II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 March 2004

on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group)

(notified under document number C(2004) 470)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2005/163/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having, pursuant to the aforementioned Articles, called on the parties concerned to submit their comments [1],

Whereas:

I. PROCEDURE

(1) Following numerous complaints, the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of aid paid to six companies in the Tirrenia Group, namely Tirrenia di Navigazione, Adriatica, Caremar, Saremar, Siremar and Toremar. This aid takes the form of subsidies paid directly to each of the companies in the group to support the maritime transport services those companies provide under six agreements concluded with the State in 1991. The purpose of these agreements is to guarantee the provision of maritime transport services, the majority of them connecting mainland Italy with Sicily, Sardinia and other, smaller Italian islands.

(2) By letter dated 6 August 1999, the Commission informed Italy of its decision to initiate the procedure. By letter dated 28 September 1999, the Italian authorities submitted their comments on this decision.

[1] OJ C 306, 23.10.1999, p. 2.

(3) Following the publication of the Decision in the Official Journal [2], many private operators providing maritime transport services in competition with the companies of the Tirrenia Group submitted comments to the Commission. These comments were in turn forwarded to the Italian authorities to give them the opportunity to react.

(4) On 18 October 1999, Italy brought an action for annulment before the Court of Justice against the decision to initiate the procedure in respect of the part stipulating that the aid grant is being suspended [3]. In addition, the Tirrenia di Navigazione, Adriatica, Caremar, Saremar, Siremar and Toremar companies brought an action for annulment before the Court of First Instance by virtue of Article 230(4) of the Treaty [4].

(5) During the investigation phase, the Italian authorities asked for the Tirrenia Group case to be split up so that priority could be given to reaching a final decision concerning the Tirrenia di Navigazione company. This request was motivated by the Italian authorities' wish to privatise the group, beginning with Tirrenia di Navigazione, and their intention to speed up the process in relation to that company.

(6) With regard to this request, the Commission noted that, while Tirrenia di Navigazione acted as group leader in terms of the group's financial and commercial strategy, the six member companies were legally independent and operated in geographically distinct market segments subject to varying degrees of competition, both from private Italian operators and from operators from other Member States. The Commission also noted that the subsidies paid by the Italian authorities pursuant to the agreements referred to in recital 1 were calculated to cover the net operating loss on the routes served by each of the said companies and that they were granted directly to those companies without going through Tirrenia di Navigazione. Lastly, the other parts of the aid covered by the procedure — investment aid and aid of a fiscal nature — required separate analysis of each company in the group. Accordingly, the Commission decided that it could accede to the Italian authorities' request, and by Decision 2001/851/EC [5] it closed the procedure initiated in respect of the aid awarded to the Tirrenia di Navigazione company.

(7) The current Decision concerns the aid granted by Italy to the other five companies in the Tirrenia Group (hereinafter the regional companies). At various bilateral meetings between 2001 and 2003, the Italian authorities supplied information on each of the 50 or so routes operated by the five regional companies, indicating the particular features of the markets in question, the trend in the traffic handled by the public companies, the presence of any private companies competing with the public companies, and changes in the amount of public aid granted to each of the companies (documents registered under the numbers A/13408/04, A/13409/04, A/12951/04, A/13326/04, A/13330/04, A/13350/04, A/13346/04 and A/13356/04.

(8) In addition, in January, February and September 2003, a number of complainant companies, notably certain private operators competing with the Caremar regional company in the Gulf of Naples, sent to the Commission additional information containing new data to be taken into account in the investigation procedure. The Italian authorities were invited to submit their comments on these matters. A bilateral meeting was held on 20 October 2003, as a result of which the Italian authorities made certain undertakings regarding a number of high-speed connections in the Gulf of Naples. These undertakings were formalised by letter ref. 501 dated 29 October 2003, which reached the Commission on 31 October 2003 (A/33506), and confirmed by a letter dated 17 February 2004 (A/13405/04). In respect of Adriatica, the Italian authorities sent the Commission additional information by fax dated 23 February 2004 (registered under the number A/13970/04).

[2] See footnote 1.
[3] Case C-400/99, pending as to the merit. In its judgment of 9 October 2001 (ECR I-7303), the Court rejected the Commission's cross application that Italy's action be declared inadmissible.
[4] Pending Case T-246/99.
[5] OJ L 318, 4.12.2001, p. 9.

