

COMMISSION DECISION (EU) 2015/1075**of 19 January 2015****on State aid SA.35843 (2014/C) (ex 2012/NN)****implemented by Italy — Additional public service compensation for Buonotourist***(notified under document C(2015) 75)***(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 and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By electronic notification of 5 December 2012, the Italian authorities notified, in accordance with Article 108(3) of the Treaty, the additional compensation awarded pursuant to a judgment by the *Consiglio di Stato* (Italy's highest administrative court) to Buonotourist S.r.l. ('Buonotourist'), for the provision of passenger transport services by bus based on concessions granted by the Italian Region of Campania ('the Region') during the period 1996-2002 ('the period under review').
- (2) The notification was registered under case number SA.35843 and from 13 December 2012 treated as a non-notified measure since, according to the information available to the Commission, the Region was not obliged to pay the additional compensation due to Buonotourist until 7 December 2012, that is, after the Italian government had notified the measure to the Commission, but before a Commission decision had been adopted.
- (3) By letter dated 20 February 2014, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid ('the opening decision').
- (4) The opening decision was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the measure.
- (5) The Italian authorities submitted their observations on the opening decision by letters dated 21 and 24 March 2014.
- (6) The only third party to submit observations in reply to the opening decision was Buonotourist, the beneficiary of the measure. Its comments were received on 25 March 2014.
- (7) On 11 July 2014, the Italian authorities provided comments on the third party submissions and additional information in response to a request for information dated 11 June 2014.
- (8) After acceptance of a deadline extension by the Commission, the Italian authorities completed the provision of additional information by letter of 15 September 2014.

⁽¹⁾ Commission Decision of 20 February 2014 on State aid SA.35843 (2012/NN) — Italy — PSO compensation for Buonotourist (OJ C 156, 23.5.2014, p. 51).

2. DESCRIPTION OF THE MEASURE

2.1. THE COMPANY

- (9) Buonotourist is a private company providing local public transport services based on regional and municipal concessions. More specifically, according to the Italian authorities, Buonotourist operated a network of bus routes as concessionaire of the Region throughout the period under review covering approximately 1,8 million km per year.
- (10) From the information provided by the Italian authorities, the Region has already paid EUR 19 507 121,54 to Buonotourist for the above-mentioned service during the period under review, of which EUR 17 036 021,13 for the operation and management of the service and EUR 2 471 100,41 for investments. Since it appears that this compensation was awarded to Buonotourist more than 10 years before the Commission sent its first request for information to the Italian State, that compensation will not be subject to an assessment in the current proceedings ⁽²⁾.
- (11) In addition to the above-mentioned sums already received, Buonotourist requested from the Region additional compensation of EUR 5 567 582,57 on the basis of Council Regulation (EEC) No 1191/69 ⁽³⁾ for the economic disadvantages it allegedly suffered as a result of public service obligations ('PSOs') allegedly being imposed upon it. According to the Region, the request was made in January 2007 when Buonotourist started proceedings before the Italian administrative courts.
- (12) In 2008, the Regional Administrative Court in Salerno rejected Buonotourist's claim for additional compensation on the basis of Regulation (EEC) No 1191/69. That court held that, in accordance with Article 4 of Regulation (EEC) No 1191/69 ⁽⁴⁾, Buonotourist could not request compensation for economic disadvantages resulting from the imposition of PSOs without having previously requested the termination of those PSOs.

2.2. THE JUDGMENTS OF THE CONSIGLIO DI STATO

- (13) By judgment of 27 July 2009 (*Sentenza* No 4683/09), the Consiglio di Stato upheld the appeal by Buonotourist against the judgment of the Regional Administrative Court in Salerno and concluded that Buonotourist was entitled to receive additional compensation for the public service it had carried out in accordance with Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. That judgment does not precisely define from which legal act and in what form the PSOs were imposed, but stresses that an undertaking operating a public service cannot be denied its claim for repayment of the costs effectively incurred in performing that service. The Consiglio di Stato further considered that Buonotourist was entitled to receive public service compensation even in the absence of a prior request for the elimination of the PSOs.
- (14) According to the Consiglio di Stato, the precise amount of the additional compensation owed to Buonotourist had to be determined by the Region on the basis of reliable data taken from the accounts of the company, showing the difference between the costs attributable to the portion of Buonotourist's activities associated with the PSO and the corresponding revenues. However, the Region claimed that it was unable to do so, due to a lack of clear and reliable data.

⁽²⁾ The Commission recalls that, pursuant to Article 15 of the 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), the powers of the Commission to recover aid are subject to a limitation period of 10 years, beginning on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period.

⁽³⁾ 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).

⁽⁴⁾ Article 4(1) of Regulation (EEC) No 1191/69 states that: 'It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them'. Article 6(3) reads: 'The competent authorities of the Member States shall take decisions within one year of the date on which the application is lodged as regards obligations to operate or to carry, and within six months as regards tariff obligations. The right to compensation shall arise on the date of the decision by the competent authorities...'.

- (15) By order (*ordinanza*) No 8737/2010 of 13 December 2010, the Consiglio di Stato appointed an expert to undertake that task. According to the Italian authorities, that expert was also unable to determine the amount to be compensated. By order (*ordinanza*) No 5880/2011 of 7 November 2011, the Consiglio di Stato appointed a second expert ('the second expert'). It appears from paragraph 9 of the judgment of the Consiglio di Stato (*giudizio per l'ottemperanza*) No 5650/2012 of 7 November 2012 that both experts excluded the existence of a right to compensation pursuant to Article 10 of Regulation (EEC) No 1191/69 (i.e. obligation to operate or carry), but both concluded that Buonotourist was undercompensated for 1998, 1999 and 2000 as a result of the application of the formula provided in Article 11 of Regulation (EEC) No 1191/69 (tariff-related obligation). Implicitly, the experts thus assumed that a tariff obligation had been imposed on Buonotourist by the Region.
- (16) However, while the first expert concluded that it would have been inappropriate to use an 'inductive method' to calculate the additional costs borne by the undertaking due to tariff costs and recommended calculating the additional compensation by means of equity appreciation (*in via equitativa*), the second expert calculated the sum to be compensated by the Region to the company through the use of such an 'inductive method', observing that the Consiglio di Stato held that the choice of the 'inductive method' was to be considered definitive, having been used in various judgments without being challenged.
- (17) The second expert was nevertheless unable to calculate the compensation pursuant to Article 11 of Regulation (EEC) No 1191/69 due to a lack of essential data on both the anticipated and the actual number of units of measure of transport. The second expert therefore calculated the possible amount of undercompensation as the difference between the potential revenues that the company could have obtained by operating the service on a commercial basis (estimate) and the sum of the actual revenues and the public contributions received. For Buonotourist, those calculations result in an undercompensation for 1998, 1999 and 2000 only, totalling EUR 1 111 572 including interest. The expert concluded that this amount could be taken as the amount of undercompensation.
- (18) Accordingly, the Consiglio di Stato issued judgment No 5650/2012 of 7 November 2012, quantifying the additional compensation the Region was obliged to pay to Buonotourist at EUR 1 111 572 and ordered payment of that sum to take place by 7 December 2012 ⁽⁵⁾. Payment of this sum was made by the Region to Buonotourist on 21 December 2012.
- (19) It is the payment of that additional compensation by the Region to Buonotourist as a consequence of judgment No 5650/2012 that constitutes the non-notified measure and the subject matter of this Decision.

