II

(Non-legislative acts)

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COMMISSION DECISION (EU) 2022/448

of 17 June 2021

on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Siremar and its acquirer Società Navigazione Siciliana

(notified under document C(2022) 4268)

(Only the Italian version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

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

(2) During the investigation phase, the Italian authorities requested the Tirrenia Group case to be split up, so that priority could be given to reaching a final decision concerning only Tirrenia di Navigazione ('Tirrenia'). This request was motivated by the Italian authorities' plan to privatise the Group, beginning with Tirrenia, and their intention to speed up the process in relation to that company.

(3) The Commission acceded to the Italian authorities' request, and by Commission Decision 2001/851/EC ([3]) it closed the procedure initiated in respect of the aid awarded to Tirrenia ('the 2001 Decision'). The aid was declared compatible subject to certain commitments by the Italian authorities.

(4) By Commission Decision 2005/163/EC ([4]) ('the 2004 Decision'), the Commission declared the compensation granted to the Tirrenia Group companies other than Tirrenia ([5]) to be partially compatible with the internal market, partially compatible conditional upon the respect of certain commitments by the Italian authorities, and partially incompatible with the internal market. The decision was based on accounting data spanning from 1992 to 2001 and included conditions to ensure the compatibility of the compensation throughout the entire duration of the initial Conventions (i.e. until 2008).

(5) By Judgment of 4 March 2009 in cases T-265/04, T-292/04 and T-504/04 ([6]) ('the 2009 Judgment') the General Court annulled the 2004 Decision.

(6) On 5 October 2011, the Commission opened a new formal investigation procedure in respect of various additional measures adopted by Italy in favour of the companies of the former Tirrenia Group ('the 2011 Decision'). The investigation concerned, inter alia, the compensations granted to Siremar – Sicilia Regionale Marittima ('Siremar') for the operation of a number of maritime routes as of 1 January 2009, and the privatisation process of the Siremar business branch (see Section 2.3.3).

(7) The 2011 Decision was published in the *Official Journal of the European Union* ([7]). The Commission invited interested parties to submit their comments on the measures under investigation.

([1]) OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.
([2]) OJ C 306, 23.10.1999, p. 2. The former Tirrenia Group consisted of the companies Tirrenia di Navigazione SpA, Adriatica SpA, Caremar – Campania Regionale Maritima SpA, Saremar – Sardegna Regionale Marittima SpA, Siremar – Sicilia Regionale Marittima SpA, and Toremar – Toscana Regionale Marittima SpA.
([3]) Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9).
([4]) Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 53, 26.2.2005, p. 29).
([5]) In particular: Adriatica, Caremar, Siremar, Saremar and Toremar.
([6]) Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.
([7]) OJ C 28, 1.2.2012, p. 18.

(8) Italy submitted its reply to the 2011 Decision by letter of 15 November 2011. As concerns the measures subject to this Decision, the Commission also received comments from Società Navigazione Siciliana SpA ('SNS'), Pan Med Lines S.r.l. ('Pan Med'), and Grandi Navi Veloci SpA ('GNV') (see Section 5). It forwarded them to Italy, which had the opportunity to react.

(9) On 10 January 2012, the Italian authorities formally notified to the Commission, allegedly for reasons of legal certainty, the draft public service contracts ('Conventions') that any future acquirer of the Tirrenia and Siremar business branches was required to sign and on the basis of which compensation for the provision of public service would be paid.

(10) On 7 November 2012, the Commission extended the investigation procedure, inter alia, in respect of (i) the illegal prolongation of rescue aid granted to Siremar, (ii) potential aid to Compagnia delle Isole ('CdI'), the first acquirer of Siremar's branch, in the context of the privatisation of the latter and (iii) public service compensations to be paid to CdI under the new Convention concluded with the Italian State. On 19 December 2012, the Commission adopted an amended version ([8]) of that Decision (the '2012 Decision', when referred to together with the 2011 Decision, the '2011 and 2012 Decisions').

(11) The 2012 Decision was published in the *Official Journal of the European Union* ([9]). The Commission invited interested parties to submit their comments on the measures under investigation.

(12) Italy submitted its reply to the 2012 Decision by letters of 7 and 13 December 2012. As concerns the measures subject to this Decision, the Commission received comments from Pan Med Lines S.r.l. ('Pan Med'), Siremar, SNS and CdI (see Sections 5 and 6). It forwarded them to Italy, which had the opportunity to react.

(13) On 5 October 2012, the Commission contracted Ecorys Netherlands BV ('Ecorys') to provide it with an estimation, based on two alternative scenarios, of the market value of the relevant assets of Siremar put up for sale (see Section 2.3.3.7). On 4 September 2013, Ecorys submitted its final report ('the First Ecorys Report'). On 27 September 2013, the Commission forwarded this report to Italy. On 18 November 2013, upon request of the Italian authorities, the Commission provided an Italian translation of the Ecorys Report. On 17 December 2013, Italy submitted its comments, including a counter-valuation by its own independent expert, Banca Profilo SpA.

(14) On 24 June 2013, the Commission sent a letter to several companies operating in the maritime sector, asking on a voluntary basis for detailed information on routes operated by Siremar in the period 2009-2012 and the conditions of its privatisation. Only CdI, which was operating the new Convention at the time, replied.

(15) By Commission Decision (EU) 2018/261 of 22 January 2014 ([10]) ('the 2014 Decision'), the Commission closed the formal investigation procedure as concerns certain measures adopted by the Region of Sardinia in favour of Saremar (see recital (36)).

(16) On 15 October 2014, the Commission's services met with representatives of Siremar and the Italian authorities. In addition, on 23 October 2014 the Commission services also met with representatives of CdI and the Italian authorities. As a follow up to the latter meeting, on 30 October 2014 CdI provided additional information to the Commission.

(17) Concerning Siremar, the Commission requested additional information from Italy by letters of 30 January 2012, 16 March 2012, 1 August 2012, 22 November 2012, 12 April 2013, 12 June 2013, 27 June 2013, 11 July 2013, 29 July 2014, 6 November 2014, 16 October 2015, 25 January 2018, 29 March 2018, 31 August 2018, 18 March 2019, 16 October 2019, 31 July 2020 and 29 October 2020.

(18) Concerning Siremar, Italy submitted additional information by letters of 28 March 2012, 5 October 2012, 23 October 2012, 13 May 2013, 8 August 2013, 19 September 2014, 20 November 2014, 12 December 2014, 12 February 2015, 13 November 2015, 18 April 2016, 2 August 2017, 26 April 2018, 31 May 2018, 29 May 2019, 26 July 2019, 3 January 2020, 24 January 2020, 8 February 2021 and 11 March 2021 ([11]).

([8]) All the amendments concerned measures in favour of Saremar.
([9]) OJ C 84, 22.3.2013, p. 58.
([10]) Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22).
([11]) Several additional informal exchanges, such as emails and conference calls, took place between the Commission and Italy throughout 2019 and 2020.

(19) By Commission Decision (EU) 2020/1411 of 2 March 2020 ([12]), the Commission concluded the investigation on the Tirrenia Group companies other than Tirrenia, including Siremar, for the period 1992-2008 (the '2020 Tirrenia Group decision'). The Commission concluded that the aid granted for the provision of maritime cabotage transport services constituted existing aid, while the aid granted for the provision of international maritime transport services was compatible with the 2011 services of general economic interest ('SGEI') Framework (the '2011 SGEI Framework') ([13]).

(20) By Commission Decision (EU) 2020/1412 of 2 March 2020 ([14]), the Commission closed the formal investigation procedure as concerns the measures granted to Tirrenia and its acquirer CIN, for the period 2009-2020 (the '2020 Tirrenia/CIN decision').

(21) This Decision concerns all the possible aid measures to Siremar, CdI, and SNS as specified in recitals (36) and (37) and as identified in the 2011 and 2012 Decisions, as well as the possible aid granted to Unicredit through the counter-guarantee (see Sections 2.3.3.5 and 3.3.2). The Commission will address all the remaining measures subject to those Decisions, under the case numbers SA.32014, SA.32015 and SA.32016 in separate Decisions. In particular, those remaining measures all concern other companies of the former Tirrenia Group (i.e. Caremar, Laziomar, Saremar and Toremar).

2. BACKGROUND AND DESCRIPTION OF THE MEASURES SUBJECT TO INVESTIGATION

2.1. General framework

2.1.1. *The initial Conventions*

(22) The Tirrenia Group was originally owned by the Italian State through the company Finanziaria per i Settori Industriale e dei Servizi SpA ('Fintecna') ([15]) and included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded in 1991 with the Italian State, in force for 20 years between January 1989 and December 2008 (the initial Conventions). Fintecna held 100 % of Tirrenia's share capital. Tirrenia wholly owned Adriatica, Caremar, Siremar, Saremar and Toremar (together, 'the regional companies'). Adriatica, which used to operate a number of routes between Italy and Albania, Croatia, Greece and Montenegro, merged with Tirrenia in 2004.

(23) The purpose of these public service contracts was to guarantee the regularity and reliability of a large number of maritime transport services, chiefly connecting mainland Italy with Sicily, Sardinia and other smaller Italian islands. To that effect, the Italian State granted financial support in the form of subsidies paid directly to each of the companies of the Tirrenia Group.

(24) Siremar, fully owned by Tirrenia, operated a series of maritime cabotage routes, both between Sicily and several smaller neighbouring islands and between Milazzo and Naples. The exact routes concerned are described in recital (41).

2.1.2. *The prolongation of the initial Conventions*

(25) The initial Conventions, including the one applicable to Siremar, were prolonged three times.

(26) Firstly, Article 26 of Decree Law No 207 of 30 December 2008 ('Decree Law 207/2008'), converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions, which were initially due to expire on 31 December 2008, until 31 December 2009.

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

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

([14]) Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45).

([15]) Fintecna is wholly owned by the Ministry of Economy and Finance ('Ministry of Economy') and is specialised in managing shareholding and privatisation processes, as well as dealing with projects to rationalise and restructure companies facing industrial, financial or organisational difficulties.

(27) Secondly, Article 19*ter* of Decree Law No 135 of 25 September 2009 ('Decree Law 135/2009'), converted into Law No 166 of 20 November 2009 ('the 2009 Law'), laid down that, in view of the privatisation of the Tirrenia Group companies, the shareholding of the regional companies, excluding Siremar, would be transferred from the parent company Tirrenia as follows:

(a) Caremar to the Region of Campania. Subsequently, the Region of Campania transferred the going concern operating the transport connections with the Pontino archipelago to the Region of Lazio (thereby setting up Laziomar) ([16]);

(b) Saremar to the Region of Sardinia;

(c) Toremar to the Region of Tuscany.

(28) The 2009 Law also specified that new 'Conventions' would be agreed between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in new 'Public Service Contracts', to be agreed between Saremar, Toremar, and Caremar and the respective regional authorities by 31 December 2009 (Sardinia and Tuscany) and 28 February 2010 (Campania and Lazio). The new Conventions or Public Service Contracts would be put up for tender jointly with the companies themselves. The new owners of each of these companies would then sign the respective Convention or Public Service Contract ([17]).

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

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

Company	Maximum annual compensation
Tirrenia	EUR 72 685 642
Siremar	EUR 55 694 895
Saremar	EUR 13 686 441
Toremar	EUR 13 005 441
Caremar	EUR 29 869 832 ([18])

Table 1 – Compensation ceilings as of 2010

(31) Finally, Law No 163 of 1 October 2010 ('the 2010 Law'), converting Decree Law No 125 of 5 August 2010 ('Decree Law 125/2010'), laid down the further prolongation of the initial Conventions, including the one applicable to Siremar, from 1 October 2010 until the completion of the privatisation processes of Tirrenia and Siremar.

2.1.3. *The privatisation of Siremar and the signing of the new Convention*

(32) In October 2010, a tender procedure was launched to find a buyer for the Siremar business branch (see Section 2.3.3). In this context, reference is made to the Siremar business branch, instead of Siremar, since the tender procedure concerned only those assets and contracts necessary to perform the public service obligations ([19]) specified in a new Convention to be concluded with the acquirer. Therefore, reference is made to 'the Siremar business branch' instead of simply 'Siremar'. Siremar's remaining assets such as the fast ship Guizzo, which were used for other purposes, were to be sold via separate procedures. Furthermore, the sale did

([16]) This transfer was formalised on 1 June 2011.
([17]) Article 19-*ter*, paragraph 10 of Decree Law 135/2009.
([18]) This amount was broken down in EUR 19 839 226, granted from Campania, and EUR 10 030 606 granted from Lazio.
([19]) Throughout this decision, the expression 'public service obligations' should be understood in a general way, without construing it in the specific meaning of Articles 2 and 4 of the Maritime Cabotage Regulation (see footnote 61) and Section 9 of the Maritime Guidelines (see footnote 110), i.e. as public service obligations as an alternative to public service contracts, i.e. without remuneration by the State. Indeed, the Commission notes that the public service obligations imposed on Siremar, CdI or SNS entailed remuneration by the State.

not result in the transfer to the purchaser of the debts accrued by Siremar until the date of sale. To this date, Siremar in Extraordinary Administration ('Siremar in EA') continues to exist as a separate entity albeit with the primary purpose of being liquidated after having reimbursed its creditors.

(33) Following its successful offer in the tender procedure, on 20 October 2011 CdI signed the contract to acquire the Siremar business branch. Then, on 30 July 2012, the new Convention for the provision of maritime services was signed by Italy and CdI. On this basis, the ownership of the Siremar business branch was transferred from the Italian State to CdI on 31 July 2012.

(34) However, SNS – the other company that had submitted a bid for the Siremar business branch – challenged the transfer before the Italian administrative tribunals, which ultimately ruled that the tender procedure had to be partially redone, excluding CdI from submitting new bids (see recitals (93) to (100)). Following a confirmation of its earlier bid, SNS thus won the renewed tender procedure, taking over the Siremar business branch and signing the new Convention with Italy on 11 April 2016.

(35) Since that date, SNS has been operating the routes under the new Convention while Siremar in EA and CdI are both being liquidated.

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

(36) The following measures have been subject to assessment in the formal investigation procedure opened by the 2011 and 2012 Decisions (see also Section 3):

(1) Compensation for the provision of SGEI under the prolongation of the initial Conventions (measure 1);

(2) Illegal prolongation of rescue aid to Tirrenia and Siremar (measure 2);

(3) The privatisation of the companies of the former Tirrenia Group ([20]) (measure 3);

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

(5) The berthing priority (measure 5);

(6) The measures laid down by the 2010 Law (measure 6);

(7) Five additional measures adopted by the Region of Sardinia in favour of Saremar (measure 7) ([21]).

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

(37) This Decision only deals with measures 1 to 6 as listed in recital (36), as far as they involve Siremar, CdI or SNS. These measures are described in more detail in the following sections.

2.3.1. *The prolongation of the initial Convention between the State and Siremar*

2.3.1.1. The public service obligations

(38) Article 1 of the initial Convention with Siremar provided for 5-year plans to detail the ports to be served, the type of vessels to be used and the required frequency of the service. The initial convention with Siremar was amended in 1994 and 1995.

(39) The first 5-year plan (1990-1994) was approved by Ministerial Decree of 29 May 1990, and applied retroactively as of 1 January 1990. The second plan, covering the period 1995-1999 and approved by Ministerial Decree of 14 May 1996, left the routes and frequencies largely unchanged.

(40) As for the 2000 – 2004 and 2005 – 2008 periods, no 5-year plans were formally adopted concerning Siremar. Instead, the network of routes and frequencies remained largely the same between 1999 and 2008. Indeed, the Inter-Ministerial Decree of 9 March 2004 ('the 2004 Decree') set out limited changes for Siremar, concerning the replacement of old ships and a capacity increase under the same frequencies ([22]).

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

([21]) Measure 7 was assessed in the 2014 Decision, with the exception of the 'Bonus Sardo – Vacanza' project.

([22]) The 2004 Decree validated certain changes to the 2000-2004 5-year Tirrenia plan and included provisions for other companies of the Tirrenia Group, including Siremar.

(41) Based on the initial Convention, as prolonged and modified (for selected routes), Siremar operated five bundles of routes all year round between 1 January 2009 and 30 July 2012, with varying frequencies and timings depending on the individual route, type of service (ferry or high-speed), and season of the year, as follows:

— On the Milazzo – Aeolian Islands – Naples bundle, which includes the islands of Vulcano, Lipari, Salina, Filicudi, Alicudi, Panarea and Stromboli ('Aeolian Islands') as well as the cities of Milazzo in Sicily and Naples in Campania, Siremar provided both ferry and high-speed services on ten individual routes ([23]);

— of 17.6.2021

— On the Palermo – Ustica bundle, Siremar provided both ferry and high-speed services on two individual routes ([24]);

— On the Porto Empedocle – Pelagie Islands bundle, which includes the islands of Linosa and Lampedusa ('Pelagie Islands'), Siremar offered ferry services on one individual route;

— On the Trapani – Pantelleria bundle, Siremar provided ferry services on one individual route.

2.3.1.2. Budget and duration

(42) The table below shows the annual compensation paid to Siremar in the period 2009 – July 2012:

Year	Compensation
2009	EUR 67 009 405
2010	EUR 55 694 895
2011	EUR 55 694 895
2012	EUR 32 348 816 (January – July) ([25])

Table 2 – Compensation 2009-2012 (EUR)

(43) The initial Convention (as modified in 1994) provides for the annual public service compensation to be paid as follows: by 1 March of each year, an initial advance payment equivalent to 70 % of the compensation paid the previous year; by 30 June, a second payment covering another 20 %; by 30 November, a final payment covering the balance of the compensation for the relevant year, based on an estimate of future revenues and losses ([26]). The final results are then verified when the company prepares the yearly statement of accounts. If it turned out that Siremar had received a sum greater than the net cost of the services provided (revenue minus losses), it was required to reimburse the difference within 15 days of the approval of the statement of accounts. After 25 November 2010, by decision of the Interdepartmental Conference on the establishment of the annual subsidy set up under Article 11 of Law No 856/1986 between the Ministry of Infrastructure and Transport (the 'Ministry of Transport'), the Ministry of Economy, and the Ministry of Economic Development (the 'Inter-departmental Conference'), any amount of overcompensation is deducted from future advance subsidy payments.

(44) The compensation was calculated differently in 2009, when compared to 2010, 2011 and 2012 as described below.

— Compensation granted in 2009

([23]) Ferry: Milazzo – Aeolian Islands – Naples; Milazzo – western and eastern Eolie and connections between islands; Milazzo-Eolie (main islands), based at Milazzo; Milazzo-Eolie (main islands), based at Lipari. High-speed: Milazzo – western and eastern Eolie and connections between islands; Milazzo-Eolie (main islands) and connections between islands, based at Milazzo; connections between islands, based at Lipari; Milazzo-Eolie and connections between islands, based at Lipari.

([24]) Ferry: Palermo – Ustica. High-speed: Ustica – Palermo.

([25]) This figure is the amount paid to Siremar until the transfer of ownership of the Siremar business branch to CdI. For the remainder of 2012, CdI was paid EUR 23 346 079. The total compensation paid for 2012 hence amounted to EUR 55 694 895, thereby respecting the compensation ceiling set by the 2009 Law.

([26]) Between 1988 and 1994, there was no second payment and the balance was due by 31 July of each year.

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

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

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

— Compensation granted in 2010, 2011 and 2012

(48) As from 2010, the compensation for the operation of the SGEI has been determined through a new methodology laid down in the CIPE ([27]) Directive of 9 November 2007 titled 'Criteria for the definition of the public service obligations and the fare dynamics in the sector of maritime cabotage of public interest' ('the CIPE Directive') ([28]). According to its Preamble, the CIPE Directive was issued in view of the upcoming privatisation of the public companies operating maritime services under a public service regime ([29]). The provisions of the CIPE Directive were applied in respect of the services provided by the companies of the Tirrenia Group as of 2010.

(49) The method laid down in the CIPE Directive allows the companies operating the maritime public service to make an appropriate return. The rate of return on capital ('return on capital' or 'ROIC') would be calculated on the basis of the weighted average cost of capital ('WACC'). The required return to equity ([30]) is to be calculated using the Capital Asset Pricing Model.

(50) On the basis of that model, the cost of equity is derived as a function of (i) the risk-free rate, (ii) the Beta (an estimate of risk profile of the company relative to equity market) and (iii) the equity risk premium assigned to the equity market.

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

(52) According to the CIPE Directive, the rate of return on risk-free activities corresponds to the average gross yield on benchmark 10-year bonds over the previous 12 months, for which data is available.

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

(54) However, the amount of compensation paid to Siremar as laid down by the 2009 Law cannot in practice exceed EUR 55 694 895 per year (see recital (30)). Although the 2009 Law caps the annual compensation paid to all Tirrenia companies for the operation of their public service obligations, the CIPE Directive includes certain safeguards to guarantee that those operators are ensured sufficient coverage of operating costs.

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

(55) In particular, according to the CIPE Directive, the scope of the services, the maximum fares and the compensation must be defined to grant the service provider full coverage of all the admissible costs, according to the following equation:

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

where:

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

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

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

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

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

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

where:

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

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

— X is a real annual rate of adjustment of the fare ceiling, laid down in the Convention or Public Service Contracts, which remains constant over the duration of the Convention or Public Service Contracts.

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

2.3.2. *Illegal prolongation of rescue aid to Siremar*

(59) On 16 November 2010, the Commission approved rescue aid to Tirrenia and Siremar ('the 2010 Decision') ([31]). The aid consisted of a guarantee on credit lines provided by private banks for an amount of up to EUR 95 000 000. Italy undertook to communicate to the Commission, no later than 6 months after the authorisation of the rescue aid measure, a restructuring plan or proof that the loan had been reimbursed in full and/or that the guarantee had been terminated.

(60) Subsequently, the private banks, *Banca Infrastrutture Innovazione e Sviluppo* ('BIIS') and Unicredit, authorised a credit line of EUR 40 000 000 to Tirrenia and Siremar (i.e. EUR 25 000 000 for Tirrenia and EUR 15 000 000 for Siremar), with the maturity date set at 30 June 2011. The State guaranteed that credit line on 15 February 2011.

(61) The financing was then disbursed as follows:

(a) the first instalment on 28 February 2011 (EUR 20 000 000 for Tirrenia and EUR 12 000 000 for Siremar);

(b) the second instalment on 23 March 2011 (EUR 5 000 000 for Tirrenia and EUR 3 000 000 for Siremar).

(62) Italy informed the Commission that, as the first instalment of the guaranteed loan was disbursed only on 28 February 2011, the 6-month period for its reimbursement according to paragraph 25(a) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Rescue and Restructuring Guidelines') ([32]) and to recitals (32) and (47) of the 2010 Decision, would elapse on 28 August 2011.

(63) Before that date, Tirrenia and Siremar defaulted on the loan and, as a result, on 11 July 2011 BIIS called the State guarantee. On this date, therefore, Siremar held a debt towards the State of EUR 15 121 838,33. This includes both the principal amount of the respective loans and outstanding interest owed to the bank.

([31]) OJ C 102, 2.4.2011, p. 1.
([32]) OJ C 244, 1.10.2004, p. 2.

(64) The Bankruptcy Court authorised the inclusion of the Ministry of Economy amongst the preferential ('prededucibili') creditors of Tirrenia and Siremar. According to the Italian authorities, the Extraordinary Commissioner entrusted with the management of the company considered at that time that Siremar could reimburse the financing by 28 August 2011, drawing from the proceeds of the planned privatisation of the Tirrenia and Siremar business branches.

(65) On 25 July 2011, the contract for the sale of the Tirrenia business branch to CIN was signed. However, the transfer of the assets and hence also the payment was delayed, mostly due to difficulties to obtain the necessary merger authorisations (first from the Commission, then by the Italian competition authority, the *Autorità Garante della Concorrenza e del Mercato* ('AGCM'). The AGCM, eventually approved the Tirrenia – CIN transaction on 21 June 2012, and the sale was finalised on 19 July 2012. On 20 October 2011, the contract for the sale of Siremar business branch to CdI was signed. However, the transfer of those assets was also delayed, in this case until 1 August 2012 (see recitals (93) to (95)). On 18 September 2012, Siremar repaid its debt to the State, including interest, for a total amount of EUR 15 511 529,35.

2.3.3. *Siremar's privatisation, the counter-guarantee, and the increase in CdI's capital*

(66) On 23 December 2009, Fintecna published the first call for tenders for the sale of the entire share capital of Tirrenia, including its subsidiary Siremar. On 19 February 2010, 16 expressions of interests had been received from 19 entities. On 4 August 2010, after the failure of the negotiations with the only bidder having submitted a binding offer, Fintecna declared the procedure closed. According to Italy, the negotiations failed due to concerns related to the financial elements of the offer.

(67) After the failure of the first privatisation attempt, Tirrenia and Siremar, facing severe financial difficulties, were both admitted into the collective insolvency procedure provided for under Italian law for large companies, the so-called extraordinary administration procedure ('amministrazione straordinaria') and were soon thereafter declared insolvent. More specifically, Siremar was admitted to the extraordinary administration procedure on 17 September 2010. On 5 October 2010, the Court of Rome delivered judgment No 381/2010 by which it declared Siremar insolvent.

2.3.3.1. The rules of the extraordinary administration procedure

(68) Unlike the normal bankruptcy procedure, whose primary aim is to liquidate the insolvent company in order to satisfy claims of the creditors, the extraordinary administration procedure, laid down by Decree Law No 270 of 8 July 1999 ('Decree Law 270/1999'), is a specific insolvency procedure for large companies, which aims to safeguard the assets and ensure the continuation of the business.

(69) Under this procedure, the management of the insolvent company is transferred to an Extraordinary Commissioner who is appointed by the responsible Ministry. The Extraordinary Commissioner proposes a recovery plan of the business in question, either by its restructuring or by the sale of its assets. The plan is subject to previous authorisation by the responsible Ministry, whilst considering the opinion of a Supervisory Board (whose members are experts appointed by the Ministry).

(70) The Decree Law No 347 of 23 December 2003 laying down urgent measures for the restructuring of large insolvent companies ('Decree Law 347/2003'), converted with amendments into Law No 39 of 18 February 2004 (the 'Marzano law'), regulates the extraordinary administration procedure applicable to large insolvent companies, which intend to undergo this restructuring procedure. These companies also need to satisfy cumulatively certain criteria concerning the number of employees in the preceding year and the level of indebtedness.

(71) The procedure requires that the insolvent company file both an application to the Italian Minister for Economic Development and a petition to the competent bankruptcy Court. The Ministry then decides on the admission of the insolvent company to the procedure and appoints the Extraordinary Commissioner under the supervision of the Supervisory Board, while the bankruptcy Court ascertains the state of insolvency of the company.

(72) Within 180 days of his appointment, the Extraordinary Commissioner must submit a restructuring plan to the Ministry. The ordinary bankruptcy procedure is only triggered in case the Ministry does not approve such restructuring plan and the alternative asset sale procedure is not viable.

(73) Article 4 (4-*quater*) of Decree Law No 134 of 28 August 2008 ('Decree Law 134/2008'), converted into Law No 166 of 27 October 2008, concerning urgent measures for the restructuring of large insolvent companies ('Disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi'), introduced several amendments to the Marzano law. These amendments are applicable to companies providing essential public services, and concern, inter alia, the possibility for the Extraordinary Commissioner to identify a buyer of the insolvent company's assets

through a negotiation procedure with parties that guarantee both continuity of the public service on the medium term and an expeditious intervention. Decree Law 134/2008 specifies that the sale price cannot be lower than the market value of the assets as set by an independent expert appointed by Ministerial decree.

(74) Decree Law 134/2008 also introduced the possibility to pursue an asset disposal plan immediately, as compared to the previous regime, which required that the company first submit a restructuring plan to the Ministry. Finally, Decree Law 134/2008 lays down that, in case neither an asset disposal plan nor a restructuring plan can be implemented or approved by the Ministry, the company will undergo the ordinary bankruptcy procedure.

2.3.3.2. The sale procedure

(75) On 4 October 2010, the call for tenders for the sale of the Siremar business branch ([33]) bundled together with the new 12-year Convention was published. The aim of this call was to check whether there were any potential national or international entities interested in acquiring the Siremar business branch that were able to guarantee the continuity of the transport services. It was published on Siremar's website, several newspapers ([34]) and on selected specialist websites ([35]). The deadline for submitting expressions of interest in the purchase of the Siremar business branch was 20 October 2010.

(76) On expiry of the deadline, six parties (two of which jointly) had submitted five expressions of interest to participate in the Siremar tender. All of these parties demonstrated that they met the requirement set out in the tender notice. Therefore, the Extraordinary Commissioner invited them to perform an in-depth due diligence check on the Siremar business branch. Access to the relevant documentation was granted on the condition that the interested parties signed confidentiality agreements.

(77) One of the six parties decided to not take part in the due diligence phase ([36]). During that phase, the remaining five parties (two of which jointly bidding) accessed the virtual data rooms containing the following:

(a) detailed technical, legal and financial information of the business branch put up for sale;

(b) the business plan of the Siremar business branch, prepared by the Extraordinary Commissioner;

(c) the vendor's due diligence report and the balance sheet of the company on the date of admission to the extraordinary administration procedure;

(d) the new draft 12-year Convention to be signed between the successful bidder and the State;

(e) additional information required so that potential buyers may valuate correctly the object of the sale.

(78) By Ministerial Decree of 4 February 2011, the Minister for Economic Development appointed Banca Profilo SpA as the independent expert tasked with performing a valuation of both the Tirrenia and the Siremar business branches under Article 4(4-*quater)* of Decree Law 347/2003. On 8 March 2011, Banca Profilo SpA estimated the value of the Siremar business branch as equal to EUR 55 million. This information was uploaded to the data room for all potential bidders before expiry of the deadline for the submission of binding offers.

(79) On 15 March 2011, at the expiry of the initial deadline for submission of binding offers, the Extraordinary Commissioner of Siremar noted that it had not received any offer consistent with the provisions of the tender regulations. The procedure was therefore reopened, with a new deadline of 5 April 2011. At that date, CdI issued an offer of EUR 60,1 million, while Ustica Lines asked for a prolongation of the deadline, to secure the necessary financing to issue its own offer. The extraordinary commissioner uploaded CdI's offer to the data room and invited the other participants to improve it by 23 May 2011. The following offers were received by that date:

(a) EUR 69 million offer by CdI, of which EUR 20 million payable upfront and the remaining deferred over 10 years (with 1,5 % interest);

(b) EUR 55,1 million offer by SNS, of which EUR 30,1 million payable upfront and the remaining deferred over 8 years (with 1,5 % interest).

([33]) See recital (32) for more background on the use of the term 'business branch' in this context.
([34]) The Financial Times, Il Corriere della Sera, Il Sole 24 Ore, La Repubblica, Il Giornale, Il Mattino, Il Giornale di Sicilia, La Sicilia and La Gazzetta del Sud.
([35]) Delloyd, Naftemporiki, Fairplay, Lloyd's List and Tradewinds.
([36]) That party was D.B. Real Estate 2 S.r.l.

(80) CdI was set up for the purpose of bidding in the procedure by Mediterranea Holding di Navigazione SpA ('Mediterranea'), Davimar Eolia Navigazione S.r.l. ('Davimar'), Navigazione Generale Italiana SpA ([37]) ('NGI'), Lauro.it SpA, Isolemar S.r.l. and Riccardo Sanges & C. S.r.l. ([38]) Mediterranea held a 60 % equity stake in CdI ([39]). The other shareholders who held the remaining 40 % of CdI's equity were privately owned. Mediterranea had participated in the procedure for the first privatisation attempt of Tirrenia (see recital (66)) and was owned by the Region of Sicily ('Sicily') (43,02 %), by Lauro.it SpA (34,36 %), by Isolemar S.r.l. (14,61 %) and by Acies S.r.l. (8,11 %).

(81) SNS was set up for the purpose of bidding in the procedure by Ustica Lines SpA ([40]) and Caronte & Tourist SpA ([41]) (50 % share each).

(82) On 26 July 2011, following further requests for information to the two bidders, with deadline of 18 July 2011, the financial advisor to the procedure made the following remarks:

(a) CdI's offer was higher in absolute terms than that of SNS, however the risk profile of the latter was lower than that of the former;

(b) the part of the sale price offered upfront by SNS, i.e. EUR 30,1 million, was entirely guaranteed, whereas the part of the sale price offered by CdI, i.e. EUR 20 million, was only partly guaranteed;

(c) SNS had already approved and implemented a EUR 25 million capital increase, as compared to the EUR 12 million capital increase which had been approved but only partially implemented by CdI.

(83) On 3 August 2011, Sicily issued an unconditional and irrevocable counter-guarantee to Unicredit, against no remuneration, for EUR 40 million. That counter-guarantee notes that Unicredit had conditioned the granting of a guarantee to CdI for EUR 39 million on the granting of a counter-guarantee for EUR 40 million by Sicily.

(84) On 5 August 2011, CdI forwarded to the Extraordinary Commissioner a comfort letter, issued on the same day by Unicredit, by which the bank undertook to guarantee the deferred instalments of the sale price offered by CdI up to EUR 39 million ([42]). Unicredit's comfort letter spells out that the guarantee was conditional on: 1) the signing by CdI of the sale contract of the Siremar business branch before the deadline of 31 December 2011, and 2) the verification of the powers of the General Accountant of Sicily to issue the counter-guarantee.

(85) The financial advisor and other consultants involved in the procedure confirmed that the documents had been submitted by CdI after the deadline of 18 July 2011 for the submission of additional clarifications and documentary evidence and could not therefore be taken into account. Consequently, on 29 August 2011, the Supervisory Board to Siremar in EA approved the awarding of the business branch to SNS and on 1 September 2011, the Extraordinary Commissioner asked the responsible Ministry to authorise that awarding.

(86) On 2, 6 and 7 September 2011 Sicily sent letters to the same Ministry, stressing that CdI had offered the highest price and was partly owned by Sicily, which should be considered a sufficient guarantee as to its financial stability. Sicily also sent directly to the Ministry: Unicredit's comfort letter, its own counter-guarantee, and legal advice testifying to the powers of the General Accountant to issue that counter-guarantee. On 8 September 2011, the Ministry asked the Extraordinary Commissioner to provide further information and clarifications on CdI's submission, without prejudice to the lateness of submission of the documents concerned. On 22 September 2011, the financial advisor communicated to the Extraordinary Commissioner that, notwithstanding non-observance by CdI of the procedural deadlines, the new documentation reduced CdI's risk profile considerably, which meant that the present value of SNS's offer could no longer be considered more advantageous than that of CdI.

(87) On 26 September 2011, the Ministry inquired with the *Presidenza del Consiglio* on whether the counter-guarantee of CdI's financial obligations by Sicily could raise any State aid concerns. The *Presidenza del Consiglio* confirmed that, since Unicredit had conditioned its decision to provide a guarantee on a counter-guarantee by Sicily, the counter-guarantee needed to be assessed under the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ('the Guarantee Notice') ([43]).

([37]) Currently part of the Caronte & Tourist group.
([38]) Later changed its name to Sicilia Occidentale Marittima S.r.l.
([39]) Later increased to 65,32 %.
([40]) On 13 April 2016, Ustica Lines changed its name to Liberty Lines.
([41]) On 1 September 2016, SNS split between Caronte & Tourist, which operates the mixed services routes of the new Convention, and Liberty Lines, which operates the passenger-only routes of the new Convention. Each company is currently operating the respective lines autonomously, with SNS SpA becoming *SNS Società Consortile per Azioni* and merely acting as a coordination centre for relations with the Italian and Sicilian authorities.
([42]) The comfort letter is the promise of issuing a formal guarantee contract ('*fidejussione*') in the future, under certain circumstances. However, Unicredit's comfort letter binds the sender and can be therefore considered a guarantee under State aid law.
([43]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

(88) On 27 September 2011, the Extraordinary Commissioner requested authorisation from the Ministry to launch an additional phase of the procedure. After receiving such authorisation, on 29 September 2011 the financial advisor invited CdI and SNS to submit new and improved binding offers by 13 October 2011.

(89) CdI submitted a new and improved offer, structured as follows:

(a) EUR 69,15 million sale price, payable EUR 34,65 million upfront and the remaining deferred (EUR 13,8 million at the end of the third year, EUR 10,35 million at the end of the sixth year, EUR 10,35 million at the end of the eighth year, with 1,5 % interest);

(b) As guarantee of the sale price: comfort letter of 12 October 2011 by Unicredit (undertaking to guarantee the amount of the deferred payments of the new sale price offered by CdI, i.e. EUR 34,5 million); notary authentication of the shareholders' resolution to increase capital up to EUR 21,48 million (see Section 2.3.3.4); two letters of MPS Capital Services, committing to finance the first instalment of the sale price (up to EUR 20 million) and prolonging the previous EUR 5 million guarantee on the offer of 23 May 2011.

(90) SNS confirmed the offer it had submitted on 23 May 2011.

(91) On 13 October 2011, the extraordinary administration and its consultants noted that the bid by CdI was consistent with the value of the business branch as estimated by Banca Profilo and was financially more advantageous than the offer made by SNS. Furthermore, the business plan attached to CdI's offer was compliant with the requirements and there was adequate evidence to prove that CDI could ensure the continuity of the maritime public service. Therefore, the Extraordinary Commissioner asked the Ministry to award the tender to CdI.

(92) On 14 October 2011, the Supervisory Board delivered its favourable opinion and the Ministry authorised the award of the tender to CdI.

(93) On 20 October 2011, Siremar's Extraordinary Commissioner and CdI signed the contract for the sale of the Siremar business branch. However, on 22 November 2011, SNS appealed the Extraordinary Commissioner's decision to award the business branch to CdI before the *Tribunale Amministrativo Regionale* of Lazio ('TAR').

(94) On 7 June 2012, the TAR of Lazio ruled that the counter-guarantee by Sicily to Unicredit of part of the sale price offered by CdI constituted State aid, irrespective of whether it had been ultimately executed or withdrawn ('decision 5172/2012'). The TAR declared the sale procedure of the Siremar business branch partially void ([44]).

(95) Mediterranea appealed that decision at the *Consiglio di Stato* (the 'CdS'). By interim order of 18 July 2012, the latter suspended the execution of decision 5172/2012 (without ruling on the substance of the appeal). Therefore, on 30 July 2012, CdI signed the new Convention for the operation of the public service, and on 1 August 2012, the Extraordinary Commissioner transferred the Siremar business branch to CdI.

(96) On 7 February 2014, the CdS ruled on the substance of the appeal lodged by Mediterranea and concluded that the counter-guarantee provided by Sicily had not observed the transparency and non-discrimination principles laid down by the national legislation ('decision 592/14'). In its decision, the CdS ruled that the counter-guarantee had jeopardised the full effectiveness of the non-discrimination principle between the two participants to the tender and declared, therefore, the sale procedure of the Siremar business branch partially void (by annulling the act of award of the tender to CdI). In particular, the guarantee by Unicredit was de facto conditional on the issuing of the counter-guarantee by Sicily, even if the former did not explicitly mention the latter (see Section 2.3.3.5).

(97) The sale contract signed by CdI with the Italian State following the tender was not annulled by the judgment of the CdS. Indeed, the latter only annulled the award, as it was an administrative act, but neither annulled the sale contract nor the new Convention, which were civil law contracts. Therefore, CdI continued operating the public service as laid down in the new Convention ([45]).

(98) On 9 February 2015, upon request from the Italian authorities and SNS, the TAR of Lazio ruled on the interpretation of its earlier decision of June 2012 and the decision of February 2014 by the CdS ('decision 2351/15'). In its decision, the TAR of Lazio ruled that the last phase of the Siremar sale procedure needed to be re-launched

([44]) In particular, decision 5172/2012 annulled the authorisation from the Ministry to the Extraordinary Commissioner to award the business branch to CdI.

([45]) CdI also appealed decision 592/14, both for retraction by the CdS itself (rejected on 4 July 2014), and for annulment by the *Corte di Cassazione* (rejected on 12 January 2016, with publication of the ruling on 4 February 2016).

from 29 September 2011 onwards ([46]). The TAR of Lazio confirmed that CdI should be excluded from this new phase of the procedure. The TAR of Lazio also ruled that the Ministry of Economy had to take the necessary measures to allow the re-launch of the procedure within 120 days from the date of the judgment.

(99) In order to implement the judgment of the TAR of Lazio, Siremar in EA:

— excluded CdI's offer from the procedure;

— verified with SNS that its offer of 23 May 2011 of EUR 55,1 million was still standing (confirmed by SNS on 19 January 2016);

— checked that SNS' offer was compliant with the necessary requirements in terms of provision of public services and with the applicable legislation;

— verified the value of the assets through a new report commissioned to Ecorys (the 'Second Ecorys Report'), which estimated a value of EUR 34,4-39,9 million (see recital (122));

— rescinded the sale contract of the business branch with CdI and transferred to SNS the debt of EUR 37,1 million, already paid by CdI ([47]);

— after receiving on 6 April 2016 the authorisation of the Ministry, awarded the business branch to SNS on 11 April 2016.

(100) On the same date, SNS and the Ministry of Transport signed the new convention.

2.3.3.3. The sale contract with SNS

(101) The sale contract between Siremar in EA and SNS defines the Siremar business branch transferred as the branch of the company dedicated to the provision of maritime transport services under the ongoing public service obligations ([48]). In particular, Article 4 spells out that the assets of the business branch are listed in an annex, and cover all intangible ([49]) and tangible assets ([50]) used by the company in the discharge of its public service obligations.

(102) Under Article 5 of the sale contract, the EUR 55,1 million sale price is payable as follows:

(a) EUR 37,1 million as of the signing of the sale contract (through the transfer of the obligation to reimburse CdI);

(b) The remaining deferred as follows, with interest of 1,5 %: EUR 9 million, after 72 months; EUR 9 million, after 96 months.

(103) Article 7(6)(d) of the sale contract lays down that the buyer is capable, in compliance with Article 4, paragraph 4-*quarter* of Decree Law 347/2003, to guarantee continuity of service in the medium term.

(104) Article 7(9) of the sale contract spells out that the buyer will make new job offers to all the administrative and crew personnel occupied in the operation of the public service obligations, taking into account the qualifications acquired and/or the equivalence of the job descriptions, as well as possible agreements with the trade unions. That article also spells out that, as required by Article 63(2) of Decree Law 270/1999, the buyer has to refrain from any non-disciplinary dismissals for a 2-year period (the 'workforce condition'). Under Article 7(11) and (12) of the sale contract, the buyer is obliged to regularly inform the seller on the observance of these obligations, with significant penalties to be paid in case of breaches.

(105) Article 8(12) of the sale contract spells out that, in accordance with Article 63(5) of Decree Law 270/1999, the new owner will not be liable to repay any of the debts incurred by Siremar before the transfer of the business branch.

([46]) That was the date when the financial advisor invited CdI and SNS to submit a final incremental offer, as a result of the acceptance of the guarantee (and counter-guarantee) submitted by CdI on 5 August 2011 by Siremar in EA (see recital (88)).
([47]) EUR 34,6 million, plus interest and inflation.
([48]) The earlier sale contract concluded between Siremar in EA and CdI has very similar provisions and conditions. Most of the differences between the contracts are a result of the different context to the transfer, notably the different price and timing.
([49]) Patent and intellectual property rights; concessions, licenses, trademarks and similar rights; other intangible assets.
([50]) Systems and machinery; industrial and commercial equipment; other tangible assets.

2.3.3.4. The capital increase

(106) On 13 October 2011, CdI's shareholders committed to increase its capital up to EUR 21 480 236. On 3 February 2012, Mediterranea, the majority shareholder with over 60 % of CdI's shares, undertook a capital increase itself, which resulted in Sicily no longer being a majority shareholder, with its share being reduced to approximately 43 %.

(107) CdI's capital increase happened while Sicily was the majority shareholder of Mediterranea, which in turn was (and still is) the majority shareholder of CdI. The objective of the capital increase was to acquire the Siremar business branch and operate the new convention.

2.3.3.5. The counter-guarantee

(108) In the course of the privatisation, Sicily issued a counter-guarantee in favour of Unicredit.

(109) Firstly, on 3 August 2011, as described in recital (83), Sicily issued a counter-guarantee in favour of Unicredit, which allowed the latter to issue 2 days later a first comfort letter undertaking to guarantee the deferred instalments of the sale price offered by CdI (i.e. EUR 39 million). That letter explicitly conditioned the validity of its guarantee to the validity of the counter-guarantee by Sicily.

(110) Secondly, on 7 October 2011, in a later stage of the procedure, Sicily confirmed its availability to counter-guarantee the deferred payments of the new sale price up to an amount of EUR 34,6 million. On 12 October 2011, Sicily modified the counter-guarantee of 3 August 2011, guaranteeing payments up to EUR 36 million. On the same day, Unicredit issued the second comfort letter that was included in the successful offer by CdI described in recital (89), without mentioning that the counter-guarantee by Sicily was still standing, as amended.

(111) On 20 November 2011, Sicily's counter-guarantee was replaced by a counter-guarantee by all of CdI's shareholders. On 31 January 2012, Sicily sent a letter to Siremar in EA stating that the counter-guarantee of 12 October 2011 is to be considered recalled. On 3 February 2012, Unicredit issued a note confirming that its guarantee of the deferred instalments of the sale price was not conditional on a counter-guarantee by Sicily.

2.3.3.6. The Banca Profilo Study

(112) As described above (see recital (78)), Banca Profilo was appointed by the Minister for Economic Development as the independent expert tasked with performing a valuation of the Siremar business branch under Article 4(4-quater) of the Marzano law. On 8 March 2011, Banca Profilo issued a report in which it described the valuation methodologies and data it had used, which included Siremar's own business plan for the period 2011-2022. This report included an estimated range of values for the Siremar business branch.

(113) Banca Profilo's valuations are based on several assumptions including, most notably, that the new public service contract would apply until its expiry and that as a result the Siremar business branch would receive public service compensation for operating the maritime transport connections laid down in that contract. In its valuation report, Banca Profilo uses the Discounted Cash Flow ('DCF') and the Economic Added Value ('EAV') methods as its main methodologies and to the Market Multiples and Equity methods as secondary methodologies for control purposes.

(114) Under the DCF methodology, Banca Profilo takes into account: (i) the cash flows generated until the expiry date of the new Convention; (ii) the liquidation value of the Siremar business branch on the day of expiry of the new Convention, based on the assumption that it will not be possible to continue the operations after that date. Under the EAV methodology, Banca Profilo assesses: (i) the adjusted book value; (ii) the badwill/goodwill; (iii) the liquidation value of the Siremar business branch on the day of expiry of the new Convention. This assessment relies on data from the company's industrial plan and on Banca Profilo's own calculations.

(115) With regard to the secondary methodologies, these entailed the following. The Market Multiples analysis is based on Banca Profilo's calculations using Bloomberg data for nine comparable maritime transport companies. The Equity Method consists of an appraisal of the net value of the assets as recorded in the balance sheet but with some adjustments on assets and liabilities and adding the estimated value of immaterial assets.

(116) Banca Profilo concluded that the value of the Siremar business branch at the time of its appraisal was in the range of EUR 55 to 61 million. As a result, the minimum price for this company would have to be set at EUR 55 million.

2.3.3.7. The First Ecorys Report and Second Ecorys Report

(117) In the course of the investigation, the Commission entrusted Ecorys with the task of establishing the market value of the Siremar business branch. The consultant was asked to (i) establish the market value of the Siremar business branch bundled with the new Convention, (ii) establish the market value of the business branch without any conditions attached and (iii) establish whether the workforce condition depressed the sale price.

(118) To determine the value of the Siremar business branch bundled with the new Convention, the First Ecorys Report applied the main methodologies also used by Banca Profilo. In particular, Ecorys applied the Discounted Cash Flow and the Economic Value Added methodologies.

(119) Firstly, Ecorys concluded that, had the Siremar business branch been sold without any conditions attached, and in particular without the new contract for the operation of the public service, the company would have been sold at its liquidation value ([51]). i.e. EUR – 0,3 million. Ecorys noted that this liquidation value is negative and indicated that therefore immediate liquidation (in essence a sale of the ships) was not a viable alternative for a market economy operator. Ecorys based this conclusion on the assumption that the Siremar business branch could not profitably continue its operations without public service compensation. Ecorys described the public-service routes operated by both Tirrenia and Siremar as 'heavily loss-making operations characterised by low passenger volumes and fully dependent on funding from the Conventions'. Furthermore, Ecorys considered that 'the possibility to change the quality of the services and more headroom to set ticket prices are not sufficient conditions to make these routes economically viable from a business point of view'.

(120) Secondly, in order to evaluate the Siremar business branch bundled with the new Convention, Ecorys assumed that the new Convention would not be prolonged at its expiry date and that therefore Siremar would be liquidated ([52]). On this basis, Ecorys determined that the minimum market value of the Siremar business branch amounted to EUR 57 million (i.e. 5 % higher than Banca Profilo's valuation).

(121) Thirdly, Ecorys compared the staffing of both the Tirrenia and the Siremar business branches with that of several comparable ferry companies and concluded that Siremar's staff number and personnel cost structure are 'not dissimilar from these comparable companies, with reference to the labour cost's share of total revenues ([53]) and the labour cost/staff ratio' ([54]). On this basis, Ecorys concluded that there are no elements showing that the workforce condition has had any significant impact on the value of the Siremar business branch.

(122) As explained in recital (99), Italy also commissioned the Second Ecorys Report before concluding the sale procedure with SNS, to verify that the renewed offer of the latter reflected the market value of the business branch, endowed with the public service contract, as of 31 August 2015. This Second Ecorys Report, issued on 28 October 2015, applied the Discounted Cash Flow method as its main evaluation tool and the Equity Method to check the robustness of their findings. The new estimate by Ecorys was EUR 34,4 million with the Discounted Cash Flow method, with the assumption that the new convention would be in force until 31 July 2024. Should the new convention be prolonged until 31 July 2026, the estimated value of the Siremar business branch would then be EUR 35,7 million. The Equity Valuation method yielded an estimate of EUR 39,9 million.

(123) Finally, that report was complemented by a comparison of the two business plans prepared by SNS: a first one, covering the period 2011-2022 and written in May 2011, and a second one, covering the period 2016-2027 and written in February 2016. Ecorys concluded that the two plans were not identical in their assumptions and did not include the same level of detail (e.g., the second business plan did not include the list of routes and frequencies). In particular, the main differences between the plans were: the assumptions on the use of the fleet, on amortisations, on staff costs; and the use of previous data from CdI, which was not available in the first business plan. Ecorys also prepared a one-page assessment confirming to the Italian authorities the internal logical consistency of SNS' second business plan for the period 2016-2027.

([51]) Ecorys calculated this value as the difference between the costs incurred to dismiss all staff and the adjusted net value of the assets of the Siremar business branch. The analysis led to an assessment of the liquidation value of Siremar's assets of EUR – 0,3 million. The severance costs, amounting to EUR 36,6 million, more than offset the market value of the adjusted net assets.

([52]) Ecorys noted that while such prolongation cannot be excluded, the uncertainties and lack of any reliable information as to the conditions of any future renewal made it reasonable to assess the value of the Siremar business branch regardless of any possible future extension of the public service regime.

([53]) Ecorys considers that this ratio indicates whether the labour cost has a significant incidence in the budget of the Siremar business branch, in comparison with similar companies.

([54]) Ecorys considers that this ratio indicates whether the labour cost of the Siremar business branch is disproportionate as compared to similar companies.

2.3.4. *The new Convention*

2.3.4.1. The beneficiary

(124) Initially, CdI was the successful bidder for the Siremar business branch and signed the new Convention for the operation of maritime routes on 30 July 2012. Then, on 11 April 2016, SNS replaced CdI and started operating the same routes.

2.3.4.2. The routes

(125) Under the new Convention, CdI and later SNS had to provide passenger and ferry services on 20 cabotage routes divided in 5 bundles, sometimes with different frequencies and/or routes between the high season and the low season ([55]) (see Table 3).

Ferry connections (mixed)	Passenger connections (fast ships)
Milazzo – Aeolian Islands – Naples bundle	
C/1: Milazzo – Vulcano – Lipari – Rinella – Panarea – Ginostra – Stromboli – Naples and back (all year, two connections per week) C/2: Milazzo – Vulcano – Lipari – Rinella – Salina and back (all year, one connection per day, no service on Sunday in the low season) C/3: Milazzo – Vulcano – Lipari – Salina – Panarea – Ginostra – Stromboli and back (all year, two connections per week) C/4: Milazzo – Vulcano – Lipari – Salina – Rinella – Filicudi – Alicudi and back (all year, five connections per week in the high season and four per week in the low season) C/6: Lipari –Vulcano – Milazzo and back (all year, one connection per day)	ALC/2: Milazzo – Vulcano – Lipari – Rinella – Salina and back (all year, at least one connection per day) ALC/3: Milazzo – Vulcano – Lipari – Salina – Panarea – Ginostra – Stromboli and back (all year, at least one connection per day) ALC/4: Milazzo – Vulcano – Lipari – Salina – Rinella – Filicudi – Alicudi and back (all year, at least one connection per day) ALC/6: Lipari –Vulcano – Milazzo and back (all year, one connection per day) ALC/2 BIS: Lipari – Rinella – Salina – Lipari (all year, four connections per week in the high season, three per week and one per day up to Salina in the low season)
Palermo – Ustica bundle	
D/1: Palermo – Ustica and back (all year, one connection per day)	ALD/1: Ustica – Palermo and back (all year, at least one connection per day)
Trapani – Egadi Islands bundle	
D/2: Trapani – Favignana – Levanzo – Marettimo and back (all year, at least one connection per day) D/3: Trapani – Favignana – Levanzo – Trapani (all year, two connections per day in the high season, 12 per week and less frequent connections to Levanzo in the low season)	ALD/2: Trapani – Favignana – Levanzo – Marettimo and back (all year, two connections per day) ALD/3: Trapani – Favignana – Levanzo – Trapani (all year, at least one connection per day) ALD/2 BIS: Marettimo – Levanzo – Favignana – Trapani and back (all year, at least one connection per day) ALD/3 BIS: Trapani – Favignana – Levanzo – Trapani (all year, at least two connections per day)

([55]) Throughout this decision, the term 'high season' indicates the summer, while the term 'low season' indicates the much longer rest of the year.

Ferry connections (mixed)	Passenger connections (fast ships)
Trapani – Pantelleria bundle	
D/4: Trapani – Pantelleria and back (all year, one connection per day in the high season, six per week in the low season)	
Porto Empedocle – Pelagie Islands bundle	
D/5: Porto Empedocle – Linosa – Lampedusa and back (all year, six connections per week)	

Table 3 – Routes operated by CdI and later SNS under the new Convention

(126) Annex A to the new Convention details how each of the routes in Table 3 are to be operated (e.g. type of ships, seasonal frequency). In addition, the fares charged to the users cannot exceed the limits set by Article 6 of the new Convention and detailed in the same Annex A.

2.3.4.3. Duration

(127) Both the new Convention between Sicily and CdI and that between Sicily and SNS have a duration of 12 years. The contract with SNS entered into force on 12 April 2016 and will expire on 11 April 2028.

2.3.4.4. The public service obligations

(128) The public service obligations imposed concern the maritime transport links to be operated (see recital (125)), the type and capacity of the vessels assigned to the respective maritime routes operated, the availability of a backup ship to ensure continuity of service, the frequency of service, and the maximum fares charged to users of the service on each of the respective routes.

2.3.4.5. The compensation

(129) The yearly compensation to be received by the company entrusted with the public service obligations defined in the new Convention is capped by law at EUR 55 694 895. The amount of compensation is to be determined based on the methodology laid down by the CIPE Directive (see recitals (48) to (58)). The compensation was paid to the two companies as follows:

	Compensation paid to CdI	Compensation paid to SNS
2012	EUR 23 346 079 (August-December)	—
2013	EUR 55 694 895	—
2014	EUR 55 694 895	—
2015	EUR 55 694 895	—
2016	EUR 15 397 836	EUR 40 297 059
2017	—	EUR 55 694 895
2018	—	EUR 55 694 895
2019	—	EUR 55 694 895

Table 4 – Compensation 2012-2019

(130) Article 8 of the new Convention provides for a regular 3-year review of the scope of the subsidised activities, to verify that there is no financial imbalance. Additionally, Article 9 of the new Convention lays down that, under very specific circumstances of unexpected and structural changes to the revenues or the costs, and in any event, only after the first year of each 3-year period, the parties may trigger such a review earlier.

2.3.5. *The berthing priority*

(131) Article 19-*ter*, paragraph 21 of Decree Law 135/2009 laid down that, in order to guarantee the territorial continuity with the islands and in light of their public service obligations, the companies of the former Tirrenia Group, including Siremar, would keep the berthing already allocated and the priority in the allocation of new slots, in line with the procedures set forth by the Italian Maritime Authorities as established by Law No 84 of 28 January 1994 and the Italian Maritime Code.

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

(132) The 2010 Law laid down the possibility for the undertakings of the former Tirrenia Group, including Siremar, to use the financial resources already committed to the upgrade and modernisation of the fleet ([56]), to cover pressing liquidity needs. In particular, drawing from two facilities ([57]), EUR 23 750 000 had already been set aside to pay for the upgrades of the entire Tirrenia Group, of which EUR 7 215 800 for Siremar. The undertakings of the former Tirrenia Group that used these funds for liquidity purposes were required to later return them, so that the necessary upgrades to the ships could still take place. Those upgrades were necessary to meet certain international safety standards following the 1996 Stockholm Agreement ([58]).

(133) In addition, the 2010 Law also laid down the following:

(a) The initial Conventions are prolonged as from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar (see also recital (31));

(b) Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law, is amended by the introduction of paragraph 24-*bis*. According to that paragraph, all official acts and operations pursuant to paragraphs 1-15 of Article 19-*ter* of Decree Law 135/2009 benefit from fiscal exemption. Those paragraphs relate to the liberalisation of the maritime cabotage sector through the privatisation of the Tirrenia group;

(c) In order to ensure the continuity of the public service and to support the privatisation process of the former Tirrenia group companies, the relevant regions may make use of the resources of the *Fondo Aree Sottoutilizzate* ('FAS') ([59]) pursuant to CIPE Directive No 1/2009 of 6 March 2009 ([60]).

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

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

(135) In their letter of 28 April 2009, the Italian authorities provided a detailed reply:

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

— Arguing that the public service compensation granted to the Tirrenia Group was necessary to ensure territorial continuity with the islands through maritime links which are not provided by private operators on the market;

([56]) As laid down by Article 19, paragraph 13-*bis* of Decree Law 78/2009, converted into Law 102/2009 ('Law 102/2009'), and by paragraph 19 of Article 19-*ter* of Decree Law 135/2009.

([57]) All the funds (i.e. EUR 7 000 000) provisioned by paragraph 19 of Article 19-*ter* of Decree Law 135/2009 and EUR 16 750 000 from the funds provisioned by Law 102/2009.

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

([59]) The FAS is a national fund that supports the implementation of Italian Regional policy.

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

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

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

— Giving an overview of the routes operated by the companies of the Tirrenia Group during 2008 and the reduced number of routes the Tirrenia Group companies would operate in 2009. According to the Italian authorities, the latter routes would form the basis for the new Conventions that were to be concluded with the new owners of the Tirrenia Group companies.

(136) On 21 December 2009, the Commission's Director-General responsible for energy and transport sent a letter to the Italian authorities noting, inter alia, that:

— Against the background of the radical overhauling of the maritime cabotage sector in Italy, and because of the sizable social impact the privatisation would have entailed, according to the Italian authorities, if the tenders were carried out on a simple public service contract basis, tendering out the shipping companies endowed with such contracts was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the criterion of non-discrimination among Community ship-owners laid down in Council Regulation (EEC) No 3577/92 ([61]) ('the Maritime Cabotage Regulation');

— Public service compensation had to be restricted to those lines in which the continuous presence of other operators all the year round was limited. In that regard, clarifications were asked about the market failure on certain routes operated by Tirrenia and Caremar. The letter also pointed out that only the inclusion of domestic lines (and not international lines) in a public service contract may be justified on the basis of the territorial continuity objective;

— The public service contracts of the Tirrenia group expired on 31 December 2008 and the privatisation planned by Italy may take longer than foreseen. The letter therefore pointed to the possibility of sending a letter of formal notice for wrong implementation of the Maritime Cabotage Regulation.

(137) On 22 January 2010, the Italian authorities replied to the Commission services' letter of 21 December 2009:

— Taking note that the Commission agreed in principle to the proposed approach for privatising the Tirrenia Group together with new public service contracts;

— Providing explanations on the routes for which the Commission had raised a number of questions;

— Mentioning that the call for expressions of interest for the sale of Tirrenia (including Siremar) had been published on 23 December 2009. Italy indicated that it intended to complete the privatisation of the entire Tirrenia Group by 30 September 2010;

— Asking the Commission to confirm that the arguments provided with regard to the market failure were sufficient.

(138) On 29 January 2010 ([62]), the Commission sent a letter of formal notice regarding the infringement of the Maritime Cabotage Regulation. In this letter, the Commission recalled that that Regulation requires that whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community ship-owners. According to Article 4(3) of the Maritime Cabotage Regulation, existing public service contracts may remain in force up to the expiry date of the

([61]) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7). The Commission notes that the Maritime Cabotage Regulation does not require Member States to privatise their maritime transport companies but only to liberalise this specific market.

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

relevant contract. However, the Commission noted that the companies of the Tirrenia Group continued to operate maritime transport services after the expiry of the respective public service contracts (the initial Conventions). In particular, those Conventions were due to expire at the end of 2008 but were repeatedly prolonged by Italy. Therefore, the Commission invited the Italian authorities to present their observations.

(139) Also on 29 January 2010, the Commission's Director-General responsible for energy and transport replied to the Italian authorities' letter of 22 January 2010. The Director-General indicated that the justifications provided concerning the lines operated by Tirrenia were sufficient to remove the doubts expressed earlier. Furthermore, the Director-General noted positively that, following his earlier request, Italy had removed an international connection from the new draft Convention for Tirrenia. With respect to the questions raised concerning routes operated by Caremar, only for some of these routes the justifications were considered sufficient. Italy was therefore asked to provide further clarifications about some of Caremar's routes. The Director-General recalled that public service contracts can only cover routes for which there is a market failure. The Director-General also emphasised that his reply only concerned the compliance with the Maritime Cabotage Regulation and not any State aid issues.

(140) On 29 March 2010, the Italian authorities replied to the Commission's letter of formal notice of 29 January 2010:

— Recalling that the Commission services, by their letter of 21 December 2009 (see recital (136)), in principle agreed to the privatisation of the Tirrenia Group by means of the bundling of the companies with new public service contracts;

— Noting that the prolongation of the initial Conventions was motivated only by the need to ensure continuity in the operation of the maritime public service until completion of the respective privatisation processes;

— Confirming their intention to carry out the privatisation process by 30 September 2010 so as to liberalise the maritime cabotage sector by that date;

— Providing an overview of the privatisation process for Tirrenia (including Siremar). In particular, Italy indicated that following the publication of the call for expressions of interest, 16 expressions of interest had been submitted on 19 February 2010 by 19 entities. As part of the due diligence phase, a data room had been opened on 22 March 2010 and would remain open until end of May 2010. At that time, Italy expected that the sale contract could be signed by mid-July 2010 and that the ownership would be transferred by September 2010;

— Clarified that in the tender procedure for Toremar, 11 interested parties would take part in the next phases of that procedure;

— Pointed out that the continued uncertainty that would arise as a result of continuing the infringement procedure may jeopardise the privatisation processes and also negatively affect the value of the companies put up for tender;

— Offered full cooperation with the Commission to clarify any remaining doubts with respect to both the infringement procedure and possible State aid issues.

(141) On 10 September 2010, the Italian authorities informed the Commission during an ad hoc meeting, that the procedure for the privatisation of Tirrenia and Siremar had been cancelled at the final stage and that, consequently, the deadline of 30 September would not be met. In addition, the Italian authorities reported that the competitive procedures for the contracts of Caremar, Saremar, Siremar and Toremar were also delayed. Subsequently, the 2010 Law further prolonged the initial Conventions until the completion of the privatisation processes of Tirrenia and Siremar.

(142) Following these developments, the Commission sent a complementary letter of formal notice on 24 November 2010. In that letter, the Commission:

— Noted that the initial Conventions of Tirrenia, Siremar, Caremar, Saremar and Toremar were extended automatically and without any competitive procedure;

— Pointed out that while the public service contracts in question continued to be applied, no competitive procedure had been completed;

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

(143) On 21 June 2012, the Commission adopted a reasoned opinion concerning the delay of privatisation of three companies (Caremar, Laziomar and Saremar) of the former Tirrenia Group. Since the tender procedures for the other three companies (Tirrenia, Toremar and Siremar) had been completed in the course of 2011 ([63]) those companies were not covered by the reasoned opinion. The Commission noted that Italy had not put in place competitive procedures for the award of public service contracts for maritime cabotage operated by the companies Caremar, Laziomar and Saremar, more than 3 years after the normal expiry of the respective initial Conventions. On the contrary, those Conventions had been extended automatically and indefinitely thereby preventing other Community shipowners from competing for the award of those contracts.

(144) On 8 August 2012, the Italian authorities replied to the reasoned opinion stating that tender notices for the award of the companies endowed with new public service contracts were or would soon be published in the *Official Journal of the European Union*. In particular, for Caremar the notice was published on 20 July 2012 and for Laziomar the notice was sent for publication on 1 August 2012. Finally, for Saremar a law was adopted on 2 August 2012 that required publication of such a notice by 2 October 2012.

(145) On 13 January 2014, Compagnia Laziale di Navigazione became the new owner of Laziomar and signed a 10-year public service contract for links with the Pontine archipelago. On 16 July 2015, ATI SNAV-Rifim took ownership of Caremar and was entrusted with a 9-year public service contract. Finally, following the 2014 Decision, Saremar was put into liquidation and the public service contract for the routes between Sardinia and small islands was awarded to Delcomar in March 2016.

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

3. GROUNDS FOR INITIATING AND EXTENDING THE PROCEDURE

3.1. **The prolongation of the initial Convention between the State and Siremar**

3.1.1. *Compliance with Altmark and existence of aid*

(147) In its 2011 Decision, the Commission took the preliminary view that the definition of the public service obligations had not been sufficiently clear and hence did not allow the Commission to definitely conclude whether it contained manifest error. In particular, even if the Italian authorities argued that Siremar's competitors on the routes falling within the scope of the SGEI mission were operators equally providing maritime services under public compensation, without a prior definition of the level of the services required, the Commission could not conclude on whether there was a real need for a public service on these routes.

(148) The Commission took the preliminary view that the second criterion of the Altmark judgment ([64]) was met, as the parameters at the basis of the calculation of the compensation had been established in advance and observed the transparency requirements. In particular, the Commission noted that these parameters are described in the initial Convention (for compensation concerning the year 2009) and in the CIPE Directive (for compensation from 2010 onwards).

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

(150) The Commission also took the preliminary view that the fourth Altmark criterion was not met inasmuch as the prolongation of the initial Conventions had not been tendered out. The Commission moreover noted it had not received any evidence to support the argument that Siremar in fact provided the services at stake at the least cost to the community.

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

(152) In the 2012 Decision, the Commission considered that to the extent that all conditions had remained unchanged in 2012 and until the entry into force of the new Convention, the compensation granted to Siremar since 1 January 2012 under the further prolongation of the initial Convention also constitutes State aid.

([63]) Even if the formal transfer of ownership of Tirrenia, Toremar and Siremar only occurred in 2012.
([64]) See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

3.1.2. *Compatibility*

(153) In the 2011 Decision, the Commission took the preliminary view that the public service compensation for the years 2009-2011 falls outside the scope of both the 2005 SGEI Decision ([65]) and the 2005 SGEI Framework ([66]). The Commission therefore assessed that measure directly under Article 106(2) TFEU and found it had doubts on whether the applicable compatibility conditions were fulfilled.

(154) In the 2012 Decision, the Commission noted that on 31 January 2012, a new SGEI package consisting of the 2011 SGEI Decision ([67]) and 2011 SGEI Framework had entered into force. The Commission however took the preliminary view that the public service compensation under the prolongation of the initial Convention could not be considered compatible with the internal market and exempted from the notification requirement under the 2011 SGEI Decision.

(155) The 2010 Law provided for the prolongation of the initial Convention from 30 September 2010 up to the end of the privatisation process. Siremar was in difficulty at the moment of adoption of the 2010 Law (see recital (67)). As a result, the compensation received by the company as of 1 October 2010 until its privatisation could not be assessed on the basis of the 2011 SGEI Framework. Instead, based on paragraph 9 of the 2011 SGEI Framework, the Commission took the preliminary view that this aid should be assessed on the basis of the 2004 Rescue and Restructuring Guidelines.

(156) The Commission noted that the compatibility criteria laid down by the 2004 Rescue and Restructuring Guidelines were not met in this case and therefore took the preliminary view that the compensation paid to Siremar in difficulty would amount to incompatible restructuring aid.

3.2. **Illegal prolongation of rescue aid to Siremar**

(157) In the 2012 Decision, the Commission took the preliminary view that the rescue aid had been illegally prolonged from 28 August 2011 until 18 September 2012 and that the prolongation of the rescue aid during this period constituted incompatible aid to Tirrenia and Siremar and possibly also to their respective buyers. In particular, the Commission noted that Italy had not submitted a restructuring or liquidation plan within 6 months after the disbursement of the first instalment of the rescue aid to these companies, as required by the 2004 R&R Guidelines. The Commission considered that the conditions for an extension of the rescue aid as laid down in the 2004 R&R Guidelines were also not fulfilled.

3.3. **Siremar's privatisation, the counter-guarantee, and the increase in CdI's capital**

3.3.1. *Siremar's privatisation*

(158) In the 2011 Decision, the Commission expressed its doubts that the tender procedure for the sale of the Siremar business branch had been sufficiently transparent and unconditional so as to ensure that the sale took place at market price.

(159) First, the Commission noted that although the call for expression of interest was published in several newspapers and on a number of websites, the call did not seem to detail the scope of the sale and did not give bidders any clear instructions as to the subsequent phases of the procedure. The call also did not seem to contain any pre-qualification or selection criteria or any other conditions that had to be met by the bidders apart from the mandatory condition to continue to provide the public service. Furthermore, all relevant information as regards the assets subject to the sale procedure was made available to the bidders only during the due diligence phase.

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

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

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

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

(161) The sale procedures of the Tirrenia and Siremar business branches were based on the procedure laid down by the Marzano law (see recital (70)). Therefore, the Commission assessed the two procedures together. It considered that the sale of the business branches entrusted with the new Conventions resulted in an obligation on the buyers to provide the public service subject to pre-established quality, frequency and fare obligations laid down by the new Conventions. By imposing such obligations, it seemed to the Commission that the State did not seek to obtain the highest price, but rather to pursue public interest objectives. The Commission considered it was highly unlikely that a private vendor would have given the same significance to the uninterrupted operation of the public service.

(162) Likewise, the Commission considered that a private vendor, operating under normal market conditions, would not have imposed the obligation to maintain employment levels for 2 years.

(163) For the above reasons, the Commission preliminarily concluded that the privatisation procedure of the Siremar business branch had not been sufficiently transparent and unconditional so as to ensure by itself that the sale took place at market price. Therefore, the Commission could not exclude that an economic advantage was conferred either to the sold economic activity or to the buyer.

(164) The Commission also considered, based on the available information, that any aid that might have arisen in the course of the privatisation process would have been incompatible.

3.3.2. *The counter-guarantee*

(165) In the 2012 Decision, the Commission took the preliminary view that the counter-guarantee by Sicily of the deferred instalments of the sale price for the Siremar business branch may have constituted aid to CdI as the borrower and to Unicredit as first guarantor.

(166) Indeed, the counter-guarantee seemed to have allowed CdI to benefit from a guarantee which otherwise would not have been granted or would have been granted on different, less favourable terms. The Commission noted that, based on the information available, the counter-guarantee did not seem to have been remunerated.

(167) Moreover, the Commission noted that the position of the General Accountant appeared to be such as to influence the decision-making process in Sicily. Given his involvement in the day-to-day management of Mediterranea, and the latter's significant share in CdI's capital, the Commission considered it was likely that the counter-guarantee was granted to favour CdI in the sale process, rather than on market terms.

(168) The Commission also noted that the documents submitted by Italy to prove that the counter-guarantee had not produced any effects did not pre-date the award of the tender to CdI. On the contrary, both documents were issued after SNS had submitted a complaint to the Commission.

(169) Finally, the Commission considered that the counter-guarantee might have also procured an economic advantage to Unicredit, as first guarantor, by decreasing the risks associated with its own guarantee, unless the counter-guarantee was remunerated by an appropriate premium.

(170) On the basis of the considerations above, the Commission took the preliminary view that the counter-guarantee may have constituted aid to Unicredit and CdI.

3.3.3. *The increase in CdI's capital*

(171) In the 2012 Decision, the Commission considered that the capital increase by Mediterranea could have conferred an advantage to CdI, to the extent that Sicily had not behaved like a private market investor. Moreover, the Commission considered that the capital increase by Mediterranea was financed by State resources and was imputable to the State.

(172) Therefore, the Commission took the preliminary view that the capital increase may have constituted aid to CdI.

3.3.4. *Compatibility*

(173) In the 2011 Decision, the Commission considered, based on the available information, that any aid that might have arisen in the course of the privatisation process would have been incompatible.

(174) In the 2012 Decision, the Commission considered, based on the available information, that both the counter-guarantee and the increase in CdI's capital might have constituted operating aid, which is in principle incompatible with the internal market.

3.4. **The new Convention between the Italian State and CdI**

(175) In the 2012 Decision, the Commission took the preliminary view that the compensation to the purchaser of the Siremar business branch (at the time, CdI), did not fulfil the criteria laid down in the Altmark Judgment and therefore amounted to aid within the meaning of Article 107(1) TFEU.

(176) The Commission came to this conclusion based on these considerations:

(a) competitors who seemed to be offering similar services were present at least on certain routes operated by CdI;

(b) the calculation of the compensation pursuant to the CIPE Directive appeared to have resulted in the operator being overcompensated for the provision of the public service for the same reasons expressed in the 2011 Decision;

(c) the fourth criterion of the Altmark Judgment ([68]) was seemingly not observed, given that the Siremar business branch endowed with a new Convention, rather than the public service contract in itself, had been tendered out and it had not been shown that this enabled the selection of the tenderer capable of providing the services at the least cost to the community.

(177) With respect to the compatibility of the compensation to CdI, the Commission first assessed it under the 2011 SGEI Decision. However, as the contract duration seemed to be longer than 10 years and as it had doubts on the proportionality of the compensation, it took the preliminary view that the compensation could not be considered compatible on the basis of the 2011 SGEI Decision. The Commission then assessed the compatibility of the aid under the 2011 SGEI Framework, and found that it had doubts on whether all the compatibility conditions of that Framework were fulfilled.

3.5. **The berthing priority**

(178) In the 2011 Decision, the Commission took the preliminary view that to the extent that the berthing priority is not remunerated, the measure is a regulatory advantage that does not involve any transfer of State resources and cannot therefore qualify as State aid. If the berthing priority is remunerated, the Commission considered that, to the extent that Siremar provides a genuine SGEI and that this priority is only granted in relation to routes covered by that SGEI, it would not result in an additional economic advantage since it would be intrinsic to the provision of the SGEI.

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

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

(180) In the 2011 Decision, the Commission took the preliminary view that the measures laid down by the 2010 Law constituted State aid in favour of the companies of the former Tirrenia Group, including Siremar. These measures were: (1) the possible use, for liquidity purposes, of the funds earmarked for the upgrade of the ships; (2) the fiscal exemptions related to the privatisation process; (3) the possible use of FAS resources. Indeed, the Commission noted that all the abovementioned measures allowed the companies of the former Tirrenia Group to avoid costs which would ordinarily have to be borne by means of their own financial resources. As a consequence, those companies were able to improve their overall financial situation.

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

4. **COMMENTS FROM ITALY**

(182) After the 2011 and 2012 Decisions, Italy submitted several letters and documents on all the measures that are assessed in this Decision. This section summarises the main arguments and contributions presented ([69]).

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

(183) Italy provided a list of routes operated by Siremar that are subject to public service obligations, including the seasonal frequency and timetables, the competitive environment and the reasons leading to the imposition of public service obligations.

(184) As regards the existence of a genuine SGEI, Italy noted that the public service obligations it imposed on Siremar and later CdI and SNS ensure, in terms of regularity, continuity and quality, a satisfactory service connecting Sicily with its smaller islands. This service contributes to the economic development of those islands, while at the same time guaranteeing the essential mobility needs of the island communities and ensuring that the constitutionally guaranteed right to territorial continuity is respected. In this context, Italy noted that the public service obligations are fully in line with the objectives of Articles 174 et seq. TFEU and Declaration No 30 on island regions (annexed to the Final Act of the Amsterdam Treaty). Italy also referred to the jurisprudence of the Court of Justice

([68]) For a detailed description of the criterion, see recital (303)(d).
([69]) Italy also referred extensively to the comments of the Extraordinary Administration, presented in Section 5.1.

of the European Union (the 'Court of Justice') which confirms that the aim of ensuring that there are sufficient regular shipping services to islands, from islands and between islands, is covered by a legitimate public interest objective ([70]).

(185) In particular, Italy pointed out that structural conditions on all of these routes require the imposition of public service obligations to guarantee territorial continuity. The five route bundles described in recital (41) are considered 'metropolitan maritime areas': the population of all of those islands depends on the main island of Sicily for the provision of essential services and employment. At the same time, the tourist business is relevant only in the high season. Therefore, shipping companies have a commercial interest in operating the routes only in the high season. In the low season, the demand from tourists almost disappears, to the point where it is impossible to operate any of these routes profitably with the regularity and frequency required to satisfy the user demand.

(186) Against this background, both Siremar and other operators, selected by Sicily through open tender procedures, have been assigned public service obligations to ensure reliable and stable connections between these islands and between them and Sicily. Non-subsidised operators could not ensure territorial continuity, because they would only operate these connections in the high season. Moreover, Italy pointed out that the ships operated by CdI and later SNS frequently dock in the islands at night, with higher costs, to provide the very first connection in the morning for residents commuting for either education or work and to ensure connections in cases of medical emergencies.

(187) Additionally, Italy claimed that the services operated by companies subject to public service obligations and those operated by companies carrying out business activity freely would not be fully comparable. In particular, only the former would guarantee the regularity, continuity and quality of the services provided thanks to clear obligations laid down in the Conventions, while private operators would be dependent solely on the calculation of their return on investment. In this regard, Italy gave the example of the route La Maddalena – Palau, operated by Enermar on commercial terms, which was discontinued without prior notice. Saremar, on the contrary, which operated this route under a public service contract, was required to continue its service and hence effectively ensured territorial continuity.

(188) Finally, Italy pointed out that in the 2004 Decision ([71]), the Commission had already established that on the five route bundles operated by Siremar, no other private operator could address the public service needs, in particular in terms of continuity of service throughout the year and of the type of ships to be used. Therefore, there was a need for public compensation to address an evident market failure. Italy then clarified that this situation had not changed in the intervening years.

4.2. **On the potential illegal prolongation of rescue aid to Siremar**

(189) The Italian authorities recall that they had informed the Commission, by letter of 16 May 2011, that Tirrenia and Siremar in EA would reimburse the State-guaranteed loans after completion of the sale of the Tirrenia and Siremar business branches, using the proceeds from either sales, as there was one Extraordinary Administration and one Extraordinary Commissioner covering both companies. Given that both sale procedures were under way in the spring of 2011 and that on 25 July 2011, CIN had signed the contract for the sale of the Tirrenia business branch, both the Italian authorities and Siremar in EA were confident that the aid could be repaid by the deadline of 28 August 2011.

(190) However, subsequent events unexpectedly delayed the completion of the sale of the Tirrenia and Siremar business branches. In particular, the sale of the Tirrenia business branch had been delayed due to the need to obtain merger approval from the Commission (see recital (65)), while the sale of the Siremar business branch was delayed by the relaunches of the procedure and related litigation described in Section 2.3.3.2. As a result, Siremar in EA had to continue to operate its services for considerably longer than planned, bearing the related costs. According to Italy, the liquidation plan for Siremar was available on the website of the Extraordinary Administration before the expiry of the 6-month time limit established by the 2004 R&R Guidelines. Italy adds that the Commission was at all times kept up to date of the progress of the privatisation process. The entire amount due from both Tirrenia and Siremar, including interest, was paid back to the State a mere 48 days after the Extraordinary Administration received the first payment from the sale of the Tirrenia and Siremar business branches.

([70]) See Case C-205/99 Analir and others, ECLI:EU:C:2001:107, paragraphs 27-28.
([71]) Italy referred in particular to recitals 105-110 and 123-153 of the 2004 Decision.

4.3. **On the privatisation of the Siremar business branch**

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

(191) Italy stressed that the privatisation of the Siremar business branch was conducted in compliance with the Marzano law. Although the law in question refers to the possibility of identifying the buyer through private negotiation, this would not preclude observance of the principles of openness, transparency and non-discrimination. Moreover, in this case there are other legal provisions that explicitly require transparent and non-discriminatory competitive procedures to be organised. In particular, Article 1(5-*bis*)(b) of the 2010 Law would require the Extraordinary Commissioner to restrict proceedings to 'the minimum time that is possible under the extraordinary administration procedure while complying with the competitive, transparent and non-discriminatory procedure required for the sales'.

(192) The procedure provided for in Article 4 (4-*quater*) of Decree Law 347/2003, according to Italy, offered additional guarantees in terms of transparency and non-discrimination, in particular given the valuation of the market price of the business branch put up for sale by an independent expert and the selection of the most advantageous offer in terms of price.

(193) Italy claimed that all parties had equal access to all the information necessary to clearly identify the assets put up for sale and prepare an offer. Indeed, the sale concerned the assets and contractual relations inherent in the provision of the public service, as follows:

(a) vessels and auxiliary equipment necessary for the discharge of the public service obligations;

(b) contracts with strategic suppliers for the services necessary for the normal running of the business;

(c) a legal requirement to make a proposal for the re-employment of the staff necessary to operate the business on the basis of the fleet manning tables (see recital (195) for more detail).

(194) Italy has also clarified that one of Siremar's vessels, which was not necessary for the provision of the public service, was sold under a separate sale procedure. This vessel was hence not included in the tender for the Siremar business branch (see also Section 4.3.2).

(195) As concerns specifically the obligation to maintain employment levels, Italy stressed that the sale of the Tirrenia and Siremar business branches did not fall within the scope of Article 2112 of the Civil Code and thus there was no automatic transfer of staff (with their existing contracts) to the successful bidders. The only legal obligation on the successful bidders was to re-employ the staff of the seller (on the basis of new contracts) and maintain employment levels for 2 years, as required by Article 63(2) of Decree Law 270/1999. This however did not mean that Siremar's employees would be automatically transferred to the buyer. In addition, this obligation is limited to staff that, according to the business plan and the manning tables of the vessels of the business branch, were deemed essential for the continued operation of the public service.

(196) Italy claimed that such obligation, imposed by general domestic law, and which serves to ensure the continuity of business and the performance of the public service, would have been imposed on the same terms by a private vendor.

(197) Following the publication of the call for expressions of interest in Italian and in English on the website of the Extraordinary Administration and in a number of national and international newspapers and specialist websites, five expressions of interest were received (see recitals (76) and (77)). Italy considers that this demonstrates that the content of this call made it possible to clearly identify what was being sold and the nature of the procedure to be followed, while at the same time safeguarding commercially sensitive information (primarily to protect the interests of potential buyers). During the due diligence phase, the entities were then provided with detailed information concerning among others the specific assets for sale, the business plan, and the draft new Convention (see recital (77)).

(198) Therefore, Italy claimed that all entities interested in acquiring the Siremar business branch were provided in a transparent and non-discriminatory manner with the information required to make a purchase offer in full knowledge of the facts.

4.3.2. *On the sale of the assets not in scope of the Siremar business branch*

(199) Italy explained that the Extraordinary Commissioner launched independent, transparent and non-discriminatory tender processes for the sale of the seven ships ([72]), which Tirrenia and Siremar did not need to operate the public service. On 10 December 2010, calls for expression of interest were published in national and international newspapers and also in some specialised publications. On the expiry of the deadline, which had been extended

([72]) In particular, two tender procedures were organised: one procedure for Tirrenia's fast ferries Aries, Taurus, Capricorn, Scorpio, Scatto and Siremar's fast ferry Guizzo; and a separate procedure for Tirrenia's motor ship Domiziana.

twice, only offers for demolition purposes had been received for the six fast ferries, including Siremar's. Attempts were made to acquire higher offers but no such offers were received. On 12 and 14 July 2011, after receiving authorisation from the Ministry of Economic Development, the Extraordinary Commissioner sold the ships to the bidder who had made the highest offer.

4.3.3. *On the bundling of the assets of the Siremar business branch with a new Convention*

(200) Firstly, Italy argued that the decision to privatise the assets together with the entrustment of the public service obligation was taken with a view to ensure a smooth liberalisation of the maritime cabotage sector. Italy mentions that this strategy was discussed with the Commission in advance (see Section 2.4) and was deemed to be in principle in line with the Maritime Cabotage Regulation.

(201) Additionally, Italy considered that, given the prevailing market conditions at the time, it was appropriate to bundle the assets of the Tirrenia and Siremar business branches with new Conventions. In a time of recession and significant decline in demand for the maritime transport sector, the possibility to use the fleet of the business branches to operate the public service routes laid down in the new Conventions would constitute viable business opportunities rather than a factor that would lower the market value of the business branches. Therefore, Italy considered that this could not have negatively affected the tender procedure and the resulting price.

(202) In this regard, Italy recalled that of the seven ships not included in the scope of the Tirrenia and Siremar business branch (see recital (199)), six had to be sold for demolition purposes. Italy considers that in light of the complexity of the maritime transport market and the economic downturn at the time, it was impossible to achieve a better price for the company's assets, even if the tender process had been repeated or if the assets had not been bundled with the new Convention.

(203) Finally, Italy pointed out that neither SNS nor other sector operators had a fleet and crews of the size and specifications required for the provision of the services laid down in the new Convention ([73]). The only way to successfully entrust these services was therefore to bundle them with the assets of the Siremar business branch, so that the operator would have been properly equipped to carry out its public service obligations.

4.3.4. *On the appointment of the independent expert*

(204) Italy claimed that, on 16 December 2010, five leading financial institutions with no exposure to the Tirrenia Group were invited to submit offers for the valuation of the Siremar business branch. None of the institutions invited submitted a bid by the deadline set.

(205) Banca Profilo subsequently expressed an interest in taking on the task of independent advisor under the same conditions as laid down in the selection procedure. By Decree of 4 February 2011, the Minister identified Banca Profilo as the independent expert for the purpose of assessing the market value of the Tirrenia and Siremar business branches.

4.3.5. *On the transparency of the procedure*

(206) Italy described the sale procedure for the Siremar business branch and the judgments by the Italian administrative tribunals (see Section 2.3.3.2), which confirmed that the general principles of competitiveness, transparency and non-discrimination had been respected. The procedure followed was that laid down by Article 4 (4 quarter) of Decree Law 347/2003 and allowed the full satisfaction of the objectives of the Extraordinary Administration, including obtaining the highest possible price from the sale. This is due to certain safeguards included in the procedure, including in particular the existence of a minimum price established by an independent expert. Moreover, all parties that had expressed their interest in the procedure were timely provided with all the relevant information which would allow them to submit an offer.

(207) Italy also confirmed that the award criterion in case of multiple bids was the highest price, as set out in the specific rules applicable to the procedure.

4.3.6. *On the First and Second Ecorys report*

(208) In the course of the investigation Italy was invited to comment (see recital (13)) on the First Ecorys report. Italy agreed with the conclusion of Ecorys that neither the bundling of the privatisation with the award of the new Convention nor the workforce condition lowered the market value of the Siremar business branch.

([73]) As of 2010, the Siremar business branch included 18 ships and almost 500 employees.

(209) With respect to the aforementioned bundling, Italy referred in particular to Ecorys' statement that, at the time of the sale, the only alternative to a sale of the assets under the public service regime was the liquidation of the Siremar business branch. Italy also reiterated that at a time of crisis in the ferry sector characterised by a significant drop in demand, the possibility of using Siremar's fleet for the public service routes identified in the Convention constituted a valid business opportunity, rather than a factor likely to reduce the value of the assets.

(210) With respect to the workforce condition, Italy highlighted Ecorys' conclusion that there are no elements showing that this condition had any significant impact on the value of the Siremar business branch. Italy further recalled that this condition derived from Article 63(2) of Decree Law 270/1999 and only concerned the employees required to guarantee the operation of the business concerned, in compliance with the fleet manning tables. The fleet manning tables (i) lay down the qualitative and quantitative composition of the crew required to operate the vessel in accordance with maritime safety laws, (ii) are set by Ministerial Decree; and (iii) are prepared by a committee that includes, in a consultative role, organisations representing workers and ship-owners. Moreover, Italy added that while the buyer of the Siremar business branch had to offer employment to all employees that are required to guarantee the operation of the public service, this was based on different employment contracts than those that had been in place before.

(211) More generally on the value of the business branch, the First Ecorys Report concluded that the estimated value of the Siremar business branch could have been approximately 4,6 % higher than the value put forward by the expert appointed by the Italian authorities, Banca Profilo. However, Italy considered that this difference could be explained because both experts had to rely on forecasts for several technical parameters and that by nature there is a margin of difference in such forecasts. Moreover, Italy noted that, thanks to the presence of two bids from SNS and CdI, the price achieved in the first transfer to CdI (EUR 69,15 million) was EUR 14 million higher than the minimum price set by Banca Profilo. The Italian authorities also submitted a counter-valuation, prepared by Banca Profilo, which explained the differences with the Ecorys report in detail, arguing that its own assumptions better reflected the situation under examination ([74]).

(212) Additionally, Italy noted that the transfer of ownership over the Siremar business branch took place more than 2 years after the reference date used by both Banca Profilo and Ecorys for their valuations. During that period, the value of the assets of the Siremar business branch depreciated and the economic outlook worsened significantly. For this reason, Italy concluded that there could be no doubts that, on the date when the sale of the Siremar business branch to CdI was completed, the price conditions agreed by the parties fully reflected the market value of the corporate assets.

(213) Finally, for the later stages of the privatisation procedure, Italy also submitted the Second Ecorys Report, which confirmed that the offer by SNS was in line with the market value of the Siremar business branch, as updated more than 4 years after its first assessment (see Section 2.3.3.7). Therefore, even if the final sale to SNS in 2016 took place at a lower price than that included in the First Ecorys Report, which, for procedural rules, the Extraordinary Administration had to ignore, Italy considers that the price conditions agreed by the parties fully reflected the market value of the corporate assets for sale.

4.3.7. *On national litigation and the final award to SNS*

(214) Italy submitted several letters to inform the Commission on the various steps of national litigation at the administrative tribunals and of the final award of the Siremar business branch to SNS (see recitals (93) to (100)).

(215) Italy claimed that these developments do not put into question the open, transparent, and non-discriminatory nature of the procedure for the sale of the Siremar business branch (see Section 4.3.5). Indeed, Italy stressed that the rulings by the Italian administrative tribunals did not declare the set-up and execution of the sale procedure flawed, but rather focused on one element of CdI's bid, i.e. the counter-guarantee, which was not known by Siremar in EA when the tender was first awarded to CdI ([75]). Therefore, Italy concluded that, by applying decision 592/14 as described in recitals (96) to (100), the procedure had been correctly finalised with the award of the business branch to SNS.

([74]) In particular, these differences concern the risk-free and market-risk rates, the betas and cost of debt. For instance, Banca Profilo used the 10-year Italian government bond rates as the risk-free rate since the Siremar business branch operates exclusively in Italy. Ecorys however used the lower German government bond rates but which according to Banca Profilo underestimate the capital cost of the business branch. Additionally, for the Market Risk Premium, both Ecorys and Banca Profilo used the one for Italy, but the latter added a 1 % Specific Risk linked to the fact that Siremar operates only in Sicily, which would be riskier than Italy's average.

([75]) As the comfort letter issued by Unicredit did not mention the existence of any counter-guarantee.

4.4. **On the compliance of the new Convention with the Altmark criteria**

(216) Italy reiterated that it had notified the public service compensation to be paid under the new Convention only for reasons of legal certainty, since it considered this measure not to constitute State aid (see recital (9)). In particular, the Italian authorities argued that the four Altmark criteria are complied with for the following reasons:

(a) The maritime transport services as defined by the Italian authorities in the new Convention are essential for the economic development of Sicily's smaller islands while also meeting the essential transport needs of those island communities, ensuring respect of the right to territorial continuity, enshrined in the Italian Constitution. The new Convention clearly sets out the services, the ships, the time schedules and tariff constraints. Therefore, Italy argued that the public service obligations are clearly defined and that the first Altmark criterion is complied with;

(b) The parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the new Convention (and annexes thereto), while the maximum compensation amounts are laid down in the 2009 Law. Therefore, Italy argued that these parameters were established in advance in an objective and transparent manner and that the second Altmark criterion is respected;

(c) The operator of the public service bears all the risks of the activity (see also Section 4.5) against a fixed amount of subsidy, with no certainty of full coverage of their costs. For this reason, Italy argued that the risk premium of 6,5 % is in line with the activity, without resulting in overcompensation of the public service. Therefore, also the third Altmark criterion is deemed to be complied with;

(d) The Siremar business branch was privatised by means of an open tender procedure, covering the assets necessary to provide the public service and bundled together with a new 12-year Convention for the operation of that service. Since the tender procedure respected the principles of competition, transparency and non-discrimination and the award criterion was the highest price, Italy argued that also the fourth Altmark criterion is fulfilled.

4.5. **On the 6,5 % risk premium laid down in the CIPE Directive as of 2010**

(217) Italy pointed out that, irrespective of the statutory 6,5 % risk premium, in 2009 the compensation paid to Siremar amounted to EUR 67 009 405. From 2010 onwards, the maximum amount of compensation was fixed at EUR 55 694 895. Italy noted that this represents a 25 % decrease. This would force the buyer of the Siremar business branch to make operations much more efficient in order to bring costs within the limits of the fixed subsidy amount over the whole duration of the new Convention and to offset inflation over a long period in the future.

(218) Italy noted that the CIPE Directive provides that the risk premium of 6,5 % would be used to determine the return on capital on the basis of the WACC (see recitals (49) to (58)). However, because the 2009 Law caps the amount of compensation, the calculation was simplified by applying the 6,5 % as a flat rate return on capital to verify any overcompensation. This approach applies under the new Convention. The Italian authorities also demonstrated that applying the full methodology as laid down in the CIPE Directive might have resulted in a return on capital that, at least in some years, would have exceeded 6,5 % (i.e. 8,87 %). For this reason, Italy considers that their simplified approach is conservative and does not allow for higher compensation for Siremar, CdI or SNS than what was established by the CIPE Directive.

(219) Italy also claimed that a return on capital of 6,5 % reflects the risk of the activities entrusted to Siremar, CdI or SNS, and that there was no overcompensation of the public service, for the following reasons:

(a) Certain macroeconomic studies assign a risk premium to a certain country or geographical area. According to IESE Business School, 6,4 % would be a suitable country risk for Italy. Therefore, a 6,5 % risk premium would be a reasonable return;

(b) The new Convention provides that the level of compensation be calculated based on the forecasted evolution of revenues and costs. Unlike the initial Conventions, the new Convention does not lay down any full and automatic compensation for the increase in operating costs (such as labour, fuel, chartering, etc.). The risks associated with any increase in costs as well as the risks connected with the traffic volumes would be fully borne by the operator. In particular, the operator bears all risks associated with the service and has no guarantee of being compensated up to a level sufficient to cover its costs. This would remain true even taking Articles 8 and 9 of the new Convention into account, since the operator is still exposed to the risk of delays

between the occurrence of any such imbalances and the point at which adjustments may be made. Italy submitted CdI and SNS' yearly route-by-route accounts for the period between August 2012 and December 2019, to show that there had not been any overcompensation under the new Convention ([76]);

(c) For the first year of the prolongation of the initial Convention, in 2009, the methodology for calculating the compensation set out in the initial Convention applied, which did not include the 6,5 % risk premium. For that year, Italy provided the detailed calculation of the compensation under the initial Convention and the route-by-route accounts. For the following years of the prolongation, i.e. 2010, 2011 and January to July 2012, the CIPE methodology for calculating the compensation applied, which included the 6,5 % risk premium. However, Italy stressed that, on top of the CIPE methodology, the cap of EUR 55,7 million set by the 2009 Law also applied as of 2010. That amount would be insufficient to support Siremar's public service obligations, because of the increase in fuel costs, changes to the EUR/USD exchange rate and the crisis in freight and passenger maritime transport sector in Italy. To substantiate this claim, Italy provided quarterly reports by the Extraordinary Administration, the route-by-route accounts for 2010 and letters sent by Tirrenia and Siremar in EA in April and June 2010 to the Ministry of Transport ([77]).

4.6. **On the compliance of the new Convention with the 2011 SGEI Decision**

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

(221) Italy recalled that the Commission's assessment of the genuine nature of an SGEI is limited to checking whether the Member State has made a manifest error when defining a service as an SGEI. Against this background, Italy described the routes specified in the new Convention and pointed out that all of the connections structurally require the imposition of public service obligations, to Siremar as well as to other operators.

(222) Italy also provided annual passenger traffic data for the 2 financial years preceding that in which the SGEI was assigned (i.e. 2010 and 2011), to argue that the threshold of 300 000 passengers as laid down in Article 2(1)(d) and (e) of the 2011 SGEI Decision had not been breached on the individual routes operated by Siremar. Furthermore, Italy claimed that Article 2(4) of the 2011 SGEI Decision is complied with since by selling the Siremar business branch via a competitive, transparent and non-discriminatory tender procedure, the requirements of the Maritime Cabotage Regulation were fully respected.

(223) Italy claimed that the new Convention fulfils all the conditions that apply to entrustment acts as specified in Articles 4 to 9 of the 2011 SGEI Decision. In particular, the Convention sets out in detail the public service obligations, their duration, the compensation mechanism (based on the CIPE Directive and the 2009 Law), and the mechanisms to avoid and recover any overcompensation. Finally, Italy pointed to the measures that are in place to ensure strict compliance with the terms of the new Convention, which include a system of remedies and financial sanctions.

4.7. **On the counter-guarantee**

(224) Italy argued that the documents submitted by the potential bidders during the tender procedure had provided no indication of the existence of a counter-guarantee backing Unicredit's comfort letter attached to CdI's successful offer. Indeed, that letter did not refer, neither explicitly nor implicitly, to the existence of a counter-guarantee by Sicily. According to Italy, the tender was awarded to CdI as its offer met all the necessary requirements and was more advantageous than the offer made by SNS. Italy also argued that the absence of any link between the comfort letter and the counter-guarantee by Sicily is confirmed by the fact that even after Sicily withdrew this counter-guarantee ([78]), Unicredit confirmed its commitment to CdI and subsequently did issue a bank guarantee addressed to Siremar in EA to cover CdI's payment instalments ([79]).

([76]) The Commission notes that there were gaps in these data linked to the national litigation and the two awards of the business branch (in particular, figures for 2015 were not validated by an external consultant and no data was provided for the period 1 January – 10 April 2016).

([77]) In those letters, the companies argued that the public service compensation amounts laid down by the 2009 Law would not be sufficient to cover the net costs of the service, on account of the rise in oil prices. In the letter of June 2010, the amount was still considered sufficient 'for the time being' for Siremar, but there was already a projected gap of EUR 23,1 million for Tirrenia.

([78]) By letter of the General Accountant of the Region.

([79]) On 3 February 2012, Unicredit returned CdI's counter-guarantee to Sicily and confirmed that its own guarantee was not linked to the counter-guarantee by Sicily. The guarantee then entered into force on 31 July 2012, when the sale of the Siremar business branch was finalised.

(225) Italy also submitted certain documents to show that the counter-guarantee had not conferred a selective advantage on CdI and hence did not qualify as State aid. In particular, Italy submitted: a Guarantee Agreement signed on 20 November 2011 by CdI's shareholders (i.e. Sicily, Mediterranea, Isolemar S.r.l., Lauro. it SpA and Davimar), by which they agreed to jointly counter-guarantee CdI's successful bid up to EUR 35 million; and a letter by Unicredit of 10 May 2012, informing CdI of the conditions applicable to its guarantee, notably a premium of at least 250 basis points per annum. According to Italy, there could not be any State aid elements in the counter-guarantee, if its later withdrawal did not have any effect on the rights and obligations of its beneficiary. These documents would thus show that the conditions for a finding of aid in a guarantee, as specified by settled Union case law, are not present in this case.

4.8. **On the berthing priority**

(226) The Italian authorities argued that no State resources were or are foregone through the allocation of the berthing priority. Indeed, all ferry operators pay regular fees to the relevant port authorities for berthing, irrespective of whether they provide public services or not. This berthing priority is applicable only to the public service routes and was accepted by the Commission with letter of 24 January 2011, sent in the context of infringement procedure No 2007/4609 (see Section 2.4), in so far as it only applied to those routes. Moreover, Italy clarified that Siremar and its successors, did and do not pay any additional fee for this berthing priority.

(227) Because no fee is due for the berthing priority, the monetary advantage granted to Siremar and its successors, if any, cannot be quantified. However, Italy noted that, in practice, the berthing priority would only apply in limited circumstances, due to the size of most of the ports and the advance scheduling of arrivals and departures.

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

(228) Italy did not dispute that Siremar received EUR 7 215 800 to carry out ship upgrades required to respect international safety standards (referred to as 'Stockholm funds'). However, the Italian authorities confirmed that these funds were only used to pay for the upgrades of ships. Indeed, by the time the sale contract with CdI was signed on 21 October 2011, only EUR 580 600 were still to be spent. Siremar in EA spent those remaining funds in January 2012, before the transfer of the business branch to CdI, to carry out certain required works on the Martini vessel that were still outstanding.

(229) With regard to the fiscal exemptions on the acts and operations related to the privatisation of the Siremar business branch, laid down by the 2010 Law, the Italian authorities first pointed out that for companies involved in insolvency proceedings, earnings are determined according to the rules laid down in Article 183 of the Consolidated Income Tax Law. Based on that provision, an undertaking's earnings for the period from the start of the bankruptcy proceedings until their conclusion are the difference between the undertaking's assets at the beginning of the proceedings and the residual assets at their end. Before the end of proceedings, it is therefore not possible to anticipate if there is a tax liability and its size.

(230) On the indirect taxes, the Italian authorities emphasised that the exemptions provided for were designed with a view to achieving administrative simplification. From the taxation perspective, their effects could be regarded as negligible and of little impact in relation to taxes on documents that are charged at flat rates. More specifically, this concerns the registration duty (EUR 168 per document), land registry and mortgage registration fees (EUR 168 each) and stamp duty (EUR 14,62 for four sides). Moreover, the Italian authorities noted that under Article 9 of the contracts for the sale of the business branch from Siremar in EA to CdI and to SNS, all duties and fees were payable by the buyer. In the case of the transfer to SNS, the Italian authorities clarified that a fixed registration duty of EUR 245 applied, pursuant to the Article 19-ter, paragraph 24-bis of Decree law 135/2009.

(231) Finally, the Italian authorities clarified that the FAS resources were not used to give an additional compensation to the companies of the former Tirrenia Group, including Siremar. Instead, these resources were made available to supplement the budget appropriations set up for the payment of the public service compensations to the companies of the former Tirrenia Group, in case those budget appropriations proved to be insufficient. Italy notes that Article 1, paragraph 5-*ter*, of Decree Law 125/2010 enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. Moreover, Italy clarified that, under Article 26 of Decree Law 185/2008, EUR 65 million for each of the years 2009, 2010 and 2011 were earmarked to the Tirrenia group and EUR 195 million were accordingly drawn

from the FAS resources. Those funds were then transferred to the account of the Ministry of Transport earmarked for the payment of the public service compensation to the companies of the former Tirrenia Group (Tirrenia, Siremar, Caremar, Toremar and Saremar). Therefore, this measure would merely concern an allocation of resources in the Italian state budget for payment of the public service compensations.

4.10. **On the absence of economic continuity between Siremar in EA and CdI**

(232) Italy submitted that there is no economic continuity between Siremar in EA and CdI based on the following grounds:

(a) *Scope of the sale*: Italy pointed out that Siremar was initially to be sold as part of Tirrenia (of which it was a subsidiary). After that privatisation attempt failed, separate tenders were organised for part of the respective company's assets (i.e. respectively the Tirrenia and Siremar business branches). In addition, the sale concerned a limited number of assets of Siremar in EA which previously had no functional autonomy; assets not essential to the public service, including one fast ferry, were sold separately. Moreover, debts incurred by Siremar in EA before the transfer were not taken over by CdI;

(b) *Economic activity*: the conditions for carrying out the public service obligations set out by the new Convention for CdI are substantially different from those set out by the initial Convention for Siremar. In particular, the new Convention provides for different criteria for calculating the compensation for the provision of the public service (which is fixed at a maximum amount, instead of entirely covering losses from the public service) and introduces more flexibility in the rates offered to the passengers (with the use of price caps instead of fixed prices). Italy considered that the significant change to the compensation method necessarily obliged the purchaser to increase the organisational efficiency of the Siremar business branch. Finally, Italy claimed that the mere transfer from a public to a private owner entails a drastic change in the organisation and management of the business branch;

(c) *Discontinuity of labour force*: Italy pointed out that there was no automatic transfer of employees to the purchaser. Siremar in EA would dismiss its employees and be liable for any remaining cost linked to the old contracts. The purchaser would then make new employment offers to the former employees, to the extent that they were deemed necessary for the operation of the transferred business (i.e. the public service). If the former employees accepted the offer, they were hired under a new, different contract;

(d) *Transfer price*: Italy pointed out that an independent expert estimated the value of the Siremar business branch and that the tender procedure for the sale of the latter had the highest price as the only criterion for the selection of the offers;

(e) *Different shareholding of the vendor and purchaser*: Italy noted that the buyer was identified via a public tender process open to the widest possible number of potential bidders. This tender was based on the principles of competition, transparency and non-discrimination and the tender was awarded using the criterion of the highest price. Moreover, Italy referred to the ruling of the AGCM n. 23023 of 23 November 2011 ([80]), according to which no individual shareholder of Mediterranea would have been able to exert exclusive or joint control on the Siremar business branch. Indeed, the successful tenderer, CdI, was controlled for 65,32 % by Mediterranea. Sicily owned 43,02 % of the shares in Mediterranea, while three private parties together owned the remaining shares. Those parties held ordinary shares or 'type A shares', but Sicily held 'type B shares', which are subject to certain limitations. For instance, Sicily could not appoint any of its officials or directors on the company's Governing Board. For these reasons, Italy claimed that the identity of the seller was different from that of the buyer and that the seller was not able to exert any kind of control or even simple interference in the management of the Siremar business branch, after its transfer to CdI;

(f) *The economic logic of the transaction*: the objective of the transaction was to liberalise the maritime transport activities operated by Siremar to comply with the Maritime Cabotage Regulation. Moreover, the first call for expressions of interest was published on 4 October 2010, while the Commission's formal investigation procedure was opened with its Decision of 5 October 2011. Therefore, Italy considered that the transaction did not have the aim of circumventing State aid rules, but was planned and executed with the intention of carrying out an important industrial project.

([80]) C11320 – Compagnia delle Isole/Ramo di azienda di Tirrenia di Navigazione (Siremar), Provvedimento n. 23023 del 23 novembre 2011.

5. COMMENTS FROM INTERESTED PARTIES

5.1. Comments from Siremar in extraordinary administration

(233) Siremar in EA submitted one main set of observations and one subsequent letter. Subsequent informal exchanges also took place, with full knowledge of the Italian authorities, to clarify certain pending issues or acquire specific information. Moreover, on most aid measures, Siremar in EA submitted arguments which were very similar to those provided by Italy.

5.1.1. *On the infringement procedure No 2007/4609*

(234) In its reply to the 2012 Decision, received on 19 April 2013, Siremar in EA first referred to the Commission's infringement procedure No 2007/4609 concerning misapplication of the Maritime Cabotage Regulation (see also Section 2.4). In this context, Siremar in EA referred to the letter of 21 December 2009 (see recital (136)) concerning Italy's intention to launch tenders not for the public service contracts but for the sale of the shipping companies holding such contracts. In that letter, it was noted that, taking into account the radical overhaul of the sector planned, and given the social impact the tenders would have if they did not include the companies, the procedures chosen were acceptable – in principle and as an exception – for the purpose of ensuring compliance with the principle of non-discrimination among Community ship-owners.

(235) On 21 June 2012 (see recital (143)), the Commission sent Italy a reasoned opinion concerning the delay in implementing competitive procedures for the awarding of the maritime cabotage public services operated by Caremar, Laziomar and Saremar, more than 3 years after the normal expiry of the relevant contracts. Since the Italian authorities had completed the competitive procedures for awarding the maritime cabotage public services operated by the Tirrenia, Siremar and Toremar companies, the reasoned opinion did not concern those companies. On this basis and in light of the earlier exchanges between the Italian authorities and the services of the Commission, Siremar in EA claimed that the Commission had found that the privatisation of the Siremar business branch was compliant with Article 4 of the Maritime Cabotage Regulation.

(236) Based on case law of the European Courts ([81]), Siremar in EA argued that once public service obligations have been established in compliance with the Maritime Cabotage Regulation, they must be considered to comply with Union law without the need to perform further scrutiny pursuant to Article 106(2) TFEU. According to Siremar in EA, since the infringement procedure reached the conclusion that the public service obligations imposed on the routes operated by the Siremar business branch before the privatisation were justified in light of the Maritime Cabotage Regulation, such conclusion cannot be questioned in the context of the Commission's formal investigation procedure laid down in Article 108(2) TFEU ([82]). Therefore, any additional action under Article 108(2) TFEU should be limited to other measures, different from the compensation for the additional costs caused by the public service obligations lawfully entrusted and operated under the Maritime Cabotage Regulation.

(237) Finally, Siremar in EA referred to the 2009 Judgment that annulled the 2004 Decision and the possibility that the public service compensation assessed in that Decision could be classified as existing aid. If the aid awarded to the former Tirrenia Group were indeed classified as existing aid, this classification would likely also apply to the compensation paid for the public service obligations operated by the Siremar business branch up to the privatisation, for the following reasons:

(a) the extension of the initial Convention was strictly necessary to guarantee provision of the public service pending award of the new Convention, in the context of privatisation of the Siremar business branch. Therefore, it was deemed justified in light of the outcome of the Commission's infringement procedure;

(b) the only material changes made since 1 January 2009 had the effect of reducing the overall amount of the public service compensation awarded.

5.1.2. *On the prolongation of the initial Convention*

(238) Concerning the existence of a real SGEI on the routes served by the Siremar business branch under the initial Convention, Siremar in EA first listed the connections where it was operating a public service during the prolongation period. There was competition on some routes for some periods of the year. However, these operators were also providing a public service and were compensated accordingly. Therefore, Siremar in EA

([81]) Siremar in EA refers in particular to the judgment of 15 June 2005 in Case T-17/02 *Fred Olsen, SA*, ECLI:EU:T:2005:218, paragraph 215.

([82]) Siremar in EA refers to the judgments of 10 May 2005 in Case C-400/99 *Italy v Commission*, ECLI:EU:C:2005:275; and of 4 March 2009 in Joined Cases T 265/04, T 292/04 and T 504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

noted that the presence of those operators did not put into question the existence of a genuine SGEI. Additionally, Siremar in EA provided passenger data on the routes operated in 2010 and 2011, which showed that on all individual routes, the average yearly passenger traffic was below 300 000 ([83]). On this basis, the conditions laid down in Article 2(1)(d) and (e) of the 2011 SGEI Decision would be complied with. Additionally, since the compensation paid on the basis of the prolongation of the initial Conventions was cleared in the context of the infringement procedure, the condition laid down respectively in Article 2(4) and (2) of the 2011 and 2005 SGEI Decisions would also be met.

(239) Moreover, Siremar in EA claimed that it had not been overcompensated by Italy. Firstly, the company referred to a report by the Corte dei Conti that signed off on the methodology set out in Article 3 of the initial Convention for determining the compensation amount of the companies of the former Tirrenia Group. Secondly, Siremar in EA pointed out that during the period in which it was under extraordinary administration (September 2010 – July 2012) the amount of the subsidy was approximately EUR 16 million lower in absolute terms, and about 25 % lower in relative terms, than the average amount of subsidies received by the company over the previous 2 years (2008 – 2009). Siremar in EA noted that the public service compensation paid until the end of 2009 allowed it to balance its income and expenses and to continue to operate despite the gradual deterioration of its economic and financial outlook. However, over time Siremar had become more reliant on the subsidies: between 1999 and 2008, their share of the turnover increased from 64 % to 77 %. Then, from 2010 onwards, the 2009 Law capped the amount of compensation at a level significantly lower than in the previous years. Siremar in EA argued that the public subsidy would thus not have been able to cover its operating costs. Therefore, Siremar in EA concluded that, in the years when the initial Convention was prolonged, there could not have been any overcompensation and that the new methodology for calculating the compensation would force the new owner of the business branch to reorganise the operations of the latter to increase its efficiency.

5.1.3. *On the potential illegal prolongation of rescue aid to Siremar*

(240) Siremar in EA recalled that the Italian authorities informed the Commission on 16 May 2011 that the Extraordinary Administrations of Tirrenia and Siremar would repay the rescue aid approved by the 2010 Decision following completion of the sale of the Tirrenia and Siremar business branches, using the receipts from the sale of these branches. However, Siremar in EA noted that the completion of the sale of the Siremar business branch was delayed due to unexpected events, and therefore Siremar in EA had to continue to operate its services for a considerably longer time than planned, bearing the associated costs. The entire rescue aid was however repaid to the State in full by means of a single payment on 18 September 2012, i.e. only 48 days after transfer of the Siremar business branch, which took place on 1 August 2012.

(241) With respect to the requirement laid down in paragraph 25(c) of the Rescue & Restructuring Guidelines, Siremar in EA noted that the liquidation plan for both Tirrenia and Siremar had been published on the website of the Extraordinary Administration ([84]) long before the expiry of the aforementioned 6-month time limit. Siremar in EA added that any relevant information on the subsequent progress of the privatisation process – which it claimed to be, in essence, a restructuring plan as defined by the Rescue & Restructuring Guidelines – was regularly submitted to the Commission under the State aid and merger approval procedures. Siremar in EA therefore claimed that the Commission was fully informed and that this plan was feasible, coherent and far-reaching, so as to restore Siremar's viability as required by the Rescue & Restructuring Guidelines.

(242) Siremar in EA also argued that Siremar ceased being an undertaking in difficulty as soon as it received the rescue aid that enabled it to provide the public service regularly, while duly managing the liquidation process. In its view, over the period in question, these activities were performed regularly and with none of the disruptions that usually mark out an undertaking in difficulty. Siremar in EA added that the completion of the privatisation coincided with the complete implementation of the restructuring plan. This involved structural modifications to Siremar's organisation and management, ensuring its return to long-term profitability. Finally, Siremar in EA pointed out that the 2010 Decision confirmed that the 'one time, only time' principle had been complied with also concerning the past, in relation to any rescue and restructuring aid or unlawful aid, such us the compensation for the public service obligations. Therefore, Siremar in EA argued that the Italian authorities might have held legitimate expectations that that compensation did not entail any State aid.

([83]) However, the Commission notes that on one route (ALC/2), the average number of passengers in 2010 and 2011 was 300 357,5.
([84]) See: http://www.tirreniadinavigazioneamministrazionestraordinaria.it/ (quoted by the company), as well as http://www.siremar-in-as.it/

5.1.4. *On the new Convention*

(243) With respect to the procedure followed, Siremar in EA claimed that Italy had notified the new Convention to the Commission on 10 January 2012 only for reasons of legal certainty. Indeed, Siremar in EA disagreed with the Commission's view in the 2012 Decision that this measure could constitute unlawful aid, granted in breach of the standstill obligation under Article 108(3) TFEU.

(244) On substance, Siremar in EA presented the four Altmark criteria and argued why it considered that each criterion was respected, thereby excluding the presence of any State aid element in the new Convention.

(245) Firstly, the company was entrusted with providing an SGEI (Altmark I): Article 3 of the new Convention clearly sets out the services to be provided, while its Annex A identifies in detail the types of ships to be used and the time bands to be covered, specifying the requirements for evening and night service and the fare constraints. Secondly, the parameters for the calculation of the compensation were set out in advance in a transparent and objective manner (Altmark II): the new Convention, its annexes and the CIPE Directive provided a detailed description of the calculation methodology. Thirdly, only the net costs of providing the public service were compensated (Altmark III): the new Convention lays down that only the services operated as a public mission would be compensated. The elements to be taken into account for the calculation of costs and the reasonable profit, i.e. 6,5 % return on risk capital, were listed in the CIPE Directive and annexes B and C of the new Convention. Fourthly, the compensation has to be set at the minimum level (Altmark IV): Siremar in EA argued that the tender for the privatisation of the Siremar business branch was transparent, open and non-discriminatory, and that the method of calculation of the compensation required increased efficiency on the part of the operator of the service.

(246) The Altmark reasoning notwithstanding, Siremar in EA also addressed the Commission's doubts on the new Convention's compliance with the conditions laid down in the 2011 SGEI Decision.

(247) In particular, Siremar in EA claimed that, on the basis of the passenger data for 2010 and 2011, the passenger threshold set by Article 2(1)(d) and (e) of the 2011 SGEI Decision was not breached. Furthermore, Siremar in EA argued that in light of the outcome of the infringement procedure (see also Section 5.1.1), and following the privatisation of the Siremar business branch, the condition in Article 2(4) of the 2011 SGEI Decision is also respected.

(248) Siremar in EA referred to the arguments provided for its Altmark reasoning to prove compliance with the conditions required by Article 4(a) and (b) of the 2011 SGEI Decision. Moreover, the new Convention lays down the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and recovering any overcompensation, as well as binding requirements covering essential aspects (price, quality and quantity) of the services provided (Article 4(d) and (e) of the 2011 SGEI Decision). Additionally, for each route, the maximum fares applicable per person or vehicle are laid down in Annex A to the new Convention, distinguishing between standard fares and reduced fares for island residents. The annual compensation for the public service obligations is fixed for the duration of the Convention. However, there is a mechanism for revising every 3 years the reference economic parameters, as well as a safeguarding clause in favour of both parties in the event of unforeseen and structural changes, above a fixed threshold, for certain economic parameters. Moreover, to ensure full compliance with the requirements described above, the new Convention introduced a strict and comprehensive system of penalties for the service operator, based on the principle of deterrence. The supervisory Ministries are also empowered to perform inspections and checks, and obtain information to assess fulfilment of the obligations laid down in the Convention (Article 5 of the 2011 SGEI Decision). Finally, Siremar in EA claimed that it complied with the other applicable provisions of the 2011 SGEI Decision (Articles 6 to 9) through the general provisions regulating an open, transparent and non-discriminatory tender, such as the one used for the sale of the Siremar business branch.

5.1.5. *On Siremar's privatisation and the counter-guarantee*

(249) Siremar in EA recalled the main steps of the tender procedure and the subsequent developments. It emphasised that the Extraordinary Commissioner designed and conducted the tender procedure in the manner considered most appropriate to ensure the attainment of the highest possible value and that he was required by law to establish safeguards to ensure the transparency, impartiality and fairness of the tender procedure. In particular, an independent expert had set the minimum price and the selection of the successful offer had been based on the

highest price criterion. Moreover, Siremar in EA noted that, when considering aid possibly granted in a privatisation, the Commission should follow the GRAWE case law ([85]), which states that when a State-owned company is privatised, it can be presumed that the market price corresponds to the highest offer received, if such offer is credible and has economic value.

(250) Siremar in EA also argued that the tender process was not subject to any conditions capable by themselves of causing a reduction in the value of the assets offered for sale, or of reducing the number of potential purchasers. In particular, this applies to the conditions mentioned in the 2011 Decision concerning: (i) the preservation of employment levels (ii) the bundling of the ships with the public service obligations in a single tender procedure. With respect to the former, Siremar in EA pointed out that it concerns a mandatory provision, established by legislative act of general scope and applicable without distinction, for a period limited to 2 years. On the latter, Siremar in EA noted that the possibility of using the business branch's fleet to operate the public service routes established in the Convention seemed to constitute a viable business opportunity rather than a negative factor impacting the value of the business branch put up for sale, especially at a time of recession for the maritime transport sector.

(251) On the specific issue of the counter-guarantee by Sicily, Siremar in EA submitted that there was no evidence of the existence of any counter-guarantee in the documents submitted by the bidders in the course of the tender procedure. In particular, Unicredit's comfort letter of 12 October 2011 did not contain any reference, explicit or implicit, to a counter-guarantee issued by Sicily. In addition, Unicredit maintained its commitment to guarantee the deferred payments of part of the sale price even after Sicily withdrew its counter-guarantee. Indeed, the fact that the sale was completed long after Sicily had recalled its counter-guarantee would suffice to conclude that there was no material link between Unicredit's comfort letter and Sicily's counter-guarantee.

(252) For these reasons, Siremar in EA concluded that the Commission's doubts on the existence of aid in the privatisation of Siremar's business branch, including the counter-guarantee issued by Sicily, were not justified.

5.1.6. *On the absence of economic continuity between Siremar in EA and CdI*

(253) Siremar in EA described the following features of the privatisation of the Siremar business branch: the scope of the transfer (assets and liabilities); the economic activity, workforce and identity of the parties; the sale price; the logic and timing of the operation. Siremar in EA claimed that in the present case, all of these elements pointed towards economic discontinuity between the Extraordinary Administration selling the Siremar business branch and the acquirer.

(254) In particular, Siremar in EA noted that:

(a) the scope of the transfer to CdI was more limited than what was initially foreseen, as only the Siremar business branch was put up for sale and not Tirrenia as a whole (including Siremar). Moreover, upon completion of the sale, all outstanding liabilities linked to the assets of the Siremar business branch were cancelled;

(b) the very nature of the transaction – i.e. achieving privatisation – implied obvious discontinuity of economic activity, in terms of organisational structure, decision-making processes, management criteria and business strategies;

(c) as set out by Article 56 (3-bis) of Decree Law No 270/1999, Article 2112 of the Italian Civil Code does not apply to the sale of companies providing essential public services, ensuring that there is no continuity in the workforce;

(d) an independent expert had set the minimum sale price; the sale procedure was transparent and non-discriminatory, with the highest price as the only award criterion;

(e) the two parties were independent of each other, as Sicily's shares in Mediterranea did not allow it to exert any influence on the business (see recital (232)(e));

(f) the tender procedure for the Siremar business branch was launched on 4 October 2010, while the Commission only opened its formal investigation by its Decision of 5 October 2011. Therefore, the transaction could not have had the purpose of circumventing the rules on State aid. On the contrary, the transaction's objective was to liberalise the maritime transport sector, as imposed by the Maritime Cabotage Regulation, through a privatisation.

([85]) Judgement of 28 February 2012 in Case T-282/08, *Grazer Wechselseitige Versicherung AG v European Commission* (ECLI:EU:T:2012:91).

5.1.7. *Additional submission of the decision of the CdS on the counter-guarantee*

(255) On 12 February 2014, Siremar in EA submitted decision 592/14 on the issue of the counter-guarantee provided by Sicily (see recital (96)), and presented its own preliminary assessment. In particular, decision 592/14:

(a) was based on national law, recognising that the Commission has the exclusive competence to assess the compatibility with the internal market of any notified or unlawful State aid;

(b) assumed the counter-guarantee has jeopardised the full effectiveness of the non-discrimination principle between the two participants to the tender;

(c) declared, therefore, the sale procedure of the Siremar business branch partially void.

(256) With regard to the last point, already at that stage, the Extraordinary Administration flagged that it could not be excluded that it would be newly called to put in place the activities legally required to finalise the Siremar privatisation process.

5.2. **Comments from SNS**

(257) SNS submitted four letters in the course of the investigation: three submissions of information and one formal request for the Commission to prioritise the Siremar part of the investigation on the Tirrenia Group. Subsequent informal exchanges also took place, with full knowledge of the Italian authorities, to clarify certain pending issues or acquire specific information. This section will summarise only the three submissions ([86]).

5.2.1. *First submission*

(258) In the first submission, sent on 22 February 2012 after the adoption of the 2011 Decision, the company submitted an update on Siremar's privatisation process and certain clarifications regarding the counter-guarantee issued by Sicily on 12 October 2011, after the last request for incremental offers of 29 September 2011. In particular, SNS pointed out that this counter-guarantee: (1) was not proportional to the shares of Sicily in Mediterranea; (2) was issued by Sicily on its own initiative and was not remunerated; (3) was made without any intervening compensation or risk mitigation on the part of CdI's shareholders. SNS also submitted the counter-guarantee itself to the Commission. Moreover, it claimed that the text of that counter-guarantee made clear that the latter was a requirement to the issuing of the guarantee on the deferred instalments of the sale price by Unicredit. SNS thus concluded that the counter-guarantee amounted to illegal State aid to CdI and possibly to Unicredit.

5.2.2. *Second submission*

(259) In the second submission, sent on 21 March 2013 after the adoption of the 2012 Decision, the company retraced the various steps of the privatisation procedure and related litigation up to that date (see Section 2.3.3.2). It also reported about a complaint issued by the ferry operator NGI to the Ministry of Transport, against the awarding of a contract to operate services to the Egadi islands, Pantelleria and Ustica to CdI ([87]). Then, it clarified the nature of Sicily's indirect shareholding in CdI, and argued why both the counter-guarantee and the capital increase represented State aid measures.

(260) Firstly, in SNS's view, Sicily's indirect shareholding in CdI cannot be considered a minority shareholding without any influence on the management of the company. Indeed, Sicily would have intervened in all strategic decisions of CdI. In particular, the complainant pointed out that Mr Vincenzo Emanuele held simultaneously the position of General Accountant of Sicily and President of the Supervisory Board of Mediterranea, and was therefore in a position to influence the decisions of CdI. Under Article 2409-*octies* of the Italian Civil Code, the Supervisory Board exerts functions of control. It is entrusted with the following responsibilities, among others: appointment and revocation of the Board of Directors; approval of the balance sheet; carrying out the functions attributed to the *Collegio Sindacale* under Article 2403 of the Italian Civil Code; promoting damages actions against members of the Board of Directors; presenting a yearly update in writing to the shareholders. Moreover, the Statute of Mediterranea attributed to its Supervisory Board the additional competence of voting on the strategic operations and financial and business plans prepared by the Board of Directors. SNS also pointed out that, when Mediterranea was being set up, Sicily did nominate two of the three members of the company's Board of Directors. Finally, SNS noted that the minority shareholders of Mediterranea and CdI were partially the same, thereby increasing the leverage of Sicily. In particular, Lauro.it SpA and Isolemar S.r.l. were minority shareholders in both Mediterranea and CdI.

([86]) SNS had also submitted a complaint against the sale procedure of the Siremar business branch on 30 January 2012 which was registered under case number SA.34292.

([87]) The Ministry of Transport rejected NGI's claims, however the latter did not drop them and instead asked the Ministry to suspend the payment of compensation for approximately EUR 55 million per year. SNS did not provide that correspondence and did not provide details about the follow-up, if any.

(261) Secondly, on the counter-guarantee, SNS pointed out that, when the tender was about to be awarded to SNS, and after the expiry of the procedural deadline, CdI modified its offer by proposing to replace the guarantee previously submitted, from Commercial Fidi, with a guarantee from Unicredit, which was counter-guaranteed by Sicily. Then, on 12 October 2011, after the last request for incremental offers, Unicredit issued a new comfort letter to CdI, without mentioning any counter-guarantee. However, the same day, Sicily did confirm its counter-guarantee to Unicredit, modifying the amounts to match those in Unicredit's letter. SNS also noted that in addition to its indirect equity participation in CdI, Sicily also held a minority shareholding in Unicredit (0,62 %) and had a close relationship with the latter ([88]).

(262) SNS considers that the Extraordinary Administration would have awarded the Siremar business branch to SNS, without the granting by Unicredit of the guarantee to CdI. Against this background, SNS claimed that, based on State aid case law and the Guarantee Notice, the counter-guarantee fit the definition of a State aid measure as it gave a selective economic advantage to CdI by allowing it to win the tender for Siremar's business branch, using State resources and distorting competition and trade. Indeed, SNS submitted that the measure might also involve aid to Unicredit, as the risk profile of its guarantee in favour of CdI would accordingly be lowered.

(263) Thirdly, SNS described the capital increase by CdI, and the changes in the shareholding structures of both CdI and Mediterranea over time. SNS first noted that after the capital increase which happened in two stages, from EUR 1 million to EUR 21 480 263, Mediterranea still held the majority of the shares of CdI. SNS also noted that, at the time of the two stages of the capital increase, Sicily was the majority shareholder of CdI, even if its share would later be diluted to 43,02 %. SNS considers that the decisions to undertake the capital increase and to grant the counter-guarantee would have been linked, and neither of them would have been ultimately profit seeking. Indeed, no private investor would have underwritten the capital increase and at the same time issued such a counter-guarantee, taking into consideration the amounts involved and the timing of both measures. Finally, SNS pointed out that the private partners, which did participate in CdI's capital increase, had much smaller shareholdings than Sicily (roughly a half), and would have never participated in that capital increase without Sicily providing most of the funds by using public resources. Therefore, SNS claimed that the capital increase by CdI also fulfilled all the conditions to be considered State aid.

(264) Finally, the company described problems in the execution of the new Convention by CdI, with considerable delays, cancellations and fare rises that affected end users, and asked the Commission to finalise the investigation concerning just the counter-guarantee and the capital increase.

5.2.3. *Third submission*

(265) In the third submission, sent on 31 July 2019, SNS made preliminary remarks on the minor islands served under the new Convention. Sicily's minor islands are fourteen, each with its own population and maritime connection needs, requiring regular and frequent maritime services with the mainland also for the provision of essential supplies such as food, water, fuel and mail. Many of these islands have no hospitals or high schools so that patients and pupils rely on stable and affordable connections to fulfil their education and health needs ([89]). SNS also noted that all evacuation plans for these islands, in cases of natural disasters or for civil protection purposes, rely on the maritime connections provided under the new Convention.

(266) SNS then argued that it considered that the compensation paid to it under the new Convention did not amount to State aid as it complied with the Altmark criteria. In particular, SNS compared its case with services provided by Saremar which were assessed in the 2014 Decision, and highlighted several elements that apply to SNS but did not apply to those services:

(a) Well-defined public service obligations, needed to address a historical market failure (Altmark I). Indeed, the public service obligations entrusted to SNS are clearly defined in all their characteristics, in terms of routes, type of vessel, frequency of services, standards, comfort, safety, maximum rates, etc. and the public service regime is necessary to face the historical market failure existing in the maritime connections between Sicily and its minor islands. For instance, SNS noted that its yearly ticket revenues amount to barely 30 % of the costs of the routes under the new Convention, strongly suggesting that these services could not be provided by the market, under any circumstances, and historically never were. The only exceptions are the connections

([88]) Sicily had a representative on Unicredit's Management Board, and Unicredit managed the Sicily's treasury and pension funds.
([89]) Indeed, only three of these islands have a high school and only two have a hospital (one of which does not have a gynaecology and obstetrics ward).

offered by SNAV and Alilauro on the Naples – Aeolian Islands bundle, which are operated without public compensation. However, these services are provided only in the high season, with different type of boats than those required in the new Convention, and do not reach Milazzo (in Sicily). They essentially cater to tourists travelling from the rest of Italy to the Aeolian Islands and back in the high season, and as such they cannot be compared to the services offered by SNS;

(b) A compensation mechanism clearly set out in the CIPE Directive and the new Convention (Altmark II). Indeed, the level of compensation has been clearly established based on the CIPE Directive, and the method of calculation of the compensation, i.e. the cost elements taken into account and the return on invested capital, are detailed therein. SNS noted that this is also in line with the Commission's preliminary view expressed in the 2011 and 2012 Decisions;

(c) An amount of compensation proportionate with the costs incurred (including a reasonable margin – Altmark III). Indeed, the compensation granted to SNS is necessary and proportionate to cover the costs incurred in the discharge of public service obligations and ensure a reasonable profit. The risk premium fixed at 6,5 % is in line with the macroeconomic analysis for Italy and is required to ensure that not only the costs incurred in providing the maritime services are covered but also that a proper remuneration for the invested capital is guaranteed. SNS noted that in the absence of the latter, no private operator would ever decide to perform public service obligations as defined in the new Convention;

(d) Awarding of the business branch and new Convention after a well-designed, open tender procedure (Altmark IV). Indeed, SNS noted that it had been chosen following a tender procedure that allowed for the selection of the tenderer capable of providing the services at the least cost to the community. More specifically, among the other tender requirements, the choice of requiring the successful operator to take over the Siremar business branch was the only possible way of ensuring territorial continuity, since no bidding companies were already adequately endowed with vessels and crews to perform the required services.

(267) Additionally and as a subsidiary reasoning, SNS noted that the compensation under the new Convention also respected the compatibility conditions set by the 2011 SGEI Decision. Indeed, the public service obligations to be fulfilled by SNS are clearly identified and defined in all their characteristics. Additionally, the convention with SNS:

(a) Identifies the content and duration of the public service obligations;

(b) Identifies the undertaking and the territory concerned;

(c) Contains a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;

(d) Contains the arrangements for avoiding and recovering any overcompensation.

5.3. **Comments from Pan Med**

(268) In its reply to the 2011 Decision, sent on 29 February 2012, Pan Med stated that it agreed with certain sections of that decision concerning the Commission's preliminary assessment on the existence of aid in the privatisation, the berthing priority, and the measures laid down by the 2010 Law.

(269) In its reply to the 2012 Decision, sent on 19 April 2013, Pan Med noted that it intended to start operating certain new routes but alleged that competition was hampered by the incompatible aid granted to the companies of the former Tirrenia Group and their acquirers. The following recitals summarise Pan Med's comments that refer to Siremar.

(270) Regarding the rescue aid granted to Tirrenia and Siremar, Pan Med claimed that from 28 August 2011 – i.e. the date by which that aid should have been terminated – until its reimbursement approximately 1 year and 2 months later, these two companies benefited from illegal and irregular rescue aid. In particular, the rescue aid would not have complied with the Rescue & Restructuring Guidelines and would not have been part of a comprehensive restructuring plan. Therefore, in Pan Med's view it amounted to operating aid to Tirrenia and Siremar.

(271) On the new Conventions, Pan Med expressed its observations concerning the genuine nature of the SGEI performed by CIN and CdI, focusing its reasoning on the routes operated by the former (i.e. the connections between Sicily and the mainland, as opposed to the connections between Sicily and the smaller islands, operated by CdI). Pan Med argued that neither the mobility needs of the local communities nor economic development

arguments could justify the public compensation granted to these operators. Pan Med pointed out that the objective of ensuring territorial continuity should not be addressed through arbitrarily selected route bundles, which did not seem to reflect the general interest and had been defined almost 25 years earlier. Moreover, Pan Med argued that the compensation for the operation of the public service allowed the operators to realise profits that were more than reasonable and hence would not meet the third Altmark criterion ([90]). In particular, Pan Med claimed that the risk premium of 6,5 % as laid down in the CIPE Directive would not be justified, as there would no business risk left to the operators.

(272) In its letter, Pan Med also described a number of new routes it had decided to operate and a new daily service on the Gaeta – Milazzo route, which it was still evaluating. Pan Med deemed this service commercially viable. However, the project would have been stalled due to red tape and resistance from CdI and other operators ([91]). This service would compete with the ferry services operated by CdI on the Naples – Aeolian Islands – Milazzo route (as well as with the service provided by Tirrenia on the Naples – Palermo route). On the competitive situation on the cabotage routes served by CdI, Pan Med recalled that the Commission had already noted that competing operators were providing comparable mixed services, at least on the following routes: Milazzo – Aeolian Islands – Naples, Trapani – Pantelleria and Palermo – Ustica. This would in Pan Med's view show that the market is indeed capable to meet the public service obligations that were arbitrarily entrusted to CdI.

(273) Pan Med concluded that the aid granted under the prolongation of the initial Convention, the rescue aid and the aid granted under the new Convention is unlawful and incompatible and had to be recovered from the respective beneficiaries (i.e. the original companies or the new owners, depending on the measure in question and on the existence of economic continuity).

5.4. **Comments from Grandi Navi Veloci**

(274) On 1 March 2012, in reply to the 2011 Decision, Grandi Navi Veloci submitted comments concerning the following items:

(a) the violation of Article 4 of the Maritime Cabotage Regulation, concerning Saremar;

(b) the annual compensation granted to Saremar for its public service obligations;

(c) the privatisation of the Tirrenia and Siremar business branches;

(d) the berthing priority assigned to Saremar;

(e) other aid measures granted to the companies of the former Tirrenia group in the context of the privatisations;

(f) the unlawfulness of the aid already granted to Saremar and the need to suspend and provisionally recover that aid ([92]).

Grandi Navi Veloci claimed that the aid measures listed in point (b) and (e) represent new aid, which is both unlawful and incompatible with the TFEU. However, the focus of Grandi Navi Veloci's comments is on the specific case of Saremar, which is outside the scope of this Decision. Those comments, which are also relevant to this Decision, are summarised below.

(275) On the alleged violation of the Maritime Cabotage Regulation, Grandi Navi Veloci noted that under that Regulation, Member States can intervene in the event of market failure to provide adequate services, granting subsidies related to public service obligations on routes identified by the Member States themselves. However, Member States must limit their intervention to the essential requirements established in the Maritime Cabotage Regulation and have to fulfil the requirement of non-discrimination in respect of all Community shipowners interested in serving those routes. As Italy awarded the routes to the companies of the former Tirrenia group exclusively without launching an open tender, it breached Article 4(1) and (2) of the Maritime Cabotage Regulation. Additionally, Grandi Navi Veloci notes that, if there are competitors offering the same services on those routes, the conditions set by the Analir case law would not be met ([93]).

([90]) Pan Med provided the example of a calculation of the costs and revenues on the Ravenna – Catania route in 2010, which would have resulted in a profit of EUR 8,3 million and hence in overcompensation to its operator Tirrenia. However, the Commission concluded in paragraph 259 and footnote 91 of the 2020 Tirrenia/CIN decision that, as Tirrenia had recorded a loss on this route in 2010, there was no need to assess this unsubstantiated claim any further.

([91]) Pan Med provided a few letters sent to local municipal and port authorities asking for the necessary permits to start operating this route.

([92]) Pursuant to Article 11 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

([93]) Case C-205/99 Analir and others, ECLI:EU:C:2001:107.

(276) Regarding the berthing priority, Grandi Navi Veloci did not contest the Commission's preliminary view that the measure does not constitute State aid, as there is no loss of State resources. However, Grandi Navi Veloci argued that the transfer of the berthing priority to the new owners of the companies of the former Tirrenia Group, as mandated by paragraph 21 of Article 19-*ter* of Decree Law 135/2009, is also a breach of Article 4 of the Maritime Cabotage Regulation. Grandi Navi Veloci then mentioned two decisions (*segnalazioni*) adopted by the AGCM in 1995 and 1997 and concerning Caremar, stating that this priority may have a negative impact on competition, particularly if the beneficiary has an exclusive right over the berthing slots that are most valuable from an economic point of view.

(277) On the privatisation of the Tirrenia and the Siremar business branches, Grandi Navi Veloci agreed with the preliminary view of the Commission, as expressed in the 2011 Decision, that the procedures would not have been sufficiently transparent and unconditional to exclude the existence of aid. Additionally, Grandi Navi Veloci argued that the Italian authorities were indefinitely delaying the privatisation of the companies of the Tirrenia Group, including the regional companies, in spite of the guarantees given over the years to the Commission and formalised in the 2001 Decision (in its recitals 4 and 12) and 2004 Decision (in its recitals 5 and 45). Grandi Navi Veloci claimed that the prospect of the future privatisations had been used as a bargaining chip vis-à-vis the Commission to allow for the payment of public service compensation to the companies of the Tirrenia Group until the end of 2008.

5.5. **Letter from the mayor of Lipari**

(278) On 2 December 2019, the mayor of Lipari and the other Aeolian Islands except Salina ([94]) submitted a letter, beyond the procedural deadlines for interested third parties to make their views known with respect to the 2011 and 2012 Decisions.

(279) In this letter, the mayor stressed the importance of the maritime transport sector for the everyday life of people living in the Aeolian Islands. In particular, the mayor highlighted that the islands in question are much smaller than Sardinia or Sicily and for this reason the maritime cabotage connections are of crucial importance. The mayor noted that these islands – especially the smallest ones – need these connections for basic food and medicine supplies. Without reliable and frequent connections, these islands would risk mass emigration until they would become uninhabited. Additionally, the mayor highlighted how tourism represents the key economic activity of these islands and how efficient and effective transports are essential for tourism, particularly in the high season. On this point, the mayor noted that the user demand for these transport services is relatively small but stable in the low season, concerning mostly commuters and island residents, while it is stronger in the high season, concerning mostly tourists. As a consequence, the connections to the Aeolian Islands need State support and withdrawing it would be a disaster for the basic rights and needs of the people living in those islands.

6. **SUBMISSIONS FROM COMPAGNIA DELLE ISOLE**

(280) On 23 October 2014, CdI participated in a meeting with the Commission and the Italian authorities. The company also submitted three sets of observations, all beyond the procedural deadlines for interested third parties to make their views known with respect to the 2011 and 2012 Decisions. For none of these submissions, CdI completed the compulsory complaint form referred to in Article 24(2) of Council Regulation (EU) 2015/1589 ([95]). Nevertheless, the Commission will summarise these submissions in the following sections and has taken them into account in its assessment.

6.1. **First submission**

(281) In its first letter sent on 8 August 2013, sent upon request from the Commission, CdI provided detailed data regarding the routes it operated in the period between 1 August 2012 and 31 December 2012. The information provided included, among other elements, a list of the routes operated with the following data:

(1) The season in which the route is operated ([96]);

(2) The tonnage of the vessels used;

(3) The overall number of voyages;

(4) The average number of passengers and cars per voyage;

(5) The average freight volume (in linear meters) per voyage;

([94]) Namely Vulcano, Panarea, Stromboli, Filicudi and Alicudi.
([95]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).
([96]) In the case of CdI, all of the routes are operated all year.

(6) The average total revenues per voyage (in EUR);

(7) Average staff numbers and costs (in EUR) per voyage ([97]);

(282) Additionally, CdI stated that it had acquired the Siremar business branch after a valuation by an independent expert and that there was no economic continuity with Siremar in EA.

6.2. **Second submission**

(283) In its second set of observations, sent on 23 and 30 October 2014, CdI provided comments on the counter-guarantee.

(284) Firstly, it noted that Sicily had decided to set up Mediterranea with clear political and economic objectives: supporting the minor islands communities with the 'in house' provision of maritime cabotage services and providing the necessary capital for a qualified and well-defined participation in the provision of those services. In this respect, in order to carry out its business object, CdI made several purchase offers for Siremar, the latest being those of 9 June, 18 July and 13 October 2011.

(285) Secondly, it claimed that the award of the business branch was legitimate and provided documents on the tender procedure and related national litigation. CdI claimed that Siremar in EA and the Ministry of Economic Development were aware of the existence of the counter-guarantee, and still they carried out the transfer of the Siremar business branch to CdI, a full 10 months after the awarding of the tender. In particular, CdI shared with the Commission a ruling by the Tribunal of Rome of 15 April 2014, clearing the plaintiffs of any criminal charges, as the Tribunal had concluded that the Extraordinary Administration had known about the counter-guarantee by Sicily, when it awarded the business branch to CdI. As facts established in final rulings in criminal proceedings cannot be contested in related procedures, CdI argued that this proved that the counter-guarantee was fully regular and at the same time not decisive for the outcome of the tender ([98]).

(286) Thirdly, CdI noted that Sicily offered the counter-guarantee in its capacity as an investor owning a stake in a company, not as a public authority. Since a counter-guarantee was necessary to obtain the guarantee by Unicredit on the deferred payments of the sale price, all its shareholders, including private parties Lauro.it SpA, Davimar and Isolemar S.r.l, issued a counter-guarantee. For the first offer by CdI, they did so even before Sicily issued its own counter-guarantee, because of the lengthier decision-making procedures of a public administration. Indeed, that delay caused CdI to rely at first on the guarantee by Commercial Fidi, which would later be replaced by the comfort letter from Unicredit, which included a suspensory clause on the verification of the powers of the General Accountant of Sicily to issue the counter-guarantee (see recital (84)). However, this would not be relevant, for two reasons: first, the Extraordinary Commissioner did not take it into account and requested another round of offers; second, the counter-guarantees by the other parties were complete. Therefore, CdI concluded that the counter-guarantee from Sicily was an ordinary business transaction and did not provide any advantage to CdI or Unicredit.

6.3. **Third submission**

(287) In its third letter, sent on 15 July 2015, CdI first referred to the arguments submitted by the Italian authorities on the price of the business branch, which met the private vendor criterion, and on economic discontinuity between Siremar in EA and CdI. CdI claimed, in particular, that decisions 5172/2012 and 592/14 did not change this conclusion, as they focused on one item of the privatisation procedure, namely the counter-guarantee by Sicily. The decisions by the TAR and CdS did not have any effect on the mechanisms put in place to ensure economic discontinuity: the scope of the transfer and of the public services under the new Convention, as defined by the 2010 Law; and the provisions on the workforce laid down by Article 56(3-bis) of Decree Law 270/1999. Moreover, Sicily had issued the counter-guarantee, while the Extraordinary Administration and the Ministry of Economic Development supervised the transfer of the business branch. Therefore, the existence of such a counter-guarantee cannot call into question the legitimacy of the sale procedure. CdI also informed the Commission that the various institutions and stakeholders involved had met on 20 April 2015 to ensure the correct application of decisions 5172/2012 and 592/14 ([99]).

([97]) This included the number of crew personnel as well as the number of overhead and on-shore staff allocated to each route.
([98]) CdI also provided information on proceedings at the administrative tribunals in Italy and informed the Commission that it had appealed decision 592/14 by the CdS at the *Corte di Cassazione* (see recital (96) and footnote 45).
([99]) These were: the Undersecretary to the Prime Minister's Office, the Ministry of Economic Development, the Ministry of Transport, the Region, Siremar in EA, SNS and CdI.

(288) Additionally, CdI argued that the safeguards of the procedure ensured that the price paid for the Siremar business branch was its real market price after the granting of the aid, meaning that the value of such aid was effectively already included in the sale price ([100]). By this reading, the seller would have kept the advantage of any State aid, as the market price of its assets was correspondingly higher, and the buyer would therefore not be required to repay that aid. Therefore, any recovery order potentially directed to Siremar in EA should not be extended to the buyer of the Siremar business branch.

7. COMMENTS FROM ITALY ON INTERESTED PARTIES COMMENTS AND SUBMISSIONS

(289) The Commission forwarded to Italy the comments and submissions summarised in Sections 5 and 6. However, Italy only provided comments to the second submission by SNS (see Section 5.2.2), by letter of 13 May 2015.

(290) In particular, Italy noted that in the last phase of the sale procedure, with the deadline of 13 October 2011, the Extraordinary Commissioner explicitly advised the bidders against submitting offers backed by any guarantee in violation with State aid rules. Accordingly, CdI submitted its offer with the comfort letter by Unicredit, which did not include any reference to a counter-guarantee by Sicily, while still subjecting the validity of the comfort letter to other conditions ([101]). Therefore, the ministerial authorisation was granted on the assumption that the rules of the procedure had been fully respected.

(291) Italy also argued that the capital increase by Mediterranea was undertaken *pari passu* with the other private shareholders of CdI, and that for this reason it did not entail any State aid. Moreover, Italy reiterated that Sicily's shares were statutorily different from those of CdI's private shareholders, thereby strictly limiting its influence within the company.

8. ASSESSMENT

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

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

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

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

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

(c) distort or threaten to distort competition,

(d) affect trade between Member States.

(294) Firstly, the Commission notes that the new Convention should be assessed jointly with the privatisation of the Siremar business branch. Such joint assessment is appropriate because in essence Italy organised a tender for a public service contract (i.e. the new Convention) whereby the winning bidder had to acquire from Siremar a number of assets (mainly ships) necessary to discharge the public service obligations laid down in that public service contract.

(295) Secondly, the Commission notes that, at the time of adoption of this Decision, the Italian authorities and CdI have already rescinded both the sale contract and the new Convention they had concluded. The latter, bundled with the Siremar business branch, was then transferred to SNS. Indeed, as described in recitals (99) and (100), the initial award of the new Convention and the Siremar business branch to CdI has been entirely annulled and both were ultimately attributed to SNS on 11 April 2016. Moreover, as the award of the new Convention and the sale of the business branch are intrinsically linked, it is not possible to assess either of the two measures separately, not even for a limited period of time. Against this background, concluding the investigation on the initial award of the new Convention, bundled with the Siremar business branch, to CdI, over the period 1 August 2012 – 10 April 2016, would be logically impossible, as it would amount to assessing the same procedure twice (once

([100]) The company referred to the judgements of 20 September 2001 in Case C-390/98 *Banks* (ECLI:EU:C:2001:456) and of 29 April 2004 in Case C-277/00 *Germany v Commission* (ECLI:EU:C:2004:238).

([101]) The two conditions were: CdI had to win the tender for the business branch and the sale contract had to be signed by 31 December 2011.

for the intermediary award to CdI and once for the final award to SNS) ([102]). Therefore, this Decision will assess only the award of the new Convention, bundled with the Siremar business branch, from Siremar in EA to SNS. As the new Convention, in force since 11 April 2016, had essentially the same terms and conditions as that which applied in the period 1 August 2012 – 10 April 2016, and as the business branch was also essentially the same, the Commission has integrated all the relevant information it has gathered in the course of the formal investigation concerning the period 1 August 2012 – 10 April 2016 in the assessment of the award of the new Convention bundled with the Siremar business branch to SNS.

(296) Finally, the Commission notes that the berthing priority, which only applies to the public service routes, is inextricably linked with the performance of the SGEI by Siremar and its acquirer SNS. Therefore, this measure will be assessed jointly with the public service compensation granted to those companies (see Sections 8.1.1, 8.1.3 and 8.3.1).

8.1.1. *The prolongation of the initial Convention between Siremar and Italy*

8.1.1.1. State resources

(297) In order to be qualified as State aid, a measure must be imputable to the State and granted directly or indirectly by means of State resources.

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

(299) The Commission takes note that, according to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing but that Siremar did and does not pay any additional fee for the berthing priority. Nevertheless, the Commission considers that in principle Italy could have chosen to impose an additional fee for the berthing priority and that by not doing so, it has foregone State revenues. Furthermore, since the berthing priority is granted by law, it is imputable to the State (see recital (131)).

8.1.1.2. Selectivity

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

8.1.1.3. Economic advantage

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

(302) In particular, in its Altmark judgment ([103]), the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not within the scope of Article 107(1) TFEU.

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

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

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

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

([102]) In any event, the Commission notes that CdI is currently in liquidation and inactive. Therefore, the investigation on any aid granted to it would be without object (see recitals (408) and (413)).

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

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

(304) The Commission specified how it applies the Altmark Criteria in its Communication on the application of State aid rules to compensation granted for the provision of SGEI (the 'SGEI Communication') ([104]).

(305) Given that the Altmark criteria have to be complied with cumulatively, if any one of these criteria is not met, the Commission would conclude that the measure under assessment provides an economic advantage to the beneficiary. The Commission will then first assess observance of Altmark 4.

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

(307) For none of the prolongations of the initial Convention in the period between 1 January 2009 and 31 July 2012 was Siremar selected following a public tender procedure. Italy merely prolonged the system already in force, thereby entitling the pre-established operator to continue receiving compensation for the discharge of the public service obligations.

(308) Moreover, the Italian authorities have not provided to the Commission any information suggesting that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit. Italy has only argued that the public service compensation for Siremar decreased significantly from 2010 onwards, following the introduction of the maximum compensation amount set by the 2009 Law. However, Italy has not shown that the costs incurred by Siremar in the provision of its public service obligations were in line with those of a typical undertaking, well run and adequately provided with means of transport.

(309) The Commission therefore concludes that Altmark 4 has not been complied with in this case.

(310) Given that the four Altmark criteria are not cumulatively observed in this case, the Commission concludes that the compensation for the operation of maritime routes under the prolongation of the initial Convention provided Siremar with an economic advantage.

(311) With respect to the berthing priority, the Commission first recalls that the Italian competition authority AGCM has at least on two occasions considered that this measure has economic value (see recital (276)). Nevertheless, Siremar does not pay any fee for the berthing priority (see recital (226)). Furthermore, the Commission observes that the berthing priority has at least in theory the potential to lower the operator's costs (e.g. because the guaranteed berthing could reduce waiting times in ports and hence result in lower fuel costs) or increase its revenues (e.g., because some timings possibly attract more demand from passengers). Indeed, to the extent the berthing priority allows for a faster docking procedure, users of the ferry service may prefer the ferry operator that benefits from this measure. Even if these effects would only materialise in rare circumstances or would be limited, the berthing priority could nevertheless constitute an economic advantage for Siremar.

8.1.1.4. Effect on competition and trade

(312) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ([105]). It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ([106]).

([104]) OJ C 8, 11.1.2012, p. 4.
([105]) See, in particular, Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, paragraph 11; Case C-53/00 *Ferring*, ECLI:EU:C:2001:627, paragraph 21; Case C-372/97 *Italy v Commission*, ECLI:EU:C:2004:234, paragraph 44.
([106]) Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

(313) In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the Union, in particular since the entry into force of Council Regulation (EEC) No 4055/86 ([107]) and the Maritime Cabotage Regulation, liberalising the market of the international maritime transport and maritime cabotage, respectively. Therefore, the compensation for the operation of maritime routes under the prolongation of the initial Convention is liable to affect Union trade and distort competition within the internal market. For the same reasons, that conclusion also holds for the berthing priority.

8.1.1.5. Conclusion

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

8.1.1.6. New or existing aid

(315) The Commission first recalls that, according to Article 1(c) of Regulation (EU) 2015/1589, new aid means 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Indeed, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision ([108]).

(316) Siremar in EA considers that if the public service compensation awarded to Siremar until 2008 included would be considered existing aid on the basis of Article 4(3) of the Maritime Cabotage Regulation, this would also apply to the compensation paid on the basis of the prolongation of the initial Convention (recital (237)). The Commission notes that the compensation paid to Siremar for the operation of maritime public service obligations until 2008 was assessed in the 2020 Tirrenia Group decision and was indeed classified as existing aid (see recital (19)).

(317) However, in line with the position of the European Courts ([109]), the Commission considers that amending (i.e. prolonging) the duration of an aid scheme that had a clear expiry date (in this case, 31 December 2008) is sufficient to make it a new aid, irrespective of whether or not other characteristics of the measure were changed. On this basis, the Commission concludes that the public service compensation paid under the successive prolongations of the initial Convention should be considered as new aid. The arguments of Siremar in EA should thus be rejected.

(318) The Commission notes that neither the Italian authorities nor Siremar in EA have argued that the berthing priority is existing aid. The Commission will therefore assess this measure as new aid.

8.1.2. *Illegal prolongation of rescue aid to Siremar*

(319) The Commission has already established in recitals (34) to (40) of the 2010 Decision, that the notified rescue aid measure constituted State aid to Siremar within the meaning of Article 107(1) TFEU.

(320) In the 2010 Decision, the Commission declared the notified rescue aid to Siremar compatible with the internal market. In accordance with the 2004 Rescue and Restructuring Guidelines, Italy undertook to communicate to the Commission within 6 months, either a restructuring (or liquidation) plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.

(321) The first instalment of the guaranteed loan was disbursed to Siremar on 28 February 2011 and thus the 6-month deadline would have expired on 28 August 2011.

(322) Italy did not submit to the Commission a restructuring (or liquidation) plan by that date. On 11 July 2011, the guarantee was called by BIIS and Siremar became debtor to the State (see recital (63)). On 18 September 2012, Siremar reimbursed to the State the amount due (see recital (65)). Until the latter date, Siremar continued to fully benefit from the rescue aid measure.

(323) The Italian authorities have neither argued nor demonstrated that the prolongation of the rescue aid would no longer constitute State aid. They have only provided arguments (see Section 4.2) for why the measure would have remained compatible even following the expiry of the 6-month deadline.

([107]) Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).
([108]) Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, ECLI:EU:C:2016:797, paragraph 45.
([109]) Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava – Diputación Foral de Álava and others v Commission*, ECLI:EU:T:2002:59, paragraph 175.

(324) The Commission therefore considers that the extension of the rescue aid beyond the 6-month deadline, i.e. from 28 August 2011 until 18 September 2012, also constitutes State aid to Siremar within the meaning of Article 107(1) TFEU.

8.1.3. *The award of the new Convention bundled with the Siremar business branch and the berthing priority to SNS, the increase in CdI's capital and the counter-guarantee*

(325) In order to conclude on whether the award of the new Convention bundled with the Siremar business branch and the berthing priority constitutes an advantage to SNS within the meaning of Article 107(1) TFEU, the Commission must assess observance of the Altmark criteria (see recitals (301) to (304)).

8.1.3.1. Altmark 1

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

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

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

(328) In the field of maritime cabotage, detailed Union rules governing public service obligations have been laid down in the Maritime Cabotage Regulation and, for the examination of potential State aid to undertakings engaged in maritime transport, in the Community guidelines on State aid to maritime transport ('the Maritime Guidelines') ([110]).

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

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

(330) Article 2(3) of the Maritime Cabotage Regulation sets out that a public service contract may cover:

— Transport services satisfying fixed standards of continuity, regularity, capacity and quality,

— Additional transport services,

— Transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes,

— Adjustments of services to actual requirements.

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

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

(332) It results from established case law that public service obligations may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone ([111]). The Communication on interpretation of the Maritime Cabotage Regulation ([112]) confirms that 'it is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services.' Moreover, Article 2(4) of the Maritime Cabotage Regulation defines public service obligations as obligations that the shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

(333) In line with the case-law ([113]), to verify whether there is a real public service need and whether the use of a public service contract (i.e. the new Convention) was necessary and proportional, and hence whether the first Altmark criterion is met, the Commission will assess:

(1) Whether there was user demand;

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

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

(1) User demand

(334) In this case, CdI and later SNS were entrusted with the provision of mixed passenger and freight services and passenger only high-speed services on multiple lines. The public service obligations imposed on CdI and later SNS concern the maritime transport links to be operated, the type and capacity of the vessels assigned to the respective maritime routes operated, the availability of a backup ship to ensure continuity of service, the frequency of service, and the maximum fares charged to users of the service on each of the respective routes (i.e. lower fares for residents of the smaller islands and higher fares for other passengers).

(335) As described in recital (184), Italy has imposed the public service obligations laid down in the new Convention mainly to (i) ensure the territorial continuity between Sicily and its smaller islands and (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission considers that these indeed can be legitimate public interest objectives.

(336) Before CdI was originally entrusted with the operation of the maritime links as defined by the new Convention, these routes were operated by Siremar on the basis of the initial Conventions. Indeed, the Commission notes that the routes in question have been operated, largely unaltered, for many years i.e. at least since the entry into force of the initial Convention ([114]). When entrusting the new Convention in 2012, the Italian authorities, and in particular Sicily, considered that these services continued to be necessary to meet user demand.

(337) To illustrate the genuine demand from users for the services, Italy provided statistics which show that in 2010, Siremar transported 1 342 402 passengers and 311 114,50 linear meters of cargo on the five route bundles combined. In 2011, those figures were 1 332 400 and 290 704,70 respectively. This shows that in the 2 years before CdI was entrusted with its public service obligations, there was a significant aggregate demand for maritime transport services on the routes concerned.

(338) However, in order to establish that there is a real user demand on each of the twenty routes concerned, grouped in the five bundles, a more detailed assessment is necessary. For this purpose, Italy provided route-by-route statistics for the period 2007 – 2019 ([115]). These statistics include the total number of passengers or linear meters of cargo transported per year, which allowed calculating averages per sailing. As an illustration, Table 5 shows two such metrics for the years 2010 and 2019. These figures show that throughout both years, most of the

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

([112]) Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), Brussels, COM(2014) 232 final, 22.4.2014.

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

([114]) Furthermore, the Commission notes that the five bundles of routes were already operated with some form of public compensation in the 1950s.

([115]) Italy provided only estimates for 2015, not validated by an external consultant as required under the New Convention, and no data for the period 1 January – 15 April 2016, as CdI was preparing for the return of the business branch to Siremar in EA, and for the period between 1 January 2011 and 30 July 2012, as Siremar in EA was operating the public service obligations.

round trip sailings on the routes concerned carried more than a hundred passengers. In 2010, only four routes carried below a hundred passenger on average, while in 2019, only three routes did. The Commission notes that the low number of passengers on those individual routes can be explained by the low populations and small sizes of the islands concerned, as well as by the relatively short and frequent trips, which are necessary to meet the mobility needs of the inhabitants of those islands. The Commission has also analysed the route-by-route statistics for each year until end 2019 ([116]). The Commission notes that there were fluctuations in the number of recorded trips and passengers on the various lines throughout the years. However, this is because these are very small islands, with limited port infrastructure, that are relatively close to each other. This requires a frequent adjustment of schedules to accommodate local needs (such as commuting patterns for education or work purposes) and mitigate any connection problems (for instance, if a berth is undergoing maintenance and can only accommodate smaller ships, or fewer ships at the same time, one route of a bundle may not be operated for some time, while other routes of that bundle could be operated at increased frequencies). However, based on the data at the Commission's disposal, there are no indications that the user demand on any route or route bundle had or has actually disappeared.

		Average # passengers/sailing ([117])		**Average cargo/sailing** ([118])	
Mixed service routes		**2010**	**2019**	**2010**	**2019**
Milazzo – Aeolian Islands – Naples bundle	C/1	[…]	[…]	[…]	[…]
	C/2	[…]	[…]	[…]	[…]
	C/3	[…]	[…]	[…]	[…]
	C/4	[…]	[…]	[…]	[…]
	C/6	[…]	[…]	[…]	[…]
Palermo – Ustica bundle	D/1	[…]	[…]	[…]	[…]
Trapani – Egadi Islands bundle	D/2	[…]	[…]	[…]	[…]
	D/3	[…]	[…]	[…]	[…]
Trapani – Pantelleria bundle	D/4	[…]	[…]	[…]	[…]
Trapani – Pelagie Islands bundle	D/5	[…]	[…]	[…]	[…]
		Average # passengers/sailing			
Passenger only routes		**2010**	**2019**		
Milazzo – Aeolian Islands (–Naples) bundle	ALC/2	[…]	[…]		
	ALC/2 bis	[…]	[…]		
	ALC/3	[…]	[…]		
	ALC/4	[…]	[…]		
	ALC/6	[…]	Not applicable ([119])		
Palermo – Ustica bundle	ALD/1	[…]	[…]		
Trapani – Egadi Islands bundle	ALD 2/3	[…]	[…]		
	ALD 2/3 bis	[…]	[…]		

Table 5 – User demand statistics for the year 2010 (operated by Siremar) and 2019 (operated by SNS)

([116]) As an illustration, Table 5 includes these route-by-route statistics for 2019. For reasons of brevity, the Commission does not report the figures for all the other years during which CdI or SNS operated the service.
([117]) Total number of passengers divided by the total number of round trip sailings in the period.
([118]) Total amount of cargo (in linear meters) divided by the total number of round trip sailings in the period.
([119]) As of 1 September 2016, the route was changed into two additional 'ALC/2' (first leg) and 'ALC/2 bis' (return) services.

(339) To demonstrate that user demand remained present when CdI and later SNS started operating the routes under the new Convention, Italy provided further statistics. The figures in Table 6 show that from 2013 onwards, CdI and later SNS transported more passengers and cargo than Siremar had done in 2010 and 2011 (see recital (337)). While there were some fluctuations over time, these figures confirm that user demand remained present and even increased in recent years.

	# of passengers transported	**Cargo transported (in linear meters)**
2012 (August-December)	[…]	[…]
2013	[…]	[…]
2014	[…]	[…]
2015 ([120])	[…]	[…]
2016 (April – December) ([121])	[…]	[…]
2017	[…]	[…]
2018	[…]	[…]
2019	[…]	[…]

Table 6 – Statistics for the years 2012-2019 (mixed and passengers only routed operated by CdI and SNS)

(340) The Commission considers that the above statistics (see recitals (337), (338) and (339)) clearly demonstrate that there is a genuine demand for passenger and freight services on each of the twenty public service routes grouped in five bundles. It can therefore be concluded that these services meet a genuine user demand and hence address real public needs.

(2) Existence of a market failure

(341) According to paragraph 48 of the SGEI Communication, 'it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions' ([122]). Therefore, the Commission must examine whether the service would be inadequate, in light of the public service requirements imposed by the Member State through the new Convention, if its provision were left to the market forces alone. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

(342) The Commission has already analysed in past decisions whether there was a market failure on these bundles of routes. In particular, in its 2004 Decision, the Commission noted that, regarding Siremar, none of the private Italian operators on the route bundles served by the (then) public operator provided comparable services all year round capable of meeting all the public service requirements stipulated in the 5-year plans ([123]). This finding relates to the period 1992-2008 and is not put into question by the 2009 Judgment that annulled the 2004 Decision, nor by the 2020 Tirrenia Group decision, which concluded that the public service compensation granted to Siremar was existing aid.

(343) However, in its 2012 Decision, the Commission noted that during the time period leading up to the first award of the new Convention, other operators were providing regular services on the relevant routes ([124]). At the time, Italy had argued that Sicily, through several tender procedures, had selected these other operators to operate additional public services under separate contracts. Before proceeding with its assessment, the Commission notes the following.

([120]) The figures for 2015 were not validated by an external consultant as for the other years, but were prepared *ex-post* by the Italian authorities using documentation from CdI.
([121]) Italy has not provided any data for the period 1 January – 10 April 2016. Italy claims these statistics were not collected as at the time CdI was preparing the transfer of the business branch back to Siremar in EA.
([122]) See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107, paragraph 71.
([123]) See recital 135 of the 2004 Decision.
([124]) See recitals 101 – 103 and 201 of the 2012 Decision.

(344) Firstly, this assessment is limited to the competitive situation of the market in the years before July 2012, as this was the relevant period for the Italian authorities when they were defining the public service obligations. Although the new Convention imposes specific public service obligations in terms of fares to be charged (including reduced fares for the residents of the smaller islands), Italy has not justified the necessity of the public service by arguing that CdI and later SNS needed to maintain fares at a level lower than those charged by the other operators. In the course of the investigation Italy has rather claimed that, to the extent that other operators provided ferry services on the routes operated by CdI and later SNS, these competing services would differ in terms of the continuity and frequency throughout the year, would not be equivalent (in terms of ports or type of service, e.g. passenger-only instead of mixed), would not be of the same quality, or would also be subsidised under separate contracts. The Commission has therefore not carried out a comparative analysis of the fares charged by all operators on the routes in question. On the contrary, the Commission has focused on possible differences in terms of continuity, regularity, capacity and quality (see recital (330)), and on whether the competing operators were also subsidised under separate contracts.

(345) Secondly, the comparable services offered by other operators on the route bundles defined in the new Convention were also provided under public compensation regimes, as complementary SGEI defined by Sicily ([125]). In principle, the presence of other providers of SGEI on the route bundles set out in the new Convention does not put into question the validity of the SGEI for those bundles, but rather it reinforces it, as it suggests that the need for these connections was so strong and/or varied that only multiple operators could fulfil it. Indeed, the fact that other operators are present on a certain route bundle cannot be an indication that that bundle can be adequately served by market forces alone, if those other operators are also receiving public compensation under separate contracts to offer their services.

(346) Thirdly, Italy identified 20 routes on five bundles, or networks of connections, to be included in the new Convention ([126]). The Commission notes that, according to Section 5.5.3 of the Communication on interpretation of the Maritime Cabotage Regulation ([127]), 'Member States often wish to group public service routes to and from different islands into a single bundle in order to generate economies of scale and attract operators. Bundles as such are not contrary to Union law provided that bundling does not lead to discrimination and does not lead to undue market distortions. The most appropriate size of bundles should be decided by taking account of the best synergy to be made in meeting essential transport needs.'

(347) In this case, the routes were grouped in geographical bundles for planning purposes, to identify potential gaps or overlaps and ensure a coherent and complete set of connections for the inhabitants of these islands, both with Sicily and with the other islands, particularly the relatively larger ones. Indeed, Table 3 shows that the routes within each bundle are frequently overlapping and are complementary to each other ([128]). Given the presence of certain essential services such as schools, large grocery stores, and specialised medical services only on Sicily or on the relatively larger islands, Italy chose to entrust route bundles instead of individual routes. Indeed, while private operators do offer some connections between the relatively larger islands (e.g. Lipari and Pantelleria) and Sicily, they do not offer connections to and between all of the islands throughout the year. Given the need to ensure connections between several small islands in various and sometimes relatively remote locations, the Commission considers that Italy has not made a manifest error in identifying the five bundles, comprising one or more routes depending on the characteristics of the island or archipelago in question. For these reasons, given the particular circumstances of this case, the Commission has not assessed each individual connection but instead focused on each bundle as a coherent set of connections to, from and within an archipelago or island.

(348) Against this background, on the basis of the competitive situation leading up to the moment of the first entrustment on 30 July 2012 and drawing on the comments from interested parties (see Section 5), the Commission has analysed each route bundle to verify that Italy did not make a manifest error in establishing that there was a market failure:

— Milazzo – Aeolian Islands – Naples. CdI operated and SNS operates five routes served by ferry ships and five routes served by high-speed ships, connecting the Aeolian Islands with Sicily and with the mainland ([129]). On this bundle, during the period 2009-2012, the competitors were Ustica Lines, NGI, SNAV and Alilauro. Ustica

([125]) As the services offered by the other operators are beyond the scope of this decision, the Commission will not comment on whether their services constitute genuine SGEI.
([126]) For details on routes and frequencies, see Table 3. These frequencies were largely the same during the prolongation period (2009-2012), with only minor differences on a few individual routes and/or periods of the year.
([127]) See footnote 112.
([128]) The schedule of the individual routes within a bundle can also be changed over time – see footnote 119.
([129]) Note that as of 1 September 2016, SNS is operating only four different high-speed routes (see footnote 119).

Lines and NGI were operating routes year-round, linking Milazzo to the Aeolian Islands, under public compensation granted through separate contracts: Ustica Lines provided high-speed services on two routes, while NGI operated a mixed service on one route. SNAV and Alilauro operated a fast ship service only during the high season on routes linking Naples and the Aeolian Islands, without receiving public compensation. The Commission firstly notes that the competitors did not offer services comparable to those of CdI and later SNS in terms of the routes covered, frequency and capacity. On the contrary, they were merely operating on one or two routes, providing a much more limited service in terms of capacity and timing. In particular, NGI provided ferry services by means of vessels subject to different capacity requirements. As for SNAV and Alilauro, their services did not provide a connection to Milazzo, as their routes only linked Naples to the Aeolian Islands and provided connections within those islands. Moreover, these private operators were not servicing these routes in the low season. As such, these services are not comparable to those operated first by CdI and later by SNS under the new Convention. Pan Med submitted that competitors offered similar services on this bundle (see recital (272)). However, Pan Med did not identify those competitors nor did it demonstrate why it considered their services similar or comparable to those carried out by CdI and later SNS. Against this background, the Commission notes that all operators providing year-round services on these lines did so under public compensation. This, together with the geographical and demographical context of these islands (with population ranging between approximately 100 in Alicudi and approximately 10 700 in Lipari), illustrates that market forces alone were not sufficient to provide the level of connections required for ensuring territorial continuity. Indeed, the Commission concludes that no other operator, considering only their own commercial interest, would have provided services of the level required in the new Convention. Therefore, Italy did not make a manifest error by considering there was a market failure on this route bundle;

— Trapani – Egadi Islands. CdI operated and SNS operates two routes served by ferry ships and four routes served by high-speed ships ([130]). Ustica Lines and Traghetti delle Isole ([131]) were also operating routes year round linking the Egadi Islands to Sicily, offering high-speed and ferry services respectively. The Commission first notes that Ustica Lines and Traghetti delle Isole were compensated by Sicily for the provision of these services under separate contracts. Additionally, for Traghetti delle Isole, the frequency required was different from that provided by CdI and later SNS, as Traghetti delle Isole did not have to offer daily connections as CdI and later SNS did. Moreover, Traghetti delle Isole provided ferry services by means of vessels subject to different capacity requirements, which included for instance the transport of dangerous goods. For Ustica Lines, the frequency required was similar to that provided by CdI and later SNS (multiple connections per day). However, Ustica Lines provided their services by means of vessels subject to different capacity requirements. Against this background, the Commission notes that all operators providing year-round services on these lines did so under public compensation. This, together with the geographical and demographical context of these islands (the total population of Favignana, Levanzo and Marettimo is around 4 300), illustrates that market forces alone were not sufficient to provide the level of connections required for ensuring territorial continuity. Indeed, the Commission concludes that no other operator, considering only their own commercial interest, would have provided services of the level required in the new Convention. Therefore, Italy did not make a manifest error by considering there was a market failure on this route bundle;

— Porto Empedocle – Pelagie Islands. CdI operated and SNS operates both ferry and high-speed services year-round. Ustica Lines was the only other operator providing year-round high-speed services on the route, with an additional high-speed service in the high season. The Commission first notes that Ustica Lines was compensated by Sicily for the provision of these services under a separate contract. Moreover, Ustica Lines was providing a passenger-only service, without carrying any freight, and with a different frequency. As such, its services are not comparable to the services provided by CdI and later SNS under the new Convention. Against this background, the Commission notes that the only operator providing year-round services on this route bundle did so under public compensation. This, together with the geographical and demographical context of these islands (the total population of Linosa and Lampedusa is around 6 500), illustrates that market forces alone were not sufficient to provide the level of connections required for ensuring territorial continuity. Indeed, the Commission concludes that no other operator, considering only their own commercial interest, would have provided services of the level required in the new Convention. Therefore, Italy did not make a manifest error by considering there was a market failure on this route bundle;

([130]) During the prolongation period, the four high-speed routes were grouped into two for reporting purposes.
([131]) Currently subject to coordination and control from Caronte & Tourist group.

— Trapani – Pantelleria. CdI operated and SNS operates year-round ferry services. Traghetti delle Isole was the only other operator providing year-round ferry services on the route. The Commission first notes that Traghetti delle Isole was also compensated by Sicily for the provision of these services, under separate contracts. Additionally, Traghetti delle Isole provided ferry services with similar frequency to CdI and later SNS, by means of vessels subject to different capacity requirements, which included for instance the transport of dangerous goods. Pan Med submitted that competitors offered similar services on this bundle (see recital (272)). However, Pan Med did not identify those competitors nor did it demonstrate why it considered their services similar or comparable to those carried out by CdI and later SNS. Against this background, the Commission notes that the only other operator providing year-round services on this line did so under public compensation. This, together with the geographical and demographical context of Pantelleria (a small island with around 7 800 inhabitants), illustrates that market forces alone were not sufficient to provide the level of connections required for ensuring territorial continuity. Indeed, the Commission concludes that no other operator, considering only their own commercial interest, would have provided services of the level required in the new Convention. Therefore, Italy did not make a manifest error by considering there was a market failure on this route bundle;

— Palermo – Ustica. CdI operated and SNS operates both ferry and high-speed services year-round. Ustica Lines and NGI were present on the route year-round, the former providing a high-speed service while the latter provided a ferry service. The Commission first notes that Ustica Lines and NGI were also compensated by Sicily for the provision of these services, under separate contracts. Additionally, both operators provided ferry services by means of vessels subject to different capacity requirements, which included, for NGI, the transport of dangerous goods. Moreover, the frequency required was also different from that provided by CdI and later SNS, as the other operators did not have to offer daily connections as CdI and later SNS did. Pan Med submitted that competitors offered similar services on this bundle (see recital (272)). However, Pan Med did not identify those competitors nor did it demonstrate why it considered their services similar or comparable to those carried out by CdI and later by SNS. Against this background, the Commission notes that all operators providing year-round services on this route bundle did so under public compensation. This, together with the geographical and demographical context of Ustica (a very small island with around 1 300 inhabitants), illustrates that market forces alone were not sufficient to provide the level of connections required for ensuring territorial continuity. Indeed, the Commission concludes that no other operator, considering only their own commercial interest, would have provided services of the level required in the new Convention. Therefore, Italy did not make a manifest error by considering there was a market failure on this route bundle.

(349) In light of the above, the Commission concludes that, at the moment of entrustment, market forces alone were insufficient to meet the public service needs. In this regards, the Commission further notes that, on all of the route bundles currently operated under the new Convention by SNS, the to some extent comparable services provided by the other operators were also subsidised and were in any event not fully equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service needs identified by Italy in the new Convention.

(3) Least harmful approach

(350) The Commission notes that the Italian authorities have chosen to conclude a public service contract with one operator (CdI and later SNS) rather than to impose public service obligations on multiple operators. Based on the information provided by Italy, the Commission accepts that the user demand (as described above, see recitals (334) to (340)) could not have been met by imposing public service obligations. On all of the route bundles, the provision of regular services throughout the year requires public service compensations. Where there are private operators present who do not receive public service compensation, the offer is provided only in the high season (see recital (348)). Furthermore, an analysis of the detailed accounts per route under the new Convention shows that the operation of all routes by SNS in 2017, 2018 and 2019 is structurally loss-making, so that without any public service compensation they would not be operated with the desired frequency, capacity and quality ([132]). Ecorys drew a similar conclusion in its report to the Commission (see

([132]) For the period 11 April – 31 December 2016, SNS reported positive results on the lines ALC/6 and ALD/3 bis. However, the Commission notes that for a significant part of the low season of 2016 (1 January – 10 April), when the routes are typically not profitable, CdI was operating the service. Therefore, the fact that SNS was not operating the service in that period likely biased the financial results of these routes for 2016.

recital (119)). In addition, the Commission takes note of Italy's argument that the choice for a public service contract was also necessary in view of the privatisation of Siremar. More specifically, Italy argued that tendering out Siremar's assets together with a new public service contract allowed to (i) ensure continuity of the maritime public service, (ii) maximise value for the State, and (iii) safeguard employment. It is for these reasons that the Commission agreed that Italy would tender out the Siremar business branch together with the new Convention (see recital (136)). In doing so, the Commission also accepted, and reiterates in this Decision, that Italy would not rely on public service obligations that apply to all operators but would conclude a single public service contract, initially with CdI and later with SNS.

Conclusion

(351) Based on the above assessment, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to CdI and later SNS as SGEI. The doubts expressed by the Commission in the 2012 Decision are hence dispelled.

(352) In order to conclude that Altmark 1 is complied with, the Commission must still check whether CdI and later SNS were entrusted with public service obligations which were clearly defined. In this regard, the Commission notes that the public service obligations are clearly described in the new Convention and its annexes (which include for instance ship specifications for each route). Likewise, the rules regulating the compensation are detailed in the Convention, the 2009 Law and the CIPE Directive. The new Convention also has a clear duration (12 years), identifies CdI and later SNS as the public service operator and contains the arrangements for avoiding and recovering any overcompensation (see also Section 2.3.4). Therefore, the Commission concludes that the first Altmark criterion is met.

Berthing priority

(353) Article 19-*ter*, paragraph 21, of Decree Law 135/2009 clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Siremar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy the mobility needs of the smaller islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are certain time scheduling obligations in the new Convention, such as taking the timetables of other means of transportation (such as buses) into account, the berthing priority helps to ensure that ports allocate the berths and berthing times in such a way as to enable the public service operator to respect its public service obligations. This berthing priority was transferred to CdI and later SNS after the acquisition of the Siremar business branch. Against this background, the Commission considers that this measure is awarded to enable CdI and later SNS to perform their public service obligations that constitute genuine SGEI (see recital (351)). Therefore, the berthing priority also complies with the first condition of the Altmark judgment.

8.1.3.2. Altmark 2

(354) The Commission recalls that in the 2012 Decision (see its recital 205), it had taken the preliminary view that the second condition of the Altmark judgment is observed.

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

(356) More specifically, the parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the new Convention (and annexes thereto) while the maximum compensation amounts are laid down in the 2009 Law. The method of calculation of the compensation, including for instance the cost elements taken into account, are detailed in the CIPE Directive. Since the berthing priority does not include any financial transfer to the operator of the service, the Commission considers that this measure complies with the second Altmark criterion.

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

8.1.3.3. Altmark 3

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

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

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

(361) The Commission notes that certain aspects of the compensation method as laid down in the new Convention, indeed seem to reduce the commercial risk incurred by CdI and later SNS. In particular, the maximum fares that the operator can charge are adjusted annually to take into account inflation and reflect variations in fuel costs. Moreover, the new Convention contains certain clauses that aim at maintaining the economic-financial equilibrium of the public service (see recital (130)). In particular, in case the public service compensation would be insufficient to cover the cost of the services entrusted by the new Convention, these clauses allow to revise (i) the scope of these services, (ii) the way the services are delivered (e.g. type of ships), or (iii) the maximum fares.

(362) However, the abovementioned clauses are subject to a number of restrictions. In particular, under Article 8 of the new Convention, the economic-financial equilibrium of the public service is only reviewed every 3 years. If this review shows that the compensation is insufficient to cover the public service cost, then the operator and the Italian authorities can only agree to make changes for the next 3-year period. In case the revenues or costs of the public service show unforeseeable structural differences more than 3 % higher or lower than the values laid down in the new Convention, its Article 9 allows the parties to request (subject to a number of conditions) a revision of the economic-financial equilibrium. Under both Articles, such changes (if any) are the outcome of a negotiation procedure and until an agreement is reached, the operator must continue to operate the public service unaltered. As a result, the operator remains partially exposed to the risk that the compensation is insufficient to cover the costs of running the service. While Articles 8 and 9 of the new Convention can be used to restore the economic-financial equilibrium, this is only done on a forward-looking basis and there is no retroactive correction possible.

(363) As explained in recitals (49) to (58), the CIPE Directive provides that the risk premium of 6,5 % would be used to determine the return on capital using the WACC formula. In particular, for Siremar Italy initially took into account a Beta of 0,56 for that formula. The Beta reflects the risk of the activity carried out by the operator and its level shows that in the calculation of the return on capital, Italy took into account the fact that the risk of the activity carried out by operator is substantially lower than the market risk. However, in the course of the formal investigation (see recital (218)), Italy has clarified that, because the amount of compensation is capped by the 2009 Law, the decision was taken to simplify the calculation by applying the 6,5 % as a flat rate return on capital. The Italian authorities also demonstrated that applying the full methodology as laid down in the CIPE Directive would have resulted in a return on capital that exceeds 6,5 % (i.e. 8,87 %). For this reason, Italy considers that their simplified approach is conservative and does not allow for higher compensation for the operator than what was established under the CIPE Directive.

(364) Against the above background, at recital (363) of the 2020 Tirrenia/CIN decision, the Commission has compared the return on capital of 6,5 %, also applied in the calculation of the compensation for the company subject to that investigation (i.e. CIN), with the median return on capital generated by a benchmark group in 2011 (the year before CdI's first entrustment). The benchmark group consisted of selected ferry operators that offered maritime

connections within Italy or between Italy and other Member States ([133]). The Commission notes that Siremar is an operator of comparable size to CIN. However, the routes in question are different from those operated by CIN, as they are shorter and connect smaller islands. The Commission considers that while the benchmark group is still relevant for Siremar, the latter's activities may be considered more risky, which means that a higher risk premium would not be unreasonable. The analysis showed that the return on capital realised by CdI and later SNS is just below the median return generated by the benchmark group. This comparison illustrates that in the year before CdI's entrustment, a 6,5 % return on capital for the maritime sector was not unreasonable.

(365) Most importantly, the Commission notes that regardless of the amount that the operator would be entitled to on the basis of the abovementioned methodology (including the return on capital), in practice later SNS can never receive more than the maximum amount set by the 2009 Law (i.e. EUR 55 694 895). The same applied for CdI in the period when it was carrying out the public services under the new convention. This amount, which was set in 2009 and never adjusted for inflation, was most likely conservative as it was almost 17 % lower of what Siremar had needed to operate the service in that same year ([134]). Irrespective of whether CdI or SNS was entrusted with the public service obligations, the actual figures for the period 2012-2019 in Table 7 show that in all entire years, the public service compensation was insufficient to cover the net cost of the service, including the 6,5 % return on capital ([135]). In 2012, CdI did obtain a small overcompensation, which was more than offset with losses in 2013 and 2014. However, CdI operated the service only in the months August to December. This period includes the most profitable month, when tourist demand is at its highest (August), and excludes the first months of the years where demand is very low. A similar consideration applies to the compensation received by SNS in 2016. The overcompensation SNS received in that year – which was also more than offset in later years – was due to the fact that SNS only operated the service in the period 11 April – 31 December 2016, which excludes the first 3 months of that year. In line with paragraph 47 of the 2011 SGEI Framework, the Commission assesses whether there was overcompensation over the whole duration of the contract. For the period 2012-2019, SNS and CdI combined received approximately EUR 30,3 million less than the amount as calculated using the methodology including the 6,5 % return. This figure confirms that the review clauses of the new Convention do not protect the operator from all the risks related to the operation of the public service. Some fluctuations between years notwithstanding, the Siremar business branch's realised return on capital for the period as a whole (up to 2019) was hence approximately – 4,7 % instead of the 6,5 % initially foreseen by Italy. Indeed, the total amount of compensation received by CdI and SNS over the period 2012-2019 is lower than the net cost incurred in the provision of the public service, even assuming a return on capital of 0 %. As shown in Table 7, CdI and SNS combined would have required additional compensation of approximately EUR 12,7 million just to cover their net costs. The conclusion that the review clauses of the new Convention do not protect the operator from all the risks also holds for SNS by itself (period 2016-2019): SNS received approximately EUR 23,3 million less than the amount as calculated using the methodology including the 6,5 % return on capital; the realised return on capital for SNS is about – 11,8 %, instead of the 6,5 % initially foreseen by Italy; and SNS would have required approximately EUR 15 million additional compensation just to cover its net costs.

([133]) In particular, it concerned Minoan Lines Shipping, La Méridionale, Moby, Grandi Navi Veloci, Liberty Lines (formerly known as Ustica Lines), Grimaldi Group, Corsica Ferries, SNAV, and Caronte & Tourist. Companies of the former Tirrenia Group (e.g. Caremar, Toremar) have been excluded from the benchmark group. The benchmark group does include the two companies that would later operate the new Convention – Liberty Lines (formerly known as Ustica Lines) and Caronte & Tourist – under the SNS joint venture. However, at the time those two companies were operating different services, outside the scope of the initial Convention. Accordingly, the Commission has not excluded them from the benchmark group.

([134]) The Commission recalls that 2009 was the last year when Siremar operated on normal terms (i.e. it had not yet entered the extraordinary administration).

([135]) In those years, the net capital invested yearly by CdI and SNS averaged EUR 33,8 million.

Public service routes	1/8/2012 - 31/12/2012 (CdI)	2013 (CdI)	2014 (CdI)	2015 (CdI)	11/4/2016 - 31/12/2016 (SNS)	2017 (SNS)	2018 (SNS)	2019 (SNS)	Grand total
Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
– Costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
– Amortizations	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
= Net cost of public service	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Reasonable profit (6,5 %)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
= Eligible for compensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
+ Actual compensation	23,346,079 €	55,694,895 €	55,694,895 €	55,694,895 €	40,297,059 €	55,694,895 €	55,694,895 €	55,694,895 €	397,812,508 €
= Over/undercompensation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	– 30,340,068 €

Table 7 – Net cost of the public service operated by CdI and SNS for the period 2012-2019

(366) The Commission further notes positively that Article 5 of the new Convention requires the operator to send its management accounts (sub-divided per route and certified by an independent auditor) every year to Sicily to enable the latter to check if there was any overcompensation. This provides an additional safeguard to ensure that the operator cannot benefit from any overcompensation. The Italian authorities also submitted these management accounts for the period 2012-2019, thereby enabling the Commission to make the calculations in Table 7 ([136]).

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

(368) With respect to the berthing priority and any possible overcompensation that might result from it, Italy has claimed that any possible monetary advantage from the berthing priority could not be quantified (see above recital (227)). In any event, the Commission notes that, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. The Commission's analysis in recital (365) confirmed that, in the period 2012-2019, CdI and SNS combined did not receive any overcompensation. This also holds for SNS by itself, in the years when it operated the new Convention (the 2016-2019 period). Therefore, the Commission concludes that also the berthing priority complies with the third Altmark criterion.

8.1.3.4. Altmark 4

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

(370) According to paragraph 63 of the SGEI Communication, the simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council ([137]) and Directive 2004/18/EC of the European Parliament and of the Council ([138]).

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

(372) The Commission observes that in this case, the tender procedure took place before the entry into force of Directive 2014/24/EU of the European Parliament and of the Council ([139]) (which applies to public contracts awarded for the operation of maritime transport services) and Directive 2014/25/EU of the European Parliament and of the Council ([140]). At that time, Directive 2004/17/EC and Directive 2004/18/EC were applicable. However, Directive 2004/17/EC does not apply to maritime transport services, such as those provided by Siremar ([141]).

([136]) With the exception of 2015 and the first months of 2016 (see footnotes 120 and 121). While the Commission regrets that Italy has not provided this data, it notes that this only affects the last period when CdI was operating the service, while the assessment of the Commission is focused on SNS, as explained in recital (295).

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

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

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

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

([141]) Indeed, Article 5 of Directive 2004/17/EC makes clear that only transport services by railway, automated systems, tramway, trolley bus, bus or cable are included in its scope.

(373) Public contracts for maritime, coastal or river transport fall instead within the scope of Directive 2004/18/EC, based on its recital 20. However, water transport services are listed in Annex II B to that Directive which implies ([142]) that they are only subject to its Article 23 and Article 35(4). This means that, under Directive 2004/18/EC, a public contract for maritime transport services is subject only to the obligations concerning technical specifications (Article 23) and to the obligation to publish a contract award notice (after the contract has been awarded and, therefore, at the end, not at the beginning, of the award procedure: Article 35(4)). All the other rules dictated by Directive 2004/18/EC – including the provisions on the content of notices to be published (Article 36(1)) and the provisions on selection criteria (Articles 45 to 52) – are not applicable to public contracts for maritime transport services.

(374) Furthermore, Directive 2004/18/EC does in any case not apply to service concessions as defined in its Article 1(4) ([143]). The Commission notes that service concessions, which have certain cross-border interest, nevertheless remain subject to the general TFEU principles of transparency and equal treatment.

(375) Based on the above, the Commission concludes that Directive 2004/18/EC can only apply in case of a public contract but not when it concerns a service concession. In addition, since the present case concerns water transport services, only some of that Directive's requirements would be applicable. Against this background, the Commission considers that it cannot rely solely on compliance with the Public Procurement Directives to demonstrate compliance with the fourth Altmark criterion. For this reason, the Commission assesses below whether the tender procedure used by Italy was competitive, transparent, and non-discriminatory. To make this assessment, the Commission will rely on the relevant guidance set out in its Notion of Aid Communication ([144]) (in particular in its paragraphs 89 et seq.).

Competitive and transparent nature of the tender

(376) Paragraph 90 of the Notion of Aid Communication specifies that a tender procedure has to be competitive ([145]) to allow all interested and qualified bidders to participate in the process. Furthermore, according to paragraph 91 of that Communication, the procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. That paragraph also emphasises that accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure and indicates that a tender has to be sufficiently well publicised, so that all potential bidders can take note of it.

(377) As a preliminary remark, the Commission points out that while Italian law ([146]) gave the Extraordinary Commissioner the possibility to engage in private negotiations with potential acquirers, he did not avail himself of this possibility in this case, except for the second phase of the procedure, after a call for expressions of interest was published and advertised, and in order to obtain better terms from CdI and SNS. Indeed, an open tender was preferred to ensure that the Siremar business branch would be sold at a market price and therefore the proceeds from the sale would be maximised. Since no private negotiations without a public call ever took place, the doubts expressed by the Commission in the 2011 Decision concerning this possibility are therefore dispelled.

(378) In this case, the tender procedure was launched by means of the publication of a call for expressions of interest for the acquisition of the Siremar business branch in one international and several national newspapers and on selected specialised websites (see recital (75)). That call invited 'anyone who can guarantee the continuity of the maritime transport service' to express their interest and did not impose any further conditions. Potential interested parties were also given sufficient time (i.e. 16 days) to express their interest. In the following due diligence stage of this process, qualified bidders were given almost 4 months to assess all relevant information in order to be able to determine if and how much they wanted to bid for the Siremar business branch.

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

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

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

([145]) In footnote 146 of the Notion of Aid Communication, the Commission observes that the Union Courts often refer, in the context of State aid to an 'open' tender procedure. The use of the word 'open' however does not refer to a specific procedure under the Public Procurement Directives. Therefore, the Commission considers that the word 'competitive' appears more appropriate, without intending to deviate from the substantive conditions set out in the case law.

([146]) In particular, Decree Law 134/2008.

(379) The Commission notes that the call for expressions of interest made clear that the Siremar business branch would be sold under the specific rules of the Marzano procedure with the express purpose of ensuring the continuity of the maritime transport service under the public service regime. Furthermore, the call referred to Article 19-*ter* of Decree Law 135/2009, which specified that on completion of the tender procedure, a new convention would be concluded with the buyer of the Siremar business branch. That Article also indicated that the duration of such new convention would be not more than 12 years and described what it should contain. In addition, that same Article fixed the maximum amount of compensation for Siremar at EUR 55 694 895 per year for the entire duration of the new convention. Finally, Article 19-*ter* specified that the acquirer of Siremar would keep the berthing priority on the public service routes.

(380) As pointed out in the 2011 Decision, the call for expressions of interest did not contain specific details about the exact assets for sale, the award criterion and the timing of the next steps of the tender procedure. The Commission considers that the tender process as a whole was nevertheless sufficiently transparent, for the reasons set out in the following recitals.

(381) First, the call for expressions of interest mentioned that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. This was the only selection criterion that Italy applied to determine whether interested parties would be allowed to participate in the tender procedure. While the call did not specify how bidders could prove they met this requirement, by default this meant that any appropriate means of evidence could be used ([147]). The Commission notes that none of the five interested parties were excluded, which indicates that each of them had actually provided adequate evidence of possessing financial means sufficient to ensure the continuity of the service. The Commission considers that this selection criterion was clear to all interested bidders and was justified in light of the objective pursued.

(382) Second, as explained in recital (379), the reference to Decree Law 135/2009 made clear to interested parties that a new convention (with a maximum duration of 12 years) would be concluded upon completion of the tender procedure and that the annual amount of public service compensation had been set at maximum EUR 55 694 895 per year. In addition, the call for expressions of interest indicated that the objective was to sell the business branch dedicated to the provision of the public service. Furthermore, as confirmed by Italy, all relevant information as regards the scope of the sale, including the draft convention to be concluded between the buyer and the State, was made available to the five parties who participated in the due diligence phase. This allowed these parties to decide whether to bid and if so how much to bid. The Commission points out that it is normal practice, in sales procedures between private operators, that commercially sensitive information is only made available in the due diligence phase. For the same reason, the interested parties had to sign confidentiality agreements before they were given access to the relevant documentation (see recital (76)). On this basis, the Commission considers that it was sufficiently clear from the call for expressions of interest ([148]) that the sale concerned the Siremar business branch bundled with a new convention. After having expressed their interest, parties were given access to all necessary information to decide on a possible bid.

(383) Third, with respect to the timing of the subsequent phases of the tender procedure the Commission notes the following. The interested bidders were invited by letter of 24 November 2010 to participate in the due diligence. The relevant details on the concrete next steps of the procedure, especially the timeline of the procedure and the criteria for admission to the second due diligence phase, were then provided to the interested bidders in a letter sent by the Extraordinary Commissioner's on 2 February 2011. The Commission considers that the absence of this information from the call for expressions of interest ([149]) is unlikely to have discouraged potential bidders from expressing their interest.

(384) Fourth, the Commission observes that based on the call six parties expressed their interest to acquire the Siremar business branch (see recitals (76) and (77)). These parties included some of the most important local ferry and ship operators: Caronte & Tourist SpA and Ustica Lines SpA (jointly bidding), Riccardo Sanges & C. S.r.l., Traghetti delle Isole SpA and Mediterranea Holding SpA (which included some experienced local operators among its shareholders and partnered with others to form CdI). The Commission considers that this confirms

([147]) Furthermore, as explained at recital (373), Article 36(1) of Directive 2004/18/EC did not apply to this tender. Therefore, Italy had actually no obligation to provide selection criteria in the call.

([148]) The Commission points out that Italy was also not obliged to provide a detailed description of the exact assets for sale and the new public service contract in the call for expressions of interest since Article 36(1) of Directive 2004/18/EC was not applicable to this tender procedure.

([149]) In addition, since Article 36(1) of Directive 2004/18/EC was not applicable to this tender procedure Italy was also not obliged to describe in the call for expressions of interest how the subsequent phases of the tender procedure would be organised.

that all potential bidders were given sufficient opportunity to express their interest to participate in the tender procedure. In this context, the Commission points out that interested parties did not have to follow burdensome procedures and would not have had to incur significant costs to express their interest. It was sufficient that they demonstrated their ability to guarantee the continuity of the maritime transport service. The six parties who expressed their interest also met this selection criterion and were accordingly invited to the due diligence phase. Five of them decided to take part in it. It was only after this phase that the parties had to decide if they wanted to make a bid and if so how high their bid would be.

(385) Based on the above, the Commission considers that, taken as a whole, the tender procedure was competitive and transparent. In particular, the intention of Siremar to divest the public service business (i.e. the Siremar business branch) was made available widely in a way reaching all possible bidders in the relevant regional or international market. Furthermore, the Commission takes into account that potential bidders could easily express their interest and did not have to commit themselves to anything at that stage. Provided that they could show they fulfilled the sole selection criterion, these parties were then given all the necessary information and time to allow them to decide if and how much they wanted to bid for the Siremar business branch. For these reasons, the Commission considers that its doubts that the tender procedure was not sufficiently transparent due to possible deficiencies in the call for expressions of interest are dispelled.

Non-discriminatory nature of the tender and highest price as criterion

(386) Paragraph 92 of the Notion of Aid Communication highlights that non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. Furthermore, that paragraph specifies that to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. Moreover, according to paragraph 95 of the Notion of Aid Communication, when public bodies sell assets, the only relevant criterion for selecting the buyer should be the highest price ([150]), also taking into account the requested contractual arrangements (e.g. the vendor's sales guarantee).

(387) As indicated above (see recital (378)), the call for expressions of interest only contained one selection condition, namely that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. Each of the six parties that submitted the five expressions of interest in the procedure also fulfilled the selection condition and were accordingly invited to the due diligence phase. The Commission considers that the only applicable selection criterion was objective and had been made sufficiently clear to all interested parties in the call for expressions of interest.

(388) Out of the six prospective bidders, five decided to proceed with the due diligence phase. During that phase, which took place between November 2010 and March 2011, the five prospective bidders were all given access to a data room containing all relevant information allowing them to assess the business branch put up for sale (see recital (77)). On 2 February 2011, the Extraordinary Commissioner sent a letter in which the procedure and requirements to make a bid were detailed (see recital (383)). In particular, that letter clearly laid down the conditions to the sale: drawing up a business plan for the discharging of the public service obligations as defined in the draft convention and providing the necessary guarantees to prove the financial robustness of the bidder. Italy has confirmed that in case more than one bid was received, the only award criterion would be the highest price. Indeed, it is precisely to achieve the highest possible price between two valid and comparable offers that Italy relaunched the procedure several times, eventually awarding the business branch to CdI in October 2011 (finalised in July 2012) and subsequently to SNS in April 2016 (see Section 2.3.3.2).

(389) The Commission's doubts in the 2011 Decision that Decree 134/2008 would allow awarding the tender on the basis of other criteria are therefore resolved. All parties were correctly and equally informed throughout the various steps of the tender procedure enabling them to make a bid with full knowledge of the procedure and requirements. The Commission also considers that the award criterion allows for an objective comparison and assessment of the tenders.

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

(390) In this case, Italy tendered out the new Convention bundled with the Siremar business branch and subject to certain conditions as regards the workforce level, rather than only the new Convention itself. In the 2012 Decision, the Commission took the preliminary position that, to the extent bidders were already adequately endowed with vessels and crews, they would have incurred lower costs had they not been obliged to take over

([150]) See Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria v Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87.

part of Siremar's capital assets and employees. The Commission therefore took the preliminary view that the tendering of the new Convention without an obligation to take over those vessels and crew of Siremar necessary to perform the public service, would have resulted in a lower cost for the community.

(391) Since Siremar was a large company in Extraordinary Administration, general domestic law ([151]) required its acquirer to maintain the same staff level for a period of 2 years. Against this background, the contract for the transfer of the business branch requires CdI, and later SNS, to offer employment (based on new contracts) to the former employees of Siremar and to abstain from dismissals ([152]) for a 2-year period. The Commission first observes that this requirement is based on a legal obligation, which the Italian authorities could not disregard in the set-up of the transfer of the business branch, and that this obligation is limited in time, i.e. to 2 years. The Commission also notes that the Siremar business branch continued the operation of the public service based on the public service obligations defined in the new Convention. In this sense, Italy has submitted that only the crew and administrative personnel required for the operation of the public service were taken over by CdI and later SNS ([153]). Given that employment costs would be covered by the compensation paid under the new Convention to SNS, the Commission considers that the obligation to maintain employment levels is in practice not onerous on CdI and later SNS. Therefore, this obligation is unlikely to have depressed the sale price of the business branch and cannot have conferred an advantage to CdI, and later SNS, in this way. In addition, this solution was also beneficial for Siremar (and therefore for its owner Italy) as the latter did not have to pay severance costs for the staff that was rehired by CdI and later SNS. The Commission notes that Ecorys estimated that the total severance cost for all of Siremar's staff would have amounted to at least EUR 34 million.

(392) As the assets of the Siremar business branch were bundled with a new public service contract ([154]), the acquirer of the business branch becomes subject to the requirement to ensure the continuity of the public service and is awarded the berthing priority. Firstly, the Commission observes that only the assets necessary to fulfil the public service obligations were bundled with the public service contract. Indeed, the one fast ferry that was not deemed necessary to that purpose was sold via a separate tender procedure. Secondly, the Commission considers that bundling the assets of the Siremar business branch with the new public service contract does not result in a lower price than if the assets and this contract had been sold separately, for the following reasons:

— As indicated above, Tirrenia's and Siremar's Extraordinary Commissioner organised separate tender procedures to sell seven ships not included in either Tirrenia's or Siremar's business branch. Of these seven ships, only one could be sold to a bidder who intended to continue to use it for shipping purposes. The other six ships could only be sold for demolition purposes. Furthermore, in March 2011, the shipbrokers ([155]) who were asked to determine the value of Siremar's ships pointed out that the latter were relatively old and tailored to the local routes on which they operated. Therefore, they had a limited market value on the international markets and could only be used in a few routes in the Mediterranean. For these reasons, and taking into account the difficult economic context at the time, it seems unlikely that Siremar's 18 ships could all have been sold for shipping purposes (i.e. for a price higher than their scrap value) ([156]). The Commission considers that bundling those ships with the public service contract allowed obtaining a higher price ([157]) for Siremar's ships since in return for operating the ships on the public service routes, their acquirer would receive public service compensation for a period of 12 years;

— In the 2012 Decision, the Commission had raised the possibility that any bidders already equipped with sufficient vessels and crews would have preferred not to have to acquire Siremar's ships and hire its employees. However, the Commission observes that in 2010, the Siremar business branch had a total

([151]) Article 63(2) of Decree Law 270/1999 requires that any potential acquirer of a business branch of a large company in extraordinary administration must commit to maintain the level of the workforce (i.e., the number of workers) and to continue business activities for at least two years after the acquisition.
([152]) Except in well-specified circumstances.
([153]) As agreed with the trade unions in November 2011, this amounted in practice to all employees of the business branch at the time of signing of the sale contract.
([154]) A draft of this contract was made available in the data room to all bidders. Furthermore, its key provisions were already laid down in Article 19-ter of Decree Law 135/2009.
([155]) Ferrando & Massone Srl.
([156]) Indeed, Ferrando & Massone Srl's report considered that two of the ships did not have any financial value.
([157]) This is because when a ship is not yet at the end of its useful life, its value for shipping purposes would be higher than its scrap value. In the scenario where the ships are sold separately it is likely that at least some ships would have to be sold at their scrap value. Therefore, by bundling the ships with the public service contract, all ships that are fit for navigation can keep operating and can hence be sold at a higher price than their scrap value.

workforce of approximately 500 people and 18 ships. The Commission considers it unlikely that potential bidders could have had such significant resources and assets readily available for (re-)deployment to operate the public service obligations laid down in the new Convention. This is all the more accurate since the new Convention contains specific requirements, such as capacity and speed, about the ships to be used on the public service routes. Any operator who had the required resources would likely have employed them already on other routes and their redeployment in line with the new Convention would necessarily have led to losing the revenues from their previous use. In this regard, the Commission points out that neither SNS nor CdI have argued to the Commission that they would have preferred not to have to acquire Siremar's ships.

(393) To verify that the bundling of the new Convention with the Tirrenia business branch and the workforce condition were not onerous for CdI and later SNS, the Commission has in the course of the formal investigation commissioned a study with independent expert Ecorys (see recitals (117) to (121)). Ecorys was asked to establish the market value of the Siremar business branch without any conditions attached. Ecorys concluded that, had the Siremar business branch been sold without any conditions attached, and in particular without the new contract for the operation of the public service (and hence also without the obligation to ensure the continuity of said public service), the company would have been sold at liquidation value, estimated at EUR – 0,3 million. Ecorys based this conclusion on the assumption that the Siremar business branch could not profitably continue its operations without public service compensation. Ecorys observed that this liquidation value is lower than the value that resulted from the tender and indicated that therefore immediate liquidation (in essence a sale of the ships) was not a viable alternative for a market economy operator. Moreover, Ecorys compared the labour cost's share of total revenues and the labour cost/staff ratio of the Siremar business branch with that of several comparable ferry companies. The analysis showed no substantive difference in staff number or personnel cost structure that could have pointed to overstaffing or excessive labour costs. A potential buyer would thus have had little margin of manoeuvre in terms of dismissing or replacing part of the workforce. On this basis, Ecorys concluded that there are no elements showing that the workforce condition had any significant impact on the value of the Siremar business branch. The Commission therefore concludes that neither the bundling of the new Convention with the Siremar business branch nor the workforce condition depressed the sale price of the business branch.

(394) To summarise, the condition to maintain employment levels is imposed by general domestic law rather than by the seller. Furthermore, that condition is not onerous for the acquirer of the Siremar business branch as also confirmed by the Commission's independent expert Ecorys. The condition to guarantee the continuity of the public service, which is the direct consequence of the bundling of the assets and the public service obligation, cannot be considered as depressing the price. On the contrary, as argued above and confirmed by Ecorys, selling the assets separately would have resulted in a lower price. Furthermore, it is highly unlikely that there would have been potential bidders interested in acquiring the public service contract without taking over the assets given the large number of ships and crew necessary to perform the public service. The Commission therefore concludes that any market economy vendor would have decided to sell the assets of the Siremar business branch along with a new public service contract in order to obtain the highest price. On this basis, the Commission concludes that Italy has not attached conditions which were likely to depress the price or which a private seller would not have demanded. On this basis, the Commission concludes that its doubt that tendering out the new Convention together with the Siremar business branch and the workforce conditions could not result in the lowest cost to the community, is dispelled.

(395) Based on the assessment described above (see recitals (376) to (394)), the Commission concludes that the tender procedure was open, transparent and non-discriminatory in line with public procurement rules.

(396) However, paragraph 68 of the SGEI Communication notes that 'in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community'.

(397) In this respect, the Commission first notes that two bids were originally received in the procedure for the Siremar business branch bundled with the new Convention. The branch was originally awarded to one of those bidders, CdI. In the final phase of the procedure, after the rulings by the Italian administrative tribunals resulted in CdI's exclusion, SNS confirmed its earlier bid, which could be interpreted as the only valid bid ultimately submitted.

(398) However, the Commission considers that, in the specific factual circumstances of this procedure, the relevant moment to determine whether more than one bid was submitted, and therefore whether the tender can be presumed to lead to the least cost for the community, should be the moment when the winning bid by SNS was

originally formulated, i.e. May 2011. That is the moment when SNS was evaluating the value of the business branch bundled with the new Convention, and at that time, there were two competing parties to the procedure: CdI and SNS. Moreover, the Commission notes that CdI actually temporarily won the tender, took over the business branch and operated the service between 2012 and 2016, before the rulings of the administrative tribunals resulted in the restart of the procedure and the ultimate award of the business branch to SNS. Against this background, it should be considered, for the purposes of the assessment of compliance with Altmark 4, that CdI has also made a bid in this procedure, and that therefore, this tender can be deemed sufficient to ensure that the procedure has lead to the least cost for the community.

(399) Therefore, based on the above, the Commission concludes that Altmark 4 is complied with in this case.

Strong safeguards in the design of the procedure

(400) As a subsidiary reasoning, the Commission notes that, if the relevant moment to determine whether a market price was reached through the tender is the moment when the last bid by SNS was finally confirmed, i.e. in January 2016, which the Commission disputes, then only one bid was actually submitted, as SNS was the only party to the procedure at that stage. Accordingly, such tender would normally not be sufficient to ensure the absence of an advantage to the winner.

(401) However, the Commission has nuanced the position expressed in paragraph 68 of the SGEI Communication in its SGEI Guide ([158]) by stating that 'it does not mean that there cannot be cases where, due to particularly strong safeguards in the design of the procedure, also a procedure where one bid is submitted can be sufficient to ensure the provision of the service at "the least cost to the community"'.

(402) The Commission considers that in the case under assessment, as in the privatisation of the Tirrenia business branch assessed with the 2020 Tirrenia/CIN decision, such safeguards were present. More specifically:

— The tender procedure was organised in such a way as to maximise interest from potential bidders. Furthermore, these potential bidders did not have to follow burdensome procedures and would not have had to incur significant costs to express their interest. As a result, five expressions of interest by six Italian entities were received, all of which were invited to the due diligence phase (see recital (388));

— Genuine competition was possible until the end of the tender procedure. In particular, six prospective bidders were invited to the due diligence phase. Two of them (i.e. Ustica Lines SpA and Caronte & Tourist SpA) set up a joint venture and made a binding offer under the name SNS. Mediterranea, also joining forces with local private operators to set up CdI, made another offer. The Commission considers that based on their profile, the other two parties which took part in the due diligence phase had reasons to have a genuine interest in making a bid (e.g. already active in the sector and/or Italy);

— A minimum price was set upfront based on the valuation performed by the independent expert appointed by Italy (see recital (78)). This minimum price was made available to all potential bidders in the data room and set a relatively high anchor point for starting bids. Indeed, as pointed in recital (79)), the first round did not produce any binding offers, which is an indication that the minimum price for the Siremar business branch was set quite high. Indeed, while this high minimum price helped to ensure that the procedure led to the least cost for the community, it may have also discouraged the other two potential bidders from submitting a bid;

— CdI's first valid offer was made available in the data room and the other bidders were explicitly invited to make a better offer. The deadline for submitting better offers was then extended by the Extraordinary Commissioner, at the request of SNS. After SNS also submitted its bid, as the two binding offers received were not easily comparable, the procedure was relaunched several times and each time the parties were invited to make improved offers. The invitation to submit better offers is a particularly strong safeguard to ensure that the highest possible bid (and hence the lowest cost for the community) is obtained. In this procedure, the existence of two serious bidders and the correspondence between Siremar in EA and both CdI and SNS suggests that there was a genuine competition. The fact that that competition was temporarily

([158]) See more specifically the Commission's reply to question 68 in its Staff Working Document 'Guide on the application of the Union rules on State aid, public procurement and the internal market to services of general economic interest' of 29 April 2013 (see: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf).

distorted through the counter-guarantee, which allowed the tender to be initially won by CdI, does not call this conclusion into question. On the contrary, it is another indicator that competition between the bidders was genuine, even if in those particular circumstances, the rules of procedure were not respected.

(403) The Commission considers that given the above safeguards, including most notably the minimum price and the invitation to submit higher bids, the tender procedure was sufficient to ensure the provision of the service at the least cost to the community, even if, in the very last stage of the procedure, only one valid bid was submitted. For completeness, the Commission notes that the case at hand differs from the following cases where only one bid was submitted:

— In the tender procedure for the operation of a fast passenger maritime connection between Messina and Reggio Calabria, only Ustica Lines submitted a bid. However, that company was also the only one who expressed an interest, so genuine competition was never possible. In that case, the Commission therefore necessarily concluded that the Altmark 4 condition was not met and that the public service compensation constituted State aid ([159]). The Commission recalls that in the case under assessment, six parties expressed their interest and five of them participated in the final part of the tender;

— In the tender procedure for the attribution of the press distribution concessions in Belgium, only bpost (the incumbent provider of this SGEI) submitted a bid. While initially three companies had expressed an interest to participate in the tender, one company withdrew before the deadline to submit an offer expired and another company announced that it no longer wished to submit an offer (albeit 3 days after bpost had submitted its offer). The Belgian authorities nevertheless argued that genuine competition had taken place during the tender procedure and that there were sufficient safeguards to ensure that the tender resulted in the least cost for the community. The Commission however found that in that case the safeguards were insufficient and therefore concluded that the Altmark 4 condition was not met and that the public service compensation constituted State aid ([160]). While the Italian authorities used an open tender procedure, the Belgian authorities organised a negotiated procedure ([161]) which according to paragraph 66 of the SGEI Communication 'can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases'. The Commission notes that apart from this important difference, also the safeguards in the bpost case were entirely different from those applicable in the case at hand. Finally, it has to be noted that in the bpost case, the incumbent SGEI provider won the tender after having made the only bid with only one possible competing bidder present. In the case under assessment, the tender was won by a bidder (SNS) that had no connection to the incumbent SGEI provider, with other possible competing bidders present, and with the abovementioned safeguards. For these reasons, the Commission concludes that the circumstances in the bpost case are not comparable to those in the case at hand.

(404) Furthermore, the Commission notes that the tender procedure used for the sale of the Siremar business branch differs significantly from the procedure used to select the operator of shipping services between the French mainland and Corsica ([162]) ('the SNCM case') in the following ways:

— The French authorities awarded the public service delegations on the basis of a negotiated procedure with prior publication. According to paragraph 66 of the SGEI Communication such a procedure 'can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases'. On the contrary, the Italian authorities used an open tender procedure, with private negotiations taking place only at the last stage of the procedure, to compare and improve the offers already received;

— While in the SNCM case two bids were submitted, one bid was rejected on the basis of one selection criterion. The two bids were therefore not even compared on their merits in order to retain the economically most advantageous one. Therefore, even if two bids were actually submitted, this was not sufficient to guarantee effective competition. In the Siremar tender procedure, however, five parties participated in the final phase and two bids were made (see recital (398)). Even if it is considered that, for the purposes of Altmark 4 assessment, ultimately only SNS had submitted a valid bid, which the Commission disputes, genuine competition did take place until the end of the procedure (see recital (402));

([159]) Commission Decision in case SA.42710, SGEI – fast passenger maritime connection between Messina and Reggio Calabria – Italy (OJ C 40, 2.2.2018, p. 4).
([160]) Commission Decision in case SA.42366, Public service compensations granted to bpost during the period 2016-2020 – Belgium (OJ C 341, 16.9.2016, p. 5).
([161]) Article 30 of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.
([162]) Commission Decision in case SA.22843, Public service delegation Corsica 2007-2013 awarded to SNCM and CMN (OJ L 220, 17.8.2013, p. 20).

— In the SNCM case, the incumbent operator SNCM/CMN group was also bidding and had a significant competitive advantage since it already had ships that met the technical requirements laid down in the public service delegation contract. These requirements implied the construction of almost tailor-made vessels similar to some of SNCM's vessels. This meant a high cost for possible interested bidders. In the case under assessment, the incumbent operator Siremar in EA did not and could not bid and SNS had no connection to the incumbent. Since the tender included the ships that met the technical requirements to operate the public service, none of the possible bidders had a competitive advantage over the other;

— Furthermore, in the SNCM case the Commission considered that the very short time (i.e. less than 1 month) set between the date of awarding the public service delegation contract and the date of commencement of services was likely to prove a significant barrier to entry for new entrants. The Commission notes that, in the Siremar case, almost a year passed between the first conclusion of the tender procedure (October 2011) and the start of the operation of the public service by CdI (August 2012), and that more than 4 years passed before the business branch and the operation of the new Convention were taken over by SNS (April 2016).

(405) Based on the above, the Commission concludes that, even under this subsidiary reasoning, Altmark 4 is complied with in the present case.

(406) Given that the four conditions set out by the Court of Justice in the Altmark case are cumulatively met, the Commission concludes that the award of the new Convention bundled with the Siremar business branch and the berthing priority to SNS does not confer an economic advantage on the latter.

8.1.3.5. Conclusion on the award of the new Convention bundled with the Siremar business branch and the berthing priority to SNS

(407) Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the award of the new Convention bundled with the Siremar business branch and the berthing priority to SNS do not constitute State aid to SNS.

8.1.3.6. The increase in CdI's capital

(408) The Commission notes that, at the time of adoption of this Decision, CdI is inactive and in liquidation. By notary-authenticated act of April 2016, the company changed its name and business form from Compagnia delle Isole SpA to *Compagnia delle Isole S.r.l. in liquidazione*. It also moved its legal seat from Palermo to Naples and appointed a liquidator. Since then, the company no longer has any business object, does not carry out any commercial activities, has sold all its ships and does not have any employees (save for the statutory employees required by law for companies in liquidation). Even if the liquidation procedure is still ongoing, the Commission considers that any possible distortion of competition ended once CdI ceased its commercial activities. Against this background, there are no longer grounds for continuing the formal investigation procedure with respect to any of the still pending measures under assessment in the present State aid case concerning this company. As a result, the investigation on the increase in CdI's capital has become without object ([163]).

8.1.3.7. The counter-guarantee

(409) As described in Section 3.3.2, in the 2012 Decision the Commission took the preliminary view that the counter-guarantee may have entailed State aid to CdI and/or Unicredit. Based on the information received during the formal investigation, the Commission first notes that the potential State aid to these two companies should be assessed separately, as their roles in the process was different.

Aid to Unicredit

(410) *Economic advantage*: In order to be qualified as State aid, a measure must confer an economic advantage to its recipient. In its 2012 Decision, the Commission recalled that under the Guarantee Notice, the aid is granted at the moment when the guarantee is given, not when it is invoked, nor when payments are made under the terms of the guarantee. Point 2.3.1 of the Guarantee Notice also lays down that 'even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid'. Moreover, the Guarantee Notice clarifies that guarantees can be provided directly by the State or they could be provided as counter-guarantees to a first level guarantor. Finally, the Guarantee Notice explains that in such circumstances 'if a State guarantee is given ex post in respect of a loan or other financial obligation already

([163]) See also previous Commission no object decisions, such as Mines de potasse d'Alsace (OJ L 86, 24.3.2006, p. 20–22) and Ducatt (case SA.39990, not yet published in the *Official Journal of the European Union*).

entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. Where the guarantee contains aid to the lender, attention should be drawn to the fact that such aid might, in principle, constitute operating aid'.

(411) Against this background, the Commission notes that in this case Sicily issued the counter-guarantee to CdI indirectly, i.e. through Unicredit acting as first level guarantor. Indeed, Sicily issued the counter-guarantee to Unicredit on the deferred amounts of the purchase price for the Siremar business branch on the same day that Unicredit issued its own guarantee to CdI (see Section 2.3.3.5). The issuance of the counter-guarantee by Sicily was a condition for Unicredit to issue its guarantee on those terms, as established by the CdS in its decision 592/14. In accordance with the Guarantee Notice, the counter-guarantee would have conferred an advantage to Unicredit if the guarantee by Sicily had been given *ex post* in respect of a financial obligation already entered into, without the terms of this financial obligation being adjusted. However, since in this case the counter-guarantee was issued on the same day that the guarantee by Unicredit to CdI was granted – indeed, it was a necessary condition for the granting of that guarantee – there is no evidence that Unicredit, as first level guarantor, decreased the risks associated with its own guarantee. Therefore, the Commission concludes that the counter-guarantee did not provide any advantage to Unicredit.

(412) *Conclusion*: Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the counter-guarantee by Sicily of the guarantee by Unicredit of the deferred amounts of the purchase price for the Siremar business branch does not constitute aid to Unicredit.

Aid to CdI

(413) The Commission recalls that, at the time of adoption of this Decision, CdI is inactive and in liquidation (see recital (408)). Even if the liquidation procedure is still ongoing, the Commission considers that any possible distortion of competition ended once CdI ceased its commercial activities. Against this background, there are no longer grounds for continuing the formal investigation procedure with respect to any of the still pending measures under assessment in the present State aid case concerning this company. As a result, the investigation on any possible aid granted to CdI through the counter-guarantee has become without object.

