

COMMISSION DECISION (EU) 2022/1328**of 30 September 2021****on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Lazio for Laziomar and its acquirer CLN***(notified under document C(2021) 6989)***(Only the Italian text is authentic)****(Text with EEA relevance)**

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THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 23 March 2009, 9 December 2009, 21 December 2009, 6 January 2010, 27 September 2010 and 12 October 2010, the Commission received six complaints concerning various support measures adopted by Italy in favour of the companies of the former Tirrenia Group ⁽²⁾. The complaints concerned the public service compensation granted to these companies after the expiry of the initial public service contracts concluded with Italy for the period between January 1989 and December 2008 ('the initial Conventions'), additional support measures laid down in national law in the context of the privatisation process of the companies, as well as certain issues regarding particularly the privatisation procedure of Tirrenia di Navigazione S.p.A. ('Tirrenia') and Siremar – Sicilia Regionale Marittima S.p.A. ('Siremar').
- (2) On 29 July 2010, Italy notified to the Commission the compensation paid in 2008, 2009 and 2010 by Italy to Caremar – Campania Regionale Marittima S.p.A. ('Caremar'). That notification was resubmitted on 1 December 2010 covering the compensation paid to Caremar in 2009 and 2010. The compensation paid to Caremar in 2008 was covered by a separate decision (see recital 20).
- (3) On 5 October 2011, the Commission opened the formal investigation procedure in respect of various measures adopted by Italy in favour of the companies of the former Tirrenia Group ('the 2011 Decision') ⁽³⁾. The investigation concerned *inter alia* the compensation granted to Caremar for the operation of a number of maritime routes as of 1 January 2009 and a number of other measures granted to that company (see recital 38).
- (4) At that time, Caremar operated maritime cabotage ⁽⁴⁾ routes in the Gulf of Naples (Region of Campania) and in the Pontino archipelago (Region of Lazio). Subsequently, the Region of Campania transferred to the Region of Lazio the routes in the Pontino archipelago on a standalone basis under the name Laziomar S.p.A. ('Laziomar'). ⁽⁵⁾ That transfer was formalised on 1 June 2011 (see recitals 32 and 33).
- (5) The 2011 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation.
- (6) By letter dated 28 September 2011, Italy confirmed its intention to privatise the regional companies of the former Tirrenia Group, including Laziomar. On 26 October 2011, the Commission sent a request for information to Italy concerning the privatisation procedure. On 30 November 2011, Italy submitted a reply to the Commission's request for information of 26 October 2011.

⁽¹⁾ OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.

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

⁽³⁾ State aid – Italian Republic – State aid SA.32014 (11/C) (ex 11/NN), SA.32015 (11/C) (ex 11/NN), SA.32016 (11/C) (ex 11/NN) – State aid to the companies of the former Tirrenia Group – Invitation to submit comments pursuant to Article 108(2) of the TFEU (OJ C 28, 1.2.2012, p. 18).

⁽⁴⁾ See Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7) ('the Maritime Cabotage Regulation').

⁽⁵⁾ Laziomar was established on 1 December 2010, with Region of Lazio being the sole shareholder.

- (7) On 15 November 2011, Italy submitted comments on the measures covered by the 2011 Decision.
- (8) On 25 April 2012, the Commission sent another request for information to Italy concerning the privatisation procedure. Italy replied by letter dated 22 May 2012.
- (9) On 7 November 2012, the Commission extended the investigation procedure *inter alia* to cover certain additional support measures granted by the Region of Lazio to Laziomar in respect of the public service compensation granted to Laziomar under the new public service contract. An amended version of that Decision was adopted by the Commission on 19 December 2012 ('the 2012 Decision') ⁽⁶⁾.
- (10) The 2012 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation.
- (11) On 11 December 2012, Italy submitted its comments.
- (12) On 25 January 2018, 29 March 2018, 31 August 2018, 4 March 2019, 15 April 2020, 9 and 26 February 2021, the Commission requested additional information from Italy. Italy provided this information on 26 April 2018, 8 and 31 May 2018, 2 November 2018, 11 December 2018, 30 April 2019, 22 June 2020, 22 February 2021 and 17 March 2021.
- (13) This Decision only concerns possible aid to Laziomar as specified in Section 2.3. All remaining measures subject to the 2011 and 2012 Decisions are being investigated separately under Cases SA.32014, SA.32015 and SA.32016 and are not therefore covered by this Decision. In particular, those remaining measures concern other companies of the former Tirrenia Group.

2. BACKGROUND AND DESCRIPTION OF THE MEASURES SUBJECT TO INVESTIGATION

2.1. General framework

2.1.1. The initial Conventions

- (14) The Tirrenia Group was traditionally owned by Italy through the company Fintecna ⁽⁷⁾ and initially included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded with Italy in 1991, in force for twenty years between January 1989 and December 2008 ('the initial Conventions'). Fintecna held 100 % of Tirrenia's share capital, which in turn wholly owned the regional companies Adriatica, Caremar, Siremar, Saremar and Toremar. Adriatica, which used to operate a number of routes between Italy and respectively Albania, Croatia, Greece, and Montenegro, was merged with Tirrenia in 2004.
- (15) The purpose of these initial Conventions was to guarantee the regularity and reliability of the maritime transport services, the majority of them connecting mainland Italy with Sicily, Sardinia and other smaller Italian islands. To that effect, Italy granted financial support in the form of subsidies paid directly to each of the companies of the Tirrenia Group.
- (16) On 1 June 2011 Laziomar started operating a series of maritime cabotage routes between the Region of Lazio and the smaller neighbouring islands (see recital 33). The exact routes concerned are described under recital 43.

⁽⁶⁾ State aid – Italian Republic – State aid SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) – State aid to the companies of the former Tirrenia Group and their acquirers – Invitation to submit comments pursuant to Article 108(2) of the TFEU (OJ C 84, 22.3.2013, p. 58).

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

- (17) On 6 August 1999, the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU") in respect of aid paid on the basis of the initial Conventions to the six companies that then formed the Tirrenia Group.
- (18) During the investigation phase, Italy requested that the Tirrenia Group case would be split up so that priority could be given to reaching a final decision concerning Tirrenia. This request was motivated by Italy's plan to privatise the Group, beginning with Tirrenia, and its intention to speed up the process in relation to that company.
- (19) The Commission decided that it could accede to Italy's request, and by its Decision 2001/851/EC ⁽⁸⁾ ('the 2001 Decision'), it closed the procedure initiated in respect of the aid awarded to Tirrenia. The aid was declared compatible subject to certain commitments by Italy.
- (20) By its Decision 2005/163/EC ⁽⁹⁾ ('the 2004 Decision'), the Commission declared the compensation granted by Italy to the Tirrenia Group companies other than Tirrenia to be partially compatible with the internal market, partially compatible conditional upon the respect of a number of undertakings by the Italian authorities, and partially incompatible with the internal market. The decision was based on accounting data spanning from 1992 to 2001 and contained certain conditions aimed at ensuring the compatibility of the compensation throughout the duration of the initial Conventions.
- (21) By Judgment of 4 March 2009 in Cases T-265/04, T-292/04 and T-504/04 ⁽¹⁰⁾ ('the 2009 Judgment') the General Court annulled the 2004 Decision.
- (22) By its Decision (EU) 2018/261 ⁽¹¹⁾ ('the 2014 Decision'), the Commission closed the formal investigation procedure as concerns various measures adopted by the Region of Sardinia in favour of Saremar. The appeal lodged by Saremar and the Region of Sardinia against that decision was dismissed by the General Court in 2017 ⁽¹²⁾.
- (23) By its Decision (EU) 2020/1411 ⁽¹³⁾ (the '2020 Tirrenia Group Decision'), the Commission concluded the investigation on the Tirrenia Group companies other than Tirrenia for the period 1992–2008. The Commission concluded that the aid granted for the provision of maritime cabotage transport services constituted existing aid, while most aid granted for the provision of international maritime transport services was compatible with the 2011 services of general economic interest ('SGEI') Framework ⁽¹⁴⁾ (the '2011 SGEI Framework').
- (24) By its Decision (EU) 2020/1412 ⁽¹⁵⁾, (the '2020 Tirrenia/CIN Decision') the Commission closed the formal investigation procedure as concerns the measures granted to Tirrenia and its acquirer CIN, for the period 2009–2020.
- (25) By its Decision (EU) 2021/4268 ⁽¹⁶⁾ and its Decision (EU) 2021/4271 ⁽¹⁷⁾, the Commission closed the formal investigation procedure as concerns the measures granted to Siremar and Toremar and their acquirers, for the period from 2009 onwards.

⁽⁸⁾ Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9).

⁽⁹⁾ Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (OJ L 53, 26.2.2005, p. 29).

⁽¹⁰⁾ Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

⁽¹¹⁾ Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22).

⁽¹²⁾ See Judgment of 6 April 2017 in Case T-219/14 *Regione autonoma della Sardegna (Italy) v Commission*, ECLI:EU:T:2017:266.

⁽¹³⁾ Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 332, 12.10.2020, p. 1).

⁽¹⁴⁾ Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

⁽¹⁵⁾ Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45).

⁽¹⁶⁾ Not yet published in the *Official Journal of the European Union*.

⁽¹⁷⁾ Not yet published in the *Official Journal of the European Union*.

2.1.2. The prolongation of the initial Conventions

- (26) Article 26 of Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions (including the one applicable to Laziomar) which were initially to expire on 31 December 2008 for one year, until 31 December 2009.
- (27) Article 19-ter of Decree Law No 135 of 25 September 2009, converted into Law No 166 of 20 November 2009 ('the 2009 Law'), laid down that, in view of the privatisation of the Tirrenia Group companies, the shareholding of the regional companies (except for Siremar) would be transferred from parent company Tirrenia without any consideration being paid as follows:
- (a) Caremar would initially be transferred to the Region of Campania. The latter would subsequently transfer to the Region of Lazio Caremar's business operating the transport connections with the Pontino archipelago on a standalone basis under the name Laziomar;
 - (b) Saremar would be transferred to the Region of Sardinia; and
 - (c) Toremar would be transferred to the Region of Tuscany.
- (28) The 2009 Law also specified that new Conventions would be agreed between Italy and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in draft Public Service Contracts, to be agreed between the Regions of Sardinia and Tuscany and Saremar and Toremar respectively by 31 December 2009 and between the regions of Campania and Lazio and Caremar and Laziomar respectively by 28 February 2010. The draft new Conventions / Public Service Contracts would be put up for tender with the companies themselves and signed with the buyers upon finalisation of the privatisation of each of those companies ⁽¹⁸⁾.
- (29) To that end, the 2009 Law further prolonged the initial Conventions (including the one applicable to Caremar) from 1 January 2010 until 30 September 2010.
- (30) The 2009 Law also set annual compensation ceilings for the operation of the services as of 2010 (under the prolongation of the initial Conventions, as well as under the new Conventions and Public Service Contracts), at a total of EUR 184 942 251, as follows:

Table 1

Compensation ceilings as of 2010

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

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

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

⁽¹⁸⁾ Article 19-ter, paragraph 10 of the 2009 Law.

- (32) In view of the provisions of Article 19-ter of the 2009 Law, the Region of Lazio has established on 1 December 2010, by means of Regional law No 2/2010, a public limited company for the regional maritime cabotage services, called Laziomar, in order to acquire the branch of Caremar that was operating the Pontino archipelago routes and to subsequently be privatised.
- (33) On 7 March 2011, Caremar sold its branch concerning the Pontino archipelago routes to Laziomar. The latter, commenced operating the routes on 1 June 2011.
- (34) According to the Region of Lazio Decree No 508 of 28 October 2011 ('the Lazio Decree'), guidelines were provided concerning the privatisation process of Laziomar bundled with the conclusion of the new public service contract for the Pontino archipelago routes.
- (35) Further, according to Law No 228 of 24 December 2012, the Region of Lazio entrusted, on the basis of a 'bridge' contract, Laziomar with the obligation to ensure the territorial continuity of the Pontino archipelago routes until its privatisation, under the same conditions. This contract was signed on 12 February 2013 and remained in force until Laziomar's privatisation.

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

- (36) In February 2012, a tender procedure was launched (see Section 2.3.2) to find a buyer for Laziomar bundled together with the new public service contract for the provision of maritime services over a period of 10 years in exchange of public service compensation.
- (37) Following a successful offer in the tender procedure, Compagnia Laziale di Navigazione S.r.l. ('CLN') became the new owner of Laziomar. The sale contract between the Region of Lazio and CLN was signed on 30 December 2013. On 15 January 2014, the Region of Lazio and Laziomar signed the new service contract for the provision of maritime services in the Pontino archipelago.

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

- (38) The following measures have been subject to assessment in the formal investigation procedure opened by the 2011 and 2012 Decisions:
 - (a) Compensation for the provision of services of general economic interest ('SGEI') under the prolongation of the initial Conventions (*measure 1*);
 - (b) Potential misuse of rescue aid by Tirrenia and Siremar (*measure 2*);
 - (c) The privatisation of the companies of the former Tirrenia Group ⁽¹⁹⁾ (*measure 3*);
 - (d) Compensation paid for the operation of SGEI under the new Conventions / Public Service Contracts (*measure 4*);
 - (e) The berthing priority (*measure 5*);
 - (f) The measures laid down by the 2010 Law converting Decree Law 125/2010 (*measure 6*);
 - (g) Additional measures adopted by the Region of Sardinia in favour of Saremar (*measure 7*);
- (39) By its 2014 Decision the Commission closed the formal investigation procedure as concerns the measures adopted by the Region of Sardinia in favour of Saremar referred to above as Measure 7 with the exception of one measure ⁽²⁰⁾.

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

- (40) This Decision only deals with measures 1, 3, 4, 5 and 6 as listed in recital 38 in so far as they involve Laziomar and CLN. Those measures are described in more detail in the following sections.

⁽¹⁹⁾ This includes the deferred payment by CIN of part of the purchase price for its acquisition of the Tirrenia business branch and several alleged additional aid measures in the context of the privatisation of the Siremar business branch (e.g. counter-guarantee and capital increase by the State for CdI, the entity that initially acquired the Siremar business branch).

⁽²⁰⁾ In particular, the Bonus Sardo – Vacanza project, which forms part of Measure 7, was not assessed in the 2014 Decision and will also not be assessed in this Decision.

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

2.3.1.1. The public service obligations

- (41) Article 1 of the initial Convention with Caremar provided for five-year plans to detail the ports to be served, the type of vessels to be used and the required frequency of the service entrusted to Caremar (and subsequently to Laziomar following the transfer of the Pontine routes to the Region of Lazio on 1 June 2011).
- (42) According to Italy, the last five-year plan for Caremar (at the time) formally approved is the one relating to the period 2000–2004, whereas a plan for the period 2005–2008 was drawn up but never formally approved by the competent ministries. Instead, *ad hoc* decisions have been taken by the government with a view to bringing the services more closely into line with the needs of the local communities, without however making substantive changes to the public service system.
- (43) Based on the initial Convention, as prolonged, with subsequent legal acts mentioned in recitals 26 to 33, Laziomar operated the following routes all year round:
- On the Ponza – Formia route (**Line T1**) Laziomar operated the only connection to this line. It ensured two daily connections providing mixed services (passengers, vehicles and goods). The vessel, leaving the island at 5.30 a.m. guaranteed the residents the connection with the mainland for study and work reasons with the last return at 17.30 p.m.;
 - On the Ponza – Formia route (**Line A2**); Laziomar operated also the only high-speed passenger service with one daily connection and maintained the vessel on the island overnight;
 - On the Anzio – Ponza route (**Line A1**) Laziomar ensured a daily high-speed passenger service in the high season from Monday to Saturday. The service was however increased on Sundays and holidays and was justified on social and economic development grounds (in particular because tourism is basically the only source of income of the island). One competitor, Vetur, also operated on the same line a high-speed passenger service during the high season;
 - On the Ventotene – Formia route (**Line T2**) Laziomar ensured all year round a daily service using a mixed vessel. The mixed service was the only regular connection for transport of passengers, vehicles and goods all year round;
 - On the Ventotene – Formia route (**Line A3**) Laziomar operated also the only high-speed connection. It departed at 6.45 a.m., thus enabling the residents to travel to the mainland for professional or study reasons, and remained overnight on the island to ensure permanence in case of a medical emergency.

2.3.1.2. Budget and duration

- (44) Table 2 shows the annual compensation paid to Laziomar by Italy for the period 2011–2013:

Table 2

Compensation granted for 2011–2013 (EUR)

Year	Compensation paid (EUR)
2011	8 601 187
2012	13 780 506
2013	12 696 006

- (45) The initial Convention provides for the annual public service compensation to be paid as follows: an initial advance payment is made in March of each year, equivalent to 70 % of the compensation paid the previous year. A second payment, made in June, is equal to 20 % of the compensation. The difference between the amounts paid and the

shortfall between operating costs and revenue during the year in progress constitutes the balance, which is paid by 30 November. If it turned out that Laziomar has received a sum greater than the net cost of the services provided (revenue minus losses), the initial Convention provides that Laziomar is required to reimburse the difference. ⁽²¹⁾

— Compensation granted in 2011–2013

- (46) Presidential Decree No 501 of 1 June 1979 ('Decree No 501/79') specifies the various elements (revenues and costs) which enter into the calculation of the subsidy paid to maritime public service operators. Furthermore, Law No 856 of 5 December 1986 ('Law 856/86') provided for certain alterations to the system of maritime public service obligations in Italy. Regarding the connections with minor and major islands, Article 11 thereof amended the criteria for the calculation of the public service compensation. Indeed, the subsidy had to be calculated based on the difference between the revenues and the costs of the service as determined with reference to average and objective parameters, and had to include a reasonable return on invested capital. Article 11 also lays down that the public service contracts had to include the list of the subsidised routes, the frequency and the types of ships to be used. The subsidies were to be approved by the responsible Ministers. The principles laid down in Presidential Decree No 501/79 and Law No 856/86 were reflected in the initial Conventions.
- (47) As from 2010, the compensation for the operation of the SGEI has been determined by the application of a new methodology laid down in the CIPE ⁽²²⁾ Directive of 9 November 2007 titled 'Criteria for the definition of the public service obligations and the fare dynamics in the sector of maritime cabotage of public interest' ('the CIPE Directive') ⁽²³⁾. According to the preamble, the CIPE Directive was issued in view of the privatisation of the public companies operating maritime services under a public service regime ⁽²⁴⁾. The provisions of the CIPE Directive were applied in respect of the services provided by the companies of the Tirrenia Group as of 2010, even prior to the entry into force of the respective new Conventions and Public Service Contracts following the respective privatisations.
- (48) The method laid down in the CIPE Directive allows the companies operating the maritime public service to make an appropriate return. The rate of return on capital is calculated on the basis of the weighted average cost of capital ('WACC').
- (49) The required return to equity ⁽²⁵⁾ is calculated using the Capital Asset Pricing Model (the 'CAPM'). On the basis of the capital asset pricing model the cost of equity is derived as a function of (i) the risk-free rate; (ii) the Beta (an estimate of risk profile of the company relative to equity market); and (iii) the equity risk premium assigned to the equity market.
- (50) In particular, the cost of equity would be calculated by applying a premium for bearing extra risk to the rate of return on risk-free activities. This premium is calculated as the risk premium of the market multiplied by its Beta, which measures how risky a specific activity is relative to the market.
- (51) According to the CIPE Directive, the rate of return on risk-free activities corresponds to the average gross yield on benchmark ten-year bonds with reference to the previous twelve months for which available data exists.
- (52) The CIPE Directive sets a 4 % market risk premium. However, in case of a service that is operated on a non-exclusive basis, the presumably greater risk borne by the operator is remunerated by the addition of an extra 2,5 % to the market risk premium.

⁽²¹⁾ After 25 November 2010, by decision of the Interdepartmental Conference on the establishment of the annual subsidy set up under Article 11 of Law No 856/1986 between the Ministry of Infrastructure and Transport, the Ministry of Economy and Finance, and the Ministry of Economic Development (the 'Interdepartmental Conference'), any amount of overcompensation is deducted from future advance subsidy payments.

⁽²²⁾ Comitato Interministeriale per la Programmazione Economica.

⁽²³⁾ Gazzetta Ufficiale della Repubblica Italiana ('GURI') No 50 of 28 February 2008.

⁽²⁴⁾ As pursuant to Article 1, letter 999 of Law No 296 of 27 December 2006 and Article 1, letter (e) of Decree Law 430/1997.

⁽²⁵⁾ The desired rate of return for an equity investor given the risk profile of the company and associated cash flows.

- (53) In practice, the amount of compensation paid to Laziomar can however not exceed the ceiling of EUR 10 030 606 per year as laid down by the 2009 Law (see recital 30). Although the 2009 Law caps the annual compensation paid to all Tirrenia companies for the operation of the maritime services subject to the public service regime, the CIPE Directive also contains certain safeguards that enable those operators to sufficiently cover their operating costs. In view of this, as shown in Table 2, the compensation paid in 2012 and 2013 has been increased to cover the totality of the public service cost in those years.
- (54) In particular, according to the CIPE Directive the scope of the services, the maximum fares set out by the new public service contract and the compensation actually granted must be defined such as to grant the service provider coverage of the entirety of admissible costs. The following formula is applicable:

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

where:

- $VA(RSP)$ is the discounted value of the compensation for the discharge of the public service obligations;
 - $VA(AI(X))$ is the discounted value of other revenue (fare receipts and other);
 - $VA(CA)$ is the discounted value of the admissible operating costs, debt repayment and return on invested capital.
- (55) In case the above equation does not hold, the scope of the subsidised activities could be reduced, or alternatively the service organisation (e.g. type of ships) would be reviewed or the fare constraints would be modified.
- (56) Furthermore, the fare ceiling applicable to each service, net of taxes and port dues, is adjusted every year on the basis of a price-cap formula as follows:

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

where:

- ΔT is the annual percentage change in the fare ceiling;
 - ΔP is the rate of inflation for the year of reference;
 - X is a real annual rate of adjustment of the fare ceiling, laid down in the public service contract, which remains constant over the duration of the contract.
- (57) The CIPE Directive also specifies that the fare ceiling may be adjusted to reflect variations in fuel costs, taking standard publicly available prices as reference.

2.3.2. Laziomar's privatisation

- (58) On 13 February 2013, the Region of Lazio published on its website the call for tenders for the sale of Laziomar and the award of a public service compensation for the discharging of public service obligations in the maritime routes identified in recital 43 ⁽²⁶⁾. This notice was also published in the *Official Journal of the European Union* ⁽²⁷⁾, in the Official Gazette of the Italian Republic ⁽²⁸⁾ and in four daily national and local Italian newspapers.
- (59) Italy chose the restricted tender procedure referred to in Article 55(6) of the Code of Public Contracts – Legislative Decree No 163/2006 (*il Codice dei Contratti pubblici*). The chosen award criterion was that of the most economically advantageous offer.
- (60) In order to encourage the broadest possible participation in the procedure, the call for tenders expressly allowed bidders to take part in joint form through temporary groupings of tenderers, consortia or European Economic Interest Groupings ('EEIGs').

⁽²⁶⁾ www.regione.lazio.it

⁽²⁷⁾ OJ No S/149, 4 August 2012.

⁽²⁸⁾ GURI, No 91, 6 August 2012.

2.3.2.1. The sale procedure and final award

- (61) Following the publication of the call for tenders, on the expiry of the deadline, eight parties expressed an interest to participate in the tender procedure (namely: Navigazione Libera del Golfo S.r.l., Carpoint Motorsport S.p.A., Blu Navy Cruise & Tour S.r.l., Traghetti Lines, CLN, Navigazione Generale Italiana S.p.A., Vetur S.r.l. and Ustica Lines, the latter now operating under the name Liberty Lines) and provided the information requested for the qualitative selection of the first stage of the procedure. Seven of these participants, with the exclusion of Blu Navy Cruise & Tour S.r.l., were admitted to the subsequent stage and invited to submit a tender on 16 May 2013.
- (62) The invitation to submit a tender contained the new draft 10-year contract to be signed between the successful bidder and the Region of Lazio and more detailed information concerning the tendering procedure. Particularly, the invitation letter confirmed that the most economically advantageous offer would be chosen for the service contract with price scoring 30 points and technical qualifications 70 points. As regards the price for the sale of Laziomar, the invitation letter mentioned a fixed amount corresponding to EUR 2 272 000, calculated on the basis of an independent study, which had assessed the total value of Laziomar's assets (see recitals 66 and 67). This price was non-negotiable and was therefore not subject of the financial offer of the tenderers.
- (63) For this reason, all potential tenderers were requested to include the above fixed amount for the sale of Laziomar in their financial offer, while the Region of Lazio would choose the most economically advantageous offer for the tender as a whole based on the price and other, mainly technical, criteria concerning the service, as set out in the invitation letter (see recital 62).
- (64) At the expiry of the deadline, CLN submitted its bid, whose specifications were examined and the outcome was positive. No other bid was submitted.
- (65) The tender was therefore awarded to CLN both as regards the privatisation of Laziomar business and the operation of the maritime services (see Section 2.3.3).

2.3.2.2. The sale contract

- (66) The sale contract was concluded on 30 December 2013 and defines the transfer of Laziomar shares to CLN for the fixed price of EUR 2 272 000, on the basis of an independent expert evaluation commissioned by the Region of Lazio.
- (67) The amount mainly reflects the value of the fixed tangible assets (consisting of four vessels and industrial and commercial equipment) and the value of ticketing for the island of Ventotene, as appeared in the balance sheet of the company at 1 June 2011.
- (68) In accordance with Article 4 of the sale contract, CLN is obliged to notify the Region of Lazio of any future sale of the Laziomar shares to third parties in which case CLN would however remain jointly responsible with the new purchaser of the Laziomar, with respect to the obligations of the service contract.

2.3.2.3. Proceedings at national level

- (69) The result of the tender procedure awarding the Laziomar business and the public service contract to CLN was the subject of a dispute at the Regional Administrative Court of Lazio ("TAR").
- (70) Vetur S.r.l. ("Vetur"), operating also the Anzio-Ponza route with hydrofoils (Line A1) brought an application for interim relief against the legitimacy of the tender procedure before TAR, which was rejected by Order No 2995/2013. The same court also ruled on the merits and rejected Vetur's complaint by Judgement No 467/2014. The Council of State confirmed the above rulings on appeal with Judgement No 5421/2018.

2.3.3. The new service contract between the Region of Lazio and Laziomar

2.3.3.1. The beneficiary

- (71) As mentioned in recital 64, CLN submitted a bid for the new public service contract. Following the successful tender, Laziomar (acquired by CLN but retained its separate legal identity) signed the new public service contract with the Region of Lazio for the operation of maritime routes on 15 January 2014.

2.3.3.2. The routes

- (72) Laziomar provides passenger, mixed (passenger, vehicles and freight) and only freight (goods and special goods) services under the public service regime on multiple cabotage routes as follows:

Table 3

Network of routes operated by Laziomar under the new service contract

Formia – Ponza (ferry – mixed service) – Line T1
Formia – Ventotene (ferry – mixed service) – Line T2
Terracina – Ponza (ferry – mixed and freight ⁽¹⁾ services) – Line T3
Terracina – Ventotene (ferry – freight service) – Line T4
Anzio – Ponza (hydrofoil – passenger service) – Line A1
Formia – Ponza (hydrofoil – passenger service) – Line A2
Formia – Ventotene (hydrofoil – passenger service) – Line A3
⁽¹⁾ Some sailings on this Line are freight only (see Table 9).

2.3.3.3. Duration

- (73) The new service contract between the Region of Lazio and Laziomar has a duration of ten years (2014–2024).

2.3.3.4. The public service obligations

- (74) The public service obligations imposed on Laziomar concern among others the ports served, the type and capacity of the vessels assigned to the maritime routes operated, the frequency of service and the maximum fares.

2.3.3.5. The compensation provisions and final award

- (75) The annual base remuneration on the basis of the tender procedure for the compensation under the new contract for the discharging of public service obligations on the maritime routes identified under recital 43 was set by the Region of Lazio at EUR 14 300 550, subject to downwards revision. The amount was finally fixed at EUR 12 752 074 (totalling EUR 127 520 740 over the 10-year contract period).
- (76) Pursuant to Article 6 of the contract, the Region of Lazio can adjust the compensation, upwards or downwards, to take account of changes concerning the actual sailings made every year. The compensation level is not affected if the number of sailings made every year is higher or lower than the contractually agreed number by 3 % or less. In case of changes, upwards or downwards, by more than 3 %, the compensation is adjusted accordingly, by multiplying the number of extra or fewer sailings by the unit price, as indicated in the bid. In 2017, the service contract was amended to adjust the compensation level at the amount of EUR 13 524 536.
- (77) This amount of compensation is determined on the basis of the methodology laid down by the CIPE Directive (see recitals 47 to 57). The safeguards laid down by the CIPE Directive have been reflected in the new service contract.

- (78) The service contract provides for a payment of compensation that does not exceed what is necessary to cover the net costs incurred for the fulfilment of the public service obligations (economic-financial balance). In case of deviations from this contractual equilibrium, the service contract provides in Article 25 for a rebalancing mechanism that evaluates all the parameters linked to the payment of the compensation. Should, therefore, as a result of a material change ⁽²⁹⁾ in the economic parameters on which it is based, the compensation amount proves insufficient to cover all costs incurred in the provision of the service, the new service contract allows for a revision of the key parameters of the compensation namely: (i) the fare system; (ii) the level of the public services offered; (iii) the level of the annual price cap; and (iv) the capital contributions for investments.
- (79) Under Article 4 (paragraphs 4 to 6) of the service contract the compensation paid to the operator shall be reduced by 80 % in the case of interruption of services because of employees' strikes and 30 % in the case of other unforeseen events, whereas failure to perform the services in circumstances other than strikes or unforeseen events would result in the payment of penalties, pursuant to Article 9 of the service contract.
- (80) Pursuant to Article 22 of the service contract, the operator is required to implement a system of technical, economic and management monitoring, according to which the profit and loss annual accounts related to the service provided on the basis of the service contract are sent to the regional authority for verification.
- (81) Pursuant to Article 4(2) of the service contract, the annual compensation to be paid to Laziomar was estimated to amount to EUR 12 752 074. Nevertheless, according to Article 4(3) of the service contract, the actual price paid to Laziomar is determined as the outcome of the production actually carried out (i.e. price per mile for each route), taking into account the risks involved (commercial and industrial) as laid down in the contract (e.g. compensation reduction in case of the company not sailing, penalties in case of services being disconnected etc.).
- (82) Table 4 shows the compensation fixed on the basis of the tendering procedure over the whole contract period and the compensation actually paid to Laziomar for the period 2014–2019, following amendments concerning the sailing production, pursuant to Article 6 of the service contract.

Table 4

Compensation fixed and paid to Laziomar under the new service contract 2014–2019

Year	Compensation fixed (EUR)	Compensation paid (EUR)
2014	12 752 074	13 374 589
2015	12 752 074	13 376 167
2016	12 752 074	13 330 304
2017	12 752 074	13 370 070
2018	12 752 074	13 356 282
2019	12 752 074	13 366 510

⁽²⁹⁾ Article 25(2) states: 'A positive or negative deviation in the economic and financial balance can be caused by:

- (a) management inefficiencies;
- (b) incorrect communication by Laziomar of the services actually provided for determining the annual price;
- (c) exceptionally unfavourable market conditions beyond Laziomar's control, resulting in a deterioration in operating conditions and thus higher operating costs or lower fare revenues, that lead to a drop in the operating result of more than 10 %;
- (d) financial charges;
- (e) amendments to legislative and regulatory provisions laying down new conditions for the performance of the service provided for in the contract;
- (f) new investment required by the Region to be carried out with public resources provided for by Article 19;
- (g) change in the fare system referred to in Article 3;
- (h) exceptionally favourable market conditions that lead to an increase in the operating result of more than 10 %;
- (i) increases in the unit cost of staff as a result of obligations under the CCNL [National Collective Labour Agreement] and additional company bargaining;
- (j) commercial policy applied by Laziomar up to the maximum levels laid down in Annex G to this contract'. (Commission's unofficial translation).

2.3.4. The berthing priority

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

2.3.5. The measures laid down by the 2010 Law

- (84) The 2010 Law laid down the possibility for the undertakings of the former Tirrenia Group to use, on a temporary basis, the financial resources already committed ⁽³⁰⁾ to the upgrade and modernisation of the fleet to cover pressing liquidity needs instead. The undertakings of the former Tirrenia Group that made use of this possibility were however required to replenish these dedicated funds, so that they could still undertake the necessary upgrades for their ships. These upgrades were necessary to meet new international safety standards following the 1996 Stockholm Agreement. ⁽³¹⁾
- (85) In particular, drawing from two facilities ⁽³²⁾, EUR 23 750 000 were set aside to pay for the upgrades of the entire Tirrenia Group. Laziomar however did not make any use of these facilities (see recital 132).
- (86) In addition, Article 1 of the 2010 Law also laid down the following:
- (a) the initial Conventions are prolonged as from 1 October 2010 until the end of the privatisation process of Tirrenia and Siremar (see also recital 31);
 - (b) Article 19-ter of Decree Law 135/2009, converted with modifications into the 2009 Law is amended by the introduction of paragraph 24 bis. According to that paragraph, all official acts and operations in the implementation of the provisions of paragraphs 1-15 of the 2009 Law benefit from fiscal exemption. Those paragraphs relate to the liberalisation of the maritime cabotage sector through the privatisation of the Tirrenia group, including its preparatory step, i.e. the transfer of the regional companies to the respective regions;
 - (c) in order to ensure the continuity of the public service and to support the privatisation process of the former Tirrenia group companies, the regions in question may make use of the resources of the *Fondo Aree Sottoutilizzate* ('FAS') ⁽³³⁾ pursuant to CIPE Directive No 1/2009 of 6 March 2009. ⁽³⁴⁾

2.4. Infringement procedure No 2007/4609

- (87) Following earlier exchanges between the Commission's services and Italy, the Commission's Director-General responsible for energy and transport on 19 December 2008 sent a request for information to Italy. This request concerned among other things, an overview of the public service routes at that time and the public service remit that Italy envisaged under the proposed new Conventions. Furthermore, Italy was asked to provide more details about the privatisation plans for the Tirrenia Group.
- (88) In its letter of 28 April 2009, Italy provided a detailed reply to the Commission's request of 19 December 2008. In that letter, among other things Italy stated the following:
- (1) the extension of the initial Conventions until 31 December 2009 was necessary to achieve the liberalisation of the maritime cabotage sector in Italy through the privatisation of the Tirrenia Group;

⁽³⁰⁾ As laid down by Article 19, paragraph 13a of Decree Law 78/2009, converted into Law 102/2009 ('Law 102/2009'), and by paragraph 19 of Article 19-ter of the 2009 Law.

⁽³¹⁾ These safety standards were then detailed in the Council Directive 98/18/EC of 17 March 1998, transposed by Legislative Decree No 45 of 4 February 2000, of Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003, transposed by Legislative Decree No 52 of 8 March 2005 and of Directive 2003/25/EC of the European Parliament and of the Council, transposed by Legislative Decree No 65 of 14 March 2005.

⁽³²⁾ All the funds (i.e. EUR 7 000 000) provisioned by paragraph 19 of Article 19-ter of the 2009 Law and EUR 16 750 000 from the funds provisioned by Law 102/2009.

⁽³³⁾ The Fund for Under-utilised Areas (*Fondo Aree Sottoutilizzate*) is a national fund that supports the implementation of Italian Regional policy. Its resources are mainly earmarked for regions identified as such by the Italian authorities.

⁽³⁴⁾ *Gazzetta Ufficiale della Repubblica Italiana*, No 137 of 16 June 2009.

- (2) the public service compensation granted to the Tirrenia Group was necessary to ensure territorial continuity with the islands through maritime links which were not satisfactorily provided by private operators on the market;
 - (3) a thorough rationalisation process of the routes had been concluded on 10 March 2009. This process took into account the relevant social, employment and economic aspects, as well as the need to safeguard essential links for territorial continuity and included a consultation of the six Regions concerned. This rationalisation would result in the reduction of the net cost of the public service of approximately EUR 66 million and the redundancy of some 600 crew members for the entire Tirrenia Group. Italy also recalled that the 2009 rationalisation complemented earlier efforts (in 2004, 2006 and 2008) to reduce the services operated by the Tirrenia Group;
 - (4) the objectives were to (i) maintain the links necessary to ensure territorial continuity with and between islands and the mainland, and the right to health, study and mobility; (ii) rationalise links where there were private operators who provided the same connections over the same time period, with similar guarantees of quality and continuity; and (iii) rationalise summer and high-speed connections which transport only persons;
 - (5) in the letter, Italy gave an overview of the routes operated by the companies of the Tirrenia Group during 2008 and the reduced number of routes the Tirrenia Group companies would operate in 2009. According to Italy, the latter routes would form the basis for the new Conventions that were to be concluded with the new owners of the Tirrenia Group companies.
- (89) On 21 December 2009, the Commission's Director-General responsible for energy and transport sent a letter to Italy noting *inter alia* that in the light of the radical overhauling of the maritime cabotage sector in Italy, and because of the sizable social impact the privatisation would have entailed, if the tenders were carried out on a simple public service contract basis, tendering out the shipping companies endowed with such contracts was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the criterion of non-discrimination among Community ship-owners laid down in Council Regulation (EEC) No 3577/92 ⁽³⁵⁾ ('the Maritime Cabotage Regulation'). The Commission notes that the Maritime Cabotage Regulation does not require Member States to privatise their maritime transport companies but only to liberalise that specific market.
- (90) On 29 January 2010 ⁽³⁶⁾, the Commission sent a letter of formal notice regarding the wrong implementation of the Maritime Cabotage Regulation. In that letter, the Commission recalled that that Regulation requires that, whenever a Member State concludes public service contracts or imposes public service obligations, it is to do so on a non-discriminatory basis in respect of all Union shipowners. The Article 4(3) of that Regulation provides that existing public service contracts may remain in force up to the expiry date of the relevant contract. However, the Commission noted that the companies of the Tirrenia Group continued to operate maritime transport services after the expiry of the respective public service contracts (the initial Conventions). In particular, those Conventions were due to expire at the end of 2008 but were repeatedly prolonged by Italy. Therefore, the Commission invited Italy to present its observations.
- (91) Also on 29 January 2010, the Commission's Director-General responsible for energy and transport replied to Italy's letter of 22 January 2010. The Director-General emphasised that his reply only concerned the compliance with the Maritime Cabotage Regulation and not State aid issues. Against this background, the Director-General indicated that the justifications provided concerning certain routes were sufficient to remove the doubts expressed earlier. The Director-General recalled that public service contracts can only cover routes for which there is market failure.
- (92) On 29 March 2010, Italy replied to the Commission's letter of formal notice of 29 January 2010.
- (93) On 10 September 2010, Italy informed the Commission during an *ad hoc* meeting, that the competitive procedure for the contract involving among others the Pontino archipelago routes operated by Caremar at the time was also delayed. Subsequently, Law No 163 of 1 October 2010 further prolonged the initial Conventions until the completion of the privatisation processes of Tirrenia and Siremar (see also recital 31).

⁽³⁵⁾ 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).

⁽³⁶⁾ The letter of formal notice was adopted on 28 January 2010 but only notified to Italy the next day.

- (94) In light of these developments, the Commission sent a complementary letter of formal notice on 24 November 2010. In this letter, the Commission stated the following:
- (a) the initial Convention of among others Caremar was extended automatically and without any competitive procedure;
 - (b) while the public service contracts in question continued to be applied, no competitive procedure had been completed, for Caremar among others;
 - (c) it reserved its right to issue a reasoned opinion if necessary (taking into account any comments Italy might make).
- (95) On 21 June 2012, the Commission adopted a reasoned opinion concerning the delay of privatisation of three companies (Caremar, Laziomar and Saremar) of the former Tirrenia Group. Since the tender procedures for the other three companies (Tirrenia, Toremar and Siremar) had been completed in the course of 2011 ⁽³⁷⁾ these companies were not covered by the reasoned opinion. The Commission noted that Italy had not put in place competitive procedures for the award of public service contract for maritime cabotage operated by among others Laziomar, more than three years after the normal expiry of the respective initial Conventions. Those Conventions had been extended automatically and indefinitely thereby preventing other Union ship-owners from competing for the award of these contracts.
- (96) On 8 August 2012, Italy replied to the reasoned opinion stating that tender notices for the award of the companies endowed with new public service contracts were or would be published in the *Official Journal of the European Union*. In particular, for Laziomar the notice was sent for publication on 1 August 2012.
- (97) On 14 January 2014, CLN became the new owner of Laziomar and signed a ten-year public service contract for links with the Pontino archipelago.
- (98) By letter of 15 July 2016, Italy informed the Commission that the privatisation of all companies of the former Tirrenia Group had been completed. On 8 December 2016, the Commission decided to close the infringement procedure.

3. GROUNDS FOR INITIATING AND EXTENDING THE PROCEDURE

3.1. The prolongation of the initial Convention between Laziomar and Italy ⁽³⁸⁾

3.1.1. Observance of *Altmark* and existence of aid

- (99) In its 2011 Decision, the Commission took the preliminary view that the definition of the public service obligations included in the initial Conventions with all the companies of the former Tirrenia group had not been sufficiently clear and hence did not allow the Commission to definitely conclude whether it contained manifest error. In particular, the Commission did not at that stage have a complete view on the actual obligations imposed for the operation of the routes in among others the Pontino archipelago as compared to the services offered by competitors on some of those routes.
- (100) The Commission took the preliminary view that the second condition of the *Altmark* judgment ⁽³⁹⁾ was observed as the parameters at the basis of the calculation of the compensation had been established in advance and observed the transparency requirements. In particular, the Commission noted that these parameters are described in the initial Conventions (for compensation concerning the year 2009) and in the CIPE Directive (for compensation from 2010 onwards).

⁽³⁷⁾ Even if the formal transfer of ownership of Tirrenia, Toremar and Siremar only occurred in 2012.

⁽³⁸⁾ The 2011 Decision contains grounds for initiating the procedure in respect of among others aid paid to the six companies of the former Tirrenia group on the basis of the initial Conventions. At the time of adoption of the 2011 Decision (5 October 2011), the maritime services on the Pontino archipelago routes had just been transferred by Caremar to Laziomar (1 June 2011). Although the 2011 Decision does not make an explicit reference to Laziomar, the Commission's preliminary assessment of the initial Convention covering the said routes, applies equally to Laziomar, as the new operator of those routes.

⁽³⁹⁾ See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

- (101) The Commission however considered that the third condition of the *Altmark* judgment did not seem to be observed and that the operators might have been over-compensated for the performance of the public service tasks. In particular, the Commission expressed doubts as to the proportionality of the compensation paid to the companies of the former Tirrenia group as from 2009, given the absence of a clear definition of the obligations imposed on those companies. Likewise, the Commission doubted whether the risk premium of 6,5 %, which applies from 2010 onwards, reflects an appropriate level of risk since *prima facie* the operators did not seem to assume the risks normally borne in the operation of such services.
- (102) The Commission also took the preliminary view that the fourth *Altmark* condition was not observed inasmuch as the prolongation of the initial Conventions had not been tendered out. The Commission moreover noted that it had not received any evidence to support the argument that the operators in fact provided the services at stake at the least cost to the community.
- (103) In the 2011 Decision, the Commission therefore came to the preliminary conclusion that the public service compensation paid to the operators during the prolongation of the initial Conventions constitutes State aid within the meaning of Article 107(1) TFEU. In addition, the Commission took the view that this aid should be considered as new aid.

3.1.2. Compatibility

- (104) In the 2011 Decision, the Commission took the preliminary view that the public service compensation for the years 2009–2011 falls outside the scope of both the 2005 SGEI Decision ⁽⁴⁰⁾ and the 2005 SGEI Framework ⁽⁴¹⁾. The Commission therefore assessed this measure directly under Article 106(2) TFEU and found it had doubts on whether the applicable compatibility conditions were fulfilled.
- (105) In the 2012 Decision, the Commission noted that on 31 January 2012, a new SGEI package consisting of the 2011 SGEI Decision ⁽⁴²⁾ and 2011 SGEI Framework ⁽⁴³⁾ had entered into force. The Commission however took the preliminary view that the public service compensation under the prolongation of the initial Conventions could not be considered compatible with the internal market and exempted from the notification requirement under the 2011 SGEI Decision.
- (106) The 2010 Law provided for the prolongation of the initial Conventions from 30 September 2010 up to the end of the privatisation process. As a result, the compensation received by Laziomar as of 1 June 2011 until its privatisation could be assessed on the basis of the 2011 SGEI Framework.

3.2. Laziomar's privatisation

- (107) In the 2012 Decision, the Commission expressed doubts that the tender procedure for the sale of Laziomar had been sufficiently transparent and unconditional so as to ensure that the sale took place at market price.
- (108) The Commission considered that certain conditions imposed in the privatisation might have restricted the number of bidders and/or influenced the sale price. The Commission restated its established practice concerning sales of assets of State owned undertakings by the State (or in this case imputable to the State): non-economic considerations which a private seller would not make, such as public policy reasons, employment requirements or regional development, point to the existence of State aid if they impose onerous obligations on the potential buyer and are therefore liable to reduce the sale price.

⁽⁴⁰⁾ 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).

⁽⁴¹⁾ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

⁽⁴²⁾ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

⁽⁴³⁾ Communication from the Commission: European Framework for State aid in the form of public service compensation.

- (109) The Commission also considered that the so called *financial requirements* as imposed in the Laziomar tender effectively disrupted the tender by restricting potential bidders to existing maritime companies, given that in the present case, the company itself, endowed with the public service contract, was put up for sale. ⁽⁴⁴⁾
- (110) Likewise, the Commission held that the *technical offers* were scored, carrying out a significantly higher weight than the economic offers (see recital 62), whilst the shares' price was fixed by the public authorities.
- (111) For the above reasons, the Commission preliminarily concluded that the privatisation procedure of Laziomar had not been sufficiently transparent and unconditional so as to ensure by itself that the sale took place at market price and obtained the highest price for the shares. The Commission could therefore at that stage not exclude that an economic advantage was conferred to the buyer.
- (112) The Commission also considered, on the basis of the information available when issuing its 2012 Decision, that any aid that might have arisen in the course of the privatisation process would be incompatible.

3.3. The new service contract between the Region of Lazio and Laziomar

3.3.1. Observance of *Altmark*, existence of aid and compatibility

- (113) In the 2012 Decision, the Commission took the preliminary view that the compensation paid to Laziomar did not fulfil the criteria laid down in the *Altmark* judgment and therefore amounted to aid within the meaning of Article 107(1) TFEU. The Commission came to this conclusion given that: (i) competitors who seemed to be offering similar services were present at least on certain routes operated by Laziomar and there was insufficient information available that would enable the Commission to conclude on whether the SGEI reflected a real public service need which could not be met by market forces alone; (ii) the calculation of the compensation pursuant to the CIPE Directive appeared to have resulted in the operator being overcompensated for the provision of the public service for the same reasons as expressed in the 2011 Decision; and (iii) the fourth criterion of the *Altmark* judgment was seemingly not observed, given that the public service was tendered out on the condition that the successful bidder would acquire the Laziomar company as a whole. The Commission considered that had the public service contract been tendered out without the purchase requirement, it could have resulted in a lower cost for the community.

3.3.2. Compatibility

- (114) With respect to the compatibility of the compensation to Laziomar, the Commission noted that, on the basis of the information provided by the Italian authorities, the 2011 SGEI Decision appeared not to be applicable. In any event, the Commission could not conclude on the application of the 2011 SGEI Decision because at that stage the signed contract had not been provided. The Commission did not receive any information (e.g. number of passengers transported in the two previous years to that of the entrustment) to examine the remaining compatibility conditions of the 2011 SGEI Decision. The Commission then assessed the aid based on the 2011 SGEI Framework but found that it had doubts on whether the compatibility conditions of that Framework were fulfilled and invited Italy to demonstrate that this was the case.

3.4. The berthing priority

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

⁽⁴⁴⁾ The invitation to submit a tender provided that the total turnover in the maritime transport sector of the potential bidders in the previous three years could not be below EUR 60 million.

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

3.5. The measures laid down by the 2010 Law

- (117) In the 2011 Decision, the Commission took the preliminary view that all measures laid down by the 2010 Law constituted State aid in favour of the companies of the former Tirrenia Group, including Laziomar. These included: (1) the possible use for liquidity purposes of the funds earmarked for the upgrade of the ships; (2) the fiscal exemptions related to the privatisation process; and (3) the possible use of FAS resources. The Commission invited Italy to clarify if and how each of these measures was necessary to provide the public service.
- (118) The Commission also took the preliminary view that these measures likely constituted operating aid reducing the costs that Laziomar, and the other companies of the former Tirrenia Group, would otherwise have to bear themselves and thus those measures should be considered as incompatible with the internal market.

4. COMMENTS FROM ITALY

4.1. On the public service obligations and the competitive environment

- (119) Italy provided a list of routes (supported by the corresponding legal documentation) operated by Caremar and subsequently by Laziomar that are subject to public service obligations, including the seasonal frequency and timetables, the competitive environment and the reasons leading to these public service obligations.
- (120) As regards the existence of a genuine SGEI, Italy noted that the above public service obligations were laid down in order to maintain the territorial continuity and the connection of the mainland with the islands and ensure the supply of goods, including special goods, necessary for the proper function of public and social services for the islands. That service also contributes to the economic development of the islands, guarantees the essential mobility needs of the islands' communities throughout the year and ensures that the constitutional right to territorial continuity is respected ⁽⁴⁵⁾.
- (121) As far as the competitive environment is concerned, Italy submitted information showing that Laziomar is the only operator sailing the lines throughout the year, whereas there has been competition on some routes only during the high season. That said, Italy is of the view that the service offered by Laziomar cannot be substituted and that the guarantee for territorial continuity could not have been achieved by the market forces alone.

4.2. On the privatisation of Laziomar

4.2.1. On the sale price of Laziomar

- (122) According to Italy, the privatisation of Laziomar involved the transferring of the entire share capital of the company via a public tender procedure launched by the Region of Lazio. This procedure additionally entailed the simultaneous entrustment of maritime public services in the Pontino archipelago for a period of 10 years, in order to maintain territorial continuity.
- (123) The Region of Lazio commissioned an independent expert evaluation (see recitals 66 and 67) to assess the legal and economic issues of Laziomar's sale. According to Italy, this evaluation sets out clearly and concisely the procedures followed to determine the market value of Laziomar's share capital.

⁽⁴⁵⁾ According to Italy, the need for territorial continuity is paramount in particular for the island of Ponza, which is located about 27 nautical miles from Terracina and 36 nautical miles from Anzio, and has fewer than 3 400 inhabitants. Similar consideration, in its view, should also apply as regards the island of Ventotene, which has fewer than 800 inhabitants.

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

- (124) Italy stresses that the procedures were conducted in compliance with the legal principles of transparency and non-discrimination. It defended that all seven parties that were admitted to the next stage of the tender procedure were given the relevant information necessary to submit their bid, including the 'tender regulations' and annexes, the 'service contract' and annexes and the 'contract for the transfer of the shares' and annexes.
- (125) Italy further submits that the Region of Lazio eliminated from the invitation to tender the financial eligibility requirements that would have made it possible only for shipping companies to take part in the procedure (see recital 109). In order to enable the broadest possible participation in the tender, the invitation to tender, additionally, expressly allowed bidders to take part in joint form through temporary groupings of tenderers, consortia or EEIGs.
- (126) Concerning the Commission's doubts on the fact that the technical offers carried a significantly higher weight compared to the economic offers (i.e. 70 and 30 points respectively), Italy refers to the Judgement No 782/2017 of 30 March 2017 of the Council of State ⁽⁴⁶⁾, where it was stated that the contracting party, when applying this criterion, should 'emphasise the qualitative elements of the offer and select criteria that will ensure an effective competitive comparison of the technical profiles. To this end, it should establish the maximum score envisaged for the economic offer in order to ensure that this element does not prevail over the others'.
- (127) Thus, according to Italy, the different weight made it possible to evaluate the qualitative elements of the offer consistently and discourage excessive downwards revisions of the price that would have been difficult to sustain without sacrificing the quality of the public service. Moreover, it also allowed achieving significant cost savings for the Region of Lazio, given that the winning bidder was awarded the contract on the basis of which it would perform the public service for a compensation amount that was set 10,8 % lower compared to the base price (see recital 75).

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

- (128) Italy argues that the four *Altmark* criteria are complied with, both for the period 2011–2013 and for the period 2014–2024 for the following reasons:
- The first and second *Altmark* criteria were not contested by the Commission in its 2012 Decision;
 - With reference to the third *Altmark* criterion, and the doubts expressed by the Commission in its 2011 Decision that the 6,5 % risk premium laid down in the CIPE Directive, does not appear to reflect an appropriate level of risk (recitals 206–207), Italy refers to the Commission decision of 13 June 2017 concerning fast passenger maritime connection in Italy between Messina and Reggio Calabria, where the calculation methodology, using the fixed 8 % as expected rate of remuneration, was not contested. ⁽⁴⁷⁾ In particular, in the latter case the Commission accepted a rate of 8% being comprised of the 6,5 % risk premium referred to in the CIPE Directive, in view of that fact that the contract did not involve the award of exclusive rights, plus a further 1,5 % increase, in view of the short duration of the contract. Further, Italy, referring to the new public service contract, submits that any measures to restore the economic – financial balance could be applied only in the event of a change in net revenues of more than 3 %, whereas any reduction of below 3 % would have been borne by Laziomar. As a result, any possible overcompensation is avoided; and
 - Italy considers that the fourth *Altmark* criterion is also fulfilled, given that the award of the public service contract was the subject of a transparent and competitive tender procedure, which allowed selecting the tenderer capable of providing the services at the least possible cost. In addition, as regards the bundling of the new service contract with the privatisation of Laziomar, Italy argues that the tender amount for the sale of Laziomar represents only around 1,4 % of the total amount established for the public service (i.e. of the total compensation of EUR 127 520 740 over the 10-year contract period). Thus, it does not appear to have any significant impact on the outcome of the selection of the tenderer, as regards to the cost of the service.

⁽⁴⁶⁾ This judgement was delivered at the request of the Ministry of Infrastructure and Transport concerning the draft legislative decree on 'Supplementary and corrective provisions to Legislative Decree No 50 of 18 April 2016' (i.e. corrective decree to the Code of Public Contracts).

⁽⁴⁷⁾ SA.42710 SGEI – fast passenger maritime connection between Messina and Reggio Calabria.

4.4. On the berthing priority

- (129) Concerning the berthing priority (see recital 83), Italy argues that this is justified by the need to provide the public service, and no economic advantage is conferred to Laziomar that would also imply a loss of State resources.
- (130) According to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing. Italy also claims that this berthing priority has been applicable only to the public service routes, and that Laziomar did not and does not pay any additional fee for this berthing priority, as ports would give it the first choice of berthing slots even in the absence of a formal berthing priority on account of its public service mission.

4.5. On the measures laid down by the 2010 Law

- (131) Likewise, as regards the measures laid down by the 2010 Law (see recitals 84, 85 and 86), Italy submits that Laziomar has not been allocated nor has it benefited or will benefit in the future of these measures.
- (132) In this context, Italy submits that Caremar, which at the time operated itself the maritime cabotage routes in the Pontino archipelago, had been allocated and effectively used the financial resources already committed by Law 102/2009. In particular, Caremar was allocated EUR 1 410 000 to upgrade two of the vessels that were later transferred to Laziomar free of charge (Quirino and Tetide). It is also submitted that these funds have not been used for liquidity purposes.
- (133) With regard to the fiscal exemptions related to the privatisation process, Italy argues that as regards corporate income tax, the measure has not been applied since the transfers of Caremar, Saremar and Toremar to the regions were made free of charge. Therefore, in the absence of any remuneration, Article 86(1)(a) of the Consolidated Income Tax Law concerning capital gains in the event of asset transfers against payment does not apply. With respect to VAT, Italy noted that the transfers of Caremar, Saremar and Toremar constitute transactions which are exempt from VAT under Article 10(1)(4) of Presidential Decree No 633 of 26 October 1972. With respect to indirect taxes other than VAT, Italy emphasised that the exemption provided for by the 2010 Law was designed with a view to administrative simplification. From the taxation perspective, its effects can be regarded as negligible and of little impact in relation to taxes, which are charged at flat rates. More specifically, it concerns the registration duty (EUR 168 per document), land registry and mortgage registration fees (EUR 168 each) and stamp duty (EUR 14,62 for four sides).
- (134) Concerning the FAS resources, Italy submits that Laziomar has not received any benefit thereof. In addition, it clarified that the FAS resources were not used to give an additional compensation to the companies of the former Tirrenia Group, including Laziomar. Instead, these resources were made available to supplement the budget appropriations set up for the payment of the public service compensations to the companies of the former Tirrenia Group, in case those budget appropriations proved to be insufficient. Italy notes that Article 1, paragraph 5-ter of Decree Law 125/2010 enabled the regions to use the FAS resources to fund (part of) the regular public service compensation and thereby ensure continuity of the maritime public services. Moreover, Italy clarified that, under Article 26 of Decree Law 185/2008, EUR 65 million for each of the years 2009, 2010 and 2011 were earmarked to the Tirrenia group and EUR 195 million were accordingly drawn from the FAS resources. Those funds were then transferred to the account of the Ministry of Transport earmarked for the payment of the public service compensation to the companies of the former Tirrenia Group (Tirrenia, Siremar, Caremar (at the time), Toremar and Saremar). Therefore, this measure would merely concern an allocation of resources in Italy's budget for payment of the public service compensations.

4.6. On the rules for calculating the compensation for the period 2011–2019 and on the 6,5 % risk premium laid down in the CIPE Directive as of 2010

- (135) Italy submits that until 14 January 2014, the parameters used to calculate the compensation paid to Laziomar were those defined by the CIPE Directive. As from 15 January 2014, the compensation is defined in the public service contract, based on the methodology referred to in the CIPE Directive and taking also into consideration the economic offer submitted by Laziomar's buyer, CLN, under the tender procedure.
- (136) Italy clarifies that, because the amount of compensation is capped by the 2009 Law, it was decided indeed to simplify the calculation by applying the 6,5 % as a flat rate return on capital. This simplified approach was applicable during the prolongation of the initial Convention and still applies under the new public service contract with Laziomar.

- (137) In addition, according to Italy, the 6,5 % flat rate return on capital is considered appropriate considering that the rebalancing mechanism laid down in Article 25 of the contract (see recital 78) is very strict to apply. Further, such mechanism (e.g. a revision of the annual price cap) could not apply in cases where a beneficiary, such as Laziomar, is under-compensated.
- (138) In Table 5, Italy provides the elements taken to calculate the risk premium for Laziomar during the period 2011–2019:

Table 5

ROCI of Laziomar for 2011–2019

(EUR '000)

	2011	2012	2013	2014	2015	2016	2017	2018	2019
Tangible and intangible fixed assets	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Inventories	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Customer and commercial credits	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Payables to suppliers	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Net invested capital	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Return on capital (6,5 %)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

4.7. On the compliance of the new public service contract with the 2011 SGEI Decision

- (139) Even if Italy considers that the public service compensation paid to Laziomar under the new public service contract does not constitute State aid, it also argued why that measure would comply with the 2011 SGEI Decision, if it were aid.
- (140) In its reply, Italy submits that both the 2005 and 2011 SGEI Decisions are applicable, considering that the conclusion of the public service contract was provided for in Article 19-ter of the 2009 Law, as well as in the Lazio Decree.
- (141) Italy has presented figures for the years 2012 and 2013 showing that the average annual number of passengers has not exceeded the threshold of 300 000 passengers as laid down in Article 2(1)(d) of the 2011 SGEI Decision in any of the sailing routes concerned during the two financial years preceding that in which the SGEI was assigned to Laziomar (i.e. 240 430 passengers in 2012 and 254 167 passengers in 2013).

4.8. On the compliance of the new public service contract with the 2011 SGEI Framework

- (142) Italy submits that the public service entrusted to Laziomar constitutes a genuine SGEI based on an entrustment act, i. e. the service contract, which contains and describes the content and duration of public service obligations, the territory concerned, the compensation mechanism and the parameters for calculating the compensation.

- (143) Further, according to Italy, the compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, as the amount of compensation was established in the context of a tendering procedure on the basis of criteria set out in the CIPE Directive, whereas the contract provides for a monitoring system to avoid overcompensation.
- (144) Likewise, as regards the rate of return, Italy refers to the Commission's decision of 13 June 2017 (in Case SA.42710) (see recital 128), where a higher rate of return than the 6,5 % (i.e. 8 %) was not contested by the Commission.

5. ASSESSMENT

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

- (145) Article 107(1) TFEU provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (146) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 107(1) TFEU, all the above-mentioned conditions need to be fulfilled. Namely, the financial support should:
- (a) be granted by a Member State or through State resources;
 - (b) favour certain undertakings or the production of certain goods;
 - (c) distort or threaten to distort competition; and
 - (d) affect trade between Member States.
- (147) The Commission notes that the berthing priority, which only applies to the public service routes, is inextricably linked with the performance of the SGEI by Laziomar and by its acquirer CLN. Therefore, this measure will be assessed jointly with the respective public service compensation granted to these companies (see Sections 5.1.1 and 5.1.2).
- (148) Furthermore, the Commission notes that the new public service contract between Italy and Laziomar should be assessed jointly with the privatisation of Laziomar. Such joint assessment is appropriate because in essence Italy organised a tender for the new public service contract whereby the winning bidder had to acquire the entire share capital of Laziomar in order to discharge the public service obligations laid down in that public service contract.

5.1.1. *The prolongation of the initial Convention between the Laziomar and Italy*

5.1.1.1. State resources

- (149) Laziomar was entrusted by Italy with the operation of maritime routes as detailed by the initial Convention, as prolonged. The initial Convention was concluded with the State and the resulting public service compensation for Laziomar is paid by the State from its own budget. Therefore, the public service compensation to Laziomar is imputable to the State and is given through State resources.
- (150) The Commission takes note that, according to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing but that Laziomar did not pay any additional fee for the berthing priority. Nevertheless, the Commission considers that in principle Italy could have chosen to impose an additional fee for the berthing priority and that by not doing so, it has foregone State revenues. Furthermore, since the berthing priority is granted by law (see recital 83) it is imputable to the State.

5.1.1.2. Selectivity

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

5.1.1.3. Economic advantage

- (152) The Commission recalls that public service compensations granted to a company may not constitute an economic advantage under certain strictly defined conditions.
- (153) In particular, in its *Altmark* judgment ⁽⁴⁸⁾, the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not within the scope of Article 107(1) TFEU.
- (154) However, the Court of Justice also made clear that for such public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria (the '*Altmark* criteria'), summarised below, must be satisfied:
- the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined ('*Altmark* 1');
 - the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('*Altmark* 2');
 - the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations ('*Altmark* 3');
 - where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations ('*Altmark* 4').
- (155) The Commission specified how it applies the *Altmark* criteria in its Communication on the application of State aid rules to compensation granted for the provision of services of general economic interest (the '*SGEI* Communication') ⁽⁴⁹⁾.
- (156) Given that the *Altmark* criteria have to be complied with cumulatively, non-observance of either one of these criteria would lead the Commission to the conclusion that the measure under assessment provides an economic advantage to the beneficiary. The Commission will then first assess observance of *Altmark* 4.
- (157) *Altmark* 4 provides that the compensation must be the minimum necessary in order for it not to qualify as State aid. This criterion is deemed to be fulfilled if the recipient of the public service compensation has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the services at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

⁽⁴⁸⁾ See Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, ECLI:EU:C:2003:415.

⁽⁴⁹⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

- (158) For none of the prolongations of the initial Convention in the period 1 June 2011 until 14 January 2014 was Laziomar selected following a public tender procedure. Italy merely prolonged the system already in force thereby entitling the pre-established operator to continue receiving compensation for the discharge of the public service obligations.
- (159) Moreover, Italy has not provided to the Commission any indication that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.
- (160) The Commission therefore concludes that *Altmark* 4 has not been complied with in the present case.
- (161) Given that the four *Altmark* conditions are not cumulatively observed in the present case, the Commission concludes that the compensation for the operation of maritime routes under the prolongation of the initial Convention provided Laziomar with an economic advantage.
- (162) With respect to the berthing priority, the Commission first recalls that the Italian competition authority AGCM has at least on two occasions considered that this measure has economic value ⁽⁵⁰⁾. Nevertheless, Laziomar does not pay any fee for the berthing priority (see recital 130). Furthermore, the Commission observes that the berthing priority has at least in theory the potential to lower the operator's costs (e.g. because the guaranteed berthing could reduce waiting times in ports and hence result in lower fuel costs) or increase its revenues (e.g. because some timings possibly attract more demand from passengers). Indeed, to the extent the berthing priority allows for a faster docking procedure, users of the ferry service may prefer the ferry operator that benefits from this measure. Even if these effects would only materialise in limited circumstances or would be relatively small, the berthing priority could nevertheless constitute an economic advantage for Laziomar.

5.1.1.4. Effect on competition and trade

- (163) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ⁽⁵¹⁾. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ⁽⁵²⁾.
- (164) In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the Union, in particular since the entry into force of the Council Regulation (EEC) No 4055/86 ⁽⁵³⁾ and the Maritime Cabotage Regulation, liberalising the market of the international maritime transport and maritime cabotage, respectively. The fact that on some routes Laziomar was at that time the only operator does not mean that other (international) operators could not be interested to offer similar maritime transport services. Therefore, the compensation for the operation of maritime routes under the prolongation of the initial Convention is liable to affect Union trade and distort competition within the internal market. For the same reasons that conclusion also holds for the berthing priority.

5.1.1.5. Conclusion

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

⁽⁵⁰⁾ Decision (EU) 2020/1412, recital 265.

⁽⁵¹⁾ See, in particular, Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, paragraph 11; Case C-53/00 *Ferring*, ECLI:EU:C:2001:627, paragraph 21; Case C-372/97 *Italy v Commission*, ECLI:EU:C:2004:234, paragraph 44.

⁽⁵²⁾ Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

⁽⁵³⁾ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

5.1.1.6. New or existing aid

- (166) The Commission first notes that the compensation paid to Caremar (at the time) for the operation of maritime public service obligations until the end of 2008 is not assessed in this Decision. The assessment of that compensation, and whether or not it can be classified as existing aid on the basis of Article 4(3) of the Maritime Cabotage Regulation, is the subject of a separate Commission decision. ⁽⁵⁴⁾
- (167) According to Article 1(c) of Council Regulation (EU) 2015/1589 ⁽⁵⁵⁾, new aid means 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Furthermore, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision ⁽⁵⁶⁾. In line with the position of Union Courts ⁽⁵⁷⁾, the Commission considers that amending (i.e. prolonging) the duration of an aid scheme that had a clear expiry date (i.e. 31 December 2008) is sufficient to make it a new aid irrespective of whether or not other characteristics of the measure were changed.
- (168) For the above reasons, the Commission considers that regardless of the fact that the compensation awarded to Caremar (at the time) up until end 2008 has been classified as existing aid ⁽⁵⁸⁾, the public service compensation paid to Laziomar on the basis of the successive prolongations of the initial Convention should be considered as new aid. This conclusion also holds for the berthing priority.

5.1.2. The award of the new public service contract bundled with Laziomar's business

- (169) In order to conclude on whether the award of the new public service contract bundled with Laziomar's business constitutes an advantage to Laziomar and its acquirer, within the meaning of Article 107(1) TFEU, the Commission must assess observance of the *Altmark* criteria (see recital 154).

5.1.2.1. Altmark 1

- (170) The Commission recalls that there is no uniform and precise definition of a service that may constitute an SGEI under Union law, either within the meaning of the first *Altmark* condition or within the meaning of Article 106(2) TFEU ⁽⁵⁹⁾. Paragraph 46 of the Communication is worded as follows:

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

- (171) National authorities are therefore entitled to take the view that certain services are in the general interest and must be operated by means of public service obligations to ensure that the public interest is protected when market forces do not suffice to guarantee that they are provided at the level or conditions required.
- (172) In the field of cabotage, detailed Union rules governing public service obligations have been laid down in the Maritime Cabotage Regulation and, for the purpose of examining potential State aid to undertakings engaged in maritime transport, in the Community guidelines on State aid to maritime transport ('the Maritime Guidelines') ⁽⁶⁰⁾.

⁽⁵⁴⁾ Decision (EU) 2020/1411.

⁽⁵⁵⁾ 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).

⁽⁵⁶⁾ Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, ECLI:EU:C:2016:797, paragraph 45.

⁽⁵⁷⁾ Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava – Diputación Foral de Álava and others v Commission*, ECLI:EU:T:2002:59, paragraph 175.

⁽⁵⁸⁾ Decision (EU) 2020/1411.

⁽⁵⁹⁾ Case T 289/03 *BUPA and Others v Commission* [2008] ECR II 81, paragraph 96. See also Opinion of Advocate General Tizzano in Case C 53/00 *Ferring*, ECR I 9069 and Opinion of Advocate General Jacobs in Case C 126/01, *GEMO*, [2003] ECR I 13769.

⁽⁶⁰⁾ Commission Communication C(2004) 43 – Community Guidelines on State aid to maritime transport, (OJ C 13, 17.1.2004, p. 3).

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

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

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

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

(176) It results from established case-law that public service obligations may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone.⁽⁶¹⁾ The Communication on interpretation of the Maritime Cabotage Regulation⁽⁶²⁾ confirms that ‘it is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services’. Moreover, Article 2(4) of the Maritime Cabotage Regulation defines public service obligations as obligations, which ‘the ship-owner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions’.

(177) In line with the case-law⁽⁶³⁾, to verify whether there is a real public service need and whether it was necessary and proportional, and hence also whether the first *Altmark* criterion is met, the Commission will assess:

- (1) Whether there was **user demand**;
- (2) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);
- (3) Whether simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(1) User demand

(178) In this case, Laziomar was entrusted with the provision of passenger, mixed and freight services on multiple lines as presented in Table 9. The public service obligations imposed on Laziomar concerned the ports served, the type and capacity of the vessels assigned to the maritime connections operated under the public service regime, the frequency of service and the maximum fares to be charged.

(179) As described in recital 120, Italy has imposed the public service obligations laid down in the new Convention mainly to (i) ensure the territorial continuity between the mainland and the islands; and (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission considers that those are indeed legitimate public interest objectives.

⁽⁶¹⁾ See Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others and Administración General del Estado*, ECLI:EU:C:2001:107.

⁽⁶²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), Brussels, COM(2014) 232 final, 22.4.2014.

⁽⁶³⁾ See Case T-454/13 *SNCM v Commission*, ECLI:EU:T:2017:134, paragraphs 130 and 134.

- (180) Historically, the objectives pursued by Italy have not been achieved through the interplay of market forces alone. In fact, the adequacy of these services has been traditionally ensured by public service obligations imposed to that effect on the companies of the former Tirrenia Group and enshrined in the initial Conventions. Indeed, the Commission notes that the routes in question have been operated, largely unaltered, for many years i.e. at least since the entry into force of the initial Convention. Italy, and in particular the regional authorities concerned, considered that these services were (and continued to be) necessary to meet user demand.
- (181) With respect to the freight-only routes (i.e. Line T3 and Line T4), the Commission recalls that the General Court has already established ⁽⁶⁴⁾ that, in order to be capable of being characterised as a service of general economic interest, the service in question must not necessarily constitute a universal service *stricto sensu*. In effect, the concept of universal service does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory ⁽⁶⁵⁾ but rather to serve the interests of society as a whole. In addition, it is the Commission's view that Union legislation does not prevent Member States from validly qualifying in the exercise of their discretion certain maritime freight services to and from remote areas as SGEL, provided that the principles laid down by the Maritime Cabotage Regulation are complied with.
- (182) Italy has explained that the public service needs are linked to the special geographical and socio-economic characteristics of the islands in the Pontine archipelago. Article 1 of the service contract stipulates that the services awarded to Laziomar are '[...]necessary to maintain territorial continuity so as to ensure the supply of goods, including special goods, necessary for the proper functioning of public and social services for the Pontine islands [...]'. As regards the island of Ponza, the need for territorial continuity and supply of goods and special goods is necessary in view of its distance from the mainland (about 27 nautical miles from Terracina) and its low population numbers (around 3 500 inhabitants). Similar considerations apply to the island of Ventotene (about 31 nautical miles from Terracina and around 800 inhabitants). The regular frequency of those freight services all year round ensures that also in the low season, when there is less demand from tourists, the inhabitants and companies of these islands remain adequately supplied. In addition, those services also contribute to the economic development of both islands by transporting goods and special goods (e.g. dangerous goods, municipal solid waste, etc.) from and to the mainland.
- (183) As regards the passenger and mixed services, to illustrate the genuine demand, Italy provided aggregated statistics, which show that in 2012 Laziomar transported 240 430 passengers and 13 228 vehicles on the public service routes combined during the respective time periods covered by the public service obligations. The numbers for 2013 were higher (i.e. 254 167 passengers and 16 927 vehicles). This shows that in the two years before Laziomar was entrusted with its public service obligations, there was a significant aggregate demand for maritime transport services on the routes concerned (see recital 291) for detailed route-by-route statistics for the years 2011 to 2013).
- (184) To further demonstrate that user demand remained present when Laziomar started operating on the basis of the new public service contract on all routes, Italy also provided aggregated statistics until the end of 2019 (see Tables 6 to 8). These confirm that user demand remained present, with some slight deviations, upwards or downwards. In any case, an analysis of the route-by-route statistics for each year until end 2019 did not provide any indications that the user demand on specific routes would have disappeared.

Table 6

Passengers' statistics for the years 2014–2019

Year	Line T1	Line T2	Line T3	Line T4	Line A1	Line A2	Line A3	Total No of passengers
2014	125 720	63 376	30 812	1 509	36 474	58 680	40 000	356 571
2015	131 453	65 822	40 211	165	37 442	69 327	46 847	391 267
2016	141 720	81 572	45 006	308	42 209	60 263	37 981	409 959

⁽⁶⁴⁾ See Case T-289/03 *BUPA and Others v Commission*, ECLI:EU:T:2008:29, paragraph 186.

⁽⁶⁵⁾ See Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, paragraph 55; Case C-266/96 *Corsica Ferries France*, ECLI:EU:C:1998:306, paragraph 45; Case T-17/02 *Fred Olsen v Commission*, ECLI:EU:T:2005:218, paragraph 186 *et seq.*

2017	154 948	86 832	57 165	360	48 985	68 573	39 482	456 345
2018	160 304	85 310	59 642	168	58 013	68 405	37 226	447 581
2019	170 636	88 728	55 047	177	52 569	48 198	32 226	442 409

Table 7

Vehicles' statistics for the years 2014–2019

Year	Line T1	Line T2	Line T3	Line T4	Line A1	Line A2	Line A3	Total No of vehicles ⁽¹⁾
2014	12 822	2 587	3 482	35				18 926
2015	12 874	2 819	3 212	390				19 295
2016	12 942	3 245	3 590	784				20 561
2017	13 796	3 331	3 772	324				21 223
2018	14 165	3 171	3 846	152				21 334
2019	14 011	3 242	3 316	172				20 741

⁽¹⁾ The vessels used on Line T4, Line A1, Line A2 and Line A3 cannot transport vehicles.

Table 8

Freight transported in linear metres for the years 2014–2019 ⁽⁶⁶⁾

Year	Line T3	Line T4	Total No of linear metres
2014	206 514	16 367	222 881
2015	259 112	22 659	281 771
2016	281 229	23 230	304 459
2017	294 442	27 623	322 065
2018	310 736	14 256	324 992
2019	302 631	15 228	317 859

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

(2) Existence of market failure

(186) According to paragraph 48 of the SGEI Communication, 'it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions ⁽⁶⁷⁾'. Therefore, the Commission must examine whether the service would be inadequate if its provision were left to the market forces

⁽⁶⁶⁾ Although freight is transported on most lines, this decision only provides detailed information about freight transported on Line T3 and Line T4, because the public service contract defines both Lines as freight routes for the transportation of goods and special goods.

⁽⁶⁷⁾ See Case C-205/99 *Analir and others*, ECLI:EU:C:2001:107, paragraph 71.

alone in the light of the public service requirements imposed by the Member State by virtue of the new public service contract. Paragraph 48 of the SGEI Communication notes in this respect that ‘the Commission’s assessment is limited to checking whether the Member State has made a manifest error’.

(187) The Commission notes that during the time period leading up to the signature of the new public service contract with Laziomar, other operators offered ferry services on some of the routes subject to the new public service contract albeit not necessarily throughout the entire year, with the same frequency and same type of service. On the basis of the competitive situation leading up to the moment of entrustment on 15 January 2014, the Commission will assess for each of the routes concerned whether the services provided by other operators were equivalent to those that Laziomar has to provide under the new public service contract.

(188) Table 9 displays the competitive situation on each of the routes operated by Laziomar at the time of the entrustment act:

Table 9

Competitive situation on the routes operated by Laziomar

Route	Laziomar (all year round sailings)	Competitors
Formia – Ponza (Line T1)	Mixed service (passengers, vehicles and goods)	None
Formia – Ventotene (Line T2)	Mixed service (passengers, vehicles and goods)	None
Terracina – Ponza (Line T3) – new route	Freight and mixed service with an average of: — From January to March and from October to December four sailings (per week) – freight service only — In April and September four sailings (per week) – freight service only, and four sailings (per week) – mixed service — From May to August five sailings (per week) – freight service only, and five sailings (per week) – mixed service	Navigazione Libera del Golfo (NLG), passenger-only service with an average of: — From April to May and September to October three sailings (per week) — From June to August one to two sailings (per day)
Terracina – Ventotene (Line T4) – new route	Freight service with an average of: — From January to March and from October to December one sailing (per week) — In April and September two sailings (per week) — From May to August five sailings (per week)	NLG passenger-only service (as an extension to Line T3) with only one sailing per week from July to August
Anzio – Ponza (Line A1)	Passenger service (hydrofoil) between June and September with one sailing per day and two on Fridays, weekends and bank holidays	Vetor , passenger service with an average of: — From June to July two to three sailings during week days and four to five during weekends (per day – see recital 192) — In August three to four sailings during week days and four to five during weekends (per day) — September one sailing (per day – see recital 192)

Formia – Ponza (Line A2)	Passenger service (hydrofoil)	None
Formia – Ventotene (Line A3)	Passenger service (hydrofoil)	None

- (189) The Commission considers, as it is clearly shown in Table 9, that the services offered by Laziomar are not substitutable to those offered by other competitors, as the latter do not serve or do not serve in full the public service obligations laid down in the new public service contract with Laziomar. That said, on four out of the seven routes, there is no other operator apart from Laziomar offering the service (Lines T1, T2, A2 and A3). As a result, the public service obligations laid down in the contract with Laziomar for operating those routes are justified by a genuine public need to ensure territorial continuity, since this cannot be fulfilled by the market alone.
- (190) As regards the routes where other operators also offer services (Lines T3, T4 and A1), the Commission considers that there are major differences concerning the type, the regularity, the capacity and the price of the services offered, for the reasons detailed in the following paragraphs.
- (191) For Lines T3 and T4, Laziomar sails throughout the year continuously, whereas the other operator, NLG, does not offer this continuous service all year round nor does it do so at the same level of frequency as Laziomar. In addition, Laziomar offers freight mixed (Line T3) and freight (Line T4) services using a vessel with capacity to transport freight, vehicles and up to 400 passengers, whereas NLG uses a high-speed craft for the transportation of passengers only. Lastly, there is a significant price difference between the two operators. For Line T3, where both operators transport passengers (as opposed to Line T4 which is a freight service for Laziomar), the price offered by NLG targets the tourist sector (e.g. one-way adult ticket costs between EUR 24 and 26 and for children up to 12 years of age EUR 13 to EUR 15). On the other hand, Laziomar's service is subject to public service fare obligations (e.g. one-way adult ticket costs EUR 10 and for children up to 12 years of age EUR 5) and social fares apply for residents and commuters (one-way ticket costs around EUR 3,50). As a result, without the service of Laziomar on those particular routes, the public service need for regular connectivity of that island with the mainland would not be satisfied, as NLG could not have provided the same services and under the same conditions as Laziomar over the whole contract period.
- (192) Concerning Line A1, both Laziomar and its competitor, Vetur, run a passenger service only during the summer season (between June and September). However, Italy provided information showing that Vetur's service predominantly targets the tourist sector and is provided under market conditions. Although, according to the time schedule of 2013 (i.e. the year before the conclusion of the entrustment act with Laziomar) as illustrated in Table 9, Vetur seems to sail more frequently than Laziomar, the Commission notes that the service was not actually provided continuously on a daily basis. More specifically, the service was not provided on 4, 5, 11 and 12 June 2013 and on 10 to 12 and 16 to 20 September 2013. In the subsequent years of the entrustment period, the information submitted by Italy shows that the service provided by Vetur also did not ensure daily connectivity on this route. For example, in 2018 Vetur did not provide the service on 5 and 6 June and on 17 to 20 September. In general, therefore, Vetur's service frequencies vary depending on the month.
- (193) In addition, under the service contract Laziomar is subject to public service obligations in terms of continuity and quality. That said, in case of failure to sail without due cause, Laziomar is subjected to a corresponding fee reduction and penalties. Moreover, the quality obligation implies that Laziomar must comply with precise minimum standards in terms of *inter alia* reliability, hygienic conditions and comfort of the journey. Vetur on the other hand, which is not subjected to public service obligations, is not meant to meet high quality standards while delivering the service. Also, from the point of view of transport capacity, Laziomar's vessel can accommodate maximum 300 passengers, compared to approximately 150 passengers that can be transported with Vetur's hydrofoil.
- (194) Finally, there is a significant price difference between the two operators. The price offered by Vetur targets predominantly the tourist sector (e.g. a one-way adult ticket costs EUR 36 which is increased to EUR 46 during the weekend, while a ticket for children up to 12 years of age costs EUR 18), whereas it offers a residents' fare at EUR 23. Vetur is also free to determine at will the price of its tickets and adjust it accordingly on a purely commercial basis. On the other hand, Laziomar's service is subject to public service fare obligations (e.g. a one-way adult ticket costs EUR 23,40 and for children up to 12 years of age it costs EUR 11,70) and social fares apply for

residents and commuters (e.g. a one-way ticket costs only EUR 7). As a result, without the service of Laziomar on that particular route, the public service need for regular connectivity of that island with the mainland at affordable prices would not be satisfied, as Vetor could not have provided the same services and under the same conditions as Laziomar over the whole contract period.

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

(3) Least harmful approach

- (196) The Commission notes that Italy has chosen to conclude a public service contract with one operator (Laziomar) rather than to impose public service obligations on all operators interested in serving the routes at stake. Based on the information provided by Italy, the Commission accepts that the user demand could not have been met by imposing public service obligations (see recital 180). In particular, on several routes Laziomar is the only operator and where this is not the case, the offer provided by the other operators does not meet (all) the requirements of regularity, continuity, capacity and price. Further, the operation of most routes, especially in the low season, is loss-making, so that without public service compensation they would not be operated at all. In addition, the Commission takes note of Italy's argument that the choice for a public service contract was also necessary in view of the privatisation of Laziomar. More specifically, Italy argues that tendering out Laziomar together with a new public service contract allowed to (i) ensure continuity of the maritime public service; and (ii) maximise value for the State. It is for these reasons that the Commission agreed (see recital 89) that Italy would tender out Laziomar business together with a new public service contract. In doing so, the Commission also accepted, and reiterates in this Decision, that Italy could not rely on public service obligations that apply to all operators but that it would rather conclude a public service contract with Laziomar only.

Conclusion

- (197) On the basis of the above assessment, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Laziomar as SGEI. The doubts expressed by the Commission in the 2012 Decision are hence dispelled.
- (198) In order to conclude that *Altmark* 1 is complied with, the Commission must still check whether Laziomar was entrusted with public service obligations, which were clearly defined. In this regard, the Commission notes that the public service obligations are clearly described in the new public service contract and its annexes (which include for instance ship specifications for each route). Likewise, the rules regulating the compensation are detailed in the new public service contract, the 2009 Law and the CIPE Directive. The new public service contract also has a clear duration (10 years), identifies Laziomar as the public service operator and contains the arrangements for avoiding and recovering any overcompensation (see also recital 215). Therefore, the Commission concludes that the first *Altmark* criterion is observed.

Berthing priority

- (199) Article 19-ter, paragraph 21 of the 2009 Law clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Laziomar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may (sometimes) have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are specific time scheduling obligations in the new public service contract for the departure of public service routes, the berthing priority helps to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations. Against this background, the Commission considers that this measure is awarded to enable Laziomar to perform its public service obligations, which constitute genuine SGEI (see recital 197). Furthermore, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime. Therefore, the berthing priority also complies with the first condition of the *Altmark* judgment.

5.1.2.2. Altmark 2

- (200) The Commission recalls that in the 2012 Decision (see its paragraph 205), it had taken the preliminary view that the second criterion of the *Altmark* judgment is observed.
- (201) Against this background, the Commission notes that the parameters at the basis of the calculation of the compensation have been established in advance and observe the transparency requirements in line with the second *Altmark* criterion.
- (202) More specifically, the parameters on the basis of which the compensation was calculated are explained in detail in the CIPE Directive and have been applied in the new public service contract (and annexes thereto) while the maximum compensation amounts are laid down in the 2009 Law. The method of calculation of the compensation, including for instance the cost elements taken into account, are detailed in the CIPE Directive. Since the berthing priority does not entail financial compensation for Laziomar, the Commission considers that this measure complies with the *Altmark* 2.
- (203) Therefore, the Commission concludes that the second condition of the *Altmark* judgment is observed.

5.1.2.3. Altmark 3

- (204) According to the third *Altmark* condition, the compensation received for the discharge of the SGEI cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- (205) However, the *Altmark* ruling does not provide a precise definition of the reasonable profit. According to the SGEI Communication, reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.
- (206) In the 2012 Decision, the Commission expressed doubts as to the proportionality of the compensation paid to the companies of the former Tirrenia Group, including Laziomar as from 2014. In particular, as regards the compensation paid as from 2010, the Commission took the preliminary view that the 6,5 % fixed risk premium did not reflect an appropriate level of risk because *prima facie* Laziomar did not appear to assume the risks normally borne in the operation of such services. More specifically, the cost elements for the purpose of calculation of the compensation include all costs involved in the provision of the service and variations in e.g. fuel prices have been taken into account. As a result, the Commission considered at that stage that Laziomar might have been overcompensated.
- (207) The Commission notes that certain aspects of the compensation method as laid down in the new public service contract, indeed seem to reduce the commercial risk incurred by Laziomar. In particular, the maximum fares that Laziomar can charge are adjusted annually to take into account inflation and reflect variations in the consumer price index. Moreover, the new public service contract contains certain clauses (see recital 78) that aim at maintaining the economic-financial equilibrium of the public service. In particular, in case the public service compensation would be insufficient to cover the cost of the services entrusted by the new public service contract, these clauses allow to revise (i) the tariff system; (ii) the level of the public services offered; (iii) the level of the annual price cap; and (iv) the capital grants for investments.
- (208) According to Article 25 of the contract, when there is a discrepancy in its economic and financial balance, Laziomar may request a rebalancing by submitting a proposal to the Region of Lazio. This proposal is then submitted to the Technical Committee responsible for managing the contract.

- (209) Although these safeguards seem to reduce the commercial risk incurred by Laziomar, the Commission considers that the company remains exposed to the risk that the compensation may not be sufficient to cover the costs of running the service. The rebalancing proposal may not always be accepted, as the Region of Lazio shall rule on the merits and adopt its decision having obtained the Technical Committee's opinion within 90 days of Laziomar submitting its request. Until a decision is adopted, Laziomar must continue to operate the public service unaltered. Indeed, as submitted by Italy, this mechanism is difficult and very strict to apply, and therefore Laziomar has so far not used this possibility.
- (210) In addition, the Commission notes that not all cost categories are subjected to a rebalancing contribution. Particularly, according to Article 25 of the public service contract, the costs related to managerial inefficiencies, the financial charges, any increases in staff unit costs to meet labour legal requirements and any costs related to the commercial policy applied by Laziomar should be borne by Laziomar itself. Therefore, Laziomar remains incentivised to perform efficiently and at the least cost to the community.
- (211) As mentioned in recitals 48 to 52, the CIPE Directive foresees that a risk premium of 6,5 % would be used to determine the return on capital using the WACC formula. However, in practice the 6,5 % was applied as a flat rate return on capital (see also recital 136).
- (212) In this context, regardless of the compensatory amount that Laziomar would be entitled to, taking into account the 6,5 % risk premium, Laziomar can never receive more than the maximum amount set by the public service contract (see recital 76). In line with paragraph 47 of the 2011 SGEI Framework, the Commission assesses whether there was overcompensation over the whole duration of the contract. As illustrated in Table 10, the figures for the period 2014–2019 show that the actual public service compensation received was (with the exception of the amounts for 2016 and 2018 – which were still less than the cap agreed under the contract, i.e. EUR 13 524 536) insufficient to cover the net cost of the service (i.e. EUR 80 173 862 paid for a net cost of EUR 80 397 000) even before taking into account the 6,5 % risk premium (i.e. EUR 1 928 000). In essence, for the period 2014–2019, Laziomar received approximately EUR 2 150 000 less than the eligible amount (i.e. EUR 82 325 000 (eligible compensation) minus EUR 80 173 862 (actual compensation), as calculated using the methodology including the 6,5 % return on capital. This means that, in practice, Laziomar did not receive the amount calculated as return on capital. Actually, Laziomar's return on capital for the period as a whole (up to 2019) was zero instead of 6,5 % initially foreseen by Italy. ⁽⁶⁸⁾ These figures confirm that the rebalancing provisions of Article 25 of the contract do not protect Laziomar from all the risks related to the operation of the public service.

Table 10

Net cost of the public service operated by Laziomar for the period 2014–2019

(EUR)

Laziomar public service remit	2014	2015	2016	2017	2018	2019	Grand total
Total revenues	[...]	[...]	[...]	[...]	[...]	[...]	[...]
- Total costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]
- Amortisations	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽⁶⁸⁾ The total amount of compensation received by Laziomar over the period 2014–2019 was less than the net cost incurred in the provision of the public service, without taking into account any return on capital.

= Net cost of public service	[...]	[...]	[...]	[...]	[...]	[...]	[...]
+ Return on capital (6,5 %)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
= Eligible for compensation	[...]	[...]	[...]	[...]	[...]	[...]	[...]
+ Actual compensation	13 375 00-000	13 376 00-000	13 330 00-000	13 370 07-070	13 356 28-282	13 366 51-510	80 173 86-862
= Over/under compensation	[...]	[...]	[...]	[...]	[...]	[...]	- 2 151 138

- (213) As regards the level of the reasonable profit, in the course of the formal investigation (see recital 136), Italy has clarified that, because the amount of compensation is capped by the 2009 Law, the decision was taken to simplify the calculation by applying the 6,5 % as a flat rate return on capital. Italy considers that its simplified approach is conservative and does not allow for higher compensation for Laziomar than what was established under the CIPE Directive.
- (214) Against this background, the Commission has compared the return on capital employed of 6,5 % that has been applied to Laziomar with the median return on capital generated by a benchmark group in 2013 (the year before Laziomar's entrustment). The benchmark group consists of selected ferry operators that offered maritime connections within Italy or between Italy and other Member States. ⁽⁶⁹⁾ The analysis shows that the return on capital applied to Laziomar is similar to the median return generated by the companies in the benchmark group. This comparison illustrates that in the year before Laziomar's entrustment, a 6,5 % return on capital was not unreasonable.
- (215) The Commission further notes positively that the new public service contract requires Laziomar to send its management accounts (sub-divided per route and certified by an independent auditor) every year to the Ministry of Infrastructure and Transport to enable the latter to check if there was any overcompensation. This provides an additional safeguard to ensure that Laziomar cannot benefit from any overcompensation. Italy also submitted these management accounts for the period 2014–2019 thereby enabling the Commission to make the calculations in Table 10.
- (216) In light of the above, the Commission concludes that the public service compensation granted to Laziomar does not exceed what is necessary to cover the costs incurred in the discharge of its public service obligations, taking into account the relevant receipts and a reasonable profit. More specifically, the Commission considers that the risk premium of 6,5 % foreseen by the CIPE Directive, has to be assessed in combination with the maximum compensation amount laid down in the public service contract. With this in mind, the return on capital that Laziomar could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the public service contract. The Commission's doubts concerning compliance with the third condition of the *Altmark* judgment are therefore dispelled.
- (217) With respect to the berthing priority and any possible overcompensation that might result from it, the Commission notes that to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. The Commission's analysis (see recital 212) confirmed that in the period 2014–2019 Laziomar did not receive overcompensation. Therefore, the Commission concludes that also the berthing priority complies with the third *Altmark* criterion.

⁽⁶⁹⁾ In particular, it concerns Minoan Lines Shipping, La Méridionale, Moby, Grandi Navi Veloci, Libertylines, Grimaldi Group, Corsica Ferries, SNAV and Caronte & Tourist. Other companies of the former Tirrenia Group (e.g. Caremar, CIN, Siremar) have been excluded from the benchmark group.

5.1.2.4. *Altmark* 4

- (218) The fourth *Altmark* criterion is fulfilled if the recipient of the compensation for the operation of an SGEI has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the SGEI at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.
- (219) According to paragraph 63 of the SGEI Communication, the simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council ⁽⁷⁰⁾ and Directive 2004/18/EC of the European Parliament and of the Council ⁽⁷¹⁾.
- (220) The Commission observes that in the present case, the tender procedure was launched before the entry into force of Directive 2014/24/EU of the European Parliament and of the Council ⁽⁷²⁾ (which applies to public contracts awarded for the operation of maritime transport services) and Directive 2014/25/EU of the European Parliament and of the Council ⁽⁷³⁾. At that time, Directive 2004/17/EC and Directive 2004/18/EC were still in force. However, Directive 2004/17/EC does not apply to maritime transport services, such as those provided by Laziomar. Indeed, Article 5 of Directive 2004/17/EC makes clear that only transport services by railway, automated systems, tramway, trolley bus, bus or cable are included in its scope.
- (221) Public contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport fall instead within the scope of Directive 2004/18/EC on the basis of its recital 20. However, water transport services are also listed in Annex II B to that Directive which implies ⁽⁷⁴⁾ that they are only subject to its Articles 23 and 35(4). This means that, under Directive 2004/18/EC, a public contract for maritime transport services is subject only to the obligations concerning technical specifications (Article 23) and to the obligation to publish a contract award notice (after the contract has been awarded and, therefore, at the end, not at the beginning, of the award procedure: Article 35(4)). All the other rules dictated by Directive 2004/18/EC – including the provisions on the content of notices to be published (Article 36(1)) and the provisions on selection criteria (Articles 45 to 52) – are not applicable to public contracts for maritime transport services.
- (222) Furthermore, Directive 2004/18/EC does in any case not apply to service concessions as defined in its Article 1(4) ⁽⁷⁵⁾. The Commission notes that service concessions (and public contracts), which have certain cross-border interest nevertheless remain subject to the general Treaty principles of transparency, non-discrimination and equal treatment.
- (223) On the basis of the above, the Commission concludes that Directive 2004/18/EC can only apply in case of a public contract but not when it concerns a service concession. In addition, since the present case concerns water transport services subjected to a public service contract, only some of that Directive's requirements, as aforementioned, would be applicable. Against this background, the Commission considers that it cannot rely solely on compliance with the Public Procurement Directives to demonstrate that compliance with the fourth *Altmark* criterion. For this reason, the

⁽⁷⁰⁾ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

⁽⁷¹⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽⁷²⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁽⁷³⁾ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁽⁷⁴⁾ Under Article 21 of Directive 2004/18/EC.

⁽⁷⁵⁾ Article 1(4) of Directive 2004/18/EC reads: "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

Commission assesses below whether the tender procedure used by Italy was competitive, transparent, non-discriminatory and unconditional. To make this assessment, the Commission relies on the relevant guidance set out in its Notion of Aid Communication ⁽⁷⁶⁾ (in particular in its paragraphs 89 *et seq.*) and the SGEI Communication (in particular in its paragraphs 63 *et seq.*).

Competitive and transparent nature of the tender

- (224) Paragraph 90 of the Notion of Aid Communication specifies that a tender procedure has to be competitive ⁽⁷⁷⁾ to allow all interested and qualified bidders to participate in the process. Furthermore, according to paragraph 91 of that Communication, the procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. That paragraph also emphasises that accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure and indicates that a tender has to be sufficiently well-publicised, so that all potential bidders can take note of it.
- (225) In the present case, the call for expression of interest was published in the *Official Journal of the European Union*, in the Official Gazette of the Italian Republic, in four daily national and local Italian newspapers, as well as on the Region of Lazio's website (see recital 58). This call invited anyone who could 'guarantee the continuity of the maritime transport service' to express its interest and did not impose any further conditions. Potential bidders were given sufficient time to adequately express their interests allowing them to then participate in the further process. The Commission therefore considers that the intention of the Region of Lazio to sell Laziomar and award the public service contract was made available widely in a way reaching all possible bidders.
- (226) Further, bidders need to be provided with all documents and information required for the participation in the bidding process enabling them to properly assess the company put up for sale. Such information has to be made available to potential bidders in a transparent and non-discriminatory manner with all interested participants having equal access to relevant information.
- (227) First, the call for expressions of interest mentioned that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. This was the only selection criterion that Italy applied to determine whether or not interested parties would be allowed to participate in the tender procedure. While the call did not specify how bidders could prove they met this requirement, by default this meant that any appropriate means of evidence could be used. ⁽⁷⁸⁾ The Commission considers that this selection criterion was clear to all interested bidders and was also justified in light of the objective pursued.
- (228) Second, the 2009 Law made clear to interested parties that a new convention/public service contract would be concluded upon completion of the tender procedure and that the annual amount of public service compensation had been set at maximum EUR 10 030 606 million per year. In addition, the call for expressions of interest indicated that the objective was to sell Laziomar business with a fixed price of EUR 2 272 000. Furthermore, as confirmed by Italy, all relevant information as regards the scope of the sale, including the draft public service contract to be concluded between the buyer and Italy, was made available to the seven parties that were admitted to the next stage of the tender process. This allowed these parties to decide whether or not to bid and if so how much to bid. On this basis, the Commission considers that it was sufficiently clear from the call for expressions of interest that the sale concerned the Laziomar business bundled with a new public service contract. After having expressed their interest, parties were given access to all necessary information to decide on a possible bid.

⁽⁷⁶⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

⁽⁷⁷⁾ In the Notion of Aid Communication, the Commission observes that the Union Courts often refer, in the context of State aid to an 'open' tender procedure. The use of the word 'open', however does not refer to a specific procedure under the Public Procurement Directives. Therefore, the Commission considers that the word 'competitive' appears more appropriate. In this Communication, the Commission also notes that this is not intended to deviate from the substantive conditions set out in the case-law.

⁽⁷⁸⁾ Furthermore, as explained above (see recital 221), Article 36(1) of Directive 2004/18/EC did not apply to this tender. Therefore, Italy had actually no obligation to provide in the call selection criteria.

- (229) Third, the Commission considers that the call for expression of interest attracted a substantial number of potential tenderers. All seven companies that were invited to the next stage of the tender process received thereafter detailed information from the Region of Lazio about the process. Further, in compliance with the provisions of Directive 2004/18/EC, it appears that Italy had no obligation to provide, in the call, any more information about the contract to be awarded apart from the mere mention of the continuation to provide the public service and the reference to the legal rules regulating that service (see recital 221).
- (230) Fourth, the call contained the minimum necessary information needed in order to submit an expression of interest (i.e. the continuation of the public service), and it could not have prompted the exclusion of otherwise interested maritime operators. It was the decision of the planning authorities to ensure continuity of the public service and connectivity of the islands of the Pontino archipelago with the mainland. This condition was made known in advance, as above explained, to all potential operators expressing an interest to participate in the tender procedure. The Commission hence considers that Italy had at that stage no control over the potential tenderers, which shows that it was not the intention of the planning authorities, as a result of the inclusion of the mandatory requirement to continue the public service, to selectively favour any potential tenderer to be awarded the contract for the public service and the ownership of the Laziomar business. The Commission also notes that all relevant information on the selection criteria and the further development of the procedure was provided for in the invitation letter sent to all seven parties that were admitted to the bidding stage.
- (231) In the 2012 Decision the Commission expressed doubts concerning certain *financial requirements* of the tender (see recital 109) that were imposed on tenderers by virtue of the public service contract, in addition to the standard qualitative conditions that are in any event required as public service obligations. Further, the Commission doubted that such requirements could be accepted in a situation, as the present one, where the whole company is put up on sale.
- (232) In the course of the investigation, the Commission however received information that alleviated its concerns. In particular, Italy eliminated from the invitation to tender the financial requirements (i.e. pre-determined volumes of turnover in the maritime transport sector) that would have made it possible only for shipping companies to take part in the tender procedure (see recital 125). In fact, the Commission notes that Carpoint Motorsport S.p.A., which according to publicly available information is a company active in the retail and wholesale sector of vehicles, was amongst those companies that expressed an interest to participate in the tender (see recital 61).
- (233) The Commission further welcomes the initiative taken by the Region of Lazio to encourage the broadest possible participation in the procedure by allowing bidders to take part in joint form through temporary groupings of tenderers, consortia or EEIGs (see recital 60).
- (234) On the basis of the above, the Commission considers that, taken as a whole, the tender procedure was competitive and transparent. In particular, the intention of the Region of Lazio to divest the Laziomar business and to conclude a new public service contract with a duration of 10 years with the winning tenderer was made available widely in a way reaching all possible bidders in the relevant regional or international market. Furthermore, the Commission takes into account that potential bidders could easily express their interest and did not have to commit themselves to anything at that stage. Provided that they could show they fulfilled the sole selection criterion of guaranteeing the continuity of the service, those parties were then given all the necessary information and time to allow them to decide if and how much they wanted to bid for the Laziomar business. For these reasons, the Commission considers that its doubts that the tender procedure was not sufficiently transparent due to possible deficiencies in the call for expressions of interest are dispelled.

Non-discriminatory nature of the tender

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

- (236) As indicated above (see recital 227), the call for expressions of interest contained the sole condition that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. All eight parties that responded to the call and expressed an interest were aware of that obligation. The Commission considers that this condition was objective and had been made sufficiently clear to all interested parties in the call for expressions of interest.
- (237) The seven out of the eight interested bidders that were admitted to the next stage of the tender procedure were then invited to submit a tender having all received the same information (see recital 61).
- (238) The Commission's doubts in the 2011 Decision that the call for expression of interest may not have been sufficiently non-discriminatory are therefore resolved. All parties were correctly and equally informed throughout the various steps of the tender procedure enabling them to make a bid with full knowledge of the procedure and requirements. The Commission also considers that the award criteria allowed for an objective comparison and assessment of the tenders.

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

- (239) Paragraph 65 of the SGEI Communication provides that based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at 'the least cost to the community'.
- (240) In this case, the new public service contract bundled with the Laziomar business, rather than only the public service contract itself, has been tendered out. Italy decided that the price for the sale of the Laziomar business was fixed (based on the valuation performed by an independent expert) and not negotiable, whilst for the service contract Italy chose the most economically advantageous offer with price scoring 30 points and technical criteria scoring 70 points (see recital 62).
- (241) In relation to the use of the most economically advantageous offer, paragraph 67 of the SGEI Communication indicates that the 'most economically advantageous offer' is deemed also (in addition to the 'lowest price') sufficient to satisfy fourth *Altmark* criterion '[...] provided that the award criteria [...], are closely related to the subject matter of the service provided and allow for the most economically advantageous offer to match the value of the market'. ⁽⁷⁹⁾
- (242) The Commission notes that Italy gave emphasis on choosing an operator that would provide the service at high technical and quality standards taking into account certain requirements. As regards the breakdown of the maximum scores for the technical offer (70 points) and the economic offer (30 points) for awarding the contract, according to the criterion of the most economically advantageous offer, Italy, referring to an opinion provided by the Italian Council of State (see recital 126), points to the importance of the qualitative elements of the offer as a means to avoid excessive downwards revisions of the price that would have been difficult to sustain without sacrificing the quality of the public service provided. At the same time, Italy argues that this breakdown made it possible to achieve a better price for the service (see recital 127).
- (243) The invitation letter to submit a tender included all necessary information needed in order to fill out the financial and technical offers. Especially as regards the technical offer, the seven maritime operators that were invited to submit a tender, were required to provide detailed information describing the management arrangements and conditions that they would observe over the whole entrustment period. Particularly, the operators had to demonstrate the following: (i) targeted management improvement initiatives (e.g. service charter, marketing and communication policy, web-marketing plan, optimisation of human resources and vessels – 10 points); (ii) arrangements for the renewal of the fleet (e.g. development of average age of the fleet, compliance with minimum functional vessel characteristics, such as dimensions, comfort, speed, security system etc. – 40 points); and (iii) allocation of vessels to supplement the existing fleet (i.e. provision of the technical characteristics of each of the vessels (including the line) that the operator intends to use to perform the services – 20 points). These requirements are evidently closely related to and confer added value to the provision of the maritime service. Therefore, the Commission considers that the use of the most economically advantageous tender for the service concerned

⁽⁷⁹⁾ See also paragraph 96 of the Notion of Aid Communication.

bundled with the sale of the Laziomar business enabled Italy to create effective competition and obtain a service with the highest possible value at the least cost to the community. In this regard, the Commission takes note of the fact that the annual remuneration that was awarded to CLN for the provision of the maritime service has been much lower than the maximum yearly compensation amount suggested by the Region of Lazio at the start of the tender (see recital 75).

- (244) As far as the bundling of the service with the sale of the Laziomar business is particularly concerned, in the 2012 Decision, the Commission took the preliminary view that the tendering of the new public service contract without an obligation to take over the vessels of Laziomar necessary to perform the public service, would have resulted in a lower cost to the community
- (245) The Commission has already concluded above that the tender procedure has been sufficiently transparent and non-discriminatory to enable the participation of as many potential tenderers as possible. Indeed, following the widespread publication of the call for expression of interest, eight maritime operators responded affirmatively and seven were admitted to the bidding stage. All relevant information concerning the tender procedure was provided in the invitation letter sent to these seven operators.
- (246) Following the expression of interest stage, one competitive bid was submitted (CLN), which the Region of Lazio evaluated, taking into account its technical and financial offer.
- (247) The mandatory condition to guarantee the continuity of the public service and the bundling of the assets with the public service obligations are interrelated. In particular, by having bundled the sale of Laziomar with a new public service contract, the acquirer, CLN, automatically becomes subject to the requirement to ensure the continuity of the public service and is awarded the berthing priority. The Commission considers that the bundling of the Laziomar business with the new public service contract and the award of the berthing priority do not result in a lower price than when the assets and this contract would have been sold separately, for the following reasons.
- (248) The Laziomar business has been solely associated to the delivery of the public service and ensuring the territorial continuity. That said, all Laziomar's vessels have been and currently are used for the public service. Hence, it cannot be argued that a private vendor would have obtained a higher price had those or some vessels been sold without the said condition. According to the information provided by Italy and an independent expert evaluation commissioned by the Region of Lazio (see recitals 66 and 67), the vessels of Laziomar are of advanced age (ranging from 22 to 32 years), and the condition of the engines and other materials (e.g. hull construction materials) require upgrading and maintenance after so many running hours over the years of use. Therefore, the vessels would attract low commercial demand, unless with a view to purchase for investment, restoration and modernisation over a short time. That said, it seems unlikely that the vessels could have been sold for shipping purposes, other than that including the condition to continue the public service, for a higher price than what they were budgeted for.
- (249) In addition, had Laziomar been sold separately, the Commission considers it unlikely that potential bidders could have had such significant resources (consisting of four vessels and industrial and commercial equipment) readily available for redeployment to operate the public service obligations laid down in the new public service contract. This is particularly true since the new contract contains specific requirements about the vessels to be used on the different public service routes (see recital 243). Any operator who had the required resources would likely have employed them already on other routes and their redeployment in line with the new public service contract would inevitably have led to losing the revenues from their previous use.
- (250) The Commission considers therefore that bundling those ships with the public service contract allowed obtaining a higher price for Laziomar's vessels since in return for operating the vessels on the public service routes, their acquirer would receive public service compensation for a period of 10 years. In addition, any market economy vendor would have decided to sell Laziomar along with a new public service contract in order to obtain the highest price. On this basis, the Commission concludes that Italy has not attached conditions that were likely to depress the price or which a private seller would not have demanded.

- (251) The Commission concludes that its doubt that tendering out the new public service contract together with the Laziomar business could not result in a lower cost to the community, is dispelled.
- (252) In view of the above, the Commission considers that the use of the most economically advantageous tender for the new public service contract bundled with the Laziomar business created genuine competition until the end of the tender procedure.

Strong safeguards in the design of the procedure where only one bid is submitted

- (253) On the basis of the assessment described above (see recitals 224 to 252) the Commission concludes that the tender procedure was open, transparent and non-discriminatory in line with public procurement rules. However, paragraph 68 of the SGEI Communication notes that 'in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community'.
- (254) Accordingly, given that only CLN submitted a bid in the tender procedure for Laziomar (which included the new public service contract), such tender would normally not be sufficient to ensure the absence of an advantage to the winner.
- (255) The Commission has however nuanced the position expressed in paragraph 68 of the SGEI Communication in its SGEI Guide⁽⁸⁰⁾ by stating that 'it does not mean that there cannot be cases where, due to particularly strong safeguards in the design of the procedure, also a procedure where one bid is submitted can be sufficient to ensure the provision of the service at 'the least cost to the community'.
- (256) The Commission considers that in the case under assessment, such safeguards were present. More specifically:
- (1) the tender procedure was organised in such a way as to maximise interest from potential bidders. Furthermore, these potential bidders did not have to follow burdensome procedures and would not have had to incur significant costs to express their interest. As a result, eight expressions of interest were received of which seven were invited to submit a bid (see recital 237);
 - (2) Italy chose the restricted tender procedure to award the service contract (see recital 59), which is a two-stage process where only those operators that have been invited to the bidding stage may submit tenders. According to paragraph 66 of the SGEI Communication, '[...] a restricted procedure can also satisfy the fourth Altmark condition, unless interested operators are prevented to tender without valid reasons'. In fact, for this tender seven possible bidders (out of the eight that had initially expressed an interest) remained in the bidding phase (see recital 61), which shows that genuine competition was possible until the end of the tender procedure. A restricted procedure usually allows potential tenderers more time to evaluate their bid before submission. The Commission considers that based on their profile, at least five of the remaining possible bidders (i.e. NLG, Traghetti Lines, Navigazione Generale Italiana S.p.A., Vetur and Ustica Lines, the latter now operating under the name Liberty Lines) were likely able (due to their experience and financial resources) to make bids or had reason to have a genuine interest in making a bid (e.g. NLG and Vetur are already active on some of the routes on which Laziomar is sailing (see Table 9), whereas the other companies are established maritime operators with national as well as international activities);
 - (3) the invitation to tender sent to the seven operators that had expressed an initial interest consisted of a fixed price for the sale of all the shares of Laziomar at EUR 2 272 000, which was not subject to review in the light of any offer of any kind (see recital 62). The Commission notes that the sale price for Laziomar was determined by an independent expert based on the relevant economic and market conditions at the time and constituted a fixed price in the tender procedure. That said, all participants were aware of that price and did not raise any complaint as regards its scope and level. In addition, the invitation to tender consisted of a maximum annual remuneration for the public service, set by the Region of Lazio, at EUR 14 300 550 per year, net of the VAT payable for 10 years. All participants were invited to submit better offers as regards this annual remuneration

⁽⁸⁰⁾ See more specifically the Commission's reply to question 68 in its Staff Working Document 'Guide on the application of the Union rules on state aid, public procurement and the internal market to services of general economic interest' of 29 April 2013 (see: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf).

for the public service on the basis of certain technical criteria. This is a particularly strong safeguard to ensure not only that the lowest possible bid in terms of annual remuneration for the public service (and hence the least cost for the community) is obtained but also that bidders were not discouraged from submitting a bid.

- (257) The Commission considers that given the above safeguards the tender procedure was sufficient to ensure the provision of the service at the least cost to the community even if only one bid was eventually submitted. ⁽⁸¹⁾
- (258) On the basis of the above, the Commission concludes that the *Altmark* 4 criterion is complied with in the present case.
- (259) Given that the four conditions set out by the Court of Justice in the *Altmark* case are cumulatively met, the Commission concludes that the award of the new public service contract bundled with the Laziomar business and the berthing priority to Laziomar, does not confer an economic advantage on the latter and on its acquirer, CLN.

5.1.2.5. Conclusion

- (260) Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the award of the public service contract bundled with the Laziomar business and the berthing priority to Laziomar and its acquirer CLN do not constitute State aid within the meaning of Article 107(1) TFEU.

5.1.3. The measures laid down by the 2010 Law

- (261) The Commission took the preliminary view in the 2011 Decision that all measures laid down by Decree Law 125/2010 converted with amendments into the 2010 Law constitute State aid in favour of the companies of the former Tirrenia Group, as long as the respective beneficiaries were able to use these measures to cover liquidity needs and thereby improve their overall financial position.
- (262) Based on the information received during the formal investigation, the Commission considers that the three measures should be assessed separately.

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

- (263) State resources: The funds in question were granted by the State from its own budget (see recital 84) and their use for liquidity purposes was enabled by the 2010 Law. The measure is therefore imputable to the State and is given through State resources.
- (264) Selectivity: this measure was only granted to the companies of the former Tirrenia Group, including to Laziomar, and is therefore selective. For completeness, the Commission points out that this measure was not granted to CLN.
- (265) Economic advantage: according to Italy, Caremar (at the time) benefited from the funds in question for modernisation work on the fleet used in the Pontino archipelago to bring it into line with international safety standards. Some of the works involved two units of the Caremar fleet which were then transferred free of charge to Laziomar (see recital 132). These funds were never thus used for liquidity purposes (see recital 132) and the Commission did not find evidence to support the opposite.
- (266) Since Laziomar did not use these funds for liquidity purposes in order to avoid costs, which it would ordinarily have to cover itself by means of its own financial resources, the doubts expressed in the 2011 Decision are no longer valid and the Commission considers that no economic advantage has thus been conferred to Laziomar through the use of the said funds.
- (267) Conclusion: since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the measure does not constitute State aid within the meaning of Article 107(1) TFEU.

⁽⁸¹⁾ For completeness, the Commission notes that the case at hand differs from other cases where only one bid was submitted. In this regard and for specific reasoning see Decision (EU) 2020/1412 (recitals 404 and 405).

5.1.3.2. Fiscal exemptions related to the privatisation process

- (268) As described in recital 86, pursuant to Article 1 of the 2010 Law, certain acts and operations undertaken to privatise the Tirrenia group and described in paragraphs 1 to 15 of Article 19-ter of Decree Law 135/2009, converted with modifications into the 2009 Law, are exempt from any taxes ordinarily due on those acts and operations.
- (269) The Commission first notes that three separate sets of transfers have to be assessed: (1) the transfers of Tirrenia's former subsidiaries Caremar, Saremar and Toremar from Tirrenia to the Regions of Campania, Sardinia and Tuscany; (2) the transfer of the Laziomar business from the Region of Campania to the Region of Lazio; and (3) the transfer of the Laziomar business from the Region of Lazio to CLN. The taxes exempted are in particular registration duty, land registry and mortgage registration fees, stamp duty (together, 'the indirect taxes'), VAT and corporate income tax. The beneficiaries of this aid measure would be the seller, the buyer, or both. Only the second and third set of transfers will be assessed in this Decision. ⁽⁸²⁾
- (270) At the outset, the Commission accepts that the transfer of the Laziomar business between the Region of Campania and the Region of Lazio was not subject to corporate income tax (since no consideration was paid) and to VAT (which does not apply to such transactions under national law). As far as the indirect taxes are concerned, those that, under national law, were payable only by the acquirers, were in this case payable by the Region of Lazio acting within its public remit, i.e. as State entity. As such, it does not qualify as an undertaking. Therefore, none of the aforementioned tax exemptions will be assessed further in this Decision.
- (271) As regards the third transfer, at the outset, the Commission notes that under Presidential Decree No 633 of 26 October 1972, transfers of going concerns or business units to another company are not considered a supply of goods and therefore are out of the scope of VAT. Therefore, as transactions such as the sale of the Laziomar business to CLN are not subject to VAT, the tax exemption cannot have conferred an advantage to Laziomar with regard to VAT. Furthermore, the Commission notes that the sale contract for the Laziomar business clearly states that the purchaser, i.e. CLN, has to bear all costs related to the sale (i.e. registration fees, notarial costs, land registry, etc.), without reference to any exemption enjoyed by CLN on these costs. As regards the exemption from corporate income tax, the Commission considers that such tax would only apply to the proceeds of a sale. In this case, however, CLN purchased Laziomar from the Region of Lazio, which means that this transaction constituted an expense for CLN and as a result no corporate income tax could be due. Therefore, this measure does not apply to CLN. The Commission, in view of the above, concludes that neither Laziomar nor CLN have benefited from these fiscal exemptions.
- (272) For these reasons, none of the aforementioned tax exemptions constitutes State aid within the meaning of Article 107(1) TFEU.

5.1.3.3. Possibility of using FAS resources to meet liquidity needs

- (273) In the 2011 and 2012 Decisions, the Commission mentioned the possibility for the (former) Tirrenia Group companies to use FAS resources in order to meet current liquidity needs. However, in the course of the formal investigation procedure, Italy clarified that the FAS resources were not meant as an additional compensation for Laziomar or CLN (or any other of the companies of the former Tirrenia Group or their respective acquirers). Instead, these resources were made available to supplement the budget appropriations for the payment of the public service compensations to the companies of the former Tirrenia Group, in case they proved insufficient. Indeed, Article 1, paragraph 5-ter, of the 2010 Law enabled the regions to use the FAS resources to fund part of the regular public service compensation and thereby ensure continuity of the maritime public services. In other words, this measure merely concerns an allocation of resources in the Italian State budget for payment of the public service compensations.
- (274) In light of the above, the Commission concludes that the FAS resources are only a funding source to allow the State to pay the public service compensations (granted on the basis of the prolonged initial Convention) and do not constitute a measure which Laziomar can benefit from in addition to these public service compensations. Therefore, the possible use of FAS resources does not constitute State aid within the meaning of Article 107(1) TFEU.

⁽⁸²⁾ The first set of transfers was assessed in Decision (EU) 2020/1412 (see recital 418).

5.1.4. Conclusion on the existence of aid

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

- the compensation to Laziomar for the operation of maritime routes in the period 1 June 2011–14 January 2014 constitutes State aid within the meaning of Article 107(1) TFEU;
- the award of the new public service contract for the period 15 January 2014–14 January 2024, bundled with the Laziomar business and the berthing priority to Laziomar and its acquirer CLN, complies with the four *Altmark* conditions and therefore does not constitute State aid within the meaning of Article 107(1) TFEU;
- as Laziomar did not use the funds to upgrade ships for liquidity purposes, as enabled by the 2010 Law, that measure does not constitute State aid to Laziomar within the meaning of Article 107(1) TFEU; and
- the fiscal exemptions related to the privatisation process of Laziomar and the possibility to use FAS resources to meet liquidity needs as laid down by the 2010 Law, do not constitute State aid to Laziomar within the meaning of Article 107(1) TFEU.

5.2. Lawfulness of aid

(276) The aid measure in scope of this Decision has been put into effect before formal approval by the Commission. Therefore, insofar as this aid measure was not exempted from notification under the 2005 SGEI Decision or the 2011 SGEI Decision, it was granted by Italy in violation of Article 108(3) TFEU ⁽⁸³⁾.

5.3. Compatibility of the aid

(277) The compatibility of the public service compensation granted to Laziomar under the prolongation of the initial Convention must be assessed in the light of Article 106(2) TFEU.

5.3.1. Applicable rules

(278) As already mentioned above, the prolongation of the initial Convention after the end of 2008 has been carried out by subsequent legal acts, as follows:

- (a) Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions from 1 January 2009 until 31 December 2009;
- (b) Decree Law No 135 of 25 September 2009, converted into the 2009 Law, laid down *inter alia* the prolongation of the initial Conventions from 1 January 2010 until 30 September 2010;
- (c) Decree-Law No 125 of 5 August 2010, converted into the 2010 Law provided for a further prolongation of the initial Conventions from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar; and
- (d) Region of Lazio Law No 228 of 24 December 2012, confirming Laziomar's obligation to ensure the territorial continuity of the Pontino archipelago routes until its privatisation.

(279) Against this background, the Commission notes that the granting of the public service compensation under the last prolongation of the initial Convention, post-dates the entry into force of the 2011 SGEI Decision and 2011 SGEI Framework, as opposed to the first three prolongations, which pre-date the entry into force of this legislative framework. In this latter context, however, the 2011 SGEI package – in Article 10 of the 2011 SGEI Decision and paragraph 69 of the 2011 SGEI Framework – contains rules that provide for its application also to aid granted before the entry into force of the 2011 SGEI package on 31 January 2012. In particular, the 2011 SGEI Decision provides in its Article 10(b) that:

⁽⁸³⁾ The Commission will assess whether this was indeed the case in Section 5.3.1.

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

- (280) As regards the 2011 SGEI Framework, paragraphs 68 and 69 of that Framework specify that the Commission will apply the principles set out in that Framework to all notified aid projects, whether the notification took place before or after the start of application of that Framework on 31 January 2012, as well as to all unlawful aid on which it takes a decision after 31 January 2012, even if that aid was granted before 31 January 2012. In the latter case, the provisions of paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework are not applicable.
- (281) As a result, the rules on the application of the 2011 SGEI Decision and the 2011 SGEI Framework as described above mean that the public service compensation granted to Laziomar during the prolongation period can be assessed pursuant to the 2011 SGEI package. If the relevant conditions of either the 2011 SGEI Decision or the 2011 SGEI Framework are complied with, this aid measure is compatible with the internal market for the entire period from 1 June 2011–14 January 2014. ⁽⁸⁴⁾
- (282) The Commission will assess first whether the public service compensation granted to Laziomar during the prolongation period complies with the conditions of the 2011 SGEI Decision.
- (283) The Commission notes that the 2011 SGEI Decision is only applicable to State aid in the form of public service compensation for maritime links to islands on which average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers (Article 2(1)(d)). As described in recital 141, Italy has presented figures showing that this threshold is not exceeded on any of Laziomar's routes. The Commission therefore concludes that the condition of Article 2(1)(d) of the 2011 SGEI Decision is complied with.
- (284) Further, according to Article 4 of the SGEI Decision, the entrustment act is to include among others a reference to the application of that Decision. The Commission notes that no such reference is included in the public service contract between the Region of Lazio and Laziomar nor in any of its accompanying documents. As a result, the Commission concludes that Article 4 is not complied with and the compatibility of the public service compensation granted to Laziomar during the prolongation period cannot be assessed under the 2011 SGEI Decision.
- (285) Consequently, the compatibility of the public service compensation granted to Laziomar as of 2011 and until the completion of the privatisation process would normally fall within the scope of application of the 2011 SGEI Framework.
- (286) In this context however, given that the conditions laid down in Article 2(1)(d) of the SGEI Decision are met, paragraph 61 of the 2011 SGEI Framework applies. On this basis, the Commission will assess whether the public service compensation granted to Laziomar during the entire prolongation period complies with the conditions of the 2011 SGEI Framework, with the exception of the conditions in its paragraphs 14, 19, 20, 24, 39 and 60.

⁽⁸⁴⁾ For completeness, the Commission notes that the transitional provision contained in Article 10(a) of the 2011 SGEI Decision, according to which any aid scheme put into effect before the entry into force of this Decision (i.e. before 31 January 2012) that was compatible with the internal market and exempted from the notification requirement in accordance with the 2005 SGEI Decision shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of two years (i.e. until 30 January 2014 included). This means that aid which was granted under such a scheme in the period between the entry into force of the 2005 SGEI Decision on 19 December 2005 and the entry into force of the 2011 SGEI Decision on 31 January 2012 will be considered compatible with the internal market but only from the date on which it was granted until 30 January 2014 included. In any event, for aid granted in the time from 31 January 2012 onwards, the transitional provision of Article 10(a) of the 2011 SGEI Decision is not applicable and the compatibility assessment has to be made pursuant to the 2011 SGEI Decision.

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

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

(288) The assessment of whether the SGEI are genuine must also be performed in light of the SGEI Communication (see recitals 170 and 186), the Maritime Cabotage Regulation (see recitals 173, 174 and 175) and the case-law (see recitals 176 and 177). Therefore, the Commission must assess for the prolongation period:

- (1) Whether there was **user demand**;
- (2) Whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**); and
- (3) That simply having recourse to public service obligations was insufficient to remedy that shortage (**least harmful approach**).

(289) The Commission points out that the public service routes operated by Laziomar during the prolongation period are the same as those entrusted to it under the new public service contract, with the exception, that the number of routes during the prolongation period was only five (see recital 43), whereas under the new public service contract two additional routes connecting Terracina with Ponza (Line T3) and Ventotene (Line T4) (see recital 72) have been added. In addition, the Commission has already described and assessed the competitive situation on those routes during the extension period. Against this background, the following assessment will rely on and refer to the relevant parts of the assessment made for the new public service contract above (see Section 5.1.2.1).

(290) The Commission first recalls (see recital 120) that Italy has imposed the public service obligations laid down in the initial Convention mainly to (i) ensure the territorial continuity between the mainland and the islands; and to (ii) contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission already concluded (see recital 179) that these are indeed legitimate public interest objectives.