2.3. ADDITIONAL INFORMATION/OBSERVATIONS PROVIDED BY THE ITALIAN AUTHORITIES

- (20) According to the Italian authorities, Buonotourist, like other providers of regional scheduled bus transport services, operated on the basis of provisional licences (concessions) which had to be renewed annually upon the request of the company. Those concessions provided the company with the exclusive right to provide the relevant services.
- (21) The Italian authorities further maintain that Buonotourist requested concessions to provide services on the relevant routes from the Region in each year of the period under review and that those concessions always stipulated that the services were carried out entirely at the risk of the undertakings in question and, specifically, 'without the performance of the service constituting a right to a subsidy or compensation of any kind'. The Italian authorities provided a copy of a sample concession contract concerning another undertaking ('the sample concession contract') from 1972/73 attesting that it was the same as the one used with Buonotourist for the period under review. However, the Italian authorities did not provide any concession contracts actually concluded with Buonotourist during the period under review.
- (22) The Italian authorities maintain that under those concessions Buonotourist was free to propose the substitution of the forms of transport to be used by it or to apply for the termination in whole or in part of its PSOs where such obligations entailed an economic disadvantage to it, but that the company never exercised that right. The Italian authorities further allege that the company never informed the Region that it was suffering economic disadvantages or that it was carrying out obligations that it would not have performed if not obliged to do so under a PSO. Finally, according to the Italian authorities, Buonotourist never requested the termination of the PSO as required by Article 4 (1) of Regulation (EEC) No 1191/69.

⁽⁵⁾ That sum therefore replaced the original claim for compensation by Buonotourist of EUR 5 567 582,57.

- (23) According to the Italian authorities, the public contributions granted to Buonotourist in the past were based on standard cost methodology, calculated on the basis of certain parameters established in Regional Law No 16/1983 ⁽⁶⁾, such as the number of kilometres awarded vis-à-vis the kilometres travelled, the number of employees and buses, which vary depending on the type of service performed (urban, mountain, hill services), the legal and economic treatment of employees, the size of the undertaking, and the costs of the buses.
- (24) The Italian authorities also doubt whether Buonotourist has demonstrated that it had efficiently and correctly operated the PSOs in accordance with Regulation (EEC) No 1191/69 and submit that Buonotourist did not have an account separation system as required by Article 1(5) of that Regulation.

2.4. AMOUNT OF COMPENSATION

- (25) As explained in recital 15, the Consiglio di Stato appointed two experts to determine the additional compensation owed to Buonotourist by the Region on the basis of Articles 6, 10 and 11 of Regulation (EEC) No 1191/69. On 27 September 2012, the two experts each issued their respective reports, but only the second expert was able to calculate the additional compensation due to Buonotourist by the Region ('the report').
- (26) In the report, the second expert frequently reiterates that the parties submitted data that did not match or that were not precise enough, constituting only an approximation. In particular, the second expert observes that the parties have provided contradictory documentary evidence regarding the compensation paid in the past. In contrast to the claim made by the Italian authorities, the second expert notes that Buonotourist kept separate accounts for its public and private transport activities, but explains that no verification could be made of the correct imputation of some costs to the one or the other sector of activity. The second expert further explains that it was not possible to acquire reliable data on the costs that would not have been incurred in case of termination of the PSO — even using the 'inductive method' prescribed by the Consiglio di Stato.
- (27) Accordingly, the second expert concluded that no additional compensation for the obligation to operate or carry, calculated on the basis of Article 10 of Regulation (EEC) No 1191/69 could be determined.
- (28) As regards additional compensation in relation to tariff obligations — Article 11 of Regulation (EEC) No 1191/69 — the second expert acknowledges that it could not be calculated on the basis of paragraph 1 of that provision, because of missing and/or unreliable data. Therefore, the 'inductive method' prescribed by the Consiglio di Stato was applied.
- (29) Article 11 of Regulation (EEC) No 1191/69 provides, inter alia, that the amount of the compensation must, in the case of a tariff obligation, be equal to the difference between the following two amounts.

— The first amount is equal to the difference between, on the one hand, the product of the anticipated number of units of measure of transport and:

— either the most favourable existing rate which might be claimed by users if the obligation in question did not exist,

— or where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied,

and, on the other hand, the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

— The second amount is equal to the difference between the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis and the costs actually incurred under the obligatory rate.

⁽⁶⁾ *Legge Regionale 25 gennaio 1983, n. 16 Interventi regionali in materia di servizi di trasporto pubblico locale per viaggiatori* (Regional measures for local passenger transport services) available at: http://jtest.itig.cnr.it:8080/cocoon/regioneCampania/xhtml?css=4&doc=/db/nir/RegioneCampania/1983/urn_nir_regione.campania_legge_1983-01-25n16&datafine=19830205

- (30) In the absence of the data required to determine those amounts, the second expert calculated the amount of compensation due as the difference between the two amounts as interpreted below.
- In the absence of the anticipated and the actual number of units of measure of transport, the first amount is equal to the amount necessary to cover the real costs (or the 'standard costs' if lower) ⁽⁷⁾, minus the revenues obtained from the traffic carried ⁽⁸⁾.
 - As regards the second amount, the expert considered that it should be equal to the real costs (or the 'standard costs' if lower) ⁽⁹⁾ minus the difference between the real costs (or the 'standard costs' if lower) and the amount of compensation already received ⁽¹⁰⁾.
- (31) According to the second expert, it follows from those calculations that during the period under review Buonotourist could only claim to have been undercompensated in 1998, 1999, and 2000 as a result of alleged tariff obligations being imposed upon it. The amount of undercompensation for those three years was calculated by the second expert to amount to EUR 838 593,21, to which legal interest of EUR 272 979,13 was added, resulting in additional compensation of EUR 1 111 572. It was this amount which the Consiglio di Stato ordered the Region to pay to Buonotourist, which it actually paid on 21 December 2012.