II. DETAILED DESCRIPTION OF THE AID MEASURES

The relevant markets

(9) Adriatica has traditionally handled the following international connections:

(i) in the middle and lower Adriatic:

— Ancona/Durrës (Albania),

— Bari/Durrës,

— Ancona/Split (Croatia),

— Ancona/Bar (Yugoslavia);

(ii) in the upper Adriatic (Istrian coast), between the Italian ports of Trieste, Grado and Lignano, on the one hand, and the Croatian ports of Piran, Porec, Rovinj and Brijuni, on the other.

Until 2000, Adriatica also operated other international routes, namely:

— Trieste/Durrës (Albania),

— Brindisi/Corfu/Igoumenitsa/Patras (Greece).

(10) At the same time, Adriatica operates purely local cabotage connections to the Tremiti islands from the mainland Italian ports of Ortona, Vasto, Termoli, Vieste and Manfredonia.

(11) Lastly, Adriatica provides freight services to and from Sicily on the following cabotage routes:

— Ravenna/Catania,

— Venice/Catania,

— Livorno/Catania ([6]),

— Genoa/Termini Imerese ([7]).

(12) The bulk of Adriatica's passenger traffic is concentrated on the international connections in the middle and lower Adriatic, especially the connections with Albania (49 % of the company's overall traffic) and the cabotage connections with the islands of the Tremiti archipelago ([8]). In terms of freight traffic, over 90 % of Adriatica's overall volume is accounted for by the cabotage connections with Sicily and the international connections in the middle and lower Adriatic (67 % of the company's total freight traffic) ([9]).

(13) Adriatica faces uneven levels of competition on the routes it operates. For instance, in the middle and lower Adriatic only two international routes are also operated by other shipping operators, namely:

— Bari/Durrës (Albania), on which two other Community operators operate all year round,

— Ancona/Split (Croatia), served by three other operators, including a Community operator which only operates in the high season.

On the other hand, the scheduled services to Greece from the ports of Brindisi and Bari, which Adriatica operated until 2000, were also operated by many other operators, including Community operators.

([6]) Services transferred from the Tirrenia di Navigazione company to Adriatica on 1 February 2001.
([7]) See footnote 2.
([8]) Of the 596 943 passengers carried by Adriatica in 2000, 397 146 travelled on routes in the middle and lower Adriatic (334 639 of them between Italy and Albania) and 161 024 on the connections with the Tremiti archipelago.
([9]) Of the 779 223 linear metres of freight carried by Adriatica in 2000, 306 124 was carried on routes in the middle and lower Adriatic (of which 235 542 between Italy and Albania) and 473 099 on the connections with Sicily.

(14) In the cabotage market with the Italian islands, Adriatica faces competition from other Italian operators on the connections with a number of islands in the Tremiti archipelago. However, these other operators are not present all year round, as the competing services are suspended for most of the off-season. On the market in freight cabotage with Sicily, there is competition from other Italian operators on two routes, namely Genoa/Termini Imerese ([10]) and Ravenna/Catania.

Saremar

(15) Saremar only operates connections with the islands to the north-east and south-west of Sardinia and on the Santa Teresa di Gallura/Bonifacio route between Sardinia and Corsica.

(16) On these routes, some of which are also operated by other Community competitors, Saremar has a total of 64 % of the passenger transport market and 70 % of the freight market.

(17) Apart from the Corsica/Sardinia connection, the other routes it operates are quite short, measuring an average of five nautical miles, and this, together with the frequency of the daily trips, makes these maritime connections not unlike a suburban transport system intended to provide the inhabitants of the neighbouring islands with transport and provisionment ([11]). The special nature of this market also derives from the local geography and meteorological conditions at sea, which necessitate the use of a particular type of ship not suitable for use elsewhere for other types of shipping.

(18) Saremar faces competition from other Italian operators on three of the four routes it operates, including the connection between Sardinia and Corsica.

Toremar

(19) Toremar only operates on the maritime cabotage routes between the mainland and the Tuscan islands (Elba, Gorgona, Capraia, Pianosa and Giglio). The company essentially runs a network of local services whose frequency and timetables meet the provisionment and mobility requirements of the islands' populations. The features of the network of services provided by Toremar make it comparable to a suburban local transport services network ([12]).

(20) Two of the six routes operated by Toremar are also operated all year round by other Italian operators.

