DECISIONS

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

(notified under document C(2013) 9101)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) By decision C(2011) 6961 final adopted on 5 October 2011 the Commission opened the formal investigation procedure [2] in respect of several measures adopted by Italy in favour of the companies of the former Tirrenia Group [3] (hereinafter *the 2011 Decision*). 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 covered by the 2011 Decision.

(2) Italy submitted its observations on the 2011 Decision on 15 November 2011. The Commission received comments from interested parties. It forwarded them to Italy, which was given the opportunity to react. Italy's observations on the comments submitted by the interested parties were received by letters dated 24 April and 4 May 2012.

(3) On 4 October 2011, 19 October 2011, 2 December 2011, 27 January 2012, 17 February 2012 and 28 February 2012, the Commission received new complaints on alleged aids to former Tirrenia Group companies and/or their acquirers. Some of these complaints claimed new aids had been granted to Saremar – Sardegna Regionale Marittima (hereinafter *Saremar*) by the Sardinian Region (hereinafter *RAS*).

(4) On 7 November 2012 the Commission extended the investigation procedure concerning, inter alia, certain support measures granted by RAS to Saremar. By decision C(2012) 9452 final of 19 December 2012 the Commission adopted an amendment to the Decision extending the investigation procedure (hereinafter *the 2012 Decision*) [4]. 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.

(5) RAS's comments on the measures concerning Saremar were received on 13 December 2012 and 26 February 2013.

[1] OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.
[2] OJ C 28, 1.2.2012, p. 18.
[3] As from 2004, the former Tirrenia Group was formed by Tirrenia di Navigazione S.p.A, Saremar — Sardegna Regionale Marittima S.p.A., Toremar — Toscana Regionale Marittima S.p.A., Siremar – Sicilia Regionale Marittima S.p.A. and Caremar — Campania Regionale Marittima S.p.A.
[4] OJ C 84, 22.3.2013, p. 58.

(6) As concerns specifically these measures, the Commission received comments from the beneficiary and competitors. It forwarded them to Italy, which was given the opportunity to react. Italy did not comment on the observations of interested parties concerning the measures subject to this Decision.

(7) By letter of 14 May 2013, RAS asked the Commission to separate from the formal investigation procedure opened by the 2011 and 2012 Decisions the measures concerning Saremar and to give priority to these measures, notably in view of the imminent privatisation of the company.

(8) The measures in question have been discussed in several meetings between the Commission and RAS's representatives and Saremar on 24 April 2012, 2 May 2013, 10 July 2013 and 10 October 2013, and between the Commission and the complainants on 27 July 2012, 20 November 2012 and 8 August 2013.

(9) By letter dated 6 August 2013 the Commission requested additional information to Italy on the measures subject to the investigation. Italy replied to this request on 26 September 2013 and 25 October 2013.

(10) Further submissions from RAS and Saremar were received by the Commission on 3 September 2013, 24 October 2013, 13 November 2013 and 21 November 2013.

(11) This Decision addresses RAS's request to treat with priority the measures concerning Saremar.

2. THE MEASURES SUBJECT TO INVESTIGATION BY VIRTUE OF THE 2011 AND 2012 DECISIONS

(12) The formal investigation opened by the 2011 and 2012 Decisions covers the following measures:

(a) Compensation for the provision of services of general economic interest (*SGEIs*) under the prolongation of the initial Conventions;

(b) The privatisation of the companies of the former Tirrenia Group, including a counter-guarantee to CdI, buyer of Siremar, and the deferred payment of the purchase price by CIN, buyer of Tirrenia di Navigazione;

(c) The berthing priority;

(d) The measures laid down by Law 163 of 1 October 2010 converting Decree Law 125/2010 of 5 August 2010;

(e) Additional measures adopted by RAS in favour of Saremar (the compensation for the operation of two maritime routes between Sardinia and mainland Italy in 2011/2012, the Bonus Sardo – Vacanza project, the EUR 3 million loan and the letters of comfort, and the recapitalisation);

(f) Misuse of rescue aid;

(g) Compensation for the provision of SGEIs under the future Conventions/public service contracts.

(13) This Decision concerns only certain measures adopted by RAS in favour of Saremar, which will be identified below. The Bonus Sardo — Vacanza project will be assessed separately.

2.1. *THE BENEFICIARY*

(14) The Tirrenia Group initially consisted of six companies, namely Tirrenia di Navigazione (hereinafter *Tirrenia*), Adriatica, Caremar, Saremar, Siremar and Toremar. The companies provided maritime transport services under separate public service contracts concluded with the State in 1991, in force until end 2008 (hereinafter *the initial Conventions*). Public company Fintecna – Finanziaria per i Settori Industriale e dei Servizi S.p.A. (hereinafter *Fintecna*) ([5]) held 100 % of Tirrenia's share capital which in turn owned the regional companies Adriatica, Caremar, Saremar, Siremar and Toremar.

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

(15) In 2004 Tirrenia merged with Adriatica. As of 2004, the Tirrenia Group was formed by Tirrenia, Caremar, Saremar, Siremar and Toremar ([6]).

(16) Article 19*ter* of Decree law 135/2009 converted into Law 166/2009 (hereinafter *the 2009 law*) laid down, inter alia, that the regional companies Caremar, Saremar and Toremar were transferred to the Regions of Campania, Sardinia and Tuscany, in view of their privatisation. It also laid down that *new Conventions* would be concluded between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the provision of regional services would be enshrined in *new Public Service Contracts* to be concluded between Saremar, Toremar, and Caremar and the respective Regions by 31 December 2009 and 28 February 2010 respectively. The new Conventions/new public service contracts would enter into force upon privatisation of each of the companies of the former Tirrenia Group ([7]).

(17) Saremar was thus transferred to RAS by virtue of the 2009 law. The company has traditionally operated purely local cabotage connections between Sardinia and the islands to the north-east and south-west of Sardinia, and an international connection with Corsica, under the initial Convention with the State. Saremar has not developed unsubsidised activities.

(18) By virtue of Regional Law 18 of 26 July 2013, the publication of the call for tenders for the privatisation of Saremar was postponed to 31 December 2013. This Decision does not prejudge the position of the Commission on other measures in favour of Saremar nor on any potential State aid issues raised by the privatisation of the company. All remaining measures covered by the 2011 and 2012 Decisions, including the Bonus Sardo – Vacanza project, are currently being investigated under cases SA.32014, SA.32015 and SA.32016 and are therefore not covered by this Decision.

2.2. *DETAILED DESCRIPTION OF THE MEASURES COVERED BY THIS DECISION*

(19) Several measures have been adopted by RAS in 2011 and 2012 to promote tourism and regional development and ensure territorial continuity. According to RAS, those initiatives had been primarily justified by two significant developments on the market for transport services to the island in 2011.

(20) First, although the parent company Tirrenia was put up for sale already in 2010, Compagnia Italiana di Navigazione (*CIN*) acquired the company and signed the new Convention only in July 2012. Presumably until the very date the new Convention was signed, it was uncertain whether maritime services between Sardinia to mainland Italy would continue to be subsidised and whether, under the new Convention with the buyer of Tirrenia, the scope of the public service would be reduced.

(21) Second, private companies operating routes between Sardinia and the mainland, were being investigated by the Italian National Competition Authority (*NCA*) on a potential violation of Article 101 TFEU, because of a significant increase in transport prices on certain routes between Sardinia and the mainland. The NCA concluded its proceedings on 11 June 2013 ([8]). The increase in prices of (passenger) transport services by the parties in the summer of 2011 was qualified as a concerted practice in violation of Article 101 TFEU. According to the NCA the infringement took place at least between September 2010 and end September 2011.

(22) On some of the measures adopted by RAS in this context the Commission has opened the formal investigation procedure by its 2012 Decision. In what follows, the Commission will present in detail the measures under investigation.

([6]) By virtue of the 2009 law, the business branch operating links with the Pontino Archipelago was separated from Caremar and transferred to the Lazio Region.

([7]) Article 19 *ter* (10) of the 2009 law.

([8]) Case I743 – Ferries Prices to/from Sardinia, on the alleged violation of Article 101 TFEU by private competitors (Onorato Participazioni S.r.l., Moby S.p.a., Marinsvest S.r.l., Investitori Associati SGR S.p.a., Grandi Navi Veloci S.p.a., SNAV S.p.a., Lotta Maritime S.A., Forship S.p.a, Clessidra SGR S.p.a. and L19 S.p.a.) on certain routes connecting Sardinia to the mainland.

2.2.1. COMPENSATION FOR THE OPERATION OF THE TWO ROUTES BETWEEN SARDINIA AND MAINLAND ITALY

2.2.1.1. ***Legal framework***

(23) RAS assumes that the operation by Saremar of two routes linking Sardinia to mainland Italy, namely Olbia (Golfo Aranci) – Civitavecchia and Vado Ligure — Porto Torres in 2011 and 2012, qualifies as SGEI, which was lawfully entrusted to the operator by means of several Regional Decisions (*the entrustment acts*) presented in more detail hereunder.

Regional Decision 20/57/EC of 26 April 2011

(24) According to RAS, private companies operating links to and from Sardinia increased prices to untenable levels in spring 2011. Regional Decision 20/57/EC of 26 April 2011 (hereinafter *Decision 20/57/EC*) recalled that technical discussions were underway with the main operators present on these routes since 1 March 2011 on possible ways 'to stabilise fares at acceptable levels' on the short, medium and long term. According to RAS, there was however no willingness among private operators to uphold RAS's call for 'common efforts aiming to increase tourist flows' by charging lower fares on these routes.

(25) Given the significant drop in tourist demand and the concerns raised by the productive sectors requiring affordable connections to the mainland, RAS was faced with the need to take 'urgent action to ensure a competitive alternative to fares charged by private operators'. It decided that Saremar was to start operation 'on market terms' of mainland and international connections 'on the main touristic and commercial routes' to and from Sardinia. Separate accounting would be kept so as to guarantee economic equilibrium, thereby balancing demand for transport services with the economic viability of the activity.

(26) Saremar would verify in particular the possibility to start operation on a trial basis during 15 June 2011 and 15 September 2011 of at least two of the following connections (mixed services):

(a) North-East Sardinia (Olbia or Golfo Aranci) - Central-Southern Italy (Civitavecchia or Naples) and return;

(b) North-East Sardinia (Olbia or Golfo Aranci) - Central-Northern Italy (La Spezia, Carrara or Livorno) and return;

(c) North-West Sardinia (Porto Torres) - Northern Italy (Genova or Savona) and return.

(27) Saremar could also freely increase the number of international connections.

Regional Decision 25/69/EC of 19 May 2011

(28) Regional Decision 25/69/EC of 19 May 2011 (*Decision 25/69/EC*) approved the tariff to be applied by Saremar for passengers and freight services on the Golfo Aranci – Civitavecchia route during 15 June 2011 to 15 September 2011. The route in question had been presumably identified as 'among the most demanded routes.'

(29) Fares could be amended by the operator in order to ensure that the operation breaks-even and ensures highest customers' satisfaction. Any such modification should be notified in advance to RAS. Different rates applied in the high and low seasons. Fares would apply in the same way to residents and non-residents.

Regional Decision 27/4/EC of 1 June 2011

(30) Regional Decision 27/4/EC of 1 June 2011 (*Decision 27/4/EC*) approved the tariff to be applied by Saremar for passengers and freight services on the Vado Ligure — Porto Torres route from 22 June 2011 to 15 September 2011.

(31) Moreover, it provided for a 15 % discount for Sardinian residents. Saremar could amend the fares in order to ensure that the operation breaks-even and ensures highest customers' satisfaction.

Regional Decision 36/6/EC of 1 September 2011

(32) Regional Decision 36/6/EC of 1 September 2011 (*Decision 36/6/EC*) recalled that the increase in transport prices on the routes to the mainland took place in the wake of the sale of the former parent company Tirrenia (see recital 75).

(33) In this sense, RAS would support the annulment of the sale procedure and the separation of the sale of Tirrenia from the public tendering procedure for the award of the new Convention and thus prevention of a *de facto* monopoly in maritime cabotage to and from Sardinia. Action would be taken to ensure the launch of open tender procedures for the imposition of public service obligations (*PSOs*) to select the best offer in terms of number of routes and ports, frequencies, speed, quality of the service and fares, for both passengers and freight.

(34) Interruption of operation by Saremar of the routes to the mainland would effectively restore the previous monopoly situation. On the longer term, the main objective at regional level would be to preserve effective competition on the cabotage market. This would be achieved by imposing PSOs on the main routes considered strategic for the island to those operators offering best conditions for the service.

(35) Decision 36/6/EC lays down that Saremar is to verify, on the basis of a business plan, the viability of operation on a trial basis for the period 30 September 2011 - 30 September 2012, of at least one of the following mixed routes: Olbia – Livorno, Porto Torres — Livorno or Cagliari – Piombino.

(36) Likewise, Saremar would also resume the Golfo Aranci (or Olbia) – Civitavecchia and the Porto Torres — Vado Ligure (or Genova) lines from 15 May 2012 to 15 September 2012. The routes would be operated by means of two newly leased cruise ferries.

(37) Decision 36/6/EC also laid down that Saremar would be recapitalised for an amount equal to its claim against Tirrenia in receivership (see recital 89 et seq).

Regional Decision 48/65/EC of 1 December 2011

(38) Acting in accordance with Decision 36/6/EC, RAS and Saremar examined the viability of operating one of the Olbia – Livorno, Porto Torres — Livorno or Cagliari – Piombino mixed lines during 30 September 2011 - 30 September 2012. In particular, current and projected demand for mixed services, fares, forecasted costs and revenues, and profitability of alternative services were assessed. The analysis revealed the following:

(a) on the Cagliari – Piombino and Porto Torres – Livorno routes, a high risk of economic imbalance, fluctuation of demand and competitive pressure of substitutable services;

(b) on the Olbia – Livorno route, although competitive pressure on prices was probable, reaching economic balance was nonetheless possible;

(c) on the Olbia — Civitavecchia route, economic balance could be reached.

(39) Decision 36/6/EC notes that the 'obligation of maintaining economic balance, in order to avoid granting incompatible state aids, does not allow in the immediate the start-up of other routes'. The operation of routes which on the short term presented good viability prospects and the start-up of high season lines, already tested positively during the trial period, was considered necessary.

(40) Consequently, Saremar was instructed to immediately activate the Olbia -Civitavecchia mixed line. The route would be operated daily by means of the ferries employed by Saremar in 2011. The low season fare charged by Saremar in 2011 was approved as stardard fare, which Saremar was entitled to amend to take due account of demand and ensure the objective of economic balance.

(41) At least three high capacity cruise ferries would be leased to improve capacity on the Olbia – Civitavecchia and Porto Torres – Vado Ligure (or Genova) routes from May to September 2012.

(42) Saremar would define a standard fare for all lines, irrespective of the season, to allow the company to reach the twofold objective of economic balance of operation and highest customers' satisfaction.

Regional Decision 12/28/EC of 20 March 2012

(43) By Regional Decision 12/28/EC of 20 March 2012 (*Decision 12/28/EC*), RAS takes note of Saremar's proposal of a tariff for the 2012 summer season on the Olbia – Civitavecchia route, based on a market inquiry carried out by the company.

(44) The fare would distinguish between the low season, weekend and the high season. As concerns the fare applicable in the high season (August), three alternatives were proposed by Saremar, namely to maintain the level of the 2011 high season fare, to increase by EUR 5 or alternatively EUR 10 the fare for '*posto letto*'.

(45) Decision 12/28/EC empowers Saremar to adopt among the proposed fares the one which best balances the public interest objectives with the necessity of ensuring economic and financial balance of the operation.

Regional Decision 22/14/EC of 22 May 2012

(46) By Regional Decision 22/14/EC of 22 May 2012 (*Decision 22/14/EC*) RAS takes note of Saremar's proposal of a tariff for the 2012 summer season (1 June 2012 – 15 September 2012) on the Porto Torres – Vado Ligure route, based on a market inquiry carried out by the company.

(47) The company advised to set different fares for the low (1 to 14 June and 3 to 15 September), medium (15 June to 13 July) and high season (14 July to 2 September). A 15 % discount would apply to Sardinian residents.

(48) The Decision does not however specify the precise fares to be charged by Saremar on the route. The company was instructed to constantly monitor the development of the market and adjust the fares so as to best balance public interest objectives with the requirement of pursuing economic and financial balance of the operation. In addition, RAS took note of the lease of the Coraggio ferry to be employed on the route during 1 June to 15 September 2012.

Regional Law 15 of 7 August 2012

(49) Regional Law 15 of 7 August 2012 (hereinafter *the Regional Law*) lays down, inter alia, the immediate publication (within 60 days of the date of entry into force of the Regional Law) of the call for tenders for the privatisation of Saremar.

(50) The Regional Law also lays down that RAS would cover the potential deficit in the operation by Saremar of the links with the mainland. A subsidy in the amount of EUR 10 million was authorised to that end.

2.2.1.2. ***Duration***

(51) Saremar was entrusted with the operation of the two routes linking Sardinia to mainland Italy by means of the acts detailed in the table below.

Table 1

Regional Decisions entrusting Saremar with the operation of the two routes

	Golfo Aranci (Olbia) – Civitavecchia	Vado Ligure — Porto Torres
2011 summer season	Decision 25/69/EC of 19 May 2011 (15 June to 15 September 2011)	Decision 27/4/EC of 1 June 2011 (22 June to 15 September 2011)
2012 winter season	Decision 48/65/EC of 1 December 2011 (immediate activation of the line)	*Not operated*
2012 summer season	Decision 36/6/EC of 1 September 2011 (15 May to 15 September 2012)	Decision 36/6/EC of 1 September 2011 (15 May to 15 September 2012)

(52) However, the pre-approved schedule of operation has not ultimately been observed in full.

(53) In particular, in 2011 Saremar operated the Civitavecchia — Olbia (Golfo Aranci) route daily during 15 June – 15 September 2011. Moby, Tirrenia, Grandi Navi Veloci (GNV) and Forship (Sardinia Ferries) were also operating the route at that time.

(54) In 2012, Saremar operated the route from 16 January 2012 to 15 September 2012. During the summer period Saremar operated the route daily from 1 June 2012 to 15 September 2012 (rather than from 15 May 2012 as laid down by Decision 36/6/EC). Moby and CIN/Tirrenia were present on the route in the summer period. During the winter period (16 January 2012 to 30 May 2012) Saremar operated the route 6 days/week ([9]). Tirrenia also operated the route subject to public service obligations under the initial Convention. No private operator was present on the route in the winter season.

(55) Saremar operated the Vado Ligure – Porto Torres route 4 days/week ([10]) from 22 June 2011 to 15 September 2011 and from 1 June 2012 (rather than from 15 May 2012 as laid down by Decision 36/6/EC) to 15 September 2012. Moby, Tirrenia and GNV were present on the route in 2011. Moby, CIN/Tirrenia and GNV were present on the route in 2012.

(56) Service on both routes was discontinued on 15 September 2012.

2.2.1.3. ***Public service obligations***

(57) RAS claims that PSOs have been imposed in respect of the fares charged by Saremar on the two routes to the mainland. The underlying justification for the imposition of the PSOs was the increase in prices to the detriment of the Sardinian community as a result of the anticompetitive agreement concluded by private operators on the routes in question.

(58) The specific provisions on fares in the entrustment acts are detailed hereunder:

(a) Decision 20/57/EC has no explicit provision on fares to be charged by Saremar on the routes proposed;

(b) Decision 25/69/EC approved the tariff to be applied by Saremar on the Golfo Aranci – Civitavecchia route from 15 June 2011 to 15 September 2011. Fares could be amended by the operator, with prior notice to RAS, in order to ensure that the operation breaks-even and ensures highest customers' satisfaction;

(c) Decision 27/4/EC approved the tariff to be applied by Saremar for mixed (passengers and freight) services on the Vado Ligure — Porto Torres route from 22 June 2011 to 15 September 2011. A 15 % discount would apply for Sardinian residents. Fares could be adjusted by the operator, with prior notice to RAS, in order to ensure that the operation breaks-even and ensures highest customers' satisfaction;

(d) Decision 36/6/EC does not refer to fares;

(e) Decision 48/65/EC instructed Saremar to immediately resume operation of the Olbia – Civitavecchia route, adopting as standard fare the low season fare charged by Saremar in 2011. Such fare could be adjusted by Saremar subject to prior notification to RAS to take due account of actual demand and ensure the objective of economic balance;

(f) Decision 12/28/EC approves Saremar's proposal to apply different fares in summer 2012 on the Olbia – Civitavecchia route, distinguishing between the low season (working days of June and July), week-end and high season (August) and takes note of the three alternatives proposed by Saremar as concerns the fare applicable in the high season. The Regional Decision did not specify the precise fares which had been proposed by the operator. Nor did RAS decide on one of the three alternative rates proposed by Saremar for the high season. Rather, RAS instructed Saremar to implement the fare which best balances the public interest with the economic viability objective. According to Decision 12/28/EC, the standard fare laid down by Decision 48/65/EC would be maintained by Saremar until end April 2012;

(g) Decision 22/14/EC approves Saremar's proposal to apply different fares in the low (first half of June and first half of September), medium (mid-June to mid-July) and high (mid-July to 2 September) season 2012 on the Porto Torres – Vado Ligure route. The Regional Decision did not specify the precise fares which had been proposed by the operator. It lay down however that a 15 % discount would apply to Sardinian residents.

(59) As concerns operation of the two routes in 2012, in the course of the investigation RAS submitted to the Commission the letters by which Saremar communicated the fares to be charged on the routes in 2012, formally

([9]) Daily connection from 1 April 2012.
([10]) 3 days/week from 1 June 2012 to 19 June 2012 and from 4 September 2012 to 15 September 2012.

adopted by RAS by Decisions 12/28/EC and 22/14/EC. As concerns the Olbia – Civitavecchia route, Saremar informed that the routes would be operated concomitantly by Tirrenia, Moby and GNV, at different fares dependant on the season. Saremar also confirmed that among those operators Tirrenia offered the best prices. The letter details the fares applicable on the route in summer 2012 in the low, week-end and high season, with three proposals for the high season (one maintaining the 2011 tariff, the second and the third reflecting a EUR 5 and 10 increase, respectively, in the price per cabin place) and confirms that, as in 2011, no reduced fare would apply to residents. Saremar also confirms that its tariff proposal is based on a benchmark with Tirrenia's fares. For the Porto Torres – Vado Ligure route, Saremar informed that the start of operation of the services in 2012 was decided based on the positive results registered in 2011. A moderate increase in fares in the medium and high seasons was proposed, which would allow the company to break-even.

(60) For the sake of completion, the Commission notes that Decision 48/65/EC on the start-up of the Olbia — Civitavecchia route in January 2012 mentions that Saremar would operate the route daily by means of cruise ferries. An examination of the entrustment acts shows that no other binding condition concerning the operation of the two routes (for instance concerning frequency) other than the provision of mixed (passenger and freight) services has been imposed on Saremar. Nor have the Italian authorities submitted to the Commission, in the course of the formal investigation procedure, any evidence that other requirements have been imposed by other legal instruments beyond those laid down in the abovementioned entrustment acts.

2.2.1.4. *Compensation*

(61) None of the entrustment acts referred to a compensation to be granted to Saremar for the operation of the two routes to the mainland in 2011/2012. On the contrary, based on the provisions of the acts in question, the services were to be provided on commercial terms and Saremar was given a large margin of manoeuvre to adjust the level of fares in order to ensure that the two routes break even.

(62) A subsidy in the amount of EUR 10 million from the 2012 regional budget was authorised by Regional Law 15 of 7 August 2012 to cover '*the potential deficit*' in the operation by Saremar of the connections with the mainland. Based on publicly available information ([11]) the compensation was effectively paid to Saremar in two instalments on 6 November 2012 and 3 December 2012.

(63) According to the information received in the course of the investigation, Saremar recorded a EUR 214 000 loss in 2011 and a EUR 13 440 220 loss in 2012 in the operation of the two routes.

2.2.1.5. *Competitive situation on the routes*

(64) The competitive situation on the routes linking Sardinia to mainland Italy has altered quite significantly during 2011-2012.

(65) Four private operators were present on routes to and from Sardinia in spring 2011, in addition to the public operator Tirrenia: Moby, Forship, SNAV ([12]) and GNV.

(66) Moby is controlled by Onorato Partecipazioni S.r.l. (hereinafter *Onorato Partecipazioni*). Moby is active on the market of maritime transport services for passengers and freight in the Mediterranean Sea.

(67) GNV is a private operator jointly held by Marinvest, a holding company of a group of undertakings active in maritime transport, and Investitori Associati SGR. The company operates numerous routes in the Mediterranean.

(68) SNAV is entirely controlled by Marinvest and operates almost exclusively passenger services on various routes in the Mediterranean.

([11]) Relazione sul Rendiconto generale della Regione autonoma della Sardegna per l'esercizio finanziario 2012, page 359, available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sezioni_riunite/sezioni_riunite_regione_sardegna/2013/relazione_parifixa.pdf.

([12]) SNAV operated the Olbia – Civitavecchia route until May 2011, whn was replaced by GNV.

(69) Forship, controlled by the French company Lotta Maritime S.A., provides passenger and vehicle transport services in the Mediterranean, in particular to and from Sardinia, using the Corsica Ferries and Sardinia Ferries brands.

(70) In May 2011 the operators (all but Tirrenia) were investigated by the NCA on a potential violation of Article 101 TFEU concerning the operation of routes to mainland Italy, including the two routes operated by Saremar during 2011-2012. The NCA concluded its proceedings on 11 June 2013 ([13]). It decided that the increase in prices of passenger transport services by the parties represented a concerted practice in violation of Article 101 TFEU. The infringement took place at least between September 2010 and end September 2011.

(71) According to the NCA, Moby (up to 40 %) and Tirrenia (up to 35 %) were the main operators on the Civitavecchia — Olbia (Golfo Aranci) route in 2009-2010 in terms of passengers carried. In 2011 Tirrenia increased its market share to the detriment of Moby, whereas Saremar gained less than 10 % of the market ([14]). The NCA noted that on this route:

— Moby had recorded losses (of less than EUR 1 million) during 2008 - 2010 and a surplus in 2011;

— SNAV had recorded losses during 2008 – 2010, albeit on a downward trend;

— negative results had also been registered by Forship during 2008 - 2011.

(72) On the Genova (Vado Ligure) – Porto Torres route, Moby, Tirrenia and GNV had a similar market share in 2009-2010. Likewise, in 2011 Tirrenia's market share increased whereas Moby's dropped. GNV reduced by more than half its presence on the market. Saremar captured less than 10 % of the market. The NCA also noted that:

— Moby improved results from a slight loss in 2008 to profits in 2011;

— GNV registered significant losses on the route during 2008 - 2010.

(73) Private operators had in the course of the NCA investigation justified the increase in prices in the 2011 summer season (generally superior to 85 % as compared to 2010 on the Olbia – Civitavecchia route and 75 % on the Genova — Porto Torres route) on account of the significant increase in fuel costs. According to the NCA, a more moderate increase in prices was implemented by Tirrenia, namely up to 30 % on the Civitavecchia — Golfo Aranci route and up to 15 % on the Genova — Porto Torres route.

(74) In addition, according to the NCA Decision, two agreements were signed between Moby and GNV in spring 2011. In particular, a code-sharing agreement was signed by the two companies on the Civitavecchia – Olbia route for the period April – December 2011, by which the two companies jointly operated the route and participated in the results in accordance with a predetermined percentage, irrespective of the tickets sold. On the basis of a second agreement, GNV could sell Moby tickets on the Genova – Porto Torres route during June — December 2011. In effect, during the reference period, GNV directed to Moby demand which it could not satisfy itself, to the detriment of Tirrenia and Saremar. On the basis of those agreements, the NCA concluded that the two companies had no incentive to compete on prices on the routes in question. Similar agreements have been put in place by the same companies in 2012.

(75) Through the acquisition of Tirrenia, CIN signed on 18 July 2012 the new Convention with the Italian State (see recital 16) by which the company was entrusted with the discharge of PSOs, inter alia, on the Civitavecchia — Olbia and Genova — Porto Torres routes. CIN is a consortium which, at the time Tirrenia was put up for sale, consisted of Moby, SNAV and GNV (the last two via Marinvest) and Grimaldi Compagnia di Navigazione, i.e. the main competitors of Tirrenia on the routes traditionally operated under the public service regime ([15]).

([13]) See footnote 8.

([14]) Decision of the NCA No 24033 of 31 October 2012, SP136 – Saremar — Sardegna Regionale Marittima/Routes Civitavecchia – Golfo degli Aranci e Vado Ligure – Porto Torres.

([15]) CIN was set up in November 2010 by Grimaldi, Marinvest and Moby for the purpose of participating in the tender to acquire Tirrenia. Beginning of 2011 Marinvest (controlling SNAV) acquired the control over GNV; also, in March 2011 Moby transferred its shareholding in CIN to its controlling shareholder Onorato Participazioni. Thus in March 2011 CIN's main shareholders were Onorato Participazioni (controlling Moby) and Marinvest (controlling GNV and SNAV).

(76) The acquisition by CIN of Tirrenia was notified to the Commission and on 18 January 2012 the Commission decided to initiate proceedings pursuant to Article 6(1)(c) of Council Regulation (EC) No 139/2004 ([16]). The operation was subsequently withdrawn by the parties and a new operation, with a new shareholding of CIN, was notified to the NCA. The new merger was approved by the NCA by a conditional decision on 21 June 2012 ([17]).

(77) GNV and Forship ceased operation of the Civitavecchia — Olbia route in 2012. By its comments in the course of the investigation, GNV claimed that its exit from the market had been the direct result of the support granted by RAS to Saremar, which enabled the latter to practice fares below costs (see recital 135).

(78) The competitive situation on the two routes at the moment of entry on the market of Saremar was as follows:

Table 2

Competitive situation on the routes

	Golfo Aranci (Olbia) – Civitavecchia	Vado Ligure — Porto Torres
2011 summer season (June – September)	Moby, Tirrenia, GNV ([1]), Forship (Sardinia Ferries)	Moby, Tirrenia, GNV
2012 winter season (January – mid May)	CIN/Tirrenia	*Not operated*
2012 summer season (mid May – September)	Moby, CIN/Tirrenia	Moby, CIN/Tirrenia, GNV

([1]) SNAV has traditionally operated the route until May 2011.

(79) By Decision adopted on 18 June 2013 ([18]), the NCA opened the formal investigation proceedings on a potential violation by Moby and CIN of the conditions imposed by the Decision of the NCA authorising the Tirrenia/CIN merger, inter alia, the condition to limit price increases (as compared to Moby's fares in 2009) on three routes linking Sardinia to the mainland, including the two routes under investigation in the present case, to the increase in fuel costs.

2.2.2. PROMOTIONAL ACTIVITIES

(80) By virtue of Regional Decision 20/58/EC of 26 April 2011 (Decision 20/58/EC), *Agenzia Sardegna Promozione* (hereinafter *the Agency*) would finance the marketing of the so-called Bonus Sardo — Vacanza by EUR 3 million (VAT included) ([19]).

(81) By Regional Decision 25/53/EC of 19 May 2011 (*Decision 25/53/EC*), RAS entrusted Saremar with the task of carrying out promotional activities essentially consisting in displaying logos and advertising on Saremar vessels with the aim to promote Sardinia as tourist destination, without however explicitly promoting the Bonus Sardo – Vacanza project. Decision 25/53/EC also instructed the Agency to allocate to Saremar the amount of EUR 3 million provided for by Decision 20/58/EC, with an immediate advance payment of 80 %.

([16]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

([17]) By Decision No 23650 of 21 June 2012, C11613, the NCA conditionally approved the acquisition of the Tirrenia business branch by CIN, jointly held by Moby (40 %), L19 (30 %), Gruppo Investimenti Portuali S.p.A. (20 %), Shipping Investment S.r.l. (10 %). Certain conditions have been imposed by the NCA, inter alia, concerning non application code-sharing agreements between Moby and CIN during 2012 – 2016 and the application, on the Civitavecchia — Olbia, Genova — Porto Torres and Genova — Olbia of fares such as to maintain the average unit revenue obtained by Moby in summer 2009 (except the increase directly attributable to the increase in bunker costs). CIN/Tirrenia will replace Moby on the Genova — Porto Torres route. On the Civitavecchia – Olbia route Moby and CIN will transfer to other operators 10 % of capacity in the 2013 and 2014 summer seasons.

([18]) Decision of the NCA No 24418 of 18 June 2013, C11613B.

([19]) The Bonus Sardo — Vacanza project was approved with a view to promote and support tourism in Sardinia. Under the project, costs of transport by ferry (capped at 90 EUR, applicable to groups of minimum two passengers) were reimbursed directly to passengers travelling to/from Sardinia and requiring at least three nights accommodation in Sardinia in summer 2011.

2.2.3. EUR 3 MILLION LOAN AND THE FIRST LETTER OF COMFORT

(82) By virtue of Regional Decision 23/2/EC of 12 May 2011 (*Decision 23/2/EC*), Saremar was authorised to contract a EUR 3 million loan, bearing interest at '*the market average rate*', with an indicative maturity of eight months, to address its liquidity needs.

(83) By Regional Decision 31/24/EC of 20 July 2011 (*Decision 31/24/EC*), RAS, as sole shareholder of Saremar, issued a letter of comfort in favour of Banco di Sardegna S.p.A (hereinafter *the BS bank*) as a precondition for approval of the credit line.

(84) In the comfort letter RAS commits to inform the BS bank in advance of any potential change in its shareholding in the company and to seek that the company is managed in an efficient way.

(85) By Regional Decision 12/15/EC of 20 March 2012 (*Decision 12/15/EC*) RAS made public that the EUR 3 million credit line approved by Decision 23/2/EC had not ultimately been contracted by Saremar and the letter of comfort approved by Decision 31/24/EC eventually expired.

2.2.4. SECOND LETTER OF COMFORT

(86) By Regional Decision 52/119/EC of 23 December 2011 (*Decision 52/119/EC*), RAS approved a second letter of comfort to enable Saremar to obtain a EUR 5 million overdraft facility to ensure sufficient liquidities in the immediate for the operation of the links to the mainland. A guarantee had been asked by Monte dei Paschi di Siena bank (hereinafter *the MPS bank*) as a precondition for approval of the facility.

(87) The comfort letter recalls that Saremar is wholly owned by RAS, that a EUR 11,5 million recapitalisation had been approved and that the company would continue operation of the links with the mainland. RAS commits to inform the lender beforehand of any potential change in its shareholding in the company and to seek that the company be managed efficiently.

(88) RAS stated that the letter of comfort approved by Decision 52/119/EC was not ultimately issued and a EUR 2,5 million credit line was granted by the MPS at market rates with no guarantee from RAS. By its comments on the 2012 opening decision, RAS provided the Commission with the credit line agreement with MPS Bank. The contract lays down a credit line up to EUR 2,5 million bearing variable interest based on the one-month EURIBOR + 5 %.

2.2.5. THE RECAPITALISATION

(89) According to Decision 36/6/EC, Saremar's EUR 11 546 403,59 claim against Tirrenia in insolvency had been duly registered by the Bankruptcy Chamber of the Civil Court of Rome and declared enforceable on 1 April 2011. The write-down of the credit by EUR 5 773 201,80, i.e. 50 %, when the company's 2010 balance sheet was approved, led to a EUR 5 253 530,05 loss in 2010. On 28 March 2012 Saremar's Shareholders' Assembly decided to cover the EUR 4 890 950,36 loss ([20]) carried forward to 2012 by reducing the capital from EUR 6 099 961 to EUR 1 209 010,64.

(90) Under the Italian Civil Code, shareholders are required to recapitalise a company when its capital has dropped by more than one third. Consequently, on 15 June 2012 the Shareholders' Assembly decided to increase Saremar capital from EUR 1 209 010,64 to EUR 6 099 961 of which EUR 824 309,69 paid in on 11 July 2012, i.e. the minimum amount required to bring the capital in line with legal requirements. The remaining would be implemented subject to prior notification of the measure to the Commission.

(91) To date the Commission has not been informed of further capital injections.

([20]) After use of the legal reserve and earnings from previous financial years.

3. **GROUNDS FOR INITIATING THE PROCEDURE**

3.1. *COMPENSATION FOR THE OPERATION OF THE TWO ROUTES BETWEEN SARDINIA AND MAINLAND ITALY*

3.1.1. AID QUALIFICATION

(92) In its 2012 decision, the Commission took the preliminary view that the acts entrusting Saremar with the operation the two routes to the mainland did not explicitly qualify the services in question as SGEIs, nor did they refer to any compensation to Saremar for the discharge of PSOs. The Commission also noted that, based on the information available at that stage, the EUR 10 million compensation granted to Saremar seemed to exceed operational losses.

(93) The Commission also took the preliminary view that the fourth Altmark condition ([21]) was not observed inasmuch as the operation of the two additional routes entrusted to Saremar in 2011 had not been tendered out. The Commission had in addition no evidence to support the argument that Saremar had in fact provided the service at the least cost to the community.

3.1.2. COMPATIBILITY

(94) The Commission considered that aid under the form of public compensation to Saremar could not be found compatible with the internal market and exempted from the notification requirement under Commission Decision 2005/842/EC ([22]) (hereinafter *the 2005 SGEI Decision*), nor under Commission Decision 2012/21/EU ([23]) (hereinafter *the 2011 SGEI Decision*).

(95) The Commission raised doubts as concerns the compatibility of the compensation on the basis of the European Union framework for State aid in the form of public service compensation (2011) ([24]) (hereinafter *the 2011 SGEI Framework*), given the questionable SGEI qualification of the services and the fact that Saremar may have been overcompensated.

(96) Finally, the Commission noted that, after 31 January 2012, in order to be deemed compatible with the internal market, SGEIs also have to observe additional conditions laid down by paragraphs 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework. The Commission considered that those conditions had not been observed in this case.

3.2. *PROMOTIONAL ACTIVITIES*

(97) The Commission invited Italy to clarify how the price of the promotional activities had been established and to submit evidence that they had been priced at market value, for instance by providing benchmarks available on the market.

3.3. *EUR 3 MILLION LOAN AND THE LETTERS OF COMFORT*

(98) The Commission took the preliminary view that the letters of comfort did not confer undue advantages to Saremar to the extent that they were not ultimately put in use to guarantee any loan or other financial obligations of the beneficiary. It asked Italy and interested parties to submit comments in this respect.

(99) The Commission also invited Italy to submit evidence that the EUR 3 million loan drawn by Saremar from Banco di Sardegna S.p.A. was in conformity with market terms.

([21]) Case C-280/00 — *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

([22]) 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).

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

([24]) OJ C 8, 11.1.2012, p. 15.

3.4. *THE RECAPITALISATION*

(100) As concerns Saremar's recapitalisation, the Commission took the preliminary view that the measure conferred an economic advantage on the company, given that it was unlikely that in similar circumstances a private shareholder would have subscribed the capital in question. It asked Italy and interested parties to submit comments in this respect.

4. **COMMENTS FROM RAS AND SAREMAR**

4.1. *COMPENSATION FOR THE OPERATION OF THE TWO ROUTES BETWEEN SARDINIA AND MAINLAND ITALY*

(101) Saremar supports and supplements the arguments developed by RAS as concerns the compensation received for the operation of the two routes linking Sardinia to the mainland in 2011 and 2012. These comments are dealt with together below.

(102) The company did not comment on the other measures subject to the investigation.

4.1.1. ISSUES REGARDING AID QUALIFICATION

(103) First, RAS argued that the compensation granted to Saremar for the operation of the two connections with the mainland complies with the market-economy investor principle (hereinafter *MEIP*). Even though the operation of the routes had been loss making, it was legitimate to assume that the activity would yield a return. When adopting the measures in question, RAS acted as a prudent market investor, given that its decisions to activate the two routes in question were based on business plans prepared *ex-ante*. Notably:

(a) in March/April 2011, when RAS decided that Saremar would start serving new routes to the mainland, it only considered routes which could be operated on economic balance;

(b) by Decision 36/6/EC, RAS decided that Saremar was to verify, on the basis of a business plan, the viability of operation for the period 30 September 2011 to 30 September 2012, of at least one additional route among Olbia – Livorno, Porto Torres — Livorno and Cagliari – Piombino. Saremar was also required to resume, on the basis of a business plan, the Golfo Aranci (or Olbia) - Civitavecchia, Porto Torres — Vado Ligure (or Genova) lines from 15 May 2012 to 15 September 2012. The decision not to start serving new routes, but rather to resume operation in the 2012 summer season of the two routes already operated by Saremar in 2011, was equally based on profitability grounds;

(c) RAS's decision to contain operational losses by the interruption of the service on both routes at the end of the 2012 high season and to partly compensate operational losses was instrumental in ensuring that its business risk was reduced to a minimum. Therefore, such decision would likewise have been taken by a private investor.

(104) Second, RAS stressed that the four Altmark criteria have been observed in this case, for the grounds developed below.

Altmark 1

(105) National authorities have a wide power of discretion as concerns the definition of SGEIs. RAS has been granted competencies as concerns territorial continuity by Law 296 of 7 December 2006 and is therefore the best placed authority to define SGEIs as concerns links from Sardinia to mainland Italy. On this basis, RAS underlines its interest in ensuring territorial continuity at affordable fares. The entrustment of the service to Saremar on a trial basis would have addressed general interest needs and would have been guided by urgency reasons.

(106) As to the actual necessity of the imposition of PSOs, RAS first recalls the severe crisis of former parent company Tirrenia, which had traditionally operated links between Sardinia and mainland Italy. Tirrenia's financial distress had allegedly resulted in extreme uncertainty as concerns the operation of the public service, at least until July 2012 when CIN signed the new Convention. RAS recalls that the sale of Tirrenia to CIN, in its original composition of shareholders, had been blocked by the Commission.

(107) Second, RAS submits that the increase in transport prices on the routes connecting Sardinia to the mainland in the following months seriously affected most users, and in particular the socially vulnerable part of the Sardinian community.

(108) It was on these grounds that, in April 2011, RAS decided to set up, on a trial basis, public transport services aiming to ensure territorial continuity with the mainland at affordable rates. The private operators, although consulted on the issue, had according to RAS not shown any willingness to contain prices and rejected any form of *erga omnes* obligation on fares.

(109) The operation of the SGEI was entrusted to Saremar by means of several entrustment acts, which would clearly outline the public interest objective. RAS stresses that entrusting the operation of the services in question to Saremar was the only viable alternative to avoid serious disruptions to territorial continuity.

(110) Saremar qualifies as *in-house* operator of RAS: it is directly controlled by RAS, which is its sole shareholder; it was statutorily entrusted with the operation of the links from Sardinia to the minor islands and Corsica on one hand, and to the mainland on the other; it does not dispose of any discretion as concerns the operation of the services entrusted to it, which are unilaterally determined by RAS; also, Saremar does not develop any activity contrary to the interest of RAS. Consequently, RAS argues that, in accordance with public procurement rules, it did not need to tender out the provision of the service, but was free to directly award it to the internal operator. As long as the compensation did not exceed the costs incurred in the operation of the service, State aid was not involved.

(111) In this sense, RAS recalls that Regulation (EC) No 1370/2007 of the European Parliament and of the Council ([25]) explicitly lays down that national authorities may entrust an internal operator/department with the provision of transport services, without tendering of a public service contract. Regulation (EC) No 1008/2008 of the European Parliament and of the Council ([26]) equally foresees the possibility for public authorities to take 'emergency measures in case of interruption of the services or risk of interruption of the services', which can take the form of the 'direct award of a public service contract or the commonly agreed prolongation of a public service contract'.

(112) According to RAS, this view was confirmed by the Commission in the framework of the infringement procedure concerning non-observance by Italy of 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) ([27]) (hereinafter the Maritime Cabotage Regulation), in which context the Commission stated that 'were the regions to operate the service in-house within the meaning of the ANAV case law (C-410/04) with the observance of all relevant requirements, the Maritime Cabotage Regulation would be considered complied with'.

(113) RAS underlines that the selection of the routes to be operated by Saremar was made on the basis of a feasibility study which took due account of the need to guarantee territorial continuity and ensure economic viability of the activity. As recalled by subsequent Decisions 25/69/EC and 27/4/EC, it was on the basis of this study and the market information gathered by Saremar that the Civitavecchia — Golfo Aranci and Vado Ligure — Porto Torres routes have been activated for the high season, namely from 15 June to 15 September 2011 and from 22 June to 15 September 2012 respectively.

(114) RAS also recalls that the operation of the Genova — Porto Torres and Civitavecchia — Olbia routes in the summer season falls outside the scope of the new Convention concluded by the Italian State with CIN and is therefore not subject to PSOs to guarantee affordability of the services. At any rate, that new Convention allows for the revision of the prices to account for increases in costs (in particular bunker costs), and would not therefore guarantee the affordability of the services to Sardinian residents.

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

([26]) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

([27]) 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).

(115) According to RAS, trial operation of the two routes to the mainland was definitely terminated in September 2012. RAS then elaborated a structured project for operation of links to the mainland, which was pre-notified to the Commission, namely the *Flotta Sarda* project. A new company, Flotta Sarda S.p.A. (*Flotta Sarda*), entirely held and financed by RAS, will be set up, to be entrusted with the provision under a public service regime of maritime transport services on four routes connecting Sardinia to mainland Italy. Flotta Sarda will receive annual compensation to cover public service costs.

Altmark 2

(116) The fact that the Regional Decisions instructing Saremar to start operation of the routes in question do not provide for its right to compensation does not affect observance of the second Altmark criterion. Public authorities need not define *ex-ante* the precise amount of compensation to be granted for the operation of public services. Rather, it is sufficient that they identify beforehand the means of calculation of eligible costs, to the extent that these costs are directly attributable to the discharge of the SGEIs. Indeed, in the present case, when RAS decided to instruct Saremar to set up connections to the mainland, it had considered that the operation of such services would not result in losses. Compensation could theoretically have proved unnecessary, however it was not excluded.

(117) RAS points out that since the operation of the services in question was subject to separate accounting, the net costs incurred in the provision of the public service, could be easily identified.

Altmark 3

(118) Saremar operated the public services in question under separate accounting. RAS takes the view that this is sufficient to ensure that the public resources were used only to compensate the operator for the deficit registered. In RAS's view, Saremar was therefore not overcompensated.

Altmark 4

(119) RAS defends that the fourth Altmark condition is fulfilled given that the vessels employed on the routes had been leased following a market consultation and bunker costs observe market rates. All other costs components (insurance, services auxiliary to navigation, port rights) are market based.

4.1.2. ISSUES REGARDING COMPATIBILITY

(120) RAS submits that Saremar's qualification as internal operator precludes application of the non-discrimination condition laid down by the Maritime Cabotage Regulation and the award of the public service to Saremar does not therefore infringe the 2005 nor the 2011 SGEI Decisions.

(121) RAS explains that the measure had been defined in all its essential elements already in April 2011. Any aid put into effect before the entry into force of the 2011 SGEI Decision should be assessed on the basis of the 2005 SGEI Decision. RAS assumes that the compatibility conditions laid down therein are complied with. In particular:

(a) the service was entrusted to Saremar on the basis of transparent, non-discriminatory conditions within the meaning of the Maritime Cabotage Regulation;

(b) the ceilings in Article 2(1)(a) and (c) of the 2005 SGEI Decision are observed: the subsidy is below EUR 30 million and less than 300 000 passengers were carried on each route;

(c) the services have lawfully been qualified as SGEIs and entrusted to Saremar by means of several entrustment acts, in accordance with Article 4 thereof;

(d) the compensation granted to Saremar for the operation of the routes to the mainland does not exceed what is necessary to cover costs incurred in the operation of the services, in line with Article 6 thereof.

(122) RAS submits that the measure would, in any event, also comply with the 2011 SGEI Decision, given that:

(a) the second ceiling laid down by Article 2(1)(d) thereof is observed;

(b) the service was entrusted to Saremar following technical discussions with private operators. Furthermore, RAS had received numerous complaints regarding the service provided by private operators;

(c) the compensation takes into account the net costs the operator incurred in the operation of the service;

(d) transparency requirements have been observed given that the Regional Decisions on the matter were published.

(123) Ultimately, RAS submits that the measure cannot be held to distort competition to an extent contrary to Union interest, given that it aims to ensure territorial continuity and is limited to the deficit incurred in the operation of SGEIs.

4.2. *PROMOTIONAL ACTIVITIES*

(124) According to RAS, the subsidy for promotional activities corresponds to the services effectively rendered by Saremar and does not therefore provide any undue economic advantage to the company.

(125) RAS holds that, when assessing the conformity of the price with market conditions, due account has to be taken of the fact that the promotional activities in question have not been limited to the 2011 high season as originally foreseen, but eventually extended to 2012.

(126) Late in the procedure, on 28 June 2013, RAS submitted to the Commission an expert opinion to justify the price of the promotional activities. The expert came to the conclusion that the market value of the promotional activities carried out by Saremar in 2011 and 2012 would range between EUR 2 458 168 and EUR 2 609 631 (VAT excluded). Hence, RAS considers that the price it paid to Saremar was justified. Market costs have been benchmarked against average advertising costs per square meter estimated based on parameters such as duration (certain discounts for the continuation of the advertising campaign in 2012 were taken into account), type of the advertising (internal or external) and location (main cities, important influx of population, mobility areas).

(127) RAS submits that, were the price paid to Saremar for the promotional activities to be considered excessive, the advantage conferred on the company would be limited to the difference between the price actually paid and the market value of the services. Finally, RAS considers that the compatibility of any such aid would have to be assessed on the basis of Article 106(2) TFEU.

4.3. *EUR 3 MILLION LOAN AND THE LETTERS OF COMFORT*

(128) RAS asserts that the EUR 3 million credit line obtained by Saremar did not involve any regional funds. It was granted to Saremar at market rates by BS bank, a private financial institution. However, the credit line has not been activated by Saremar, with the result that the letter of comfort of July 2011, issued in accordance with Decision 23/2/EC, expired on 30 November 2011. Given that the letter of comfort was not linked to any financial obligation of the company, it cannot be qualified as a guarantee.

(129) The second comfort letter, approved by Decision 52/119/EC, was not issued, and therefore no binding obligation in favour of Saremar was taken on by RAS. In fact, the financial transaction provided for by Decision 52/119/EC (EUR 5 million overdraft facility) has never been completed. As recalled by Decision 12/15/EC, the loan contracted with the MPS bank has been requested and obtained by Saremar without being guaranteed by RAS.

4.4. *THE RECAPITALISATION*

(130) RAS underlines that the recapitalisation bears no connection to the operation by Saremar of the two routes to mainland Italy. The measure rather concerns the services operated by Saremar to minor islands and Corsica under the initial Convention, as prolonged.

(131) The EUR 11,5 million laid down by Decision 36/6/EC corresponds to the claim filed against Tirrenia in insolvency proceedings. This amount however refers to financial operations within the Tirrenia Group dating back to before 2009. This amount would have been therefore already authorised in 2004, when the Commission adopted its final decision on the initial Conventions up to end 2008.

(132) To date the recapitalisation has only partially been carried out. By Decision of 15 June 2012, Saremar's Shareholders Assembly decided to increase capital of the company from EUR 1 209 010,64 to EUR 6 099 961, by issuing 307 765 ordinary shares of a nominal value of EUR 19,82. On 11 July 2012 RAS increased Saremar's capital by only EUR 824 309,6. RAS conditioned the subscription of the remaining EUR 4 066 640,67 to the observance of the standstill clause and notification of the operation to the Commission.

(133) RAS underlines that the recapitalisation merely served to recover funds which were, in any event, already at Saremar's disposal. The measure does not involve a transfer of new public resources and does not therefore constitute state aid. The measure should be considered MEIP-compliant given that it is based on a business plan defined *ex-ante* and aims to optimise the proceeds of the sale of a company with reliable viability perspectives.

(134) Finally, RAS stresses that private operators, in particular GNV and Moby, have benefitted from capital increases to compensate operational losses. Some of these operations have presumably taken place concomitantly with the measure undertaken by RAS in favour of Saremar.

5. **COMMENTS FROM INTERESTED PARTIES**

5.1. *MOBY*

5.1.1. COMPENSATION FOR THE OPERATION OF THE TWO ROUTES BETWEEN SARDINIA AND MAINLAND ITALY

(135) Moby claims that Saremar was able to operate the two connections to the mainland at prices below costs during 2011 and 2012 only on account of the subsidy granted by RAS. Moby submits that, as a result of the excessively low prices charged by Saremar, the structure of the market has been significantly altered. Private operators active on the routes in question until 2011, such as GNV or Forship (Sardinia Ferries), had no alternative but to exit the market.

(136) According to Moby, the measure cannot be justified on public interest grounds for at least two reasons.

(137) First, any lawful public service interest was taken into account by Italy when concluding on 18 July 2012 the new Convention with CIN, which included the discharge of PSOs on routes between Sardinia and mainland Italy. The new Convention laid down PSOs concerning operation of the Genova —Porto Torres and Civitavecchia – Olbia routes during the low season (year round, except for June to September) with at least a daily frequency. That Convention also laid down a cap on fares and additional fare reductions for residents on all routes operated under a public service regime. It imposed minimum capacity requirements, specifically identified on each of the routes in question.

(138) Second, there is no genuine public service interest inherent in the measure, as the two routes in question are commercial in nature. The routes have been operated by Saremar not only in the low season, but also in the 2011 and 2012 high seasons, when several other operators were present on the market. It was precisely on account of the commercial character of the routes in question in the summer season that they have been excluded from the scope of the new Convention.

(139) In addition, the entrustment acts do not explicitly define the services in question as SGEIs and do not grant the operator a right to compensation. Furthermore, RAS directly entrusted Saremar with the provision of those services, without prior tendering procedure.

(140) Moby concludes that the compensation was not justified and is in any event not proportional to the losses incurred by Saremar in the provision of the services.

5.1.2. PROMOTIONAL ACTIVITIES

(141) Moby holds that the EUR 2 479 000 (VAT excluded) subsidy granted to Saremar for the promotional activities is manifestly disproportionate. Further, the immediate advance of 80 % amount cannot be considered as normal business practice.

(142) Moby also submits, relying on Saremar's balance sheet for 2011, that in addition to the EUR 3 million amount, the Agency granted to Saremar EUR 1 157 000 (VAT excluded) as reimbursement of an amount presumably advanced by Saremar under the framework of the '*Summer 2011 — Flotta Sarda campaign*' (see recital 80). Moby claims that this amount would also constitute aid to Saremar.

(143) Finally, the Agency had not previously held a tendering procedure to award the promotional services.

5.1.3. EUR 3 MILLION LOAN AND THE LETTERS OF COMFORT

(144) As concerns the second letter of comfort (see recital 87), Moby recalls that, by Decision 52/119/EC, RAS confirmed that an immediate loan from the MPS bank was required for launching service on the Civitavecchia — Olbia route and that the bank had requested a guarantee from RAS. The fact that the comfort letter was formally withdrawn by Decision 12/15/EC is irrelevant for the qualification of the measure as State aid, since it had been explicitly asked for by the MPS bank and had already produced its effects.

5.1.4. THE RECAPITALISATION

(145) Moby fully supports the preliminary view of the Commission on the recapitalisation. It submits that a private investor would not have undertaken the same investment given the difficult financial situation of the company and the lack of foreseeable prospects of return to viability. Also the recapitalisation effectively eased Saremar's access to the loan by the MPS bank and therefore has effects similar to those of a guarantee, thereby conferring an economic advantage on Saremar.

5.1.5. OTHER MEASURES

(146) Moby also refers to an additional amount of EUR 4 million granted by RAS to Saremar in October 2011. The amount presumably supplemented State subsidies as a result of the increase in operating costs on the routes to the minor islands and Corsica operated by Saremar under the initial Convention, as prolonged. Moby argues that this measure constitutes additional aid to Saremar, which had not been notified to the Commission in advance.

(147) Moby qualifies all measures under assessment as constituting unlawful and incompatible aid to Saremar.

5.2. *OTHER PARTIES*

(148) No other party has commented on the measures subject to this Decision within the procedural deadlines.

(149) Late in the course of the investigation, on 3 July 2013, GNV has submitted to the Commission two documents: (i) the report of a Court-appointed expert in the context of the civil litigation initiated by GNV against Saremar before the Court of Genoa, and (ii) the Court Order of 11 June 2013 admitting the report.

(150) Three issues of relevance to the present State aid assessment were examined by the expert and included in the report: (i) whether or not the recapitalisation conferred an advantage to the business branch operating the two connections with the mainland, (ii) MEIP-compliance of the recapitalisation, and (iii) the market-conformity of the subsidy paid to Saremar for promotional activities.

(151) According to the report, the recapitalisation aimed at maintaining the company afloat, in light of the uncertain prolongation of the initial Convention for the following 12 months and thus of the availability of the compensation for the following year. The report relies on a document approved with the 2011 balance-sheet ([28]), which recalls that the two links to mainland Italy produced an operating loss of EUR 214 000 in 2011 and that, due to the uncertainty surrounding Tirrenia's privatisation, State subsidies were not certain either. The report concludes that the recapitalisation was required to ensure continuity of operation. It benefitted both the business branch operating links to minor islands and the one providing services to the mainland.

([28]) The report invokes the Relazione al bilancio 2011.

(152) The report goes on to say that Saremar had an EUR 2 523 439 overall surplus in 2011. This included a EUR 2 737 797 profit on the lines operated under the Convention with the State and a EUR 214 358 loss on the routes to the mainland.

(153) The expert also concluded that the recapitalisation was not MEIP-compliant, given the precarious condition of the company, which had lost more than one third of its registered capital, and the highly competitive market the company was operating on and its limited business perspectives. It concluded that a private investor would most likely not have invested in such activity.

(154) As concerns the congruity with the market value of the price for promotional activities, the expert noted that, according to the company's balance-sheet for 2011, Saremar had received EUR 2 479 000 as compensation for the provision of advertising services on the vessels operating the routes to the mainland. It analysed the market conformity of this price by dividing the costs incurred in the provision of transport services by the number of passengers carried. The resulting figure of EUR 18,47 cost per passenger was considered excessive when compared with normal costs for this type of advertising, all the more considering the fact that the advertising was directed at onboard passengers, which therefore had already chosen Sardinia as tourist destination. The price paid by RAS was considered not to reflect the market value of the promotional activities carried out by Saremar.

(155) GNV has also submitted to the Commission Saremar's comments on the report provided in the context of the national proceedings. In its comments Saremar underlined that the NCA had already confirmed that its share of the market for maritime transport services linking Sardinia to mainland Italy had remained marginal and was therefore not liable to have altered pre-existing market conditions. Saremar also confirmed the negative result in 2011 (EUR 214 358) on the routes linking Sardinia to the mainland. It stated that, in order to offset losses on the two routes to the mainland, the company would have had to increase fares at the levels charged by private operators.

(156) The fact that the services on the two routes were discontinued in September 2011 helped contain operational losses. The continuation of operation would have negatively impacted the results and would have led to an intervention by RAS to cover operational losses.

(157) Saremar underlined that the situation of the company at the moment the recapitalisation was critical, given the (more than moderate) risk of cutbacks in public subsidies. On account of the State's inability to support the company, also in managerial terms, the financial situation of the company raised substantial concerns. According to Saremar, this would make any comparison with private operators inappropriate.

6. **COMMENTS FROM ITALY ON INTERESTED PARTIES COMMENTS**

(158) Italy did not comment on the observations submitted by interested parties as regards measures adopted by RAS in favour of Saremar.

7. **ASSESSMENT**

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

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

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

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

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

(c) distort or threaten to distort competition,

(d) affect trade between Member States.

7.1.1. COMPENSATION FOR THE OPERATION OF THE TWO ADDITIONAL ROUTES LINKING SARDINIA TO THE MAINLAND

State resources

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

(162) The compensation for the operation by Saremar of the two maritime routes is disbursed by RAS from the regional budget. It is therefore imputable to the State and is given through State resources.

(163) The subsidy granted to Saremar for the promotional activities may be imputed to the State given that the Agency is wholly owned by RAS and serves to implement regional policies in terms of tourism and regional development. Neither the information at the disposal of the Commission nor the comments by interested parties submitted following the opening of the procedure called into question the imputability to the State of that measure.

(164) As concerns the comfort letters, the Commission notes that they merely lay down RAS's commitment to notify the banks of any change in its shareholding in the company, coupled with a declaration that RAS would ensure, in its capacity as a shareholder, that Saremar is managed in an efficient, effective and economic way. Since those comfort letters did not guarantee any financial obligation of Saremar, they did not create a future potential burden on State resources. On this basis, the Commission concludes that they do not constitute State aid.

(165) All other measures are granted by RAS directly from the regional budget and therefore amount to State resources.

Selectivity

(166) All measures under assessment, including the compensation for the operation of maritime routes, are granted to one recipient and are therefore clearly selective.

Economic advantage

Compensation for the operation of the two routes between Sardinia and mainland Italy

(167) During the formal investigation procedure, RAS argued first, that the compensation for the operation of the two routes was MEIP-compliant. RAS then assumed that it fulfilled the Altmark criteria.

(168) The extent to which the compensation fulfils the Altmark criteria is assessed in recital 180 et seq. As a general observation, however, the Commission notes that it is necessary to distinguish between application of the MEIP test and the fulfilment of the Altmark criteria. While both tests serve to assess the existence of an advantage for the beneficiary, they clearly refer to the different roles that public authorities can take when adopting financial measures in favour of a given undertaking. The MEIP applies when the public authorities act in their role of shareholders (i.e. in the first place with a view to obtain a profit from the operation), whilst Altmark is relevant when the public authorities pursue public interest objectives, which are not typical of a private operator (i.e. the perspective to make a profit is of secondary importance, if any) ([29]). The arguments raised by RAS to justify the compensation for the operation of the two routes between Sardinia and mainland Italy appear therefore contradictory.

(169) The Commission notes moreover, that a measure can only be MEIP-compliant if based on sound viability perspectives for the beneficiary. RAS argues that the process and steps it followed before taking the decision to entrust Saremar with the operation of the routes in question are comparable to those of a private market

([29]) See, *mutatis mutandis*, Joined Cases C-214/12 P, C-215/12 P, C-223/12 P, Land Burgenland v Commission, judgment of 24 October 2013, not yet published in the ECR, paragraph 56.

operator in similar circumstances. Nonetheless, the business plan or market investigation presumably carried out by Saremar before obtaining public support has not been provided to the Commission in the course of the investigation, even though it was for the Member State to provide objective evidence showing that the compensation for the operation of the two routes between Sardinia and mainland Italy is to be ascribed to the State acting as shareholder ([30]). On the contrary, by letter of 26 September 2013 RAS confirmed that, although the preparation of a business plan was foreseen by Decision 36/6/EC, no such plan was prepared as concerns the operation of the routes in summer 2012. Thus, at least as concerns the 2012 summer season, the decision to resume operation on the two routes was taken by RAS before any business plan was drawn up by Saremar. Furthermore, according to Saremar's balance sheet, and as confirmed by Saremar in the framework of the national civil proceedings, the operation of the two routes in the 2011 summer season had been loss making and could not therefore reasonably justify the decision to continue operation of the same routes in 2012, notably in the absence of any business plan or projections showing that the routes would have become substantially profitable in the future. In conclusion, the Commission finds that the compensation for the operation of the two routes between Sardinia and mainland Italy cannot be ascribed to the State acting as shareholder and as a consequence does not comply with the MEIP.

(170) As regards the alleged fulfilment of the Altmark criteria, Italy claims that the public mission defined was the operation of the two cabotage routes mentioned above at affordable rates ([31]). In this context, the Commission notes that services could only be qualified as SGEIs if in the absence of a public compensation they would not be provided by the market satisfactorily and under conditions (such as price) similar to those defined by the public authorities ([32]). According to RAS, entrusting Saremar with the provisional operation of the two routes was a short-term measure, until more effective remedial measures were in place to address the market failure in the provision of affordable connections between Sardinia and mainland Italy.

(171) While not explicitly qualifying the operation of the two routes to the mainland as SGEIs, the entrustment acts refer to affordability of fares as a general pre-requisite of operation. Throughout the formal investigation procedure, RAS and Saremar have insisted on the SGEI justification of the measure. This justification is particularly evident in their comments on the 2012 Decision, notwithstanding the additional argument on MEIP-compliance.

(172) In what follows, the Commission will examine the alleged observance of the conditions set out by the Court in its judgement in the Altmark case, in order to conclude whether or not the compensation paid to Saremar for the operation of public services constitutes an advantage within the meaning of Article 107(1) TFEU. Those conditions are cumulative, so that if only one of them is not fulfilled, the compensation is deemed to confer an advantage within the meaning of Article 107(1) TFEU to the beneficiary. Those conditions may be summarised as follows:

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

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

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

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

([30]) Joined Cases C-214/12 P, C-215/12 P, C-223/12 P, cited, paragraph 57.
([31]) As confirmed by the NCA, the Sardinian ports of Olbia and Golfo Aranci may be considered substitutable on the demand side. The same applies to the Ligurian ports of Genova and Vado Ligure.
([32]) See, paragraph 47 and 48 of the 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).

Altmark 2

(173) For the sake of clarity, in the present case the Commission considers it more expedient to start its analysis from the second Altmark condition.

(174) In this respect, the Commission notes that the parameters for the calculation of the compensation have not been established in advance. In fact, no explicit reference to any compensation to be granted to Saremar for the operation of the routes in question was laid down by the entrustment acts, namely Decision 25/69/EC, Decision 48/65/EC and Decision 36/6/EC for the Golfo Aranci – Civitavecchia route, and Decision 27/4/EC and Decision 36/6/EC for the Vado Ligure — Porto Torres route. RAS itself admitted that no compensation had initially been foreseen because the routes were considered commercially viable and Saremar was meant to exploit those routes so as to reach economic balance. Indeed, RAS's intention was not to compensate Saremar for the services in question. Since first, no compensation was foreseen for the operation of the two routes in question, and second, Saremar was granted a margin of manoeuvre to adjust the fares precisely in order to break-even, the Commission cannot consider that the parameters for the calculation of that (inexistent) compensation were established in advance in an objective and transparent manner.

(175) As Decision 20/57/EC shows, the obligation to maintain separate accounting aimed at ensuring that Saremar ensured economic equilibrium in operating the routes, rather than establishing the parameters for a future hypothetical compensation, which was as a matter of fact excluded from the outset.

(176) RAS's decision to compensate Saremar for operating the two routes in question was only taken on 7 August 2012 and, therefore, the compensation mechanism was developed *ex-post*, after the deficit in the operation of the routes had emerged. As already mentioned, neither the amount of compensation, nor the parameters for its calculation could have been established *ex-ante* since the operation of the two routes, considered to be the '*main commercial and tourist* lines' ([33]), was considered viable and the routes in question were meant to be exploited by Saremar on economic balance. The Commission recalls that the entrustment acts clearly laid down Saremar's leeway in adjusting the fares so as to ensure the viability of operation of the two routes. The Commission further notes that, not only was Saremar entitled to amend the fares in keeping with the viability objective, but it actually did so. In particular, Saremar's proposal for fares on the Porto Torres – Vado Ligure route in 2012 mentioned that proposed fares reflected a slight increase as compared to those which had been applied on the same route in 2011 to allow the company to break even. Based on the proposed tariff Saremar had at that time forecasted a EUR […] (*) surplus on the route.

(177) Furthermore, Decision 36/6/EC mentioned that the 'obligation to maintain economic balance, in order to avoid granting incompatible state aids, does not allow in the immediate the start-up of other routes'. Hence, already at the time the entrustment acts were issued it was clear that RAS intended to grant no compensation for the two routes in question. Moreover, it is also clear that already at that time RAS was aware that, in the light of the prevailing market situation, subsidies granted for the operation of cabotage routes to mainland Italy would probably qualify as incompatible State aid. The Italian Court of Auditors in its report on RAS's financial statements for 2012 concluded: 'the operation of the two routes […] far from observing the obligation to maintain economic balance so as to avoid granting incompatible State aids, as laid down by Decision 48/65/EC, would have generated absent the EUR 10 million paid by the Region a deficit in excess of EUR 13 million' ([34]).

(178) Finally, as explained below with regard to the analysis of the first Altmark condition, the Commission considers that for part of the period analysed in the present Decision, Saremar was not entrusted with an obligation clearly defining the level of fares to be considered as affordable. Since the parameters for calculating the compensation for the discharge of PSOs concerning affordable fares must necessarily be linked to the level of fares considered affordable and that level was not always clearly defined in the present case, the parameters for calculating the compensation cannot be considered as established in advance in an objective and transparent manner.

([33]) Decision 27/4/EC.
(*) Covered by the obligation of professional secrecy.
([34]) Relazione sul Rendiconto generale della Regione autonoma della Sardegna per l'esercizio finanziario 2012, page 360, available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sezioni_riunite/sezioni_riunite_regione_sardegna/2013/relazione_parifixa.pdf.

(179) In conclusion, the Commission considers that the second Altmark condition cannot be considered as fulfilled in the present case and therefore the compensation granted an advantage to Saremar within the meaning of Article 107(1) TFEU.

Altmark 1

(180) The Commission also has strong doubts as regards the fulfilment of the first Altmark condition.

(181) In this connection, it must be observed that there is no uniform and precise definition of a service that may constitute a SGEI under Union law, either within the meaning of the first Altmark condition or within the meaning of Article 106(2) TFEU ([35]). Point 46 of the 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 ([36]) 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.'

(182) National authorities are therefore entitled to take the view that certain services are in the general interest and must be operated by means of PSOs 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.

(183) In this case, the allegedly public service mission defined by Italy was the operation of two cabotage routes connecting mainland Italy to Sardinia, namely Civitavecchia – Olbia/Golfo Aranci and Vado Ligure – Porto Torres at affordable rates.

(184) In the field of cabotage, detailed Union rules governing PSOs 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 (hereinafter *the Maritime Guidelines*) ([37]).

([35]) 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.
([36]) 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.
([37]) Commission Communication C(2004)43 – Community Guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

(185) 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.'

(186) In accordance with section 9 of the Maritime Guidelines, 'public service obligations (PSOs) 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.

(187) It results from established case-law that PSOs may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone ([38]). The Communication on interpretation of the Maritime Cabotage Regulation ([39]) confirms that 'it is for the Member States (including regional and local authorities where appropriate) 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 PSOs 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.

(188) As mentioned above, RAS considers that in this case PSOs have been imposed in terms of requiring Saremar to charge affordable rates on the two cabotage routes to mainland Italy. The table below details the specific fares to be charged by Saremar on the routes, as laid down by the entrustment acts. For 2012, given that no precise fares were mentioned in the entrustment acts, the fares proposed by Saremar to RAS were considered.

Table 3

Passenger fares (deck passage) laid down by the entrustment acts

	Golfo Aranci (Olbia) – Civitavecchia	Vado Ligure — Porto Torres
2011 summer season	(Decision 25/69/EC) — EUR 21 from 15 June - 15 July and 1 - 15 September; — EUR 35 from 16 July - 31 August.	(Decision 27/4/EC) — EUR 35 from 22 June - 15 July and 1 - 15 September; — EUR 40 from 16 July - 31 August, A 15 % discount would apply to Sardinian residents.
2012 winter season	(Decision 48/65/EC) — Saremar was to apply the low season fare charged in 2011 (i.e. EUR 21).	*Not operated*
2012 summer season	— EUR 21 from 16 January to 30 May, June and July (Mondays to Thursdays) and from 3 September to 31 December 2012; — EUR 25 June and July (Fridays to Sundays), 30 and 31 July, 1 and 2 September; — EUR 35 from 1 to 31 August.	— EUR 35 (EUR 30 for residents) from 1 to 14 June and from 3 to 15 September; — EUR 38 (EUR 33 for residents) from 15 June to 13 July; — EUR 44 (EUR 38 for residents) from 14 July to 2 September.

([38]) Judgment of the Court in Case C-205/1999 Analir and others [2001] ECR I-1271.
([39]) 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), COM(2003) 595 final, 22 December 2003.

(189) The Commission notes that the entrustment acts do not impose other PSOs as concerns the frequency, capacity, or regularity of the (mixed) services offered by Saremar, with the possible exception of Decision 48/65/EC on the start-up of the service on the Olbia — Civitavecchia route in the 2012 winter season, which laid down that Saremar was required to operate the route daily by cruise ferries. Nor have the Italian authorities submitted to the Commission in the course of the investigation that other requirements have been imposed on Saremar which had not been outlined by the aforementioned entrustment acts.

(190) The Commission considers that the obligation to apply affordable fares, even taken in isolation, could be qualified as a PSO and therefore that the public interest objective pursued in this case could be legitimate, notably in the context of the increase in prices of passenger transport services to the island in the summer of 2011, to the extent that it can be considered that the market did not already offer a comparable service at those fares.

(191) In order to verify the existence of the PSOs entrusted to Saremar and whether it was necessary to compensate the latter for the supplementary costs incurred in meeting these obligations, the Commission must therefore examine:

(a) first, whether the service would be inadequate if its provision were left to the market forces alone in the light of the public service requirement concerning affordable fares imposed by the Member State, and

(b) second, whether the operator was indeed entrusted with public service obligations which were clearly defined.

(192) On the grounds detailed hereunder, the Commission concludes that those conditions have not been fully respected in the present case.

2011 and 2012 summer seasons

(193) In summer 2011, when Saremar was entrusted with the operation of the two routes, four other operators provided regular service on the Civitavecchia – Olbia route and three on the Genova — Porto Torres route ([40]). Moreover, Tirrenia was offering similar services to those provided by Saremar and which met the rather vague obligations laid down by the act(s) of entrustment. Indeed, as detailed above, until July 2012 Tirrenia provided mixed services on both the Genova – Porto Torres and Civitavecchia – Olbia routes under a public service regime subject to PSOs concerning the type of vessel, the frequency of service and reduced rates to Sardinian residents and special categories under the initial Conventions (see recital 14 above). Originally the initial Convention, which remained in force until June 2012, also laid down PSOs in terms of fares so as to guarantee affordability of the services in question. In view of the fact that certain routes, and notably the two routes under assessment, '*ensured particularly high traffic levels*', the Italian authorities decided to suspend the obligations concerning fares imposed to Tirrenia in the summer season (with the exception of fares for residents and other obligations concerning frequencies and type of vessels) so as to ensure that Tirrenia enjoys full commercial freedom as regards prices offered to its clients ([41]). The same commercial freedom was granted to Tirrenia/CIN by the new Convention with regard to fares on the two routes in question as of July 2012 ([42]). Therefore, the choice to leave Tirrenia and Tirrenia/CIN free to set prices in the summer season when high traffic levels are recorded and several other shipping companies operate those routes is not a random choice of the Italian authorities, but the result of their assessment as regards the adequacy of the services provided by market forces in that period of the year. The fact that RAS itself initially considered that Saremar could operate the two routes offering affordable prices and reaching economic equilibrium suggests that market conditions on those routes are such that market forces are capable of offering satisfactory services, notably in summer when traffic is particularly high.

(194) On the other hand, no objective justification has been provided by RAS as to why the services already provided by Tirrenia under the initial Convention, which had been already prolonged at the time of Saremar's entrustment, would not have been adequate to guarantee territorial continuity. The argument raised by RAS as regards the

([40]) NCA Decision on the Tirrenia/CIN merger, Table 3.
([41]) NCA Decision on the Tirrenia/CIN merger, paragraph 45.
([42]) NCA Decision on the Tirrenia/CIN merger, paragraph 46.

price increase recorded in 2011 is of no avail in this context. In fact, the NCA Decision on the increase in prices to/from Sardinia only sanctioned private operators for the violation of Article 101 TFEU. The NCA Decision clarified that whereas Tirrenia had also increased prices to a certain extent in the reference period, such increase was significantly lower than that of private competitors.

(195) As to RAS's argument that the imposition of PSOs would be justified by the uncertainty concerning the privatisation process of Tirrenia, the Commission notes that the initial Convention was prolonged until completion of the privatisation process already in 2010. Consequently, any delay in the sale of the business branch operating the public services could not have caused any interruption in the operation of the relevant routes.

(196) As concerns the 2012 summer season, by Decision 36/6/EC of 1 September 2011 Saremar was entrusted with the operation between 15 May and 15 September 2012 of the Golfo Aranci (Olbia) – Civitavecchia and Vado Ligure — Porto Torres routes. RAS submitted that the decision to resume operation of the routes in 2012 was based on viability perspectives, supported by the results recorded in summer 2011. Both routes were effectively operated as of 1 June 2012.

(197) As of July 2012, when the new Convention between the Italian State and CIN entered into force, Tirrenia's presence on the two routes was replaced by Tirrenia/CIN. The new Convention sets out minimum frequencies and capacity as well as maximum prices for the winter season and reduced rates for Sardinian residents and special categories throughout the year.

(198) RAS defends that the operation in the summer season of certain routes under the new Convention, including the two routes subject to the assessment, is not subject to PSOs on fares so as to guarantee affordability of the service. Indeed, according to the NCA, the Ministry of Infrastructure and Transport had confirmed that, although the new Convention did lay down specific (maximum) fares throughout the year, including June — September, as well as special rates for Sardinian residents, the operation of the routes during this period fell outside of the scope of the new Convention, and therefore no PSOs applied. Thus CIN operates the Genova — Porto Torres and Civitavecchia — Olbia routes on commercial terms from 1 June – 30 September.

(199) On top of what already underlined above in recitals 193-194, the Commission notes that in June 2012 the NCA authorised the Tirrenia/CIN merger by means of a conditional decision. The Decision imposed specific conditions on the parties, inter alia, concerning the fares to be charged on the routes in question. In particular, in the summer 2012 season, CIN and Moby would maintain on the Civitavecchia — Olbia, Genova — Porto Torres and Genova — Olbia routes a level of fares such as to maintain the average unit revenue obtained by Moby in summer 2009 (except an increase directly attributable to the increase in bunker costs). In summer 2013, CIN and Moby would maintain the 2012 average unit revenue. In addition, special discounted rates would apply in the 2012 and 2013 summer seasons to residents.

(200) Therefore, the NCA Decision on the merger ensures that Tirrenia/CIN will not apply excessive fares on the two routes in question. It is true that when RAS entrusted Saremar with the operation of the two routes by means of Decision 36/6/EC of 1 September 2011, it could not know the possible conditions that the NCA would have imposed. However, the fact remains that in September 2011 Tirrenia was still obliged to provide year round mixed services on the routes under the prolongation of the old Convention, and a plurality of operators were present on the routes in the summer season. By the same token, the Italian authorities had already decided that there was no need to impose fare obligations on Tirrenia, given the market conditions in the summer season.

(201) On 18 June 2013 the NCA opened an investigation into non-observance in summer 2012 by Tirrenia and Moby of the relevant conditions imposed by the NCA Decision on the Tirrenia/CIN merger. RAS and Saremar have claimed that this would suffice to prove that the fares charged by competitors on the routes in question were not such as to satisfy the affordability requirement imposed by RAS. The Commission cannot accept this argument. The operation of the two routes in the summer 2012 season was entrusted to Saremar by means of Decision 36/6/EC of 1 September 2011, which pre-dates the start of booking for the 2012 summer season. RAS could not have therefore forecasted that the parties would increase fares possibly in violation of the NCA Decision at the moment of entrustment.

(202) In addition, the Commission considers that even if RAS's argument that CIN was under no obligation to maintain affordable fares in the summer season were to be accepted, this would mean that PSOs on affordable fares would be justified in the summer season, rather than during January — May 2012. This argument would not therefore justify the imposition of PSOs in the winter season.

(203) Moreover, a comparison between Tirrenia and Saremar's (passenger) prices on the two routes shows that fares on the Olbia — Civitavecchia route in the summer season were comparable. On the Vado Ligure — Porto Torres route, Saremar's fares were lower than those of Tirrenia.

Table 4

Passenger fares (deck passage) on the Golfo Aranci (Olbia) – Civitavecchia route

	Saremar	Tirrenia/CIN
2011 summer season	— EUR 21 from 15 June to 15 July and 1-15 September; — EUR 35 from 16 July 2011 to 31 August 2011.	EUR 21,68 (EUR 21,46) for residents).
2012 summer season	— EUR 21, in June and July weekdays and 3-15 September; — EUR 25, in June and July weekends and 30, 31 July and 1, 2 September — EUR 35 in August.	EUR 21,68 (EUR 21,46).

Table 5

Passenger fares (deck passage) on the Genova (Vado Ligure) – Porto Torres

	Saremar	Tirrenia/CIN
2011 summer season	— EUR 35 (EUR 29,75) from 22 May to 15 July and 1-15 September; — EUR 40 (EUR 36) from 16 July 2011 to 31 August 2011	EUR 53,63 (EUR 37,18)
2012 summer season	— EUR 35 (EUR 30) 1 - 14 June and 3-15 September; — EUR 38 (EUR 33) from 15 June to 13 July; — EUR 44 (EUR 38) from 14 July to 2 September	EUR 53,63 (EUR 37,18)

(204) Therefore, the Commission considers that the Italian authorities did not demonstrate the existence of a genuine public service need as regards the imposition upon Saremar of an obligation to apply affordable fares in the summer season of 2011 and 2012. In any case, the fares applied by Saremar on the Olbia — Civitavecchia route were comparable and at times higher to those already offered by Tirrenia and Tirrenia/CIN in the absence of public service requirements relating to fares level.

Winter season

(205) In 2011 the service on Olbia — Civitavecchia route was discontinued by Saremar from October to December 2011. The service was then resumed in winter 2012, from 16 January 2012 to 31 May 2012. At the same time Tirrenia was operating this route under the PSOs imposed by the initial Convention, which notably also concerned the fares that Tirrenia had to offer. No clear justification has been put forward by RAS to justify the necessity of public service obligations relating to the fares to be applied on the route in question by Saremar in the winter season.

(206) Moreover, a comparison between Saremar's fares and those offered by Tirrenia shows that Saremar's fares were not lower. Therefore, the fares obligations imposed on Saremar cannot be considered as having been catered to the satisfaction of public service needs that were not met by the obligations already imposed on Tirrenia.

Table 6

Passenger fares (deck passage) on the Golfo Aranci (Olbia) – Civitavecchia route

	Saremar	Tirrenia/CIN
2012 winter season	EUR 21.	— EUR 19,79 (EUR 18,16) low season; — EUR 20,61 (EUR 19,98) medium season (1); — EUR 21,68 (EUR 21,46) high season (2).

(1) At most 40 departures each way during the year.
(2) At most 40 departures each way during June-September, Christmas and Easter holidays.

Freight transport

(207) As regards fares for freight transport, the Commission notes that Tirrenia and Tirrenia/CIN were entrusted with an obligation to provide mixed services on the two routes in question. Moreover, in 2011 five operators (including Saremar) were offering freight transport services on the Olbia — Civitavecchia route and three on the Vado Ligure — Porto Torres route.

(208) RAS provided neither any explanation as to why the fares for freight transport offered by Tirrenia and other operators on the routes in question were inadequate to satisfy the transport needs of Sardinia, nor did it give the Commission any comparative information on freight fares applied by Saremar and its competitors on the routes in question. Moreover, the increase in prices charged by private operators on the routes in question as sanctioned by the NCA only refers to 2011 and is limited to passenger fares. As a consequence, the Commission considers that the Italian authorities did not demonstrate the existence of a real public service need relating to the imposition of public service obligations on Saremar as regards freight transport.

(209) Finally, the Commission notes that Tirrenia/CIN operates the routes in question by vessels of comparable quality and capacity as those of Saremar. Nor has RAS or Saremar in the course of the investigation claimed that Tirrenia's vessels would not meet pre-defined quality standards.

(210) In the light of the above, the Commission concludes that RAS did not demonstrate clearly the need to impose public service obligations relating to the application of affordable fares on the two routes in question and to what extent those obligations were required.

(211) Second, in order for the first Altmark condition to be met, the service provider must be entrusted with clearly defined PSOs.

(212) As concerns the definition of the public mission in the entrustment acts in the present case, the Commission notes the following:

(a) Decision 20/57/EC instructed Saremar to verify the viability of providing mixed passenger and freight services on two of three proposed links to the mainland. The precise routes to be operated were not chosen by RAS but rather left at the discretion of the operator. Although RAS claims that the imposition of PSOs in this case was justified by the increase in fares of competing operators, no specific obligation to charge reduced fares on the routes to be operated was imposed on Saremar;

(b) as concerns the Golfo Aranci – Civitavecchia route, specific fares have been approved by Decision 25/69/EC for the period 15 June 2011 to 15 September 2011. The standard fare for the winter season (16 January 2012 to 15 June 2012) was laid down by Decision 48/65/EC. By Decision 12/28/EC concerning operation of the route in the 2012 summer season, RAS merely took act of Saremar's proposal on the application of different fares in the low, week-end and high season and of the three alternatives proposed by Saremar as concerns the fare applicable in the high season, without however specifying the precise fares which had been proposed by the operator. Nor did RAS decide on one of the three alternative fares proposed by Saremar for the high season. Rather, RAS instructed Saremar to implement the fare which best balances the public interest with the economic viability objective;

(c) fares applicable on the Genova (Vado Ligure) – Porto Torres route in 2011 were set by Decision 27/4/EC. As concerns the operation of the route in the 2012 summer season, by Decision 22/14/EC RAS accepted Saremar's proposal on the application of different fares in the low, medium and high season. A 15 % discount would apply to Sardinian residents. That Decision does not specify the precise level of fares to be charged by Saremar.

(213) The Commission therefore notes that even if some of the entrustment acts regulate the fares to be charged to a certain extent, it is clear that these provisions relate to only a fraction of Saremar's activity. Applicable fares have indeed been pre-approved on both routes for the 2011 summer season. As concerns operation of the two routes in the 2012 summer season, the entrustment acts do not specify the precise fares to be charged by the operator. Late in the investigation procedure, RAS has submitted to the Commission the actual fares which had been proposed by Saremar and implicitly approved by Decision 25/69/EC and Decision 27/4/EC.

(214) Nonetheless, the Commission notes that a large discretion has been left to Saremar to adapt fares. Saremar retained the faculty to adjust fares so as to ensure economic viability of the activity and customer satisfaction, subject to prior notice to RAS. The Commission notes that SGEIs are by nature services which address market failures as the market does not autonomously provide them to the standard required by the public authority. Whilst the Commission considers that some flexibility with regard to prices may be left in some cases to public service providers, when the alleged public service obligation relates precisely to the necessity to offer affordable fares, the public authorities must define the maximum fares that the operator can apply or link that flexibility either to objective criteria, which allow to determine with a reasonable degree of certainty what fare level is to be considered as affordable, or to a prior authorisation procedure by the entrusting authority.

(215) In the present case, however, the provisions concerning applicable fares in the entrustment acts are not sufficiently precise so as to qualify as clearly defined PSOs (with the exception of Decision 25/69/EC and Decision 27/4/EC). Saremar's margin of manoeuvre was not linked to objective criteria or at least to criteria that were applied in an objective way. The requirement to exploit the routes on economic balance was manifestly not met and customer satisfaction was not measured (to the knowledge of the Commission). Likewise, it is true that Saremar had to inform RAS of changes in the level of fares, but there is no indication that RAS's agreement was a condition for the application of the amended fare.

(216) Saremar has claimed in the course of the civil proceedings before the Genoa Court that, in order to offset losses on the two routes, the company would have had to increase fares. However, there is no evidence in the case file that, in trying to keep with the viability objective, the company has at any time proposed an increase in fares which was rejected by RAS. On the contrary, documents in the case file show that Saremar had indeed, at least as concerns the operation of the Porto Torres – Vado Ligure route, increased fares to ensure that the company could break even. It would therefore rather appear that the company could freely set its fares.

(217) Finally, it results from the analysis of the entrustment acts that no obligation on fares has been imposed on Saremar for the operation of the Olbia – Civitavecchia route from 1 May to 30 May 2012: the rate approved by Decision 48/65/EC was applied until end April 2012, whereas the rate approved by Decision 12/28/EC applied as of June 2012. Given that the operation of the route was not discontinued, it results that Saremar's prices were not subject to regulation at least during May 2012.

(218) In view of the above, the Commission considers that Saremar was not entrusted with clear obligations as regards fare level, with the exception of the service offered in 2011 pursuant to Decision 25/69/EC and Decision 27/4/EC.

(219) Consequently, the Commission considers that the Italian authorities have not demonstrated that the compensation meets the first Altmark condition.

Altmark 3

(220) In accordance with the third Altmark condition, the compensation received for the discharge of PSOs cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of those obligations, taking into account the relevant receipts and a reasonable profit for their discharge.

(221) Inasmuch as the Commission already concluded that RAS did not demonstrate the existence of a real public service need on the two routes in question over the relevant period, the Commission considers that Saremar was not entitled to receive any compensation under the Altmark jurisprudence for the costs incurred in the operation of the two routes.

(222) RAS has argued however, that the compensation is lower than the loss incurred by Saremar in serving these two routes in 2011 and 2012 and that since it has been calculated according to the separate accounts for those routes, it cannot benefit any other activity of Saremar. It should therefore be considered as complying with the third Altmark condition. However, the Commission notes that in the absence of a clear definition of the obligations imposed on Saremar over the whole period of entrustment, it is impossible to calculate the costs ensuing from those obligations.

(223) Therefore, the Commission must conclude that the third Altmark condition is not met either.

(224) Given that the first three Altmark conditions have not been met, the Commission concludes that the compensation granted to Saremar by Regional Law 15/2012 provides an economic advantage to Saremar.

Conclusion

(225) The compensation granted to Saremar by virtue of Regional Law 15/2012 provides the beneficiary with an economic advantage.

Promotional activities

(226) As concerns the promotional activities, the Commission first notes that the logos and advertising effectively carried on Saremar vessels did not refer to the reduction in prices of maritime transport services but were intended at promoting Sardinia as tourist destination. Therefore, the question that arises is whether Saremar received a remuneration for those promotional activities which was above market price.

(227) RAS has argued that promotional activities carried out by Saremar have been priced at market rates. The Commission should presumably take into account the fact that these activities have been carried out by Saremar both in 2011 and 2012. As mentioned above, a study concluded by an expert appointed by RAS was submitted to the Commission in August 2013. The study concluded that the market value of the promotional activities carried out by Saremar in 2011 and 2012 would range between EUR 2 458 168 and EUR 2 609 631. Hence the EUR 2 479 000 price set by RAS would be justified.

(228) In the present case, there was neither an open and unconditional bidding procedure nor an *ex-ante* independent expert valuation prepared for the purposes of awarding the services in order to ensure that the price adequately reflects the market value of the services. Since the activities in question were not tendered out, it cannot be

assumed that the price paid by RAS is in line with market conditions, thus ruling out the possibility that it conferred an advantage on Saremar. The mere fact that the amount was originally granted as compensation for promotional activities to be carried out exclusively in 2011, and that no advertising was supposed to be carried out by Saremar in 2012, suggests that the price was not based on a reliable *ex-ante* valuation of costs.

(229) Nonetheless, it cannot be ruled out that other valuation methods may be applied in such instances, so long as it is ensured that the price actually paid by the purchaser on the basis of those methods reflects, as far as possible, the market value of the service ([43]).

(230) RAS has indeed produced a valuation report showing that the services have been priced at market value. The expert derived the market value of the services provided by Saremar to RAS based on a benchmark with average advertising costs per square meter estimated on the basis of parameters such as duration (certain discounts for the continuation of the advertising campaign in 2012 were taken into account), type of the advertising (internal or external) and location (main cities, important influx of population, mobility areas).

(231) Given that the valuation was carried out on the basis of generally accepted valuation standards, which in this case consist of an analysis of transactions involving similar services, the Commission considers that the valuation adequately reflects the market value of the services in question.

(232) The Commission considers that it cannot rely on the report of the expert commissioned by the Court of Genoa in the context of civil proceedings concluding that the pricing of the promotional activities was excessive: no benchmark is considered and no market value is put forward for comparable advertising activities in that report. Moreover, there is no indication that the expert in question has any relevant experience in carrying out similar tasks.

(233) On this basis, the Commission cannot conclude that the price paid by RAS for the promotional services contains State aid.

EUR 3 million loan and the letters of comfort

(234) The Commission concluded in recital 164 above that no transfer of State resources has occurred. In particular, the EUR 3 million credit line initially considered was not drawn by Saremar before the first comfort expired and the second letter of comfort authorised by Decision 52/119/EC in the end was not issued by RAS.

The recapitalisation

(235) RAS has argued that (i) the measure did not involve a transfer of new public resources since it merely implied a transfer of funds already at Saremar's disposal, (ii) the measure was justified by profitability perspectives and based on a business plan prepared *ex-ante*, and (iii) the measure aimed to maximise the proceeds of the sale and was due to the financial situation of former parent company Tirrenia. RAS claimed that the measure was in no way linked to the operation by Saremar of the two routes to the mainland, but rather to the provision of SGEIs under the initial Convention with the Italian State, as prolonged.

(236) In order to assess whether the recapitalisation entailed an advantage to Saremar, the Commission must assess whether in similar circumstances, a private investor in a market economy would have made capital contributions of the same size ([44]), having regard in particular to the information available and foreseeable developments at the date of those contributions ([45]). The MEIP should be applied *ex-ante*, i.e. one should determine whether at the time of the investment a private investor in a market economy would have prevailed upon making such capital contribution. A market investor would duly take into account the risks associated with the investment — so as to require higher profitability from more risky investments. If, for instance, specific regulatory requirements, such as on minimum capital or liquidity, make the investment unprofitable, a market economy investor would not proceed with the investments.

([43]) Case C-239/09 *Seydaland Vereinigte Agrarbetriebe & Co. KG* v *BVVG Bodenverwertungs- und -verwaltungs GmbH* [2010] ECR I-13083, paragraph 39.
([44]) Case C-261/89 Italy v Commission [1991] ECR I-4437, paragraph 8; Joined Cases C-278/92 to C-280/92 Spain v Commission, cited above, paragraph 21; Case C-42/93 Spain v Commission [1994] ECR I-4175, paragraph 13.
([45]) See points 3.1 and 3.2 of the Export-credit Communication, the Commission's notice regarding *Application of Articles 92 and 93 of the EEC Treaty [now 107 and 108 of the TFEU] to public authorities' holdings*, Bulletin EC 9-1984, and the Commission Communication to the Member States on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

(237) The recapitalisation of Saremar was finally decided on 15 June 2012 when the Shareholders' Assembly decided to increase Saremar capital from EUR 1 209 010,64 to EUR 6 099 961 of which EUR 824 309,69 paid in on 11 July 2012.

(238) Given that the company appeared to be in a precarious financial position, it was the Commission's preliminary view in the 2012 Decision that a market economy investor would have required the implementation of a plan to restore the firm's viability, so that the company could provide a sufficient return for its shareholders. This view was supported by the interested parties in the course of the investigation.

(239) RAS provided to the Commission Saremar's business plan for 2011-2022, approved in July 2010. The business plan has a key significance in this sense because a private investor will inject fresh capital in a company whose capital has dropped below the legal limit only if he expects a sufficient profitability level. The Commission considers that Saremar's business plan for 2011-2022 is not based on realistic assumptions since (i) it did not refer to the capitalisation of the company by the public shareholder, but rather to a capital injection to be carried out *pari passu* by a future private shareholder and RAS after completion of the partial privatisation initially foreseen for November 2010; the capital injection laid down by the business plan for 2010 was supposed to provide one third of the required funding to acquire two vessels, whereas the remaining 70 % would have been obtained by the repayment by Tirrenia to Saremar of a EUR 11,5 loan (see recital 89 above) and from various financial institutions; (ii) it covers the 12-year duration of the new public service contract to be signed with the buyer of the company, which was initially sought to be signed end 2010. This plan therefore only concerns measures to be implemented upon partial privatisation of the company. In summary, the business plan provided by RAS predates of about two years the binding decision to recapitalise Saremar. In the meanwhile the market situation had changed significantly: Tirrenia was admitted to the extraordinary administration procedure in August 2010 and declared insolvent by the Court; the former parent company was subsequently acquired by CIN and the latter signed on 18 July 2012 a new Convention laying down PSOs on the routes between Sardinia and mainland Italy; Saremar's privatisation was delayed. The Commission considers a private investor would have updated its business plan to take into account the new market situation before deciding to inject the sums in question.

(240) Both RAS and Saremar have confirmed that the capital injection was agreed so as to satisfy regulatory requirements, thus allowing the company to continue to stay in business. The case file contains no document showing that RAS took into consideration the profitability prospects of the company in the changed market situation when it decided to inject capital into Saremar in June 2012.

(241) The Commission considers that compliance with regulatory capital requirements would not have been a sufficient reason for a private market investor to inject further capital into a company. As provided in the Commission communication on the application of Articles 92 and 93 of the EEC Treaty [now 107 and 108 TFEU] (hereinafter the *MEIP Communication*) ([46]), investors are often obliged by law to contribute with additional equity to firms whose capital base has been eroded by continuous losses to below a predetermined level. To answer Member States' claims that these capital injections cannot be considered as aid as they are merely fulfilling a legal obligation, the MEIP Communication provides that private investors faced with such a situation would consider all other options – including the liquidation or run-down ([47]) – and choose the one which is financially the most advantageous.

(242) For the purpose of assessment of MEIP compliance, the Commission may only take into account information which was available at the time when the decision to make the investment was taken, including developments which were reasonably foreseeable at that time. On account of the information available at the relevant time, the decision to recapitalise the company does not appear to be based on economic evaluations comparable to those which, in the relevant circumstances, a rational private investor in a similar situation would have had carried out, before making the investment, in order to determine its future profitability. Indeed, the Commission notes that, at the time the recapitalisation was decided, the company was facing acute financial difficulties. In addition, as put forward by RAS itself, it was not at that stage certain whether the operation of the routes to minor islands and Corsica would continue to be subsidised by the State. Moreover, no compensation had been at that time set to cover the potential operating deficit for the operation of the routes to the mainland (which was granted only in November 2012).

([46]) Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

([47]) See Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty, paragraph 36.

(243) The Commission considers that RAS's argument, according to which several market investors had also injected capital into their companies competing with Saremar, thereby supporting their loss-making operations, is irrelevant to the extent that each investment decision must be assessed on its own merits. Fully fledged profitability projections may have been available to these private investors at the time of their investments. Furthermore, such companies may have been in a better financial situation prior to the recapitalisation, thus making it more likely that a return to profitability could be achieved.

(244) The Commission must likewise reject RAS's claim that the capitalisation of the company was in no way linked to the operation by Saremar of the routes to mainland Italy. As stressed by RAS, the objective of the measure was to allow the company to continue operation by bringing the capital, which had dropped by more than one third, back to legally approved standards. Therefore, the recapitalisation of Saremar benefitted necessarily all the activities offered by that undertaking.

(245) The Commission therefore concludes that the decision to recapitalise the company does not comply with the MEIP and therefore confers on Saremar an advantage that it would not have received under normal market conditions.

Affectation of trade and distortion of competition

(246) In order to be qualified as State aid, a financial measure must affect trade between Member States and distort or threaten to distort competition. In its assessment of those two conditions, the Commission is not required to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition ([48]). When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.

(247) 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 Maritime Cabotage Regulation, liberalising the market of maritime cabotage. Therefore, the measure under scrutiny is liable to affect Union trade and distort competition within the internal market. The fact that Saremar's share in that market has remained marginal does not affect this finding.

7.2. *LAWFULNESS OF THE AID*

(248) All measures subject to this Decision have been put into effect before formal approval by the Commission. Therefore the Italian authorities did not respect the stand-still obligation under Article 108(3) TFEU.

7.3. *COMPATIBILITY OF THE AID*

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

(250) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds for compatibility and to demonstrate that the conditions for compatibility are met ([49]). RAS considers that none of the measures under assessment constitutes State aid and has only provided possible grounds for compatibility as concerns the compensation for the operation of the two routes to the mainland and the subsidy paid for the promotional activities.

([48]) See for instance judgment of the Court in case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44.
([49]) C-364/90 — *Italy v Commission* [1993] ECR I-2097, paragraph 20.

7.3.1. COMPENSATION FOR THE OPERATION OF THE TWO ROUTES BETWEEN SARDINIA AND MAINLAND ITALY

(251) On 31 January 2012 the new SGEI package entered into force. As of this date, the compatibility of the aid under the form of public service compensation has to be examined in light of the 2011 SGEI Decision and the 2011 SGEI Framework's criteria.

(252) As was already the case under the 2005 SGEI Decision, the 2011 SGEI Decision is only applicable to State aid in the form of public service compensation granted to undertakings in connection with a SGEI which complies with the Maritime Cabotage Regulation. In the 2012 Decision, the Commission took the preliminary view that, by directly entrusting the operation of the services to Saremar, the Italian authorities did not observe Article 4(1) of the Maritime Cabotage Regulation on non-discriminatory treatment of ship-owners.

(253) RAS has claimed during the formal investigation procedure that Saremar qualified as an internal operator of the Region. According to RAS, it can be drawn from the case law ([50]) that the application of the principle of non-discrimination is precluded, provided that the control exercised over the operator by a public authority is similar to that which the authority exercises over its own departments and the operator carries out the essential part of its activities with the controlling authority.

(254) It would appear that indeed Saremar acts on behalf of RAS as an instrument for the implementation of RAS's maritime transport and regional development policies. It is however unclear whether that circumstance can justify the direct and exclusive award of compensation to Saremar. In any event, the Commission does not need to decide on this issue for the purpose of this case, given that the aid measure does not comply with the 2011 SGEI Decision.

Applicability of the 2011 SGEI Decision

(255) The 2011 SGEI Decision only applies to aid under the form of public service compensation in connection to genuine SGEI services. On the basis of the grounds developed in recitals 180-218 above, the Commission concludes that RAS has neither demonstrated to the required legal standards the existence of a real public service need justifying the imposition of public service obligations on the routes in question, nor that those obligations were sufficiently precise. Consequently, the subsidy granted to Saremar for the operation of the two routes cannot be considered as compatible aid pursuant to the 2011 SGEI Decision.

(256) In any event, in order to be deemed compatible and exempted from the notification requirement by virtue of the 2011 SGEI Decision, the operation of a SGEI necessarily has to be entrusted by way of one or more acts, laying down:

(a) The content and duration of the PSOs;

(b) The undertaking and, where applicable, the territory concerned;

(c) The nature of any exclusive or special rights assigned to the undertaking;

(d) A description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;

(e) The arrangements for avoiding and recovering any overcompensation;

(f) A reference to the 2011 SGEI Decision.

([50]) Case C-410/04 — *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio S.p.A.*

(257) It is manifest that in this case the entrustment acts do not meet the requirements under letter (d), (e) and (f), above. Therefore, the aid in question cannot be considered as compatible on the basis of the 2011 SGEI Decision.

(258) According to RAS, the measure has been defined in its main elements before the entry into force of the new SGEI package and, therefore, the 2005 SGEI Decision, rather than the 2011 SGEI Decision, would be applicable for the purpose of compatibility assessment. However, in this case the compensation was granted only in August 2012 by Regional Law 15 of 7 August 2012 and therefore does not pre-date the entry into force of the 2011 SGEI Decision. RAS's argument is therefore untenable.

(259) In conclusion, aid to Saremar cannot be deemed compatible and exempted from the notification requirement on the basis of the 2011 SGEI Decision.

(260) In any event, given the absence of any provision setting a compensation for the operation of the two routes, and of the arrangements for avoiding and recovering any overcompensation, the compensation in question cannot be considered compatible and exempted from the notification requirement on the basis of the 2005 SGEI Decision either.

Saremar is an undertaking in difficulty within the meaning of the Rescue and Restructuring Guidelines

(261) For the reasons set out below, the Commission considers that Saremar can be considered as an undertaking in difficulty within the meaning of the Rescue and Restructuring Guidelines at the time the compensation in question was granted to it.

(262) According to point 9 of the Rescue and Restructuring Guidelines, a firm is regarded to be in difficulty if it is unable to recover through its own resources or by rising the funds it needs from shareholders or on the market, and if without the intervention of public authorities it will almost certainly go out of business. In particular, according to point 10 of the Rescue and Restructuring Guidelines a firm is regarded to be in difficulty:

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

(b) when in a case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter has been lost in the preceding 12 months;

(c) whatever type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(263) Point 11 of the Rescue and Restructuring Guidelines provides that even when none of the circumstances set out in point 10 are present, a firm may still be considered as being in difficulty and lists some of the usual signs of such a situation, such as: increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil asset value.

(264) Saremar had a EUR 5 253 530 loss in 2010. Despite the fact that the company experienced a EUR 2 523 439 profit in 2011 this result was not enough to cover the losses incurred in 2010. In fact the 2010 losses were twice higher than the 2011 surplus. The 2010 loss was carried over to 2012 and covered by a reduction in the company's capital from EUR 6 099 961 to EUR 1 209 010,64. Therefore, in 2011 Saremar lost over 80 % of its capital and must be regarded as a company in difficulties under point 10 of the Rescue and Restructuring Guidelines.

(265) Based on Saremar's 2012 balance sheet ([51]) the company still recorded a EUR 1,7 million loss in 2012. As mentioned in recital 157 above, the Commission notes that Saremar itself considered its financial situation in 2012 as critical.

([51]) http://www.sardiniapost.it/wp-content/uploads/2013/10/Bilancio-Saremar-2012.61-78.pdf.

(266) This state of facts has been reflected by Decision 41/23/EC adopted by RAS on 15 October 2012. The Decision mentioned a Note dated 4 October 2012 submitted by Saremar's President, by which the latter informed RAS, inter alia, that unless the provisions of Regional Law 15 of 7 August 2012 laying down a EUR 10 million subsidy to the company were immediately enforced, the company's indebtedness would call into question the continuity of its activity, with significant impact on both the public service and on the envisaged privatisation of the company ([52]).

(267) Given the continuous losses, the liquidity problems and the analysis made by Saremar itself, the Commission concludes that the company must be considered a company in difficulty also on the basis of point 11 of the Rescue and Restructuring Guidelines.

(268) In 2012, the financial difficulties of the Saremar were eased by the grating in November/December 2012 of the compensation subject to the current assessment. Had Saremar not received these sums it would have recorded a EUR 13 million loss in 2012.

(269) According to point 9 of the 2011 SGEI Framework, SGEI compensation granted to firms in difficulty must be assessed under the Rescue and Restructuring Guidelines. Given that the conditions set out in the 2011 SGEI Decision are not fulfilled, the compensation received by Saremar in difficulty for the operation of the two routes in question must be assessed under the Rescue and Restructuring Guidelines, in order to establish whether it may be declared compatible with the internal market pursuant to Article 107(3) TFEU.

(270) The company did not receive any rescue or restructuring aid in last 10 years. Hence, the Commission finds that the company complies with the '*one time, last time*' principle, as set out in point 72 et seq. of the Rescue and Restructuring Guidelines.

(271) However, all the conditions laid down in the Rescue and Restructuring Guidelines must be respected for State aid to a company in difficulty to be considered compatible with the internal market in accordance with Article 107(3)(c) TFEU.

(272) First, pursuant to point 13 of the Rescue and Restructuring Guidelines a firm belonging to a larger business group is not normally eligible for restructuring aid, except where it can be demonstrated that the firm's difficulties are its own and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. Following its transfer from parent company Tirrenia, Saremar is entirely held by RAS and is not therefore part of a group.

(273) Second, in order to consider a measure compatible under points 34 - 37 of the Rescue and Restructuring Guidelines, the restructuring plan has to analyse in detail the problems which have led to the difficulties and to set out the means by which to restore the long-term viability and health of the firm within a reasonable timescale. This has to be done on the basis of realistic assumptions as to future operating conditions with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's specific strengths and weaknesses. The plan must be submitted in all relevant detail to the Commission and include, in particular, a market survey.

(274) No such plan has been provided to the Commission. It is true that RAS submitted Saremar's business plan for the period 2011 - 2022, however that plan does not comply with the requirements of the Rescue and Restructuring Guidelines.

(275) In this case Saremar's business plan was approved in July 2010, before the compensation was granted by RAS and it was not predicated on the idea that such measure would be adopted in favour of Saremar. The plan was based on the assumption that the company would be partially privatised (RAS initially intended to divest 49 % of its stake in the company) by November 2010 and covered the twelve-year duration of the new public service contract sought to be signed with the buyer at the end of 2010. The plan does not present in detail the circumstances leading to the difficulties of the company, nor does it describe the means to restore its long term viability and makes no reference to the operation by Saremar of two links between Sardinia and the mainland.

([52]) Relazione sul Rendiconto generale della Regione autonoma della Sardegna per l'esercizio finanziario 2012, p. 359, available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sezioni_riunite/sezioni_riunite_regione_sardegna/2013/relazione_parifixa.pdf.

(276) On this basis the Commission considers that the measure has not been conditioned on the implementation of a business plan fulfilling the requirements of the Rescue and Restructuring Guidelines, which is sufficient to exclude its compatibility with the internal market.

(277) Third, measures must be taken to ensure that the aid's adverse effects on trading conditions are mitigated as far as possible. The aid shall not unduly distort competition. This usually means a limitation of the presence which the company can enjoy on its markets at the end of the restructuring period. The compensatory measures should be in proportion to the distortive effects of the aid and, in particular, to the size and relative importance of the firm on its market or markets. The degree of compensatory measures must be established on a case-by-case basis and with regard to the objective of restoring the long-term-viability of the firm. Moreover, according to point 7 of the Rescue and Restructuring Guidelines the Commission will request compensatory measures which minimise the effect on competitors. RAS did not propose any compensatory measure in compensation for the potential distortion of competition caused by the granting of the aid.

(278) Fourth, the aid must be limited to the strict minimum, necessary to enable the restructuring. The beneficiary is expected to make a significant contribution to the restructuring plan from its own resources, including the sale of assets not essential to the company's survival, or from external financing at market conditions. Such contribution must be real, i.e. actual, excluding all future profits such as cash flow, and is a sign that the markets believe in the feasibility of the return to viability of the company.

(279) In this case no own contribution was foreseen.

(280) The Commission concludes that the subsidy granted to Saremar to cover the deficit resulted from the operation in 2011 and 2012 of the two routes to mainland Italy constitutes incompatible aid to Saremar in difficulty.

(281) For the sake of completeness, the Commission has also checked if the aid in question would have been compatible with the 2011 SGEI Framework had Saremar not been a company in difficulty at the moment it was granted.

Genuine service of general economic interest as referred to in Article 106 of the Treaty

(282) As indicated in paragraph 56 of the 2011 SGEI Framework, Member States have a wide margin of discretion regarding the nature of services that could be classified as SGEIs. The Commission's task is to ensure that the margin of discretion is applied without manifest error as regards the definition of the SGEI.

(283) On the basis of the grounds developed under recitals 188 - 210, the Commission considers that this condition has not been observed in this case.

Need for an entrustment act specifying the PSOs and the methods of calculating compensation

(284) In accordance with section 2.3 of the 2011 SGEI Framework, the concept of SGEI within the meaning of Article 106 TFEU means that the undertaking in question has been entrusted with the operation of the SGEI by way of one or more official acts.

(285) These acts must specify, in particular:

(a) The precise nature of the public service obligation and its duration;

(b) The undertaking and territory concerned;

(c) The nature of the exclusive rights assigned to Saremar;

(d) The description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;

(e) The arrangements for avoiding and repaying any overcompensation.

(286) The Commission notes that, in this case, the entrustment acts do not refer to any compensation to Saremar for the discharge of PSOs and therefore they do not comply with the requirements under letters (d) and (e) above.

Duration of the period of entrustment

(287) As indicated in section 2.4 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.'

(288) Given that in this case the period of operation of the services is limited to 2011 and 2012, this condition is complied with.

Amount of compensation

(289) 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'. In order to be deemed necessary, the aid measure must, in its amount and form, be necessary to achieve the public interest objective. It must be of the minimum amount necessary to reach the objective and take the form most appropriate to remedy the disturbance. It is therefore necessary, in this case, to quantify the extra costs of the PSOs imposed on Saremar by the entrustment acts and compare these additional costs with the advantages granted to it by RAS.

(290) The public service compensation granted to Saremar amounts to EUR 10 million. RAS claimed that over the relevant period, the extra costs incurred in the provision of the service corresponded to the financial support granted to Saremar without taking into account any reasonable profit. The investigation showed that on the routes in question Saremar had a EUR 214 000 loss in 2011 and a EUR 13 440 220 loss in 2012.

(291) Based on these results, the compensation granted by RAS would seem not to exceed the deficit incurred in the operation of the services. However, as already observed as regards the third Altmark condition and for the same reasons detailed above, the Commission considers that Saremar was not entitled to receive any compensation for the costs incurred in the operation of the two routes, and the compensation did not reflect clearly defined public service obligations.

(292) Finally, given that the aid was granted after the entry into force of the new SGEI Framework, its compatibility must also be assessed against the following conditions:

(a) Paragraph 14: give proper consideration to public service needs when entrusting the provider with a particular SGEI;

(b) Paragraph 19: compliance with Union public procurement rules when entrusting an SGEI;

(c) Paragraph 20: absence of discrimination;

(d) Paragraph 24 (and onwards): application of net avoided cost methodology to calculate the net cost;

(e) Paragraph 39 (and onwards): efficiency incentives;

(f) Paragraph 60: transparency.

(293) RAS has not carried out a public consultation, nor published the required information concerning the PSOs and the compensation paid for their discharge beforehand. In fact, as detailed above, no compensation had initially been provided for, given that the services were considered commercially viable.

(294) According to paragraph 21 of the 2012 SGEI Framework, '[t]he amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.' In accordance with paragraph 24 of the 2012 SGEI Framework the net cost necessary for the discharge of PSOs has to be calculated based on a comparison of the provider's situation with and without the public service obligations to discharge. No such calculation was carried out in this case.

(295) In addition, no mechanism for incentivising efficiencies was set out in the entrustment acts. Nor has RAS justified that the introduction of such incentives was not feasible or appropriate. Finally, the transparency obligations have not been complied with.

(296) The Commission therefore concludes that the compensation granted to Saremar for the operation of the services is incompatible with the internal market under the 2011 SGEI Framework.

7.3.2. THE RECAPITALISATION

(297) In the course of the investigation, RAS put forward two main arguments as regards the recapitalisation: first, that the measure had only partially been put into effect and, second, that it concerned financing to which Saremar was lawfully entitled. As already mentioned, RAS has not argued that the measure would amount to restructuring aid within the meaning of the Rescue and Restructuring Guidelines. In fact, as explained above, RAS did not comment on the compatibility of the measure with the internal market.

(298) Nonetheless, the Commission considers that Saremar qualifies as an undertaking in difficulty within the meaning of the Rescue and Restructuring Guidelines and is therefore eligible to receive restructuring aid. The recapitalisation constitutes restructuring aid which must be assessed under the Rescue and Restructuring Guidelines, in order to establish whether it may be compatible with the internal market pursuant to Article 107(3) TFEU.

(299) Given that the compatibility criteria laid down by the Rescue and Restructuring Guidelines are not met (see in particular the grounds developed in recitals 272 - 279 the Commission concludes that the compensations paid to Saremar constitutes incompatible restructuring aid to a company in difficulty. The measure cannot therefore be deemed compatible with the internal market.

7.3.3. CONCLUSION

(300) The following measures implemented by RAS in favour of Saremar constitute State aid incompatible with the internal market:

(a) The EUR 10 million compensation for the operation of the two additional routes linking Sardinia to the mainland granted by Regional Law 15 of 7 August 2012 and effectively paid to Saremar in two instalments on 6 November 2012 and 3 December 2012;

(b) The EUR 6 099 961 recapitalisation decided on 15 June 2012 (of which EUR 824 309,69 paid on 11 July 2012).

(301) The payment of promotional activities and the comfort letters do not involve State aid to Saremar.

7.4. *CONCLUSION*

(302) The aid measures in question are incompatible with the internal market. Italy has unlawfully implemented the aids in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

(303) In accordance with the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid [53] when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation [54]. In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored [55].

[53] Case C-70/72 *Commission v Germany*, paragraph 13.
[54] Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, paragraph 75.
[55] Case C-75/97 *Belgium v Commission*, paragraphs 64-65.

(304) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ([56]) laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(305) Thus, given that the measures identified in recital 300 are considered unlawful and incompatible State aid, the amount of aid of these measures already granted, i.e. EUR 10 824 309,69, must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid.

(306) This Decision does not concern or prejudge any other issues covered by the 2011 and 2012 Decisions or brought to the attention of the Commission by interested parties in the course of the investigation opened under those Decisions.

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid measures granted to Saremar in the form of public service compensation by Regional Law 15 of 7 August 2012 and in the form of a capital injection decided by Saremar Shareholders' Assembly on 15 June 2012 are incompatible with the internal market. That aid was unlawfully put into effect by Italy in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

2. The payment of promotional activities and the comfort letters do not involve State aid to Saremar.

Article 2

1. Italy shall recover the incompatible aid referred to in Article 1(1) from the beneficiary.

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

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([57]) and to Commission Regulation (EC) No 271/2008 ([58]) amending Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

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

Article 4

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

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

([56]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).
([57]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the functioning of the European Union (OJ L 140, 30.4.2004, p. 1).
([58]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 22 January 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

ANNEX

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received under the scheme [1]	Total amount of aid to be recovered [1] (Principal)	Total amount already reimbursed [1]	
			Principal	Recovery interest

(1) Million of national currency.