

**COMMISSION DECISION****of 2 October 2013****on compensation to be paid to Simet SpA for public transport services provided between 1987 and 2003 (state aid measure SA.33037 (2012/C) – Italy)***(notified under document C(2013) 6251)***(Only the Italian text is authentic)****(Text with EEA relevance)**

(2014/201/EU)

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 provisions cited above <sup>(1)</sup>, and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) By electronic notification of 18 May 2011, the Italian authorities notified, in accordance with Article 108(3) of the Treaty, compensation given to Simet SpA ('Simet') for the provision of inter-regional bus transport services under a public service obligation carried out during the period 1987–2003, as ordered by the Council of State (*Consiglio di Stato*), Italy's Supreme Administrative Court ('the notified measure'). This notification was registered under case number SA.33037.
- (2) Further information on the notified measure was provided by the Italian authorities by submissions of 12 July 2011, 5 October 2011, 20 February 2012, 2 and 28 March 2012, and 17 April 2012.
- (3) By letter dated 31 May 2012, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty ('the opening decision').

The following submissions were received within the accepted deadlines:

- The Italian authorities submitted their observations on the opening decision by letters of 1 June 2012, 24 September 2012 and 11 October 2012.
- The only third party to submit observations in reply to the opening decision was Simet, the potential beneficiary of the notified measure. Its submissions were received on 4 August 2012, 31 October 2012 and 13 December 2012.
- The Italian authorities provided comments on third party submissions by letters of 28 November 2012, 4 December 2012, 19 December 2012 and 10 January 2013.

**2. DESCRIPTION OF THE MEASURE****2.1. THE COMPANY AND THE SERVICES PROVIDED**

- (4) Simet is a private company providing scheduled passenger transport services by bus based on concessions granted by the Italian State under Law 1822/39 <sup>(2)</sup>. More specifically, Simet operates a network of inter-regional scheduled bus connections between the Calabria Region and other Italian regions. In addition to these services, which account for approximately two thirds of its revenue, Simet also provides other services, including international travel services, tourism services and bus hire with driver <sup>(3)</sup>, which account for the remaining third of its revenue.

<sup>(1)</sup> OJ C 216, 21.7.2012, p. 45.

<sup>(2)</sup> Law of 28 September 1939 — Rules governing bus services for passengers, baggage and agricultural packages on the basis of a concession awarded to private industry (rules subsequently replaced by Legislative Decree 285/2005).

<sup>(3)</sup> See <http://ngs.Simetspa.it/portale/azienda/>

- (5) In October 1999 Simet for the first time asked the Ministry for Infrastructure and Transport ('the Ministry') for compensation for its inter-regional bus service with respect to the years starting from 1987 <sup>(4)</sup>. The Ministry denied this and subsequent requests, as it considered that it had not entrusted Simet with public service obligations.
- (6) According to the Italian authorities, Simet, like other providers of inter-regional scheduled bus transport services, operated on the basis of provisional licences (concessions) renewed annually at the request of the company. Those concessions gave the company the exclusive right to provide the relevant services. The annual concession specifications stated that delivering the service did not give the company the right to any subsidy or compensation of any kind and that the service was operated entirely at the company's own risk. The fares proposed by the company itself were also reflected in the annual concession specifications accepted by the Ministry.
- (7) Over time, the company submitted a number of requests to change the arrangements for delivery of the services provided, which were usually approved in accordance with the procedure laid down in Presidential Decree 369/94 <sup>(5)</sup>. Articles 4 and 5 of Presidential Decree 369/1994 provided for a detailed procedure for the assessment and comparative analysis of applications related to the introduction of any new service on the basis of a concession.

## 2.2. THE JUDGMENTS OF THE COUNCIL OF STATE PRIOR TO THE OPENING DECISION

- (8) In response to the Ministry's refusal to grant public service compensation for the period starting from 1987, Simet brought a legal action before the Italian administrative courts requesting compensation for the discharge of public service obligations.
- (9) On appeal, in judgment 1405/2010 of 9 March 2010 ('judgment 1405/2010'), the Council of State recognised Simet's right to receive compensation for its scheduled (predominantly inter-regional) bus services, provided under the concessions granted by the Italian State. The precise amount of the compensation was to be determined on the basis of reliable data from the company's accounts.
- (10) As explained in more detail in the opening decision, judgment 1405/2010 does not precisely identify by which legal act the public service obligation was imposed, or in what form. Order 2072 of the Council of State issued on 18 January 2011, following the failure of the administration to comply with judgment 1405/2010, is more explicit in this respect, stating that '*the Ministry has repeatedly denied the company the opportunity to change routes, times and stops and ordered it to keep fares at or below those charged by Ferrovie dello Stato (Italian State Railways) – these are elements that the company believes are indicative of carrying out a public service.*'
- (11) While judgment 1405/2010 does mention the new Regulation (EC) No 1370/2007 of the European Parliament and of the Council <sup>(6)</sup>, which governs public service compensation, insofar as it '*lays down compensation criteria which are not dissimilar to those laid down in previous Community regulations*', the Council of State ordered the responsible authorities to pay compensation to Simet on the basis of Articles 6, 10 and 11 of Council Regulation (EEC) No 1191/69 <sup>(7)</sup>.
- (12) The Italian authorities have decided to await the assessment of the notified measure by the Commission before executing the rulings of the Council of State (judgment 1405/2010 and order 2072/2010) and paying Simet the compensation.

<sup>(4)</sup> Simet's letter of 22 October 1999, reference 175/99.

<sup>(5)</sup> Presidential Decree of 22 April 1994 – Regulations on simplifying the concession procedure for ordinary bus lines under state responsibility.

<sup>(6)</sup> 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).

<sup>(7)</sup> Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1).

### 2.3. INITIALLY NOTIFIED SUM OF POSSIBLE PUBLIC SERVICE COMPENSATION

- (13) As regards the amount of compensation to be paid to Simet for the services rendered, the Italian authorities submitted a report to the Commission, commissioned by Simet and prepared by an outside consultant ('the initial report'), without endorsing the estimates it contained. The initial report estimated the compensation due at approximately EUR 59,4 million <sup>(8)</sup>.
- (14) Subsequently, however, the claims for compensation were reassessed as, following the opening decision, the Council of State asked for an independent evaluation of the appropriate level of compensation. The outcome of that evaluation is discussed in sections 2.6 and 2.7.

### 2.4. DURATION

- (15) Although SIMET claims compensation for services provided until the end of 2013 <sup>(9)</sup>, the Italian authorities consider that the relevant period for the purposes of this notification covers only 1987 to 2003, as judgment 1405/2010 relates only to the appeal covering that period. In particular, point 3.1 of judgment 1405/2010 clearly refers to compensation for the years 1987 to 2003.

### 2.5. DEVELOPMENTS IN THE NATIONAL COURT PROCEEDINGS FOLLOWING THE OPENING DECISION

- (16) Following the Italian authorities' refusal to execute judgment 1405/2010 and order 2072/2011, the Council of State made a new order, No 270/2012, appointing a panel of independent experts to decide how to enforce judgment 1405/2010.
- (17) The panel, comprising a chairman and two members, was tasked with calculating the amount of compensation payable to Simet under judgment 1405/2010. At the same time the parties to the dispute appointed their own experts, who commented on the preliminary findings of the panel of experts. This led to the exchange of a number of reports and replies over the ensuing months.
- (18) The panel of experts completed its work in August 2012. The panel did not reach a unanimous conclusion. Instead, two separate reports were submitted to the Council of State:
- On 29 August 2012, a minority report signed by the chairman of the panel appointed by the Council of State was submitted, which concluded that there was not enough data available to determine the compensation to be paid to Simet and therefore that no compensation could be awarded.
  - On 20 August 2012, a majority report signed by two of the three experts appointed by the Council of State was submitted, concluding that the compensation payable to Simet amounted to EUR 22 049 796.
- (19) As the state aid procedure is still ongoing before the Commission, the Council of State has not yet adopted a final decision on the amount of compensation payable to Simet.

### 2.6. THE MINORITY REPORT

- (20) The minority report stresses the following points in particular:
- the lack of reliable data for calculating compensation (required by order 2072/2011 and judgment 1405/2010);
  - the lack of separate accounting required by Regulation (EEC) No 1191/69 as a necessary condition for awarding compensation (in order to prevent overcompensation);

<sup>(8)</sup> For each year under review, the annual compensation was the sum of the deficit resulting from operating losses, financial charges and return on equity. The calculation was based on a number of theoretical assumptions, including assumptions on the operating costs related to the inter-regional scheduled bus services in years prior to 2000, as no account separation existed for that period. The required return on equity invested in scheduled bus services was estimated at between 20 % and 36 % for the period 1987 to 2003. As the annual compensation was not paid in the years for which it was calculated, the consultant calculated its net present value (NPV). More details on the methodology used in this initial calculation are available in the opening decision.

<sup>(9)</sup> Under Article 9 of Legislative Decree 285/2005, which repealed Law 1822/39, the concessions for scheduled services under Law 1822/1939 can be prolonged until the end of 2013.

- the impossibility of replacing the separate accounting system with other accounting systems, which have not yet been shown to allow accurate identification of all elements of cost and revenue;
  - as to the years for which analytical accounting data are available (only two, 2002 and 2003): the documents enclosed with the financial statements (notes to the financial statements and report on operations) make no reference to such data. This would seem to indicate that the analytical accounts were not used by the corporate governance bodies to monitor the company's operations;
  - the lack of predetermined parameters for calculating compensation;
  - the company's failure to identify precise, specific and unequivocal public service obligations (with reference to the types identified in Union legislation) for individual routes;
  - the failure to identify precisely the 'economic disadvantage' arising from such obligations;
  - the lack of evidence of the damage incurred by Simet, which had the burden of providing such evidence in the proceedings that led to judgment 1405/10.
- (21) In light of these deficiencies, the minority report concludes that there are no reliable data for calculating the compensation ordered by judgment 1405/2010 and thus that no amount of compensation can be determined.

## 2.7. THE MAJORITY REPORT

- (22) The majority report uses the following methodology to calculate the compensation due to Simet:

### 2.7.1. Compensation element based on the difference between operating costs and revenue

#### 2.7.1.1. Method for estimating revenue

- (23) For the years 1987 to 1992 and 2002 to 2003, the experts extrapolated revenue derived from scheduled bus services directly from the financial account statements. For the period 1993-2001 the experts used Simet's documentation on revenue, since the financial account statements for that period do not detail revenue derived from those services<sup>(10)</sup>. On the basis of these calculations, the total revenue for the period 1987-2003 was found to be EUR 57 213 440.

#### 2.7.1.2. Method for estimating bus service costs

- (24) Since no analytical accounts were available for the period 1987 to 1992, the experts allocated costs to inter-regional scheduled bus services on the basis of the percentage of revenue generated by those same services during that period. The experts took the total amount of costs from each of the annual financial statements. Then, to reconstruct the operating costs, the experts deducted from total costs all the following non-operating costs: interest payable, financial charges, losses on disposal of assets, miscellaneous losses and costs, direct taxes and final inventories. Finally, the operating costs attributable to inter-regional scheduled bus services were determined on the basis of the percentage of revenue generated by the same scheduled bus services.
- (25) For the period 1993 to 2001, Simet changed the presentation of data in its annual financial statements<sup>(11)</sup>. Consequently, for those years the experts deducted from the company's annual financial statements the value of total operating costs, being the algebraic sum of the following production cost items: ancillary and consumable materials, outside services, use of property not owned, personnel costs, amortisation and depreciation, variation in stocks of raw, ancillary and consumable materials, and miscellaneous operating expenses. The operating costs attributable to scheduled bus services were then determined on the basis of the percentage of revenue generated by those same scheduled bus services (as was done for the period 1987-1992). For the years 2000 and 2001, even if some cost accounting was applied, the relevant documents were not exhaustive, which was why it was decided to use the same method for the identification of costs stemming from the scheduled bus service as for the previous years.

<sup>(10)</sup> Apparently in the light of the amendments to the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

<sup>(11)</sup> See previous footnote.

- (26) For the years 2002 and 2003, cost accounting data were available. The experts therefore divided costs into the following categories: (i) costs related to mileage; (ii) costs directly allocable to scheduled bus services; and (iii) allocable costs based on turnover.
- The first category of costs includes costs related to fuel, engine oil, tyres, spare parts, outside work, vehicle wash, motorway tolls, compulsory vehicle servicing, leasing and depreciation of assets. Each of these cost items was divided by the total number of kilometres travelled and the cost per kilometre was then multiplied by the number of kilometres travelled by scheduled bus services only.
  - The second category of costs includes those cost items which, on the basis of the analytical accounts, are directly attributable to inter-regional scheduled bus services. These include: direct employment, waste disposal, commissions payable, miscellaneous charges, parking fees, rental of third-party vehicles for scheduled bus services, purchases for on-board services, and reimbursement of travelling personnel's expenses.
  - The third category of costs includes 'indirect costs' and comprises indirect labour costs, overheads, bus insurance, vehicle ownership tax and rent for premises. Those costs were allocated on the basis of the percentage of revenue generated by the same scheduled bus services.
- (27) After adding up the figures thus calculated for each of the above periods, the total costs related to the scheduled bus services for the period 1987-2003 were found to amount to EUR 59 510 413.
- (28) Consequently, after subtracting these costs from the revenues derived from scheduled bus services, the majority report arrives at an operating loss of EUR 2 296 973 for the period 1987-2003.

#### 2.7.2. Compensation element related to the need to ensure remuneration of the capital employed

- (29) For each year under review, the experts determined the capital employed, being the sum of:
- equity (E), whose value was taken from the annual financial statements, considering the shareholder's equity and
  - loan capital (D). The experts counted as loan capital only financial debt, i.e. payables to banks and to other lenders.
- (30) The 'Weighted Average Cost of Capital' (WACC) formula is taken as a basis for determining the remuneration rate of the capital employed.

$$\text{WACC} = \frac{E}{V} * \text{Re} + \frac{D}{V} * \text{Rd} * (1 - \text{Tc})$$

Where:

Re = required rate of return on equity;

Rd = cost of debt; E = firm's equity;

D = firm's debt; V = E + D;

E/V = percentage of financing that is equity;

D/V = percentage of financing that is debt;

Tc = corporate tax rate

- (31) The required return on equity was calculated using the 'Capital Asset Pricing Model'. This model describes the relationship between risk and expected return:

$$\bar{r}_a = r_f + \beta_a (\bar{r}_m - r_f)$$

Where:

$r_f$  = Risk free rate

$\beta_a$  = Beta of the security

$\bar{r}_m$  = Expected market return

- (32) The interest rate for ten-year government bonds, taken from national statistics, was used as a proxy for a risk-free rate ( $r_f$ ).
- (33) For the years for which compensation was to be assessed, the experts concluded that a 5,8 % risk premium ( $r_m - r_f$ ) was on average asked by investors investing in stocks rather than in risk-free securities on the Italian market <sup>(12)</sup>.
- (34) The beta <sup>(13)</sup> of the shares in Simet's capital was calculated by taking an unlevered beta <sup>(14)</sup> value of 0,39 for the bus service and transport sector <sup>(15)</sup>. That beta value was subsequently adjusted relative to the financial structure reported by the company for each year:

$$\text{Levered beta} = \text{Unlevered beta} \times \{1 + [(1 - \text{Tax Rate}) \times (\text{Debt}/\text{Equity})]\}$$

- (35) From 1987 to 1994 the Italian corporate tax rate was 36 %, from 1995 to 2000 it was 37 %, and from 2001 to 2002 it was 36 %.
- (36) According to the experts, the remuneration of capital employed provides the compensation that Simet should receive after tax. As the compensation will be taxable, it has to be adjusted as follows:

$$\text{Remuneration before tax} = \text{Remuneration after tax} \div (1 - \text{corporate tax rate})$$

- (37) On the basis of these formulae, the experts calculate that the remuneration due on the capital employed by Simet is EUR 5 948 150.
- (38) Thus, the total amount of compensation calculated by the experts before the application of late payment interest is EUR 8 245 124 (compensation related to the operating loss and remuneration of the capital employed).

### 2.7.3. Calculation of interest for late payment

- (39) Given that the compensation sums calculated above were not paid in the years for which they were due, the experts revised those sums upwards as follows:
- the sums initially calculated were re-valued based on ISTAT consumer price inflation indices up to July 2012;
  - then statutory interest was applied to the amounts so obtained.

- (40) Thus, the expert panel arrived at a total compensation of EUR 22 049 796.

### 2.7.4. Other observations included in the majority report

- (41) The majority report takes the view that the compensation awarded by the Council of State does not concern a direct application of Regulation (EEC) No 1191/69, that is a direct award – albeit retroactively – of compensation under that Regulation. Instead, it considers that the Council of State proposed the application of the criteria laid down in that Regulation on the common methods of compensation to ascertain the damage incurred by Simet as a result of the unlawful extension of its public service obligations over time.
- (42) The majority report further notes that in cases where the Commission considered that Regulation (EEC) No 1191/69 did not apply for the purpose of assessing public service compensation, it often approved such compensation by applying by analogy the Community framework for state aid in the form of public service obligations. The main criterion for the Commission was that the amount of compensation did not exceed what was necessary to cover the costs incurred in discharging those obligations. As regards the risk of over-compensation in the present case, the majority report takes the view that since the exercise performed relates to the *ex post* calculation of the costs actually incurred in the past by the company to provide the required scheduled bus services, its calculations are free from the uncertainty inherent in any prognostic assessment when compensation is determined *ex ante*. Consequently, there is no issue of over-compensation.

<sup>(12)</sup> This figure was taken from a database compiled by Professor A. Damodaran. See [www.damodaran.com](http://www.damodaran.com)

<sup>(13)</sup> A measure of the volatility, or systematic risk, of a security or a portfolio in comparison to the market as a whole.

<sup>(14)</sup> *Unlevered beta* = beta of the company without any debt.

<sup>(15)</sup> This figure was taken from a database compiled by Professor A. Damodaran. See [www.damodaran.com](http://www.damodaran.com), 'auto and trucks'.

- (43) The majority report touches upon the issue of the absence of account separation. It takes the view that separate accounting is applied to those undertakings receiving compensation for the provision of a public service in order to prevent the misuse of such funds for the company's other activities. However, since in the case at hand no public resources have thus far been transferred to Simet as compensation for the provision of a public service, the requirement of account separation should not be considered a reason for refusing payment of the compensation awarded by the Council of State.
- (44) The majority report also notes that for the years 2002 and 2003, when analytical accounting was available, the actual operating loss was largely the same as the losses arrived at on the basis of the methodology used for previous years according to which costs were allocated to inter-regional scheduled bus services on the basis of the percentage of revenue generated by those same services (the figures differed by just 2,6 %). Therefore, the experts take the view that the unavailability of analytical accounts for the preceding period should not have any practical significance for awarding compensation.

### 3. GROUNDS FOR INITIATING THE PROCEDURE

- (45) As explained in the opening decision, the Commission had several doubts regarding the compatibility of the notified measure with the internal market.
- (46) First, the Commission had doubts regarding the classification of the notified measure as a non-aid measure. In particular, the Commission questioned whether the four conditions laid down by the European Court of Justice in its *Altmark* judgment<sup>(16)</sup> had been fulfilled.
- (47) Second, the Commission raised the question as to the applicable legal framework. As the compensation ordered by the Council of State related to public service obligations allegedly imposed on Simet for the years 1987 to 2003, but not yet paid, the question arose whether Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007 was applicable in the present case.
- (48) The Commission considered that Regulation (EEC) No 1191/69 would be applicable in the present case if it could be shown that a public service obligation had in fact been unilaterally imposed on Simet by the Italian authorities and that the compensation proposed complied with all the requirements of that Regulation. That is because, under Article 17(2) of Regulation (EEC) No 1191/69, compensation for public service obligations imposed unilaterally on an undertaking which is paid pursuant to the rules of that Regulation is dispensed from prior notification to the Commission. If, however, neither of these two conditions was shown to have been satisfied, the compatibility of the notified measure would need to be assessed under Regulation (EC) No 1370/2007.
- (49) Third, assuming that the compensation ordered by the Council of State had in fact resulted from the unilateral imposition of public service obligations, the Commission nevertheless had doubts, based on the information available to it, that the compensation complied with the requirements of Regulation (EEC) No 1191/69. The Commission also doubted the appropriateness of applying the common compensation procedure laid down in Regulation (EEC) No 1191/69, applicable to unilaterally imposed public service obligations, for the years after 1992, since, as of July 1992, inter-regional bus services could not have been subject to unilaterally imposed public service obligations<sup>(17)</sup>.
- (50) Fourth, if further investigation confirmed that at least one of the conditions for exemption from notification pursuant to Regulation (EEC) No 1191/69 was not met and an assessment under Regulation (EC) No 1370/2007 had to be conducted, the Commission had doubts whether the conditions of that Regulation were complied with in the present case.
- (51) In any event, regardless of the legal basis applied, the Commission had doubts whether the compensation ordered by the Council of State excluded the possibility of overcompensation. The Commission noted the absence of a proper account separation by Simet until at least 2000<sup>(18)</sup>, and questioned the possibility of precisely establishing *ex post* the costs related to scheduled bus services. It also questioned the appropriateness of the required return on equity used in the calculations for the compensation.

<sup>(16)</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>(17)</sup> See Article 1(5) of Regulation (EEC) No 1191/69, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 169, 29.6.1991, p. 1).

<sup>(18)</sup> Until 2000, no account separation was implemented at all.

#### 4. COMMENTS FROM ITALY

- (52) In their submissions, the Italian authorities considered that the notified measure constituted state aid within the meaning of Article 107(1) of the Treaty, specifically because it did not satisfy all the conditions laid down by the European Court of Justice in its *Altmark* judgment. The Italian authorities also considered that the compensation awarded by the Council of State neither complied with Regulation (EEC) No 1191/69 nor with Regulation (EC) No 1370/2007.
- (53) The Italian authorities stressed that neither a unilateral nor a contractual imposition of public service obligations existed for inter-regional bus services during the period under review. The legal instruments governing the relationship between the public authority and private companies operating passenger transport services were unilateral concessions on the basis of which the public authority transferred to a private body its own legal right to carry out transport services for undifferentiated customers, originally assigned to the State under Law 1822/39.
- (54) The Italian authorities further recalled that the concession specifications issued by the Ministry at the request of the company clearly stated that the service was operated entirely at the operating company's own risk, except for the guarantee of exclusive rights which existed during the period under review. Operating the service gave rise to no right to receive any kind of subsidy or compensation. Such concessions were of a temporary nature and renewed each year at the company's request. The licences were subject to various changes from one year to the next with regard to routes, stopping points, numbers of departures, etc., in light of specific requests made by the companies.
- (55) Regarding the cap on fares described in the opening decision and existing until 2001, the Italian authorities noted that this cap applied throughout Italy and not just in one specific geographical location. They also noted that, according to Article 2(5) of Regulation (EEC) No 1191/69, this was a measure of price policy, but did not constitute a tariff obligation subject to mandatory compensation within the meaning of that Regulation.
- (56) Furthermore, according to the Italian authorities, as of July 1992 <sup>(19)</sup>, unilateral public service impositions for inter-regional bus services were not even allowed under Regulation (EEC) No 1191/69. Article 1(5) of that Regulation allows unilateral impositions only for urban, suburban and regional services.
- (57) In any event, the Italian authorities noted that Simet never applied for the termination of public service obligations as required by Article 4 of Regulation (EEC) No 1191/69, which it considers a prerequisite for maintaining that the obligations in question existed. Simet's 1999 request addressed to the Ministry <sup>(20)</sup> was a generic request for compensation for public service obligations allegedly imposed by the concessions issued from 1987 onwards. The Italian authorities pointed out that that request did not indicate which public service obligations were to be terminated to ensure appropriate profitability of the inter-regional scheduled bus services.
- (58) Consequently, the Italian authorities concluded that Simet had not shown that it took responsibility for public service obligations (as defined in Article 2(2) of Regulation (EEC) No 1191/69) and had, in particular, not shown to which specific and precise obligations to operate or to carry, and to which fare obligations, it had been subject. According to Italy, Simet had demonstrated only that it carried out various universal transport services on the basis of state concessions granted by the responsible authorities, issued at the company's request. The entrusting of universal transport services to Simet did not in itself show that Simet took on any public service obligation within the meaning of Regulation (EEC) No 1191/69.
- (59) The Italian authorities further noted that, for the largest part of the period under review (1987-2001), Simet did not implement proper accounting separation as required by Article 1(5) of Regulation (EEC) No 1191/69 <sup>(21)</sup>. It was therefore not possible to calculate the additional net costs resulting from the fulfilment of the public service obligations, which meant that the conditions as laid down in Article 10 of Regulation (EEC) No 1191/69 were not met.
- (60) Finally, the Italian authorities pointed out that the Ministry did not establish any compensation amounts in advance, as required by Article 13 of Regulation (EEC) No 1191/69, since it did not impose any public service obligations on Simet. In the present case, the compensation owed to Simet had been exclusively calculated on the basis of an *ex post* assessment.

<sup>(19)</sup> Date of entry into force of Regulation (EEC) No 1893/91.

<sup>(20)</sup> Simet's letter of 22 October 1999, reference 175/99.

<sup>(21)</sup> There was no account separation at all until 2000.

- (61) The Italian authorities considered that an assessment under Regulation (EC) No 1370/2007 raised largely the same issues as an assessment under Regulation (EEC) No 1191/69 (including absence of a clearly defined public service obligations, absence of the objective compensation parameters decided in advance, absence of account separation, etc.) With regard to the concept of 'reasonable profit', as set out in the Annex to Regulation (EC) No 1370/2007, the Italian authorities considered the rate of return proposed by Simet in the initial report to be inflated for a situation where compensation was determined *ex post* and eliminated the risk of unforeseen costs/losses.
- (62) The Italian authorities fully endorsed the findings of the minority report, which concluded that the amount of the compensation could not be calculated. At the same time, they considered that the majority report contained certain material and methodological errors. For example, the Italian authorities doubted the appropriateness of the assumption-based method used in that report for estimating the net operating costs of the alleged public service obligations. They also contested the fact that that report:
- does not limit the sum of capital employed to the capital attributable to the public service obligations, but takes the entire capital employed for the purposes of calculating the compensation; that is, the capital used for other business activities of the company, such as travel agencies, international services, bus hire with driver, is not excluded from those calculations;
  - includes a risk premium going beyond 100 basis points when determining the required return on capital; this does not appear appropriate for a compensation calculated *ex post*; and
  - does not properly calculate the interest related to the fact that compensation amounts were not paid in the years for which they were determined. The experts appointed by the Council of State applied legal interest on amounts totally re-valued in 2012 and not on the original amounts, as would have been appropriate.

#### 5. COMMENTS FROM THIRD PARTIES

- (63) The only third party to submit observations in response to the opening decision was Simet, the potential beneficiary of the notified measure. In its submissions, Simet disagreed with the preliminary positions taken by the Commission in the opening decision.
- (64) To substantiate its claim that obligations were imposed on it, Simet submitted the concessions awarded to it for the routes covered by the court proceedings. According to Simet, the requirements stipulated in those concessions included, *inter alia*, the fares, stability of the itinerary, stops, frequency and timing of the service. They also included the conditions regulating the transportation of passengers' luggage, and the free carriage of ordinary letters for the postal service and of other mail against payment of the fee laid down by the provisions governing such carriage. Those concessions also required the company to report all interruptions, accidents and changes to the service and contained obligations to issue tickets for the transportation of passengers, luggage and agricultural packages and to keep the relevant records for five years. Also, Simet had to obtain prior authorisation from the Ministry's Provincial Motor Vehicle Offices concerning the type and characteristics of buses to be used for services covered by concessions as well as for providing other services.
- (65) Simet also submitted what it claimed were full or partial refusals of the Ministry to grant changes to the details of the services provided by it. For the period under review, Simet submitted (partial) refusals with respect to <sup>(22)</sup>:
- applications to operate new stops in addition to those of its existing scheduled services on the Rossano-Naples link (1992), on the Cariati-Milan link (1995), on the Cosenza-Florence link (1999), on the Cosenza-Florence and Cosenza-Pisa link (2000), and on the San Giovanni-Milan link (2003);
  - an application for authorisation to operate new scheduled services on the Cosenza-Naples link (2000).

<sup>(22)</sup> The Commission did not analyse other submissions as they do not concern the period covered by the Council of State's decisions.

- (66) Simet considers that these refusals demonstrate the unilateral nature of the imposition of public service obligations by the Italian authorities. Simet further claims that the authorities did not allow for the 'optimisation' of transport links through expansion and diversification of supply. Transport links have in fact been 'frozen' and, therefore, remained tied to ministerial decisions, although formally classified as 'business activity'.
- (67) Simet disagrees with the claim in recital 16 of the opening decision that the fares proposed by the company were reflected in the annual concession specifications. Initially, the fares for long-distance routes had to be similar to those for second-class rail travel. This is supported by the ministerial memo of 19 December 1988 (D.C. III Div 32 No 3846), which states '*whereas many companies with concessions for public bus services have petitioned for fare increases; whereas no general directives on fares have been issued recently; pending new directives [...] [regional offices] may directly authorise concession holders to implement for the services they operate an increase in the fares to align them on the level of prices of the State railway company, Ferrovie dello Stato (FS), for second-class rail travel, plus the 'express' supplement if the services use the motorways [as in the case in question]; ... obviously there should not be any fare increase in cases where the fare level referred to above is already applied.*' According to Simet, these steps demonstrate that it was not allowed to set fares that were higher than the fare for second-class rail travel (i.e. the lowest fare charged by Ferrovie dello Stato). As a result, the company was prevented from obtaining more revenue from its operations due to the State's interest in satisfying essentially public needs and purposes.
- (68) The Ministry's circular No A/7302 of 3 July 1992 stipulated that for that year the fare should be increased by 6,1 % for bus lines under state responsibility. According to Simet, this circular, by which the Ministry authorised fare increases merely to align them with ISTAT figures, confirms that it was impossible for the company to charge the fares it thought appropriate on its own initiative. Simet further notes that the Ministry's circular No 3/02 of 5 April 2002, which lays down how the fares should be converted from lire to euros, states (in point (2) that the fares in question are 'regulated fares and prices'.
- (69) Finally, the concessions issued by the Ministry state that the fare is 'laid down' (*stabilita*), i.e. decisively fixed by the administration. Not being a simple 'authorisation' but a 'concession', the corresponding specifications expressly state that the provision of services is '*governed by the clauses laid down, and those which may be subsequently laid down*' and that '*the administration may withdraw the concession at any time and the operator may make no claim of any kind*'. Point 6 of each of the concession specifications states clearly that the timetables and the fares are to be those approved by the Provincial Motor Vehicle Office of the Ministry. Simet argues that since fixed fares preclude any flexibility in the services that can be offered to users, it was not allowed to react to the demands of the market or its own needs as it saw fit.
- (70) By being obliged to charge the fares imposed upon it, Simet claims it was prevented from implementing pricing policies that would usually be practised by an undertaking in a modern, free and competitive market. On the one hand, Simet stresses that the level of the fares imposed by the Ministry (equivalence to the second-class rail fares charged by Ferrovie dello Stato) were so low that the company was unable to cover the costs of operating the bus services. On the other hand, these measures have enabled the state to provide unjustified support to its rail company, Ferrovie dello Stato, since concession holders of inter-regional bus service such as Simet were prevented from applying fares lower than the fares charged by that company for a second-class ticket with express train supplement. Ferrovie dello Stato was further favoured by the fact that subsidies were refused to Simet and other companies providing similar services.
- (71) In light of the above, Simet considers that the concessions issued by the Ministry and subsequent decisions rejecting the requests for changes to the routes show that those concessions fulfil the criteria of a service contract within the meaning of Article 14 of Regulation (EEC) No 1191/69 in providing for obligations with respect to routes, stops, fares, free carriage of ordinary letters for the postal services and of other mail against payment of the fee laid down by the provisions governing such carriage.

- (72) Even assuming Regulation (EEC) No 1191/69 did not provide for any right to compensation for holders of inter-regional concessions, as argued by the Ministry, Simet contends that this would mean that the service had been liberalised and, as such, the administration could not impose any obligations, in particular those concerning fares, on the undertaking. Simet therefore considers that the Ministry acted in breach of the law and that under national law (i.e. Article 35 of Legislative Decree No 80/1998 applied by the Council of State) compensation for damages is due.
- (73) For Simet, what is at stake is not a case of the type governed by Regulation (EEC) No 1191/69, but a dispute over damages. Simet notes that judgment 1405/2010 recognised Simet's entitlement to damages under Article 35 of Legislative Decree No 80/1998 to compensate for the harm caused by the Ministry's unlawful decisions refusing to abolish the public service obligations imposed on Simet. Those decisions, which breached the right to freedom of enterprise anchored in Article 41 of the Italian Constitution, since they caused material loss to the company in the running of its business activity, therefore had to be deemed unlawful and, as such, entitled the company to repayment of the losses suffered. The Council of State recognised that the Ministry had caused unjustified injury to Simet by obliging it to perform public service obligations in breach of its right to provide a transport service freely and independently.
- (74) If, however, it is assumed that Regulation (EEC) No 1191/69, as amended, allowed the administration to impose public service obligations to meet the needs of the region, Simet considers that the Ministry was obliged to provide for payment to compensate such obligations. According to Simet, Regulation (EEC) No 1191/69 allows service obligations to be imposed to 'meet the transport needs of a region' and not 'in a region' (Article 1(2)).

#### 6. COMMENTS FROM ITALY ON THIRD PARTY COMMENTS

- (75) In their comments on the third party comments, the Italian authorities reiterated their position that no public service obligations within the meaning of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007 existed and that no compensation was due.
- (76) To substantiate their position, the Italian authorities further explained the system which governed the operation of scheduled passenger transport services by bus under Law No 1822/39 <sup>(23)</sup> (law applicable during the period under consideration). According to this law, the regulatory framework for scheduled services under state responsibility (also known as 'ordinary scheduled bus services') was as follows:
- i) The service was operated under a system of concessions.
  - ii) Concessions were awarded upon application by the undertakings.
  - iii) No selection procedures for the award of concessions were provided for or carried out.
  - iv) Under the Law, concessions could be temporary or permanent, at the sole discretion of the Ministry, which invariably chose to grant temporary concessions to all undertakings. Consequently, concessions lasted one year and the undertakings (including Simet) applied for renewal of the concession each year.
  - v) The concessions gave operators the exclusive right to operate the service on the route identified in the concession specification.
  - vi) Concession holders were awarded preferential consideration based on the catchment areas served, defined on the basis of the '*finitimità*' criterion, that is, of bus route proximity and economic and functional interconnection (Articles 5 and 6 of Law No 1822/39).
  - vii) Priority was also awarded to existing services. In other words, for reasons of cost-effectiveness, it was considered preferable to adapt existing services rather than set up new services.

<sup>(23)</sup> Since repealed and replaced by Legislative Decree No 285/2005.

- viii) Furthermore, whenever a concession for new services needed to be issued, the criterion of population size in the catchment area was applied, relative to the total length of the new bus routes. A population size of at least 300 000 residents was considered necessary for services with a total length of up to 500 km. For longer bus routes, a proportional criterion was applied <sup>(24)</sup>.
- (77) Consequently, whenever undertakings lodged applications for a change to an existing service or for an award of a concession for new services, the Ministry had to base its decision on that legal framework.
- (78) Concerning full or partial refusals by the Ministry to grant the changes requested by Simet with respect to the services provided, the Italian authorities noted that these were solely related to the system as governed by Law 1822/39. The Ministry could not agree to grant new concessions to provide new services or to extend the scope of existing concessions (by accepting new stops) in cases where this would have impinged on the rights of other scheduled service operators, as defined in that Law. At the same time, the Ministry accepted the changes which did not contradict the principles laid down in Law 1822/39 <sup>(25)</sup>.
- (79) While acknowledging that Simet was refused authorisation to provide new services or to add additional stops to the existing services on a number of occasions, the Italian authorities contend that Simet's submissions and annexed documents fail to provide evidence of formal requests to change the details of the services provided as laid down in existing concession specifications, followed by refusals. In any event, the Ministry never rejected Simet's requests for the removal of stops in sparsely populated areas or for changes to the timetables.
- (80) Concerning the clauses of the concession specifications on the transportation of postal items, the Italian authorities claim that Simet did not furnish any evidence documenting the services actually provided and the net cost involved. The Italian authorities further noted that Simet produced no documentary evidence that the Ministry rejected its applications for fare changes. Furthermore, Simet never asked for authorisation to reduce fares.
- (81) As regards the memo of the Ministry of Transport of 19 December 1988 (D.C. III Div 32 No 3846) and the subsequent ministerial circular No A/66 of 10 January 1989 (issued by the Ministry's Provincial Motor Vehicle Office of Catanzaro), according to the Italian authorities these documents allowed scheduled service providers to align their fares with the fares of Ferrovie dello Stato and had to be viewed as part of a wider national transport policy and a wider pricing policy. The same should be said of the letter from the Provincial Office of Catanzaro No 7302 of 3 July 1992 (also referred to by Simet) aimed at enabling scheduled bus service operators to raise fares by up to 6,1 % in line with inflation, implementing circular No 801/92 <sup>(26)</sup>. That letter also points out that undertakings could operate under a different fare scheme, provided they submitted a specific application. The Italian authorities note that no such application was ever submitted by Simet. In any event, neither the ministerial memo of 1988 nor the Ministry's 1992 letter constituted a rejection of any application from Simet for termination of a public service obligation relating to fares.
- (82) The Italian authorities also disagree with Simet's contention that point 2 of circular No 3/02 of 5 April 2002 proves that the fares for the scheduled service were set by the Ministry. That circular merely provided instructions for converting fares in lire to euros. The fact that long-distance scheduled transport fares were referred to as being 'regulated' fares does not mean that they were not set by the operators. Rather, this meant that those were fares which were set in advance in the interests of transparency and publicity for passengers and subsequently authorised by the competent ministerial services. Since the service is a scheduled universal service, the details of the services provided, such as routes, bus stops, timetables and fares, must be known in advance, in contrast to occasional services. According to the Italian authorities, the same principle exists at Union level for regular services, which are governed by Regulation (EC) No 1073/2009 of the European Parliament and of the Council <sup>(27)</sup>, according to

<sup>(24)</sup> Article (2)(2)(e) of Presidential Decree No 369 of 22 April 1994.

<sup>(25)</sup> For instance, in 1992 the Ministry accepted that bus stops should be moved for safety reasons on the Rossano-Naples link; and in 2000 the Ministry accepted additional bus stops and route changes to serve new locations on grounds of cost-effectiveness on the Cosenza-Florence and the Cosenza-Pisa link. In addition, the Italian authorities noted that the documentation submitted by Simet showed that in 1992 the Ministry accepted the fare increase it had requested on the Rossano-Naples link.

<sup>(26)</sup> Which set a ceiling on fare increases for ordinary scheduled bus services corresponding to the rate of inflation.

<sup>(27)</sup> Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ L 300, 14.11.2009, p. 88).

which fares are an integral part of the authorisations for regular services (Article 6(2) of that Regulation). In light of these advance scheduling requirements, the Italian authorities also contest Simet's interpretation of point No 6 of the concession specifications<sup>(28)</sup>, as both Simet's application and the Ministry's concession specification referred to pre-set timetables and fares for the scheduled services.

- (83) As regards the amount of compensation demanded, Simet claimed only '*compensation ... within the limits of the amounts proven to be due*'. According to the Italian authorities, the cost calculations produced over time by Simet are generic, as they cover its entire business activity, and also objectively incorrect and not based on reliable data, given the absence of account separation for the majority of the period under review.
- (84) The Italian authorities consider it entirely irrelevant whether the case in question concerns the award of public service compensation (hence, the direct application of Regulation (EEC) No 1191/69) or the award of damages. Even supposing that the Council of State meant to recognise Simet's entitlement to damages, which according to the Italian authorities is neither a foregone nor an obvious conclusion based on a reading of judgment 1405/2010<sup>(29)</sup>, any damage incurred could only arise from the operation of public service obligations. The Italian authorities insist that no such obligations have ever been imposed on Simet.
- (85) Finally, the Italian authorities disagree that compensatory damages are required by Article 41 of the Italian Constitution. The transport of passengers by means of scheduled inter-regional services cannot be considered to have been completely liberalised by a simple and direct application of Article 41 of the Italian Constitution, being first subject to a concession system (regulated by Law No 1822/39 and Presidential Decree 369/94) and subsequently to an authorisation system (regulated by Legislative Decree 285/05).

## 7. ASSESSMENT OF THE AID

### 7.1. EXISTENCE OF AID

- (86) Under Article 107(1) of the Treaty, '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*'.
- (87) For a support measure to be considered state aid within the meaning of Article 107(1), it must fulfil all of the following conditions:
- it must be granted by the state or through state resources,
  - it must confer a selective advantage by favouring certain undertakings or the production of certain goods,
  - it must distort or threaten to distort competition,
  - it must affect trade between Member States.
- (88) The Commission will examine whether each of these conditions has been fulfilled in the present case.

#### 7.1.1. State resources and imputability

- (89) The Commission observes that the judgments of the Council of State require the Ministry to pay compensation to Simet for the provision of inter-regional bus transport services from 1987 to 2003 on routes under state responsibility. The resources from which this compensation would be paid are those available to the Ministry and thus constitute state resources. The decision to pay that compensation, which has been taken by the court, is imputable to the state.

#### 7.1.2. Selective economic advantage

- (90) The Commission notes first and foremost that Simet is engaged in an economic activity, namely passenger transportation against remuneration. Therefore, Simet should be considered an 'undertaking' within the meaning of Article 107(1) of the Treaty.
- (91) The granting of the measure should also be considered selective, since it benefits only Simet.

<sup>(28)</sup> Point 6 of each of the concession specifications states clearly that the timetables and the fares shall be those approved by the Provincial Motor Vehicle Office of the Ministry.

<sup>(29)</sup> Judgment 1405/2010 refers to the right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data (page 21, point 3.3 of the judgment). Furthermore, in point 3.3 the Council of State affirms that it has not assessed damages because: '*No claims for damages put forward by the appellant can be accepted at present, because only when the administration has determined the amount referred to above will it be known whether there is residual damage not covered by the amount assessed, which must be calculated and demonstrated by the company concerned.*'

- (92) As regards the granting of an economic advantage, it follows from the *Altmark* judgment that compensation granted by the state or through state resources to undertakings in consideration for public service obligations imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute aid within the meaning of Article 107(1), provided the following four conditions are met <sup>(30)</sup>:
- first, the recipient undertaking must actually be required to discharge public service obligations and those obligations have to be clearly defined;
  - second, the parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner;
  - third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and
  - fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed must have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (93) As regards the second condition, the parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings. However, the need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined.
- (94) In the present case, Simet has not provided any evidence to show that the compensation parameters for the provision of the services in question over the period under consideration were ever established in advance in an objective and transparent manner. Rather, the concessions specifications upon which Simet relies to demonstrate that a public service obligation was imposed upon it state that the operation of the services does not give the company any right to a subsidy or compensation of any kind and that the service is operated entirely at the company's own risk. It is for this reason that judgment 1405/2010 of the Council of State ordered that that compensation be calculated on the basis of reliable data from the company's accounts. Any such calculations, in the absence of compensation parameters established in advance, are necessarily based solely on *ex post* estimates of the net costs involved in the provision of the inter-regional scheduled bus services in question, such as the calculations contained in the initial report and the majority report. The second *Altmark* condition has therefore not been met in the present case.
- (95) In order to exclude the presence of an economic advantage where compensation is granted to undertakings in consideration for public service obligations imposed on them, the *Altmark* judgment requires that all four conditions be satisfied, and there is consequently no reason for the Commission to examine whether the other three conditions have been met in the present case. Accordingly, the payment of compensation to Simet for the provision of inter-regional bus transport services for the period 1987-2003 does confer on that undertaking a selective economic advantage.

### 7.1.3. Distortion of competition and effect on trade between Member States

- (96) As regards these two criteria, it is necessary to verify whether the notified measure is likely to distort competition to the extent that it affects trade between Member States.
- (97) As reflected in the *Altmark* judgment <sup>(31)</sup>, since 1995 several Member States have opened certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their state of origin. This tendency is even more pronounced for inter-regional scheduled transport services such as those provided by Simet. Accordingly, any compensation granted to Simet should be considered liable to distort competition for the provision of inter-regional bus transportation services and liable to affect trade between Member States to the extent that it negatively impacts on the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of Simet.

<sup>(30)</sup> Case C-280/00 *Altmark Trans and Regierungspresidium Magdeburg* [2003] ECR I-7747, paragraphs 87 and 88.

<sup>(31)</sup> Paragraph 79.

- (98) The Commission also notes that Simet is active in other markets, such as international travel services, tourism services and bus rental services, and thus clearly competes with other companies within the Union in those markets. Any compensation granted to Simet would necessarily also distort competition and affect trade between Member States on those markets as well.
- (99) Accordingly, the Commission takes the view that the notified measure is liable to distort competition and affect trade between Member States.

#### 7.1.4. Conclusion

- (100) In light of the above, the Commission finds that the notified measure constitutes state aid within the meaning of Article 107(1) of the Treaty.

#### 7.2. EXEMPTION FROM THE NOTIFICATION OBLIGATION UNDER REGULATION (EEC) NO 1191/69

- (101) According to the reasoning of the Council of State, Simet acquired the right to obtain compensation for the provision of the transport services in question at the point in time at which it carried out those services. For this reasoning to hold, the compensation payments would have to have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69: otherwise failure to notify that compensation would have rendered it illegal, as it would have been contrary to the state aid provisions of the Treaty.
- (102) This is because, under Article 17(2) of that Regulation (EEC) No 1191/69, compensation paid pursuant to the Regulation is exempted from the preliminary information procedure laid down in Article 108(3) of the Treaty and thus from prior notification. It follows from the *Combus* judgment that the concept of 'public service compensation' within the meaning of that provision must be interpreted in a very narrow manner<sup>(32)</sup>. The exemption from notification provided by Article 17(2) covers only compensation for public service obligations imposed unilaterally on an undertaking, pursuant to Article 2 of that Regulation, which are calculated using the method described in Articles 10 to 13 of that Regulation (the common compensation procedure), and not to public service contracts as defined by Article 14. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which constitutes state aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed illegally implemented aid.
- (103) The question of whether Article 17(2) indeed dispensed the Italian authorities from prior notification in the present case therefore depends, first, on whether a public service obligation was in fact unilaterally imposed on Simet by the Italian authorities and, second, on whether the compensation paid pursuant to that obligation complies with Regulation (EEC) No 1191/69. The Commission will examine both questions in turn.

##### 7.2.1. Did the Italian authorities unilaterally impose a public service obligation on Simet?

- (104) According to Simet<sup>(33)</sup>, the unilateral imposition of a public service obligation upon it can be inferred from the specifications regarding the details of the services to be provided as laid down in the concession specifications issued for each separate inter-regional scheduled bus route, the imposition of fares by the Ministry and the ministerial refusals to accept changes to existing services or to issue new service concessions.
- (105) However, on the basis of the information it has received, the Commission finds that Simet has not convincingly shown that the Italian authorities unilaterally imposed a public service obligation upon it.
- (106) First, Simet's initiative in requesting the renewal of concession specifications for all sixteen years during the period under review cannot be reconciled with the unilateral imposition of a public service obligation. The purpose of those specifications was to provide Simet with the exclusive right to provide the relevant services for the period under review. Despite the fact that each of those specifications stipulated that the operation of the service was not subject to compensation and that the service was operated entirely at the company's own risk, Simet repeatedly requested the prolongation of those rights.

<sup>(32)</sup> Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, paragraphs 77 to 79.

<sup>(33)</sup> See section 5.

- (107) Second, the fact that these specifications stipulated the fares, the routes and the frequency and timing of the services does not necessarily mean that unilateral public service obligations were imposed on Simet as a result of the concessions. Rather, considering that the services provided were regular scheduled services, it was necessary for the concession specifications, which granted Simet an exclusive right to provide those services, to stipulate in advance the details of the services to be provided. No evidence has been provided of formal requests to change those details followed by refusals by the Ministry. Nor has Simet provided evidence to show that these details were unilaterally imposed by the Italian authorities on Simet, rather than proposed by that operator, in return for the right to provide services on an exclusive basis, and subsequently authorised by the Ministry.
- (108) Third, as regards the alleged obligation to transport postal items, Simet has failed to provide any evidence setting out the services actually provided and the net cost involved. Nor has Simet provided evidence that it ever contested the clauses of the concession specifications concerning the transportation of postal items. This could either mean that the provision of those services did not go against the commercial interests of the company or that it considered the provision of those services as a fair remuneration for the right to operate the inter-regional transport services on an exclusive basis.
- (109) Fourth, as regards the fares that Simet could charge to passengers for the services it provided, while the Italian authorities acknowledge that until 2001 there were indeed national provisions setting broad principles for the pricing of bus transport services pricing as part of a wider national transport policy and a wider pricing policy<sup>(34)</sup>, operators could submit a specific application to apply a different fare. This is clearly explained in the ministerial letter that Simet refers to<sup>(35)</sup>. The Commission notes, however, that Simet has provided no evidence that it ever submitted such an application to the Italian authorities, nor that any applications for fare changes during the period 1987-2003 were ever rejected by the Ministry.
- (110) Contrary to Simet's contention, the fact that long-distance scheduled transport fares were 'approved' by the Provincial Motor Vehicle Office of the Ministry<sup>(36)</sup> and the reference to 'regulated' fares in circular No 3/02 of 5 April 2002<sup>(37)</sup> do not mean that those fares were not initially set by the operators. Rather, the use of these terms only means that the fares were set in advance in the interests of transparency and publicity for passengers and subsequently authorised by the competent ministerial services.
- (111) In any event, such measures do not constitute a 'tariff obligation' within the meaning of Article 2(5) of Regulation (EEC) No 1191/69 which would have been subject to the common compensation procedure. The latter is limited to *'any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions'*. The definition of tariff obligations *'shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof'*.
- (112) Finally, as regards the ministerial refusals submitted by Simet, the Commission observes that these were requests for expansion and did not concern changes in the manner of provision of existing services. An expansion of services was not always possible, because of the way in which the operation of scheduled passenger transport services is regulated under Law No 1822/39. Concessions to provide new services or to extend the scope of existing services could be granted only to the extent they did not impinge on the rights of other scheduled services operators, so that the refusals to start new services or extend existing services were the result of a balancing of interests of different economic operators, rather than the consequence of imposing public service obligations as alleged by Simet.

<sup>(34)</sup> Until the end of 1991, circular 13/74 of 30 April 1974 provided that, normally, the fares of inter-regional scheduled bus services had to be similar to those of second-class rail transportation. Subsequently, between 1992 and 2000, memorandum No 801 of 17 March 1992 stipulated that, normally, fare increases had to be contained within the rate of inflation, which at the time was indicated by the inter-ministerial pricing committee.

<sup>(35)</sup> Letter from the Provincial Office of Catanzaro No A/7302 of 3 July 1992.

<sup>(36)</sup> Point 6 of the concession specifications.

<sup>(37)</sup> Point 2 of circular No 3/02 of 5 April 2002 which gave instructions for converting fares in lire to euros.

- (113) Consequently, Simet has not shown that the Italian authorities unilaterally imposed a public service obligation upon it.

#### 7.2.2. Does the compensation paid pursuant to that obligation comply with Regulation (EEC) No 1191/69?

- (114) In any event, even if a unilateral imposition of public service obligations were shown to exist in some form, the compensation for those services, in order to be exempted from prior notification under Article 17(2) of that Regulation, would still need to comply with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69. The Commission does not consider this to be the case.
- (115) First, the Commission notes that Article 10 of Regulation (EEC) No 1191/69 provides, inter alia, that the amount of the compensation must, in the case of an obligation to operate or to carry, be equal to the difference between the reduction in financial burden and the reduction in revenue of the undertaking if the whole or the relevant part of the obligation in question were terminated for the period of time under consideration. The Commission further notes that, according to the Court of Justice in the *Antrop* judgment, the requirement set out in that provision is not fulfilled where 'it is not possible to ascertain on the basis of reliable data [from the company's accounts] the difference between the costs imputable to the parts of [its] activities in the areas covered by the respective concessions and the corresponding income and consequently it is not possible to calculate the additional cost deriving from the performance of public service obligations by [that undertaking]' <sup>(38)</sup>.
- (116) Moreover, as of 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, requires transport undertakings which operate not only services subject to public service obligations but also engage in other activities to operate the public services as separate divisions, whereby: (i) the operating accounts corresponding to each of those activities are separate and the proportion of the assets pertaining to each is used in accordance with the accounting rules in force, and (ii) expenditure is balanced by operating revenue and payments from public authorities, without any possibility of transfer from or to another sector of the undertaking's activity.
- (117) In the present case, Simet failed to implement a proper account separation for the different services provided by it until 2002 and the robustness of the cost accounts as regards account separation for the years 2002 and 2003 can be called into question since there is no evidence that those cost accounts were used by the company's governance bodies to exercise control over its operations. Article 10 has therefore not been complied with.
- (118) Second, Simet has not demonstrated that '*economic disadvantages ... were determined taking into account the effects of the obligation on the undertaking's activities as a whole*' (Article 5(1) of Regulation (EEC) No 1191/69), nor was the requirement to fix the amount of compensation in advance (Article 13 of the Regulation) fulfilled, as explained in section 7.1.2.
- (119) Finally, the compensation period of the notified measure covers 1987 to 2003. However, the common compensation procedure applied to inter-regional bus services only until July 1992 and was subsequently restricted to '*urban, suburban, or regional passenger transport services*' by Council Regulation (EEC) No 1893/91 <sup>(39)</sup>. The definition of '*regional services*' provided in Regulation (EEC) No 1191/69 ('*transport services operated to meet the transport needs of a region*') cannot be extended to cover all transport services serving the needs of the population of a region and therefore also to cover inter-regional routes. This is because such a wide interpretation would have rendered the Regulation largely ineffective, as Member States were in any event allowed to exclude its application to undertakings whose activities were confined exclusively to the '*operation of urban, suburban or regional services*' <sup>(40)</sup>.
- (120) The Commission therefore finds that the notified compensation does not comply with the common compensation procedure laid down in Regulation (EEC) No 1191/69.

<sup>(38)</sup> Case C-504/07 [2009] ECR I-3867.

<sup>(39)</sup> OJ L 169, 29.6.1991, p. 1.

<sup>(40)</sup> Article 1(2) of Regulation (EEC) No 1191/69.

### 7.2.3. Conclusion on the exemption from notification

- (121) In light of the above, the Commission concludes that the compensation the Council of State considers due to Simet for the provision of inter-regional bus transport services in the period 1987-2003 was not exempted from compulsory prior notification on the basis of Article 17(2) of Regulation (EEC) No 1191/69.

### 7.3. COMPATIBILITY OF THE AID

- (122) Since it has not been shown that the compensation payments were exempted from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69, the compatibility of those payments with the internal market will need to be examined, as they constitute state aid within the meaning of Article 107(1) TFEU, as explained in section 7.1 above.
- (123) The Commission considers that the examination of the compatibility of the notified measure should be conducted under Regulation (EC) No 1370/2007, which entered into force on 3 December 2009 and repealed Regulation (EEC) No 1191/69, since that is the legislation in force at the time the present decision is being adopted<sup>(41)</sup>. It notes in this respect that the compensation awarded to Simet by the Council of State has not yet been paid, so that the date on which the effects of the planned aid would occur is the same as that on which the Commission adopts the decision ruling on the compatibility of the aid with the internal market<sup>(42)</sup>. Moreover, it is questionable that an entitlement to that compensation was irrevocably granted to Simet prior to judgment 1405/2010, delivered by the Council of State on 9 March 2010, which effectively obliges the Italian State to make those payments to that undertaking. As explained in (94) above, the concession specifications upon which Simet relies to demonstrate that a public service obligation was imposed upon it stipulate that the operation of the services does not give the company any right to a subsidy or compensation of any kind and that the provision of those services was operated entirely at the company's own risk. Finally, it should be stressed that the amount of the compensation to be paid to Simet has not yet been decided by the Council of State.
- (124) Regulation (EC) No 1370/2007 governs the award of public service contracts, as defined in Article 2(i) thereof, in the field of public passenger transport by road and by rail. Under to Article 9(1) of that Regulation, *'public service compensation for the operation of public passenger transport services ... paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty.'*
- (125) For the reasons set out below, the Commission considers that the notified compensation does not comply with the conditions of Regulation (EC) No 1370/2007, and so it cannot be declared compatible with the internal market on the basis of Article 9(1) of that Regulation.
- (126) In particular, the Commission notes that even if the concession specifications met the requirements under Article 2(i) of Regulation (EC) No 1370/07 for the definition of a public service contract, not all the provisions of Article 4 of that Regulation, which establishes the mandatory content of public service contracts and general rules, have been complied with. For instance, Article 4(1)(b) requires that the parameters on the basis of which the compensation is calculated be established in advance in an objective and transparent manner in a way that prevents overcompensation, while Article 4(1)(c) and Article 4(2) lay down the arrangements with regard to the allocation of costs and revenues. As explained in relation to the Commission's examination of the second criterion of the *Altmark* judgment in section 7.1.2, the concession specifications at issue stipulated that the operation of the services does not give Simet any right to a subsidy or compensation of any kind and that the service is operated entirely at the company's own risk. Such an exclusion of compensation necessarily entails that the compensation parameters have not been established in advance, so that Article 4 of the Regulation has not been complied with.
- (127) Furthermore, Article 6(1) provides that in the case of directly awarded public service contracts, compensation must comply with the provisions of Regulation (EC) No 1370/2007 and with the provisions laid down in the Annex to ensure that the compensation does not go beyond what is necessary to carry out the public service obligation. That Annex requires, inter alia, a separation of accounts (point (5) and specifies how the maximum amount of compensation should be determined.

<sup>(41)</sup> The Commission refers in this respect to the reasoning developed in recitals 307 to 313 of its Decision of 24 February 2010 in Case C 41/08 (ex NN 35/08) concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (OJ L 7, 11.1.2011, p. 1). This decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v European Commission* [2013], not yet published – which judgment is currently on appeal before the Court of Justice in Case C 303/13. The outcome of the appeal is not relevant for the outcome of the present case, since the General Court confirmed in the judgment under appeal that with regard to aid which has been notified but not paid, the rules, principles and criteria for assessing the compatibility of state aid which are in force at the date on which the Commission takes its decision should be applied (see paragraph 39 of the judgment).

<sup>(42)</sup> Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraphs 50 to 53; Case T-3/09 *Italy v Commission* [2011] ECR II-95, paragraph 60.

- (128) As noted in recital 115 above, for most of the notified period (between 1987 and 2001), Simet did not apply a proper account separation, while the robustness of the analytical accounts for 2002 and 2003 can also be questioned. Consequently, it is impossible to demonstrate that whatever compensation is ultimately awarded does not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator (point 2 of the Annex).
- (129) Moreover, in the absence of compensation parameters laid down in advance, any cost allocation must necessarily be conducted *ex post* on the basis of arbitrary assumptions, as was done in both the initial report and the majority report. The Commission cannot accept, however, the assumptions made in the majority report that each service provided by the company should necessarily represent the same proportion of revenues and costs in a given year. Moreover, since an *ex post* calculation will necessarily result in full compensation of the costs incurred in the provision of the service, the Commission considers that a rate of return on equity exceeding the relevant swap rate plus 100 basis points, as employed in both the initial report and the majority report, would normally not be viewed as a suitable reference for calculating the reasonable profit.
- (130) Accordingly, the Commission considers that the compensation ordered by the *Council of State*, which is not provided for in the concession specifications, would not be paid in accordance with the provisions of Regulation (EC) No 1370/2007, and therefore that the notified measure is incompatible with the internal market.
- (131) Finally, as regards Simet's claim that judgment 1405/2010 of the Council of State does not concern an award of public service compensation based on the applicable Council Regulation, but represents an award of damages related to a breach of Regulation (EEC) No 1191/69 which stems from the alleged illegal unilateral imposition of public service obligations under Articles 1(3) and 1(5) of that Regulation, the Commission notes that while no reference to Regulation (EEC) No 1191/69 appears in the operative part of judgment 1405/2010, that judgment does refer to Simet's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data<sup>(43)</sup>. Furthermore, in judgment 1405/2010, the Council of State itself dismissed Simet's claim for damages, which it understood to cover the residual losses not covered by the compensation to be awarded, and its claim for unjust enrichment, since the main claim for compensation on the basis of Regulation (EEC) No 1191/69 had been accepted<sup>(44)</sup>. Thus, in point 3.3 of the judgment the Council of State states that: *'No claims for damages put forward by the appellant can be accepted at present, because only when the administration has determined the amount referred to above will it be known whether there is residual damage not covered by the amount assessed, which must be calculated and demonstrated by the company concerned.'*
- (132) In any event, the Commission considers that an award of damages in favour of Simet for the alleged illegal unilateral imposition of public service obligations by the Italian authorities, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, would contravene Articles 107 and 108 of the Treaty. This is because such an award would produce the exact same result for Simet as an award of public service compensation for the period under review, despite the fact that the concession specifications governing the services in question were neither exempt from prior notification nor complied with the substantive requirements of Regulation (EEC) No 1191/69 or Regulation (EC) No 1370/2007, as demonstrated above. The availability of such an award would thus effectively enable the circumvention of the state aid rules and the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred in return for the discharge of public service obligations. Finally, as previously stated, the concession specifications under which Simet provided the transport services did not provide for payment of any financial compensation. Simet agreed to run the services under the conditions laid down in those concessions at its own risk.
- (133) Accordingly, the Commission cannot accept Simet's claim that judgment 1405/2010 of the Council of State represents an award of damages related to a breach of Regulation (EEC) No 1191/69 rather than an award of public service compensation.

## 8. CONCLUSION

- (134) In light of the above, the Commission finds that the notified measure constitutes state aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market,

<sup>(43)</sup> Point 3.3 of judgment 1405/2010.

<sup>(44)</sup> Point 3.4 of judgment 1405/2010.

HAS ADOPTED THIS DECISION:

*Article 1*

The compensation payments to Simet notified by the Italian authorities constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union. The aid was not exempt from prior notification on the basis of Article 17(2) of Regulation (EEC) No 1191/69.

The aid is not compatible with the internal market, as the conditions of Regulation (EC) No 1370/2007 have not been met. Consequently, the aid may not be implemented by the Italian authorities.

*Article 2*

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 October 2013.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

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