2.5. GROUNDS FOR INITIATING THE PROCEDURE

- (32) As explained in the opening decision, the Commission had several doubts regarding the compatibility of the measure with the internal market.
- (33) First, the Commission questioned whether the four conditions laid down by the Court of Justice of the European Union ('the CJEU') in its *Altmark* case-law ⁽¹¹⁾ had been fulfilled.
- (34) Second, the Commission had doubts regarding the exemption from the notification obligation under Regulation (EEC) No 1191/69. The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed exempted the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on Buonotourist by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission could not conclude whether the compensation awarded to Buonotourist fulfilled those conditions.
- (35) Third, the Commission had doubts regarding the possible compatibility of the measure under Regulation (EC) No 1370/2007 of the European Parliament and of the Council ⁽¹²⁾. If it was 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.

3. COMMENTS BY ITALY

- (36) The Italian authorities at the national level did not provide any comments on the opening decision. Only the Campania Region did.
- (37) First, the Region submitted documentation meant to show that Buonotourist performed 'authorised services' at its own risk, in addition to the services under concession in the period concerned. For example, Buonotourist appears to have provided international and interregional bus transport services in the period under review. In addition, the Region explained that Buonotourist only had accounting separation between rental services and bus transport services, without further distinguishing the 'authorised services' that the company performed at its own risk.

⁽⁷⁾ Instead of the difference between, on the one hand, the product of the anticipated number of units of measure of transport and — either the most favourable existing rate which might be claimed by users if the obligation in question did not exist or — where there is no such rate, the rate which the undertaking, operating on a commercial basis and taking into account both the costs of the operation in question and the state of the market, would have applied.

⁽⁸⁾ Instead of the product of the actual number of units of measure of transport and the rate imposed for the period under consideration.

⁽⁹⁾ Instead of the costs which would be incurred applying either the most favourable existing rate or the rate which the undertaking would have applied if operating on a commercial basis.

⁽¹⁰⁾ Instead of the costs actually incurred under the obligatory rate.

⁽¹¹⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] EU:C:2003:415.

⁽¹²⁾ 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).

- (38) Second, the Region reiterated that no unilateral imposition of PSOs took place during the period under review. The Region noted that the company, under the rules then in force, requested yearly renewal of the concession services and that none of the concession acts entailed the unilateral imposition of PSOs. Moreover, following the judgment of the Consiglio di Stato in 2009, the Region repeatedly asked Buonotourist to provide the acts or contracts imposing PSOs on it in order to comply with the judgment. According to the Region, the company never replied to these requests. Regarding the cap on tariffs, the Region noted that the tariffs indicated by the concession contracts derived from general measures of price policy applied by all companies operating in the same sector.

4. COMMENTS BY INTERESTED PARTIES

- (39) The only third party to submit observations in response to the opening decision was Buonotourist, the beneficiary of the measure. In its submissions, Buonotourist disagreed with the preliminary positions taken by the Commission in the opening decision.
- (40) To substantiate its claim that obligations were imposed on it, Buonotourist argued that the PSOs were not set out in the document awarding the concession, which did not exist, but derived solely from internal acts of the Region which predetermined the organisation of the undertaking and the compensation through the 'standard cost' mechanism. Buonotourist explained that Italy had regulated the PSOs by means of Law No 151/81, Regional Law No 16/83, Article 4 of Law No 59/97 and Legislative Decree No 422/97. The public service was entrusted to Buonotourist by the Region by means of a concession act in 1972/73 and renewed every year until 2003. That PSOs were imposed on Buonotourist for the years 1996-2002, such as tariff obligations, routes, times and stops, can be allegedly inferred from the following documents:
- the 'bridging service contract' signed by Buonotourist and the Region for the year 2003 in compliance with Article 46 of Regional Law No 3/02, recalling and replacing the existing concessions,
 - decision of the Regional Government (*delibera della Giunta Regionale*) No 8726 of 30 December 1999, authorising Buonotourist to modify some routes following requests from both the company and other petitioners,
 - decision of the Regional Government No 323 of 4 May 2000, which extended the duration of the suspension of the increase in costs for season tickets for bus transport services in the Region,
 - note 4770/2000 communicating the distinction between how to calculate the tariff for ordinary season tickets and season tickets for 'work lines' (*linee operaie*),
 - decree of the Region's *Assessore di Trasporti* No 1609/2001 concerning the change from lira to euros, reminding the service providers that any irregular increase in tariffs was forbidden and that prohibition constituted a 'concession/contractual obligation'.
- (41) Moreover, Buonotourist argued that since the Region repeatedly reduced the amount of the standard cost and applied that cost unevenly across the different routes and concessions, some operators decided to close certain bus routes consistently operated at a loss. The Region allegedly replied that the operators were duty bound to operate the routes under the PSOs and that legal action would be taken against them for interrupting a public service if indeed they did stop providing their activity. According to Buonotourist, this showed that PSOs were imposed upon it. However, Buonotourist did not provide evidence to support this claim.
- (42) Buonotourist also claimed that it mainly operated as a local public transport service provider (80 % of its activity). For the remaining diversified economic activity, it maintained separate accounts.
- (43) After having recalled the final national ruling by the Consiglio di Stato, Buonotourist challenged the following arguments put forward by the Region:
- the calculation was not supported by separate management accounts by cost centres such as to distinguish the activities subject to PSOs,
 - given the absence of accounting data allowing the identification of the specific elements to be calculated pursuant to Articles 10 and 11 of Regulation (EEC) No 1191/69, the calculation had been performed inductively, with a method the Region termed as 'abstruse and aberrant'.

- (44) Buonotourist explained that the applicable rules simply required the accounting data relating to the public transport service operated under a PSO to be supplied separately from those of any other business activities, but did not require any further accounting breakdown showing separately the costs and revenue for each route covered. Buonotourist claimed to keep separate accounts for the accounting data concerning public service activities and those concerning the business activities, and it added that the reliability of such accounting data was never questioned by the Region, which on the contrary used them correctly as the basis for calculating and paying out the annual contributions.
- (45) Buonotourist further disputed that the accounting documents supplied were insufficient to support the compensation claim merely because they consisted of annual financial statements and 'E forms' ⁽¹³⁾ and were not accompanied by full copies of the underlying accounting and administrative entries (accounting register, ledgers, invoices issued and received, ticket receipts, etc.). According to Buonotourist, this argument could be easily countered by noting that the Region had accepted the same data during the period under review, considering them reliable at the time. Furthermore, the requirement to keep full accounting and administrative documentation for the period under review has now expired and it is, therefore, objectively difficult to demand copies at present. It is therefore appropriate to reconstruct the amount of compensation due via an inductive approach, as prescribed by the Consiglio di Stato. Finally, the financial statements had been duly certified and their correctness and truthfulness had never been called into question. In conclusion, the accounts submitted by Buonotourist are clearly sufficient for calculating the compensation in full compliance with the requirements of Regulation (EEC) No 1191/69.
- (46) Concerning the correctness of the calculation method and its consistency with Union law, Buonotourist considered that the company had to be compensated for the disadvantage incurred in terms of the difference between lower revenue and greater costs as a consequence of its PSOs. To establish the value of lower revenue on the basis of reliable data, Buonotourist, first, considered the actual annual operating revenue, which was the product of the actual number of units of measure of transport and the tariff imposed. It then identified the amount to be subtracted in accordance with Union rules, considering the revenue necessary to cover the actual costs as recorded in the annual accounts. The amount of the annual operating revenue coincides with the actual revenue obtained by the company in the activity provided under a tariff obligation which was separately indicated in the annual financial statements of Buonotourist and in the E forms sent each year to the Region, which never questioned their reliability. There is, therefore, no need to break down those amounts into their component parts, even though they include revenues for routes that were not subject to concessions and are therefore overstated. As for the amount to be subtracted, Buonotourist claimed that it used a criterion that fully complied with the instructions contained in Regulation (EEC) No 1191/69, which allowed the use of the tariff that the company would have applied had it operated on a commercial basis, which had to cover the actual costs incurred. As far as the difference between the costs which the undertaking would have incurred by applying the most favourable existing rate or operating on a commercial basis and the costs actually incurred were concerned, Buonotourist considered that its calculation is fully consistent with Article 11 of that Regulation, as it captured the lower cost incurred by the undertaking as a consequence of the PSO on account of the contributions received from the Region to cover operating costs. Moreover, Buonotourist is of the opinion that it would be impossible to estimate the passenger traffic in a free market scenario. Therefore the 'inductive method' prescribed by the Consiglio di Stato is legitimate. Finally, Buonotourist recalled that both Articles 10 and 11 established the right of public transport companies subject to PSOs to be compensated for all negative financial impacts resulting from their obligations.
- (47) Concerning the notion of State aid, Buonotourist argued that the market for public transport in Italy in the period in question was not open to competition from undertakings established in other Member States. Buonotourist therefore concluded that there was no effect on trade. Likewise, in view of the current organisation of the local public transport service based on the unilateral, exclusive concession of certain routes, the compensation was not likely to distort competition. Furthermore, the standard cost/km was imposed by the Region and accepted by the concessionaire together with all the other PSOs, therefore there would be no advantage. Buonotourist thus considered that at least three of the conditions laid down by the CJEU for identifying State aid were not met in the case at issue.
- (48) Buonotourist is of the opinion that the compatibility of the compensation had to be assessed with reference to Regulation (EEC) No 1191/69. Concerning the exemption from the requirement to notify under Regulation (EEC) No 1191/69, Buonotourist considered that since the Region imposed the tariff obligation unilaterally and the

⁽¹³⁾ *Modelli E*, namely the documents based on the accounts of the company containing the information necessary for the annual calculation of the public contribution.

amounts do not constitute PSOs under a service contract but stem from the correct application of the calculation under Article 11 of that Regulation in the framework of a concession, the payment awarded as compensation was exempted from the notification requirement of Article 17(2) of the same Regulation.

5. COMMENTS BY ITALY ON THE COMMENTS BY INTERESTED PARTIES

- (49) The Italian authorities at the national level did not submit any comments on Buonotourist's comments. Only the Campania Region did, on 11 July 2014.
- (50) In the submission, the Region explained that the separate accounting kept by Buonotourist only concerned the rental services (*noleggio* or *fuorilinea*) vis-à-vis the bus services in general. The bus services provided by Buonotourist, however, included interregional and international routes (so-called 'authorised' transport services) that were performed at the company's own risk. The Region provided evidence of the provision by Buonotourist of such authorised services during the period under review. In particular, the Region provided Decision of the Regional Government No 8734/1999 authorising services between two regions and note No 4765/2011 of the Ministry of Infrastructure and Transport certifying the provision of three interregional routes. Moreover, the notes to the accounts of the company for 1998 and 2000 clearly mention the international and interregional activities, as does judgment No 2157/2004 of the Lazio Regional Administrative Court (*Tribunal Amministrativo Regionale*).
- (51) The provision of 'authorised' interregional and international transport services was not separately indicated in the accounts of Buonotourist. Finally, the account separation for those services cannot be inferred from the E forms submitted by Buonotourist to the Region every year, where the actual costs and revenues for the provision of bus services are indicated separately under 'Local Public Transport Campania Region' and the rental services are indicated under 'Rental' (*noleggio* or *fuorilinea*). According to the Region, the column 'Local Public Transport Campania Region' shows all the costs and revenues indicated in the 'Bus Services Income Statement', which represented all bus services in general, including authorised interregional and international transport services.

6. ASSESSMENT OF THE AID

6.1. EXISTENCE OF AID

- (52) Pursuant 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 provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (53) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all of the following conditions:
- it must be granted by the State or through state resources,
 - it must confer a selective advantage by favouring certain undertakings or the production of certain goods,
 - it must distort or threaten to distort competition, and
 - it must affect trade between Member States.

6.1.1. State resources and imputability

- (54) The Commission notes that the judgment of the Consiglio di Stato requires the Region to pay additional compensation to Buonotourist with respect to the provision of scheduled bus services during the period under review on routes under the remit of the Region. The second court-appointed expert calculated that Buonotourist suffered an economic disadvantage in the form of undercompensation only for 1998, 1999, and 2000 in the amount of EUR 1 111 572 as a result of alleged tariff obligations being imposed on it. On 21 December 2012, the Region paid this sum to Buonotourist in order to comply with that judgment.
- (55) The fact that the Region was obliged by a national court to pay compensation to an undertaking does not mean that the aid cannot be imputed to the Region complying with that judgment, since the domestic courts of that State are to be considered organs of that State and are thus bound by their duty of sincere cooperation⁽¹⁴⁾.

⁽¹⁴⁾ Case C-527/12 *Commission v Germany*, EU:C:2014/2193, paragraph 56 and the case-law cited. See also Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59, described in recital 94 below.

- (56) The measure is thus imputable to the State and the resources from which that compensation has been paid are state resources.

6.1.2. Selective economic advantage

- (57) The Commission notes at the outset that Buonotourist is engaged in an economic activity, namely passenger transport for remuneration. Therefore, Buonotourist should be considered an 'undertaking' within the meaning of Article 107(1) of the Treaty.
- (58) The granting of the measure should also be considered selective, since it will benefit only Buonotourist.
- (59) As regards the granting of a selective economic advantage, it follows from the *Altmark* judgment that compensation granted by the State or through state resources to undertakings as consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) of the Treaty, provided that four cumulative conditions are satisfied ⁽¹⁵⁾.
- First, the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
 - Third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
 - Fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (60) The *Altmark* judgment requires all four conditions to be cumulatively satisfied to exclude the presence of an economic advantage where compensation is granted to undertakings as consideration for public service obligations imposed on them.
- (61) The Commission notes first that neither the Italian authorities nor Buonotourist were able to provide it with any entrustment act related to the period under review and that Buonotourist has not been able to identify clearly obligations that it was required to discharge that could qualify as PSOs, as explained in more detail below in 6.2, subsection (i).
- (62) Second, the Commission observes that the compensation awarded by the judgment of the Consiglio di Stato is based solely on an *ex post* calculation using an 'inductive method' in the absence of necessary and reliable data. The Commission therefore concludes that the parameters on the basis of which the alleged undercompensation was calculated by the court-appointed experts were not established in advance and that therefore the second *Altmark* condition does not appear to have been complied with in relation to the non-notified measure.
- (63) Considering the cumulative nature of the *Altmark* conditions, there is no need for the Commission to examine whether the other two *Altmark* conditions have been met in the present case. Accordingly, the payment of additional compensation to Buonotourist for services performed during the period under review confers on that company a selective economic advantage within the meaning of Article 107(1) of the Treaty.

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

- (64) In its observations, Buonotourist argued that the market for public transport in Italy was not open to competition from undertakings established in other Member States during the period under review, so there could be no effect on trade or distortion of competition as regards the disputed measure.

⁽¹⁵⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] EU:C:2003:415, paragraphs 87 and 88.

- (65) The Commission recalls, in the first place, that the disputed measure was implemented on 21 December 2012, long after the market for public passenger transport was opened to competition in Italy. Since it is at that point in time that the measure under review produces its effects on the market, it is also at that point in time that it must be assessed whether the measure is liable to distort competition or affect trade between Member States.
- (66) In any event, the Commission further notes that, as the CJEU remarked in its *Altmark* judgment, since 1995 several Member States had started to open certain transport markets to competition from undertakings established in other Member States, so a number of undertakings were already offering their urban, suburban or regional transport services in Member States other than their State of origin by that point in time.
- (67) Therefore, any compensation granted to Buonotourist should be considered likely to distort competition for the provision of passenger transport services by bus and likely to affect trade between Member States to the extent that it impairs the ability of transport undertakings established in other Member States to offer their services in Italy and strengthens the market position of Buonotourist by releasing it from costs which it would normally have had to bear in its day-to-day management or normal activities ⁽¹⁶⁾.
- (68) The Commission also notes that Buonotourist is active on other markets, i.e. rental services, and thus competes with other companies within the Union on those markets. Any compensation granted to Buonotourist might also threaten to distort competition and affect trade between Member States on those markets as well.
- (69) Accordingly, the Commission concludes that the measure distorts competition and affects trade between Member States.

6.1.4. Conclusion

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

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

- (71) According to the reasoning of the Consiglio di Stato, Buonotourist acquired the right to obtain additional compensation for the provision of the transport services in question at the time at which it carried out those services. For this reasoning to hold, the compensation payments must have been exempted from the compulsory notification procedure pursuant to Article 17(2) of Regulation (EEC) No 1191/69. Otherwise, to the extent the compensation constitutes State aid within the meaning of Article 107(1) TFEU, failure to notify that compensation would render that compensation unlawful in accordance with Article 108 of the Treaty.
- (72) This is because, in accordance with Article 17(2) of Regulation (EEC) No 1191/69, compensation paid pursuant to that Regulation is exempted from the preliminary information procedure laid down in Article 108(3) of the Treaty and thus from notification.
- (73) However, it follows from the *Combis* judgment that the concept of 'public service compensation' within the meaning of that provision must be interpreted in a very restrictive manner ⁽¹⁷⁾. The exemption from notification provided by Article 17(2) of Regulation (EEC) No 1191/69 covers only compensation for PSOs imposed unilaterally on an undertaking pursuant to Article 2 of that Regulation that is calculated using the method described in Articles 10 to 13 of the same Regulation (the common compensation procedure), and not public service contracts as defined by Article 14 of the Regulation. Compensation paid pursuant to a public service contract as defined by Article 14 of Regulation (EEC) No 1191/69 which entails State aid must be notified to the Commission before it is put into effect. Failure to do so will result in that compensation being deemed to be unlawfully implemented aid in accordance with Article 108 of the Treaty.
- (74) The question of whether Article 17(2) of Regulation (EEC) No 1191/69 indeed released the Italian authorities from prior notification in the present case thus depends, first, on whether a PSO was in fact unilaterally imposed on Buonotourist by the Region and, second, on whether the compensation paid pursuant to that obligation complies with the requirements of Regulation (EEC) No 1191/69. The Commission will examine both questions in turn.

⁽¹⁶⁾ Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55.

⁽¹⁷⁾ Case T-157/01 *Danske Busvognmænd*, [2004] EU:T:2004:76, paragraphs 77 to 79.

(i) *PSO unilaterally imposed*

- (75) The Commission notes that neither the Italian authorities nor Buonotourist were able to provide it with any entrustment act related to the period under review. Buonotourist only provided the Commission with contracts which were implemented as from 2003.
- (76) The Italian authorities claim that the sample concession contract provided by them — which concerned another undertaking — was the standard one in use in the Region during the period under review. However, the sample concession contract was only valid from April 1972 to December 1973, which is more than 20 years before the period under review, and before the entry into force of Law No 151/1981, as enacted by Regional Law No 16/1983, on which basis Buonotourist was compensated in the first instance. Although the sample concession contract would seem to provide for some obligations that could qualify as PSOs (e.g. at points 2, 9 and 10), including the duty to apply discounts for students, workers, teachers, and private and public employees and the duty to transport certain categories of passengers for free, the Commission has no evidence that the same obligations were actually applicable to Buonotourist during the period under review because of the absence of an entrustment act. Rather, considering that the services provided were regular scheduled services, it was necessary for the concession regulations, which granted Buonotourist an exclusive right to provide those services, to specify in advance the arrangements for the services to be provided. Buonotourist has not provided evidence to show that those arrangements were unilaterally imposed by the Region, instead of being proposed by the operator, in return for the right to provide services on an exclusive basis, and subsequently authorised by the Region. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (77) The Commission has also assessed whether a PSO could be inferred from Regional Law No 16/1983, it being the legal basis identified by both the Region and Buonotourist for the compensation granted to the company in the period under review (see recitals 23 and 40). In this respect, it must be noted that that Regional Law only provides that entities and public or private undertakings providing public local transport services under a concession regime could receive public contributions. Article 2 of the Regional Law clearly states that: ‘any possible loss or deficit not covered by the regional contributions as determined above [in Article 2] remains chargeable to the individual undertakings’.
- (78) The Commission further notes that the Regional acts provided by Buonotourist (see recital 40) mentioned some contractual obligations in place between Buonotourist and the Region during the period under review. However, those acts do not clearly identify obligations that could qualify as PSOs, despite being an indicator of their possible existence. Moreover, the existence of contractual obligations excludes a PSO being unilaterally imposed on Buonotourist. In any case, the methodology used by the court-appointed expert to calculate the alleged undercompensation does not refer to those obligations.
- (79) On the possible existence of a tariff obligation, although the calculation of additional compensation by the court-appointed expert was made on the basis of Article 11 of Regulation (EEC) No 1191/69, the Commission has no evidence that such obligations were in fact unilaterally imposed on Buonotourist. According to Article 2(5) of Regulation (EEC) No 1191/69, tariff obligations are ‘obligation[s] imposed on 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’. By contrast, 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’. The Commission acknowledges that Point 27 of the sample concession contract from 1972/73 lays down applicable tariffs for the operator it covers, but recalls that it has received no similar concession or entrustment act concerning Buonotourist for the period under review from which it could establish the imposition of such obligations on the undertaking. In any event, the Commission notes that, under Article 2 of Regional Law No 16/1983, the annual compensation to undertakings providing public transport services was calculated *ex ante* as the difference between the revenues deriving from the application of minimum tariffs and the so-called ‘standard cost’ (see recital 23). The Commission therefore concludes that the Regional Law provided for minimum tariffs, which also excludes the existence of a general tariff obligation.
- (80) In any event, it does not appear that any PSO Buonotourist might have been required to carry out was unilaterally imposed on it. The Commission notes in this respect that Buonotourist took the initiative in requesting the renewal of concessions for all seven years during the period under review.

- (81) Buonotourist's argument that the operators were duty bound to operate the routes under PSOs, even if the Region repeatedly reduced the amount of the standard cost, and that legal action would have been taken against them for interrupting a public service if they did indeed stop their activities, has not been backed up by any evidence, so it cannot be used to support the finding of unilaterally imposed PSOs in the present case.
- (ii) *Compliance of the compensation with the common compensation procedure*
- (82) Even if the PSOs were shown to have been unilaterally imposed on Buonotourist in this instance, which is not the case, the compensation for those services would still need to comply with the common compensation procedure (Section IV) of Regulation (EEC) No 1191/69 to be exempted from prior notification under Article 17(2) of that Regulation. The Commission does not consider this to be the case.
- (83) First, the Commission notes that the common compensation procedure under Regulation (EEC) No 1191/69 sets out a method for calculating the amount of compensation to be granted in respect of the financial burdens resulting from the imposition of a public service obligation. With effect from 1 July 1992, Regulation (EEC) No 1191/69, by virtue of Article 1(5)(a) thereof, required transport undertakings, which operate not only services subject to PSOs 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.
- (84) The Commission further notes that, according to the Court of Justice in the *Antrop* judgment, the requirements set out by that procedure are not fulfilled where it is not possible to ascertain on the basis of reliable data from the relevant accounts the difference between the costs imputable to the part of its activities in the area covered by the concession and the corresponding income and, consequently, where it is not possible to calculate the additional cost deriving from the performance of public service obligations by that undertaking ⁽¹⁸⁾.
- (85) The Commission considers that the compensation awarded to Buonotourist does not comply with these requirements. Buonotourist confirmed that, in addition to its alleged PSO activities, it also engaged in rental services activities. In addition, the Region alleges that Buonotourist also engaged in other activities — in interregional and international bus services (see recitals 50 to 52). However, neither the Italian authorities nor Buonotourist demonstrated that proper separate accounts were kept for these activities. This seems to be implicitly confirmed by Buonotourist when it asserts that the amounts indicated in the 'E forms' sent each year to the Region also included revenues for routes that were not subject to concessions (see recital 45).
- (86) The Commission considers that the argument put forward by Buonotourist that the legal requirement to keep full accounting and administrative documentation for the period under review has now expired is not relevant to justify *ex post* an additional amount of compensation via an inductive approach. In any event, such a requirement deriving from national law, were it to be shown to exist, cannot undermine an obligation deriving from the case-law of the CJEU or Regulation (EEC) No 1191/69, which must be shown to have been fulfilled before public service compensation can be paid to a transport operator.
- (87) Second, the Commission notes that Article 13 of Regulation (EEC) No 1191/69 requires the administration to fix the amount of the compensation in advance. The calculation of the additional compensation on the basis of an *ex post* assessment, as prescribed by the Consiglio di Stato, is at odds with that provision, as already explained in recitals 62 and 63.
- (88) In the light of these observations, the Commission concludes that the additional compensation the Consiglio di Stato considers due to Buonotourist was not exempted from compulsory prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69.

⁽¹⁸⁾ Case C-504/07 *Associação Nacional de Transportadores Rodoviários de Pesados de Passageiros (Antrop) and Others v Conselho de Ministros, Companhia Carris de Ferro de Lisboa SA (Carris) and Sociedade de Transportes Colectivos do Porto SA (STCP)*, [2009] EU:C:2009:290.

6.3. COMPATIBILITY OF THE AID

- (89) Since it has not been shown that the measure under review was exempt from prior notification pursuant to Article 17(2) of Regulation (EEC) No 1191/69, the compatibility of the payment with the internal market will have to be examined, as they are considered to constitute State aid within the meaning of Article 107(1) of the Treaty, as explained in section 6.1.
- (90) Article 93 of the Treaty contains rules for the compatibility of State aid in the area of coordination of transport and PSOs in the field of transport and constitutes a *lex specialis* with respect to Article 107(3), as well as Article 106(2), as it contains special rules for the compatibility of State aid. The CJEU has ruled that that Article ‘acknowledges that aid to transport is compatible with the internal market only in well-defined cases which do not jeopardise the general interests of the [Union]’⁽¹⁹⁾.
- (91) On 3 December 2009, Regulation (EC) No 1370/2007 entered into force and repealed Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 of the Council⁽²⁰⁾. Regulation (EC) No 1370/2007 applies to the compensation of PSOs concerning public passenger transport services by rail and by road.
- (92) The Commission considers that the examination of the compatibility of the non-notified measure should be conducted under Regulation (EC) No 1370/2007, since that was the legislation in force at the time that this Decision was adopted⁽²¹⁾. It further notes that the additional compensation awarded to Buonotourist by the Consiglio di Stato was paid on 21 December 2012, so Regulation (EC) No 1370/2007 had already been in effect for more than three years on the date on which the effects of the disbursed aid occurred⁽²²⁾.
- (93) Article 9(1) of Regulation (EC) No 1370/2007 states that ‘Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the [internal] market. Such compensation shall be exempt from the prior notification requirement laid down in Article [108(3)] of the Treaty’.
- (94) For the reasons set out below, the Commission considers that the notified compensation does not comply with Regulation (EC) No 1370/2007, so it cannot be declared compatible with the internal market under Article 9(1) of that Regulation.
- (95) First, pursuant to Article 3 of Regulation (EC) No 1370/2007, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation in return for the discharge of PSOs, it must do so within the framework of a public service contract, unless the public service obligation aims to establish maximum tariffs and is imposed through a measure applicable without discrimination to all public passenger transport services of the same type in a given geographical area (general rules).
- (96) In the present case, the Commission considers that no evidence has been put forward that a contractual scheme existed between Buonotourist and the Region or that general rules establishing maximum tariffs for all passengers or certain categories of passengers were put in place. The Commission has received only one sample concession contract for the year 1972/73 concerning another company, from which it is not possible to extract reliable information on the relationship between Buonotourist and the Region in the period under review (1996-2002). Moreover, the Commission notes that, in accordance with Article 2 of Regional Law No 16/1983 — the legal basis identified by both the Region and Buonotourist for the period under review (see recitals 21 and 39) — the revenues of public transport providers derive from the application of minimum tariffs established by the Region. No reference is made to maximum tariffs.

⁽¹⁹⁾ Case 156/77 *Commission v Belgium*, [1978] EU:C:1978:180, paragraph 10.

⁽²⁰⁾ Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970, p. 1).

⁽²¹⁾ The Commission refers in this respect to the reasoning developed in recitals 307 to 313 of its Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)) (OJ L 7, 11.1.2011, p. 1). That Decision was annulled by the General Court in Case T-92/11 *Jørgen Andersen v European Commission*, [2013] EU:T:2013:143, and an appeal against that judgment is currently pending before the Court of Justice in Case C-303/13 P. The outcome of that appeal is not relevant for the outcome of the present case, since the General Court confirmed in the judgment under appeal that it is the date on which the effects of the disbursed aid occurred which determines which set of rules applies. In this case the aid was paid on 21 December 2012, so the rules, principles and criteria for assessing the compatibility of state aid which are in force on the date on which the Commission takes its Decision should be applied (see paragraph 39 of that judgment).

⁽²²⁾ Case C-334/07 P *Commission v Freistaat Sachsen*, [2008] EU:C:2008:709, paragraphs 50 to 53; Case T-3/09 *Italy v Commission*, [2011] EU:T:2011:27, paragraph 60.

- (97) The Commission therefore concludes that Article 3 of Regulation (EC) No 1370/2007 has not been complied with.
- (98) Second, the Commission notes that regardless of whether Buonotourist concluded a public service contract or was subject to tariff obligations by way of general rules, not all the provisions of Article 4 of Regulation (EC) No 1370/2007, which establishes the mandatory content of public service contracts and general rules, appear to have been respected. For instance, Article 4(1)(b) requires the parameters on the basis of which the compensation is calculated to be established in advance in an objective and transparent manner in a way that prevents overcompensation, 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 condition laid down by the CJEU's *Altmark* judgment in section 6.1, the parameters on the basis of which the alleged undercompensation was calculated by the second expert were not established in advance and therefore Article 4 of Regulation (EC) No 1370/2007 has not been complied with.
- (99) Third, 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. The Annex to Regulation (EC) No 1370/2007 provides that the compensation may not exceed an amount corresponding to the financial amount composed of the following factors: costs incurred in relation to the PSO minus ticket revenue, minus any positive financial effects generated within the network operated under the public service obligation, plus a reasonable profit. In addition, that Annex requires costs and revenues to be calculated in accordance with the accounting and tax rules in force. Furthermore, for transparency reasons, there should be separation of accounts (Point 5 of the Annex to Regulation (EC) No 1370/2007).
- (100) As noted in recital 85, Buonotourist did not apply proper account separation. 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).
- (101) 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 through the inductive methodology.
- (102) Accordingly, the Commission considers that the additional compensation ordered by the Council of State was not paid in accordance with Regulation (EC) No 1370/2007, and therefore that the non-notified measure is incompatible with the internal market.

6.4. THE COMPENSATION AWARDED BY THE CONSIGLIO DI STATO DOES NOT CONSTITUTE DAMAGES

- (103) In the opening decision, the Commission invited interested parties to comment on whether the judgment of the Consiglio di Stato concerns an award for damages for alleged breach of law as opposed to an award of public service compensation based on the applicable Council Regulations. Neither the Italian authorities or Buonotourist addressed the question in their observations.
- (104) The Commission notes in this respect that, under certain circumstances, compensation for damages due to the wrongful acts or other conduct by the national authorities ⁽²³⁾ does not provide for an advantage and is therefore not to be considered State aid within the meaning of Article 107(1) of the Treaty ⁽²⁴⁾. The purpose of compensation for damage suffered is different from that of State aid since it aims to bring the damaged party back to the situation in which it found itself prior to the damaging act, as if the latter had not occurred (*restitutio in integrum*). The Commission further notes, in that respect, that for compensation for damages to fall outside the State aid rules, it must be based on a general rule of compensation ⁽²⁵⁾. The Commission finally recalls that the CJEU, in its judgment in *Lucchini*, held that a national court was prevented from applying national law where the application of that law would have the effect of frustrating 'the application of Community law in so far as it would make it impossible to

⁽²³⁾ For example, tort or unjust enrichment.

⁽²⁴⁾ Joined Cases 106 to 120/87, *Asteris and others v Greece and EEC*, [1988] EU:C:1988:457.

⁽²⁵⁾ See Commission Decision of 16 June 2004 on Dutch aid in favour of Akzo Nobel in order to minimise chlorine transports (Case N 304/2003), summary notice in OJ C 81, 2.4.2005, p. 4; See also Commission Decision of 20 December 2006 on Dutch aid for relocation of car dismantling company Steenbergen (Case N 575/2005), summary notice in OJ C 80, 13.4.2007, p. 1.

recover State aid that was granted in breach of Community law' ⁽²⁶⁾. The principle underlying this pronouncement is that a rule of national law cannot be applied where such application would frustrate the proper application of Union law ⁽²⁷⁾.

- (105) As regards the additional compensation awarded to Buonotourist by the Consiglio di Stato, the Commission observes that, while no reference was made to Regulation (EEC) No 1191/69 in the operative part of the Consiglio di Stato's judgment, that judgment refers to Buonotourist's right to receive amounts by way of compensation pursuant to Articles 6, 10 and 11 of Regulation (EEC) No 1191/69, which must be determined by the administration on the basis of reliable data. This would suggest that Buonotourist's right to additional compensation flows, according to the Consiglio di Stato, not from a general rule of compensation for damages as a result of a wrongful act or other conduct of the national authorities, but from rights allegedly derived from Regulation (EEC) No 1191/69.
- (106) In any event, the Commission considers that an award of damages in favour of Buonotourist for the alleged illegal unilateral imposition of PSOs by the Italian authorities, calculated on the basis of the common compensation procedure laid down by Regulation (EEC) No 1191/69, would be in breach of Articles 107 and 108 of the Treaty. This is because such an award would produce the same result for Buonotourist 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 of the conditions laid down by the Union legislator under which competent authorities, when imposing or contracting for PSOs, compensate public service operators for costs incurred in return for the discharge of PSOs. Indeed, an award of damages equal to the sum of the amounts of aid that were planned to be granted would constitute an indirect grant of State aid found to be unlawful and incompatible with the internal market ⁽²⁸⁾. Following that line, the General Court has considered indemnification clauses for the recovery of State aid to constitute State aid ⁽²⁹⁾.
- (107) In any event, the sample concession contract from 1972 under which Buonotourist supposedly provided the transport services in question did not provide for the payment of any financial compensation. Buonotourist agreed to run the services under the conditions established in the concession at its own risk. This conclusion is also confirmed by Article 2 of Regional Law No 16/1983, which provided that any loss or deficit not covered by public contributions was to be borne by the service providers.
- (108) Accordingly, the Commission does not consider the judgment of the Consiglio di Stato to constitute an award of compensation for damages suffered by Buonotourist as a result of the wrongful act or other conduct of the national authorities, but as the grant of unlawful and incompatible State aid, which is prohibited under Article 107(1) of the Treaty.
- (109) In the light of the foregoing, the Commission concludes that the non-notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

7. RECOVERY OF THE AID

- (110) In accordance with the Treaty and the CJEU's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid ⁽³⁰⁾ 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 ⁽³¹⁾. In this context, the CJEU has established that that objective is attained once the recipient has repaid the

⁽²⁶⁾ Case C-119/05 *Lucchini*, EU:C:2007:434, paragraph 59.

⁽²⁷⁾ *Ibid*, paragraph 61.

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

⁽²⁹⁾ Case T-384/08 *Elliniki Nafpigoikataskevastiki AE Chortofylakeiou v Commission*, EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission*, EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council*, EU:C:2013:785, paragraph 44.

⁽³⁰⁾ Case C-70/72 *Commission v Germany*, [1973] ECR 813, paragraph 13.

⁽³¹⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, [1994] ECR I-4103, paragraph 75.

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 ⁽³²⁾.

- (111) In line with that case-law, Article 14 of Council Regulation (EC) No 659/1999 ⁽³³⁾ 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’.
- (112) Therefore the State aid identified in this Decision must be recovered by Italy, insofar as it has already been paid out to Buonotourist. Italy must add recovery interest to that aid amount, calculated from the date on which the unlawful aid was put at the disposal of Buonotourist (i.e. from 21 December 2012) until the date of its recovery ⁽³⁴⁾, pursuant to Chapter V of Commission Regulation (EC) No 794/2004 ⁽³⁵⁾.
- (113) Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 1 111 572 in favour of Buonotourist unlawfully granted by the Italian Republic, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

1. The Italian Republic shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from 21 December 2012 until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽³⁶⁾ amending Regulation (EC) No 794/2004.
4. The Italian Republic shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. The Italian Republic shall ensure that this Decision is implemented within 4 months following the date of its notification.

Article 4

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

⁽³²⁾ Case C-75/97 *Belgium v Commission*, [1999] ECR I-3671, paragraphs 64 and 65.

⁽³³⁾ 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).

⁽³⁴⁾ See Article 14(2) of Regulation (EC) No 659/1999.

⁽³⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽³⁶⁾ 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).

immediately submit 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

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 19 January 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission
