

COMMISSION DECISION (EU) 2016/2084**of 10 June 2016****on State aid SA.38132 (2015/C) (ex 2014/NN) — additional PSO compensation for Arfea***(notified under document C(2016) 3472)***(Only the Italian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By electronic notification of 9 January 2014, the Italian authorities notified, in accordance with Article 108(3) TFEU, the additional compensation awarded by the Regional Administrative Court of Piedmont) to Arfea - Aziende Riunite Filovie ed Autolinee ('Arfea'), for the provision of passenger transport services by bus based on concessions granted by the Italian Piedmont Region ('the Region') during the period 1997-1998 ('the period under review').
- (2) The notification was registered under case number SA.38132. Following a request for information sent by the Commission on 7 February 2014 to clarify whether the additional compensation had been paid, the Region confirmed on 11 March 2014 having paid the additional compensation to Arfea on 7 February 2014, that is, after the Italian government had notified the measure to the Commission. The measure is therefore treated as a non-notified measure.
- (3) Further information was provided by the Italian authorities on 7 April 2014 and 21 May 2014 and, following a request for information sent by the Commission on 24 July 2014, additional information was provided by the Italian authorities on 20 August 2014.
- (4) By letter dated 23 February 2015, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') in respect of the aid. The Italian authorities submitted their observations on the opening decision by letter of 16 April 2015.
- (5) In its decision to initiate the procedure, which was published in the *Official Journal of the European Union* ⁽²⁾, the Commission invited interested parties to submit their comments on the measure.
- (6) The only third party to submit observations in reply to the opening decision was Arfea, the beneficiary of the measure. Its submission was received on 30 July 2015 and forwarded to Italy on 18 August 2015, which was given the opportunity to react. Italy's comments were received by letter dated 24 September 2015.

⁽¹⁾ OJ C 219, 3.7.2015, p. 12.

⁽²⁾ Cf. footnote [1].

2. DETAILED DESCRIPTION OF THE AID

2.1. The company and the services provided

- (7) Arfea is a private company providing local public transport services based on concessions and private commercial transport services. More specifically, according to the Italian authorities, Arfea operated a network of bus connections as concessionaire in the Province of Alessandria and the Province of Asti ('the Provinces') throughout the period under review (1997 and 1998). The company also provided other private services, such as touristic services and bus rentals.
- (8) According to the information provided by the Italian authorities, the Region has already paid public contributions to Arfea for the above-mentioned service during the period 1997-1998 pursuant to the framework decision of the Regional Government (Delibera della Giunta Regionale or D.G.R.) no. 658-2041 of 16 February 1984 ('the 1984 Framework Decision') implementing Law no. 151/1981 ⁽³⁾ and Regional Law no. 16/1982 ⁽⁴⁾. Those laws established the rules for granting public contributions for investments and operating deficits of entities or undertakings providing passenger transport services. According to Article 1 of Regional Law no. 16/82, such services are those 'normally meant for the collective transportation of people or goods provided continuously or periodically with tariffs, times, frequencies and predefined itineraries and undifferentiated offer'. In 1997, Arfea also requested and obtained additional public contributions from the Region under Article 12 of Law no. 472/1999 for 1997. Since it appears that those public contributions were awarded to Arfea more than ten years before the Commission sent its first request for information to the Italian State, those contributions will not be subject to an assessment under the present decision.
- (9) In 2007, following a judgment of the Consiglio di Stato (the Italian supreme Administrative Court) awarding retroactive public service compensation to a transport service provider directly under Regulation (EEC) No 1191/69 of the Council ⁽⁵⁾ in addition to the compensation it had already received under national law ⁽⁶⁾, Arfea requested additional public service compensation from the Region on the basis of that regulation for the economic disadvantages it suffered as a result of public service obligations ('PSOs') allegedly imposed upon it in 1997 and 1998, respectively. According to Arfea, the amount of compensation it received, as calculated under national legislation, did not allow for the full compensation of its deficits in operating the PSOs. That request was rejected by the Region by notes of 14 May 2007 and 25 January 2008. By appeals nos. 913/2007 and 438/2008, Arfea and other service providers challenged those notes rejecting their requests for additional compensation.

2.2. The judgments of the Regional Administrative Court of Piedmont (Tribunale Amministrativo Regionale del Piemonte — TAR Piemonte)

- (10) By judgments of 18 February 2010 (Sentenze nos. 976 and 977/2010), the Regional Administrative Court of Piedmont ('the Regional Administrative Court') upheld Arfea's appeals and concluded that it was entitled to receive additional compensation for the public service it had carried out, in accordance with the Regulation (EEC) No 1191/69.
- (11) In those judgments, the Regional Administrative Court held that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The inadequate level of contribution applied by Italy would have represented an unjustified disadvantage for the concessionaire. The Regional Administrative Court further considered that Arfea was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs. According to the Regional Administrative Court, the precise amount of the additional compensation owed to Arfea had to be determined by the Region on the basis of reliable data taken from the accounts of the company, showing the difference between the costs attributable to the portion of Arfea's activities associated with the PSO and the

⁽³⁾ Legge 10 aprile 1981, n. 151 *Legge quadro per l'ordinamento, la ristrutturazione ed il potenziamento dei trasporti pubblici locali. Istituzione del Fondo nazionale per il ripiano dei disavanzi di esercizio e per gli investimenti nel settore* (GU n. 113 del 24.4.1981), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1981-04-10;151>

⁽⁴⁾ Legge regionale 23 luglio 1982, n. 16. *Interventi finanziari della Regione nel settore del trasporto pubblico di persone* (B.U. 28 luglio 1982, n. 30), available at: <http://arianna.consiglioregionale.piemonte.it/base/leggi/1982016.html>

⁽⁵⁾ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

⁽⁶⁾ Sentenza n. 5043 of 28 August 2006.

corresponding revenues. However, the Region failed to calculate the amount of compensation that had to be paid to Arfea, as ordered by the Regional administrative Court.

- (12) By orders (ordinanze istruttorie) nos. 198 and 199 of 14 February 2013, the Regional Administrative Court appointed an expert ('the expert') to undertake the task of verifying whether the amounts claimed by Arfea (EUR 1 446 526 for 1997 and EUR 421 884 for 1998) had been calculated in compliance with Regulation (EEC) No 1191/1969 and paragraphs 87 to 95 of the *Altmark* judgment ⁽⁷⁾. It appears from the judgments of the Regional Administrative Court (giudizio per l'ottemperanza) nos. 1070 and 1071/2013 of 10 October 2013, that the expert verified that the economic disadvantage in the form of an undercompensation suffered by Arfea was EUR 1 196 780 for 1997 and EUR 102 814 for 1998. The Regional Administrative Court quantified the amounts of additional compensation the Region was obliged to pay to Arfea accordingly and ordered payment of those sums to take place by 7 February 2014. The Italian authorities confirmed that the payment of those sums was made by the Region to Arfea on 7 February 2014.
- (13) It is the payment of those additional compensations by the Region to Arfea as a consequence of judgments nos. 1070 and 1071/2013 that constitute the non-notified measures and which are the subject of the present Decision.

2.3. Amount of additional compensation

- (14) As explained in the preceding section, the Regional Administrative Court appointed an expert to determine the additional compensation owed to Arfea by the Region. On 17 June 2013, the expert issued two reports, one for 1997 and one for 1998. The expert made accounting corrections to the calculation of the amount of compensation made by Arfea's consultants but confirmed that the methodology used for the calculation of the additional compensation was in line with Articles 10 et seq. of Regulation (EEC) No 1191/69 and paragraphs 87 to 95 of the *Altmark* judgment. The methodology employed by the expert was the following:
- (a) Calculate the difference between the net costs and revenues originating from the provision of PSOs;
 - (b) From the amount calculated under (a), deduct the public contributions already granted to Arfea (the 'verified deficit');
 - (c) The verified deficit was then compared to the net financial effect 'equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator' ⁽⁸⁾. To this end, the expert calculated the net financial effect following the methodology indicated in the Annex to Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽⁹⁾.
- (15) In its reports, the expert explains that the data used for the verification was certified by the Region. In contrast to the claim made by the Italian authorities, the expert considers that it is possible to determine, on the basis of Arfea's accounts, which were the costs incurred in the discharge of public service obligations allegedly imposed by the Piedmont Region. According to the expert, some costs can be allocated directly, while some common costs can only be separated by making an indirect attribution of such costs to Arfea's public and private activities. The indirect allocation of common costs was done on the basis of parameters indicated in the so-called 'base model' (modelli base) prepared by Arfea allegedly on the basis of instructions provided by the Region (so called

⁽⁷⁾ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* EU:C:2003:415.

⁽⁸⁾ See the Annex to Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

⁽⁹⁾ According to point 2 of the Annex, 'the effects shall be assessed by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect, the competent authority shall be guided by the following scheme:

- costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority/authorities, contained in a public service contract and/or in a general rule,
- minus any positive financial effects generated within the network operated under the public service obligation(s) in question,
- minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,
- plus a reasonable profit,

equals net financial effect'.

'Instructions 97'). Such parameters indicated the percentage of activity for the urban and inter-city public service performed in the Region and the percentage of other private activities (e.g. bus rentals). The expert applied these percentages to the common costs for which it was allegedly not possible to keep separate accounts.

- (16) As regards compliance with the Altmark judgment, the expert does not take a view on whether Arfea was actually entrusted with clearly defined PSOs as this was not within his mandate. He confirms that the parameters for the calculation of the public contributions were established by the 1984 Framework Decision and that the additional compensation verified in his reports does not exceed what is necessary to cover all or part of the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- (17) The expert agrees with the calculations made by Arfea's consultants on the reasonable profit, which is defined as an average remuneration of capital, based on the following assumptions:
- (a) The invested capital was calculated as the net assets of Arfea resulting from the accounts (in 1997: ITL 7,98 billion) minus the regional contributions for investments. The amount was then reduced to reflect the proportion of the assets used to provide public services only, using the relevant percentage of Arfea's activities. The resulting amount for 1997 was ITL 1,6 billion.
- (b) Based on the formula chosen by the consultant for calculating the required return on invested capital, the relevant rate of return was set at 12,39 % for 1997 and 10,81 % for 1998;
- (18) Finally, the expert maintains that the unit costs of Arfea in 1997 and 1998 are coherent with those of a typical well-run undertaking providing similar services on the market.
- (19) As a result, the additional compensations for 1997 and 1998 (EUR 1 196 780 for 1997 and EUR 102 814 for 1998) would correspond to the difference between the verified deficit and the net financial effect, minus the public contributions already paid by the Region.

2.4. The Concessions Agreements

- (20) The Italian authorities provided 28 concessions (*disciplinari di concessione*) granted by the Provinces to Arfea for the provision of services on 27 regional routes and one interregional route, with different validity dates. Some of the concessions were clearly in force during the period under review, while for others there is no evidence of renewal but only of subsequent modifications:

Concession	Validity
1. Alessandria - Voghera (interregional service)	1996
2. Acqui – Mombaruzzo	15.9.1993-31.12.93 – evidence of modifications, the last one in September 1996
3. Acqui - Spinetta - industrial factories (<i>linea operaia</i>)	1996 - evidence of modifications, the last one in October 1998
4. Oviglio - Asti fs	18.10.93 - 31.12.93 - evidence of modifications, the last one in September 1996
5. Alessandria – Mirabello – Casale	1986 - evidence of modifications, the last one in 1994
6. Alessandria - Ovada	1.6.97-31.12.97 (signed in 1999 - the concession mentions payments from Arfea for both 1997 and 1998)
7. Altavilla - Casale	1983 - evidence of modifications, the last one in 1994

Concession	Validity
8. Arquata – Spinetta - Alessandria - industrial factories Michelin and Montedison (<i>linea operaia</i>)	1997 (signed in 1998)
9. Cassano Spinola - Novi - industrial factory (ILVA)	15.9.93-31.12.93 - evidence of modifications, the last one in September 1997
10. Avolasca – Tortona	1.3.83-31.12.83 - evidence of modifications, the last one in 1995
11. Moretti - Acqui Terme	15.9.93-31.12.93 - evidence of modifications, the last one in 1996
12. Novi Ligure – Tortona	1998 (previous concession from 1994 is mentioned)
13. Sarizzola-Tortona	15.9.93-31.12.93 - evidence of modifications, the last one in 1995
14. Fontanile-Alessandria	15.9.93-31.12.93 - signed in 1996
15. Isola s. Antonio – Tortona	8.11.93-31.12.93 - evidence of modifications, the last one in 1996
16. Mombaruzzo-Quattordio	1993 - evidence of modifications, the last one in November 1996
17. Altavilla-Alessandria	18.10.93 - evidence of modifications, the last one in June 1996
18. Arquata – Tortona	29.9.97-31.12.98 - signed in 1999
19. Garbagna – Tortona	1997 - signed in October 1998
20. Bassignana - Alessandria	18.10.93-31.12.93 - evidence of modifications, the last one in 1997
21. Caldirola - Alessandria	1.4.96-31.12.96 - signed November 1996
22. Masio - Alessandria	18.10.93-31.12.93 - last modifications agreed in October 1997 as from April 1997
23. Quattordio - Alessandria	Request 1993 - evidence of the renewal in 1994, 1995, 1996 and 1997
24. S.Agata Fossili - Tortona	1.4.92-31.12.92 - evidence of modifications, the last one in 1995
25. Torre Garofoli - Tortona	1973 - evidence of modifications, the last one in 1993
26. Castelnuovo S.- Spinetta M.	1981 - evidence of modifications, the last one in 1997
27. Acqui - Alessandria	1994 - evidence of modifications, the last one in 1999
28. Alessandria - Acqui Terme	1994 - evidence of modifications, the last one in 1996

- (21) All concessions are annual concessions, the renewal of which was subject to the introduction of a request for renewal at least one month before the expiry of the concession and to the payment of a concession fee. They all stipulate that the services were carried out entirely at the risk of the undertaking. Several concessions refer to regional tables establishing tariffs. Five concessions indicate that the provision of the service does not constitute a right to a subsidy or compensation of any kind. The remaining 23 concessions indicate that access to public contributions is subordinated to compliance with the provisions of the concessions and that the relevant calculations shall be made on the basis of the 1984 Framework Decision ⁽¹⁰⁾.

2.5. Grounds for initiating the procedure

- (22) As explained in the opening decision, the Commission had several doubts regarding the compatibility of the measure with the internal market.
- (23) First, the Commission questioned whether the four conditions laid down by the Court of Justice of the European Union ('CJEU') in its *Altmark* case-law had been fulfilled.
- (24) Second, the Commission had doubts whether the measure at stake was exempted from the notification obligation under Article 17(2) of Regulation (EEC) No 1191/69. In particular, the Commission expressed doubts first whether any PSO had been unilaterally imposed on Arfea by the Region and, second, whether the compensation at stake complied with all the requirements of Regulation (EEC) No 1191/69. If neither of these conditions was shown to have been satisfied, the compatibility of the notified measure would need to be assessed under Regulation (EC) No 1370/2007.
- (25) Third, the Commission had doubts regarding the compatibility of the measure at stake under Regulation (EC) No 1370/2007. The Commission questioned whether Arfea had been entrusted with public service obligations (PSO) within the meaning of Regulation (EC) No 1370/2007 by way of a public service contract or by way of general rules. To the extent that the concession agreements could be considered as public service contracts, the Commission doubted that these agreements met the requirements of Article 4 of Regulation (EC) No 1370/2007, establishing the mandatory content of public service contracts. The Commission also had doubts on whether the calculation of the compensation granted to Arfea met the requirements laid down in Regulation (EC) No 1370/2007 in order to avoid overcompensation.
- (26) Fourth, the Commission had doubts regarding the exact nature of the measure at stake. In particular, the Commission questioned whether the measure at stake could, instead of an award of public service compensation, be considered as an award of damages for wrongful act, which does not constitute an advantage in the meaning of 107(1) of the TFEU.

3. COMMENTS FROM ITALY

- (27) In their submissions, the Italian authorities considered that the notified measure constituted State aid within the meaning of Article 107(1) TFEU, specifically because it did not satisfy all the conditions laid down by the European Court of Justice in its *Altmark* judgment. The Italian authorities also considered that the compensation awarded by the Region neither complied with Regulation (EEC) No 1191/69 nor with Regulation (EC) No 1370/2007. In this regard Italy submitted essentially the following arguments.
- (28) The Italian authorities stressed that neither a unilateral nor a contractual imposition of public service obligations existed for the bus services during the period concerned. First, Italy maintains that Arfea operated on the basis of concessions which had to be renewed annually upon the request of the company. Those concessions (28 in total, listed in recital 19 above) included an obligation to use a tariff system approved by the Region for a pre-determined schedule in return for the exclusive right to provide the relevant services, but did not identify any

⁽¹⁰⁾ The 1984 Framework Decision established the levels of 'standard costs' for buses and tram services for the city of Turin and for other municipalities in Piemonte, and further distinguished between level lines and mountain lines. Article 1 specifies that standard costs were established on the basis of prudent and rigorous management criteria, taking also into account the quality of the service provided and the geographical conditions. According to Article 4, the amount deriving from the application of the standard costs to the kilometres performed by the service provider represented the maximum admissible level of public contributions per year, unless the actual costs incurred by the service provider were lower than the standard costs. If this was the case, public contributions were to be granted on the basis of the actual costs of the service provider.

specific PSOs within the meaning of Article 2 of Regulation (EEC) No 1191/69. Similarly, in the opinion of the Italian authorities, those concessions did not indicate compensation parameters established in advance referring to specific PSOs. The award of *ex post* compensation by means of a judgment from a national court would be incompatible with that requirement.

- (29) Second, all concessions documents specify that the service is to be provided entirely at the company's own risk and that the cost is to be borne in full by the service provider. Despite the fact that the concessions provided by the Italian authorities stipulated that the operation of the service was operated entirely at the company's own risk, Arfea repeatedly requested the prolongation of those concessions.
- (30) Third, the concession documents also show that the routes served by the company's buses were changed several times at the company's request, and it can therefore be ruled out that any public service obligations were imposed, even implicitly, by the awarding regional or provincial authority.
- (31) Furthermore, the Italian authorities explained that in return for the exclusive right to provide the transport services, on the conditions specified with the changes made at its request, the company received the operating contributions provided for by Italian law as remuneration for the services provided, based on a standard cost calculated on the basis of the 1984 Framework Decision. The standard cost of the service was calculated in accordance with the legislation then in force (Law No 151/81 and Regional Law No 16/82), which made provision for a contribution to the costs of providing local public transport services on the basis of standard eligible expenditure. This was intended to fully cover the company's operating deficit. Under the Italian legislation such operating contributions were intended to enable the service provider to achieve economic balance, whereas any further deficits were to be ascribed to inefficient management by the provider. Accordingly, it was expressly provided that any such deficits were to be borne by the company, on the ground that it had failed to adopt all the measures required to reduce costs and increase revenues.
- (32) The Italian authorities also maintain that the calculation of the additional compensation made *ex post* by the Court mandated expert is in clear breach of the requirements of the common compensation procedure set out in Articles 10 et seq. of Regulation (EEC) No 1191/69. According to the Italian authorities, the expert consulted by the Court simply analysed the costs and revenues presented by the company's consultant, which had been determined *ex post* and in the absence of proper separation of accounts. It then, concluded that, apart from a few items where discrepancies were found, the result obtained was essentially correct.
- (33) The Italian authorities further consider that the compensation does not meet either the requirements of Regulation (EC) No 1370/2007. In particular, the calculation of the amount of compensation would not respect the method set out in the Annex to Regulation (EC) No 1370/2007 to calculate the net financial effect of compliance with PSOs.
- (34) Finally, the Italian authorities argue that the judgments of the Regional Administrative Court ordered to pay Arfea financial compensation for the discharge of service obligations in 1997 and 1998, but did not award compensation for damages arising as a result of those contributions not having been paid. The Italian authorities explained that Arfea lodged on 6 June 2014 an application for an award of damages in addition to the compensation it had already been granted by the Regional Administrative Court. According to the Italian authorities, this would show that the compensation granted to Arfea by the Regional Administrative Court, and which are the object of the present decision, did not constitute an award of damages.

4. COMMENTS FROM INTERESTED PARTIES

- (35) The only interested party to submit observations in response to the opening decision was Arfea, the beneficiary of the measure. In its submissions, Arfea disagrees with the preliminary positions taken by the Commission in the opening decision.
- (36) Arfea argues first that the compatibility and legality of the measure at stake should be assessed by the Commission only under Regulation (EEC) No 1191/69 and not under Regulation (EC) No 1370/2007. According to Arfea, Regulation (EC) No 1370/2007 cannot apply to situations which originated before its entry into force, i.e. 3 December 2009, as would have been confirmed by the General Court in its judgment of 20 March 2013 in *Andersen* case T-92/11. Arfea maintains however that, in any event, the compensations granted to it comply with the requirements of Regulation (EC) No 1370/2007.

- (37) Second Arfea claims that it was entrusted with public services obligations in the meaning of Article 2(1) and 2(2) of Regulation (EEC) No 1191/69. According to Arfea, local public transport services are public services. In Italy, these services would be assigned by way of administrative concessions and public services obligations attached to the provision of these services would be laid down in the concession agreements as well as in agreements and regulations attached to these concessions agreements. In Arfea's case, these public service obligations would concern operating programmes, bus routes, stops and tariffs. As regards the fact that the concessions specified that the services was to be operated at the companies own risk, Arfea argues that this relates to safety risks for passengers and third parties, not to a general business risk.
- (38) Third, Arfea claims that its failure to request the termination of these PSOs, as required by Article 4 of Regulation (EEC) No 1191/69, does not deprive it of its right to compensation under Regulation (EEC) No 1191/69. According to Arfea, the procedure imposed by Article 4 of Regulation (EEC) No 1191/69 would not apply to PSOs which were imposed on an undertaking after the entry into force of Regulation (EEC) No 1191/69. This interpretation of Article 4 of Regulation (EEC) No 1191/69 would, according to Arfea, be supported by the judgment of the Court of Justice of 3 March 2014 in *CTP* case C-518/12.
- (39) Fourth, as regards the calculation of the amount of compensation granted to it by the Regional Administrative Court of the Region of Piedmont, Arfea argues that the report of the expert mandated by the court cannot be questioned by the Commission because it is a preliminary technical activity that would fall exclusively under the responsibility of the national courts. In any event, according to Arfea, the parameters for the calculation of the compensation would have been set in advance in the decision of the Regional Council of 16 February 1984 and it would not have been overcompensated. The compensations at stake would therefore comply with the requirements set in that regard by Regulation (EEC) No 1191/69.
- (40) Fifth, according to Arfea, the arguments summarised in recitals 37 to 39 above would also apply for the assessment of the compatibility of the compensation at stake with the requirements of Regulation (EC) No 1370/2007. However, as regards the compliance of these compensations with the formal requirements imposed by this Regulation cited by the Commission in recitals 64 and following of its opening decision, Arfea argues that they should not apply in the case at stake. According to Arfea, it would be legally and logically impossible to demonstrate compliance with these requirements, as the situation at stake predates by many years the entry into force of Regulation (EC) No 1370/2007.
- (41) Finally, Arfea claims that the compensations awarded to it by the Regional Administrative Court of the Region of Piemonte meet the four Altmark conditions. First, Arfea would have been entrusted with clearly defined public service obligations, in accordance with the first Altmark condition. Second, the parameters for compensation would have been set in advance in a transparent and objective manner in the decision of the Regional Council of 16 February 1984, in accordance with the second Altmark condition. Third, the expert report would have established that the compensation did not exceed the cost of the discharge of the public service obligations, including a reasonable profit, in accordance with the third Altmark condition. Finally, Arfea would qualify as a typical and well run undertaking in the meaning of the fourth Altmark criterion, as evidenced by the fact that its average cost/km was below the standard regional costs.

5. COMMENTS ON THIRD PARTY COMMENTS

- (42) In their comments on Arfea's comments, the Italian authorities reaffirm their position expressed in their comments to the opening decision without additional comments.

6. ASSESSMENT OF THE AID

6.1. Existence of aid

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

(44) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) the Treaty, it must cumulatively fulfil all of the following conditions:

- it must be granted by the State or through State resources,
- it must confer a selective advantage, by favouring certain undertakings or the production of certain goods,
- it must distort or threaten to distort competition, and
- it must affect trade between Member States.

6.1.1. *Imputability and State resources*

- (45) The Commission notes that the judgments of the Regional Administrative Court require the Region to pay additional compensation to Arfea with respect to the provision of scheduled bus services in 1997 and 1998 concerning regional routes. The expert verified that Arfea suffered an economic disadvantage in the form of an undercompensation in the amount of EUR 1 196 780 for 1997 and EUR 102 814 for 1998, as a result of PSOs allegedly being imposed upon it. On 7 February 2014, the Region effectively paid this sum to Arfea in order to comply with these judgments.
- (46) The fact that the Region is obliged by a national court to pay compensation to an undertaking does not render the Region complying with that judgment unimputable, since the domestic courts of that State are to be considered organs of that State and are thus bound by their duty of sincere cooperation ⁽¹¹⁾.
- (47) The measure is thus imputable to the State and the resources from which that compensation has been paid are State resources.

6.1.2. *Selective economic advantage*

- (48) The Commission notes at the outset that Arfea is engaged in an economic activity, namely passenger transportation against remuneration. Therefore, Arfea should be considered an ‘undertaking’ within the meaning of Article 107(1) of the Treaty.
- (49) The grant of the measure should also be considered selective, since it benefits only Arfea.
- (50) As regards the granting of an economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through State resources to undertakings in consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) of the Treaty, provided four cumulative conditions are satisfied:
- First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined,
 - Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner,
 - Third, 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,
 - Fourth, 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.

⁽¹¹⁾ Case C-527/12 *Commission v Germany* EU:C:2014:2193, paragraph 56 and the case-law cited. See also, Case C-119/05 *Lucchini* EU:C:2007:434, paragraph 59.

- (51) The Altmark judgment requires that all four conditions are cumulatively satisfied to exclude the presence of an economic advantage where compensation is granted to undertakings in consideration for public services obligations imposed on them.

(a) First Altmark condition

- (52) As regards the first Altmark condition, the Commission notes first of all that it is for Member States to show that a particular undertaking was entrusted with public service obligations and that the imposition of such public service obligations is justified by considerations of general interest ⁽¹²⁾. However, the Italian authorities did not explain what public service obligations justified by considerations of general interest were imposed on Arfea. On the contrary, they argued that Arfea had not been entrusted with any public service obligation.
- (53) Second, the Commission notes that the notion of public service obligation relates to conditions imposed on an operator, which that operator, if it were considering its own commercial interest, would not assume or would not assume to the same extent without reward. Moreover, these conditions must be clearly defined by the authority in an entrustment act. In that regard, Arfea has not been able to explain precisely what public service obligations had been imposed upon it nor to show that these PSOs had been clearly defined in an entrustment act. Moreover, for the reasons explained in recitals 77 to 82 below, the Commission considers that there are serious indications that no such clearly defined public service obligations were imposed upon Arfea.

(b) Second Altmark condition

- (54) As regards the second Altmark condition, the Commission observes that, the parameters for the calculation of the compensation awarded to Arfea by the judgments of the Regional Administrative Court were not set in advance. They were determined based solely on an *ex post* calculation made by the expert on the basis of various assumptions which were not properly explained and in the absence of separation of accounts.
- (55) Contrary to what Arfea argues, it cannot be considered that the parameters for the calculation of these compensations had been established in the decision of the Regional Council of 16 February 1984. Indeed, the compensations awarded to Arfea by the Regional Administrative Court are additional compensations, the purpose of which was precisely to cover the financial burden of the PSOs allegedly imposed on Arfea, which would not have been fully covered by the compensations already granted to it in application of the decision of the Regional Council of 16 February 1984.
- (56) Such an approach is in contradiction with the second Altmark condition and any compensation granted on that basis constitutes State aid. The Court has indeed made clear in its Altmark judgment that ‘payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established in advance beforehand, where it turns out that after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, constitutes a financial measure which falls within the concept of State aid within the meaning of 107§1 of the TFEU’ ⁽¹³⁾.
- (57) The Commission therefore concludes that the notified measure does not meet the second Altmark condition.

(c) Third Altmark condition

- (58) As regards the third Altmark condition, the Commission considers first of all that, when an undertaking carries out both activities which are subject to PSOs and activities which are not subject to PSOs, it is not possible to determine precisely what are the costs incurred in the discharge of PSOs in the absence of a proper separation of account between the different activities of the provider.

⁽¹²⁾ Case T-17/02 Fred Olsen [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraphs 166-169 and 172.

⁽¹³⁾ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* EU:C:2003:415, paragraph 91.

- (59) In the present instance, the Italian authorities have argued that Arfea did not implement a proper separation of account between its activities allegedly subject to PSOs imposed by the Piedmont Region and its other activities. The Commission also expressed doubts on whether Arfea had implemented such a separation of accounts and Arfea did not provide any comments on this issue. Moreover, the extracts of Arfea's account which the expert mandated by the court used to determine the amount of the compensations do not show any separation of account between the different activities of Arfea. The cost allocation done by the Court mandated expert has been done *ex post*, based on the base model prepared by Arfea's consultants, which determined percentages of costs to be allocated to the different activities of Arfea.
- (60) Second, the Commission considers that the profit levels taken into account by the expert for the calculation of the amounts of compensation are higher than what can be considered as a reasonable profit in the meaning of the third Altmark condition.
- (61) The expert considered that a rate of return on invested capital of 12,89 % for 1997 and of 10,81 % for 1998 was a reasonable profit rate; these rates being based on the yield of Italian 10 years State bond (6,8 % for 1997) plus an average risk premium (4,8 % for 1997) corrected upwards to take into account Arfea's own financial situation (by 1,28 for 1997).
- (62) In that regard, the Commission observes that the risk premium determined by the expert is particularly high, given that the risk to which Arfea was exposed was rather limited. Indeed, Arfea operated the concessions on the basis of an exclusive right, which shielded it from competition from other operators, and the compensation determined by the expert compensated the alleged full cost incurred in the discharge of public service obligations.
- (63) Moreover, the Commission notes that, while the expert noted that the transport sector benefited from an average risk below market, it corrected the risk premium upwards in order to take into account Arfea's own financial exposure which was higher than the sector's average. By doing so the expert therefore did not take into account the risk of a typical transport company but Arfea's own risk, which was higher than the average of the sector.
- (64) Taking into account the above, the Commission considers that the third Altmark condition is not met.

(d) Conclusion

- (65) Considering the cumulative nature of the Altmark conditions and the fact that the measure at stake does not comply with the first three Altmark conditions, there is no need for the Commission to examine whether the fourth Altmark condition is met.
- (66) Based on the above, the Commission considers the additional compensation paid to Arfea for services performed during the period under review does not meet the four cumulative Altmark condition and therefore confer on that company a selective economic advantage for the purposes of Article 107(1) of the Treaty.

6.1.3. *Distortion of competition and effect on trade between Member States*

- (67) The Commission notes, in the first place, that the compensations at stake were awarded to Arfea by two judgments of the Regional Administrative Court of Piedmont of 10 October 2013 and were paid by the Piedmont Region on 7 February 2014, i.e. long after the market for passenger transport by bus had been opened to competition in the EU.
- (68) In that regard, the CJEU remarked in its *Altmark* judgment that since 1995 several Member States started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings were already offering their urban, suburban or regional transport services in Member States other than their State of origin by that point in time.

- (69) Accordingly, any compensation granted to Arfea should be considered liable to distort competition for the provision of passenger transport services by bus and liable to affect trade between Member States, to the extent that it negatively impacts on the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of Arfea by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.
- (70) The Commission further notes that Arfea is active on other markets, such as private transport services, and thus competes with other companies within the Union on those markets. Any compensation granted to Arfea may also risk distorting competition and affecting trade between Member States on those markets as well.
- (71) Accordingly, the Commission concludes that the measure distorts competition and affects trade between Member States.

6.1.4. Conclusion

- (72) In light of the above, the Commission concludes that the measure constitutes aid within the meaning of Article 107(1) of the Treaty.

6.2. Exemption from notification obligation under Regulation (EEC) No 1191/69

- (73) For the reasoning of the Regional Administrative Court to hold that Arfea was entitled to additional PSO compensation under Regulation (EEC) No 1191/69, Arfea would have had to have acquired the right to additional compensation at the point in time at which it carried out those services and those compensation payments must have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69. Otherwise, to the extent the compensation constitutes State aid within the meaning of Article 107(1) TFEU, failure to notify that compensation would have rendered that compensation unlawful in accordance with Article 108 TFEU. This is because, in accordance with Article 17(2) of that regulation, compensation paid pursuant to this regulation is exempted from the preliminary information procedure laid down in Article 108(3) TFEU and thus from notification.
- (74) In that regard, it follows from the *Combust* judgment that the concept of 'public service compensation' within the meaning of that provision must be interpreted in a very narrow manner ⁽¹⁴⁾. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that Regulation which are calculated using the method described in Articles 10 to 13 of that Regulation (the common compensation procedure). It does not apply however to public service contracts as defined by Article 14. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69, which entails State aid, must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed illegally implemented aid in accordance with Article 108 of the Treaty.
- (75) The question whether Article 17(2) of Regulation (EEC) No 1191/69 indeed dispensed the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on Arfea by the Region and, second, on whether the compensation paid pursuant to that obligation complies with Regulation (EEC) No 1191/69. The Commission will examine both questions in turn.

(i) PSO unilaterally imposed

- (76) According to Arfea, the Piedmont Region imposed upon it public service obligations which were defined in the concession agreements for the provision of bus transport services as well as in agreements and regulations attached to these concession agreements. These public service obligations would concern the operating programmes, bus routes, bus stops and tariffs.

⁽¹⁴⁾ Case T 157/01 *Danske Busvognmænd* [2004] EU:T:2004:76, points 77, 78 and 79.

- (77) The Commission notes first of all that the concessions agreements clearly foresaw that they were valid for only one year and were renewable upon request of the transport provider, subject to the payment of a concession fee. It follows that these concessions formed the basis of a contractual relationship between Arfea and the Piedmont Region, in which Arfea voluntarily entered.
- (78) It can therefore not be considered that public service obligations in the meaning Regulation (EEC) No 1191/69 were unilaterally imposed upon Arfea on the basis of these agreements. As recalled by the General Court in its judgment of 3 March 2016 in *Simet* case T-15/14, a voluntary adhesion to a contractual relationship is different from a unilateral imposition of PSOs and does not give rise to an obligation of compensation under Regulation (EEC) No 1191/69 ⁽¹⁵⁾.
- (79) Second, the Commission notes that Arfea did not clearly identify the agreements and regulations attached to the concession agreements, which would have imposed upon it public service obligations. The Commission understands however that Arfea refers to the agreements on the bus routes and timetables which were attached to the concession agreements and to tables establishing regional tariffs, to which some of the concession agreements referred.
- (80) As regards these agreements on bus routes and timetables, the Commission notes that they cannot be considered to impose unilaterally PSOs on Arfea. Indeed, as the concessions agreements themselves, they were voluntarily concluded by Arfea. Moreover, the content of these agreement, e.g. the bus routes, has been modified at Arfea's request for several concessions. They can therefore not be considered to have imposed unilaterally public service obligations in the meaning of Article 2 of Regulation (EEC) No 1191/69.
- (81) As regards tables establishing regional tariffs, which establish maximum tariffs for all passengers, the Commission notes that the General Court has clearly explained in its judgment of 3 March 2016 in *Simet* case T-15/14 that such general rules on tariffs do not impose PSOs in the meaning of Article 2 of Regulation (EEC) No 1191/69. Indeed, according to the Court, the notion of tariff obligations in the meaning of that provision is limited to maximum tariffs imposed for a particular category passengers or products and does not cover general measures of price policy ⁽¹⁶⁾.
- (82) Finally the Commission notes that, in any event, the fact that Arfea requested the renewal of the concessions and even paid a concession fee for it is hardly reconcilable with the imposition of any public service obligation in the meaning of Article 2(1) of Regulation (EEC) No 1191/69. Indeed, pursuant to that provision, public service obligation 'means obligations which the transport undertaking in question, if it were considering its own commercial interest, would not assume or would not assume to the same extent or under the same conditions'. As observed by the General Court in its judgment of 3 March 2016 in *Simet* case T-15/14, it is difficult to admit an undertaking would ask for the renewal of a concession, taking into account the obligations attached to it, while the execution of that concession is not in its commercial interest.
- (ii) Compliance of the compensation with the common compensation procedure
- (83) Even if PSOs were shown to have been unilaterally imposed on Arfea in the present case, quod non, the compensation for those services would still need to comply with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69 to be exempted from prior notification under Article 17(2) of that Regulation. The Commission does not consider this to be the case.
- (84) In that regard, the Commission recalls first that it follows from Articles 10 and 11 of Regulation (EEC) No 1191/69 that a compensation may not be higher than the financial burden born by an undertaking as a result of the imposition of public service obligations. Moreover, Article 1 paragraph 5 of Regulation (EEC) No 1191/69, in its version applicable as of 1 July 1992, provided that: 'Where a transport undertaking not only

⁽¹⁵⁾ Case T-15/14, *Simet SpA v Commission*, paragraph 163.

⁽¹⁶⁾ Case T-15/14, *Simet SpA v Commission*, paragraph 159.

operates services subject to public service obligations but also engages in other activities, the public services must be operated as separate divisions meeting at least the following conditions:

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

[...]

- (85) Second, the Commission recalls that Article 13 of Regulation (EEC) No 1191/69 requires that the administration fixes the amount of the compensation in advance.
- (86) In the present instance, the Commission considers that the compensations awarded to Arfea do not comply with these requirements.
- (87) First, the Commission notes that, as indicated in recital 59 above, it has not been shown that Arfea implemented a proper separation of accounts between its activities allegedly subject to PSOs and its other activities, as required by Article 1 paragraph 5 (a) of Regulation (EEC) No 1191/69. On the contrary, the extracts of Arfea's accounts for the years 1997 and 1998, which the expert mandated by the court used to determine the amount of the compensations, rather show that costs were not separated per activity.
- (88) Second, the Commission notes that, contrary to Article 13 of Regulation (EEC) No 1191/69, the compensation awarded to Arfea has not been set in advance but has been determined on the basis of an *ex post* assessment, as prescribed by the Regional Administrative Court.
- (89) In light of these observations, the Commission concludes that the additional compensations awarded by the Regional Administrative Court of Piedmont to Arfea was not exempted from compulsory prior notification on the basis of Article 17(2) of Regulation (EEC) No 1191/69.

6.3. Compatibility of the aid

- (90) Since it has not been shown that the measure under review was exempted from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69, the compatibility of those payments with the internal market will need to be examined, as they are considered to constitute State aid within the meaning of Article 107(1) of the Treaty, as explained in section 6.1.
- (91) In that regard, Article 93 of the Treaty contains rules for the compatibility of State aid in the area of coordination of transport and PSOs in the field of transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of State aid. The CJEU has ruled that this provision 'acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]' ⁽¹⁷⁾.
- (92) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 of the Council ⁽¹⁸⁾. Regulation (EC) No 1370/2007 applies to the compensation of PSOs concerning public passenger transport services by rail and by road.
- (93) The Commission considers that the examination of the compatibility of the non-notified measure should be conducted under Regulation (EC) No 1370/2007, since that is the legislation in force at the time the present Decision is adopted. The Commission also notes that the additional compensation awarded to Arfea by the Regional Administrative Court was paid on 7 February 2014 ⁽¹⁹⁾.
- (94) Article 9(1) of Regulation (EC) No 1370/2007 states '[p]ublic service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty'.

⁽¹⁷⁾ Case 156/77 *Commission v Belgium* [1978] EU:C:1978:180, paragraph 10.

⁽¹⁸⁾ Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1).

⁽¹⁹⁾ C 303/13 P *Commission v. Andersen*, paragraph 55.

- (95) For the reasons set out below, the Commission considers that the non-notified compensation does not comply with Regulation (EC) No 1370/2007, so that it cannot be declared compatible with the internal market under Article 9(1) of that Regulation.
- (96) First, the Commission notes that the concessions agreements do not meet the requirements of Article 4 of this Regulation, which establishes the mandatory content of general rules and public service contracts establishing public service obligations:
- Article 4(1)(b) requires the parameters on the basis of which the compensation is calculated to be established in advance in an objective and transparent manner in a way that prevents overcompensation. However, as explained above in recitals 54 to 57 concerning the fulfilment of the second Altmark condition, the additional compensations granted to Arfea were not calculated on the basis parameters established in advance in an objective and transparent manner.
 - Article 4(1)(c) and Article 4(2) require that the public service contract provides the arrangements for the allocation of costs and revenues connected with the provision of the services. However, the concession agreements did not contain any arrangements regarding the allocation of costs and revenues and, as explained in recital 59 above, Arfea did not apply a proper separation of accounts between its different activities.
- (97) Second, the Commission notes that the measure at stake does not meet the relevant requirements of Regulation (EC) No 1370/2007 concerning the calculation of the amount of compensation.
- (98) Article 6(1) of Regulation (EC) No 1370/2007 provides that, in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation.
- (99) Point 2 of the Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the PSO minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. Point 4 of that Annex requires that costs and revenues be calculated in accordance with the accounting and tax rules in force. Point 5 of the annex provides that: 'where a public service operator not only operates compensated services subject to public transport service obligations, but also engages in other activities, the accounts of the said public services must be separated so as to meet at least the following conditions:
- the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with the accounting and tax rules in force,
 - all variable costs, an appropriate contribution to the fixed costs and a reasonable profit connected with any other activity of the public service operator may under no circumstances be charged to the public service in question,
 - the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.'
- (100) However, as already noted in recital 59, Arfea did not apply a proper separation of account between its activities allegedly subject to PSOs and its other activities, as required by point 5 of the Annex to Regulation (EC) No 1370/2007. Consequently, it is impossible to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator (Point 2 of the Annex to Regulation (EC) No 1370/2007). Moreover, in the absence of compensation parameters laid down in advance, any calculation of compensation must necessarily be conducted ex-post on the basis of arbitrary assumptions, as was done by Arfea's consultants and the expert mandated by the Regional Administrative Court of Piedmont. Finally, as explained in recitals 60 to 63 the profit levels taken into account by the expert for the calculation of the amounts of compensation are higher than what can be considered as a reasonable profit.

- (101) Third, the Commission notes that Arfea itself has recognised that the requirements of Regulation (EC) No 1370/2007 were not met in the present case, by arguing that such compliance would be legally and logically impossible, as the situation at stake predates by many years the entry into force of the said Regulation.
- (102) Accordingly, the Commission considers that the additional compensation ordered by the Regional Administrative Court has not been paid in accordance with Regulation (EC) No 1370/2007 and therefore that the additional compensation is incompatible with the internal market.

6.4. The compensation awarded by the Regional Administrative Court does not constitute damages

- (103) In the opening decision, the Commission invited interested parties to comment on the question whether the judgments of the Regional Administrative Court concern an award for damages for alleged breach of law as opposed to an award of public service compensation based on the applicable Council Regulations. Only the Italian authorities submitted comments in that regard, arguing that the measure at stake constituted an award of compensation for the discharge of PSOs, not an award of damages.
- (104) The Commission notes in this respect that, under certain circumstances, compensation for damages due to the wrongful act or other conduct of the national authorities ⁽²⁰⁾ does not constitute an advantage and is therefore not to be considered as State aid within the meaning of Article 107(1) of the Treaty ⁽²¹⁾. The purpose of compensation for damage suffered is different from that of State aid since it aims to bring the damaged party back to the situation in which he found itself prior to the damaging act, as if the latter had not occurred (*restitutio in integrum*).
- (105) However, for compensation for damages to fall outside the State aid rules, it must be based on a general rule of compensation ⁽²²⁾. Moreover, in its judgment in *Lucchini*, the CJEU held that a national court was prevented from applying national law where the application of that law would have the effect to ‘frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law’ ⁽²³⁾. The principle underlying this pronouncement is that a rule of national law cannot be applied where such application would frustrate the proper application of Union law ⁽²⁴⁾. In that regard, the General Court has held in its judgment of 3 March 2016 in *Simet* case T-15/14 that an award of damages that would consist in the indemnification of a prejudice suffered as a result of the imposition of public service obligations could not escape to the qualification of State aid merely because it consisted in an award of damages, as this would allow the circumvention of Articles 107 and 108 of the Treaty ⁽²⁵⁾.
- (106) As regards the additional compensations awarded to Arfea by the Regional Administrative Court, the Commission notes, first of all, that the Regional Administrative Court’s judgments refer to Arfea’s right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data. This indicates that Arfea’s right to additional compensation flows, according to the Regional Administrative Court, not from a general rule of compensation for damages as a result of a wrongful act or other conduct of the national authorities, but from rights allegedly derived from Regulation (EEC) No 1191/69.
- (107) Second, the Commission notes that Arfea lodged on 6 June 2014 an application in front of the Italian Courts requesting the payment of damages by the Piedmont Region in addition to the compensations already granted to it by the Regional administrative Court. Arfea alleged in its application that it suffered damages as a result of the late recognition and payment of the compensations owed to it for the years 1997 and 1998 by the Region. This indicates that Arfea itself does not consider that the compensations already awarded to it by the Regional Administrative Court constitute an award of damages.

⁽²⁰⁾ For example, tort or unjustified enrichment.

⁽²¹⁾ Joined cases 106 to 120/87, *Asteris and Others v Greece and EEC* EU:C:1988:457.

⁽²²⁾ See Commission Decision of 16 June 2004 on Dutch aid in favour of Akzo-Nobel in order to minimise chlorine transports (Case N 304/2003), summary notice in OJ C 81, 2.4.2005, p. 4; see also Commission Decision of 20 December 2006 on Dutch aid for relocation of car dismantling company Steenberg (Case N 575/2005), summary notice in OJ C 80, 13.4.2007, p. 1.

⁽²³⁾ Case C-119/05 *Lucchini* EU:C:2007:434, paragraph 59.

⁽²⁴⁾ See *ibid*, paragraph 61.

⁽²⁵⁾ Case T-15/14, *Simet SpA v Commission*, paragraphs 102-103.

- (108) Third, the Commission considers that, in any event, an award of damages in favour of Arfea to compensate for the financial burden resulting from the alleged illegal unilateral imposition of PSOs by the Italian authorities would be in breach of Articles 107 and 108 of the Treaty.
- (109) This is because such an award would produce the exact same result for Arfea as an award of public service compensation for the period under review, despite the fact that the concession agreements governing the services in question were neither exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, as demonstrated above.
- (110) The availability of such an award would thus effectively enable the circumvention of the State aid rules and the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for the costs incurred in return for the discharge of PSOs. Indeed, an award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of State aid found to be illegal and incompatible with the internal market ⁽²⁶⁾. As recalled above, the General Court has made clear that, in such circumstances, State aid rules cannot be circumvented merely because the measure at stake would consist in an award of damages ⁽²⁷⁾.
- (111) Accordingly, the Commission does not consider the judgment of the Administrative Regional Court to constitute an award of compensation for damages suffered by Arfea as a result of the wrongful act or other conduct of the national authorities, rather than a grant of unlawful and incompatible State aid, which is prohibited under Article 107(1) of the Treaty.
- (112) In light of the foregoing, the Commission concludes that the non-notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

7. RECOVERY OF THE AID

- (113) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽²⁸⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽²⁹⁾.
- (114) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³⁰⁾.
- (115) In line with the case-law, Article 16(1) of Council Regulation (EU) No 2015/1589 ⁽³¹⁾ stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...]'.

⁽²⁶⁾ Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori* EU:C:2005:256, paragraph 198.

⁽²⁷⁾ Case T-15/14, *Simet SpA v Commission*, paragraph 102-103.

See also the case-law of the General Court on indemnification clauses for the recovery of State aid: Case T-384/08 *Elliniki Nafpigokataskevastiki AE Chartofylakeiou v Commission* EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission* EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council* EU:C:2013:785, paragraph 44.

⁽²⁸⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

⁽²⁹⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽³⁰⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-3671 paragraphs 64 and 65.

⁽³¹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- (116) Thus, given that the measures in question were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to Arfea, that is to say when the aid was put at its disposal (i.e. on 7 February 2014), until effective recovery, and the sums to be recovered should bear interest until effective recovery,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 1 299 594 unlawfully granted by the Italian Republic, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Arfea is incompatible with the internal market.

Article 2

1. The Italian Republic shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from 7 February 2014 until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽³²⁾ and to Commission Regulation (EC) No 271/2008 ⁽³³⁾ amending Regulation (EC) No 794/2004.
4. The Italian Republic shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. The Italian Republic shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, the Italian Republic shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. The Italian Republic shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 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 recovery interest already recovered from the beneficiary.

⁽³²⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140 30.4.2004, p. 1).

⁽³³⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 10 June 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission
