



EUROPEAN COMMISSION

Brussels, 02.10.2013
C(2013) 6251 final

PUBLIC VERSION

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COMMISSION DECISION

of 2.10.2013

State aid Measure SA.33037 (C/2012) – Italy

Compensation of Simet SpA for public transport services provided between 1987 and 2003

(Only the Italian version 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 sub-paragraph 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 above Articles¹, and having regard to those comments,

Whereas:

¹ OJ C 216 of 21.7.2012, p.45

1. PROCEDURE

- (1) By electronic notification of 18 May 2011, the Italian authorities notified, in accordance with Article 108(3) of the Treaty, the compensation to Simet SpA (hereinafter: 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 *Consiglio di Stato*, Italy's Supreme Administrative Court (hereinafter: 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 of 31 May 2012, the Commission communicated to the Italian authorities its decision to initiate the procedure under Article 108 (2) of the Treaty (hereinafter: 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 passenger transport services by bus based on service concessions granted by the Italian State under Law 1822/39². 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 revenues, Simet also provides other services, including international travel services, tourism services and bus rental services³, accounting for the remaining one-third of its total revenues.
- (5) The first time Simet requested public service compensation for its inter-regional bus service with respect to years starting from 1987 from the Ministry for Infrastructure and Transport (hereinafter: the Ministry)⁴ was in October 1999. That request, as well as subsequent requests, was denied by the Ministry, as it considered that it had not entrusted Simet with public service obligations.

² Law of 28.9.1939 - 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).

³ see <http://ngs.Simetspa.it/portale/azienda/>

⁴ Simet's letter of 22 October 1999, reference 175/99

- (6) According to the Italian authorities, Simet, similar to other providers of inter-regional scheduled bus transport services, operated on the basis of provisional licences (concessions), which were renewed annually upon the request of the company. Those concessions provided the company with the exclusive right to furnish the relevant services. The annual concession regulations specified that the operation of the service did 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. The tariffs proposed by the company itself were also reflected in the annual concession regulations accepted by the Ministry.
- (7) Over time, the company submitted a number of requests to change the modalities of the services provided, which were normally accepted on the basis of the procedure described in Presidential Decree 369/94⁵. 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 by the Consiglio di Stato preceding the opening decision

- (8) In response to the refusals by the Ministry to grant public service compensation for the period starting from 1987, Simet brought legal action before the Italian administrative courts requesting compensation for the discharge of public service obligations.
- (9) Following a number of subsequent appeals, the *Consiglio di Stato*, by judgment of 9 March 2010 (*decisione 1405/2010*), recognised Simet's right to receive payment for its scheduled (predominantly inter-regional) bus services, covered by concessions issued by the Italian State. The precise amount of the compensation was left 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 define from which legal act and in which form the imposition of the public service obligations followed. An order of the *Consiglio di Stato* (*ordinanza 2072/2011*), rendered on 18 January 2011, following the failure of the administration to comply with Judgment 1405/2010, is somewhat more explicit in this respect. Notably, the *Consiglio di Stato* states that "*the Ministry has repeatedly denied the company the opportunity to change the routes, times, stops, as well as ordered to keep transportation tariffs at a level not exceeding those charged by Ferrovie dello Stato (Italian State Railways) – these are elements symptomatic of carrying out a public service, according to the company*".
- (11) While Judgment 1405/2010 mentions the new 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 1107/70⁶ governing public service compensations, explaining that "*it lays down compensation criteria which are not dissimilar to those laid down in previous Community regulations*", the *Consiglio di Stato* 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 of 26 June 1969 on action by Member States

⁵ Presidential decree of 22.4.1994 – Regulations on simplifying the concession procedure for ordinary bus lines under government jurisdiction.

⁶ OJ L 315, 3.12.2007, p. 1–13

concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway⁷.

- (12) The Italian authorities have decided to await the assessment of the notified measure by the Commission before executing the judgments of the *Consiglio di Stato* (*decisione* 1405/2010 and *ordinanza* 2072/2010) and pay the compensation ordered to Simet.

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 (hereinafter: the initial report), without endorsing the estimate contained in that report. The initial report estimated the compensation due at approximately EUR 59.4 million⁸.
- (14) Subsequently, however, the relevant claims for compensation were reassessed as, following the opening decision, the *Consiglio di Stato* asked for an independent evaluation on the appropriate level of compensation. The outcome of this evaluation is discussed in sections 2.6 and 2.7 below.

2.4. Duration

- (15) Although Simet claimed compensation for services provided until the end of 2013⁹, the Italian authorities consider that the relevant period for the purpose 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 that judgment refers to compensation for the years 1987 to 2003.

2.5. The 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, a new order was adopted by the *Consiglio di Stato*, *ordinanza* 270/2012, appointing a panel of independent experts to decide the manner of enforcing Judgment 1405/2010.
- (17) The panel of experts, consisting of a chairman and two members, was charged with the task of calculating the amount of compensation payable to Simet under Judgment 1405/2010. Simultaneously, the parties to the dispute appointed their own experts, which provided comments on the (intermediate) findings of the panel of experts. This led to the exchange of a number of reports and replies.

⁷ OJ L 156, 28.6.1969, p. 1–7

⁸ For each year under review, the annual compensation was determined as a sum of the deficit stemming from the 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 this period. The required return on equity invested in scheduled bus services was estimated at a level between 20 % and 36 % during the period 1987 to 2003. As the relevant annual compensations were not paid in the years for which they were calculated, the consultant calculated the net present value (NPV) of the relevant compensation. More details on the methodology used in the initial report are available in the opening decision.

⁹ Based on Article 9 of the Legislative Decree 285/2005 which replaced law 1822/39, the licensing arrangements under the former law 1822/1939 can be prolonged until the end of 2013.

- (18) The proceedings of the panel of experts ended in August 2012. The panel did not reach a unanimous conclusion. Instead, two separate reports were submitted to the *Consiglio di Stato*:
- On 29 August 2012, a minority report endorsed by the president of the expert panel appointed by the *Consiglio di Stato* was submitted, which concludes that the available data did not suffice to determine the compensation to be paid to Simet and therefore that no compensation could be awarded.
 - On 20 August 2012, a majority report endorsed by two of the three experts appointed by the *Consiglio di Stato* was submitted in which the experts concluded that the compensation payable to Simet amounts to EUR 22 049 796 million.
- (19) The final decision on the amount of compensation due to Simet has not yet been taken by the *Consiglio di Stato* in light of the on-going State aid procedure before the Commission.

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 No 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);
 - the impossibility of replacing the separate accounts with other accounting systems, which have not been proven to enable precise identification of all cost and revenue elements;
 - as to the years for which analytical accounting data are available (only two, namely 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 for exercising control over 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 proof of the damage incurred by Simet, which had the burden of providing such evidence in the proceedings which 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 revenues

- (23) For the years 1987 to 1992 and 2002-2003, the experts extrapolated revenues derived from scheduled bus services directly from the financial account statements. For the period 1993 to 2001, the experts used Simet's documentation on receipts, since the financial account statements for that period do not detail revenues derived from those services¹⁰. On the basis of these calculations, the total revenue for the period 1987-2003 was determined at 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. As regards the total amount of costs, the experts took them from each of the annual financial statements. Then, to reconstruct 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. The operating costs attributable to inter-regional scheduled bus services were finally 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 statements¹¹. Consequently, for those years the experts deducted from the company's annual financial statements the value of total operating costs as 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 costs. 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 analytical accounting was applied, the relevant documents were not exhaustive, so that it was decided to use the same method for the identification of costs stemming from the scheduled bus service as for the previous years.

¹⁰ Apparently, following 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

¹¹ See the previous footnote

(26) For the years 2002 and 2003, analytical accounting data were available. Therefore, the experts 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 km travelled and the cost per km was then multiplied by the number of km 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 tolls, parking fees, rental of third-party vehicles for scheduled bus services, purchases for on-board services, reimbursement of travelling personnel's expenses.
- The third category of costs includes "indirect costs" and comprises indirect labour costs, overhead, bus insurance, vehicle ownership tax, rent payable 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-mentioned periods, the total costs related to the scheduled bus services for the period 1987-2003 was determined at 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 as 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:

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

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 has been 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

β_a = Beta of the security

\bar{r}_m = Expected market return

- (32) The interest rate for 10 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 market¹².
- (34) The beta¹³ of the shares in Simet's capital was calculated by taking an unlevered beta¹⁴ value of 0.39 for the bus service and transport sector¹⁵. That beta value was subsequently adjusted relative to the financial structure reported by the company for each year:

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

- (35) As to the Italian corporate tax rate applied, it was 36 % from 1987 to 1994, 37% from 1995 to 2000, and 36 % from 2001 to 2002.
- (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 had to be adjusted as follows:

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

- (37) On the basis of these formula, the experts calculated 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 interest related to late payment is EUR 8 245 124 (compensation related to the operating loss and remuneration of the capital employed).

¹² This figure was taken from a database compiled by Professor A. Damodaran. See www.damodaran.com.

¹³ A measure of the volatility, or systematic risk, of a security or a portfolio in comparison to the market as a whole.

¹⁴ Unlevered beta = beta of the company without any debt

¹⁵ This figure was taken from a database compiled by Professor A. Damodaran. See www.damodaran.com, "auto and trucks"

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 until July 2012.
 - subsequently, legal 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 *Consiglio di Stato* does not concern the 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 *Consiglio di Stato* 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 compensations, it often approved such compensations by applying the Community framework for State aid in the form of public service obligations by analogy. 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.
- (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 *Consiglio di Stato*.
- (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 OPENING 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* case-law¹⁶ had been fulfilled.
- (47) Second, the Commission raised the question as to the applicable legal framework. As the compensation ordered by the *Consiglio di Stato* 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 *Consiglio di Stato* 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 obligations¹⁷.
- (50) Fourth, if further investigation confirmed that at least one of the conditions for exemption from notification pursuant to Regulation (EEC) No 1191/1969 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 *Consiglio di Stato* excluded the possibility of overcompensation. The Commission noted the absence of a proper account separation by Simet until at least 2000¹⁸ and questioned the possibility to precisely establish *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.

¹⁶ Case C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* [2003] ECR I-7747.

¹⁷ See Article 1(5) of Regulation (EEC) No 1191/69 as amended by Regulation (EC) No 1893/91.

¹⁸ Until 2000, no account separation was implemented at all

4. COMMENTS FROM ITALY

- (52) In its submissions, the Italian authorities considered that the notified measure constitutes State aid within the meaning of Article 107(1) of the Treaty, in particular, since it does not satisfy all the conditions laid down by the European Court of Justice in its *Altmark* case-law. The Italian authorities also considered that the compensation awarded by the *Consiglio di Stato* 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 concessions issued by the Ministry at the request of the company clearly specified that the service is operated entirely at the operating company's own risk, except for the guarantee of exclusive rights which existed during the period under assessment. 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 licenses 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 from July 1992¹⁹, 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 allowed 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 Ministry²⁰ was a generic request for compensation for public service obligations allegedly imposed by the concessions issued as from 1987. 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.

¹⁹ Date of entry into force of Council Regulation (EEC) No 1893/91

²⁰ Simet's letter of 22 October 1999, reference 175/99

- (58) Consequently, the Italian authorities conclude that Simet has not shown that it took responsibility for public service obligations (as defined in Article 2(2) of Regulation (EEC) No 1191/69) and has, in particular, not shown to which specific and precise obligations to operate or to carry, and to which tariff obligations, it had been subject. According to Italy, Simet has only demonstrated that it carried out various universal transport services on the basis of State concessions granted by the responsible authorities, issued at the undertaking's request. The entrustment 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 note that, for the largest part of the period of the review (1987-2001), Simet did not implement a proper accounting separation as required by Article 1(5) of Regulation (EEC) No 1191/69²¹. It has therefore not been possible to calculate the additional net costs resulting from the fulfilment of the public service obligations, so that the conditions as laid down in Article 10 of Regulation (EEC) No 1191/69 are not met.
- (60) Finally, the Italian authorities note 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 has been exclusively calculated on the basis of an ex post assessment.
- (61) The Italian authorities consider that an assessment under Regulation (EC) No 1370/2007 raises largely the same issues (including absence of a clearly defined public service obligations, absence of the objective compensation parameters decided in advance, absence of account separation, etc.) as an assessment under Regulation (EEC) No 1191/69. With regard to the concept of “reasonable profit”, as set out in the Annex to Regulation (EC) No 1370/2007, the Italian authorities consider the rate of return proposed by Simet in the initial report to be inflated for a situation where compensation is determined ex-post and eliminates the risk of unforeseen costs/losses.
- (62) The Italian authorities have fully endorsed the findings of the minority report, which concluded that the amount of the compensation could not be calculated . At the same time, the Italian authorities consider that certain material and methodological errors are present in the majority report. Notably, 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. Similarly, the Italian authorities contested the fact that that report:
- does not limit the sum of capital employed to the capital attributable to the public service obligations, but took the entire capital employed for the purposes of the calculation of the compensation. That is, the capital used for other business activities of the company, such as travel agencies, international services, bus hire with driver, was 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

²¹ No account separation existed until 2000 at all.

- does not properly calculate the interest related to the fact that compensation amounts were not paid in the years for which they were determined. Namely, the Court experts 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 disagrees 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. Similarly, Simet had to obtain prior authorisation from the Ministry's Provincial Motor Vehicle Offices concerning the type and characteristics of busses 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 modalities of the services provided by it. Notably, concerning the period under review, Simet submitted (partial) refusals with respect to²²:
- 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).
- (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".

²² The Commission did not analyse other submissions as they do not concern the period covered by the *Consiglio di Stato's* decisions.

- (67) Simet disagreed with the claim in recital 16 of the opening decision that the tariffs proposed by the company were reflected in the annual licence regulations. Initially, the fares for long-distance routes had to be similar to those for second-class rail travel. This is *inter alia* supported by the Ministerial Memo of 19 December 1988 (D.C. III Div 32 No 3846), according to which “*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 to the level of prices of the state railway company (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 passages 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, in turn, stipulates that for that year the fare should be increased by 6.1 % for State-run bus lines. 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, mentions (in point 2) that the tariffs and prices of State-run road transport services are “regulated”.
- (69) Finally, the concessions issued by the Ministry state that the fare is “laid down”, i.e. decisively fixed by the administration. Not being a simple “authorisation” but a “concession”, the licences 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 shall be those approved by the Provincial Motor Vehicle Office of the Ministry. Simet argues that since fixed fares render the services that can be offered to users inelastic, 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 not able to implement pricing policies that would usually be practised by an undertaking in a modern, free and competitive market. On the one hand, Simet stressed 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 lower fares 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 *Consiglio di Stato*) 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 stresses 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 breach the right to freedom of enterprise anchored in Article 41 of the Italian Constitution, since they cause material loss to the company in the running of its business activity. They were therefore deemed unlawful and, as such, entitled Simet to repayment of the losses suffered. The *Consiglio di Stato* recognised that the Ministry had caused unjustified injury to Simet by obliging it to perform public service obligations in violation 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. Indeed, according to Simet, Regulation (EEC) No 1191/69 allows service obligations to be imposed to "meet the transport needs of a region" (Article 1(2)) and not "in a region".

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 1822/39²³ (law applicable during the period under consideration). According to this law, the regulatory framework for scheduled services falling within the authority of the State (also known as "ordinary scheduled bus services") was as follows:

²³ Since repealed and replaced by Legislative Decree No 285/2005.

- (i) The service was operated under a system of concessions.
 - (ii) Concessions were awarded upon application of the undertakings.
 - (iii) No selection procedures for 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 for all undertakings. Consequently, concessions lasted one year and the undertakings (including Simet) applied for renewal of the concession each year.
 - (v) The concessions granted on the undertakings' application gave operators the exclusive right to operate the service on the route identified in the concession regulation.
 - (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.
 - (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 applied²⁴.
- (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 said 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. Notably, 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 1822/39²⁵.

²⁴ Article (2)(2)(e) of Presidential Decree No 369 of 22 April 1994

²⁵ For instance, in 1992 the Ministry accepted to move bus stops for safety reasons on the Rossano – Naples link; 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 stressed that the documentation submitted by Simet showed that in 1992 the Ministry had accepted the fare increase requested by it on the Rossano-Naples link.

- (79) While acknowledging that Simet was refused 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 modalities of the services provided as laid down in existing concession regulations followed by refusals. In any event, the Ministry never rejected Simet's requests for the removal of stops in sparsely populated areas and for changes to the timetables.
- (80) Concerning the clauses of the concession regulations 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 lodged any application for fare reduction.
- (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 connection with inflation and implemented circular No 801/92²⁶. That letter also points out that undertakings could operate under a different fare, 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. This circular merely provides 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 modalities 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 of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006²⁷, according to 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 equally contest Simet's interpretation of point No 6 of the concession specifications²⁸,

²⁶ Which set a ceiling on fare increases for ordinary scheduled bus services corresponding to inflation rate
²⁷ OJ L 300, 14.11.2009, p. 88.

²⁸ Point 6 of each of the concession specifications states that the timetables and fares shall be those approved by the Provincial Motor Vehicle Office of the Ministry"

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 only claimed "*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 both 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 largest part 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 *Consiglio di Stato* meant that Simet is entitled to damages, which according to the Italian authorities is neither a foregone nor an obvious conclusion based on a reading of Judgment 1405/2010²⁹, 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 would be required pursuant to 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 (as regulated by Law No 1822/39 and Presidential Decree 369/94) and subsequently to an authorisation system (as regulated by Legislative Decree 285/05).

7. ASSESSMENT OF THE AID

7.1. Existence of aid

- (86) According to Article 107(1) of the Treaty, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- (87) Accordingly, for a support measure to be considered aid within the meaning of Article 107(1), it must cumulatively fulfil all of the following conditions:
- it must be granted by the State or through State resources,

²⁹ Indeed, 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 *Consiglio di Stato* affirms that it has not assessed damages for the injury because: "All claims for damages put forward by the appellant cannot be accepted at present as only when the administration has determined the amount referred to above will it be known whether there is a residual injury not covered by the amount assessed, which must be calculated and demonstrated by company concerned."

- 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 *Consiglio di Stato* requires the Ministry to pay compensation to Simet for the provision of inter-regional bus transport services from 1987 to 2003 on routes in State competence. The resources from which this compensation would be paid are those at the disposal of the Ministry and thus constitute State resources. The decision to pay that compensation, which has been ordered by the court, is imputable to the State.

7.1.2. Selective economic advantage

(90) As a preliminary matter, the Commission notes 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 grant of the measure should also be considered selective, since it will only benefit Simet.

(92) As regards the grant 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 satisfied³⁰:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established in advance 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; 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 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

³⁰ Case C-280/00 *Altmark*, paragraphs 87 and 88.

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 showing 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 regulations upon which Simet relies to demonstrate that a public service obligation was imposed upon it specify 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 *Consiglio di Stato* 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 fulfilled in the present case.
- (95) Since the Altmark judgment requires that all four conditions are cumulatively satisfied to exclude the presence of an economic advantage where compensation is granted to undertakings in consideration for public service obligations imposed on them, there is 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 confers 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 needs to be verified 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* judgment³¹, since 1995 several Member States started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings 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.

³¹ Paragraph 79.

- (98) The Commission also notes that Simet is active on other markets, such as international travel services, tourism services and bus rental services, and thus clearly competes with other companies within the Union on 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 concludes 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 concludes that the notified measure constitutes 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 *Consiglio di Stato*, 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 must 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 that compensation illegal as it is contrary to the State aid provisions of the Treaty.
- (102) This is because, according to 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 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 manner³². 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 of that regulation. 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.

³² Case T-157/01 *Danske Busvognmænd* [2004] ECR II-917, points 77 to 79

7.2.1. Was a public service obligation unilaterally imposed on Simet by the Italian authorities?

- (104) According to Simet³³, the unilateral imposition of a public service obligation upon it can be inferred from the specifications regarding the modalities of the services to be provided as laid down in the concession regulations issued for each specific 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 supplied to it, 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 regulations 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 regulations was to provide Simet with the exclusive right to furnish the relevant services for the period under review. Despite the fact that each of those regulations stipulated that the operation of the service was not subject to compensation and was operated entirely at the company's own risk, Simet repeatedly requested the prolongation of those rights.
- (107) Second, the fact that these regulations 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 the nature of the services provided were regular scheduled services, it was necessary for the concession regulations, which granted Simet an exclusive right to provide those services, to specify in advance the modalities of the services to be provided. No evidence has been provided of formal requests to change those modalities followed by refusals by the Ministry. Nor has Simet provided evidence to show that these modalities were unilaterally imposed by the Italian authorities on Simet, rather than proposed by that operator, in return for the right to provide services on exclusive basis, and subsequently authorised by the Ministry.
- (108) Third, as regards the alleged obligation to transport postal items, Simet failed to furnish 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 regulations 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 policy³⁴,

³³ See Section 5 above.

³⁴ Until the end of 1991, Circular 13/74 of 30 April 1974 provided that, normally, the tariffs of inter-regional scheduled bus services had to be similar to those of second-class rail transportation. Subsequently, during the years 1992 to 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.

operators could submit a specific application to apply a different fare. This is clearly explained in the Ministerial letter referred to by the Simet³⁵. The Commission notes, however, that Simet 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 had ever been 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 Ministry³⁶ and the reference to "regulated" fares in Circular No 3/02 of 5 April 2002³⁷ 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 of an expansionary nature and did not concern changes in the modalities of the provision of existing services. An expansion of services was not always possible due the manner in which the operation of scheduled passenger transport services is regulated under Law No 1822/39. Indeed, concessions to provide new services or to extend the scope of existing services could only be granted 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.
- (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 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.

³⁵ Letter from the Provincial Office of Catanzaro No A/7302 of 3 July 1992

³⁶ Point 6 of the Concession Regulations

³⁷ Point 2 of Circular No 3/02 of 5 April 2002 which gave instructions for converting fares in lire to euros.

- (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]*”³⁸.
- (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 analytical accounts as regards account separation for the years 2002 and 2003 can be called into question since there is no evidence that those analytical 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) respected, as explained in section 7.1.2 above.
- (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 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 waterway³⁹. 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 cover inter-regional routes. This is because such a wide interpretation would have rendered the regulation largely ineffective as Member States

³⁸ Case C-504/07 [2009] ECR I-03867

³⁹ OJ L 169 of 29.6.1991, p. 1.

were allowed to exclude its application to undertakings whose activities were confined exclusively to the “*operation of urban, suburban or regional services*”⁴⁰.

- (120) The Commission therefore finds that the notified compensation does not comply with common compensation procedure laid down in 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 *Consiglio di Stato* 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 are considered to 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 adopted⁴¹. It notes in this respect that the compensation awarded to Simet by the *Consiglio di Stato* 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 that aid with the internal market⁴². Moreover, it is questionable that an irrevocable grant of a right to that compensation was granted to Simet prior to Judgment 1405/2010, rendered by the *Consiglio di Stato* on 9 March 2010, which effectively obliges the Italian State to make those payments to that undertaking. As explained in recital (94) above, the concessions regulations upon which Simet relies to demonstrate that a public service obligation was imposed upon it specify 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 *Consiglio di Stato*.

⁴⁰ Article 1, second paragraph, of Regulation (EEC) No 1191/69

⁴¹ 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 of 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 this 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 that judgment).

⁴² 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

- (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. According 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, so that 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 regulations fulfilled the requirements established in 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 respected. For instance, Article 4(1)(b) requires that 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 criterion of the Altmark judgment in section 7.1.2 above, the concession regulations at issue specified 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 of the Annex) and specifies how the maximum amount of compensation should be determined.
- (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 employed 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 proxy for calculating the reasonable profit.

- (130) Accordingly, the Commission considers that the compensation ordered by the Consiglio di Stato, which is not foreseen in the concession regulations, will not be paid in accordance with the provisions of Regulation 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 *Consiglio di Stato* does not concern an award of public service compensation based on the applicable Council regulation, but represents an award of damages related to a violation of Regulation (EEC) No 1191/69 which stems from the alleged illegal unilateral imposition of public service obligations in light of Articles 1(3) and 1(5) of this 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 refers 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 data⁴³. Furthermore, in Judgment 1405/2010, the Consiglio di Stato itself dismissed Simet's claim for damages, which it understood to cover the residual losses not covered by the compensation to be awarded, as well as its claim for unjust enrichment, since it considered the main claim for compensation on the basis of Regulation (EEC) No 1191/69 had been accepted⁴⁴. Thus, in point 3.3 of that Judgment the Consiglio di Stato states that "[a]ll claims for damages put forward by the appellant cannot be accepted at present as only when the administration has determined the amount referred to above will it be known whether there is a residual injury not covered by the amount assessed, which must be calculated and demonstrated by 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 regulations 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 regulations under which SIMET provided the transport services did not foresee the payment of any financial compensation. SIMET agreed to run the services under the conditions established in those concessions at its own risks.

⁴³ Point 3.3 of Judgment 1405/2010

⁴⁴ Point 3.4 of Judgment 1405/2010.

(133) Accordingly, the Commission cannot accept Simet's claim that Judgment 1405/2010 of the *Consiglio di Stato* represents an award of damages related to a violation of Regulation (EEC) No 1191/69 rather than an award of public service compensation.

8. CONCLUSION

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

HAS ADOPTED THIS DECISION:

Article 1

The compensation payments for 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. That State aid was not exempt from prior notification on the basis of Article 17(2) of Regulation (EEC) No 1191/69.

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

Article 2

This Decision is addressed to the Italian Republic.

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. In this context and for the establishment of a non-confidential version of the decision, Italy is invited to consult the company mentioned in this decision to ensure that the latter does not contain information covered by professional secrecy in meaning of the Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions.

If the Commission does not receive a reasoned request by that deadline, the Italian authorities will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid Registry
1049 Brussels
Belgium
Fax No: +32 2 2961242

Done at Brussels,

For the Commission
Joaquín ALMUNIA
Vice-President