(291) To illustrate the genuine demand from users for the maritime services concerned, Italy provided (see Tables 11 and 12), detailed statistics which show that in 2011, Laziomar transported 270 457 passengers and 17 717 vehicles on the five service routes combined during the respective time periods covered by the public service obligations. These figures in 2012 were 240 430 passengers and 13 228 vehicles and in 2013 254 167 passengers and 16 927 vehicles. ⁽⁸⁵⁾

⁽⁸⁵⁾ Italy has also provided passenger only figures for 2009 and 2010. It shall be reminded that the specific routes were carried out by Caremar during that period until the end of May 2011. The figures in 2009 were 287 639 passengers (157 055 for T1 and A2, 99 087 for T2 and A3 and 31 494 for A1) and 253 638 in 2010 (141 300 for T1 and A2, 86 031 for T2 and A3 and 26 307 for A1).

Table 11

Passengers' statistics for the years 2011–2013

Year	Line T1	Line T2	Line A1	Line A2	Line A3	Total No of passengers
2011	57 374	53 461	15 374	106 588	37 660	270 457
2012	36 446	61 978	16 372	96 125	29 509	240 430
2013	26 492	61 678	19 655	117 085	29 257	254 167

Table 12

Vehicles' statistics for the years 2011–2013

Year	Line T1	Line T2	Line A1	Line A2	Line A3	Total No of vehicles ⁽¹⁾
2011	13 203	2 880	1 634 ⁽²⁾			17 717
2012	10 614	2 614				13 228
2013	14 177	2 750				16 927

⁽¹⁾ The vessels used on Line A1, Line A2 and Line A3 did not transport vehicles (with the exception of Line A1 in 2011).

⁽²⁾ As from 2012 this route has been only serving passengers.

- (292) Overall, the numbers show that the user demand for the maritime services on each of the routes concerned was significant and fairly stable, and the analysis for the years 2011–2013 did not provide any indications that it would have disappeared. The Commission has already demonstrated that there was also significant user demand for the maritime services for the period from 2014 onwards (see recital 184).
- (293) It can therefore be concluded that these services addressed a genuine user demand and thus satisfied real public needs.
- (294) As explained under recital 186, the Commission must also examine whether the service would have been inadequate if its provision were left to the market forces alone in the light of the public service obligations imposed by the Member State by virtue of the extension of the initial Convention. Paragraph 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.
- (295) The Commission notes that during the period from 1 June 2011 until 14 January 2014, on one route that was operated by Laziomar under the extension of the initial Convention (Line A3), another operator, Vetur, offered a passenger service albeit not with the same continuity, regularity and price. The Commission has already assessed in recital 195 the competitive situation on Line A3 and whether the services provided by Vetur were equivalent to those that Laziomar had to provide under the new public service contract. The Commission recalls that this assessment was based on the competitive situation on that route between 1 June 2011 and 14 January 2014. Since the services in general that Laziomar has to operate are almost identical in terms of routes served, frequencies and technical requirements to those that it had to perform during the prolongation period, the Commission's conclusion (see recital 195) that market forces alone were insufficient to meet the public service needs is also valid for Laziomar during the entire prolongation period. Indeed, on most routes Laziomar was the only operator while on only one route (Line A3) the services provided by Vetur were not equivalent in terms of continuity, regularity, capacity and price and therefore did not satisfy in full the public service needs imposed on Laziomar by virtue of the initial Convention (as prolonged).

- (296) Finally, in light of the planned privatisation and in order to ensure the continuity of the public services that were operated under the initial Convention, Italy decided to extend this Convention unaltered and subject to the change in compensation methodology applicable from 2010 onwards). The Commission accepts that user demand (as described in recitals 291, 292 and 293) could not have been met by imposing public service obligations applicable to all operators serving the routes at hand. In particular, on most routes Laziomar was the only operator (see e.g. recital 188) and, where this was not the case, the offer provided by the other operator did not meet the requirements of regularity, continuity, capacity and affordable price. Furthermore, the operation of most (if not all) routes, especially in the low season, is loss-making so that without public service compensation they would likely not be operated at all. In addition, the Commission accepts that in view of the process to privatise Laziomar, prolonging the existing public service contract was the only way to guarantee the continuity of the public services until completion of that privatisation.
- (297) Therefore, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Laziomar as SGEI. The doubts expressed by the Commission in the 2011 and 2012 Decisions are hence dispelled.

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

- (298) As indicated in the Section 2.3 of the 2011 SGEI Framework, the concept of service of general economic interest within the meaning of Article 106 TFEU means that the undertaking in question has been entrusted with the operation of the service of general economic interest by way of one or more official acts.
- (299) These acts must specify, in particular:
- The precise nature of the public service obligation and its duration;
 - The undertaking and territory concerned;
 - The nature of the exclusive rights;
 - The parameters for calculating, controlling and reviewing the compensation;
 - The arrangements for avoiding and repaying any overcompensation.
- (300) In its 2011 and 2012 Decisions, the Commission expressed doubts as to whether the entrustment act provided for a comprehensive description of the nature of Laziomar's public service obligations during the prolongation period. Nevertheless, the Commission also recalled that different elements of the entrustment might be placed in several acts without putting into question the appropriateness of the definition of the obligations. During the extension period, Laziomar's entrustment act included the initial Convention (as amended and extended over time), the five-year plans covering the periods 2000–2004 and 2005–2008, a series of *ad hoc* decisions by Italy, the CIPE Directive and the 2009 Law.
- (301) Against this background, the Commission first notes that the initial Convention (as amended over time), which forms the core of Laziomar's entrustment act, remained fully applicable until the completion of the privatisation on the basis of a series of Decree Laws (see recital 278). These legal acts specify that Laziomar was entrusted with public service obligations until the completion of its privatisation.
- (302) According to the initial Convention, the five-year plans specify the routes and the ports to be served, the type and capacity of vessels to be used for the maritime connections in question, the frequency of the service and the fares to be paid, including subsidised fares, particularly for residents of island regions. While the plans for the period 2005–2008 were not formally adopted, the plan for the period 2000–2004 continued to apply without any changes as regards the scope of the public service obligations. Therefore, the provisions of that plan continued to apply in full during the period from 1 June 2011 until 14 January 2014. Before 2011, the original fare scheme provided for in the initial Convention was amended by a number of subsequent acts. However, during the entire prolongation period, no inter-ministerial decrees were issued to further amend the fares to be charged by the companies of the former Tirrenia Group, including Laziomar. On this basis, the Commission concludes that the public service obligations that Laziomar had to comply with during the prolongation period were defined in a sufficiently clear way.

- (303) The Commission already noted in recitals 239 and 240 of the 2011 Decision that the parameters necessary for the calculation of the amount of compensation have been established in advance and are clearly described. In particular, for the years 2011 to 2013 the initial Convention (see recital 46) contains an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return on invested capital for the operator. The relevant methodology is set out in the CIPE Directive (see recitals 47 to 57). More specifically, the CIPE Directive details the cost elements taken into account and the return on invested capital. Finally, the 2009 Law includes the maximum compensation amount of EUR 10 030 606 million per year that applies from 2010 onwards. Furthermore, the initial Convention laid down that the compensation would be paid out in instalments and ensured that the compensation was based on the actual costs and revenues incurred for the delivery of the public service. In this way, overcompensation could be detected and easily avoided. Where applicable, the State could then recover the overcompensation from Laziomar.
- (304) On this basis, the Commission considers that for the period of prolongation of the initial Convention the entrustment acts laid down a clear definition of the public service obligations, the duration, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and repaying any overcompensation, as required under the 2011 SGEI Framework.

5.3.4. Duration of the period of entrustment

- (305) As indicated in paragraph 17 of the 2011 SGEI Framework, '[...] the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.'
- (306) Italy indicated that the duration of the extension has been set in reference to the period required for the depreciation of the assets employed in the provision of the SGEI. In particular, the total duration of the initial Convention as prolonged amounts to just over 24 years. Vessels are the most significant assets required to provide the public service. The depreciation period for vessels used for ferry services is usually long and can exceed 25 years.
- (307) Italy has provided the Commission with the depreciation value of Laziomar's vessels for the period 2011–2013. The Commission notes that, at the time Laziomar started operating the Pontino archipelago routes on 1 June 2011 under the prolongation of the initial Convention, its four vessels had an average age of 24 years.
- (308) The Commission notes that extending the period for two and a half years was necessary to ensure the continuity of the public service until the completion of the privatisation process. Taking into account, additionally, the average age of the vessels, the average length of the depreciation of vessels used in general for ferry services, the modernisation initiatives envisaged pursuant to the service contract provisions and the use of new vessels (see recital 243), the Commission concludes that the duration of the entrustment act is sufficiently justified and that paragraph 17 of the SGEI Framework is complied with.

5.3.5. Compliance with Commission Directive 2006/111/EC ⁽⁸⁶⁾

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

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

- (310) Furthermore, paragraph 44 of the 2011 SGEI Framework requires that: 'Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31.'
- (311) Italy has confirmed that Laziomar has only been active in providing public services under the initial Convention.
- (312) Therefore, the Commission considers that paragraph 18 of the 2011 SGEI Framework is not applicable.

5.3.6. Amount of compensation

- (313) Paragraph 21 of the 2011 SGEI Framework states that '[...] the amount of the compensation must not exceed what is necessary to cover the cost of discharging the public service obligations, including a reasonable profit'.
- (314) In the case at hand, since the compensation constitutes illegal aid granted before its entry into force, paragraph 69 of the 2011 SGEI Framework specifically provides that, for the purpose of the State aid assessment, the use of the net avoided cost methodology is not required. Instead, alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost allocation can be used. Under the latter methodology, the net cost would be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act. Paragraphs 28 to 38 of the 2011 SGEI Framework set out in more detail how this methodology should be applied.
- (315) In its 2011 and 2012 Decisions, the Commission expressed doubts regarding the risk premium of 6,5 %, which applied from 2010 onwards. In particular, the Commission questioned whether this premium reflects an appropriate level of risk, taking into account that *prima facie* Toremar did not seem to assume the risks normally borne in the operation of such services.
- (316) The risk premium of 6,5 % would have been applied to determine the return on capital using the WACC formula. However, as already explained in recitals 136, 137 and 138, Italy has clarified that, because the amount of compensation was capped by the 2009 Law, it was decided to simplify the calculation by applying the 6,5 % as a flat rate return on capital.
- (317) In this context, on the basis of the route-by-route accounts submitted by Italy and as aggregated in Table 13, the Commission could verify that for 2011, 2012 and 2013 together, the public service compensation was EUR 70 650 higher than the net cost of the service (not including any return on capital):

Table 13

Net cost of the public service operated by Laziomar for the period 2011–2013

(EUR)

Toremar public service remit	2011	2012	2013	Grand total
Total revenues	2 845 238	3 441 567	3 569 149	9 855 942
- Total costs	11 182 105	17 140 076	15 799 712	44 121 893
- Amortisations	114 836	274 044	352 229	741 109
= Net cost of public service	- 8 451 703	- 13 972 553	- 12 582 792	- 35 007 048
+ Return on capital (6,5 %)	0	0	0	0

= Eligible for compensation	- 8 451 703	- 13 972 553	- 12 582 792	- 35 007 048
+ Actual compensation	8 601 187	13 780 506	12 696 005	35 077 698
= Over/under compensation	149 484	- 192 047	113 213	70 650

- (318) The Commission takes account of the fact that Laziomar commenced operating the routes in the Pontino archipelago on 1 June 2011, immediately following the transfer of these routes from the Region of Campania and Caremar to the Region of Lazio and Laziomar (see recitals 4, 32 and 33). Therefore, the 2011 financial exercise, showing a positive difference at EUR 149 484, cannot be fully attributed to Laziomar and is not representative of Laziomar's actual results. In fact, for the financial years 2012 and 2013, which are fully attributed to Laziomar, the combined difference between the eligible and the actual compensation is negative (EUR - 78 834).
- (319) The Commission also verified the calculations provided by Italy regarding the return on capital invested based on the 6,5 % flat rate. Given that the returns are negative over the period 2011–2013 (see recital 138), they are represented as 'zero' on Table 13 for the purpose of calculating the net cost of the public service. Considering these negative results, therefore, the Commission notes that in the case of the three-year financial exercise, the positive difference of EUR 70 650, which represents only 0,2 % of the actual compensation paid to Laziomar, is captured by the 6,5 % flat rate and does not result in overcompensation. Moreover, a rate of return of 0,2 % (or 20 basis points), does not exceed the relevant swap rate plus a premium of 100 basis points, which, pursuant to paragraph 36 of the 2011 SGEI Framework, is regarded as reasonable in any event.
- (320) Paragraph 49 of the 2011 SGEI Framework requires Member States to ensure that the compensation granted for operating the SGEI does not result in undertakings receiving overcompensation (as defined in paragraph 47 of that Framework). Among others, Member States must provide evidence upon request from the Commission. Furthermore, they must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years.
- (321) The Commission has already assessed under *Altmark* 3 that the 6,5 % flat rate return on capital that Laziomar could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the public service contract (see recitals 211 to 216). In addition, the Commission reiterates that Italy has used a flat rate return on capital for calculation simplification purposes.
- (322) The Commission notes that the submitted CIPE Directive takes into account certain market values applicable in the maritime cabotage sector. It prescribes the eligible costs for the purposes of public service obligations, as well as the calculation principles concerning the rate of return on capital on the basis of the information, conditions and risks relevant for this particular sector.
- (323) In addition, as already explained in recital 214 in the context of assessing the new public service contract under *Altmark* 3, the Commission has found that in 2013 (as well as for the whole period 2011–2013) the median return on capital generated by a benchmark group of selected ferry operators offering maritime connections within Italy or between Italy and other Member States was generally similar to the 6,5 % return on capital of Laziomar.
- (324) In view of the above, the Commission considers that the 6,5 % return on capital remains at a reasonable level.
- (325) Italy has lastly provided the necessary evidence showing that all regular checks were carried out to ensure that the amount of the compensation did not exceed the net cost of the service. In addition, the Commission recalls that the compensation is paid out in instalments (see recital 45) and that the final pay-out is made on the basis of the actual costs and revenues of the year. This ensures that the amount of compensation does not exceed the net costs of the service.

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

5.3.7. *The berthing priority*

- (327) Article 19-ter, paragraph 21, of the 2009 Law clearly specifies that the berthing priority was necessary to guarantee the territorial continuity with the islands and in light of the public service obligations of the companies of the former Tirrenia Group, including Laziomar. Indeed, if there were no priority berthing for companies entrusted with public service obligations, these may have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the consumers. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since the departure times for the public service routes are fixed by the Convention the berthing priority is necessary to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its public service obligations.
- (328) Against this background, the Commission considers that this measure was awarded to enable Laziomar to perform its public service obligations, which constitute a genuine SGEI (see Section 5.3.2). Furthermore, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime.
- (329) The Commission has already assessed in detail the compatibility of the SGEI and the related compensation for Laziomar during the prolongation of the initial Convention (see Sections 5.3.2 to 5.3.6). The Commission hence considers that its compatibility assessment of the berthing priority can be limited to establishing whether or not this measure could result in overcompensation.
- (330) The Commission considers that any possible monetary advantage from the berthing priority would be limited (see recital 162). As a result, also the risk of overcompensation stemming from the measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. Therefore, the overcompensation checks that have been applied to Laziomar as described in Section 5.3.6 are also fit to detect any possible overcompensation resulting from the berthing priority.
- (331) The Commission therefore concludes that the berthing priority, which is inextricably linked with the public service performed by Laziomar, is compatible with the internal market on the basis of Article 106(2) TFEU and the 2011 SGEI Framework.

5.3.8. *Conclusion*

- (332) Based on the assessment in recitals 278 to 331, the Commission concludes that the compensation granted to Laziomar for the provision of the maritime services subject to the prolongation of the initial Convention in the period from 1 June 2011 to 14 January 2014 and the berthing priority complies with the applicable conditions of the 2011 SGEI Framework and are therefore compatible with the internal market under Article 106 TFEU.

6. CONCLUSION

- (333) The Commission finds that Italy has unlawfully implemented the aid measures under assessment in breach of Article 108(3) TFEU. On the basis of the foregoing assessment, the Commission has decided that the public service compensation granted to Laziomar under the prolongation of the initial Convention is compatible with the internal market under Article 106 TFEU. Furthermore, since the berthing priority is inextricably linked with the performance of the SGEI by Laziomar, this measure is also compatible with the internal market under Article 106 TFEU.
- (334) Further, the Commission finds that the following measures do not constitute State aid within the meaning of Article 107(1) TFEU:
- (a) the compensation granted to Laziomar for the provision of maritime services under the new service contract for the period 15 January 2014 – 14 January 2024, bundled with the Laziomar business and the berthing priority to Laziomar, because it complies with the four *Altmark* criteria;

- (b) Laziomar's possible use of funds to upgrade ships for liquidity purposes, since Laziomar did not make use of these funds for the said purposes;
- (c) the fiscal exemptions related to the privatisation process of Laziomar and the possibility to use FAS resources in order to meet liquidity needs as laid down by the 2010 Law,

HAS ADOPTED THIS DECISION:

Article 1

The compensation to Laziomar and the berthing priority for the provision of maritime services under the prolongation of the initial Convention in the period 1 June 2011–14 January 2014 constitutes State aid within the meaning of Article 107(1) TFEU. Italy has implemented the aid to Laziomar in violation of Article 108(3) TFEU. This aid is compatible with the internal market.

Article 2

The award of the new public service contract for the period 15 January 2014–14 January 2024, bundled with the Laziomar business and the berthing priority to Laziomar does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 3

The possibility to use, on a temporary basis, the financial resources already committed to the upgrade and modernisation of the fleet, to cover pressing liquidity needs, as laid down by the 2010 Law, was not availed of as far as Laziomar is concerned. Therefore, it does not constitute State aid to Laziomar within the meaning of Article 107(1) TFEU.

Article 4

The fiscal exemptions related to the privatisation process of Laziomar as laid down by the 2010 Law, do not constitute State aid to Laziomar within the meaning of Article 107(1) TFEU.

Article 5

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

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 30 September 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission