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

(414) The Commission took the preliminary view in the 2011 Decision that all measures laid down by the 2010 Law constitute State aid in favour of the companies of the former Tirrenia Group, to the extent that the respective beneficiaries were able to use these measures to cover liquidity needs and thereby improve their overall financial position.

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

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

(416) As the criteria for qualifying a measure as State aid are cumulative, the Commission may begin its assessment with any of them. In this case, it will first assess whether the measure effectively grants any advantage to Siremar.

(417) Economic advantage: the Commission notes that Siremar received EUR 7 215 800 to carry out the ship upgrades required to respect international safety standards and, on the basis of the 2010 Law, it could use these funds temporarily for liquidity purposes (see recital (132)). However, Siremar did not use these funds for liquidity purposes. On the contrary, Italy confirmed that these funds were spent to upgrade the ships as initially intended (see recital (228)). Therefore, the Commission notes that Siremar did not use these funds for liquidity purposes, i.e. to avoid costs, which it would ordinarily have had to cover by means of its own financial resources, and accordingly did not receive any economic advantage through this measure.

(418) As the criterion of economic advantage in the case of Siremar is not met, the Commission concludes that the measure does not constitute aid and that its doubts expressed in the 2011 Decision, as far as Siremar is concerned, are dispelled.

8.1.4.2. Fiscal exemptions related to the privatisation process

(419) As described in recital (133)(b)), pursuant to Article 1 of the 2010 Law, certain acts and operations undertaken to privatise the Tirrenia group and described in paragraphs 1 to 15 of Article 19-*ter* of Decree Law 135/2009, converted with modifications into the 2009 Law, are exempt from any taxes ordinarily due on those acts and operations.

(420) The Commission first notes that this tax exemption, which is unconditional, concerns two separate sets of transfers: (1) the transfers of Tirrenia's former subsidiaries Caremar, Saremar and Toremar from Tirrenia (now in EA) to the regions of Campania, Sardinia and Tuscany, and (2) the transfer of the Siremar business branch from Siremar in EA to CdI and later to SNS. The taxes exempted are in particular registration duty, land registry and mortgage registration fees, stamp duty (together, 'the indirect taxes'), VAT and corporate income tax. The beneficiaries of this aid measure would be the seller, the buyer, or both. Only the second set of transfers will be assessed in this decision.

(421) At the outset, the Commission notes that, under Presidential Decree No 633 of 26 October 1972, transfers of going concerns or business units to another company are not considered a supply of goods and therefore are exempt from VAT. Therefore, transactions such as the sale of the Siremar business branch are not in scope of VAT and the tax exemption cannot have conferred an advantage to Siremar with regard to VAT. Moreover, with respect to the indirect taxes, the Commission takes note that the contract for the sale of the Siremar business branch to CdI clearly states that the purchaser has to bear all taxes, levies and notarial costs related to the transaction. Italy also provided evidence that CdI did not make use of this tax exemption when registering the contract. Therefore, the Commission accepts that CdI has not benefited from this measure. However, the sale contract for the transfer to SNS, which includes the same provision, also stipulates that the purchaser will benefit from a fixed registration fee on the basis of the fiscal exemptions provided by the 2010 Law.

(422) Against the above background, the Commission will assess the following:

(1) whether Siremar (in EA) and SNS benefited from any exemption from registration duty, land registry and mortgage registration fees, and stamp duty ('the indirect taxes') for the transfer of the Siremar business branch to SNS, and

(2) whether Siremar (in EA) benefited from any exemption from corporate income tax on the proceeds of the transfer of the Siremar business branch to SNS.

(423) State resources: a tax exemption by definition entails a foregoing of State resources. Furthermore, since these exemptions were granted by means of the 2010 Law (see recital (133)(b)), they are also imputable to the State.

(424) Selectivity: since the tax exemptions are only granted for operations and acts related to the privatisation of the former Tirrenia Group, they are selective. Italy has neither argued nor demonstrated that the tax exemptions are not selective.

(425) Economic advantage: concerning the indirect taxes, Siremar was exempted from paying them on operations and acts related to the transfer of the Siremar business branch to SNS and therefore benefited from an economic advantage equal to the taxes ordinarily due for these types of operations and acts under national law.

(426) Concerning the indirect taxes, SNS benefited from a fixed fee for the registration of the contract for the purchase of the Siremar business branch, in accordance with the 2010 Law, as provided in Article 9 of that contract. Therefore, SNS benefited from an economic advantage equal to the difference between the fee ordinarily due for the registration of these acts under national law and the fee effectively paid. […]

(427) Concerning the exemption from corporate income tax on the proceeds of the transfer of the Siremar business branch to CdI and later to SNS, the Commission notes, as a preliminary remark, that the relevant moment to assess whether a measure constitutes State aid is when the measure is granted, i.e. when the beneficiary acquires a right, under national law, to receive aid under that measure ([164]). In this case, this moment is when the 2010 Law entered into force. Then, in its investigation of aid granted unlawfully, the Commission can take into account, based on the information at its disposal, whether that aid was already paid out or not, and whether it could be paid out in the future, according to the applicable methodology laid down by the national law. This informs whether the Commission will order recovery of any aid found incompatible or whether it will order the Member States not to pay out any aid found incompatible in the future, but it does not question the existence of aid at the moment when it was granted.

(428) Against this background, the Commission first notes that the transfer of the Siremar business branch was made in exchange for a consideration, initially paid by CdI and later by SNS. However, the sale of the business branch to CdI for EUR 69,15 million was annulled (see recital (99)). Therefore, that exemption did not have any practical effect and no advantage was granted to Siremar through that first transfer. On the contrary, the sale to SNS for EUR 55,1 million would normally be subject to corporate income tax. The exemption from this tax constitutes an

([164]) Case C-385/18 *Arriva Italia*, ECLI:EU:C:2019:1121, paragraph 36.

economic advantage since the proceeds of a sale of certain assets would normally be taken into account in the calculation of a company's corporate income tax. Indeed, in cases of insolvency proceedings such as the one involving Siremar in EA, the methodology to calculate earnings is laid down in Article 183 of the Consolidated Income Tax Law. Based on that provision, an undertaking's earnings for the period from the start of the bankruptcy proceedings until their conclusion are the difference between the undertaking's assets at the beginning of the proceedings and the residual assets at their end. At the time of adoption of this decision, the liquidation proceedings of Siremar in EA are still ongoing and it is therefore not possible to anticipate if there will be a tax liability and its size, given that is unclear whether any income tax will be due at all. However, for the reasons explained at recital (427), this does not affect the finding of the existence of an economic advantage, as the 2010 Law laid down an unconditional right to a tax exemption.

(429) Effect on trade: on the grounds set out in recitals (312) and (313), the Commission considers that exempting Siremar and SNS from certain taxes is liable to affect Union trade and distort competition within the internal market.

(430) Conclusion: the exemptions from corporate income tax on the proceeds from the sale of the Siremar business branch to SNS and from the indirect taxes on the transfers of the same business branch to SNS, which were granted by the 2010 Law, constitute State aid to Siremar. The payment by SNS of a fixed fee for the registration of the contract for the purchase of the Siremar business branch pursuant to the 2010 Law, instead of the fee ordinarily due under national law, constitutes State aid to SNS.

8.1.4.3. Possibility of using FAS resources

(431) In the 2011 and 2012 Decisions, the Commission mentioned the possibility for the former Tirrenia Group companies to use FAS resources (see recital (133)(c)) in order to meet current liquidity needs. However, in the course of the formal investigation procedure, the Italian authorities clarified that the FAS resources were not meant as an additional compensation to any of the companies of the former Tirrenia Group (including Siremar). Instead, these resources were made available to supplement the budget appropriations allocated for the payment of the public service compensations to the companies of the former Tirrenia Group, in case they proved to be insufficient. Indeed, Article 1, paragraph 5-*ter* of the 2010 Law enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. In other words, this measure merely concerns an allocation of resources in the Italian State budget for payment of the public service compensation.

(432) In light of the above, the Commission concludes that the FAS resources are only a funding source to allow the State to pay the public service compensations (granted on the basis of the prolonged initial Convention) and do not constitute a measure which Siremar can benefit from in addition to these public service compensations. In other words, the possible use of FAS resources does not constitute State aid to Siremar and will therefore not be assessed further in this Decision.

8.1.5. *Conclusion on existence of aid*

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

— the compensation to Siremar for the operation of maritime routes in the period 1 January 2009 until 30 July 2012 and the berthing priority on these routes constitute State aid to Siremar within the meaning of Article 107(1) TFEU and qualify as new aid;

— the extension of the rescue aid from 28 August 2011 until 18 September 2012 constitutes State aid to Siremar within the meaning of Article 107(1) TFEU;

— the award of the new Convention for the period from 1 August 2012 until 11 April 2016, bundled with the Siremar business branch and the berthing priority to CdI, has been annulled and could not be assessed separately. The award of the new Convention for the period from 11 April 2016 until 11 April 2028, bundled with the Siremar business branch and the berthing priority to SNS complies with the four Altmark-criteria and therefore does not constitute State aid to SNS within the meaning of Article 107(1) TFEU. The investigation on the increase in CdI's capital has become without object. The counter-guarantee does not constitute aid within the meaning of Article 107(1) TFEU to Unicredit. The investigation on any possible aid granted to CdI through the counter-guarantee has become without object;

— As Siremar did not use the funds to upgrade ships for liquidity purposes, as enabled by the 2010 Law, that measure does not constitute State aid to Siremar within the meaning of Article 107(1) TFEU;

— the exemptions from (i) indirect taxes on the transfer of the Siremar business branch and from (ii) corporate income tax on the proceeds from the sale of the Siremar business branch, that were granted by the 2010 Law, constitute State aid to Siremar and SNS within the meaning of Article 107(1) TFEU; and

— the possibility to use FAS resources to meet liquidity needs, as laid down by the 2010 Law, does not constitute State aid within the meaning of Article 107(1) TFEU.

8.2. **Lawfulness of the aid**

(434) All aid measures in scope of this Decision have been put into effect before formal approval by the Commission. Therefore, insofar as they were not exempted from notification under the 2005 SGEI Decision or the 2011 SGEI Decision, these aid measures were granted by Italy in violation of Article 108(3) TFEU ([165]).

8.3. **Compatibility of the aid**

(435) Insofar as the measures identified above constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article and of Article 106(2) TFEU.

8.3.1. *The prolongation of the initial Convention between the State and Siremar*

8.3.1.1. Applicable rules

(436) As already mentioned above, the prolongation of the initial Convention beyond the end of 2008 was carried out by subsequent legal acts:

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

(b) Decree Law 135/2009, converted into the 2009 Law, laid down, inter alia, the prolongation of the initial Conventions from 1 January 2010 until 30 September 2010; and

(c) Decree Law 125/2010, converted into the 2010 Law, provided for a further prolongation of the initial Conventions from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar.

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

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

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

([165]) The Italian authorities have only notified the public service compensation granted under the new Convention, which the Commission has found not to constitute State aid (see recital (9)). Furthermore, Siremar in EA has argued that the public service compensation granted to Siremar under the prolongation of the initial Convention would be compatible and exempt from notification under the 2011 SGEI Decision. The Commission will assess whether this was indeed the case in Section 8.3.1.

(439) As a result, the rules on the application of the 2011 SGEI Decision and the 2011 SGEI Framework as described above mean that the public service compensation granted to Siremar during the prolongation period can be assessed pursuant to the 2011 SGEI package. If the relevant conditions of either the 2011 SGEI Decision or the 2011 SGEI Framework are complied with, that aid measure is compatible with the internal market for the entire period from 1 January 2009 until 30 July 2012 ([166]).

(440) The Commission notes that both the 2005 SGEI Decision, which entered into force on 19 December 2005, and the 2011 SGEI Decision are only applicable to State aid in the form of public service compensation for maritime links to islands on which average annual traffic during the 2 financial years preceding that in which the SGEI was assigned did not exceed 300 000 passengers. The evidence provided by Italy shows that in the years 2007 and 2008, the number of passengers on four maritime links operated by Siremar under the initial Convention, as prolonged, did not exceed on average the threshold of 300 000 passengers per year. These are the bundles Trapani – Pantelleria, Porto Empedocle – Pelagie Islands, Palermo – Ustica (i.e. mixed routes D1, D4, D5 and the passenger-only route ALD/1). All other routes either were individually above the threshold (the case of ALC/6, Lipari –Vulcano – Milazzo) or were part of a route bundle that well exceeded the threshold (the cases of the Milazzo – Aeolian Islands – Naples and the Trapani – Egadi Islands bundles). Therefore, for the other 16 routes operated under the initial Convention, as prolonged, the Commission cannot assess the compatibility of the public service compensation paid to Siremar under the prolongation of the initial Convention until 30 July 2012, neither on the basis of the 2005 SGEI Decision nor on the basis of the 2011 SGEI Decision.

(441) Consequently, the compatibility of the public service compensation granted to Siremar as of 2009 and until the completion of the privatisation would normally fall within the scope of application of the 2011 SGEI Framework. However, according to paragraph 9 of the 2011 SGEI Framework, aid for providers of SGEI in difficulty must be assessed under the 2004 Rescue and Restructuring Guidelines. Siremar was admitted to the extraordinary administration procedure on 17 September 2010 and was declared insolvent on 5 October 2010. Therefore, it was an SGEI provider in difficulty within the meaning of point 10(c) of the 2004 Rescue and Restructuring Guidelines, at least for part of the period of the prolongation (from 5 October 2010 until its sale on 30 July 2012).

(442) The 2014 Rescue and Restructuring Guidelines ([167]) in force as of 1 August 2014 apply retroactively for aid to SGEI providers. Those guidelines lay down that the compatibility assessment of aid granted before 31 January 2012, i.e. the date of entry into force of the 2011 SGEI Framework, to SGEI providers in difficulty is assessed under the 2011 SGEI Framework with the exception of the provisions of paragraphs 9, 14, 19, 20, 24, 39 and 60 ([168]). Therefore, the same rules apply for the entire period from 1 January 2009 until the transfer of the business branch to CdI on 30 July 2012.

(443) Since 16 of Siremar's routes under assessment fall outside the scope of the 2005 and 2011 SGEI Decisions and for reasons of brevity and efficiency, the Commission will first assess whether the public service compensation granted to Siremar for the operation of all twenty maritime transport routes on the five bundles during the prolongation period complies with the conditions of the 2011 SGEI Framework, with the exception of the conditions in its paragraphs 9, 14, 19, 20, 24, 39 and 60. Only after this first step, will the Commission assess whether that same compensation (only for the route bundles not exceeding the threshold of 300 000 passengers) was possibly compatible with the internal market and exempted from the notification requirement pursuant to the 2005 SGEI Decision, since it concerns aid that was granted between 19 December 2005 and 31 January 2012 (see recital (436)).

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

([167]) OJ C 249, 31.7.2014, p. 1.

([168]) See paragraph 140 of the 2014 Rescue and Restructuring Guidelines.

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

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

(445) The assessment of whether the SGEI are genuine must also be performed in light of the SGEI Communication (see recitals (326) and (341)), the Maritime Cabotage Regulation (see recitals (328) to (330)) and the case-law (see recitals (332) and (333)). Therefore, the Commission must assess for the prolongation period:

(1) Whether there was user demand;

(2) Whether that demand could not be satisfied by the market operators in the absence of any obligations imposed by the public authorities (existence of a market failure);

(3) That simply having recourse to public service obligations would have been insufficient to remedy that shortage (least harmful approach).

(446) The Commission points out that the public service routes operated by Siremar during the prolongation period are the same as those entrusted to CdI and later SNS under the new Convention. In addition, the Commission has already described and assessed the competitive situation on those route bundles during the prolongation period. Against this background, the following assessment will rely on and refer to the relevant parts of the assessment made for the new Convention above (see Section 8.1.3.1).

(447) Against this background, the Commission first recalls (see recital (184)) that Italy has imposed the public service obligations laid down in the initial Convention mainly to (i) ensure the territorial continuity between Sicily and its smaller islands and to (ii) contribute to the economic development of the smaller islands, through regular and reliable maritime transport services. The Commission already concluded that these are indeed legitimate public interest objectives (see recital (335)).

(448) The routes in question have been operated, largely unaltered, for many years, i.e. at least since the entry into force of the initial Convention. Italy confirmed that there were no changes to the scope of the services entrusted to Siremar during the prolongation period. Before the prolongation period, the Commission notes that over the course of 2008, there was a reduction in the routes operated under the public service regime. In particular, the Mazara del Vallo – Pantelleria route, operated 6 days a week by Siremar with the Guizzo fast ferry, was discontinued, and the frequency on certain routes in the high season schedules for the Aeolian and Egadi route bundles was decreased.

(449) To illustrate the genuine demand from users for the services, the Italian authorities provided detailed statistics which show that in 2008, the last year of the initial Convention before the prolongation, Siremar transported 1 821 387 passengers and 397 626,5 linear meters of cargo on the five route bundles combined. The figures for 2009 show that Siremar transported 1 513 214 passengers and 324 540 linear meters of cargo on those routes.

(450) These figures were slightly lower in 2010 (see recital (337)), but comparable. This shows that the aggregate user demand was significant and fairly stable throughout the years. Indeed, the Italian authorities also provided detailed statistics at individual route level for the period 2007 – 2019 ([169]). The Commission notes that there were fluctuations in the number of trips and passengers on the various route bundles throughout the years. However, this can be explained by the fact that these routes connect very small islands with limited port infrastructure that are relatively close to each other. This implies a frequent adjustment of schedules to accommodate user demand at the local level. Indeed, the Commission has already demonstrated (see Table 5) that there was user demand on each of the routes in 2010. The same analysis for the years 2009, 2011 and the period January – July 2012 ([170]) did not provide any indications that the user demand for the ferry services on any of the route bundles concerned had disappeared.

([169]) With the exception of 2015 (data not validated by external consultants – see footnote 120) and the period 1 January – 10 April 2016 (data lacking – see footnote 121).

([170]) For reasons of brevity, the Commission does not include the detailed figures in this Decision.

(451) The Commission considers that the above statistics clearly demonstrate that there was a genuine demand for passenger and freight services on each of the public service routes in question in the period January 2009 – July 2012. It can therefore be concluded that these services addressed a genuine user demand and thus satisfied real public needs.

(452) As explained at recital (341), the Commission must also examine whether these services would have been inadequate if their provision were left to the market forces alone, in the light of the requirements imposed by Italy through the prolongation of the initial Convention. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

(453) The Commission first notes that no manifest error was found in the definition of the SGEI for Siremar for the period 1992-2008, as ascertained by its 2004 Decision, and that this finding was not put into question by the 2009 Judgement nor the 2020 Tirrenia Group decision (see recital (342)). Moreover, the difficult economic situation in Italy in the period between 2009 and 2012 would have likely made the profitability of those routes even lower.

(454) The Commission also notes that, during the period between 1 January 2009 and 30 July 2012, on all of the route bundles that had to be operated by Siremar under the prolongation of the initial Convention, other operators offered maritime services, albeit not necessarily throughout the year, often with a different frequency or type of ship, and frequently also under public compensation. The Commission has already assessed above (see recitals (341) to (349)) for each of the route bundles concerned whether the services provided by other operators not receiving public compensation were equivalent to those that CdI and later SNS had to provide under the new Convention. The Commission recalls that this assessment was based on the competitive situation on those routes between 1 January 2009 and 30 July 2012. Since the services that CdI and later SNS had to operate are very similar in terms of routes served and frequencies to those that Siremar had to perform during the prolongation period, the Commission's conclusion that market forces alone were insufficient to meet the public service needs is also valid for Siremar during the entire prolongation period. In particular, the Commission notes that at the time of entrustment, no other operator was providing year-round services on any of the route bundles operated by Siremar without receiving public compensation. The other operators, also entrusted with public service obligations, offered a service which was not equivalent in terms of continuity, regularity, capacity and quality and therefore did not satisfy in full the public service obligations imposed on Siremar by virtue of the initial Convention (as prolonged).

(455) Finally, in light of the planned privatisation and in order to ensure the continuity of the public services that were operated under the initial Convention, Italy decided to prolong this Convention unaltered (with the exception of the change in compensation methodology applicable from 2010 onwards). The Commission accepts that the user demand, as described at recitals (449) to (451), could not have been met by imposing public service obligations applicable to all operators serving the routes in question. Indeed, on the routes operated by Siremar, all of the comparable services provided by the other operators were also subsidised, and, in any case, the offer provided by those operators did not meet the requirements of regularity, continuity and quality throughout the year. Furthermore, the operation of these routes in the low season is loss making so that without public service compensation they would likely be operated only in the high season. Ecorys drew a similar conclusion in its report, stating that those routes are not economically viable (see recital (119)). In addition, the Commission accepts that in view of the process to privatise Siremar, prolonging the existing public service contract was the only way to guarantee the continuity of the public services until completion of that privatisation.

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

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

(457) As indicated in Section 2.3 of the 2011 SGEI Framework, responsibility for the operation of a service of general economic interest, within the meaning of Article 106 TFEU, must be entrusted to the undertaking concerned by way of one or more official acts.

(458) These acts must specify, in particular:

(a) The precise nature of the public service obligation and its duration;

(b) The undertaking and territory concerned;

(c) The nature of the exclusive rights;

(d) The parameters for calculating, controlling and reviewing the compensation;

(e) The arrangements for avoiding and repaying any overcompensation.

(459) In its 2011 and 2012 Decisions, the Commission expressed doubts as to whether the entrustment act provided for a comprehensive description of the nature of Siremar's public service obligations during the prolongation period. In particular, the Commission emphasised that no 5-year plan, as required by the initial Convention, had been adopted for the 2000-2004 and 2005-2008 periods. Nevertheless, the Commission also recalled that different elements of the entrustment may be placed in several acts without putting into question the appropriateness of the definition of the obligations. During the prolongation period, Siremar's entrustment act included the initial Convention (as amended and prolonged over time), the validated 5-year plans, certain ad hoc decisions by the Italian authorities, the CIPE Directive and the 2009 Law.

(460) Against this background, the Commission first notes that the initial Convention (as amended over time), which forms the core of Siremar's entrustment act, remained fully applicable until the completion of the privatisation, based on a series of Decree Laws (see recital (436)). Those documents specify that Siremar was entrusted with public service obligations until the completion of its privatisation.

(461) According to the initial Convention, the 5-year plans specify the routes and the ports to be served, the type and capacity of vessels to be used for the maritime connections, the frequency of service and the fares to be paid, including subsidised fares, particularly for residents of the smaller islands. However, Italy argued that, as the investigation of the Commission under case number SA.15631 was still ongoing between 1999 and 2004 on the Tirrenia group companies (including Siremar), Italy did not adopt any 5-year plan for those companies for the period 2000-2004 ([171]). Consequently, the last formally approved 5-year plan for Siremar was that of 1995-1999, and Siremar continued to operate in the following years based on the route network of 1999. After the adoption of the 2004 Decision, the Ministry of Transport drew up a draft plan for the period 2005-2008. This plan did not entail significant variations to the network of routes or their schedules. However, as the preparatory discussions and works for the impending privatisation had already started, Italy decided not to approve it formally. Therefore, the obligations on Siremar under the initial Convention continued to apply as they were defined in 1999 and confirmed in the 2004 Decree (see recital (40)). In other words, unless a decision was taken to change certain specific elements (e.g. a route, a frequency, a type of vessel) as compared to the schedule in 2004, the provisions of the initial Convention as applied in that year continued to apply in full during the period from 1 January 2009 until 30 July 2012. Additionally, Italy confirmed that during the entire prolongation period, no Inter-Ministerial Decrees were issued to amend the fares to be charged by the companies of the former Tirrenia Group, including Siremar. On this basis, the Commission concludes that, taking into account the very specific circumstances of the privatisation of the Tirrenia Group in general and the Siremar business branch in particular, the public service obligations that Siremar had to comply with during the prolongation period were defined in a sufficiently clear way.

(462) The Commission already noted in recitals 239 and 240 of the 2011 Decision that the parameters necessary for the calculation of the amount of compensation have been established in advance and are clearly described. In particular, for the year 2009 the initial Convention contains an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return on capital for the operator (see recitals (45) to (47)). For the period 1 January 2010 to 30 July 2012, the relevant methodology is set out in the CIPE Directive (see recital (48) to (58)). In particular, the CIPE Directive details the cost elements and the return on capital to be taken into account, while the 2009 Law lays down that from 2010 onwards the maximum compensation amount for Siremar is EUR 55 694 895. Finally, the initial Convention ensured that the compensation would be based on the actual costs and revenues incurred for the delivery of the public service and laid down that the compensation would be paid out in instalments. In this way, overcompensation could be easily detected and avoided. Where applicable, the State could then recover the overcompensation from Siremar.

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

([171]) After the adoption of the 2001 Decision, the Italian authorities did draw up a 5-year plan for Tirrenia di Navigazione for the period 2000-2004. That plan was endorsed by Ministerial Decree of 20 September 2001.

8.3.1.4. Duration of the period of entrustment

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

(465) Italy has argued that the duration of the prolongation is in line with the period required for the depreciation of the most significant assets employed in the provision of the SGEI, i.e. Siremar's ships. In particular, the total duration of the initial Convention, as prolonged, amounts to just over 23,5 years. The ships used by Siremar for the operation of the public service have a useful life ([172]) of 30 years (for motor ferries) and 20 years (for high-speed passenger-only crafts) and are depreciated over this period. Moreover, the expert valuation, which was undertaken in the context of the privatisation of the business branch, indicated that the ships were rather old and dedicated to the provision of services of a local nature within the Mediterranean. Hence, they were not easily transferable, and this in principle justifies a long entrustment period. Furthermore, Italy recalled that the prolongation from 1 January 2009 until 30 July 2012 was necessary to ensure the continuity of the public service until the completion of the privatisation.

(466) On this basis, the Commission concludes that the duration of the period of entrustment is sufficiently justified and therefore that paragraph 17 of the 2011 SGEI Framework is complied with.

8.3.1.5. Compliance with Directive 2006/111/EC and separation of accounts

(467) According to paragraph 18 of the 2011 SGEI Framework, 'aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings' ([173]).

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

(469) The Commission notes that compliance with both paragraphs of the 2011 SGEI Framework requires a proper separation of accounts on the part of the undertaking entrusted with providing the service. On this issue, Italy recalled that Article 2 of the 2004 Decision required that Siremar started drawing up separate accounts for each route from 1 January 2004 onwards. In the context of the 2001 and 2004 Decisions and at the request of the Commission, PriceWaterhouseCoopers ('PWC') had prepared a study reproducing the analytical accounts of Siremar for the period 1992-1999, supplemented by the Italian authorities to include the years 2000 and 2001. In that context, PWC issued an opinion confirming that the methodology used to prepare these accounts was appropriate and in line with the applicable accounting practice. According to Italy, Siremar has continued to produce their analytical accounts on this basis and have therefore complied with the requirements laid down in the 2004 Decision. For the period under assessment, Italy has also submitted Siremar's route-by-route accounts for the years 2009 and 2010 as evidence.

(470) The Extraordinary Commissioner did not prepare such accounts for the period 1 January 2011 until 30 July 2012. However, Italy confirmed that during the prolongation period, Siremar did not perform any activity falling outside its public service obligations. Therefore, any possible cross-subsidisation is excluded. Moreover, the Extraordinary Commissioner did submit quarterly financial statements throughout 2011 and 2012 to the Ministry of Economic Development. These statements are available on the website of Siremar in EA and they show that the operating results between September 2010 and June 2012 were negative (EUR 0,7 million loss in total). Furthermore, by September 2012, those losses had increased to EUR 4,8 million. The Commission considers that this is a strong indication that in the period 1 January 2011 until 30 July 2012, when no line-by-line accounts were produced, Siremar in EA was not overcompensated (see also Section 8.3.1.6). The Commission notes that the two main objectives of account separation, i.e. avoiding overcompensation and cross-subsidisation, are hence achieved also for that period.

(471) Based on the above and taking into account the very specific circumstances of the privatisation, which was carried out by the Extraordinary Administration while ensuring continuity of public services, the Commission concludes that the requirements laid down in paragraphs 18 and 44 of the 2011 SGEI Framework have been complied with.

([172]) As decided by the Interministerial Conference on 30 December 2004. This decision prolonged the initially foreseen depreciation period from 20 to 30 years for motor ferries and from 15 to 20 years for high-speed passenger crafts. The Interministerial Conference was set up according to Article 11 of law 856/1986, and included representatives from the Ministry of Transport, the Ministry of Economy, and the Ministry of Economic Development.

([173]) OJ L 318, 17.11.2006, p. 17.

8.3.1.6. Amount of compensation

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

(473) In the case at hand, since at least part of the compensation constitutes illegal aid granted before its entry into force ([174]), paragraph 69 of the 2011 SGEI Framework specifically provides that, for the purpose of the State aid assessment, the use of the net avoided cost methodology is not required. Instead, alternative methods can be used, such as the methodology based on cost allocation. Under the latter methodology, the net cost would be calculated as the difference between the costs and the revenues of fulfilling the public service obligations, as specified and estimated in the entrustment act. Paragraphs 28 to 38 of the 2011 SGEI Framework set out in more detail how this methodology should be applied.

(474) In its 2011 and 2012 Decisions, the Commission could not conclude whether the amount of compensation was proportionate as it still had doubts regarding the qualification of some of the public services entrusted to Siremar as genuine SGEI. Those doubts have been addressed in Section 8.3.1.2.

(475) However, the Commission had also expressed doubts regarding the risk premium of 6,5 %, which applied from 2010 onwards. In particular, the Commission questioned whether this premium reflects an appropriate level of risk, taking into account that prima facie Siremar did not seem to assume the risks normally borne in the operation of such services. Indeed, the Commission recalls that in the 2011 Decision it took the preliminary view that Siremar might have been over-compensated only for the performance of the public service tasks from 2010 onwards. This means that the Commission does not need to assess *ex-post* whether there was any overcompensation for the year 2009 ([175]).

(476) Therefore, the Commission will assess whether there was overcompensation over the whole period between 1 January 2010 and 30 July 2012, in line with paragraph 47 of the 2011 SGEI Framework. Regarding this period, the Commission notes the following:

— Firstly, the report on the reasons of the insolvency of Tirrenia and Siremar, prepared by the Extraordinary Administration in May 2011, reports that the public compensation to Siremar under the initial convention, before 2010, amounted to EUR 70 million per year on average. This represented between 70 % and 75 % of Siremar's turnover in that period. Therefore, Siremar was almost entirely reliant on the public service compensation to carry out its operations. Indeed, while Siremar was increasingly reliant on public compensations between 1999 and 2008, a yearly compensation capped at EUR 55,7 million would have been insufficient to allow it to fulfil its public service obligations in the long term. In particular, the report notes how the methodology for calculating the public compensation under the initial Convention, applied until 2009 included, had always allowed Siremar to properly reward all its factors of production (i.e. capital and labour), despite achieving on average a poor rate of return on equity. However, that methodology did not apply anymore as of 2010. On the contrary, the new methodology laid out in the CIPE directive and in the 2009 Law applied, which included a cap that for Siremar was set at an amount considerably lower than the average compensation received over the previous decade;

— Secondly, the documents submitted show that for 2010, Siremar had requested approximately EUR 66 million, but Italy only approved a compensation of EUR 55,7 million. Moreover, that amount means that the compensation decreased by 17 % between 2009 and 2010, when the new methodology to calculate the compensation, combined with a fixed cap, entered into force. If the comparison is between 2008-2009 and 2010-2011, the difference is even starker: compensation decreased by a significant 22 % over that period;

— Thirdly, based on the route-by-route accounts prepared by Siremar for 2010, the Commission notes that in 2010 Siremar reported a positive operational result of approximately EUR 5,9 million. Italy clarified that this amount was equal to the ROIC, calculated by applying a 7,6 % rate to an invested capital of EUR 77,5 million. The Commission notes that the invested capital reported for 2010 is more than twice the average yearly

([174]) As established in recital (440). The legality of the aid granted for the other routes will be examined further in Section 8.3.1.8.

([175]) The Italian authorities did provide some information related to that year: the calculation of the compensation amount for 2009, i.e. EUR 67 million, which was determined based on the methodology laid down in the initial Convention, and the line-by-line accounts. For that year, Siremar had requested approximately EUR 72,2 million but Italy rejected some of the proposed costs, as they were not eligible under the applicable methodology. The awarded amount of EUR 67 million represented a sizable decrease from the compensation amount approved for 2008 (i.e. EUR 75,4 million). Italy also clarified that the ROIC was calculated at EUR 2,9 million, applying the initial Convention. This amount was added to the total costs to determine the compensation of EUR 67 million.

invested capital reported by CdI and later SNS (see footnote 135), and that the rate is higher than the 6,5 % risk capital premium laid down by the CIPE directive, but lower than the rate resulting from the full application of the CIPE methodology (i.e. 8,87 %, see recital (218)). If the 6,5 % rate had been applied, there would have been a ROIC of just EUR 5 million. The Commission thus notes that Siremar was over-compensated by approximately EUR 0,9 million for 2010;

— Fourthly, after Siremar went into Extraordinary Administration in September 2010 (in this case, a liquidation procedure), the 2010, 2011 and 2012 financial statements were not prepared. The same applies to the line-by-line accounts for 2011 and 2012. On the contrary, and as per applicable law, the Extraordinary Administration prepared and submitted quarterly reports to the supervising national authorities, i.e. the Ministry for Economic Development. These reports show that the total operating results between September 2010 and June 2012 were negative, with a loss of EUR 0,7 million. By September 2012, i.e. after the transfer of the business branch to CdI, those operational losses had increased to EUR 4,8 million. Therefore, Siremar was incurring losses as it kept operating the public service obligations while the sale procedure of the Siremar business branch was ongoing. While the Commission regrets that no line by line accounts were prepared for 2011 and the first half of 2012, Italy has confirmed that Siremar was not operating any services outside their public service obligations during the prolongation. As the overall financial results for the period between September 2010 and September 2012 were negative, those documents strongly suggest that Siremar was not overcompensated in the period after it entered into Extraordinary Administration, and that the limited over-compensation it received in 2010 was lost in the following years.

(477) Against this background, taking into account the very specific circumstances of the privatisation of the Siremar business branch, and based on the information submitted by the Italian authorities, the Commission notes that the limited overcompensation it identified for 2010 was consumed by the losses of the subsequent period. Therefore, the Commission concludes that Siremar was not overcompensated in the period between 1 January 2010 and 30 July 2012 taken as a whole. As the Commission had expressed doubts in its 2011 Decision on potential overcompensation to Siremar only for that period, the Commission considers that its doubts on this issue have been dispelled.

(478) Paragraph 49 of the 2011 SGEI Framework requires Member States to ensure that the compensation granted for operating the SGEI does not result in undertakings receiving overcompensation (as defined in paragraph 47 of that Framework). Indeed, Member States must provide evidence upon request from the Commission. Furthermore, they must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals no longer than 3 years. In this regard, the Commission notes that the Italian authorities have provided the necessary evidence as described above (see recitals (469) and (470)). Indeed, in 2009 and 2010, Siremar submitted its route-by-route accounts to the supervisory ministry allowing the latter to review the compensation amount. From 17 September 2010 onwards, the presence of the Extraordinary Commissioner, appointed by the Italian State, subject to detailed rules under national law and with civil and criminal liability, provided another safeguard against overcompensation. In addition, the Commission recalls that the compensation is paid out in instalments; that the final pay-out is made on the basis of the actual costs and revenues of the year; and that, after 25 November 2010, by decision of the Interdepartmental Conference, any amount of overcompensation is deducted from future advance subsidy payments (see recital (43)). Against this background, while Siremar was overcompensated in 2010, the Commission notes that that overcompensation was nonetheless consumed in the following years, as Siremar in EA was incurring losses (see recital (476)). Therefore, no overcompensation was granted for the period between 1 January 2010 and 30 July 2012 taken as a whole. Against this background, the Commission concludes that, taking into account the very specific circumstances of the privatisation, which was carried out by the Extraordinary Administration while ensuring continuity of public services, the measures described above could be considered sufficient to avoid and detect overcompensation.

(479) Based on the elements described above (see recitals (472) to (478)), the Commission concludes that the applicable requirements of Section 2.8 of the 2011 SGEI Framework (Amount of compensation) are complied with.

8.3.1.7. The berthing priority

(480) Article 19-*ter* paragraph 21 of Decree Law 135/2009 clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Siremar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. In the case of Siremar, a regular timetable is indeed necessary to satisfy the mobility needs of the

population of the smaller islands and to contribute to the economic development of the latter. Furthermore, since Siremar was subject to specific time scheduling obligations under the initial Convention, the berthing priority helped to ensure that ports allocated the berths and berthing times in such a way as to enable Siremar to respect its public service obligations.

(481) Against this background, the Commission considers that this measure is awarded to enable Siremar to perform its public service obligations that constitute genuine SGEI (see recital (456)). Furthermore, the Italian authorities have confirmed that the berthing priority is only applicable to services provided under the public service regime, and that Siremar was not operating any service outside its public service obligations during the prolongation of the initial Convention. The Commission has already assessed in detail the compatibility of the SGEI and the related compensation for Siremar during the prolongation of the initial Convention (see recitals (444) to (479)). The Commission hence considers that its compatibility assessment of the berthing priority can be limited to establishing whether or not this measure could result in overcompensation.

(482) Italy claims that any possible monetary advantage from the berthing priority cannot be quantified (see recital (227)). In any event, the Commission notes that, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. Therefore, the overcompensation checks that have been applied to Siremar as described above (see Section 8.3.1.6) are also fit to detect any possible overcompensation resulting from the berthing priority.

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

8.3.1.8. Compliance with the 2005 SGEI Decision

(484) As explained at recital (440), the average annual traffic during the 2 financial years preceding that in which the SGEI was assigned did not exceed 300 000 passengers on the following route bundles:

— Trapani – Pantelleria (mixed routed D4)

— Porto Empedocle – Pelagie Islands (mixed routed D5),

— Palermo – Ustica, i.e. (mixed route D1 and passenger-only route ALD/1).

(485) Therefore, for routes D1, D4, D5, ALD/1, the requirement of Article 2(1)(c) of the 2005 SGEI Decision is met. In addition, the Commission considers that Article 2(2) of the 2005 SGEI Decision that requires compliance with the Maritime Cabotage Regulation is also fulfilled ([176]). On this basis, the Commission concludes that these four routes can be assessed based on the 2005 SGEI Decision.

(486) The Commission has already established above (see Section 8.3.1.3) that for the period of prolongation of the initial Convention the entrustment acts laid down a clear definition of the public service obligations, the duration, undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation, and also the arrangements for avoiding and repaying any overcompensation. Therefore, for routes D1, D4, D5, ALD/1, Article 4 (Entrustment) of the 2005 SGEI Decision is complied with.

(487) Furthermore, the Commission has concluded (see Section 8.3.1.6) that (i) Siremar was not overcompensated in the period of prolongation of the initial Convention, taken as a whole, and (ii) that the Italian authorities have carried out regular checks to avoid that Siremar received overcompensation. On this basis, the Commission finds that also Article 5 (Compensation) and Article 6 (Control of overcompensation) of the 2005 SGEI Decision are complied with for routes D1, D4, D5, ALD/1.

(488) Given the inextricable link with the performance of the public service and in view of the assessment above (see Section 8.3.1.7), also the berthing priority awarded for the operation of routes D1, D4, D5, ALD/1 complies with the 2005 SGEI Decision.

8.3.1.9. Conclusion

(489) Based on the assessment in recitals (436) to (483), the Commission concludes that the compensation granted to Siremar for the provision of the maritime services subject to the prolongation of the initial Convention in the period from 1 January 2009 to 1 August 2012, and the inextricably linked berthing priority, comply with the applicable conditions of the 2011 SGEI Framework and are therefore compatible with the internal market under Article 106 TFEU.

([176]) The Commission recalls in this context that these four routes were found to constitute a genuine SGEI (see Section 8.3.1.2) and meet the requirements for public service obligations as established by the Maritime Cabotage Regulation. Furthermore, the Commission accepted the prolongation of Siremar's initial Convention in light of the privatisation process of that company and therefore its reasoned opinion of 21 June 2012 did not concern Siremar (see recital (143)).

(490) Furthermore, based on the assessment in recitals (484) to (488), the compensation granted to Siremar and the berthing priority for the operation of routes D1, ALD/1, D4, D5 during the prolongation period is also compatible with the internal market and exempted from the obligation of prior notification pursuant to the 2005 SGEI Decision.

8.3.2. *Illegal prolongation of rescue aid to Siremar*

(491) On the basis of the 2010 Decision, rescue aid to Siremar, as far as it is limited to the 6-month period that expired on 28 August 2011, was compatible with the internal market. However, in accordance with the 2004 Rescue and Restructuring Guidelines, Italy was required to communicate to the Commission within 6 months, either (i) proof that the loan had been reimbursed in full and/or that the guarantee had been terminated or (ii) a restructuring (or liquidation) plan.

(492) The guarantee was called on 11 July 2011 and Siremar only reimbursed the full amount due to the State on 18 September 2012 (see recital (65)). Therefore, Italy could not provide proof that the loan was reimbursed in full and/or that the guarantee was terminated within the period of 6 months that expired on 28 August 2011.

(493) According to the information provided by Italy (see Section 4.2) in the course of the formal investigation procedure, a liquidation plan for Siremar would have been available on the website of Siremar in EA before the expiry of the 6-month time limit laid down by the 2004 Rescue & Restructuring Guidelines. Additionally, Italy argues that at all times it kept the Commission up to date of the progress of the privatisation process of the Siremar business branch.

(494) The information in the Commission's case file confirms that the Italian authorities indeed updated the Commission about the then ongoing privatisation of the Siremar business branch. Furthermore, Italy also confirmed Siremar's intention to repay the rescue aid before the expiry of the 6-month deadline using the proceeds from this privatisation. However, the Italian authorities did not formally submit a restructuring or liquidation plan to the Commission. The Commission was not aware at the time, that a liquidation plan had been published on Siremar in EA's website. Furthermore, the fact that the Commission was informed about the privatisation process of the Siremar business branch cannot substitute for the formal submission of a liquidation plan. More specifically, the Commission must be given the opportunity to assess whether the liquidation plan complies with the 2004 Rescue & Restructuring Guidelines and therefore it should have been formally submitted by Italy.

(495) In addition, the Commission notes that on 5 October 2011 it had sent a letter in which it requested Italy to confirm it had complied with the requirements of the 2004 Rescue and Restructuring Guidelines and the 2010 Decision. The Commission sent a reminder letter to Italy on 28 November 2011 and received a reply from the Italian authorities on 12 December 2011. Therefore, as far as the Commission is concerned, until the latter date (and hence after the expiry of the 6-month period) Italy had not submitted, either (i) proof that the loan had been reimbursed in full and/or that the guarantee had been terminated or (ii) a restructuring (or liquidation) plan.

(496) In its reply to the Commission's letter of 5 October 2011, Italy confirmed that its intention had been for Siremar to repay the rescue aid before 28 August 2011, after the sale of the Tirrenia business branch, but that the privatisation process of the latter had been delayed due to the need to obtain merger approval from the Commission. Since the proceeds of the privatisation of the Tirrenia business branch were necessary to repay the State, the repayment could not take place before expiry of the deadline on 28 August 2011. The Commission points out that in their letter of 12 December 2011, the Italian authorities did not refer at all to the liquidation plan of Siremar that, according to their later submissions, would have already been publicly available before 28 August 2011. Instead, Italy only tried to explain why the repayment could not take place before the expiry of the 6-month period. However, if the Italian authorities had submitted a restructuring or liquidation plan to the Commission before 28 August 2011 they would not have had to provide such explanations. The Commission takes this as further evidence that Italy has not submitted a restructuring or liquidation plan within the required 6-month period.

(497) In view of the above, even if the Commission was aware about the privatisation process, Italy has not complied with its commitment in the 2010 Decision to communicate to the Commission a restructuring (or liquidation) plan within 6 months after the rescue aid had been authorised. As a result, from the expiry of the 6-month period on 28 August 2011, the rescue aid must be considered as illegal and incompatible aid. The Commission

considers that the illegally prolonged rescue aid cannot be found compatible on other grounds as it complies neither with the relevant conditions of the Rescue and Restructuring Guidelines nor with those of the 2011 SGEI Framework ([177]).

(498) Indeed, in the case at hand, the Commission notes that the illegally prolonged rescue aid was not granted for a genuine and correctly defined service of general economic interest, as required by paragraph 12 of 2011 SGEI Framework. Siremar already received compensation for the operation of public services based on the initial Convention (as prolonged) while the rescue aid was notified and approved as a temporary rescue aid measure and not as SGEI compensation. Therefore, it cannot be declared compatible on the basis of the 2011 SGEI Framework.

(499) Against the above background, the Commission notes that Siremar in EA already reimbursed an amount of EUR 15 511 529,35 on 18 September 2012. This payment exceeded the EUR 15 121 838,33 ([178]) already due to the State on 11 July 2011. However, since the illegally prolonged rescue aid has been found incompatible, the repayment must include at least the amount of recovery interest. If the interest already paid by Siremar in EA were insufficient, the remaining interest amount would still have to be recovered.

8.3.3. *Fiscal exemptions related to the privatisation process*

(500) The Commission has concluded above (see recitals (419) to (430)) that the exemptions from corporate income tax on the proceeds from the sale of the Siremar business branch, for Siremar, and from the indirect taxes on the transfer of the same business branch, for Siremar and SNS, which were granted by the 2010 Law, constitute State aid to Siremar and SNS.

(501) In both instances, the aid is equal to the difference between the tax ordinarily due for these types of transaction and the tax effectively paid. The compatibility of this State aid is therefore to be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of Article 107 TFEU and Article 106(2) TFEU.

(502) Firstly, the Commission considers that none of these exemptions can be found compatible on the basis of any of the derogations provided for by Article 107(2) and (3) TFEU.

(503) Secondly, the Commission notes that these tax exemptions on the sale of the Siremar business branch are one-off measures related to a transfer of assets that was part of the wider reorganisation and privatisation of the Tirrenia group. As such, the Commission considers that this aid is not inextricably linked with the SGEI performed by Siremar and later SNS and should therefore not be assessed under the same compatibility basis. Indeed, these exemptions are not related to the operation of services of general economic interest, as defined in either the initial or the new Convention ([179]). Therefore, the compatibility grounds laid down in Article 106(2) TFEU cannot be invoked.

(504) The Commission therefore concludes that Siremar's and SNS' tax exemptions constitute operating aid reducing the costs that Siremar in EA and SNS would otherwise have had to bear from their own resources and is thus incompatible with the internal market ([180]).

8.3.4. *Conclusion on compatibility of the aid*

(505) On the basis of the assessment above, the Commission finds that:

— the compensation granted to Siremar and the berthing priority for the operation of maritime routes in the period 1 January 2009 – 1 August 2012 are compatible with the internal market under Article 106 TFEU, the 2011 SGEI Framework, and for four routes grouped in three bundles, also under the 2005 SGEI Decision;

— the rescue aid to Siremar was illegally prolonged in the period from 28 August 2011 to 18 September 2012 (when it was repaid) and is incompatible with the internal market;

— Siremar's exemption from indirect taxes on operations and acts related to the transfer of the Siremar business branch to SNS, and from the corporate income tax on the proceeds from that transfer, constitutes incompatible operating aid to Siremar;

([177]) Even if this aid was granted before the entry into force of the 2014 Rescue and Restructuring Guidelines, according to paragraph 139 of those Guidelines, when examining aid to SGEI providers in difficulty, such as Siremar, the Commission must apply the provisions of the 2014 Rescue and Restructuring Guidelines, regardless of the date when the aid was granted. When the Commission assesses the compatibility under the 2014 Rescue and Restructuring Guidelines of aid granted to SGEI providers in difficulty before 31 January 2012, such aid will be deemed compatible with the internal market if it complies with the provisions of the 2011 SGEI Framework, with the exception of paragraphs 9, 14, 19, 20, 24, 39 and 60.

([178]) This amount included interest due to the State for an amount of EUR 11 367,51, for the period between 30 June 2011 and 11 July 2011.

([179]) *Ad abundantiam*, concerning the aid granted to Siremar via these tax exemptions, the Commission notes that, at the time of adoption of ths Decision, Siremar in EA no longer performs an SGEI nor any other economic activity.

([180]) Case C-301/87 *France v Commission*, ECLI:EU:C:1990:67, paragraph 41.

— the payment by SNS of a fixed fee for the registration of the contract for the purchase of the Siremar business branch pursuant to the 2010 Law, instead of the fee ordinarily due under national law, constitutes incompatible operating aid to SNS.

8.4. **Response to CdI's submissions**

(506) As described above (see Section 6), CdI has made three submissions to the Commission. These submissions were made after the expiry of the deadlines for interested third parties to comment on the 2011 and 2012 Decisions.

(507) The Commission notes the following with respect to the arguments raised by CdI in its submissions:

— Regarding the data provided on the routes it operated in the period between 1 August 2012 and 31 December 2012, the Commission confirms it has taken that information into account in its assessment;

— Regarding the sale of the Siremar business branch, including whether it took place at market price, the Commission notes that, at the time of adoption of this Decision, the Italian authorities and CdI have already rescinded both the original sale contract and the new Convention, and that that Convention, bundled with the Siremar business branch, was finally awarded to SNS. As established in recital (295), concluding the investigation on the initial award of the new Convention, bundled with the Siremar business branch, to CdI, over the period 1 August 2012 – 10 April 2016, would be logically impossible. Therefore, the Commission will not comment on the contributions by CdI on the privatisation of the Siremar business branch;

— Regarding the implied claim in several of CdI's letters that the public service obligations imposed on it by the new Convention for the period 1 August 2012 – 10 April 2016 are genuine SGEI, the Commission has concluded in recital (351) that those public service obligations, as entrusted to SNS, respond to a genuine user demand, address a real market failure and can be considered the least harmful approach. However, as the Commission notes that as the new Convention between Italy and CdI was rescinded and the public service obligations were eventually awarded to SNS, for the same reasons expressed above, it is not possible to separately assess whether the public service obligations imposed on CdI by the new Convention represent a genuine SGEI. Therefore, the Commission will not comment on the contributions by CdI on this issue;

— Regarding the counter-guarantee and the capital increase, the Commission has concluded in recitals (408) and (413) that the investigation on these measures no longer has any object. Therefore, the Commission will not comment on the contributions by CdI on these measures;

— Regarding the economic discontinuity between Siremar in EA and CdI, the Commission notes that as the Siremar business branch and the new convention were eventually awarded to SNS, for the same reasons expressed above, it is not necessary to separately assess the existence of any potential economic continuity between Siremar in EA and CdI. On the contrary, the Commission will assess in Section 11 the existence of any economic continuity between Siremar in EA and SNS ([181]). Moreover, and as an additional argument, the Commission notes that CdI is currently in liquidation and inactive. As such, the investigation, in the present State aid case, on any aid granted to it would be without object. Against this background, the Commission considers that also the assessment of any potential economic continuity between Siremar in EA and CdI would not have any object. Therefore, the Commission will not comment on the contributions by CdI on the economic discontinuity between Siremar in EA and CdI.

9. **CONCLUSION**

(508) The Commission finds that Italy has unlawfully implemented some of the aid measures under assessment in breach of Article 108(3) TFEU. Based on the foregoing assessment, the Commission has decided that the public service compensation granted to Siremar under the prolongation of the initial Convention is compatible with the internal market under Article 106 TFEU. Furthermore, since the berthing priority is inextricably linked with the performance of the SGEI by Siremar, that measure is also compatible with the internal market under Article 106 TFEU. For four of the 20 public service routes concerned, Italy was exempt from the obligation of prior notification provided for in Article 108(3) TFEU because the public service compensation and the berthing priority granted to Siremar for the operation of these four routes complied with the 2005 SGEI Decision.

([181]) Incidentally, the Commission notes that as the business branch was returned to Siremar in EA and then awarded to SNS, together with the new Convention, there is no question of potential economic continuity between CdI and SNS, which are two distinct parties in a bidding procedure.

(509) However, the rescue aid to Siremar, which was illegally prolonged in the period from 28 August 2011 to 18 September 2012, is incompatible with the internal market. Finally, the exemption from indirect taxes on operations and acts related to the transfer of the Siremar business branch, for Siremar and SNS, and from the corporate income tax, on the proceeds from the sale of the Siremar business branch, for Siremar, also constitutes operating aid to Siremar and SNS that is incompatible with the internal market.

(510) This Decision does not concern or prejudge any other issues covered by the 2011 and 2012 Decisions or brought to the attention of the Commission by interested parties in the course of the investigation opened under those Decisions.

10. **RECOVERY**

(511) According to the TFEU and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market ([182]). The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([183]).

(512) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage, which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ([184]).

(513) In line with the case law, Article 16(1) of Council Regulation (EU) 2015/1589 ([185]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(514) Thus, given that the measures in question were implemented in breach of Article 108(3) TFEU, and are to be considered as unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery.

(515) In the present case, the aid beneficiary, Siremar in EA, is already undergoing insolvency proceedings. Therefore, effective recovery can be achieved through registration of the claim relating to the aid to be recovered in the schedule of liabilities ([186]). In that case, the registration of the claim must be followed by (i) recovery of the full recovery amount, or, if that cannot achieved, (ii) the winding-up of the undertaking and the definitive cessation of its activities.

(516) The incompatible State aid listed in recital (505) granted to Siremar in EA and SNS must be reimbursed to Italy insofar as it has been paid out. In particular, the aid to be recovered is established as follows:

(a) The principal of the rescue aid, i.e. EUR 15 121 838,33, plus recovery interest, accruing from the dates of payment of the two loan tranches and from the date when the State guarantee was called by BIIS (i.e. 28 February 2011 for the first tranche of EUR 12 000 000, 23 March 2011 for the second tranche of EUR 3 000 000 and 11 July 2011 for the amount of EUR 121 838,33), until full recovery. The Commission takes note that the principal of the aid and part of the recovery interest have already been repaid by Siremar in EA;

(b) To the extent that the indirect taxes on operations and acts related to the transfer of the Siremar business branch, are payable by the seller (i.e. Siremar in EA), the aid principal is equal to the taxes ordinarily due for these types of transaction. Italy shall also calculate the difference between the fixed fee, paid by SNS for the registration of the contract for the purchase of the Siremar business branch, pursuant to the 2010 Law, and

([182]) Judgment of 12 July 1973, Commission v Germany, C-70/72, EU:C:1973:87, paragraph 13.
([183]) Judgment of 21 March 1990, Belgium v Commission, C-142/87, EU:C:1990:125, paragraph 66.
([184]) Judgment of 17 June 1999, Belgium v Commission, C-75/97, EU:C:1999:311, paragraphs 64 and 65.
([185]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).
([186]) National law governs the ranking of the State aid claim in the schedule of liabilities, provided the ranking complies with the principle of effectiveness and the principle of equivalence. See point 64 of the Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p. 1. In any event, the State aid claim cannot be ranked lower than ordinary unsecured claims. The final registration of the State aid claim also stops the accrual of additional recovery interest.

the fee ordinarily due under national law. […] Italy shall also provide a list of all the documents for which taxes were effectively exempted and calculate the difference between the taxes ordinarily due from Siremar and SNS and the taxes effectively paid. To these amounts, recovery interest shall be added, accruing from the date(s) of the official documents, for which taxes were exempted, until full recovery.

(517) In addition, Italy shall not exempt the proceeds from the sale of the Siremar business branch from the corporate income tax to be paid by Siremar in EA.

11. **ECONOMIC CONTINUITY**

(518) Where there has been a sale or transfer of the beneficiary of illegal and incompatible State aid, the obligation to repay can be extended to other undertakings to which the beneficiary's shares or business have been transferred ([187]). In case of a share deal, where the beneficiary is still existing and active on the market and has merely changed its owners, the obligation to repay the aid stays with the beneficiary. In case of an asset deal, where another undertaking is continuing the business with some or all of the assets of the original beneficiary, that other undertaking should be considered as the beneficiary of the State aid, provided that the transfer or sale structure triggers the conclusion that there is economic continuity between the two companies.

(519) On the contrary, where it can be shown that, notwithstanding a transfer of some or all of the assets, the benefit of the unlawful aid remains with the original recipient and the acquiring company performs a substantially different activity, the repayment obligation will remain with the original recipient of the aid. According to the case-law, in order to assess whether there is economic continuity, the following factors may be taken into account: the scope of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the owners of the acquiring undertaking and of the original undertaking, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and the economic logic of the transaction ([188]).

(520) Under the same case law, the aforementioned factors may be taken into account to varying degrees, according to the specific features of the case at hand. It follows that the Commission is not required to take into account the whole of those factors, as is demonstrated by use of the expression 'may be taken into consideration' ([189]) and that there is no hierarchy between those factors. In particular, in the case at hand, the Commission considers that the assessment of economic continuity should take into account the peculiar nature of the transaction between Siremar in EA and SNS, which concerned the privatisation of a public company by means of a tender procedure for a 12-year public service contract, combined with the assets necessary to operate the SGEI spelled out in that contract. To this date, Siremar in EA continues to exist as a separate entity but does not undertake any business activities and continues to be subject to bankruptcy proceedings with the primary purpose of reimbursing its creditors and finalising its liquidation.

(521) In order to decide whether there is economic continuity between Siremar in EA and SNS, and therefore establish whether the latter should also be held liable for the reimbursement of the incompatible aid granted to the former, the Commission applied the aforementioned indicators to the specific circumstances of the case at issue.

11.1. **The scope of the transfer**

(522) This indicator concerns the extent of the transfer of the existing assets and liabilities, including contractual relationships with the employees and suppliers, from Siremar (later in EA) to SNS. At the outset, it should be noted that none of the existing liabilities were transferred: they remained entirely within Siremar in EA, and still do as of the time of adoption of this Decision. The transfer entailed the complete write-off of any claim on the assets being transferred, such as mortgages, seizures, and priority claims.

(523) Additionally, as far as the assets are concerned, the Commission firstly notes that the procedure for the sale of the Siremar business branch followed a failed privatisation attempt of Tirrenia di Navigazione in its entirety, with all its assets and liabilities, including its then subsidiary Siremar. The second, successful, privatisation attempt of the

([187]) Case C-303/88 *Italy v Commission*, ECLI:EU:C:1991:136.
([188]) Case T-121/15 *Fortischem a.s. v. Commission*, ECLI:EU:T:2019:684, paragraph 208.
([189]) Case T-123/09 *Ryanair v. Commission*, ECLI:EU:T:2012:164, paragraph 156.

Siremar business branch involved the Siremar brand ([190]), the assets deemed necessary for the public service obligations imposed on Siremar, and the contractual relationships with suppliers, with a different and narrower scope when compared with the first attempt (e.g., approximately 45 % in terms of the number of ships). Those assets belonging to Siremar in EA, which were not considered necessary for the provision of the public service obligations, were sold separately, with different and unrelated tenders, and included the fast ship Guizzo.

(524) Finally, the Commission also notes that, as far as the workforce is concerned, there was no transfer of work contracts from Siremar in EA to CdI and later to SNS. Indeed, Article 2112 of the Italian Civil Code requires that, in case of transfer of a business, the existing employment contracts continue with the buyer and each employee maintains all resulting rights. However, pursuant to Decree Law 270/1999, this ordinary regime is not applicable to the transfer of a branch of a company subject to an extraordinary administration procedure and providing essential public services. On the contrary, the new owner is obliged to take over the staff necessary for providing the service and refrain from collective dismissals for 2 years (see recital (195)). The Commission notes that, while the general rule would have provided for a clear continuity in the workforce from Siremar in EA to SNS through CdI, this exception effectively allowed Siremar in EA to terminate all contracts with its employees. Then, CdI and later SNS offered new contracts to the employees that were actually employed on the performance of public service obligations.

(525) The obligation to maintain the number of employees was set by a general law which could not be ignored by the Italian authorities in the set-up of the sale procedure. However, even without this legal obligation, the Commission notes that the shipping business requires a mandatory minimum number of employees to operate the ships, with a very specific set of skills, which are set out in the manning tables (see recital (210)). Indeed, in the present case, after being awarded the new Convention, CdI, and later SNS, would have had to recruit around 500 employees in a short timeframe, to discharge its obligations. It is therefore highly likely that SNS would have hired most of the employees of Siremar in EA even if it were not required to offer them employment contracts, for reasons of expediency and to reduce recruitment costs.

(526) Against this background, the Commission concludes that, while there was de facto continuity in the workforce, the latter was due to the factual circumstances of the case (i.e. the size of the transfer) and to generally applicable labour laws. On the other hand, almost all of the assets of Siremar in EA and none of its liabilities were transferred to SNS. Overall, as far as the scope of the transfer is concerned, the Commission considers that there are indications of economic continuity between these companies.

11.2. **The transfer price**

(527) According to settled case law, the transfer of the assets at a price below market price would also be an indicator of economic continuity between the liquidated company, liable to repay the aid to the State, and the newly created company. In this case, the Commission notes that the assets were transferred as a result of a tender which was sufficiently open, transparent and non-discriminatory so as to obtain a market price, as described in Section 8.1.3.4. There is no evidence that the joint tendering of the assets and the public service contract had a negative impact on the outcome of the tender. On the contrary, Italy has shown that when separate tenders were organised for some of Tirrenia's and Siremar's other ships, these could only be sold at scrap value. Indeed, the conditions imposed on the buyer, such as the requirement to maintain staffing levels for 2 years, did not depress the price, as established by the Ecorys report (see recital (121)). Additionally, the price eventually paid by SNS, i.e. EUR 55,1 million, was higher than the minimum price identified in the independent expert evaluation by Banca Profilo, i.e. EUR 55 million, and SNS has to pay a yearly interest of 1,5 % on the two deferred instalments of EUR 9 million each. Moreover, as pointed out in recital (122), at the time of the transfer of the business branch to SNS, the market value was estimated in the Second Ecorys Report at a much lower EUR 39,9 million under an equity valuation method. Finally, the Commission notes that the numerous calls for improved offers during the bidding procedure (see recitals (79) to (100)) clearly show that there was a competitive dynamic between CdI and SNS, and even if the former was eventually excluded from the procedure, at the time when the successful offer by SNS was first formulated, CdI was still an active bidder in the procedure. It is established case law that where a public authority proceeds to sell an undertaking through an open, transparent and unconditional tender, it can be presumed that the market price corresponds to the highest binding and credible offer received. Furthermore,

([190]) However, as described in footnote 41, SNS is currently offering its services exclusively as either Caronte & Tourist or as Liberty Lines, and not on its own right (see for instance the website of Siremar, http://siremar.it/, which immediately directs the viewer to one of the two companies' websites).

according to the case law, even the presence of unlawful conditions to that tender might not call this finding into question, if those conditions did not lower the amount of that offer ([191]).

(528) In light of the above, the Commission concludes that the circumstances of the transfer exclude the transfer of any economic advantage, received by Siremar in EA, to SNS. Hence, the price of the transfer cannot be considered an indicator of economic continuity in this case.

11.3. **The identity of the owners**

(529) When the transfer of the assets takes place between two related entities, this is a sign that the purpose of the transfer may be to circumvent the obligation to repay aid identified as unlawful and incompatible in a Commission decision. In this case, the Commission notes that Siremar in EA and SNS had and have no connections of any kind. The former was a public company, ultimately fully owned by the Ministry of Economy (see recital (22)). The latter is a private company owned 50 % by Ustica Lines SpA and 50 % by Caronte & Tourist SpA. Therefore, the Commission notes that no control could be exercised from Siremar in EA to SNS or vice versa.

(530) In light of the above, the Commission concludes that also the criterion of the identity of the shareholders indicates that there is no economic continuity in this case.

11.4. **The timing of the transfer**

(531) Where the transfer of the assets took place after the adoption of a Commission decision raising doubts as to the compatibility of an aid, which had already been granted, this is another indicator that such transfer may have been set up in order to circumvent a recovery order. In the present case, the Commission notes that the publication of the call for expressions of interest took place on 4 October 2010, while SNS made its binding offer on 23 May 2011. The Commission's decision to open a formal investigation on, inter alia, the privatisation of the Siremar branch, was adopted several months later, on 5 October 2011. Then, on 20 October 2011, CdI signed the sale contract, based on its last offer submitted on 13 October 2011. The transfer was finalised only on 30 July 2012, due to the legal challenges against the awarding of the business branch and the new Convention to CdI. Subsequently, on 7 November 2012, the Commission extended the formal investigation to, inter alia, the new Convention signed by CdI. The business branch was eventually awarded to SNS in April 2016, after the legal proceedings described in Section 2.3.3.2.

(532) Against this background, the Commission considers that even if the transfer to SNS took place after the 2011 and 2012 Decisions, when SNS was devising and submitting its binding offer, i.e. in May 2011, neither SNS nor Siremar in EA could have known that, a few months later, the Commission would have opened a formal investigation. It seems very unlikely that either party could have already known the content of the 2011 and 2012 Decisions, gauged the risks they entailed, and decided to transfer the assets to void the investigation of any purpose.

(533) Additionally, the Commission notes that Italy had informed the Commission about its intention to sell the Siremar business branch in a bundle with the new Convention well ahead of time, in the context of discussions with the Commission for the implementation of the Maritime Cabotage Regulation (see also Section 2.4). Moreover, Italy also notified, for reasons of legal certainty, the draft new Convention (see recital (9)). This is another indication that Italy did not intend to circumvent any future recovery order by organising the transfer of the business branch and the entrustment of the new Convention in the way described and assessed in Section 8.1.3.

(534) In light of the above, even if the transfer to SNS took place after the adoption of the 2011 and 2012 Decisions, the Commission considers that, taking into account the specific circumstances just described, and in particular the lengthy legal proceedings against the first awarding of the business branch to CdI, the timing of the events suggests that there is no economic continuity in this case.

11.5. **The economic logic of the transfer**

(535) This indicator is concerned with both the intentions of the parties to the asset transfer, and with the economic rationale of the latter, in light of the future business of the company that will operate those assets. In this respect, the Commission firstly notes that, on the one hand, the intention of the Italian authorities was to comply with the obligation to liberalise the maritime transport sector, as spelled out in the Maritime Cabotage Regulation, by privatising its main public operator, the Tirrenia Group, including Siremar, and by entrusting the public service obligations to the acquiring company. While not required by that Regulation, this transfer of both the assets and the public service compensation was indeed one of the options available to Italy to implement that liberalisation

([191]) See Judgment of the Court of Justice of 24 October 2013, *Land Burgenland v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94-96.

(see recital (136)), and in these circumstances, was also optimal in terms of sale price of the assets, relative to the use of two separate procedures (see recital (393)). On the other hand, the intention of SNS was to operate the routes under public service obligation in a more efficient manner than did Siremar (later in EA), and thereby earn a profit.

(536) The scope of activity, i.e. the provision of maritime services to and between certain Sicilian islands under specific public service obligations concerning frequency, fares and characteristics of the vessels, remains essentially the same.

(537) As far as the future business of the company is concerned, the Commission notes that while it is true that SNS offers the same or very similar routes and frequencies as Siremar, this is the logical consequence of the ongoing need to provide genuine services of general economic interest, as set out in the new Convention. In other words, continuity of the public service should not be confused and conflated with economic continuity under State aid rules. Indeed, the Commission considers that Italy could not have arbitrarily changed the scope of the public services provided by SNS without defeating the very purpose of the new Convention, i.e. to (i) ensure the territorial continuity between the mainland and the islands and (ii) contribute to the economic development of the islands concerned.

(538) Additionally, the Commission notes that the conditions for the day-to-day execution of the public service obligations by SNS are different from those which applied until 2009 included. The amount of compensation is set with a different mechanism, which requires the operator to operate efficiently. Moreover, as there is no guarantee of full cost coverage and as the amount of nominal compensation is fixed for several years (i.e. it decreases in real terms), SNS had no choice but to undertake an overhaul of the business strategy followed by Siremar. The latter, throughout its long history within the Tirrenia group, always and consistently operated as a public service, without any strategy to achieve sustainable profitability, while Siremar in EA simply aimed at the orderly winding down of the company while ensuring the continuity of the public service until the transfer of ownership to CdI and later SNS following the tender procedure.

(539) Indeed, the Commission notes that in its first business plan, covering the period 2011-2022 and drafted in May 2011, SNS set out to increase the efficiency of the fleet, in terms of maintenance, insurance, fuel costs; improve online sales; save on labour costs through new employment contracts; and reduce costs by entering into new contracts with suppliers. In its second business plan, covering the period 2016-2027 and drafted in February 2016, SNS updated its financial projections and assumptions based on data from CdI, changed the allocations of certain ships to the various routes, particularly as far as passenger-only services are concerned, and changed certain assumptions on staff costs and amortisations ([192]). Finally, as from 1 September 2016, SNS effectively split its business between the ferry and passenger-only services, assigning them to Caronte & Tourist and Liberty Lines respectively, and transferring its assets proportionately. The Commission notes that this represents a key difference in the operation of the public services between SNS and Siremar in EA.

(540) Hence, SNS executed its public service obligations under different operating conditions than Siremar in EA, based on its own business strategy. Indeed, the Italian authorities did not require SNS to follow any specific business model nor to maintain a certain scope of activities, beyond those set out in the new Convention, nor to take over any specific assets or employees which were not intrinsically linked with the operation of the public service obligations as defined in the new Convention. In this respect, SNS was (and still is) free to make any changes to the way the business is run that they see fit.

(541) Against this background, the Commission notes that while the public service obligations themselves, in terms of routes and frequencies, are inevitably similar as they respond to similar public service needs, the conditions of their execution and the business strategy behind it are different. Indeed, this de facto similarity in the activity undertaken was due to the very specific circumstances of the case and was mitigated by the different financial constraints on SNS' operations. Overall, as far as the economic logic of the transaction is concerned, the Commission considers that there are some indications of the existence of economic continuity in this case.

11.6. **Conclusion on economic continuity between Siremar in EA and SNS**

(542) Based on the above, the Commission notes that the price of the transfer, its timing and the identity of the owners do not present any indication of economic continuity. Even if the scope of the transaction and its economic logic contain some elements that suggest that there could be economic continuity, for those criteria the Commission

([192]) The 2016-2027 business plan did not include the frequency on the lines (see recital (123)). It also did not include the main strategic 'drivers' of the business plan, which were included in the 2011-2022 plan: new employment contracts for all staff, internet sales, fuel efficiency, operational efficiency.

notes that any element of potential continuity is motivated by the very specific circumstances of this transaction, i.e. the bundling of the asset transfer and public service contract in a single procedure, the size of the transaction and the generally applicable labour laws. In particular, there are no indications of circumvention to a recovery obligation. Against this background, the Commission concludes that on balance there is no economic continuity between Siremar and SNS. This also means that the obligation to repay the illegal and incompatible State aid granted to Siremar shall not be extended to SNS,

HAS ADOPTED THIS DECISION:

Article 1

1. The compensation granted to Siremar and the berthing priority awarded for the provision of maritime services under the initial Convention, as prolonged in the period 1 January 2009 to 30 July 2012, constitutes State aid within the meaning of Article 107(1) TFEU. With the exception of the State aid granted for the operation of routes D1 (Trapani – Pantelleria), D4 (Porto Empedocle – Linosa – Lampedusa), D5 (Palermo – Ustica), ALD/1 (Palermo – Ustica), the aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2. The aid referred to in paragraph 1 of this Article is compatible with the internal market.

Article 2

1. The prolongation of the rescue aid from 28 August 2011 to 18 September 2012 constitutes State aid to Siremar within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2. The aid referred to in paragraph 1 of this Article – amounting to EUR 15 121 838,33 – is incompatible with the internal market.

Article 3

1. The exemption from the indirect taxes on the transfer of the Siremar business branch to SNS constitutes State aid to Siremar within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

2. The payment by SNS of a fixed fee for the registration of the contract for the purchase of the Siremar business branch pursuant to the 2010 Law, instead of the fee ordinarily due under national law, constitutes State aid to SNS within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

3. The exemption from corporate income tax of the proceeds from the sale of the Siremar business branch to SNS constitutes State aid to Siremar within the meaning of Article 107(1) TFEU. The State aid was unlawfully put into effect by Italy in violation of Article 108(3) TFEU.

4. The aid referred to in paragraphs 1, 2 and 3 of this Article is incompatible with the internal market.

5. At the time of adoption of this Decision, Italy has not yet paid out the aid referred to in paragraph 3 of this Article.

Article 4

1. The award of the new Convention for the period from 11 April 2016 until 11 April 2028, bundled with the Siremar business branch and the berthing priority to SNS does not constitute State aid within the meaning of Article 107(1) TFEU.

2. The possibility to use resources of the *Fondo Aree Sottoutilizzate* to meet liquidity needs, as laid down by the 2010 Law, does not constitute State aid within the meaning of Article 107(1) TFEU.

3. The possibility to use, on a temporary basis, the financial resources already committed to the upgrade and modernisation of the fleet, to cover pressing liquidity needs, as laid down by the 2010 Law, was not availed of as far as Siremar is concerned. Therefore, it does not constitute State aid to Siremar within the meaning of Article 107(1) TFEU.

Article 5

1. Italy shall recover the incompatible aid referred to in Articles 2 and 3 from the beneficiaries, in so far as it has been paid out.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

4. Based on the information at its disposal, the Commission acknowledges that the beneficiary has already repaid the principal of the aid referred to in Article 2 and part of the recovery interest.

5. Italy shall cancel all outstanding payments of the aid referred to in paragraph 2 of Article 3 with effect from the date of adoption of this Decision.

Article 6

1. Recovery of the aid referred to in Article 5 shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 7

1. Within 2 months following notification of this Decision, Italy shall submit the following information to the Commission:

— the total amount (principal and recovery interest) to be recovered from the beneficiaries;

— a detailed description of the measures already taken and planned to comply with this Decision;

— documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 6 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 8

This Decision is addressed to the Italian Republic.

The Commission may publish the amounts of aid and recovery interest recovered in application of this decision, without prejudice to Article 30 of Council Regulation (EU) 2015/1589.

Done at Brussels, 17 June 2021.

For the Commission
Margrethe VESTAGER
Executive Vice-President