

DECISIONS

COMMISSION DECISION

of 2 May 2013

on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée

(notified under document C(2013) 1926)

(Only the French text is authentic)

(Text with EEA relevance)

(2013/435/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2)(1) thereof;

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

Having regard to 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)⁽²⁾,

Having invited the interested parties to submit their comments in accordance with the said Articles⁽³⁾, and having regard to those comments,

Whereas:

1. PROCEDURE

- (1) By letters dated 27 September, 30 November and 20 December 2007 the Commission received a complaint from Corsica Ferries about illegal, incompatible aid allegedly received by Société Nationale Corse-Méditerranée ('SNCM') and Compagnie Maritime de Navigation ('CMN') under the public service delegation contract signed between the Corsican regional authorities and the Corsican Transport Board, on the one hand, and SNCM and CMN, on the other. The contract concerns the shipping routes between Corsica and Marseille during the period 2007-2013. By letters dated 20 May 2010, 16 July 2010, 22 March 2011, 22 June 2011, 15 December 2011 and 10 January 2012 the complainant sent additional information in support of its complaint.

- (2) By letters dated 17 March 2008, 12 November 2008, 13 October 2011 and 14 December 2011 the Commission requested additional information from France. The French authorities sent their comments and replies by letters dated 3 June 2008, 14 January 2009, 7 December 2011 and 20 January 2012.

- (3) By letter dated 27 June 2012, the Commission informed France of its decision to initiate the procedure under Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) on the potential aid to SNCM and CMN contained in the public service delegation contract. The Commission decision (the 'opening decision') was published in the *Official Journal of the European Union*⁽⁴⁾ on 5 October 2012.

- (4) The French authorities submitted their comments and answers to questions contained in the opening decision in letters dated 13 July 2012, 7 September 2012, 14 November 2012 and 16 January 2013.

- (5) Corsica Ferries, SNCM and CMN submitted observations within the deadlines provided for in the opening decision. By letters dated 22 October 2012 and 21 December 2012, the Commission forwarded these observations to the French authorities. France sent its observations on the comments of the third parties by letters dated 3 January 2013 and 12 February 2013.

2. FACTUAL BACKGROUND

2.1. THE LINK BETWEEN CORSICA AND THE MAINLAND

- (6) As stated in the opening decision, the territorial continuity between Corsica and the mainland was provided by the first 25-year concession signed in 1976 between SNCM and CMN, on the one hand and the State, on the other. From 1 January 2002, only lines from Marseille were served by SNCM and CMN under a public service delegation contract signed with the regional authorities and the Corsican Transport Board for a period of five years.

⁽¹⁾ OJ L 1, 3.1.1994, p. 3.

⁽²⁾ OJ L 364, 12.12.1992, p. 7.

⁽³⁾ OJ C 301, 5.10.2012, p. 1.

⁽⁴⁾ OJ C 301, p. 1.

- (7) For the other lines, a social assistance system⁽⁵⁾ was set up in parallel. This system, and its extension for 2007-2013, was approved by the Commission⁽⁶⁾.
- (8) Since 1 July 2007, SNCM and CMN have been providing a shipping service between Marseille and Corsica under the public service delegation contract, signed on 7 June 2007 (see section 2.5 below). This agreement will expire on 31 December 2013.
- (9) The main maritime transport companies operating on the market for the route between the French mainland and Corsica are SNCM, CMN (see sections 2.2 and 2.3 below) and Corsica Ferries, which operates services from Toulon and Nice.
- (10) For many years, the routes to Corsica have been very seasonal, with the bulk of passenger traffic during the summer months. During the 2000s, the main trend in the transport markets between Corsica and the French mainland was the development of the offer of crossings from Toulon, now the main port offering services to Corsica in terms of traffic. It is particularly important to note that the trend towards more traffic from Toulon predates the establishment of the social assistance system in 2002 and has continued since⁽⁷⁾. This trend is consistent with the increase in the market share of the company Corsica Ferries.
- (11) SNCM is a shipping company with its registered office in Marseille and was selected by the French government to ensure territorial continuity with Corsica in 1976. It provides a full range of lines to Corsica from Marseille and Nice, connecting these ports to those of Ajaccio, Bastia, Calvi, Ile Rousse, Porto Vecchio and Propriano.
- (12) SNCM also provides a service to Sardinia (Porto Torres) from Marseille and Corsica (Ajaccio and Propriano). Finally, it connects Algeria (Algiers, Skikda, Bejaia, Oran) and Tunisia from Sète, Marseille and Toulon.
- (13) Until May 2006, SNCM was 80 % owned by the Compagnie générale maritime et financière (CGMF)⁽⁸⁾ and 20 % was held by the Société nationale des chemins de fer (SNCF). On 26 January 2005, the French government began to privatise SNCM, accepting the bid by Butler Capital Partners (holding a 38 % stake) associated with the Connex Group, a subsidiary of Veolia (with a 28 % stake). The employees were allowed a 9 % stake, and the State held on to the remaining 25 % through CGMF.
- (14) This privatisation process included a clause on termination in favour of Butler Capital Partners and Veolia, and could be invoked by the buyers, particularly in the following cases:
- should the Corsican regional authorities decide to launch a consultation on the awarding of a public service delegation contract effective from 1 January 2007 that did not substantially comply with the guidelines adopted by the Territorial Assembly of Corsica for the operation of routes between Marseille and Corsica from 1 January 2007⁽⁹⁾;
 - should the delegation be awarded to a third party or to SNCM under significantly less favourable economic conditions.

2.2. SNCM

- (11) SNCM is a shipping company with its registered office in Marseille and was selected by the French government to ensure territorial continuity with Corsica in 1976. It provides a full range of lines to Corsica from Marseille and Nice, connecting these ports to those of Ajaccio, Bastia, Calvi, Ile Rousse, Porto Vecchio and Propriano.
- (12) SNCM also provides a service to Sardinia (Porto Torres) from Marseille and Corsica (Ajaccio and Propriano). Finally, it connects Algeria (Algiers, Skikda, Bejaia, Oran) and Tunisia from Sète, Marseille and Toulon.
- (13) The transfer to the private sector was accompanied by a series of restructuring measures subject to a separate procedure regarding the law on State aid⁽¹⁰⁾.
- (14) On 10 November 2008, Butler Capital Partners sold its shares to Veolia Transport. In 2011, Veolia Transport merged with Transdev to form Veolia

⁽⁵⁾ This system, entitled 'Individual social assistance scheme under Article 87(2) of the Treaty', is aimed at residents of the island, but also at certain clearly identified social categories, and is applicable to the lines connecting Corsica with the ports of Toulon and Nice. A reduced fare is pre-financed by the transport companies for each passenger eligible for a discount and the individual payment is then reimbursed to these companies.

⁽⁶⁾ Decision of 2 July 2002 in State Aid Case No N 781/2001 - France - Individual social assistance scheme for shipping services to Corsica and Decision of 23 April 2007 in State Aid Case No N 13/2007 - France - Extension of the individual social assistance scheme for shipping services to Corsica No N 781/2001.

⁽⁷⁾ See for example Competition Authority, Opinion No 12-A-05 of 17 February 2012 relating to maritime transport between Corsica and the mainland, paragraph 125.

⁽⁸⁾ Of which the French State holds 100 % of the company capital.

⁽⁹⁾ These guidelines were drawn up on 24 March 2006, see section 2.4.1 below.

⁽¹⁰⁾ C 58/2002 (ex N 118/02) - France - on measures that France has granted for the restructuring of the Société Nationale Maritime Corse-Méditerranée, adopted on 25 February 2003, OJ L 61, 7.2.2004, p. 13. On 15 June 2005, in case T-349/03, the Court annulled the 2003 decision because of an erroneous assessment of the minimal nature of the aid. Following further restructuring measures, the Commission extended procedure C 58/2002 by a decision of 13 September 2006. The Commission adopted a new decision on 8 July 2008, OJ L 255, 27.8.2009, p. 180. This decision was partially annulled by the Court (Case T-565/08) following an application by Corsica Ferries France. SNCM and France lodged an appeal for annulment of that decision before the Court (Case C-533/12 P and C-536/12 P).

Transdev⁽¹¹⁾, which then held a 66 % stake. On 30 March 2012, Veolia Environnement concluded an agreement with CDC under which it would take over the 66 % stake in SNCM previously held by the joint venture, for a sale price of EUR 1.

- (17) SNCM currently operates a fleet of ten vessels, including six ferries⁽¹²⁾ and four passenger cargo vessels, the *Jean Nicoli*⁽¹³⁾, the *Pascal Paoli*, the *Paglia Orba* and the *Monte d'Oro*.

2.3. CMN

- (18) CMN is a private shipping company founded in 1931, with its head office in Marseille, whose main activity is operating freight and passenger shipping services to Corsica and Sardinia.
- (19) Before 2 October 2009, 53,1 % of CMN was owned by Compagnie Méridionale de Participations (CMP), 45 % by SNCM and 1,9 % by the employees. CMP was itself 55 % owned by Société de travaux industriels et maritimes d'Orbigny (STIM d'Orbigny), a subsidiary of the STEF-TFE Group, and 45 % was held by Compagnie Générale de Tourisme et d'Hôtellerie (CGTH), a subsidiary owned 100 % by SNCM. Since that date, the stakes that SNCM held directly and indirectly in CMN were acquired by the STEF group, which now holds a 97,9 % stake in CMN, with the employees holding the remaining 2,1 %.
- (20) CMN provides part of the services on the three routes between Corsica and Marseille (Marseille - Ajaccio, Marseille - Bastia and Marseille - Propriano) under the public service delegation contract (see section 2.5 below). In parallel, the company operates a route to Sardinia (Porto Torres) outside the public service delegation. To perform its business plan under the public service delegation, CMN has three passenger cargo vessels, the *Girolata*, the *Piana* (which replaced the *Scandola*) and the *Kalliste*.

2.4. THE PUBLIC SERVICE DELEGATION CONTRACT 2007-2013

2.4.1. PROCUREMENT PROCEDURE UNDER THE PUBLIC SERVICE DELEGATION CONTRACT

- (21) Here, the Commission provides only a brief review of the procurement procedure under the public service

delegation contract, which is described *in extenso* in the opening decision.

- (22) On 24 March 2006, by Resolution No 06/22, the Corsican Assembly voted in principle to renew a public service delegation for maritime services to the ports of Bastia, Ajaccio, Balagne (Ile Rousse and Calvi), Porto Vecchio and Propriano from the port of Marseille by 1 January 2007.
- (23) A notice of a competitive public tender was published in the *Official Journal of the European Union* (OJEU) on 27 May 2006 and in the newspaper *Les Echos* on 9 June 2006. Four bids were submitted⁽¹⁴⁾. Following the decision of 11 December 2006 by the Competition Council⁽¹⁵⁾ and the judgment of 15 December 2006 by the Council of State⁽¹⁶⁾, the procedure to award the public service delegation was cancelled in its entirety to ensure compliance with obligations concerning competitive procedures.
- (24) By Resolution No 06/263 AC of 22 December 2006, the Corsican Assembly decided to repeat the procedure for awarding a public service delegation and to extend the existing delegation until 30 April 2007.
- (25) A new invitation to tender was then published on 30 December 2006 in the OJEU and on 4 January 2007 in *Les Echos* and on 5 January 2007 in the *Journal de la Marine Marchande*. Two candidates submitted bids - the SNCM and CMN group⁽¹⁷⁾ on the one hand, and Corsica Ferries⁽¹⁸⁾ on the other.
- (26) The economic parameters proposed by the SNCM/CMN group in its overall bid were presented in the opening decision⁽¹⁹⁾. On 28 March 2007, the SNCM/CMN group sent the Corsican Transport Board an amended version of its bid, which essentially concerned a significant reduction of the subsidy requested in exchange for the overall bid. This led to changes in estimated traffic levels, the market value of certain vessels of the group, the date of chartering new ships, and the level of cost savings between the overall bid and the bids tendered on a line-by-line basis.

⁽¹¹⁾ In 2011 Veolia Transdev was owned equally by Veolia Environnement and the Caisse des Dépôts et Consignations (CDC).

⁽¹²⁾ Among them, only the *Napoleon Bonaparte* and the *Danielle Casanova* have been used regularly to operate DSP services since 2007. The other four ferries operated by SNCM in 2013 are the *Méditerranée*, the *Corse*, the *Ile de Beauté* and the *Excelsior*.

⁽¹³⁾ The *Jean Nicoli* replaced the *Monte Cinto* for the operation of DSP services in 2009.

⁽¹⁴⁾ A comprehensive and indivisible bid from SNCM for all the lines; a bid from Corsica Ferries with various options; a bid from the CMN containing six different individual proposals; a bid from a temporary group formed by Corsica Ferries and CMN with two options.

⁽¹⁵⁾ See paragraph 24 of the opening decision.

⁽¹⁶⁾ See paragraph 25 of the opening decision.

⁽¹⁷⁾ There was one bid for each of the five public service shipping lines, and another was a comprehensive and indivisible bid concerning all five shipping lines.

⁽¹⁸⁾ Corsica Ferries submitted bids for the Marseille - Ajaccio, Marseille - Porto-Vecchio and Marseille - Propriano lines and an overall bid for these three lines.

⁽¹⁹⁾ See paragraph 30 of the opening decision.

(27) After the Corsican Assembly postponed the date of entry into force of the new delegation to 1 July 2007 and another negotiation procedure took place, the Corsican Transport Board proposed rejecting the bid from Corsica Ferries ⁽²⁰⁾.

(28) By Resolution No 07/108 dated 7 June 2007, the Corsican Assembly awarded the SNCM/CMN group the public service delegation for the ferry service between the port of Marseille and the Corsican ports and, by a Decision of the same day, the President of the Executive Council of Corsica was authorised to sign the public service delegation contract ('the two decisions of 7 June 2007').

2.4.2. CALLING INTO QUESTION THE VALIDITY OF THE TWO DECISIONS OF 7 JUNE 2007

(29) On 24 January 2008, Bastia Administrative Court rejected Corsica Ferries' application for the annulment of the two decisions of 7 June 2007. On 7 November 2011 the Marseille Administrative Court of Appeal subsequently annulled the Bastia Administrative Court ruling of 24 January 2008 and the two decisions of 7 June 2007.

(30) In its judgment, the Administrative Court of Appeal cited a violation of Regulation (EEC) No 3577/92 on maritime cabotage ⁽²¹⁾ ('the Cabotage Regulation') and characterised the public service delegation contract as illegal state aid. The judgment on this matter stated that the provisions of the first paragraph of Article 7 of the public service delegation contract make it incompatible with the third *Altmark* criterion ⁽²²⁾. The Court therefore ordered the Corsican regional authorities to rescind amicably the public service delegation contract before 1 September 2012 ⁽²³⁾.

⁽²⁰⁾ The OTC felt that Corsica Ferries was not able to set a firm and final date on which it would be able to operate the delegation and also that it did not meet the maximum age requirement for vessels set out in the specific regulations of the call for tenders.

⁽²¹⁾ 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.

⁽²²⁾ Judgment of the Court of 24 July 2003, Case C-280/00, *Trans GmbH and Regierungspräsidium v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

⁽²³⁾ Marseille Administrative Court of Appeal, 7 November 2011 *Corsica Ferries v Collectivité territoriale de Corse*, No 08MA01604. See paragraph 40 of the opening decision.

(31) On appeal by SNCM and CMN ⁽²⁴⁾, the Council of State annulled the 7 November 2011 judgment handed down by the Administrative Court of Appeal on 13 July 2012, and referred the case back to the Administrative Court of Appeal of Marseille.

2.5. REMINDER OF THE MAIN PROVISIONS OF THE PUBLIC SERVICE DELEGATION CONTRACT

(32) The public service delegation contract was signed for the period from 1 July 2007 to 31 December 2013. Article 1 defines the purpose of the public service delegation contract as the provision of scheduled maritime transport services on all lines of the public service delegation between the port of Marseille and the ports of Bastia, Ajaccio, Porto Vecchio and Propriano-Balagne.

(33) The specifications contained in Annex 1 of the public service delegation contract define the nature of these services. In particular, it distinguishes between:

- (i) the permanent 'passenger and freight' service ⁽²⁵⁾ which the SNCM-CMN group must provide throughout the year ('the basic service') and

⁽²⁴⁾ The Council of State considered firstly that Council Regulation No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States does 'not preclude an overall assessment of the real public service need for each line or journey over the entire period of performance of the contract or any periods distinguished therein, without it being necessary to examine whether this need is justified continuously during that period or those periods; as a result, the Administrative Court of Appeal of Marseille committed an error of law when it ruled that the contractual conditions were incompatible with the regulation on the grounds that the additional service required from the concession-holding group on the Marseille-Ajaccio, Marseille-Bastia and Marseille Propriano lines, which were set up to reinforce the permanent service provided on these lines throughout the year during the peak periods, had to meet a real public service need that is different to the public service need met by the permanent service'. Moreover, the Council of State considered that the fact that Article 7(1) of the contract (see paragraph 38 below) 'could thereby cause a decision to be taken by the public body whose intervention would be subject to prior notification to the European Commission does not, in itself, qualify this clause as aid within the meaning of Article 107 of the Treaty; by judging the contrary, the court therefore erred in its legal characterisation of the facts'.

⁽²⁵⁾ On the Marseille - Bastia, Marseille - Ajaccio and Marseille - Porto Vecchio lines, concession-holders must offer minimum capacity for the transport of passengers in each direction of at least 450 people in sleeping accommodation in at least 140 cabins; at least 50 seats in common facilities for this purpose; at least 150 places for cars. The Marseille - Propriano line must offer at least 200 places in sleeping accommodation in at least 55 cabins; at least 55 places for cars. The Marseille - Balagne line must offer at least 220 places in sleeping accommodation in at least 70 cabins; at least 70 places for cars. For freight transport, the Marseille - Bastia route must offer capacity of at least 1 800 linear metres; the Marseille - Ajaccio route at least 1 200 linear metres; the Marseille - Porto Vecchio route at least 1 000 linear metres; the Marseille - Propriano and Marseille - Balagne routes at least 600 linear metres.

- (ii) the additional passenger service⁽²⁶⁾ to be provided during peak periods, for approximately 37 weeks, on the Marseille - Ajaccio and Marseille - Bastia routes and during the period from 1 May to 30 September on the Marseille - Propriano route ('the additional service').
- (34) Article 2 of the public service delegation contract sets out the reference financial compensation to which concession holders commit for the duration of the concession. The amounts of this reference financial compensation are summarised in Table 4 of the opening decision.
- (35) Article 3 of the public service delegation contract states that the public service delegation does not confer exclusive use of the routes in question, but allows other companies to operate regular services without financial compensation. Nevertheless, potential entrants are to be subject to obligations, as set out in the opening decision⁽²⁷⁾. In addition, Article 3 states that the requests for financial compensation from concession holders were determined according to the social assistance scheme⁽²⁸⁾.
- (36) According to the third paragraph of Article 5(2) of the public service delegation contract, the final financial compensation for each concession holder for each year is limited to the operating deficit resulting from its contractual obligations, allowing for a 15 % return on the conventional value of the fleet in proportion to the days it has been effectively used for the crossings corresponding to those obligations. The conventional value is specified in Annex III of the public service delegation contract⁽²⁹⁾.
- (37) Article 7 of the public service delegation contract (the 'safeguard clause') makes it possible to change the annual lump sum financial compensation payable to joint concession holders, in accordance with their commitments, set for the duration of the public service delegation contract under Article 2 thereof.
- (38) Article 7(1) states that, in the event of a substantial change in the technical, regulatory or economic conditions of the contract, the parties shall meet to take steps to re-establish the initial financial equilibrium 'with priority given to the maximum fares and the adaptation of the services'.
- (39) Article 7(2) of the public service delegation contract states that the amounts of financial compensation are based on forecast passenger traffic and revenues. Each year, on the assumption that the absolute value of the difference between forecast revenue⁽³⁰⁾ and actual revenue is greater than 2 % of forecast revenue⁽³¹⁾, an upward or downward adjustment of the financial compensation is provided for each category of revenue, and for each concession holder⁽³²⁾.
- (40) The public service delegation contract states⁽³³⁾ that adjustments in compensation under this clause should be capped by agreement between the parties in the course of the third year of the delegation.
- (41) The forecast revenue for both types of traffic and both concession holders are summarised in Table 5 of the opening decision.
- (42) Under the adaptation clause, the public service delegation contract was amended by a supplementary contract on 28 December 2009. This amendment led to the cancellation of 108 crossings a year between Corsica and Marseille. The number of seats available thus decreased from 9 000 to 8 000 during the Christmas holidays, from 3 500 to 2 300 during the 'spring-autumn' period and from 85 000 to 71 000 in the 'summer' period on the Marseille - Ajaccio route. The capacity of the additional service decreased by 7 000 seats on the Marseille - Propriano route.
- (43) The Corsican Transport Board also redefined traffic periods into a high season (an 11-week summer period between the last week of June and early September) and the mid-season period (22 weeks from April to June and from early September to late October, excluding spring and November school half-term holidays).
- (44) The fares and financial compensation were also changed. The correction (at 2007 values) from 2010 to 2013 led to a reduction in the annual amounts of the reference financial compensation of EUR 6,5 million for the two concession holders. The revised amounts of compensation and forecast revenue are set out in Tables 7 and 8 of the opening decision.
- (45) Under the public service delegation contract⁽³⁴⁾, 95 % of the forecast amount of indexed compensation is paid in monthly instalments within 7 days of the operator sending a brief report on service implementation. The remaining compensation, which is adjusted upwards or downwards, is paid annually within 15 days of the operator sending the final report on service implementation.
- (46) Total forecast compensation was EUR 659 million in 2007. Taking into account the indexation clause (inflation) and the adjustment clause (difference between actual and forecast revenues, changes in fuel prices, penalties), the amount of compensation actually paid up until 2011 is as follows:
- ⁽²⁶⁾ The extent of the additional service is defined in sections I(a)(2) (Marseille - Ajaccio), I(b)(2) (Marseille - Bastia) and I(d)(1.4) (Marseille - Propriano) of the specifications of the public service delegation contract.
- ⁽²⁷⁾ See paragraph 44 of the opening decision.
- ⁽²⁸⁾ See paragraph 45 of the opening decision.
- ⁽²⁹⁾ See paragraph 46 of the opening decision.
- ⁽³⁰⁾ Forecast revenue is reference gross revenue reassessed on the basis of the forecast GDP price index for that year.
- ⁽³¹⁾ Article 7(2) thus provides for an 'excess' of 2 % of forecast revenue.
- ⁽³²⁾ See paragraph 49 of the opening decision.
- ⁽³³⁾ Article 7(2) of the public service delegation contract provides that this adjustment clause based on actual revenue will apply until implementation of the adaptation clause mentioned in Article 8.
- ⁽³⁴⁾ Articles 5(1) and 5(2) specifying the conditions for payment of financial compensation.

| € million | 2007 | 2008 | 2009 | 2010 | 2011 | Total |
|----------------------------|--------|---------|---------|---------|---------|---------|
| Total SNCM | 34,242 | 77,779 | 82,672 | 78,577 | 87,275 | 360,545 |
| <i>of which basic</i> | 20,453 | 39,343 | 41,818 | 39,423 | 46,123 | 187,160 |
| <i>of which additional</i> | 13,764 | 38,415 | 40,738 | 39,018 | 40,839 | 172,774 |
| CMN | 12,525 | 28,067 | 29,270 | 29,184 | 33,853 | 132,899 |
| Total | 46,766 | 105,846 | 111,942 | 107,761 | 121,128 | 493,443 |

- (47) The compensation paid to SNCM, established comprehensively by Article 2 of the public service delegation contract, is divided between the basic service (operated by passenger cargo vessels) and the additional service (operated by passenger ferries) according to a set of allocation rules that essentially provide for a proportional distribution of the - negative - result⁽³⁵⁾ before financial compensation for each type of service, as set out in the income statement in the bid tendered by the SNCM-CMN group⁽³⁶⁾.

3. REASONS FOR INITIATING THE FORMAL EXAMINATION PROCEDURE

- (48) First of all, the Commission expressed doubts about the necessity and proportionality of the public service obligation imposed, particularly since it encompasses both the basic and the additional services. The Commission found that the inclusion of the additional service in the public service delegation could constitute a violation of the provisions of Regulation No 3577/92, cited above, leading to a breach of the first *Altmark* criterion (*clearly defined public service obligations*). Indeed, the Commission considered that the French authorities had not shown that there was a real public service need in the case of the additional service and that it did not seem essential to the proper performance of the basic service.
- (49) Second, the Commission expressed doubts about the parameters of public service compensation under Article 7 of the public service delegation contract (see paragraphs 86-94 of the opening decision) and their compliance with the second *Altmark* criterion (*parameters on which the compensation is calculated established beforehand*). In addition, the Commission considered initially that variations in the amounts of the forecast revenues between the different tenders submitted by the concession holders may have had the effect of depriving the parameters of the compensation

mechanism of transparency. Lastly, there was evidence to suggest that financial compensation may have been awarded to the concession holders outside the framework of the public service delegation contract.

- (50) Third, the Commission expressed doubts as to whether the third *Altmark* criterion had been fulfilled (*fair compensation for the costs incurred in the discharge of public service obligations*). It underlined that it did not have at its disposal all the information required to be able to assert that the joint concession holders had not received any overcompensation, in particular as far as the assessment of reasonable profit was concerned. It wondered in particular whether Article 5(2) of the public service delegation contract (see paragraphs 95 to 102 of the opening decision) were sufficient to avoid overcompensation of the costs of providers.
- (51) Finally, the Commission expressed doubts about the real and open competition allowed by the public procurement procedure, which is the only means of selecting a tenderer capable of providing those services at the least cost to the community, according to the fourth *Altmark* criterion (*selection of the service provider*). The Commission had not particularly ruled out that the contractual conditions, in particular those relating to the maximum age of the fleet and the possibility of submitting a global offer covering all the routes served, might have had the effect of preventing effective competition in the award of the public service delegation contract.
- (52) Accordingly, the Commission expressed serious doubts in the opening decision about the public service delegation contract having met all of the *Altmark* criteria. Therefore the Commission could not exclude the possibility that SNCM and CMN had enjoyed a selective advantage through the public service delegation contract. In addition, given that both companies have operated in a fully liberalised market since 1 January 1993⁽³⁷⁾, the Commission also found that this selective advantage was likely to distort competition in the internal market and affect trade between Member States.

⁽³⁵⁾ The result before subsidy is negative for both services (basic and additional) for each year between 2007 and 2011.

⁽³⁶⁾ This allocation rule is applied to the indexed contractual compensation. Adjustments for actual income are allocated in proportion to the annual variance for each of the two services, and supplements for particular goods are charged to the basic service. Finally, adjustments for 'fuel' and deductions made for services not provided are assigned directly to the service concerned.

⁽³⁷⁾ Regulation (EEC) No 3577/92.

- (53) The Commission concluded that it could not rule out that the compensation received by SNCM and CMN under the public service delegation contract constitutes State aid within the meaning of Article 107(1) TFEU. Furthermore, with regard to the compatibility of any aid contained in the compensation under investigation, and provided that it can be concluded that the public service obligations have been correctly defined, the Commission considered that the specific rules on the application of Article 106(2) TFEU would apply. More specifically the Commission had identified the 2011 European Union framework for State aid in the form of public service compensation ⁽³⁸⁾ ('the SGEI Framework') as the applicable legal basis that France should invoke, without prejudice to any other possible basis for compatibility.

4. COMMENTS FROM FRANCE

- (54) The French authorities note first of all that non-public service delegation routes have cost accounting mechanisms that are different to those of routes operated under the delegation.
- (55) They then point out that the privatisation protocol included a single termination clause. This particular clause could be implemented in the event that the Corsican regional authorities decided to launch a consultation on the awarding of a public service delegation contract effective from 1 January 2007 if that public service delegation were not to meet the guidelines adopted by the Territorial Assembly of Corsica ⁽³⁹⁾. The French authorities state that the clause could also be implemented if the concession was awarded to a third party, or to SNCM in significantly less favourable economic conditions.
- (56) The French authorities also note that CMN ceased to have an indirect interest in SNCM from 2 October 2009 and therefore any financial relationship between the two joint concession holders was removed.
- (57) They also mention that the change of the parameters of the bid by the SNCM/CMN group between February 2007 and 28 March 2007 was due to consideration of amendments to the forecast level of traffic and to operating costs. They claim that the assessment of the market value was due to the appraisal of an independent international brokerage firm, which reviewed its estimate in the interval between the two bids tendered by SNCM.

⁽³⁸⁾ OJ C 8, 11.1.2012, pp. 15–22.

⁽³⁹⁾ France refers to the guidelines for operating routes between Marseille and Corsica from 1 January 2007, defined by the Territorial Assembly of Corsica on 24 March 2006, see paragraph 22 above.

4.1. CHARACTERISATION AS AID

- (58) France submitted the following comments on the preliminary assessment made by the Commission in the opening decision of whether they fulfilled the *Altmark* criteria.
- (59) Concerning the possible existence of elements of State aid in the public service delegation contract, the French authorities refer primarily to the judgment of the Council of State of 13 July 2012 ⁽⁴⁰⁾ by which it was held that the clause authorising steps to re-establish the initial financial equilibrium did not in itself constitute aid within the meaning of Article 107(1) TFEU.

4.1.1. THE SCOPE OF THE PUBLIC SERVICE REMIT AND THE FIRST *ALTMARK* CRITERION

- (60) The French authorities contest the Commission's distinction between the 'basic service' and the 'additional service'. Instead they believe that the public service delegation contract defines two programme seasons corresponding to different volumes of supply as a result of peak periods. Taken together, these correspond to a permanent service bolstered by additional minimum capacity taking into account developments in traffic.
- (61) Regarding the fulfilment of the first *Altmark* criterion, the French authorities refer to the broad discretion of Member States in determining the scope of an SGEI. They underline that Commission control is limited to authorising the assessment of manifest error.
- (62) They add that the permanent service is inseparable from the additional service. The French authorities refer to the above-mentioned decision by the Council of State, which concluded that Regulation 3577/92 does not preclude an overall assessment of the real public service need without it being necessary to examine whether this need is justified at all times. In this connection, the French authorities stress the importance of not limiting the scope of the public service remit to unprofitable activities to ensure equalisation. To support their position, they indicate that the specifications of the public service delegation contract do not require the use of different vessels for the basic service and the additional service.

⁽⁴⁰⁾ Council of State, 13 July 2012, *Compagnie méridionale de navigation, Société Nationale Corse Méditerranée*, Req. No 355616.

(63) With regard to market operators' ability to provide the shipping service, the French authorities consider that trends in traffic on the Marseille-Corsica route compared to the Toulon-Corsica route do not in themselves establish a manifest error in the definition of the scope of the SGEL. They point out that in a decision of 11 December 2006 ⁽⁴¹⁾ the Competition Council concluded that the various markets for shipping services to Corsica were not interchangeable. The French authorities therefore consider that the shipping routes from Marseille are a relevant market.

(64) The French authorities also believe that the downward trend in traffic from Marseille in 2004 and 2005 was caused by the interruption of the service for more than one month owing to industrial action at SNCM. In contrast, they partly attribute the increase in traffic from Toulon to the effect of absorption of demand from Italian ports.

(65) Finally, they argue that the Corsican regional authorities did not oversize the offer. The level of capacity is considered to be due in particular to the requirement of continuity of the public service and, more generally, to the provisions of the public service delegation contract setting down conditions on fares and quality of service.

4.1.2. THE OTHER *Altmark* CRITERIA

(66) As regards compliance with the second and third *Altmark* criteria, cited above, the French authorities argue firstly that Article 7(1) of the public service delegation contract, authorising the parties to meet to re-establish the initial financial equilibrium, does not determine in advance how such an adaptation is formulated. This leeway is a necessary condition for the flexibility of the service in the light of its market environment. Secondly, the French authorities stress that these changes in the public service delegation contract can lead to an increase or a reduction in financial compensation, but primarily concern the obligations for the concession holders or the prices paid by users. As the French authorities see it, had an increase in the compensation paid by the Corsican regional authorities have been decided, then that is the measure that should have been assessed against the *Altmark* criteria, cited above, rather than Article 7(1) of the public service delegation contract itself.

(67) As regards the fulfilment of the fourth *Altmark* criterion, cited above, the French authorities consider sufficient the

degree of competition provided by the public procurement procedure. They argue that this procedure led to several applications and bids; no demands or claims were made against the conditions imposed by the specifications; all bids were actively negotiated, with the President of the Corsican regional authorities choosing among several bids and the differences between them in terms of quality do not support the argument that there was no effective competition; and the succession of disputes relating to the public service delegation in question shows quite clearly that there was genuine competition.

(68) The French authorities also emphasise the complete lack of links between the privatisation of SNCM and the procedure for delegating the public service, as well as the Corsican regional authorities' full and sole responsibility for maritime services to Corsica.

(69) Lastly, in response to the doubts expressed by the Commission under paragraph 51 above, the French authorities stress that, in the definition of a public service contract in the field of maritime transport, Member States can legitimately ⁽⁴²⁾ impose obligations that go beyond conditions concerning (1) the ports to be served, (2) regularity, (3) continuity, (4) frequency, (5) capacity to provide the service, (6) rates charged, and (7) the ship's crew.

4.2. COMPATIBILITY WITH THE INTERNAL MARKET

(70) In addition, the French authorities consider that in this case all the conditions of the SGEL Framework were met: the definition of the SGEL, the accuracy of the mandate, the fact that it is not excessively long, the fact that it complies with Directive 2006/111/EC on financial transparency ⁽⁴³⁾ and the absence of overcompensation.

5. COMMENTS FROM INTERESTED THIRD PARTIES

5.1. OBSERVATIONS FROM CORSICA FERRIES

(71) First of all, Corsica Ferries points to the economic issues at stake for the operators in the shipping market to Corsica, noting in particular that the operation of the

⁽⁴¹⁾ Decision No 06-MC-03 of 11 December 2006 on requests for provisional measures in the field of maritime transport between Corsica and the mainland.

⁽⁴²⁾ The French authorities refer to Communication COM (2003) 595 final of 22 December 2003 on the interpretation of Regulation 3577/92 above.

⁽⁴³⁾ Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, pp. 17–25.

lines in question generally represents a higher share of the net income of such operators than their turnover from this activity ⁽⁴⁴⁾.

5.1.1. THE CHARACTERISATION OF STATE AID IN THE PUBLIC SERVICE DELEGATION CONTRACT

- (72) Corsica Ferries turns first to the characterisation of the measure as State aid. It considers that the criteria under Article 107(1) TFEU are met in this case and particularly considers that the assistance provided by the Corsican Transport Board constitutes a selective advantage granted to its beneficiaries which could distort competition between Member States. It has the following to say with regard to the four *Altmark* criteria:

5.1.1.1. *The first Altmark criterion*

- (73) On the severability of the basic and additional services, Corsica Ferries considers it to be quite clear that the public service delegation contract itself, and its implementation, mean that these activities can be separated. In general, it emphasises that the required public service obligations are more stringent with regard to the basic service, according to a set of detailed criteria below:

Comparison of the technical requirements for the basic service and the additional service on the routes from Marseille to Ajaccio and Bastia

| | Basic Service Freight and passenger | Additional service Passengers |
|---------------------------|---|--|
| Period | Every day for the duration of the public service delegation contract | Christmas/February 22 weeks in spring 11 weeks in summer |
| Timetables | Departure between 6 pm and 8 pm Arrival between 6 am and 8 am | Freedom allowed to concession holders |
| Frequency | 365 days a year | Freedom allowed to concession holders |
| Vehicle capacity | Stable during the public service delegation contract and determined per journey | Variable according to periods and free per journey |
| Cabins | Stable during the public service delegation contract and determined per journey | Variable according to periods and free per journey |
| Welcome and food services | Single selling point for food | A minimum of two types of food |
| Journey | Non-stop | Stopovers allowed |

⁽⁴⁴⁾ In other words, the net margin of the shipping activity with Corsica would be higher than the average net profit margin of the undertakings involved.

- (74) More specifically, Corsica Ferries argues that the additional service cannot be considered technically essential to the basic service. It points out that the vessels used for the additional service (car ferries) could not be used to operate the basic service (passenger cargo vessels), that different staff are employed to operate these activities, and that the specifications entrust the operation of the additional service to SNCM alone. It further notes that the specifications envisaged for the period after 2013 provide that the concession holder will be responsible for operating the basic service only.

- (75) Regarding the shortage of private initiative, Corsica Ferries states that the French authorities have not established that the service offering, as it would exist under free competition, fails to meet the public service needs defined.

- (76) Firstly, it considers that, because of the obligations upon it, the basic service alone would respond to a real public service need. However, the additional service would not meet such a need, since it concerns only passenger transport during certain periods of the year, and only for three of Corsica's six ports. In the opinion of Corsica Ferries, this assessment is confirmed by the 40 % increase in fare caps during the summer and the fact that passengers using the additional service are essentially tourists for whom the choice of departing from Marseille or Toulon to sail to Corsica would be irrelevant. By contrast, passengers using the basic service are essentially residents of Corsica or southern France, who are more influenced by the proximity of the port of departure to their home.

- (77) According to Corsica Ferries, the growth in traffic between 2002 and 2005, characterised by a slight increase in traffic in the basic service ⁽⁴⁵⁾, a sharp decline in traffic on the additional service ⁽⁴⁶⁾, and an increase in traffic between Toulon and Corsica ⁽⁴⁷⁾, clearly shows the direct competition between the offering of the additional service and its own offering of sailings from Toulon. This competition confirms the commercial and competitive nature of the additional service, which therefore does not satisfy a real public service need.

- (78) Secondly, Corsica Ferries considers that the additional service as established by the public service delegation contract is disproportionate in relation to the *Analir* judgment ⁽⁴⁸⁾, as it is manifestly oversized in relation to the traffic of the maritime connections between Marseilles and Corsica.

⁽⁴⁵⁾ Increase of 44 242 passengers.

⁽⁴⁶⁾ Decrease of 208 213 passengers.

⁽⁴⁷⁾ Increase of 324 466 passengers.

⁽⁴⁸⁾ Judgment of the Court of 20 February 2001 in Case C-205/99 *Analir and Others v Spain*, ECR 2001, I-1295.

(79) Finally, Corsica Ferries argues that, on the date of the Resolution of the Corsican Assembly on 24 March 2006, the additional service could not be considered as responding to a shortage of private initiative. It also stresses that while the level of its offering of departures from Toulon increased 455 % between 2000 and 2007, it intentionally restricts the services it offers on account of the subsidised additional service. It adds that the capacities it offers in the summer and spring-autumn periods, along with those corresponding to the basic service offered by the concession holder, would be sufficient to meet demand. Therefore the loading ratios of the vessels of the concession holder assigned to the additional service under the 2007-2013 public service delegation contract did not initially exceed 30 % ⁽⁴⁹⁾. Corsica Ferries therefore concludes that the shortage of private initiative could not be assessed in the same way following adoption of the specifications of the 2007-2013 public service delegation and in the period preceding it.

(80) Furthermore, Corsica Ferries believes that its argument applies partially to freight traffic. It adds that the development of the freight market from Toulon has not had a negative impact on the amount of goods transported within the scope of the public service delegation, thus highlighting the creation of a service that met the requirements of continuity and service quality, and responded to an unsatisfied demand.

(81) In the light of the above, Corsica Ferries considers that the first *Altmark* criterion is not fulfilled in this case.

5.1.1.2. *The second Altmark criterion*

(82) Corsica Ferries considers that the amount of compensation should be assessed in the light of the regulations applying which make it impossible to compete with the joint concession holders.

(83) Corsica Ferries considers firstly that the public service compensation does not meet the requirements of precision, objectivity and transparency. It considers that the reference to the 'abnormal and unforeseeable increase for which the carriers are not responsible' to justify the change in peak fares is not sufficiently precise. In general, financial compensation increases at a faster pace than the decline in actual revenues, and *vice versa*.

⁽⁴⁹⁾ Corsica Ferries bases its arguments essentially on the statistics transcribed in the Resolution of the Corsican Assembly of 26 November 2009.

(84) It adds that the upward revision of the forecast revenue between the bid of December 2006 and that of March 2007, under the revenue safeguard clause (Article 7 of the public service delegation contract), was designed to provide payment of further compensation in addition to the operating subsidy. It also considers that the reference basis for determining the value of SNCM's ships was neither objective nor transparent, as this base changed substantially between the various bids tendered by the company.

(85) Corsica Ferries further considers that the parameters for calculating the compensation related to the implementation of the safeguard clause were not established. This uncertainty resulted in additional funding being granted to the joint concession holders. It considers that the partial compensation of the difference between forecast and actual revenue was calculated in reference to an overestimated traffic forecast.

5.1.1.3. *The third Altmark criterion*

(86) Corsica Ferries considers, firstly, that a 15 % rate of return on invested capital would be excessive by maritime transport standards. It considers that this effect was increased by the level at which SNCM assessed the market value of its ships.

(87) Furthermore, it considers that no effective monitoring mechanism was set up to avoid overcompensation from taking place.

5.1.1.4. *The fourth Altmark criterion*

(88) Corsica Ferries argues that the public service delegation award procedure failed to ensure adequate open and effective competition. The company believes that the outcome of this process was influenced by the economic consequences which the implementation of the termination clause would have caused had the public service delegation not been renewed. It also considers that the conditions imposed by the specifications failed to ensure effective competition and mentions the clause that aims to avoid a deterioration in the economic conditions of the concession holder ⁽⁵⁰⁾, and sets out the extent of the public service obligations imposed, the lack of financial compensation for companies competing with the joint concession holders, the discretionary power of the Corsican Transport Board regarding exceptions to the specific

⁽⁵⁰⁾ Article 3 of the public service delegation contract, see paragraph 35 above.

regulations of the call for tenders and specifications, the obligation to operate vessels put into service after 1 January 1987; the oversizing of the public service for maritime services, the absence of allotment between the basic service and the additional service and the interpretation of the specific regulations of the call for tenders concerning the tendering of a bid involving unnamed vessels.

(89) In addition, Corsica Ferries notes that the award procedure under the public service delegation did not lead to the cheapest bid being accepted. The bid from the SNCM/CMN group led to payment of a subsidy amounting to EUR 15 million more per year than would have resulted from a combination with the bid from Corsica Ferries.

(90) Accordingly, Corsica Ferries stresses that the level of compensation should have been determined by reference to a medium-sized, well run undertaking adequately equipped with the necessary resources. As it feels that it meets those conditions, the company further considers that it would have been able to operate sailings to the ports of Ajaccio, Propriano and Porto Vecchio at a cost less than half that proposed by the SNCM/CMN group.

5.1.2. REMARKS ON THE SOCIAL ASSISTANCE SYSTEM

(91) Corsica Ferries emphasises that the social assistance system would have the advantage of providing reimbursement only for trips actually made by eligible passengers, unlike the public service delegation, which subsidises transport capacity. This social assistance system would make it possible to finance the public service obligations at a substantially lower cost than under the public service delegation system.

5.2. OBSERVATIONS FROM SNCM AND CMN

5.2.1. THE SCOPE OF THE PUBLIC SERVICE REMIT AND THE FIRST ALTMARK CRITERION

(92) SNCM and CMN consider first and foremost that the public service delegation contract does not distinguish between a basic service and an additional service. Like the French authorities, they consider that the public service delegation contract defines two programme seasons corresponding to different volumes of offerings according to peak periods. For SNCM it is not a matter of debate that the community should bear the fixed costs imposed upon concession holders throughout the year to meet the specific needs of the concession.

(93) In this context SNCM points to the broad discretion of Member States with regard to determining the scope of an SGEI, which the Commission may question only in the event of a manifest error of assessment. Here, in terms of the burden of proof, it believes that it would be excessive to require the Member State concerned to prove that the regular services as provided in a situation of free competition do not meet the needs defined for the public service.

(94) Furthermore, SNCM denies that Article 4 of Regulation 3577/92 implies that the criterion of a real public service need linked to a shortage of private initiative is a general rule applicable in this case. It considers that the interpretation of the Court of Justice in the *Analir* judgment⁽⁵¹⁾ does not generally subject the ability of Member States to define the scale of public service remits to this condition.

(95) SNCM and CMN also share the opinion of the French authorities according to which, if the Commission does not accept this interpretation, the real public service need linked to a shortage of private initiative should be assessed overall for the entire period of validity of the contract. This overall assessment would thus make it possible to alleviate the public service burden by compensating with income from the high season. It would therefore be crucial to assess whether the private operator has the capacity to meet the requirements of regularity, continuity and frequency of service throughout the year. CMN also believes that the basic service is inseparable from the additional service.

(96) In this context, SNCM notes that the specifications of the public service delegation do not require the use of different vessels for the permanent and the additional service.

(97) It also considers that the comparison of traffic on the Marseille-Corsica and Toulon-Corsica routes is insufficient to establish a manifest error of assessment as regards the evaluation of the ability of private providers to respond to the need defined by the public service obligations. Furthermore, it concurs with the opinion of the French authorities that the reduction in the overall traffic carried by the joint concession holders during the period 2004-2005 is related to the interruption in SNCM's service due to industrial action. Contrary to the claims of the French authorities, which moreover were not backed up by figures, this trend does not seem to be due to an effect of absorption of demand from Italy.

⁽⁵¹⁾ Case C-205/99, cited above.

- (98) Regarding the possibility of oversizing of the service offering under the public service delegation contract, SNCM believes that the reference period does not include the years 2004 and 2005 because of the aforementioned industrial action. Car ferries are therefore needed to absorb the high season traffic. CMN also states that the size of the bid was based on the economic environment, service disruptions and the directionality of high season traffic which result in low loading coefficients.
- (99) SNCM and CMN note, moreover, that the services offered by Corsica Ferries from Toulon are not subject to the same obligations as those imposed upon the joint concession holders under the public service delegation contract. In the freight sector, SNCM and CMN highlight the obligations concerning timetables, payload capacity and fare costs with which they have to comply. In the area of passenger transport, SNCM believes that time constraints limit the number of rotations, that the looser fare constraints to which Corsica Ferries is subject afford it greater commercial freedom and that quality of service requirements push up the costs borne by the joint concession holders. Similarly, SNCM mentions the specific nature of the departmental destinations included in the specifications and the obligations concerning daily rotations, as mentioned by Corsica Ferries.
- (100) In the alternative, SNCM underlines that the subsidies from which other market players have benefited, particularly those concerning social assistance, could play a role in the development of traffic. This latter element would not therefore prove that concession holders are less able to meet their obligations.
- (101) Finally, SNCM notes that its service offering was set in 2007. Thus, the lower requirements of the Corsican Transport Board in 2009 relate primarily to the economic crisis as well as to the investments made by Corsica Ferries.

5.2.2. THE SECOND ALTMARK CRITERION

- (102) In accordance with the position of the French authorities (see paragraph 66 above), SNCM considers that Article 7(1) of the public service delegation contract is sufficient to determine the parameters on the basis of which the compensation is calculated. Moreover, only the measure adopted on the basis of that provision might be subject to control, to the exclusion of the existence of Article 7(1) itself.
- (103) SNCM and CMN consider that the reasoning put forward by France in the paragraph mentioned above also applies to the issue of adjusting the compensation based on the

real revenue provided for in the public service delegation contract. This clause applies automatically and does not give rise to any possibility for subjective interpretation. The 'fuel' safeguard clause is in turn justified by the fact that it is impossible to predict market trends and the impact of changes in legislation. Finally, CMN underlines that the revenue safeguard clause applies equally to increases and decreases in revenue.

- (104) SNCM considers that the variation in the amount of forecast revenues between the various bids tendered by the joint concession holders was unlikely to jeopardise the transparency of the parameters of the compensation mechanism.
- (105) SNCM also points out that no compensation was paid outside the framework provided by the public service delegation. The company points out that, in some cases of service disruptions, the public service delegation contract provides that expenses incurred by the concession holder in implementing alternatives or compensating customers will be deducted from the contractual penalty charged to the concession holders by the Corsican Transport Board. However, if the relevant request sent by SNCM to Corsican Transport Board actually amounts to EUR 600 000, it was not paid and corresponds only to a provision estimating the compensation paid by SNCM as a result of the 2010 industrial action.

5.2.3. THE OTHER ALTMARK CRITERIA

- (106) As regards the level of compensation for the costs of public service obligations, SNCM and CMN consider that they have not benefited from any overcompensation. On the contrary, with regard to the requirements applying to the return on capital, SNCM points out that the costs of the public service obligations were insufficiently compensated, leading to a negative result after capital charges.
- (107) As far as the service provider selection procedure is concerned, SNCM points out that the privatisation protocol included a single termination clause that should be analysed in the same terms as those put forward by the French authorities in paragraph 55 above. It also believes that the privatisation process of SNCM was of no concern to the Corsican regional authorities and did not have any influence on the process of awarding the public service delegation.
- (108) SNCM and CMN also consider that the requirements of the specifications did not call into question the competitive nature of the procedure awarding the delegation. They believe that the appropriateness of the

public service obligations imposed on carriers which are not parties to the public service delegation does not enter into checks on the fulfilment of the fourth *Altmark* criterion.

(109) Moreover, SNCM and CMN emphasise that the limitations imposed on the content of public service contracts by Regulation 3577/92 do not preclude Member States from imposing other requirements.

(110) Basing its approach on all of the arguments put forward by the French authorities and presented in paragraph 67 above, SNCM further considers that the selection procedure for the service was not discriminatory. For SNCM, the fact that Corsica Ferries challenges the impartiality of the Bastia Administrative Court and the Corsican regional authorities merely confirms this.

(111) In the alternative, assuming that the *Altmark* criteria are not fulfilled, SNCM and CMN believe that the compensation should be viewed as aid compatible with the internal market under the SGEI Framework. In this regard, they believe that the duration of the delegation is reasonable. The cost accounting mechanisms for the routes lying outside the scope of the public service are separate from those for the routes operated under the delegation, and comply with Directive 2006/111/EC on financial transparency.

6. COMMENTS FROM FRANCE ON THE OBSERVATIONS FROM INTERESTED PARTIES

6.1. THE SCOPE OF THE PUBLIC SERVICE REMIT AND THE FIRST *ALTMARK* CRITERION

(112) Concerning the observations from Corsica Ferries cited above on whether the first *Altmark* criterion was fulfilled, the French authorities first of all reiterate their position on the inseparability of the basic service and the additional service. They consider that employing temporary staff to operate the additional service is not proof to the contrary.

(113) Next, they contest the statement from Corsica Ferries that capacity is the only criterion required in the case of the additional service; the quality criterion set by the specifications applies to them as well.

(114) In addition, the specifications of the public service delegation do not require the use of different vessels for the permanent service and the additional service.

(115) They also believe that it is unfounded to limit the analysis of a possible shortage of private initiative only to the periods covered by the additional service. They believe that to fail to classify the additional service as a public service because it is used mainly to transport tourists is unfounded, as the purpose of this service is to ensure territorial continuity and to limit the drawbacks of Corsica's insularity.

(116) The French authorities do not agree with Corsica Ferries' analysis regarding the appropriateness of the level of the tender for the public service delegation contract that was finally accepted for the additional service. They consider that the reference period for passenger traffic should be limited to the period after 2006, since the years from 2002 to 2005 were marked by a disruption of service caused by industrial action. They also attribute the general oversizing of supply during the period 2010-2013 to the commissioning of the *Smeralda* by Corsica Ferries.

(117) Finally, the French authorities point out that Corsica Ferries is the primary beneficiary of the social assistance system, since the amount paid depends upon the number of passengers carried. In addition, Corsica Ferries considers transport capacity only, without reference to other criteria such as quality of service.

6.2. THE OTHER *ALTMARK* CRITERIA

(118) With regard to Corsica Ferries' observations on compliance with the second and third *Altmark* criteria, cited above, the French authorities indicate that the amendment of the public service delegation by a supplementary contract on 28 December 2009 resulted from the difference between a traffic forecast based on ambitious economic development goals and the real situation of the economic slowdown and the increasing supply of maritime transport. They emphasise that monitoring of the compensation system by the competent financial bodies does not address whether it complies with the applicable law on State aid but the regularity, efficiency and effectiveness of its management. Moreover, the French authorities emphasise that these observations also related firstly to the social assistance system from which Corsica Ferries benefited, with the funds involved rising from EUR 13,8 million to EUR 20,8 million between 2002 and 2009, according to the French authorities.

(119) Regarding the observations by Corsica Ferries concerning compliance with the fourth *Altmark* criterion, the French authorities indicate that the Court's judgment of 11 September 2012 in Case T-565/08 has no connection with the award of the public service delegation contract.

They thus challenge Corsica Ferries' interpretation of the judgment, considering that the termination clause may be exercised only if the Commission were to adopt a decision classifying the measures in question as State aid incompatible with the internal market or if the public service delegation contract were not to be awarded to SNCM.

- (120) Finally, the French authorities consider that relying on a statement by the President of the Territorial Assembly to judge the degree of competition is not consistent with applicable law, since this authority has no jurisdiction to adopt the specifications of the public service delegation on its own. At the same time, they point out that the analysis of the bids led the awarding authority to consider that Corsica Ferries failed to meet the conditions of that specification, did not provide criteria for assessing its debt and could not guarantee the relevance of its projected profit-and-loss account.

7. ASSESSMENT OF THE MEASURES

7.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (121) Under Article 107(1) TFEU, aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the internal market.
- (122) Characterising a national measure as State aid presupposes that the following cumulative conditions are met: (1) the beneficiary or beneficiaries are undertakings within the meaning of Article 107(1) TFEU, (2) the measure in question is granted out of State resources and is imputable to the State, (3) the measure confers a selective advantage on its beneficiaries, and (4) the measure in question distorts or threatens to distort competition, and is liable to affect trade between Member States⁽⁵²⁾.

7.1.1. CONCEPTS OF UNDERTAKING AND ECONOMIC ACTIVITY

- (123) As highlighted in paragraph 62 of the opening decision, SNCM and CMN are two operators engaged in the provision of international maritime transport services and, as such, carry out economic activities.

7.1.2. STATE RESOURCES AND ATTRIBUTION TO THE STATE

- (124) As outlined in paragraphs 63 to 65 of the opening decision, the resolution to conclude the public service

delegation contract was passed by the Assembly of Corsica, and, as a public authority, the resources of the Corsican Transport Board are public resources provided particularly from the budget for territorial continuity paid by the State. The compensation paid under the public service delegation therefore constitutes a transfer of State resources imputable to the State.

7.1.3. SELECTIVE ADVANTAGE FOR THE JOINT CONCESSION HOLDERS

- (125) To determine whether a State measure constitutes aid to an undertaking, it must be determined whether the company in question enjoys an economic advantage enabling it to avoid costs that would otherwise have been borne by its own financial resources or whether it enjoys an advantage which it would not have received under normal market conditions⁽⁵³⁾.
- (126) In this context, contrary to the claims made by CMN, the Commission considers that gains in market share by competing operators do not by any means indicate the absence of any benefit granted to the joint concession holders. Indeed it is clear that, without public intervention, the concession holders would not have received any compensation for their operational costs as provided for by the public service delegation contract.
- (127) France refers in particular to the Council of State's ruling of 13 July 2012, cited above, to conclude that there are no elements of State aid in the public service delegation contract as a whole. However, the Commission notes that the judgment by the national court holds merely that the safeguard clause in Article 7(1) of the public service delegation contract⁽⁵⁴⁾, considered in isolation, could not be characterised as State aid⁽⁵⁵⁾. As the Commission does not consider the safeguard clause in isolation, but takes into account the public service delegation contract as a whole, it considers that the grounds for this ruling on the above-mentioned clause are not relevant in determining whether the public service delegation contract as a whole includes elements of State aid. It will examine the substance of the arguments presented in the judgment in the context of its review of the definition of public service obligations covered by the public service delegation contract (see section 7.1.3.1 below).
- (128) Insofar as France argues that such compensation does not provide a selective advantage to the beneficiaries under the *Altmark* judgment mentioned above, the Commission must consider whether all the *Altmark* criteria are fulfilled by the compensation granted under the public service delegation contract, as the French authorities and joint concession holders claim.

⁽⁵²⁾ See, for example, the judgment of the Court of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* (C-222/04, ECR I-289, point 129).

⁽⁵³⁾ See in particular the judgment of the Court of 14 February 1990, C-301/87, *France v Commission*, ECR I-307, point 41.

⁽⁵⁴⁾ See paragraph 38 above.

⁽⁵⁵⁾ See footnote 24 above.

(129) In this regard, it should be recalled that the Court ruled in that case⁽⁵⁶⁾ that the compensation granted in discharging public service obligations does not constitute aid within the meaning of Article 107(1) TFEU when four criteria are cumulatively met:

- the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined (criterion 1);
- the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner (criterion 2);
- the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (criterion 3);
- where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (criterion 4).

(130) In its Communication on the application of State aid rules to compensation granted for the provision of an SGEI⁽⁵⁷⁾ ('the SGEI Communication'), the Commission provided guidance to clarify the requirements for compensation for services of general economic interest. The communication addresses the various requirements set out in the *Altmark* judgment, i.e. the concept of service of general economic interest within the meaning of Article 106 TFEU, the need for a mandate, the obligation to define the parameters of the compensation, the principles relating to the need to avoid overcompensation and principles for selecting the service provider.

(131) In the case in point, the Commission considers it appropriate to analyse the first and fourth *Altmark* criteria.

7.1.3.1. *Definition of the service of general economic interest (criterion 1)*

Analysis framework

(132) It should be noted that the Commission's powers with regard to the definition of an SGEI are limited to ensuring that the Member State concerned has not committed a manifest error of assessment in characterising a service as being of general economic interest⁽⁵⁸⁾.

(133) Furthermore, where there are specific rules at European Union level, they are binding on the discretion of Member States, without prejudice to the assessment made by the Commission to determine whether the SGEI was defined correctly for the purposes of monitoring State aid⁽⁵⁹⁾. In the opening decision, the Commission had essentially considered that, to be acceptable from the point of view of monitoring State aid, the scope of the public service had to respect Regulation 3577/92, as interpreted by the Court's case-law⁽⁶⁰⁾. Accordingly, the Commission indicated that it would analyse whether the scope of the public service as defined by the public service delegation contract was necessary and proportionate to a real public service need, attested to by the shortage of regular transport services in a situation of free competition.

(134) Here, in the event of non-compliance with the substantive criteria of Regulation 3577/92, as interpreted by case-law, the compensation in question could not be declared compatible on the basis of Article 106(2) TFEU. Compliance with Regulation 3577/92 is therefore a necessary condition for the applicability of the SGEI Framework in this case⁽⁶¹⁾.

(135) In this regard, the Commission notes that the public service delegation contract is clearly a 'public service contract' within the meaning of Regulation 3577/92⁽⁶²⁾. It believes that the conditions set out in the *Analir* judgment, mentioned above, are of particular relevance to the analysis of such a public service contract. Indeed, the compensation of specific obligations under a public

⁽⁵⁶⁾ Cited above, see footnote 22.

⁽⁵⁷⁾ Communication from the Commission on the application of the European State aid rules to compensation granted for the provision of services of general economic interest, adopted by the Commission on 20 December 2011 and published in OJ C 8, 11.1.2012, p. 4.

⁽⁵⁸⁾ See SGEI Communication, paragraph 46, above.

⁽⁵⁹⁾ See SGEI Communication, paragraph 46, above.

⁽⁶⁰⁾ Specifically the *Analir* judgment mentioned above.

⁽⁶¹⁾ See SGEI Framework, paragraphs 8 and 13.

⁽⁶²⁾ See Articles 2 and 4 of Regulation 3577/92 above.

service contract, subsidising a range of services, clearly constitutes an obstacle to the free movement of services⁽⁶³⁾. This obstacle may be justified only under restrictive conditions establishing the necessity and proportionality of the definition of all the services exempted from the scope of free competition in relation to a real need for transport, which is not met under conditions of free competition.

- (136) By analogy with the *Analir* judgment above, the Commission therefore considers that the scope of the public service remit as defined by a public service contract must be necessary and proportionate to a real public service need, as demonstrated by the lack of regular transport services under normal market conditions.

Separate analysis of the basic and additional services

- (137) The French authorities argue first of all that the basic service and the additional service, as defined in the opening decision mentioned above, do not constitute separate services. Nevertheless, the Commission considers that the distinction between the transport services to be provided throughout the year as part of the basic service and the additional capacity to be provided in peak periods is clearly reflected in the specifications of the public service delegation⁽⁶⁴⁾.
- (138) The French authorities also argue that the scope of the public service remit must be assessed overall for both services. To this end, they refer to the Council of State ruling of 13 July 2012, cited above, in which the national court held that Regulation 3577/92 did not preclude an overall assessment of the real public service need for each line, without it being necessary to examine whether this need is justified at all times. The Council of State concluded that Regulation 3577/92 did not require the additional service to meet a real public service need different to the one already met by the basic service.
- (139) In accordance with its practice in previous decisions, the Commission considers⁽⁶⁵⁾ that, to avoid 'creaming off

the market'⁽⁶⁶⁾ as a practice that is detrimental not only to the economic efficiency of service delivery but to its quality and economic viability, it may be legitimate, in circumstances where transport demand shows a marked seasonality, to include services for both peak and off-peak periods within the public service remit. In the case in hand, the Commission therefore considers that it would only be legitimate to consider that the additional service may be justified by the real public service need met by the basic service if it can be determined, as the French authorities argue, that its operation is essential to the basic service, on the grounds of a set of technical and economic considerations.

- (140) However, contrary to the claims by France, SNCM and CMN, the operation of the additional service in this case does not seem to be indispensable to the basic service.

- (141) The Commission notes that in certain circumstances, extending the scope of the public service may be justified in the presence of well-established complementary technical or economic efficiency considerations (synergies). However, in this case there is no technical complementarity between the basic service and the additional service. Indeed, the Commission points out that the requirements applied to them are distinct, particularly with regard to timetables and frequency. As regards timetables, while the definition of the basic service required a minimum daily schedule of departures and a strict range of arrival times⁽⁶⁷⁾, the definition of the additional service stipulated no timetable to be met. As far as frequency is concerned, the public service delegation contract imposes no obligation in respect of the additional service, with transport capacity defined annually on peak periods. In addition, services organised according to a similar distinction⁽⁶⁸⁾ were provided with different ships and crews from 2002 to 2006.

- (142) Here, it is worth noting that the French authorities' argument that the technical specifications did not require the use of different types of vessels does not undermine this conclusion insofar as the experience of the previous public service delegation over the period

⁽⁶³⁾ See in particular the judgments of 25 July 1991, *Säger*, C-76/90, ECR I-4221, point 12; 9 August 1994, *Vander Elst*, C-43/93, ECR I-3803, point 14; 28 March 1996, *Guiot*, C-272/94, ECR I-1905, point 10; 18 June 1998, *Corsica Ferries France*, C-266/96, ECR I-3949, paragraph 56; and 23 November 1999 *Arblade*, C-369/96 and C-376/96, ECR I-8453, point 33.

⁽⁶⁴⁾ The component elements of each service are listed in paragraph 33 and in footnotes 25 and 26 above. In particular, I(a)(2) (Marseille - Ajaccio), I(b)(2) (Marseille - Bastia) and I(d)(1.4) (Marseille - Propriano) of the specifications of the public service delegation contract lay down the components of the additional service.

⁽⁶⁵⁾ See Decision of 30 October 2001 on State aid granted by France to the Société Nationale Maritime Corse-Méditerranée, OJ L 50, 21.2.2002, p. 66, paragraph 74.

⁽⁶⁶⁾ *Creaming* refers to a situation in which competing shipping companies operate in peak periods only.

⁽⁶⁷⁾ Public service delegation contract, Annex I. This range of arrival times was 6.30 to 7 am on the Marseille - Ajaccio and Marseille - Bastia lines, and from 6.30 to 7.30 for the Marseille - Propriano line, taking into consideration the constraints imposed on passenger and cargo transport.

⁽⁶⁸⁾ Over the period 2002-2006, an 'additional' service was defined, under which the joint concession holders provided additional passenger capacity at peak times. The service was operated by car ferries. See report from the Regional Audit Chamber of Corsica above.

from 2002 to 2006 established that both these types of services could be provided with different ships ⁽⁶⁹⁾.

- (143) Furthermore, and also with regard to the French authorities' argument that the inclusion of the additional service is justified by financial equalisation with the basic service, suffice it to say that SNCM's cost accounts show an operating deficit for this latter service month after month ⁽⁷⁰⁾. This argument can therefore not be upheld.
- (144) It follows that in the specific circumstances of the case, the implementation of the additional service cannot be considered essential to the proper performance of the basic service, and none of the arguments put forward by the French authorities and the concession holders in this regard invalidate that conclusion. The Commission therefore considers that the characterisation as a service of general economic interest should be assessed separately for both types of service in question.

Analysis of the basic service

- (145) The Commission notes first that, in accordance with case-law ⁽⁷¹⁾ and with Commission decision-making practice in this field ⁽⁷²⁾, the territorial continuity policy applied by the French authorities stems from a legitimate public interest, i.e. to provide an adequate level of transport services to meet the economic and social development needs of Corsica. It follows therefore that providing a minimum territorial continuity service between Marseille and the five Corsican ports concerned meets a clearly defined public service need.
- (146) As for the shortage of private initiative with regard to the basic service, the other market operators admit they have been unable to provide such a service ⁽⁷³⁾.
- (147) In particular, for the period in which such a shortage was observed, the Commission considers that the shortage of private initiative on each line in relation to a clearly identified need for transport during the off-peak

periods of the year alone is sufficient to justify the inclusion of the basic service within the scope of the public service for the whole year for all these lines. Indeed, clear considerations of technical and economic efficiency justify the permanent nature of the basic service without the need for a shortage of transport services over the year as a whole to be shown. In this regard, redeploying some vessels during the year would have imposed an additional economic burden on the concession holders, while depriving them of significant revenue during peak periods.

- (148) Finally, as the Commission noted in its Interpretative Communication ⁽⁷⁴⁾ on Regulation 3577/92, grouping together several routes within a single service is not, in itself, contrary to the Regulation. Instead, in this case, grouping together these five routes made it possible to pool shipping resources to improve the quality of the service in question ⁽⁷⁵⁾ and to reduce costs, to the extent that the technical requirements that were set for connections to the five ports of Corsica in the basic service are particularly comparable in terms of timetables, journey time and the capacity-sharing between freight and passengers ⁽⁷⁶⁾. In fact, the public service delegation contract ⁽⁷⁷⁾ covers the use of some ships on several different lines of the basic service, and the use of several different ships on the same line ⁽⁷⁸⁾.
- (149) Finally, pursuant to Article 4 of Regulation 3577/92, the public service delegation contract and its annexes set clear standards of continuity, regularity, capacity and pricing that concession holders must fulfil to ensure the service (see section 2.5).
- (150) It follows that the inclusion of basic services in the scope of the public service delegation contract is necessary and proportionate to the real public service need.

Analysis of the additional service

- (151) The Commission considers that including the additional service in the public service remit is in breach of the requirement of necessity and proportionality of the definition of the public service remit in relation to the real public service need (see section 8.1.1 below).

⁽⁶⁹⁾ The basic service has been operated by passenger cargo vessels since 2002, while the additional service has been provided by car ferries. As underlined in particular by the Regional Audit Chamber of Corsica (Report on the final observations on the Corsican Transport Office, pp. 80-82), the public service delegation contract 'resembles the previous agreement in its wording and in its general organisation', and 'the terms of the public service obligations change only slightly'.

⁽⁷⁰⁾ See paragraph 47 above and footnote 35.

⁽⁷¹⁾ See point 27 of the *Analir* judgment.

⁽⁷²⁾ See Decision of 30 October 2001 on State aid granted by France to the Société Nationale Maritime Corse-Méditerranée, OJ L 50, 21.2.2002.

⁽⁷³⁾ See paragraph 79 of the opening decision.

⁽⁷⁴⁾ COM (2003) 595 final - not published in the Official Journal, section 5.5.3.

⁽⁷⁵⁾ Particularly by minimising the impact of the operational downtime of certain ships.

⁽⁷⁶⁾ Public service delegation contract, Annex I.

⁽⁷⁷⁾ Appendix 2, assignment in principle of vessels per line.

⁽⁷⁸⁾ Thus, the *Pascal Paoli* was assigned principally to the main Marseille-Bastia line and occasionally to the Marseille-Balagne line. Similarly, the basic crossing to Propriano was to be made by the three ships belonging to CMN, the *Girolata*, the *Kalliste* and the *Scandola*.

(152) In this regard, the Commission notes that the three lines of the additional service, i.e. Marseille - Ajaccio, Marseille - Bastia and Marseille - Propriano, were operated in an inseparable way by SNCM using two car ferries, the *Danielle Casanova* and the *Napoleon Bonaparte*, to provide services on the three lines⁽⁷⁹⁾. The Commission further notes that the weak nature of the obligations imposed on the provision of the additional services in this case⁽⁸⁰⁾ further justified pooling the shipping resources to provide the service, fostering technical and economic complementarities to operate the services on the three routes in question. The Commission considers therefore that the validity of including the additional service within the scope of the public service delegation contract must be considered in its entirety.

(153) In addition, the review of the necessity and proportionality of the scope of the public service delegation must take into account the presence of public service obligations on all services between the French mainland and Corsica. On the other hand, in the present circumstances and having regard to the parties' arguments⁽⁸¹⁾, this review should also consider the presence of a private initiative offering departing from Toulon, which could significantly substitute the lines departing from Marseille covered by the public service delegation.

Substitutability of passenger services from Marseille and Toulon

(154) In its opening decision, the Commission had pointed to a number of signs indicating substitutability between the services from Marseille and those from Toulon. Indeed, the progression of traffic on routes between the French mainland and Corsica shows clearly the fast-developing competition with the services offered by the joint concession holders. Passenger traffic between the French mainland and Corsica increased by 31,6 % between 2002 and 2009⁽⁸²⁾. In this regard, the distribution of traffic between the ports concerned shows strong growth in traffic departing from Toulon (up 150 % between 2002 and 2009), and a concomitant decrease in traffic from Marseille (down 1,7 %). It appears that the growth in overall traffic was absorbed mainly by the service providers operating from Toulon, to the detriment of the joint concession holders operating out of Marseille.

(155) Contrary to the claims of the French authorities, which moreover were not backed up by figures, this trend does

not seem to be due to an effect of absorption of demand from Italy. Indeed it would appear that the share of Corsican traffic⁽⁸³⁾ due to connections between the French mainland and Corsica increased steadily between 2002 and 2009, rising from 60,9 % in 2002 to 66,2 % in 2009, at the expense of traffic between Corsica and Italy⁽⁸⁴⁾.

(156) As for the argument advanced by the French authorities whereby the Competition Council had recognised in its 2006 decision that it could not be excluded that the market for passenger transport from Marseille constitutes a relevant market, the Commission observes that, in support of its arguments establishing the presence of a dominant position by SNCM in its response to the tender of the Corsican Transport Board⁽⁸⁵⁾, the Competition Council merely noted that there was a relevant market consisting of routes from Marseille⁽⁸⁶⁾. However, this position did not prevent the Competition Council from considering that 'in the market for passengers travelling during peak periods between the continent and Corsica (mainland France and Italy), it cannot be excluded that the ports of Nice, Toulon, Marseille, Livorno, Savona and Genoa exert some competitive pressure on each other'⁽⁸⁷⁾.

(157) In fact, the development of traffic between the French mainland and Corsica to the benefit of crossings from Toulon is even more pronounced for the additional service. Between 2002 and 2005, actual traffic on the additional service declined by 208 213 passengers on the Marseille - Corsica route, while traffic increased by 324 466 passengers on the Toulon - Corsica route over the same period. The decrease in the proportion of traffic carried by the additional service to the benefit of other market operators in the context of an overall increase in traffic since 2002 indicates a high degree of substitutability between these two services.

(158) In a more qualitative way, the short distance between Marseille and Toulon, about 50 km, is in fact likely to lead to substitutability between services to the same Corsican port. Furthermore, the 35 to 45 minutes' travelling time from Marseille to Toulon is considerably less than that of the sea crossing⁽⁸⁸⁾, and is therefore

⁽⁷⁹⁾ See Appendix 2 to the public service delegation contract.

⁽⁸⁰⁾ These obligations are essentially limited to a minimum carrying capacity to be provided in all peak periods, see paragraph 141 above.

⁽⁸¹⁾ See section 5.1.1 above.

⁽⁸²⁾ Report on the final observations of the Regional Audit Chamber of Corsica *Territorial continuity*, 2010, p 65.

⁽⁸³⁾ Here, the Commission refers to maritime passenger traffic from or to all Corsican ports.

⁽⁸⁴⁾ Source: Regional Transport Observatory of Corsica.

⁽⁸⁵⁾ See Section 2.4

⁽⁸⁶⁾ See Decision No 06-MC-03 of 11 December 2006, paragraph 97.

⁽⁸⁷⁾ See Decision No 06-MC-03 of 11 December 2006, paragraph 80.

⁽⁸⁸⁾ The sea crossing takes from 5 hours 45 minutes from Toulon to about 10 hours from Marseille by passenger cargo ship (overnight journey).

unlikely to be an obstacle to competition between both services as far as the final customer is concerned. In addition, the port of Toulon is about 50 km closer to Corsica, allowing for shorter crossings from Toulon to Corsica than from Marseille, which increases the substitutability of services from Marseille by those from Toulon ⁽⁸⁹⁾.

(159) A substantial degree of substitutability of the services ⁽⁹⁰⁾ operated from the ports of Marseille and Toulon could therefore be seen in quantitative terms from 2006, on the basis of shifts of traffic to Toulon during strikes that seriously disrupted services from Marseille in late 2005 ⁽⁹¹⁾. Thus, even taking into account the impact of the upward trend in traffic from Toulon ⁽⁹²⁾, levels of transfer of traffic from Marseille to Toulon ⁽⁹³⁾ observed on the lines to Ajaccio were of the order of 89 % ⁽⁹⁴⁾ for September-October 2005.

(160) In the light of all of these factors, the Commission considers that in these particular circumstances the additional service was broadly substitutable, in terms of demand, by passenger services from Toulon to Bastia and Ajaccio when the public service delegation contract was awarded.

Shortage of private initiative

(161) The Commission also considers that the French authorities have provided no evidence of a shortage of private initiative for this additional service. While they deny the distinction between the basic service and the additional service, they simply recall the broad power of discretion available to Member States in determining the

scope of an SGEI. However, they do not justify the inclusion of the additional service by a shortage of private initiative in relation to a need for a specific service. In fact, the French authorities justify the overall character of the public service delegation contract by the intention to avoid limiting the scope of the public service to unprofitable activities to ensure financial equalisation (see paragraphs 61 and 62 above). However, this argument has already been considered unacceptable (see paragraph 143 above).

(162) In this context, the Commission compared the actual passenger traffic to each of the ports of the additional service with the offering of transport provided by Corsica Ferries from Toulon, and by the basic service of the public service delegation. It is apparent from this that, for the ports of Bastia and Ajaccio, which represent 90 % of the capacity required by the additional service, the combination of capacities offered by the basic service of the public service delegation, from Marseille, and the private initiative service available from 2004 to 2006 from Toulon was sufficient to meet the real demand observed, both for the spring-autumn period and for the summer period, for each of the two ports for each year between 2004 and 2006.

(163) This conclusion has not been challenged in its entirety by France. The French authorities merely refer to the exceptional circumstances of 2004 and 2005 ⁽⁹⁵⁾, which, they claim, explain the decline in the number of passengers on the additional service. However, the Commission considers that the scope of this argument for the years 2004 and 2005 is broadly limited by the significant shifts in traffic observed to services from Toulon ⁽⁹⁶⁾. Furthermore, the Commission notes in this regard that the adequacy of transport services could also have been noted for 2006, immediately before the public service delegation entered into force ⁽⁹⁷⁾, when the competitive situation was of particular importance.

(164) The Commission therefore considers that bringing the additional service into the scope of the public service delegation was neither necessary nor proportionate to meeting demand for transport observed for the Marseille - Bastia and Marseille - Ajaccio lines. As regards the Marseille - Propriano line, although no other service served the Corsican port on a regular

⁽⁸⁹⁾ See also Opinion No 12-A-05 of 17 February 2012, cited above, section C (2) and in particular paragraph 131 concerning a degree of substitutability among services between Corsican ports on the one hand, and Marseille and Toulon on the other, including low traffic periods. No evidence obtained as part of the procedure indicates that the factors affecting the substitutability of the demand for transport departing from Marseille and Toulon have changed fundamentally between 2006 and 2012.

⁽⁹⁰⁾ The services referred to are passenger services to Bastia and Ajaccio, provided from Toulon only.

⁽⁹¹⁾ Significant industrial action occurred in Marseille in the months of September-October 2005 as a result of the privatisation of SNCM.

⁽⁹²⁾ The Commission has taken into account the impact of correcting the actual traffic transfer as a result of annual shifts observed in the months before the strike. While it is plausible that the data for traffic in the months immediately after a major disruption are also affected by cancelled reservations, the figures for the previous months do nonetheless provide a more accurate picture of the long-term changes in the markets concerned.

⁽⁹³⁾ In contrast, shifting traffic to Nice, although significant, was significantly lower. Source: Regional Transport Observatory of Corsica.

⁽⁹⁴⁾ Given the trends described above, the decline in passenger numbers from Marseille represented 22 600 passengers, while the adjusted increase in passengers from Toulon was 20 056 passengers. There was no adjusted shift in Nice.

⁽⁹⁵⁾ See paragraph 159 above and footnote 93.

⁽⁹⁶⁾ The impact of disruptions of services from Marseille on the total traffic actually observed is in fact mitigated by the concomitant increase in the number of passengers on routes from Toulon, see paragraph 159 above.

⁽⁹⁷⁾ Moreover, 2006 was marked by a sharp increase in the overall number of passengers travelling to Corsica, to the tune of 8,5 % according to the ORTC.

basis in 2006, the Commission considers that the small proportion of traffic represented by this line⁽⁹⁸⁾ would not lead to the assumption that a shortage of private initiative on this one line invalidates the conclusion concerning the additional service as a whole.

(165) It is important to note in this regard that the service provided by Corsica Ferries did meet the standards of public service obligations applicable to all connections between the French mainland and Corsica, and showed no qualitative difference with the service provided as part of the additional service. Indeed, as noted in paragraph 141 above, the quality obligations imposed on the additional service were significantly less strict than those imposed on the basic service.

(166) In this regard, the Commission considers in particular that Member States may not impose specific public service obligations for services that are already provided or can be provided satisfactorily in conditions (price, objective quality features, continuity and access to the service) that are compatible with the public interest, as defined by the State, by companies operating under normal market conditions⁽⁹⁹⁾. In this context, the Commission considers that the elements mentioned above establish that compensation for costs incurred by SNCM for the provision of the additional service also runs counter to Commission practice in this regard. Indeed, in the light of the presence of public service obligations and the social assistance scheme⁽¹⁰⁰⁾ on all the lines operating between the French mainland and Corsica, SNCM's competitors for passenger transport operating out of Toulon could be considered to be operating under normal market conditions.

(167) In sum, the Commission considers that the inclusion of the additional service in the scope of the public service does not correspond to a real public service need and therefore, having regard to the specific rules, France has in this case committed a manifest error of assessment in classifying the additional service set out in the public service delegation contract as an SGEI. The first *Altmark* criterion as regards the compensation awarded under the additional service is not fulfilled.

⁽⁹⁸⁾ Both in terms of the capacity made available under the public service delegation from 2007-2013 and the demand actually observed, the Marseille-Propriano route represented approximately 10 % of the activity of the additional service. Source: ORTC and Report on the implementation of SNCM services in 2010.

⁽⁹⁹⁾ See paragraph 48 of the SGEI Communication.

⁽¹⁰⁰⁾ See paragraph 7 above and footnote 5.

7.1.3.2. *Selection of the service provider (criterion 4)*

(168) According to the fourth *Altmark* criterion, the compensation must be either the result of a public procurement procedure making it possible to select the candidate capable of providing the services in question at the least cost to the community, or established by reference to a medium-sized, well run undertaking adequately equipped with the necessary resources⁽¹⁰¹⁾.

Concerning the first sub-criterion

(169) The delegation for shipping services between the French mainland and Corsica was awarded following a negotiated procedure following the publication of a notice of tender in the OJEU pursuant to Article L.1411-1 of the CGCT⁽¹⁰²⁾. However, a public procurement procedure only excludes the possibility of aid if it allows for the selection of the tenderer capable of providing those services 'at the least cost to the community'⁽¹⁰³⁾. In the opening decision, the Commission had expressed doubts as to whether the procurement process was likely to ensure adequate open and effective competition.

(170) The procedure used in this case and set out in French law for the award of public service delegations was a negotiated procedure with prior publication under EU public procurement law. First, it should be noted that such a procedure can ensure effective competition only when subject to a case-by-case analysis⁽¹⁰⁴⁾. Indeed, it offers broad discretion to the contracting authority and may restrict the participation of interested operators.

(171) In this case, the Commission considers that the conditions of the tender failed to ensure such effective competition.

(172) In fact, the only bid that was in competition with that of the joint concession holders was not evaluated on its own merits (award criteria), but on the basis of one selection criterion, which in this case was the tenderer's ability to operate from 1 July 2007. The procedure therefore did not allow the Corsican Transport Board to compare several offers and to select the most economically advantageous.

⁽¹⁰¹⁾ See paragraph 62 of the SGEI Communication.

⁽¹⁰²⁾ *Code Général des Collectivités Territoriales* [General Code of Local Authorities].

⁽¹⁰³⁾ See paragraphs 65 and 66 of the SGEI Communication.

⁽¹⁰⁴⁾ See SGEI Communication, paragraph 67.

- (173) As such, and contrary to the assertions of the French authorities, the Commission considers that the fact that two bids were actually submitted was not sufficient to guarantee effective competition, insofar as the competing bid was not able to provide a credible alternative. Indeed, in this case, the Corsica Ferries bid set 12 November 2007 as the date for the start of service, while the specifications required the services to be provided from 1 July 2007⁽¹⁰⁵⁾. Furthermore, contrary to the argument put forward by the French authorities, the Commission does not consider multiple litigation as evidence in favour of the effectiveness of competition in the procurement procedure for the public service delegation contract.
- (174) A series of elements related to the market situation and conditions of the tender procedure reinforce this conclusion.
- (175) Firstly, it should be noted that the SNCM/CMN group had a significant competitive advantage, noted in particular by the Competition Council⁽¹⁰⁶⁾, as the incumbent operator that already had ships adapted to the requirements of the specifications of the public service delegation contract.
- (176) In addition, the very short time set between the date of awarding the public service delegation contract (finally awarded on 7 June 2007) and the date of commencement of services (1 July 2007) was likely to prove a significant barrier to entry for new entrants. Combined with the technical requirements related to the specific conditions of the ports involved⁽¹⁰⁷⁾, the condition concerning the age of the fleet⁽¹⁰⁸⁾, and the unit capacities required by the specifications of the public service delegation contract, this very short timeframe was likely to limit participation in the tender. Indeed, the Commission considers that a period of around three weeks is insufficient to allow redeployment of a fleet of ships in the circumstances concerned, or the acquisition and/or chartering of a group of vessels meeting the requirements of the specifications⁽¹⁰⁹⁾.
- (177) Finally, the existence of numerous clauses providing for meetings⁽¹¹⁰⁾ associated with the freedom given to the Corsican Transport Board to decide upon exemptions to rules⁽¹¹¹⁾ may also have helped to dissuade tenderers from taking part in the procedure by raising doubts about some technical and economic parameters that were critical to the preparation of a bid. Here, the Commission concurs with the point raised by the French authorities that imposing conditions over and above those mentioned in Article 4(2) of Regulation 3577/92 does not run counter to this regulation as part of a public service contract. However, it was up to national authorities to check whether in this case effective competition for the award of the public service delegation contract was likely to fulfil the fourth *Altmark* criterion, particularly in the light of these additional conditions that could restrict participation in the tender procedure, and, if not, to draw the necessary legal consequences.
- (178) In the light of all of the above, the Commission considers that the conditions of the procedure followed in this case failed to ensure effective competition for awarding the public service delegation, and therefore for selecting the bid that would provide the service at the least cost to the community⁽¹¹²⁾.
- ### The second sub-criterion
- (179) It was therefore up to the French authorities to demonstrate that the compensation was established by reference to a medium-sized, well run undertaking adequately equipped with the necessary resources⁽¹¹³⁾.
- (180) France failed to provide such information. Moreover, as noted in Section 2.5 above, compensation was not defined by reference to a base cost established in advance, or by comparison with the cost structure of other comparable shipping companies, but with reference to forecast revenue and fuel costs, which refer only to a portion of the income and expenses of the service.
- (181) Moreover, as indicated in the report from the Regional Audit Chamber of Corsica⁽¹¹⁴⁾, the Commission observes that the forecast compensation of the public service delegation for 2007-2013 was significantly higher than that forecast for the period 2002-2006, for similar obligations, or in fact slightly less demanding ones in terms of available capacity.
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- ⁽¹⁰⁵⁾ Report from the public service delegation committee.
- ⁽¹⁰⁶⁾ See Decision No 06-MC-03 of 11 December 2006 on requests for provisional measures in the field of maritime transport between Corsica and the mainland, in particular paragraph 106: 'Despite the absence of legal exclusivity, the situation of routes departing from Marseille can be understood as a *de facto* monopoly in favour of the two concession holders which, because of their position as incumbents on these routes, also have the most suitable vessels for providing freight and passenger services from Marseille.'
- ⁽¹⁰⁷⁾ In 2007, the port of Bastia did not allow the manoeuvring of ships over 180 metres long.
- ⁽¹⁰⁸⁾ The restriction on the use of vessels over 20 years old thereby led to restricting the number of vessels eligible for use by competitors to the incumbent.
- ⁽¹⁰⁹⁾ In this connection, it should be noted that the high cost of a ship meeting the requirements of the specifications of the public service delegation contract, even in the case of a second-hand vessel, was an additional barrier to entry. The passenger cargo ship *Jean Nicoli* was thus acquired by SNCM for EUR 75 million in 2009.
- ⁽¹¹⁰⁾ See section 2.5 above.
- ⁽¹¹¹⁾ Particularly in terms of age of the fleet, or adaptation of the services (see Annex I of the public service delegation contract).
- ⁽¹¹²⁾ Clearly, the conclusion of an amendment by direct negotiation between the contracting authority and the concession holding group is unlikely to undermine this conclusion with respect to the period 2010-2013.
- ⁽¹¹³⁾ See paragraph 61 of the SGEI Communication.
- ⁽¹¹⁴⁾ See Report on the final observations on the Corsican Transport Office, p. 80.

(182) Despite the change to the economic situation between 2001 and 2007, a comparison with the costs incurred by a well-run undertaking was all the more necessary since there were certain elements to suggest that SNCM, which was emerging from a period of intense restructuring at that time ⁽¹¹⁵⁾, did not meet such requirements.

(183) In the light of the above, the Commission considers that the fourth *Altmark* criterion is not fulfilled in this case.

7.1.3.3. *Conclusion on the existence of a selective advantage*

(184) As the *Altmark* criteria are cumulative, failure to satisfy the first criterion for the additional service, and, in any event, the fourth criterion by the public service delegation contract as a whole are sufficient to establish the presence of a selective economic advantage granted to the joint concession holders.

7.1.4. EFFECT ON TRADE BETWEEN MEMBER STATES AND DISTORTION OF COMPETITION

(185) As indicated in the opening decision, SNCM and CMN operate lines between the French mainland and Corsica in direct competition with operators such as Corsica Ferries, Moby Lines and Saremar. As a result, the Commission finds that the public compensation under review is liable to strengthen the position of SNCM and CMN in relation to maritime transport competitors in the EU and thereby threaten to distort competition and affect trade between Member States.

7.1.5. CONCLUSION ON THE PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(186) Based on the foregoing, the Commission considers that all compensation received by SNCM and CMN under the public service delegation contract constitutes state aid within the meaning of Article 107(1) TFEU.

(187) To the extent that the aid was granted without prior notification to the Commission, it is illegal.

8. COMPATIBILITY WITH THE INTERNAL MARKET

8.1. ANALYSIS OF COMPATIBILITY UNDER ARTICLE 106(2) TFEU

(188) As set out in the opening decision ⁽¹¹⁶⁾, passenger traffic under the public service delegation amounts to more

than 300 000 passengers a year and the compensation provided by the public service delegation contract is in excess of EUR 30 million a year. The SGEI decisions of 2005 ⁽¹¹⁷⁾ and 2011 ⁽¹¹⁸⁾ are not applicable to the public service delegation contract by virtue of their Articles 2(1)(c) and 2(1)(d) respectively.

(189) In so doing, and in the absence of any indication by France of any other basis for compatibility ⁽¹¹⁹⁾, the Commission considers that the compatibility with the internal market of the compensation granted under the public service delegation contract must be assessed in the light of the SGEI Framework. However, it should be recalled that, in accordance with paragraph 69 of the SGEI Framework, the principles set out in paragraphs 14, 19, 20, 24, 39 and 60 thereof shall not apply to unlawful aid granted prior to 31 January 2012.

(190) In accordance with point 11 of the SGEI Framework, State aid that does not fall within the scope of the 2011 decision may be declared compatible with Article 106(2) TFEU if it is necessary for the functioning of the services of general economic interest concerned and does not affect the development of trade to an extent contrary to the interests of the Union. Such a balance is possible only when the conditions set out in sections 2.2 to 2.10 of the Framework are met.

(191) First it is necessary to examine the definition of services of general interest alleged here.

8.1.1. GENUINE SERVICE OF GENERAL ECONOMIC INTEREST

(192) Insofar as the characterisation of the additional service as a SGEI is vitiated by a manifest error of assessment (see paragraphs 151-167 above), the compensation paid for this service cannot be declared compatible with Article 106(2) TFEU.

(193) Conversely, on the basis of the analysis carried out in paragraphs 145 to 150 above, the Commission has established that the basic service corresponded to a well-defined SGEI.

⁽¹¹⁵⁾ See paragraph 15 above and footnote 10.

⁽¹¹⁶⁾ See paragraphs 118 to 120 of the opening decision.

⁽¹¹⁷⁾ Commission Decision 2005/842/EC 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.

⁽¹¹⁸⁾ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3.

⁽¹¹⁹⁾ See the judgment of the Court of 28 April 1993, C-364/90, *Italy v Commission*, [1993] ECR I-02097, point 20.

8.1.2. OTHER CONDITIONS OF THE SGEI FRAMEWORK

- (194) It is necessary to examine whether the other conditions of the SGEI Framework are met for the basic service, which alone is a well-defined SGEI.

8.1.2.1. *Mandate*

- (195) Regarding the need for a **mandate** specifying the obligations of the public service and the methods for calculating compensation, the public service delegation contract specifies the obligations at stake and the compensation parameters.

- (196) In this respect, it should be clarified at the outset that the mere existence of the safeguard clause⁽¹²⁰⁾, applicable in the event of significant changes in the technical, regulatory or economic conditions of the contract, does not call into question the preliminary nature of the definition of the parameters of the compensation.

- (197) Indeed, above all it allows the parties to conclude amendments in the event of significant changes in the conditions for operating services which could undermine the objectives of the public service delegation contract. It therefore equates to an amendment clause in common law, the possible application of which should nevertheless be analysed in relation to the law on State aid. The purpose of this clause is to 're-establish the initial financial equilibrium' primarily by modulating the maximum fares and nature of the services. The possibility of changing the compensation, which is not stated explicitly in the text, can therefore be understood only within the context of changing the services provided. As stated in the above-mentioned judgment of the Council of State, the safeguard clause cannot therefore open the way to overcompensation for services rendered.

- (198) This would not be the case if, contrary to the present circumstances, the application and renegotiation situations were clearly too wide, or if the clause provided for the possibility of additional compensation in respect of services already performed when the clause providing for meetings were invoked without specifying the parameters of this additional compensation. Neither does the presence of the adaptation clause⁽¹²¹⁾ call into question this conclusion, since the application of the clause provided firstly for preserving the general economy of the public service delegation contract, limiting itself to small-scale changes and adjustments, and secondly to the parallel decrease in compensation and services. Even assuming that the amendment of 28 December 2009 substantially altered the compensation parameters and the type of service, it is

nonetheless true that these parameters were defined prior to the performance of services for the period 2010-2013, to which they apply.

- (199) Furthermore, the changes in the amount of forecast revenues among the various bids by the joint concession holders do not seem unjustified. The Commission considers that the inclusion of more optimistic revenue forecasts may indeed reflect the revised forecasts based on market prospects. It also notes that the traffic forecasts given under the terms of the negotiations were generally lower than those presented by the competing bid⁽¹²²⁾. Given actual and forecast revenues between 2002 and 2006⁽¹²³⁾ and the favourable market trends for services to Corsica in 2006, the Commission considers that the reference parameters on the basis of which the compensation adjustments were forecast by the public service delegation contract are in any event plausible in the light of paragraph 23 of the SGEI Framework.

- (200) As regards the other points raised by the complainant on the grounds of the existence of a set of adjustment clauses⁽¹²⁴⁾, it is worth recalling that, according to the Court's case-law, the complexity of mechanisms for adjusting compensation is unlikely to undermine the objective and transparent nature of the compensation mechanism⁽¹²⁵⁾.

- (201) Finally, the Commission no longer has any doubts regarding financial compensation allegedly allocated to the concession holders outside the scope of the public service delegation contract, as the French authorities have provided proof that the amounts mentioned in the opening decision corresponded to simple requests from the concession holders, which were ultimately refused by the Corsican Transport Board.

8.1.2.2. *Duration of the mandate*

- (202) The **duration of the mandate**, of six and a half years, is in accordance with EU guidelines on the matter⁽¹²⁶⁾, which refer to a limit of six years.

⁽¹²⁰⁾ See paragraphs 37 and 38 above.

⁽¹²¹⁾ See footnote 33 above and paragraph 54 of the opening decision.

⁽¹²²⁾ On the Marseille-Ajaccio, Marseille-Propriano and Marseille-Porto Vecchio lines. Source: report from the Public Service Delegation Committee.

⁽¹²³⁾ For example, SNCF's total net revenue in 2005 for its public service activities was EUR 80,3 million, compared to forecast revenue of EUR 85,5 million in 2008.

⁽¹²⁴⁾ See paragraphs 38 and 39 above, and paragraph 53 of the opening decision.

⁽¹²⁵⁾ See judgment of 12 February 2008, Case T-289/03, *BUPA v Commission*, [2008] ECR II-81, point 217.

⁽¹²⁶⁾ See Commission Communication C(2004) 43 - Community guidelines on State aid to maritime transport, Section 9, paragraph 3.

8.1.2.3. *Compliance with Directive 2006/111/EC*

- (203) As regards **compliance with Directive 2006/111/EC** on financial transparency, the concession holding companies have set up a separate cost accounts for their activities under the public service delegation. For SNCM, this account strikes a further distinction between the activities of the basic service and those related to the additional service (see paragraphs 46 and 47 above).

8.1.2.4. *Amount of compensation*

- (204) As for **the absence of overcompensation**, the public service delegation contract included a cap on the gross margin (excluding depreciation, chartering costs and other capital charges) at 15 % of the market value of the vessels. In the opening decision, the Commission noted that it had no information that would allow it to exclude overcompensation *a priori*.

- (205) The formal examination procedure clarified first of all that the market value of the vessels was established according to experts, with several evaluations obtained to reach the contractual parameters. The asset base used for capping the compensation therefore represents the residual market value of the vessels used under the public service delegation ⁽¹²⁷⁾.

- (206) By considering that the residual market value of the ships under the public service delegation is amortised in eight years ⁽¹²⁸⁾, as French tax law allows, the capping clause effectively limited the ratio of return on assets (ROA) and net return on capital employed (ROCE) to 2,5 % ⁽¹²⁹⁾. The 'safe harbour' charge provided by the SGEI Framework ⁽¹³⁰⁾ on the date the public service delegation was awarded was more than 5 % ⁽¹³¹⁾, while a substantial part

of the commercial risk of the services was actually borne by the joint concession holders SNCM and CMN. In addition, it appears that in practice the result before capital charges of the concession holders was significantly lower than this limit (see below).

- (207) The conditions of the public service delegation contract did not therefore lead to overcompensation. The distribution of compensation between the basic service and the additional service for SNCM is unlikely to undermine this conclusion with regard to the basic service in the light of the conditions for analytical distribution of compensation between both services (see paragraph 46 above). Indeed, from the figures provided by France and SNCM it appears that SNCM's result before capital charges attributable to the basic service remained significantly lower than the 15 % limit mentioned above.

Result before capital costs by company and service

| | SNCM basic service | SNCM overall | CMN |
|---------|--------------------|--------------|-------|
| 2007 2H | [...] (*) | [...] | [...] |
| 2008 | [...] | [...] | [...] |
| 2009 | [...] | [...] | [...] |
| 2010 | [...] | [...] | [...] |
| 2011 | [...] | [...] | [...] |

(*) Information covered by professional secrecy.

- (208) Finally, an external audit for overcompensation was performed for the Corsican Transport Board after three years of delegation (in 2010). Furthermore, an independent trust company checks the operating accounts of concession holders each year on behalf of the Corsican Transport Board.

8.1.2.5. *Additional requirements that may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union*

- (209) Bearing in mind the factors referred to in section 8.1.1.3, the Commission considers that there is no evidence to suggest that the public territorial continuity service could

⁽¹²⁷⁾ The market value of each vessel is recorded on a *pro rata* basis according to use for the DSP.

⁽¹²⁸⁾ This duration, although short in relation to the economic life of a ship (which can exceed 20 years), is justified to the extent that (1) the specifications imposed a maximum age of 20 years, and (2) the average age of CMN's vessels was over 13 years old and that of SNCM's ships was 12, limiting *de facto* their economic life in the absence of major maintenance investments.

⁽¹²⁹⁾ Indeed, the value of the vessels used for the DSP constitutes a lower limit for the assets of the shipping company.

⁽¹³⁰⁾ See paragraph 37 of the SGEI Framework, in which the Commission indicates a rate of 100 basis points above the applicable swap rate (same currency, same maturity) as constituting a reasonable profit regardless of the level of commercial risk actually borne by the SGEI provider.

⁽¹³¹⁾ In the absence of an available swap rate for a maturity of six and a half years, the Commission has used a maturity swap rate of seven years as an indicator. The daily closing values of the rate during the months preceding the award of the DSP ranged from 4,4 % to 4,7 % (source: Bloomberg).

be provided in conditions making it possible to reduce the distortions in competition caused by a public service contract. Indeed, the arguments put forward by Corsica Ferries that the average cost of the routes of the public service delegation contract is much higher than that of routes from Nice and Toulon for which the social assistance scheme is applicable⁽¹³²⁾ do not call into question the need and proportionality of a public service contract for service throughout the year from Corsican ports, and particularly for routes involving secondary ports (Porto Vecchio, Calvi - Balagne and Propriano). Moreover, as mentioned above in section 7.1.3.1, the Commission considers that the grouping together of routes for the basic service responds to undeniable requirements in terms of technical and economic efficiency.

- (210) The Commission notes that the French authorities have launched a tender process for the selection of a service provider able to operate, for the period 2014-2023, a service to Corsica from Marseille in conditions similar to those of the public service delegation basic service covered by this Decision. This procedure should be complete in the summer of 2013.
- (211) Concerning distortions of competition in the maritime transport market, the Commission observes that compensation for the costs of the basic service may not exceed the costs incurred by concession holders, including a reasonable profit (see previous section). It does not therefore allow these companies to generate excessive profits that would allow them to fund other services.
- (212) The Commission therefore considers it unnecessary to impose additional conditions to ensure compatibility of the compensation for the basic service with the internal market.

9. CONCLUSION

- (213) In the light of the above, the Commission considers that the compensation received by SNCM and CMN under the basic service constitutes illegal state aid, which is nonetheless compatible with the internal market under Article 106(2) TFEU.
- (214) The compensation received by SNCM for the additional service provided under the public service delegation contract for the period from 1 July 2007 to 31 December 2013 is illegal and is incompatible with the internal market.
- (215) The French authorities must therefore cancel all payments to SNCM awarded as compensation for the

additional service as from the date of notification of this Decision. In particular, this includes the remainder of the compensation for 2012 (if such payment has not already been made) as well as the monthly payments for 2013 that are due for payment after that date.

- (216) Next, the Commission recalls that, under Article 14(1) of Regulation (EC) No 659/1999, all illegal aid incompatible with the internal market must be recovered from the beneficiary⁽¹³³⁾.
- (217) Consequently, France must take all necessary measures to recover any compensation that SNCM has received for the additional service under the public service delegation contract since 1 July 2007.
- (218) To determine the amount of aid to be recovered, without interest, the Commission considers that SNCM's cost accounting⁽¹³⁴⁾ provides an adequate basis for allocating compensation between the basic service and the additional service. On this basis, the amount of aid to be recovered shall include the following:
- (a) the amount of compensation actually paid from 2007 to 2011 under the additional service, amounting to EUR 172 744 million (see table in paragraph 46 above);
 - (b) the monthly payments made for 2012 under the additional service, currently estimated at EUR 38 million⁽¹³⁵⁾ and the remainder of the compensation, due for payment after the final report on service implementation was sent, if already paid.
 - (c) monthly payments made for 2013 under the additional service up to the date of this Decision, currently estimated at EUR 9,5 million, it being recalled that France must cancel all payments subsequent to that date.

- (219) The French authorities must recover an amount equal to all payments made as compensation for the additional service within four months of the date of notification of this Decision.

⁽¹³³⁾ 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.

⁽¹³⁴⁾ See Section 2.5.

⁽¹³⁵⁾ This amount has been estimated on the basis of the analytical division between compensation for the basic service and the additional service for 2011, based on a projected increase in compensation of 0,3 % in 2012 compared to 2011 for SNCM. The monthly payments represent 95 % of the forecast indexed compensation (see paragraph 45 above).

⁽¹³²⁾ See paragraph 7 above and footnote 5.

(220) For the purposes of the recovery of this aid, the French authorities must also add the interest payable from the date on which the aid concerned was made available to the company, i.e. each effective date of payment of the compensation provided by the public service delegation contract, until it has been effectively recovered⁽¹³⁶⁾ in accordance with Chapter V of Regulation (EC) No 794/2004⁽¹³⁷⁾.

(221) Along with the calculation of interest to be provided to the Commission within two months of notification of this Decision, the French authorities must also send a table showing the dates and exact amounts of the monthly payments and annual adjustments made from the entry into force of the agreement up until the date of adoption of the decision.

HAS DECIDED AS FOLLOWS:

Article 1

The compensation awarded to SNCM and CMN under the Public Service Delegation Contract of 7 June 2007 constitutes State aid within the meaning of Article 107(1) TFEU. That aid was granted in breach of the obligations laid down in Article 108(3) TFEU.

Article 2

1. The compensation paid to SNCM for implementing the additional capacity provided for under sections I(a)(2), I(b)(2) and I(d)(1.4) of the specifications of the above-mentioned Public Service Delegation Contract is incompatible with the internal market.

2. The compensation paid to SNCM and CMN for the operation of other services provided under the above-mentioned Public Service Delegation Contract is compatible with the internal market.

Article 3

1. France is required to make the beneficiaries repay the aid referred to in Article 2(1).

2. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary until the date of their actual recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004⁽¹³⁸⁾ and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004⁽¹³⁹⁾.

4. France shall cancel all outstanding payments of the aid in Article 2(1) with effect from the date of adoption of this Decision.

Article 4

1. The recovery of the aid specified in Article 2(1) shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months following the date of its notification.

Article 5

1. Within two months of notification of this Decision, France shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary

(b) a detailed description of the measures already adopted and planned for the purpose of complying with this Decision;

(c) the documents proving that the recipient has been ordered to repay the aid;

(d) the date and the exact amount of monthly instalments and annual adjustments made from the entry into force of the agreement until the date of adoption of this Decision.

2. France shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2(1) 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 interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 2 May 2013.

For the Commission

Joaquín ALMUNIA

Vice-President

⁽¹³⁶⁾ See Article 14(2) of Regulation No 659/99 (above).

⁽¹³⁷⁾ OJ L 140, 30.4.2004, p. 1.

⁽¹³⁸⁾ OJ L 140, 30.4.2004, p. 1.

⁽¹³⁹⁾ OJ L 82, 25.3.2008, pp. 1–64.