'1. Save for cases falling within Article 1(3), after the date of entry into force of this Regulation Member States may impose public service obligations on a transport undertaking only in so far as such obligations are essential in order to ensure the provision of adequate transport services.

2. Where obligations thus imposed entail for transport undertakings economic disadvantages within the meaning of Article 5(1) and (2) or financial burdens within the meaning of Article 9, the competent authorities of the Member States shall, when deciding to impose such obligations, provide for grants of compensation in respect of the financial burdens resulting therefrom. The provisions of Articles 10 to 13 shall apply.'

12 Article 17(2) of Regulation No 1191/69 provides:

'2. Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details, classified by category of obligation, of compensation payments made in respect of financial burdens devolving upon transport undertakings by reason of the maintenance of the public service obligations set out in Article 2 or by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person.'

13 Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation No 1191/69 (OJ 1991 L 169, p. 1), which came into force on 1 July 1992, removed the possibility for Member States to maintain or impose public service obligations on transport undertakings, except those whose activities were confined exclusively to the operation of urban, suburban or regional services.

14 Under Article 1(4) of Regulation No 1191/69, as amended by Regulation No 1893/91, 'in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking'.

15 Thus, Article 14 of Regulation No 1191/69, as amended by Regulation No 1893/91, provides:

'1. "A public service contract" shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services.

A public service contract may cover notably

— 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 passenger or on certain routes,

— adjustments of services to actual requirements.

2. A public service contract shall cover, inter alia, the following points:

(a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality;

(b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties;

(c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes;

(d) the period of validity of the contract;

(e) the penalties in the event of failure to comply with the contract.

3. Those assets involved in the provision of transport services which are the subject of a public service contract may belong to the undertaking or be placed at its disposal.

4. Any undertaking which intends to discontinue or make substantial modifications to a transport service which it provides to the public on a continuous and regular basis and which is not covered by the contract system or the public service obligation shall notify the competent authorities of the Member State thereof at least three months in advance.

The competent authorities may decide to waive such notification.

This provision shall not affect other national procedures applicable as regards entitlement to terminate or modify transport services.

5. After receiving the information referred to in paragraph 4 the competent authorities may insist on the maintenance of the service concerned for up to one year from the date of notification and they shall inform the undertaking at least one month before the expiry of the notification.

They may also take the initiative of negotiating the establishment or modification of such a transport service.

6. Expenditure arising for transport undertakings from the obligations referred to in paragraph 5 shall be compensated in accordance with the common procedures laid down in Sections II, III and IV.'

16 On the other hand, in accordance with Article 1(5) of Regulation No 1191/69, as amended by Regulation No 1893/91, 'the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services'. In those circumstances, 'the conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV'.

17 That provision also states:

'Where a transport undertaking not only operates services subject to public service obligations but also engages in other activities, the public services must be operated as separate divisions meeting at least the following conditions:

(a) the operating accounts corresponding to each of these activities shall be separate and the proportion of the assets pertaining to each shall be used in accordance with the accounting rules in force;

(b) expenditure shall be balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.'

18 Regulation No 1191/69, as amended by Regulation No 1893/91, was repealed by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), which came into force on 3 December 2009.

National law

19 The applicant initially operated inter-regional connections pursuant to annual licences granted by the Italian Ministry of Infrastructure and Transport (Ministero delle Infrastructure e dei Trasporti; 'the MIT') in accordance with Law No 1822 of 28 September 1939 laying down rules on scheduled bus services for passengers, baggage and agricultural packages under the system of licences granted to private undertakings (legge n. 1822 Disciplina degli autoservizi di linea (autolinee) per viaggiatori, bagagli e pacchi agricoli in regime di concessione all'industria privata) (GURI No 292 of 18 December 1939; 'Law No 1822/1939').

20 In accordance with Article 3 of Law No 1822/1939, the licence was granted 'on the basis of particular specifications covering all technical, administrative and economic conditions governing the licence itself, as well as transport obligations in respect of mail items'. Point 3 of the second paragraph of Article 6 of that law provided that if there were several applicants for a single licence, the authorities would give priority, inter alia, to any applicant showing that it assumed other financial burdens for works or services of local interest related to the transport services and that it was capable of meeting those burdens. Furthermore, Article 1 of Law No 1822/1939 provided that licence holders were required to carry mail items at the request of the postal and telegraph authorities.

21 Law No 1822/1939 was amended by Presidential Decree No 369 of 22 April 1994 laying down rules simplifying the licensing procedure in respect of ordinary bus services under State responsibility (decreto del Presidente della Repubblica n. 369 Regolamento recante semplificazione del procedimento di concessione di autolinee ordinarie di competenza statale) (Ordinary Supplement

No 91 to GURI No 136 of 13 June 1994; 'Decree No 369/1994'). Pursuant to Decree No 369/1994, undertakings wishing to secure a licence had to demonstrate in their licence application, 'in a clear and detailed manner, why the identified public utility needs could not be met, in whole or in part, through existing transport services'.

22 Law No 1822/1939, as amended by Decree No 369/1994, was subsequently repealed by Legislative Decree No 285 of 21 November 2005 reorganising motor vehicle services under State responsibility (decreto legislativo n. 285 Riordino dei servizi automobilistici interregionali di competenza statale) (Ordinary Supplement to GURI No 6 of 9 January 2006), adopted pursuant to Law No 32 of 1 March 2005 delegating reform of the rules on the transport of persons and goods by road to the Government (legge n. 32 Delega al Governo per il riassetto normativo del settore dell'autotrasporto di persone e cose) (GURI No 57 of 10 March 2005).

23 However, the effect of the transitional provisions of Legislative Decree No 285/2005 was that the annual licence system provided for in Law No 1822/1939, as amended by Decree No 369/1994, was maintained in respect of the applicant until 31 December 2012.

24 In addition, the applicant benefited from successive national provisions providing for the payment of compensation in respect of financial burdens resulting from some of the obligations assumed by the holders of licences for road transport services.

25 The applicant thus benefited from the provisions of Presidential Decree No 1227 of 29 December 1969 concerning the rules on the termination of public service obligations with respect to undertakings providing predominantly inter-regional motor vehicle services, on compensation for the maintenance of public service obligations and on reimbursement of expenses in respect of tariff obligations (decreto del Presidente della Repubblica n. 1227 Norme riguardanti la soppressione degli obblighi di servizio pubblico nei confronti delle aziende esercenti servizi automobilistici a carattere prevalentemente interregionale, la compensazione degli obblighi di servizio pubblico da mantenere e il rimborso degli oneri per obblighi tariffari) (GURI No 75 of 25 March 1970; 'Decree No 1227/69').

26 Article 2 of Decree No 1227/69 provided that, in accordance with Article 6(2) of Regulation No 1191/69, undertakings mainly operating regional transport services by road could apply to the MIT for the termination in whole or in part of any public service obligation imposed on them, if that obligation had not already been terminated. On 8 January 1981, the applicant consequently received from the Italian authorities, pursuant to Decree No 1227/69, an allocation of funds as compensation for the financial burdens resulting from the tariff obligations imposed on licensees between 1972 and 1974.

27 The applicant also benefited from the provisions of Law No 877 of 13 December 1986 on urgent action in respect of scheduled public bus services under State responsibility (legge n. 877 Interventi urgenti per gli autoservizi pubblici di linea di competenza statale) (GURI No 295 of 20 December 1986), which provided that assistance had to be granted, based on the distances covered between 1 April 1972 and 1986, to undertakings operating scheduled bus services under State responsibility and international bus services to the Italian border.

28 The applicant did not receive any further compensation.

29 In addition, Article 4(4)(b) of Law No 59 of 15 March 1997 delegating to the Government the allocation of functions and powers to the regions and to local bodies, the reform of public authorities and administrative simplification (legge n. 59 Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della pubblica amministrazione e per la semplificazione amministrativa) (Ordinary Supplement No 56 to GURI No 63 of 17 March 1997), as amended by Legislative Decree No 422 of 19 November 1997 allocating functions and powers in the area of public transport at local level to the regions and local bodies, under Article 4(4) of Law No 59

of 15 March 1997 (Decreto legislativo n. 422 Conferimento alle regioni ed agli enti locali di funzioni e compiti in materia di trasporto pubblico locale, a norma dell'articolo 4, comma 4, della legge 15 marzo 1997, n. 59) (GURI No 287 of 10 December 1997), states:

'to provide that regions and local bodies, within the framework of their respective powers, shall regulate the provision of services regardless of the manner in which they are carried out and the method employed to allocate them, either by way of licence or in accordance with the detailed rules laid down in Articles 22 and 25 of Law No 142 of 8 June 1990, through public service contracts, detailed rules which shall comply with Articles 2 and 3 of Regulation (EEC) No 1191/69 and Regulation (EEC) No 1893/91, which ensure financial security/certainty and budget coverage as well as, by 1 January 2000, a ratio of at least 0.35 between revenue from traffic/movement and operational costs, after deducting infrastructure costs following the application of Directive 91/440/EEC to railway transport of regional and local interest; to lay down detailed rules to overcome monopoly situations in the management of urban and out-of-town transport and to establish rules on competition in the periodic award of services; to lay down detailed rules, by 1 January 2000, according to which regions will replace their own independent regional service contracts with public service contracts between the State and Ferrovie dello Stato Spa.'

Actions brought by the applicant before the national courts

30 On 22 October 1999, the applicant applied to the MIT for compensation in consideration for the public service obligations it had assumed in connection with the operation of inter-regional connections between 1987 and 1999. The MIT refused that application on the ground that it did not satisfy the requirements set out in Article 4 of Regulation No 1191/69 for the award of such compensation. The applicant challenged the MIT's decision by way of an extraordinary action brought before the President of the Italian Republic. That action was dismissed by Presidential decree on 10 October 2002.

31 In 2004, the applicant brought an action before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy; 'the TAR Lazio') seeking recognition of its right to receive EUR 66 891 982 in consideration for the financial burdens it had assumed as a result of performing public service obligations since 1987, by way of either annual compensation, pursuant to Regulation No 1191/69, as amended by Regulation No 1893/91, or damages, or by means of an action for unjust enrichment, pursuant to Article 2041 of the Italian Civil Code. By judgment No 112/2009 of 12 January 2009 ('the judgment of the TAR Lazio'), the TAR Lazio dismissed as inadmissible the claims of the applicant based on Regulation No 1191/69, as amended by Regulation No 1893/91, and on Article 2041 of the Italian Civil Code. The TAR Lazio held, in particular, pursuant to the principle of Italian procedural law that judgments are to rule not only on the questions actually raised, but also on those raised by implication (*il giudicato copre il dedotto e il deducibile*), that the Presidential Decree of 10 October 2002 had already ruled by implication on the claim based on Regulation No 1191/69, as amended by Regulation No 1893/91. Moreover, the TAR Lazio dismissed the applicant's action for damages as unfounded.

32 On 9 March 2009, the applicant lodged an appeal against the judgment of the TAR Lazio, referred to in paragraph 31 above, before the Consiglio di Stato (Council of State).

33 By judgment No 1405/2010 of 3 March 2010 ('the judgment of the Consiglio di Stato'), the Consiglio di Stato (Council of State) reversed the judgment of the TAR Lazio, holding that the applicant was entitled, in its capacity as a public service operator, to receive compensation in respect of the costs entailed by the provision of that service, under Articles 6, 10 and 11 of Regulation No 1191/69. The Consiglio di Stato (Council of State) made clear that the amount of that compensation should be determined, pursuant to Article 35 of Legislative Decree No 80 of 31 March 1998 laying down new provisions on the organisation of and working relations in public authorities, and on jurisdiction over

labour disputes and administrative matters, adopted in accordance with Article 11(4) of Law No 59 of 15 March 1997 (decreto legislativo n. 80 Nuove disposizioni in materia di organizzazione e di rapporti di lavoro nelle amministrazioni pubbliche, di giurisdizione nelle controversie di lavoro e di giurisdizione amministrativa, emanate in attuazione dell'articolo 11, comma 4, della legge 15 marzo 1997, n. 59.) (Ordinary Supplement to GURI No 82 of 8 April 1998), by public authorities on the basis of reliable data from the applicant's accounts allowing the difference to be calculated between the costs attributable to the part of the applicant's activities affected by the public service obligation and the revenue generated by that activity.

34 However, the Consiglio di Stato (Council of State) stayed the action for damages on the ground that only after the Italian public authorities had calculated the sums due in respect of compensation would it be possible to identify any residual loss, not covered by that calculation, which would then have to be proven by the applicant. Furthermore, the Consiglio di Stato (Council of State) found that, since it had upheld the applicant's claim seeking recognition of its right to receive compensation, it was not necessary to rule on the claim of unjust enrichment based on Article 2041 of the Italian Civil Code.

35 On 1 April 2011, the Consiglio di Stato (Council of State), at the request of the applicant, issued an order intended to force the MIT to calculate the compensation payments pursuant to its judgment, referred to in paragraph 33 above.

36 On 17 January 2012, in the light of the difficulties experienced by the MIT in calculating the compensation and at the request of the applicant, the Consiglio di Stato (Council of State) issued a further order appointing a panel of three independent experts tasked with calculating the amount of compensation due to the applicant under its judgment, referred to in paragraph 33 above.

37 Since the panel of experts were unable to reach a unanimous conclusion, it submitted, on 20 August 2012, a majority report signed by two experts concluding that the compensation due to the applicant was EUR 22 049 796 and, on 29 August 2012, a minority report signed by the third member and chairman of the panel of experts concluding that the available data was not sufficient to determine the compensation to be recognised in favour of the applicant with the result that no award of compensation could be made.

Administrative procedure

38 Following the order of the Consiglio di Stato (Council of State) of 1 April 2011, on 18 May 2011 the Italian authorities notified the European Commission of the grant of compensation to the applicant for the provision of inter-regional passenger transport services by bus between 1987 and 2003 in the context of a public service obligation, in compliance with the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above.

39 On 12 July and 5 October 2011 and 20 February, 2 and 28 March and 17 April 2012, the Italian authorities submitted additional information on the notified measure.

40 By letter of 31 May 2012, the Commission informed the Italian authorities of its decision to initiate the formal investigation procedure laid down in Article 108(2) TFEU and invited the parties concerned to submit observations.

41 The Italian authorities submitted their observations on the initiation of the formal investigation procedure on 1 June, 24 September and 11 October 2012.

42 The applicant, in its capacity as interested third party, submitted observations on the decision to initiate the formal investigation procedure on 4 August, 31 October and 13 December 2012.

43 The Italian authorities submitted comments on the applicant's observations on 28 November and 4 and 19 December 2012 and 10 January 2013.

Contested decision

44 On 2 October 2013, the Commission adopted Decision 2014/201/EU on compensation to be paid to Simet for public transport services provided between 1987 and 2003 (State aid SA.33037 (2012/C) Italy) (OJ 2014 L 114, p. 67; 'the contested decision'), in which it found that the measure notified by the Italian authorities as State aid within the meaning of Article 107(1) TFEU was incompatible with the internal market.

45 In the contested decision, the Commission, first of all, found that the notified measure was imputable to the State, entailed the use of State resources, conferred an economic advantage on the applicant, was selective in nature and was likely to distort competition to the extent that it affected trade between Member States. In those circumstances, the Commission observed that the notified measure did not satisfy the second criterion laid down by the Court in its judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, ECR, EU:C:2003:415; '*Altmark*'), according to which the parameters on the basis of which compensation is calculated must be established in advance in an objective and transparent manner. The Commission concluded that the notified measure constituted State aid within the meaning of Article 107(1) TFEU.

46 Next, the Commission examined whether the notified measure could be regarded, in the light of Article 17(2) of Regulation No 1191/69, as compensation exempted from the prior notification obligation set out in Article 108(3) TFEU.

47 To that end, the Commission considered whether the Italian authorities had unilaterally imposed on the applicant a public service obligation within the meaning of Article 1 of Regulation No 1191/69. In the first place, the Commission found that the applicant's initiative in requesting the renewal of the licence specifications for all 16 years of the period under review was incompatible with the alleged unilateral imposition of a public service obligation. In the second place, it pointed out that the fact that the specifications stipulated the fares, the routes and the frequency and timing of the services did not necessarily mean that unilateral public service obligations had been imposed on the applicant as a result of the licences granted. In the third place, the Commission considered that the applicant had not adduced any evidence to prove that it had actually provided mail transport services or to substantiate the net costs involved. In the fourth place, as regards the fares that the applicant was able to charge for the passenger transport services it provided, the Commission took the view that the fact that they were approved by the MIT and that reference was made to regulated fares did not, in itself, mean that those fares were not initially set by the operators. In any event, those regulated fares do not fall within the definition of tariff obligation within the meaning of Article 2(5) of Regulation No 1191/69, as that provision does not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof. In the fifth place, as regards the MIT's rejections of the applicant's requests to establish new services or to expand existing services, the Commission observed that those rejections were the result of the way in which the operation of scheduled passenger transport services was regulated under Law No 1822/1939, which only allowed the creation or expansion of new services in so far as the new licences did not impinge on the rights of existing operators. Furthermore, the Commission found that, in general terms, the applicant had not adduced any evidence to show that it had submitted requests to change the details set out in the specifications or that those requests had been rejected by the MIT.

48 The Commission also checked whether the compensation awarded to the applicant complied with the common method of compensation laid down in Regulation No 1191/69.

49 In the first place, the Commission noted that, under Article 10 of Regulation No 1191/69, in the case of an obligation to operate or to carry, the amount of compensation had to be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration. In accordance with the case-law, the requirement set out in that provision is not fulfilled where it is not possible to ascertain on the basis of reliable data from the company's accounts the difference between the costs imputable to the parts of its activities in the areas covered by the respective licences and the corresponding income and consequently it is not possible to calculate the additional cost deriving from the performance of public service obligations by that undertaking. The Commission also found that, under Article 1(5) of Regulation No 1191/69, in the version applicable from 1 July 1992, transport undertakings which not only operated services subject to public service obligations but also engaged in other activities were required to provide those services in such a way that (i) the operating accounts corresponding to each of those activities were separate and the proportion of the assets pertaining to each was used in accordance with the accounting rules in force; and (ii) expenditure was balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity. Since the applicant did not implement a proper account separation for the services provided by it until 2002, and in view of the concerns over the robustness of the cost accounts as regards account separation for the years 2002 and 2003, in the absence of any evidence that those cost accounts were used by the applicant's governance bodies to exercise control over its activities, the Commission found that Article 10 of Regulation No 1191/69 had not been complied with.

50 In the second place, the Commission considered that the applicant had not shown that it had complied with Article 5(1) of Regulation No 1191/69, which provided that economic disadvantages had to be determined taking into account the effects of the obligation on the undertaking's activities as a whole, or with Article 13 of that regulation, under which the amount of compensation had to be fixed in advance.

51 In the third and last place, the Commission pointed out that the common method of compensation applied to the applicant's inter-regional transport activities only until the entry into force of Regulation No 1893/91, on 1 July 1992, and that it could not therefore apply to compensation for the period between 1987 and 2003.

52 The Commission therefore found that the notified measure could not be regarded as compliant with the common method of compensation laid down in Regulation No 1191/69.

53 The Commission concluded that the notified measure was not exempted from the preliminary information obligation under Article 17(2) of Regulation No 1191/69.

54 Lastly, the Commission examined whether the notified measure was compatible with the legislation in force when the contested decision was adopted, namely Regulation No 1370/2007. After finding that the notified measure did not comply with some of the obligations laid down in Article 4 of Regulation No 1370/2007, concerning the content of the public service contract, and Article 6(1) of and the Annex to that regulation, concerning the separation of the accounts of the compensation recipient and the detailed rules to be applied to determine the maximum amount of compensation, the Commission concluded that the compensation ordered by the Consiglio di Stato (Council of State) was not in accordance with Regulation No 1370/2007 and, therefore, the notified measure was incompatible with the internal market. The Commission also rejected the applicant's argument that the Consiglio di Stato (Council of State) did not order the MIT to pay it compensation for public service obligations pursuant to Regulation No 1191/69, but instead ordered the MIT to pay it damages on account of the unlawful imposition of such obligations in terms of Article 1(3) and (5) of that regulation. The Commission observed that it was apparent from the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, that the latter had recognised the applicant's right to receive compensation on the basis of Articles 6, 10 and 11 of Regulation

No 1191/69 and had dismissed its claim for damages. The Commission also stated that, in any event, the award of damages to the applicant for the alleged unilateral and unlawful imposition of public service obligations, calculated on the basis of the common method of compensation laid down in Regulation No 1191/69, would contravene Articles 107 TFEU and 108 TFEU, since it would produce the same result for the applicant as compensation for public service obligations in respect of the period under review even though the licence specifications governing the services in question did not comply with the substantive requirements of either Regulation No 1191/69 or Regulation No 1370/2007.

55 The operative part of the contested decision reads as follows:

'Article 1

The compensation payments to Simet notified by the Italian authorities constitute [S]tate aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union. The aid was not exempt from prior notification on the basis of Article 17(2) of Regulation (EEC) No 1191/69.

The aid is not compatible with the internal market, as the conditions of Regulation (EC) No 1370/2007 have not been met. Consequently, the aid may not be implemented by the Italian authorities.

Article 2

This Decision is addressed to the Italian Republic.'

Procedure and forms of order sought by the parties

56 The applicant brought the present action on 6 January 2014.

57 The Commission lodged its defence on 24 March 2014.

58 The applicant lodged a reply on 12 May 2014. The Commission lodged a rejoinder on 28 August 2014.

59 On 4 June 2015, the Court put a question to the applicant for a written reply by way of measures of organisation of procedure provided for in Article 64(3)(a) and (b) of the Rules of Procedure of the General Court of 2 May 1991. The applicant replied to that question on 12 June 2015.

60 The parties presented oral argument and replied to the questions put by the Court at the hearing on 14 July 2015.

61 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

62 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility

63 The Commission submits that, since the applicant stated in the reply that it was discontinuing its application for enforcement of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, it no longer has any legal interest in bringing proceedings in the context of this case, bearing in mind that the very purpose of the contested decision was to notify the compensation to which the applicant was entitled in compliance with that judgment, according to the majority report drawn up in the application for enforcement.

64 It should be recalled that having a legal interest in bringing proceedings is a precondition for the admissibility of an action for annulment brought by a natural or legal person. Such an interest presupposes that the annulment of the contested measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party who brought it (see judgment of 18 March 2010 in *Centre de Coordination Carrefour* v *Commission*, T-94/08, ECR, EU:T:2010:98, paragraph 48 and the case-law cited). That interest must be vested and present when the action is brought.

65 Moreover, it must continue until the final decision, failing which there will be no need to adjudicate (see judgment in *Centre de Coordination Carrefour* v *Commission*, cited in paragraph 64 above, EU:T:2010:98, paragraph 49 and the case-law cited).

66 It must also be borne in mind that if the interest which a party bringing proceedings claims concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain (order of 27 March 2012 in *European Goldfields* v *Commission*, T-261/11, EU:T:2012:157, paragraph 29).

67 In the present case, it is apparent both from the contested decision and the applicant's pleadings that the Italian authorities twice refused to comply with the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, ordering them to pay compensation to the applicant, which resulted in the Consiglio di Stato issuing, at the request of the applicant, an initial order for enforcement on 1 April 2011 followed by a second order for enforcement on 17 January 2012.

68 In the reply, the applicant stated that it was discontinuing its application for enforcement of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, and reserved the right to bring a fresh application.

69 In response to a question for a written reply put by the Court under Article 64(3)(a) and (b) of the Rules of Procedure of 2 May 1991, the applicant stated that it had discontinued the proceedings by which it sought to secure enforcement of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, but that it had not discontinued its action for enforcement of that judgment and therefore retained the possibility of bringing a fresh application for enforcement thereof until expiry of the limitation period, being 9 March 2020. According to the applicant, it thus retained an interest in the outcome of proceedings in the present case, with a view to bringing a fresh application to enforce the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above.

70 It follows that there is no certainty that the applicant will take further steps in its action for enforcement of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above.

71 However, in this case, that fact is not, of itself, capable of depriving the applicant of its legal interest in bringing proceedings.

72 If the Court found it necessary to annul the contested decision, the Italian authorities would still in any event be bound to comply with the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, irrespective of the applicant's discontinuance of its application for enforcement of that judgment.

73 Furthermore, it should be noted that in accordance with the very wording of the contested decision, the Italian authorities 'decided to await the assessment of the notified measure by the Commission before executing the [judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, and its order of 1 April 2011] and paying [the applicant] the compensation'.

74 In the light of the foregoing considerations, the applicant retains an interest in the outcome of the proceedings.

Substance

75 In support of the action, the applicant essentially relies on five pleas in law. The first plea alleges infringement of Article 107(1) TFEU and Regulation No 1191/69, in so far as the Commission committed an error of fact and manifest errors of assessment and failed to investigate the case sufficiently. The second plea alleges infringement of the principles relating to compensation for harm suffered by individuals as a result of breaches of EU law by a Member State. The third plea alleges infringement of the obligation to state reasons. The fourth plea alleges infringement of Article 107(1) TFEU, in so far as the Commission committed manifest errors of assessment as regards whether the notified measure complied with the common method of compensation laid down in Regulation No 1191/69. The fifth plea alleges that the Commission interfered with the judicial business of the national court by taking account, in the contested decision, of the reports of the panel of experts on which the Consiglio di Stato (Council of State) had yet to rule.

First plea in law, alleging infringement of Article 107(1) TFEU and Regulation No 1191/69

76 The first plea in law is essentially divided into two parts. The first part alleges error of fact, in so far as the Commission wrongly found that the Consiglio di Stato (Council of State) had ordered the MIT to pay compensation to the applicant pursuant to Regulation No 1191/69. The second part alleges manifest error of assessment, or insufficient investigation, in so far as the Commission failed to take account of the fact that the national legislation on the basis of which public service obligations were imposed on the applicant was contrary to Regulation No 1191/69.

– First part of the first plea in law, alleging error of fact

77 Following the line it took in the administrative procedure, the applicant submits that the Consiglio di Stato (Council of State) did not order the MIT to pay it compensation pursuant to Regulation No 1191/69, but instead ordered the MIT to pay it damages on account of the harm suffered as a result of the unilateral imposition of public service obligations in breach of that regulation for the period between 1987 and 2003. According to the applicant, the Consiglio di Stato (Council of State) — as expressly provided for in Article 35 of Legislative Decree No 80/1998 — referred to Regulation No 1191/69 (which applied to the relevant period) solely for the purpose of determining the appropriate criteria in order to quantify the damage. The applicant argues that the Consiglio di Stato (Council of State) did not dispose of the case pursuant to Regulation No 1191/69; in the light of the pleas put forward by the applicant, it merely referred to the criteria set out in that regulation in order to quantify the actual amount of compensation due in respect of the costs incurred in the performance of public service obligations under domestic law. In other words, the Consiglio di Stato (Council of State) recognised the right to compensation only in respect of the losses suffered pursuant to its case-law.

78 The Commission disputes the applicant's arguments and contends that the first part of this plea should be rejected.

79 It should be noted that the applicant's proposition is tantamount to considering that the notified measure was not compensation for the imposition of public service obligations, for the purposes of *Altmark*, cited in paragraph 45 above (EU:C:2003:415), or Regulation No 1191/69, but rather damages awarded by the national court for the harm caused as a result of the imposition of such obligations in breach of the applicable EU law.

80 That proposition is at odds with the judgment of the TAR Lazio, referred to in paragraph 31 above, and the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above.

81 The judgment of the TAR Lazio, referred to in paragraph 31 above, shows that the applicant brought an action before that court in 2004 seeking recognition of its right to receive EUR 66 891 982 in consideration for the financial burdens it had assumed as a result of performing public service obligations since 1987, by way of either annual compensation, pursuant to Regulation No 1191/69, as amended by Regulation No 1893/91, or damages, or by means of an action for unjust enrichment, pursuant to Article 2041 of the Italian Civil Code (see paragraph 31 above).

82 At this juncture it is appropriate to return, as the Commission did, to the content of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above.

83 In paragraph 2 of its judgment (referred to in paragraph 33 above), the Consiglio di Stato (Council of State) set out the applicable legal framework, recalling that Law No 1822/1939 governed the grant by licence of bus routes under State responsibility to private operators, in so far as those licences did not compete with existing licences, and enabled the MIT to pay mileage-based subsidies for establishment and operation.

84 It went on to state that Regulation No 1893/91 'drew a clear distinction between transport services of special public interest (namely "regional or local services") and transport services in respect of which the termination of service obligations was definitive, without prejudice to the possibility for public authorities to conclude public service contracts in order to ensure the provision of adequate transport services and notwithstanding the guarantees for special categories of person'.

85 The Consiglio di Stato (Council of State) also observed that 'the Court of Justice ruled [in *Altmark*] on the nature of the compensation paid by Member States in the field of transport services, so as not to include it in the category of State aid'.

86 The Consiglio di Stato (Council of State) concluded that 'any trader who provides, in respect of public service obligations, public transport services … is entitled to receive compensation for the financial burdens borne by him'.

87 It then stated that, in consequence, 'in the light of the rules described above, it is necessary to ascertain in the present case whether or not the [applicant] is entitled to the compensation provided for'.

88 As the Commission correctly points out, the reasoning of the Consiglio di Stato (Council of State) set out above shows that it examined the substance of the applicant's application for compensation for the performance of certain public service obligations.

89 Furthermore, after finding that 'the company's court claim seeking recognition of its right to compensation' was admissible, unlike the TAR Lazio, the Consiglio di Stato (Council of State) noted that 'Regulation (EEC) No 1191/69 of the Council of 26 June 1969, as amended by Regulation (EEC) No 1893/91', expressly provided, in Article 1(5) thereof, for the possibility of maintaining or imposing service obligations for urban, suburban and regional services. It also stated that, in those

circumstances, the financial burdens arising from the decision to maintain or impose unilateral service obligations must be compensated for by the Member States, in accordance with the methods listed in Articles 10, 11 and 12 of Regulation No 1191/69, irrespective of the applications referred to in Article 4 of that regulation. The Consiglio di Stato (Council of State) made clear that 'not only did the Italian legislature not avail itself of that power, but it established, by adopting Article 4(4) of Law No 59/97 and the provisions of Legislative Decree No 422/97, that public service contracts [had] to be concluded which incorporate the obligation to pay compensation for public service obligations'.

90 After recalling that Regulation No 1191/69 was directly applicable, the Consiglio di Stato (Council of State) went on to state that 'it follows from the foregoing … that it is not possible to reject the public service provider's application for reimbursement of the costs actually incurred on account of the provision of public services'.

91 The Consiglio di Stato (Council of State) concluded as follows:

'It is appropriate to uphold the action … for the reasons set out in this judgment and, in consequence, to find that the applicant company is entitled to receive the compensation provided for in Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, the amount of which, pursuant to Article 35 of Legislative Decree No 80 of 1998, is to be determined by the authorities … on the basis of reliable data from the interested party's accounts evidencing the difference between the costs attributable to the part of the interested party's activities affected by the public service obligations and the corresponding revenue. That being so, it is not possible to uphold the claims for damages filed by the applicant because only after the authorities have fixed the amount will any residual harm not covered by that amount come to light, harm which will have to be justified and proven by the company in question. Since the main claim has been upheld, there is no need for the bench to rule on the action for unjust enrichment submitted by the applicant in the alternative.'

92 Consequently, the Consiglio di Stato (Council of State) 'orders the Ministry … to pay the amounts to be determined in accordance with Article 35 of Legislative Decree No 80 of 1998 within the time-limit and under the conditions stipulated by this court'.

93 It is therefore apparent from the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, that the court recognised the applicant's right to receive the compensation provided for in Articles 6, 10 and 11 of Regulation No 1191/69 for the public service obligations imposed on it and also ordered the MIT to pay the applicant, by way of compensation, an amount to be determined by the authorities in accordance with Article 35 of Legislative Decree No 80/1998.

94 Article 35(1) of Legislative Decree No 80/1998 provides that the administrative courts are to adjudicate on claims for damages in actions over which they have exclusive jurisdiction. Article 35(2) thereof states that the administrative courts may, in the context of that jurisdiction, lay down the criteria in accordance with which the authorities are to propose the payment of a sum to the applicant within a reasonable time.

95 However, contrary to what the applicant submits, the mere reference to Article 35 of Legislative Decree No 80/1998 does not lead to the conclusion that the notified measure was necessarily intended to indemnify it for the harm caused by the breach of Regulation No 1191/69 by national legislation, in terms of the judgment of 22 January 1976 in *Russo* (60/75, ECR, EU:C:1976:9, paragraph 9).

96 The wording of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, shows that the court did not find that the national rules were unlawful in the light of Regulation No 1191/69, but simply refrained from applying those rules in order to find that a right to compensation existed on the basis of Regulation No 1191/69.

97 Furthermore, the payment ordered against the MIT must be made by way of compensation and such compensation must correspond, according to the terms of the judgment, to the financial burden attributable to the public service obligations imposed on the applicant.

98 In addition, the Consiglio di Stato (Council of State) expressly stayed the action for damages brought by the applicant.

99 In those circumstances, it must be considered that the purpose of the notified measure was not to indemnify the applicant for the harm resulting from the breach of Regulation No 1191/69, but rather to compensate it for the financial burdens attributable to the imposition of the public service obligation pursuant to the provisions of that regulation.

100 Indeed, the Consiglio di Stato (Council of State) confirmed that interpretation of its judgment, referred to in paragraph 33 above, in its order of 1 April 2011, in which it stated:

'Judgment No 1405 of 2010, the grounds of which the bench relies on, recognised the right of the company Simet to receive the compensation provided for in Articles 6, 10 and 11 of Regulation (EEC) No 1191/69 and held that the amount of that compensation, in accordance with Article 35 of Legislative Decree No 80 of 1998, would have to be fixed by the authorities within 90 days, on the basis of reliable data from the accounts of the undertaking concerned evidencing the difference between the costs attributable to the part of the activities of the undertaking concerned affected by the public service obligation and the corresponding revenue.'

101 It follows that the applicant's contention that the Commission committed an error of fact in finding that the Consiglio di Stato (Council of State) had ordered the MIT to pay it compensation pursuant to Regulation No 1191/69 is unfounded.

102 Moreover, if the notified measure had to be construed, as the applicant submits, not as compensation for the imposition of public service obligations within the meaning of Regulation No 1191/69, but as damages for the harm caused as a result of the imposition of such obligations in breach of that regulation, the applicant cannot argue at the same time that such damages fall outside the definition of State aid, within the meaning of Article 107(1) TFEU, solely because they seek to compensate for the imposition of public service obligations within the meaning of that regulation.

103 Otherwise, as the Commission correctly pointed out in recitals 131 to 133 of the contested decision, in such a situation, the classification of the payment due in respect of compensation not as compensation but as damages would make it possible to circumvent the application of Articles 107 TFEU and 108 TFEU.

104 In the present case, the applicant has not put forward any arguments to challenge the finding that the notified measure contains all the constituent elements of State aid within the meaning of Article 107(1) TFEU, with the result that the applicant's contention that the notified measure is not compensation within the meaning of Regulation No 1191/69 but damages for the harm caused by the breach of that regulation is, on any view, ineffective.

105 The first part of the first plea in law must therefore be dismissed.

– Second part of the first plea in law, alleging manifest error of assessment or insufficient investigation as to whether the applicable national legislation was consistent with EU law

106 The applicant essentially makes two complaints against the Commission.

107 In the first place, the applicant criticises the Commission for failing to examine of its own motion the question whether national legislation was consistent with EU law. According to the applicant, if the Commission had considered that question, it would have realised that national legislation was not consistent with EU law and that that was why the Consiglio di Stato (Council of State) had refrained from applying domestic law and had ordered the MIT to pay it damages.

108 In the second place, the applicant criticises the Commission for having found, in the contested decision, that it had not been subject under national legislation to public service obligations in breach of Regulation No 1191/69.

109 The Commission submits that the second part of the first plea in law is inadmissible, in the light of Article 44(1) of the Rules of Procedure of 2 May 1991, because the applicant's complaints are not related to the title of the first plea, which the applicant disputes.

110 The Commission also challenges the admissibility of the documents annexed to the applicant's reply in support of its first complaint. They comprise Italian legislative instruments, namely Law No 1822/1939, Law No 32/2005 and Law No 877/86, by which the applicant sought to prove that Italian legislation was contrary to Regulation No 1191/69. The Commission claims that these documents were not produced in order to address the arguments set out in the defence and that the applicant could have submitted them with its application. In those circumstances, the Commission considers that, in the absence of any justification for the delay in producing this new evidence, the documents in question must be deemed inadmissible.

111 Furthermore, the Commission challenges the merits of the applicant's complaints.

112 It should be borne in mind that the applicant's first complaint is based on three clearly identifiable arguments. According to the first argument, the Commission was required to examine of its own motion the question whether domestic law was consistent with EU law. This argument concerns a breach of the duty to investigate. According to the second and third arguments, respectively, domestic law was not consistent with EU law and that was why the Consiglio di Stato (Council of State) refrained from applying domestic law and ordered the MIT to pay the applicant damages. These arguments concern alleged errors of assessment by the Commission.

113 The second complaint, by which the applicant criticises the Commission for finding that it had not been subject under national legislation to public service obligations in breach of Regulation No 1191/69, can also be easily seen to concern a manifest error of assessment.

114 In addition, it must be stated that notwithstanding the wording of the applicant's complaints, the Commission's understanding of those complaints was sufficient to enable it to deal with them substantially in the defence. Accordingly, the plea of inadmissibility raised by the Commission on the basis of Article 44(1) of the Rules of Procedure of 2 May 1991 must be rejected.

115 The merits of the applicant's complaints must therefore be assessed.

116 As regards the first complaint, it is necessary at the outset to reject as unfounded the applicant's arguments that national legislation was contrary to EU law and that that was why the Consiglio di Stato (Council of State) ordered the MIT to pay the applicant damages. Those arguments simply repeat the contention that was rejected in the examination of the first part of the first plea in law.

117 It is also necessary to reject as unfounded the applicant's argument that the Commission ought to have examined of its own motion whether domestic law was compatible with EU law. It should be recalled that, according to settled case-law, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own

motion and on the basis of prediction, what information might have been submitted to it (judgments of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 60, and 3 February 2011 in *Italy* v *Commission*, T-3/09, ECR, EU:T:2011:27, paragraph 84).

118 The applicant does not deny the Commission's assertion that, during the administrative procedure in which it participated as an interested third party, it did not raise the question of the consistency of national legislation with Regulation No 1191/69. Therefore, the applicant's first complaint must be rejected as unfounded without it being necessary to rule on the admissibility of annexes C1, C3 and C4 to the reply.

119 In respect of the second complaint, since, unlike the first complaint (which is directly linked to the first part of the first plea in law), it concerns a manifest error of assessment as regards the application of Regulation No 1191/69, the Court considers it appropriate to examine it alongside the other complaints of the fourth plea in law, which specifically relate to such errors of assessment.

120 In the light of the foregoing considerations, the Court must reject the second part of the first plea in law and, therefore, the first plea in law in its entirety, except for the second complaint of the second part, which will be considered in the context of the fourth plea in law.

Second plea in law, alleging infringement of the principles governing compensation for harm suffered by individuals as a result of breaches of EU law by a Member State

121 The applicant submits that the Consiglio di Stato (Council of State) found that the licences granted to it each year infringed its right to receive compensation on the basis of Regulation No 1191/69 and, after the entry into force of Regulation No 1893/91, its right to pursue business activities without public service obligations. Consequently, the Consiglio di Stato (Council of State) ordered the MIT to make good the harm caused, in accordance with the principles governing the liability of Member States for damage sustained as a result of the adoption of administrative measures which are contrary to EU law, and directed that the amount of reparation be calculated fairly, by reference to the criteria laid down in Regulation No 1191/69 for the determination of compensation for public service obligations, subject to those criteria being adapted to the applicant's individual situation. The applicant also claims that the Consiglio di Stato (Council of State) expressly stated that, if the existence of harm exceeding that determined on the basis of the criteria laid down in Regulation No 1191/69 could be proven, such harm would have to be compensated for separately. According to the applicant, the harm may be greater or lesser than the compensatory measure awarded to the company on the basis of Regulation No 1191/69. It follows that, by classifying the notified measure as State aid within the meaning of Article 107(1) TFEU, the Commission infringed the principles established by the case-law governing compensation for harm suffered by individuals a result of a breach of EU law.

122 In support of that proposition, the applicant argues that the failure to comply with the criteria laid down in *Altmark*, cited in paragraph 45 above (EU:C:2003:415), which the Commission found as a fact in the contested decision, is not relevant in the present case because that judgment concerns situations in which public service obligations may be imposed, whereas the imposition of such obligations has not been possible as regards the applicant since 1992. With respect to the earlier period, the failure to comply with those criteria confirms, in the applicant's view, that the measures by which the MIT granted the annual licences were unlawful. Similarly, according to the applicant, the failure to comply with the account separation obligation is not relevant as the applicant was not required to separate its accounts after 1992 because, after that time, it could not be subject to public service obligations. In any event, Regulation No 1191/69 only imposes the obligation to separate public resources from private resources in the accounts of the undertaking in order to avoid cross-subsidies. Since the applicant had not received any compensation, it was not required to separate its accounts.

123 The Commission disputes the applicant's arguments and contends that the action should be dismissed.

124 It must be noted that this plea in law is based on the premiss that, in the present case, the Consiglio di Stato (Council of State) ordered the authorities to pay damages to the applicant for the harm suffered as a result of the imposition of public service obligations in breach of Regulation No 1191/69. As the Court held in its examination of the first part of the first plea in law, it is apparent from the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, that this premiss is incorrect: the Consiglio di Stato did not find that the national legislation in question was unlawful. Instead, it recognised the applicant's right to receive compensation on the basis of Articles 6, 10 and 11 of Regulation No 1191/69 on account of the public service obligations which had been imposed on it and ordered the MIT to pay, by way of compensation, the difference between the financial burdens and revenue linked to the performance of those obligations.

125 The Court must therefore reject the second plea in law as unfounded, without there being any need to examine the merits of the applicant's arguments concerning the alleged misapplication of *Altmark*, cited in paragraph 45 above (EU:C:2003:415), and the account separation obligation set out in Regulation No 1191/69.

Third plea in law, alleging infringement of the obligation to state reasons

126 In its third plea in law, the applicant again argues in favour of the proposition that the Consiglio di Stato (Council of State) ordered the MIT to pay it damages on account of the imposition of public service obligations in breach of Regulation No 1191/69. However, in addition to those considerations, it puts forward various arguments and complaints, some of which concern infringement of the obligation to state reasons or insufficient investigation, while others concern manifest errors of assessment as regards the application of Regulation No 1191/69.

127 To ensure that the action is structured clearly, the complaints relating to alleged manifest errors of assessment in the application of Regulation No 1191/69 will be examined in the context of the fourth plea in law, in the same way as the complaints raised by the applicant in the second part of the first plea in law.

128 Furthermore, since the Court dealt with the applicant's arguments concerning the alleged error of fact as regards the interpretation of the judgment of the Consiglio di Stato (Council of State), referred to in paragraph 33 above, in the examination of the first part of the first plea in law, it will confine itself in this plea to examining the applicant's complaints alleging infringement of the obligation to state reasons.

129 As a preliminary point, it should be recalled that the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. Thus, the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of the reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments in *Commission* v *Sytraval and Brink's France*, cited in paragraph 117 above, EU:C:1998:154, paragraph 63; of 22 June 2004 in *Portugal* v *Commission*, C-42/01, ECR, EU:C:2004:379, paragraph 66; and of 15 April 2008 in *Nuova Agricast*, C-390/06, ECR, EU:C:2008:224, paragraph 79).

130 In addition, it would be inappropriate for the Court to examine, in considering fulfilment of the obligation to state reasons, the substantive legality of the reasons relied on by the Commission to justify its decision. It follows that, in a plea based on a failure to state reasons or a lack of adequate reasons, objections and arguments which aim to challenge the merits of the contested decision are misplaced and irrelevant (judgment of 15 June 2005 in *Corsica Ferries France* v *Commission*, T-349/03, ECR, EU:T:2005:221, paragraphs 58 and 59).

131 The question whether the Commission complied with its obligation to state reasons in this case must be assessed in the light of those principles.

– First complaint, alleging that the Commission failed to give reasons for its finding that the applicant's accounts were not reliable

132 The applicant criticises the Commission for, in essence, failing to explain in the contested decision why it considered the applicant's accounts not to be reliable, thereby reproducing the view taken in the minority report of the panel of experts appointed by the Consiglio di Stato (Council of State), without addressing the arguments set out in the majority report of the panel. It also criticises the Commission for not examining the accounts itself.

133 The Commission disputes the applicant's arguments and contends that the first part of the third plea in law should be dismissed.

134 It should be noted at the outset that the applicant's criticism of the Commission's failure to examine its accounts has less to do with an infringement of the obligation to state reasons, the scope of which was recalled in paragraph 129 above, than with a failure to investigate the case properly.

135 It should also be borne in mind that, as is apparent from the contested decision and in contrast to the submissions of the applicant, the Commission did not challenge the reliability of the applicant's accounts for the entire period under review.

136 In recital 115 of the contested decision, the Commission recalled the principle established by the Court in its judgment of 7 May 2009 in *Antrop and Others* (C-504/07, ECR, EU:C:2009:290), according to which the requirements set out in Article 10 of Regulation No 1191/69 are not satisfied where 'it is not possible to ascertain on the basis of reliable data [from the company's accounts] the difference between the costs imputable to the parts of [its] activities in the areas covered by the respective concessions and the corresponding income and consequently it is not possible to calculate the additional cost deriving from the performance of public service obligations by [that undertaking]'.

137 In recital 117, the Commission found:

'In the present case, Simet failed to implement a proper account separation for the different services provided by it until 2002 and the robustness of the cost accounts as regards account separation for the years 2002 and 2003 can be called into question since there is no evidence that those cost accounts were used by the company's governance bodies to exercise control over its operations. Article 10 has therefore not been complied with.'

138 In recitals 127 and 128, the Commission reproduced the same arguments in the context of its review of the compatibility of the notified measure with Regulation No 1370/2007:

‘Article 6(1) provides that in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. That Annex requires, inter alia, a separation of accounts (point (5)[)] and specifies how the maximum amount of compensation should be determined.

As noted in recital 115 above, for most of the notified period (between 1987 and 2001), Simet did not apply a proper account separation, while the robustness of the analytical accounts for 2002 and 2003 can also be questioned. Consequently, it is impossible to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator (point 2 of the Annex).’

139 These recitals show that, except for the financial years 2002 and 2003, the Commission did not challenge the reliability of the applicant’s accounts and simply found that, since there was no proper account separation, it was not possible to rule out completely the risk of overcompensation, as required by Article 10 of Regulation No 1191/69 and Article 6(1) of Regulation No 1370/2007, with the result that the applicant’s complaint has no basis in fact as regards the period between 1987 and 2001.

140 Furthermore, as regards the doubt cast on the reliability of the analytical accounts for the financial years 2002 and 2003, the Commission stated that this was the result of there being no evidence that such accounts were actually used by the applicant’s governance bodies to exercise control over its activities, so that the applicant was able to understand the reasoning of the Commission in that respect.

141 This complaint should therefore be rejected in its entirety.

– Second complaint, alleging that the Commission did not explain in the contested decision why, in its view, a return rate exceeding the swap rate plus 100 basis points was normally not regarded as a suitable reference for calculating reasonable profit

142 The applicant criticises the Commission for having asserted, without giving any other reasons, that a return rate exceeding the swap rate plus 100 basis points was normally not regarded as a suitable reference for calculating reasonable profit.

143 The Commission disputes the applicant’s arguments and contends that the first part of the third plea in law should be rejected.

144 It must be pointed out that the assertion mentioned by the applicant, which concerns the return rate applicable to the capital employed by the applicant each year in the operation of inter-regional routes, appears in recital 129 of the contested decision, in the section of the decision relating to the compatibility of the notified measure with Regulation No 1370/2007.

145 Recital 129 of the contested decision reads as follows:

‘Moreover, in the absence of compensation parameters laid down in advance, any cost allocation must necessarily be conducted ex post on the basis of arbitrary assumptions, as was done in both the initial report and the majority report. The Commission cannot accept, however, the assumptions made in the majority report that each service provided by the company should necessarily represent the same

proportion of revenues and costs in a given year. Moreover, since an ex post calculation will necessarily result in full compensation of the costs incurred in the provision of the service, the Commission considers that a rate of return on equity exceeding the relevant swap rate plus 100 basis points, as employed in both the initial report and the majority report, would normally not be viewed as a suitable reference for calculating the reasonable profit.'

146 It is apparent from recital 129 that the Commission justified the assertion that the return rate proposed in the majority report would normally not be considered suitable for calculating the reasonable profit on the fact that an ex post calculation of the amount of compensation will always result in full compensation of the costs incurred in the provision of the service encumbered by public service obligations. Thus, the Commission indeed justified its assertion, thereby complying with its obligation to state reasons.

147 The question whether that justification is sufficient, which is moreover disputed by the applicant, forms part of the assessment of the merits of the contested decision. The arguments put forward to that effect by the applicant must therefore be regarded, in the light of the case-law cited in paragraph 130 above, as ineffective and irrelevant in the context of a plea alleging infringement of the obligation to state reasons.

148 The second complaint of the third plea in law must therefore be dismissed as unfounded.

149 Having regard to the foregoing, the third plea in law must be dismissed as unfounded.

Fourth plea in law, alleging infringement of Article 107(1) TFEU, in so far as the Commission committed several manifest errors of assessment in the application of Regulation No 1191/69

150 In its application, the applicant makes several complaints against the Commission concerning manifest errors of assessment in the application of Regulation No 1191/69 which can essentially be grouped under a single plea in law alleging infringement of Article 107(1) TFEU.

151 The applicant criticises the Commission for finding that, since there was no account separation, the notified measure was not immune from the risk of overcompensation and, therefore, was not consistent with the common method of compensation laid down in Regulation No 1191/69. The applicant submits that, before 1992, it was not required to keep its accounts separate because it did not receive any compensation and, after 1992, it could not be required to keep its accounts separate because it could no longer be subject by unilateral decision to public service obligations. It states that, in those circumstances, *Antrop and Others*, cited in paragraph 136 above (EU:C:2009:290), does not apply to it. Furthermore, the applicant contends that the calculation method suggested in the majority report served to avoid all risks of overcompensation since it was based on an ex post reconstruction of the costs incurred in respect of public service obligations.

– First complaint, alleging that the Commission wrongly found that the applicant had not been subject to public service obligations within the meaning of Regulation No 1191/69

152 The applicant criticises the Commission for, in essence, finding that it had not been subject to public service obligations within the meaning of Regulation No 1191/69.

153 The Commission disputes that complaint.

154 It is important to note that the present complaint touches on the key issue in this case. Although the Consiglio di Stato (Council of State) held in its judgment, referred to in paragraph 33 above, that the applicant was entitled to claim compensation pursuant to Articles 6, 10 and 11 of Regulation

No 1191/69, it did not expressly indicate the basis for that right in the applicant's favour. It simply stated that such a right could not be refused to public service operators in relation to the financial burdens assumed by them in respect of that service.

155 The applicant argues that the Consiglio di Stato (Council of State) therefore drew the logical conclusion from the fact that national legislation, by organising the activity of scheduled passenger transport by road as a public service the operation of which was licensed to private undertakings on the terms stipulated by the State, necessarily imposed on those undertakings, including the applicant, obligations inherent in the concept of public service, in breach of Regulation No 1191/69, which precisely required Member States to terminate such obligations.

156 However, the applicant's proposition is not persuasive for the following reasons.

157 In the first place, as regards the obligations to which the applicant was subject pursuant to the annual licensing decisions between 1987 and 30 June 1992, during which time Regulation No 1191/69 as originally worded applied to the facts of the case, under Article 1(1) and (2) of that regulation, the obligations which the Member States were, in principle, required to terminate were those inherent in the concept of public service, as defined in the regulation, imposed in the field of transport by rail, road and inland waterway.

158 It should be noted, first of all, that the setting of passenger tariffs in the annual licensing decisions and the obligation to submit a fare table to the local office of the MIT for approval cannot be construed as tariff obligations within the meaning of Article 2(5) of Regulation No 1191/69.

159 According to the case-law, the distinguishing features of a tariff obligation are not only that rates are fixed or approved by public authorities but also that it satisfies the double condition that 'special' tariff obligations for certain specified categories of passenger or goods, or on certain routes, should be involved, and that, in addition, they should be contrary to the commercial interests of the undertaking. This interpretation is confirmed by the second subparagraph of Article 2(5), which excludes from the definition of tariff obligations 'general measures of price policy' and 'measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof'. It follows that a legal obligation of general application whereby transport rates are submitted for approval by public authorities cannot, therefore, of itself, be regarded as constituting a 'tariff obligation' within the meaning of Article 2(5) of Regulation No 1191/69 (judgment of 27 November 1973 in *Nederlandse Spoorwegen*, 36/73, ECR, EU:C:1973:130, paragraphs 11 to 13).

160 Although the applicant claims that the setting of tariffs was contrary to its commercial interests, since the price of bus tickets could not exceed the price of second class rail tickets in Italy, it does not submit and, *a fortiori*, does not adduce evidence to show that the setting of tariffs in the annual licensing decisions was for specified categories of passengers or goods or for certain routes.

161 Next, in so far as some of the obligations contained in the annual licensing decisions — relating to the determination of the route, both in terms of destination and itinerary; the number of stops and their frequency; the timing of the route; the immediate reporting of all service interruptions, suspensions and changes; the requirement for prior authorisation from the local office of the MIT in order to purchase vehicles to be used in the service or to put vehicles used in the service to other uses; the issuance of tickets for the transport of passengers, baggage and agricultural packages and their storage for five years; the inspection of the applicant's accounts by officials from the local office of the MIT; and the statutory obligation to carry without charge packages for the postal authorities — may be construed as 'obligations to operate' or 'obligations to carry' within the meaning of, respectively, Article 2(3) and Article 2(4) of Regulation No 1191/69, it must be noted that the system provided for under Italian law allowed the applicant to request renewal of the annual licensing decisions or to refrain from doing so if it considered that the public service obligations to which the operation of an inter-regional route was subject were unsuited to it.

162 It follows that such obligations were not obligations imposed by the State unilaterally in order to ensure adequate transport services, within the meaning of Article 1 of Regulation No 1191/69.

163 As the Commission points out, the applicant seems to confuse the unilateral imposition of public service obligations by the authorities, which, under Regulation No 1191/69, must give rise to compensation in accordance with the common methods of compensation referred to in Articles 10 to 13 thereof, with the voluntary acceptance of a relationship of a contractual nature requiring the provision of certain transport services, specifically defined in the public interest, which does not trigger any obligation to compensate under Regulation No 1191/69.

164 The arguments put forward by the applicant in that regard are also unconvincing. The applicant essentially contends that, under national law, it was only able to submit its application in accordance with the public interest criteria laid down by the authorities in advance. Thus, in the applicant's opinion, the only choice actually open to it was whether or not to pursue its passenger transport activities on inter-regional routes.

165 It should be recalled that pursuant to Article 4(1) of Regulation No 1191/69, it was for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entailed economic disadvantages for them. Under Article 4(2) of that regulation, '… transport undertakings [could] propose the substitution of some other form for the forms of transport being used'. However, as the Commission found in the contested decision, without being challenged by the applicant, at no point did the applicant ever submit such an application. This shows that the applicant voluntarily and automatically accepted the obligations stipulated in the specifications and contained in the annual licensing decisions.

166 The applicant argues that, under national law, first, the applicant had to identify in clear and detailed terms the public interest needs that the previous licensee had not met and had to undertake to meet those needs itself; secondly, in the grant of annual licenses, the MIT gave priority to undertakings which 'showed that they assum[ed] other financial burdens for works or services of local interest related to the transport services and that they [were] capable of meeting such burdens'; and, thirdly, as from 1994, licences were only granted after a public meeting at which the interested parties were heard, during which 'the actual existence of a public interest' had to be confirmed. However, those arguments are not such as to call in question the finding that the applicant voluntarily accepted the public service obligations stipulated in the specifications and not once applied for the termination or variation of those obligations, as permitted under the regulation.

167 The applicant's argument that the imposition of public service obligations within the meaning of Regulation No 1191/69 also stems from the fact that, in the past, it received compensation in that respect, under Law No 877/86, is not persuasive either. The applicant has not shown that the purpose of the law in question was to establish compensation for public service obligations imposed unilaterally on transport undertakings within the meaning of Regulation No 1191/69. Furthermore, the criterion set out in that law in order to calculate the aid, namely the number of kilometres travelled, prevents such aid being assimilated to compensation within the meaning of Regulation No 1191/69, which lays down a specific method for calculating the amount of compensation due in consideration for the public service obligations imposed on transport undertakings.

168 Lastly, under Article 2(1) of Regulation No 1191/69, '"public service obligations" means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions'. It is difficult to believe that the applicant could request renewal of the various licences, notwithstanding the obligations to carry and operate stipulated in the specifications and contained in the annual licensing decisions, without having a commercial interest in doing so.

169 It should be pointed out that the applicant simply submits that the obligations contained in the annual licensing decisions were prejudicial to its freedom of economic development, which it claims is evidenced by the MIT's multiple rejections of its applications to vary routes and timetables. It is apparent from the documents supplied by the applicant in support of that assertion that the applications in question related not to routes already awarded to the applicant and operated by it, but to the extension of routes already awarded to it. Furthermore, as the Commission stated in the contested decision, specifically because of the exclusive nature of the licences granted by the MIT to operators of scheduled passenger transport services, including the applicant, the applicant's requests for expansion could only be met if they did not interfere with the rights of other operators.

170 In the second place, the obligations to which the applicant was subject pursuant to the annual licensing decisions taken between 1 July 1992 and 2003, during which time Regulation No 1191/69, as amended by Regulation No 1893/91, applied to the facts of the case, could not, under any circumstances, give rise to a right to compensation.

171 It is apparent from Article 1 of Regulation No 1191/69, in the version applicable from 1 July 1992, that only urban, suburban and regional transport undertakings were entitled to receive compensation where the State decided to impose on them or maintain in respect of them public service obligations.

172 It is not in dispute that the activity of the applicant at issue concerns the operation of inter-regional routes, so that, as from 1 July 1992, it was not possible for the State to impose public service obligations on the applicant or, in consequence, for the applicant to claim compensation for the financial burdens assumed in respect of those obligations.

173 Even if the services provided by the applicant allowed it to be treated in the same way as a regional transport undertaking, it must be stated that, in the light of the fact that the obligations to which the applicant was subject pursuant to the annual licensing decisions were not imposed on it unilaterally, they were necessarily covered by the contract system provided for in Article 14(1) and (2) of Regulation No 1191/69, in the version applicable from 1 July 1992, which laid down a specific financing scheme leaving no room for compensation according to the methods set out in Sections II, III and IV of that regulation (see, to that effect, judgment of 16 March 2004 in *Danske Busvognmænd* v *Commission*, T-157/01, ECR, EU:T:2004:76, paragraph 79).

174 In view of the above, it must be held that the applicant failed to demonstrate that the Commission committed a manifest error of assessment in finding, in the contested decision, that the Italian authorities had not unilaterally imposed on it public service obligations within the meaning of Regulation No 1191/69 for the period between 1987 and 2003.

175 The first complaint of the fourth plea in law must therefore be dismissed as unfounded.

– Second complaint, alleging that the Commission wrongly found that the applicant had not demonstrated the existence of an economic disadvantage warranting the payment of compensation within the meaning of Article 5(1) of Regulation No 1191/69

176 The applicant submits, in essence, that the Commission was wrong to find that it had not demonstrated that the existence of economic disadvantages had been determined taking into account the effects of the obligation on the undertaking's activities as a whole, in accordance with Article 5(1) of Regulation No 1191/69, since, in the present case, the risk of overcompensation was offset by the fact that the losses sustained by the applicant as a result of the public service obligations it had assumed were calculated ex post.

177 The Commission disputes the applicant's arguments and contends that this complaint should be rejected.

178 It should be noted, as the Commission did, that economic disadvantage and the risk of overcompensation are two separate concepts. Thus, under Articles 5, 10 and 11 of Regulation No 1191/69, proof of an economic disadvantage is necessary in order to determine the amount of compensation due to a transport undertaking on account of the unilateral imposition of public service obligations. On the other hand, the risk of overcompensation can be the result of a wide range of factors giving rise to a higher amount of compensation than that due to the undertaking under Regulation No 1191/69. In the present case, although the Commission indeed found that the notified measure was not consistent with Article 10 of Regulation No 1191/69, on account of the genuine lack of account separation which, in the Commission's view, was the only way to prevent the risk of overcompensation, it also found that the measure was not consistent with Article 5(1) of that regulation, because the applicant had not shown that the economic disadvantages had been determined taking into account the effects of the public service obligation on the undertaking's activities as a whole. In the absence of any specific arguments from the applicant to demonstrate that, on the contrary, it had proved that point, the present complaint must be dismissed as unfounded.

– Third complaint, based on the finding of the Commission, like that of the MIT, that the majority report wrongly concluded that the capital employed was not limited to the amount of capital attributable to public service obligations

179 The applicant criticises the Commission for finding, as the MIT did, that the majority report wrongly concluded that the capital employed was not limited to the amount of capital attributable to public service obligations.

180 The Commission disputes the applicant's arguments and contends that this complaint should be dismissed.

181 It should be noted from the outset that the applicant's complaint has no basis in fact. The applicant objects to the Commission's endorsement of the criticism levelled by the Italian authorities against the majority report concerning the amount of capital it employed in the operation of inter-regional routes subject to public service obligations. The applicant refers in that regard to recital 62 of the contested decision. That recital appears in the section of the contested decision in which the Commission summarises the observations submitted by Italy. The Italian authorities' assertion is not, however, reproduced in turn by the Commission in the section of the decision dealing with the assessment of the aid.

– Fourth complaint, alleging that the Commission wrongly found that, since there was no account separation, the notified measure was not immune from the risk of overcompensation and, therefore, was not consistent with the common method of compensation laid down in Regulation No 1191/69

182 The applicant criticises the Commission for finding that, since there was no account separation, the notified measure was not immune from the risk of overcompensation and, therefore, was not consistent with the common method of compensation laid down in Regulation No 1191/69. The applicant submits that, before 1992, it was not required to keep its accounts separate because it did not receive any compensation and, after 1992, it could not be required to keep its accounts separate because it could no longer be subject by unilateral decision to public service obligations. It states that, in those circumstances, *Antrop and Others*, cited in paragraph 136 above (EU:C:2009:290), does not apply to it. Furthermore, the applicant contends that the calculation method suggested in the majority report served to avoid all risks of overcompensation since it was based on an ex post reconstruction of the costs incurred in respect of public service obligations.

183 The Commission disputes the applicant's arguments.

184 As a preliminary remark, it should be noted that the applicant argues, in particular, that it was not required to comply with the account separation obligation laid down in Article 5(2) of Regulation No 1191/69 in so far as that regulation no longer allowed the Italian authorities to impose public service obligations on it. It also submits that *Antrop and Others*, cited in paragraph 136 above (EU:C:2009:290), does not apply to it since the Court ruled in that judgment on the detailed rules for the common method of compensation set out in Regulation No 1191/69, in the version applicable from 1 July 1992.

185 Under Article 10 of Regulation No 1191/69, as originally worded, in the case of an obligation to operate or to carry, the amount of compensation is to be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration. It follows from this provision that the amount of compensation must not exceed the financial burdens assumed by the undertaking in respect of the public service obligation for which it is responsible.

186 In addition, Article 1(5) of Regulation No 1191/69, in the version applicable from 1 July 1992, provided as follows:

‘Where a transport undertaking not only operates services subject to public service obligations but also engages in other activities, the public services must be operated as separate divisions meeting at least the following conditions:

(a) the operating accounts corresponding to each of these activities shall be separate and the proportion of the assets pertaining to each shall be used in accordance with the accounting rules in force;

…’

187 It is apparent from this provision that, in contrast to the applicant’s assertions, all transport undertakings operating services subject to public service obligations, either following the unilateral imposition of such obligations (in the case of, for example, undertakings providing urban, suburban or regional transport services) or after the conclusion of a public service contract, as well as other activities, were required to comply with the account separation obligation as from 1 July 1992.

188 Therefore, irrespective of whether or not in this case the Italian authorities infringed Articles 1 and 14 of Regulation No 1191/69, in the version applicable from 1 July 1992, by failing to conclude formally a public service contract at the end of the annual licensing procedures for the operation of inter-regional routes — which is a matter for the national court to assess, where appropriate by referring a question to the Court of Justice for a preliminary ruling — the applicant, for its part, remained bound to comply with the account separation obligation.

189 However, since, as the Court found in its examination of the first part of the fourth plea, the applicant was not entitled to claim compensation as from 1 July 1992, the question whether or not it was required to comply with the account separation obligation from that date is, in practical terms, irrelevant in the present case.

190 It nevertheless remains to be determined whether the notified measure was consistent with Article 10 of Regulation No 1191/69, as regards the period between 1987 and 30 June 1992.

191 As is apparent from recital 24 of the contested decision, in so far as no analytical accounts were available for the period between 1987 and 1992, the experts who drafted the majority report allocated the costs of operating the inter-regional scheduled transport services on the basis of the percentage of revenue generated by those services during that period. The experts took the total amount of costs from the annual financial statement for each of the financial years covered. Then, to reconstruct the

operating costs, they deducted from the total costs all of the following non-operating costs: interest payable, financial charges, losses on disposal of assets, miscellaneous losses and costs, direct taxes and final inventories. Finally, the operating costs attributable to the inter-regional scheduled transport services were calculated on the basis of the percentage of revenue generated by those services.

192 Accordingly, although the method for calculating compensation recommended in the majority report was indeed based, as the applicant submitted, on an ex post analysis of the applicant's accounts, the costs assumed in respect of inter-regional scheduled transport services were determined according to the revenue generated by those services expressed as a percentage of the applicant's revenue as a whole. As the Commission points out in recital 129 of the contested decision, such a method is based on the assumption that each service provided by the applicant should necessarily represent the same proportion of costs and revenue in a given year. As the Commission found, that assumption is, in itself, difficult to accept and it does not ensure that the amount of compensation will not exceed the financial burdens actually assumed by the applicant in respect of the public service obligations for which it was responsible between 1987 and 30 June 1992.

193 Accordingly, the applicant's fourth complaint must be dismissed as unfounded.

194 The fourth plea in law must therefore be dismissed in its entirety as unfounded.

Fifth plea in law, alleging that the Commission interfered with the judicial business of the national court by taking account, in the contested decision, of the reports of the panel of experts on which the Consiglio di Stato (Council of State) had yet to rule

195 The applicant claims that the Commission unlawfully interfered in the national judicial proceedings by taking into account, in the contested decision, the majority report and the minority report drawn up by the experts appointed by the Consiglio di Stato (Council of State) in the proceedings for enforcement of the judgment of the Consiglio di Stato, referred to in paragraph 33 above. According to the applicant, those reports are documents drawn up at the request of the Consiglio di Stato (Council of State) by experts acting as assistants to the court and their assessment is a matter solely for the court. The Commission deprived the Consiglio di Stato (Council of State) of its decision-making power by agreeing to take the panel of experts' reports into consideration — reports which were unlawfully forwarded to it by the MIT — before the Consiglio di Stato had itself ruled on them.

196 The Commission argues that this plea is inadmissible in so far as it was raised for the first time in the reply. Furthermore, it disputes the merits of the applicant's arguments and contends that the plea should be dismissed.

197 As the Commission points out, this plea was raised for the first time in the reply and the applicant has not justified that delay by claiming that new matters of fact or law have come to light. In addition, the plea does not expand upon a plea raised previously, directly or by implication, in the application initiating proceedings. Therefore, in accordance with the case-law relating to Article 48(2) of the Rules of Procedure of 2 May 1991, this plea must be dismissed as inadmissible (see judgment of 15 March 2006 in *Italy* v *Commission*, T-226/04, EU:T:2006:85, paragraph 64 and the case-law cited).

198 It must also be noted that the applicant has failed to demonstrate how the conduct of the Commission which it complains of constitutes an infringement of EU law affecting the lawfulness of the contested decision, with the result that this plea does not satisfy the requirements of Article 44(1) of the Rules of Procedure of 2 May 1991 and must, for this reason too, be regarded as inadmissible.

199 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

Costs

200 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders Simet SpA to bear its own costs and to pay the costs incurred by the European Commission.**

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 3 March 2016.

[Signatures]

Table of contents

Background to the dispute 1

Legislative and regulatory framework governing the applicant's business 2

EU law 2

National law 6

Actions brought by the applicant before the national courts 8

Administrative procedure 9

Contested decision 10

Procedure and forms of order sought by the parties 12

Law 13

Admissibility 13

Substance 14

First plea in law, alleging infringement of Article 107(1) TFEU and Regulation No 1191/69 14

– First part of the first plea in law, alleging error of fact 14

– Second part of the first plea in law, alleging manifest error of assessment or insufficient investigation as to whether the applicable national legislation was consistent with EU law 17

Second plea in law, alleging infringement of the principles governing compensation for harm suffered by individuals as a result of breaches of EU law by a Member State 19

Third plea in law, alleging infringement of the obligation to state reasons 20

– First complaint, alleging that the Commission failed to give reasons for its finding that the applicant's accounts were not reliable 21

– Second complaint, alleging that the Commission did not explain in the contested decision why, in its view, a return rate exceeding the swap rate plus 100 basis points was normally not regarded as a suitable reference for calculating reasonable profit 22

Fourth plea in law, alleging infringement of Article 107(1) TFEU, in so far as the Commission committed several manifest errors of assessment in the application of Regulation No 1191/69 23

– First complaint, alleging that the Commission wrongly found that the applicant had not been subject to public service obligations within the meaning of Regulation No 1191/69 23

– Second complaint, alleging that the Commission wrongly found that the applicant had not demonstrated the existence of an economic disadvantage warranting the payment of compensation within the meaning of Article 5(1) of Regulation No 1191/69 26

– Third complaint, based on the finding of the Commission, like that of the MIT, that the majority report wrongly concluded that the capital employed was not limited to the amount of capital attributable to public service obligations 27

– Fourth complaint, alleging that the Commission wrongly found that, since there was no account separation, the notified measure was not immune from the risk of overcompensation and, therefore, was not consistent with the common method of compensation laid down in Regulation No 1191/69 27

Fifth plea in law, alleging that the Commission interfered with the judicial business of the national court by taking account, in the contested decision, of the reports of the panel of experts on which the Consiglio di Stato (Council of State) had yet to rule 29

Costs 30