Siremar

(21) Siremar operates local connections between the ports of Sicily and the smaller islands around Sicily (Aeolian islands, Pelagian islands, Egadi islands, Ustica and Pantelleria). Only the connections with the Aeolian islands archipelago to the north of Sicily extend as far as the peninsula (Naples). This is a purely local network of routes; the — generally short — trips, the frequency of service and the timetable essentially serve the mobility requirements of the islands' residents.

(22) On the connections with the Aeolian islands archipelago and the Egadi islands, Siremar operates in competition with private Italian operators.

(23) The Aeolian islands, which are home to 12 000 permanent residents, 9 000 of them on the main island of Lipari, are served by five connections operated by Siremar from the Sicilian port of Milazzo. The service is provided all year round using mixed (passenger/vehicle) vessels and high-speed passenger craft. One Italian operator competes with Siremar on four of the five routes, using mixed vessels of modest capacity, while another competes with the high-speed services on three routes in the off-season and four in the high season.

([10]) Comparable to the Genoa/Palermo route served by competitors, in that the ports of Palermo and Termini Imerese, which are only a few kilometres apart, can be regarded as mutually substitutable.

([11]) On the four scheduled routes operated by the company, there is an average of one sailing per hour between 6 a.m. and 10 p.m.

([12]) For each route served, there is an average of one sailing per hour from all ports from 6 a.m. to 10 p.m.

(24) Siremar operates year-round connections with the three islands of the Egadi archipelago to the north-west of Sicily from the Sicilian port of Trapani, using one mixed (passenger/vehicle) vessel and two high-speed craft. Two private Italian operators are present on this market; the first provides a freight-only service while the second provides high-speed services.

(25) Siremar faces no competition from private operators on the other routes it operates from the ports of Palermo and Agrigento. Siremar is thus the only carrier catering to the mobility requirements of the inhabitants of the islands in question.

Caremar

(26) Caremar operates a network of local maritime connections between the mainland ports of the Gulf of Naples (Naples, Sorrento and Pozzuoli) and the Parthenopean islands (Capri, Ischia, Procida) and between the mainland ports of Formia and Anzio (Lazio) and the minor islands of Ponza and Ventotene. The services it provides essentially meet the mobility requirements of the local communities.

(27) In the Gulf of Naples, Caremar operates in competition with other private Italian operators on the Capri/Naples, Capri/Sorrento, Ischia/Naples and Procida/Naples routes.

(28) Caremar faces no competition on the connections it operates with the islands of Ponza and Ventotene, which it serves all year round using mixed passenger/vehicle vessels. It does face competition, however, from a private operator on the high-speed services it provides on the Ponza/Formia and Ventotene/Formia routes.

(29) Again, the network of routes operated by Caremar may be likened to a suburban transport network in terms of frequency and timetable, particularly as regards the Gulf of Naples.

Subsidies paid in respect of public service obligations

The legislative framework

(30) Article 8 of Law No 684 of 20 December 1974 on the restructuring of shipping services of major national interest (Law No 684/1974) requires maritime connections with the major and minor islands to satisfy requirements relating to the economic and social development of the regions concerned, particularly the Mezzogiorno. To this end, the Law provides for operators entrusted with the provision of such services to be paid subsidies pursuant to public service contracts of 20 years' duration.

(31) Article 9 of Law No 160 of 5 May 1989 amending and converting into law Decree-Law No 77 of 4 March 1989 concerning urgent provisions regarding maritime transport and concessions (Law No 160/1989) stipulates that the routes to be served and the frequency of service to be guaranteed are to be determined by the public authorities on the basis of technical proposals from the concessionary companies, which must to that end submit a service plan every five years.

(32) In accordance with Law No 169 of 19 May 1975 on the reorganisation of local postal and commercial shipping services (Law No 169/1975), the concessionary companies must also, as an accessory activity, provide the service of transporting mail and postal packages, as well as commercial services of a purely local nature.

(33) Presidential Decree No 501 of 1 June 1979 implementing Law No 684/1974 as interpreted and amended by Law No 373 of 23 June 1977 on the restructuring of maritime services of major national interest (Decree No 501/1979) specifies the various elements (revenue and costs) which enter into the calculation of the subsidy paid to the concessionary companies and stipulates that the times of departure and arrival on each of the routes served by the abovementioned companies are to be approved by ministerial decree. As far as vessels are concerned, the Presidential Decree requires concessionaires to use ships not more than 18 years old, of which they must be the owners, unless this is expressly waived by the Ministry. This constraint, which obliges the concessionary companies periodically to renew their fleet, constitutes a specific obligation on those shipping companies. The vessels used must in addition be assigned individually to each public service route. In addition to the ordinary services, Article 40 empowers the Minister for Merchant Shipping to arrange for the provision of additional services to satisfy extraordinary requirements in the public interest or for reasons of traffic.

(34) Law No 856 of 5 December 1986 on regulations for the restructuring of the public fleet (Finmare Group) and measures regarding private shipping (Law No 856/1986) stipulates that fares are to be set by ministerial decree on a proposal from the concessionary companies. Different fares apply for ordinary travellers and for residents and migrant workers, the latter two categories enjoying preferential rates.

The public service agreements

(35) In July 1991 the Italian State concluded identical agreements with each of the five regional companies of the Tirrenia Group. By virtue of Article 2 thereof, the agreements applied retroactively with effect from 1 January 1989 and, with a duration of 20 years, are due to expire on 31 December 2008. However, the agreements provided for the economic relations for the years 1989, 1990 and 1991 to be determined by *ad hoc* measures, which are not covered by this Decision.

(36) Under the terms of Article 3 of the agreements, the amount of the annual subsidy is established on the basis of an application which the company submits in February of each financial year. The application is then the subject of interministerial consultations and is approved in the following month of May by ministerial decree. The purpose of the annual subsidy is to enable the company to cover losses resulting from the shortfall between its operating costs and revenue. Article 5 details the economic parameters used to calculate the various cost elements taken into consideration, pursuant to Presidential Decree No 501/1979, when determining the amount of the subsidy.

The five-year plans

(37) Article 1 of the public service agreements provides for five-year plans to specify the routes and ports to be served, the type and capacity of the vessels assigned to the maritime connections in question, the frequency of service and the fares to be paid, including subsidised fares, particularly for residents of the island regions.

(38) The first five-year plan (1990-1994) was approved by Ministerial Decree of 29 May 1990, and applied retroactively as of 1 January 1990. The second plan, covering the period 1995-1999 and approved by Decree of 14 May 1996, left the routes and frequencies largely unchanged.

(39) The third plan (covering the period 2000-2004), submitted to the Italian authorities in September 1999, has not yet been approved. Pending the adoption of this plan, a Decree of 8 March 2000 ordered the companies of the Tirrenia Group to maintain the services specified in Article 9 of Law No 160/1989, using the vessels at their disposal at 31 December 1999.

The annual balancing subsidy

(40) The agreements provide for the annual balancing subsidy to be paid as follows: an initial advance payment is made in March of each year, equivalent to 70 % of the subsidy paid the previous year. A second payment, made in June, is equal to 20 % of the subsidy. The difference between the amounts paid and the shortfall between operating costs and revenue during the year in progress constitutes the balance, which is paid at the end of the year. Where a company has received a sum greater than the net cost of the services provided (revenue minus losses), it is required to reimburse the difference within 15 days following approval of the balance sheet.

(41) The annual subsidy corresponds to the accumulated net loss on the services referred to in the five-year plan, to which must be added a variable amount corresponding to the return on capital invested. The net operating loss is derived from the difference between accumulated losses, usually generated during the winter period, and recorded revenue, earned mainly in the summer period.

(42) With regard to the return on capital invested, the information supplied by the Italian authorities shows that, as a percentage of such capital, it varies from year to year, ranging from 12,5 % in 1992 to 5,1 % in 2000, in line with the market rates applied in those years.

(43) The amount of the subsidy paid to the regional companies of the Tirrenia Group pursuant to the 1991 public service agreements has evolved as follows ([13]):

ADRIATICA

(in ITL million)

YEAR	(A) OPERATING COSTS	(B) OPERATING REVENUE	(C) NET LOSS (accumulated losses minus accumulated revenue) (A — B)	RETURN ON CAPITAL INVESTED	AMOUNT OF ANNUAL SUBSIDY
1992	−127 018	64 772	−62 772	8 258	70 504
1993	−124 191	79 716	−44 475	10 615	55 090
1994	−158 533	80 324	−78 209	7 819	86 028
1995	−166 334	95 114	−71 220	9 304	80 524
1996	−170 095	95 422	−74 673	7 935	82 608
1997	−174 331	94 995	−79 336	5 788	85 124
1998	−175 809	114 210	−61 599	5 271	66 870
1999	−151 109	126 403	−24 706	3 646	28 352
2000	−137 255	109 786	−27 469	4 377	31 846
2001	−183 820	155 616	−28 204	6 147	34 351

The sizeable variations in the amount of the annual subsidy (last column) are explained by the fluctuations in the net operating costs (column C) of the international connections with Albania, Yugoslavia and Croatia, on which services were interrupted on account of the political situation in the Balkans. Conversely, the net operating costs and the annual subsidy requirement for the cabotage connections in the upper Adriatic and with the Tremiti archipelago generally remained stable between 1992 and 2001. In addition, the suspension of services to Greece at the end of 1999 brought an appreciable reduction in operating costs and thus in the size of the balancing subsidy.

([13]) Data taken from the PricewaterhouseCoopers study *Valutazione dei criteri di predisposizione dei conti economici gestionali per linea e stagionalità relativi agli esercizi 1992-1999*, supplemented by the Italian authorities to include the years 2000 and 2001. The study reproduces the analytical accounts of the Tirrenia Group companies and assesses the operating costs and revenue for each of the routes.

SAREMAR

(in ITL million)

YEAR	(A) OPERATING COSTS	(B) OPERATING REVENUE	(C) NET LOSS (accumulated losses minus accumulated revenue) (A — B)	RETURN ON CAPITAL INVESTED	AMOUNT OF ANNUAL SUBSIDY
1992	– 33 519,0	7 464,0	– 26 055,0	1 342,0	27 397,0
1993	– 35 938,0	8 365,0	– 27 573,0	2 641,0	30 214,0
1994	– 35 295,2	9 383,8	– 25 911,4	1 606,2	27 517,6
1995	– 34 605,7	11 396,6	– 23 209,1	1 781,6	24 990,7
1996	– 34 972,8	11 533,5	– 23 439,3	1 560,4	24 999,7
1997	– 36 653,4	11 746,7	– 24 906,7	1 172,8	26 079,5
1998	– 39 602,0	11 744,0	– 27 858,0	973,0	28 831,0
1999	– 40 218,8	12 425,6	– 27 793,2	738,8	28 532,0
2000	– 36 300,0	12 652,0	– 23 648,0	828,0	24 476,0
2001	– 31 105,6	12 487,0	– 17 649,5	1 094,9	18 725,1

The relatively stable level of the annual subsidy (last column) reflects the nature of the market on which Saremar operates, i.e. a local market meeting the mobility requirements of the island communities. The services the company provides have remained largely unchanged — in terms of frequency and timetables — since the public service agreement entered into force [14] and are virtually unchanged throughout any given year.

TOREMAR

(in ITL million)

YEAR	(A) OPERATING COSTS	(B) OPERATING REVENUE	(C) NET LOSS (accumulated losses minus accumulated revenue) (A — B)	RETURN ON CAPITAL INVESTED	AMOUNT OF ANNUAL SUBSIDY
1992	– 43 511,0	27 406,0	– 16 105,0	1 367,0	17 472,0
1993	– 44 907,0	30 750,0	– 14 157,0	2 145,0	16 302,0
1994	– 47 696,6	32 759,0	– 14 937,0	1 312,1	16 249,1
1995	– 47 900,0	32 000,0	– 15 900,0	1 400,0	17 300,0
1996	– 50 516,1	32 483,3	– 18 032,8	1 285,0	19 317,8
1997	– 48 900,0	31 200,0	– 17 700,0	900,0	18 600,0
1998	– 50 801,0	29 996,0	– 20 805,0	718,0	21 523,0
1999	– 47 840,1	32 362,0	– 15 478,1	588,1	16 066,2
2000	– 45 675,0	34 577,0	– 11 098,0	1 993,0	13 091,0
2001	– 44 903,1	35 573,5	– 9 329,6	3 033,5	12 363,2

[14] In 1992 Saremar carried out a total of 18 000 trips on the four routes it operates. In 2000 the number of trips was around 20 000.

The essentially local market on which Toremar operates explains the relatively stable level of the annual subsidy over the years (last column). The services the public company provided in 2000 were the same — in terms of frequency and timetables — as those provided in 1992 ([15]) and are unchanged throughout the year irrespective of seasonal variations in demand.

SIREMAR

(in ITL million)

YEAR	(A) OPERATING COSTS	(B) OPERATING REVENUE	(C) NET LOSS (accumulated losses minus accumulated revenue) (A — B)	RETURN ON CAPITAL INVESTED	AMOUNT OF ANNUAL SUBSIDY
1992	– 79 543,0	26 903,0	– 52 640,0	2 874,0	55 514,0
1993	– 75 845,0	30 444,0	– 45 401,0	5 334,0	50 735,0
1994	– 78 549,7	32 845,7	– 45 704,0	3 336,0	49 040,0
1995	– 80 947,5	33 847,0	– 47 100,5	4 363,7	51 464,2
1996	– 85 934,6	32 724,0	– 53 210,6	3 888,4	57 099,0
1997	– 97 536,9	35 203,2	– 62 333,4	3 155,1	65 488,5
1998	– 106 563,1	37 244,8	– 69 318,3	2 599,3	71 917,6
1999	– 110 611,1	40 274,2	– 70 336,9	2 211,2	72 548,1
2000	– 102 881,0	43 335,0	– 59 546,0	3 940,0	63 486,0
2001	– 106 490,0	47 314,4	– 59 175,6	4 249,9	63 425,5

The services provided by Siremar are comparable in nature to those provided by Saremar and Toremar: supply has been stable since the public service agreement entered into force ([16]) and is scarcely affected by seasonal variations. The company's high operating costs, entailing a huge annual subsidy, are explained in particular by the number of routes it operates (18 scheduled routes) in order to meet the mobility requirements of the inhabitants of the 14 islands situated off Sicily. This large number of scheduled services means that major operating costs (staff, fuel, maintenance, etc.) are incurred in guaranteeing the large number of trips the company carries out each year ([17]).

CAREMAR

(in ITL million)

YEAR	(A) OPERATING COSTS	(B) OPERATING REVENUE	(C) NET LOSS (accumulated losses minus accumulated revenue) (A — B)	RETURN ON CAPITAL INVESTED	AMOUNT OF ANNUAL SUBSIDY
1992	– 59 987,0	20 543,0	– 39 444,0	26,0	39 470,0
1993	– 63 737,0	22 810,0	– 40 927,0	1 538,0	42 465,0
1994	– 69 365,7	25 470,0	– 43 894,8	1 690,0	45 584,8
1995	– 71 389,6	24 519,9	– 46 869,7	2 173,2	49 042,9
1996	– 71 404,3	26 613,7	– 44 790,6	1 867,4	46 658,0
1997	– 73 752,0	30 420,0	– 43 332,0	1 516,9	44 848,9
1998	– 77 143,0	31 920,0	– 45 223,0	1 287,0	46 510,0
1999	– 74 172,0	30 896,5	– 43 275,5	986,6	44 262,3
2000	– 70 114,0	32 594,0	– 37 520,0	2 291,0	39 818,0
2001	– 68 316,8	33 377,9	– 34 938,9	3 366,5	38 305,4

([15]) In 2000 the company carried out a total of 9 097 trips on its network of routes, compared with 8 300 in 1992.
([16]) In 2000 Siremar carried out a total of 11 910 trips on its various routes; in 1992 it carried out 11 919.
([17]) In 2000 the company carried out a total of 11 900 trips on 18 scheduled routes (11 700 in 1992).

The stability of the annual subsidy is explained by the nature of the network of services Caremar provides; these services have remained largely unchanged since the agreement with the State entered into force [18].

The company's high operating costs, which are reflected in the level of annual compensation, arise from the number of routes it operates (11) and the frequency of connections.

Investment scheduled in the five-year plans and the business plan

(44) In addition to specifying which routes are to be served and with what frequency, the five-year plans also specify the investments the concessionary companies intend to make over the period in order to guarantee service on the routes in question. In its investigation, the Commission sought to establish in particular the way in which the costs of vessel acquisition and depreciation were taken into account for the purposes of calculating the annual subsidy.

(45) The Commission also wanted to check whether the additional investments planned for the companies in the group under the business plan which Tirrenia adopted in March 1999 for the period 1999 to 2002 contained any element of aid. The plan has the following main objectives:

— to enable the companies of the group to cope with the changed conditions on the Italian cabotage market which have resulted from its liberalisation (1 January 1999) and prepare themselves for the expiry in 2008 of the agreements concluded with the State,

— to reduce the costs of the services provided pursuant to the abovementioned agreements,

— to sustain the group's development and make best use of available resources,

— to create the conditions for privatisation of the group's companies.

(46) The business plan includes changes to the requisite investment in the services covered by the public service agreements, to be used for the decommissioning of old ships, the transfer of other vessels within the group and new investments totalling ITL 700 billion.

Preferential fiscal treatment

(47) Decree Law No 504 of 26 October 1995 introduced preferential fiscal arrangements for mineral oils used as fuel for shipping. In accordance with Article 63(3) of this Decree, excise duties are reduced for lubricants used on board.

(48) In its decision to initiate the procedure, the Commission had expressed some doubts about the way this fiscal relief was being applied to vessels laid up in Italian ports for maintenance purposes. The Commission wanted reassurance that this measure did not discriminate against other maritime operators whose ships were in the same situation.

[18] In 2000 the company carried out 12 872 trips on 12 routes (15 650 in 1992).

III. COMMENTS FROM THE PARTIES CONCERNED

Comments from the Tirrenia Group companies

(49) The Tirrenia Group companies submitted their comments on the decision to initiate the procedure by letter dated 22 November 1999. Primarily, the companies contested the notion that the compensation paid pursuant to the agreements signed with the State can be qualified as 'new aid' and hence the legitimacy of the decision to initiate the formal investigation procedure. They assert, in particular, that the Commission had been informed long before of the existence of public service compensation arrangements and that it had never raised objections regarding them. They also contend that the amount of annual compensation paid to the public companies is that which is strictly necessary and proportionate to the need to cover the additional net cost of the public service obligations. Tirrenia concludes, therefore, that such payment does not hamper competition with other market operators.

(50) At the same time, by virtue of paragraph 4 of Article 230 of the Treaty [19], Tirrenia di Navigazione and the regional companies of the Tirrenia Group instituted proceedings, currently pending before the Court of First Instance, against the Commission's decision to initiate the procedure.

Comments from private operators

(51) The Commission received comments from various private operators competing on a number of the routes served by Caremar, Saremar and Toremar. These can be summarised as follows:

— the Tirrenia Group companies practise an aggressive commercial policy on the routes on which competition from private operators is focused, taking the form of voyages at dumped prices, discounts and deferred payment systems, the only explanation for which is the public aid they receive,

— the public service obligations lack transparency, and the Tirrenia Group companies' ability to alter the extent of the obligations imposed on them, particularly in terms of the routes they serve and the imposed timetables and frequencies, is contrary to the very nature of public service obligations,

— given that services are being provided by private operators on certain routes served by the Tirrenia Group companies, the need for a public service seems highly debatable,

— the financing arrangements for investments carried out since 1995, or scheduled in the business plan, contain elements of aid, particularly as regards two vessels acquired by Viamare in 1996 and more generally in terms of the more favourable access to bank loans enjoyed by the Tirrenia Group companies,

— the Tirrenia Group companies enjoy preferential fiscal treatment for mineral oils used on board their vessels when laid up in Italian ports.

IV. COMMENTS FROM THE ITALIAN AUTHORITIES

Subsidies paid in respect of public service obligations

(52) By letter dated 29 September 1999, the Italian authorities supplied their comments on the decision to initiate the procedure. In their opinion, Article 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within the Member States (maritime cabotage) [20] allows the agreements concluded with each company of the Tirrenia Group to remain fully in force until they expire at the end of 2008. Consequently, the system of public service obligations which derives from those agreements may not be thrown into question by the decision to initiate the procedure.

[19] See footnote 4.
[20] OJ L 364, 12.12.1992, p. 7.

(53) The Italian authorities also contest the notion that the aid referred to by the Commission Decision constitutes 'new' aid within the meaning of Article 88(3) of the Treaty and that it could have affected trade between Member States before the Italian market was opened up to cabotage on 1 January 1999.

(54) Apart from these general comments, the Italian authorities stress that the presence of private operators on the routes served by the Tirrenia Group companies is an often recent and limited phenomenon, being confined to a small number of routes and concentrated in the summer season. Moreover, the method of calculating the annual compensation, which consists in deducting profit accrued during the summer from losses accumulated during the winter, helps keep the amount of compensation to the strict minimum.

Consequently, according to the Italian authorities, the compensation is necessary and strictly proportionate in respect of the public service obligations, whose characteristics it is for the Member State to define.

Regarding Adriatica's infringement of the competition rules on the connections it operated between Italy and Greece, the Italian authorities emphasise that the Commission's decision in respect of that infringement is not definitive, that the two procedures are independent of each other, that the aid was not used to finance anti-competitive behaviour, that to declare it incompatible would be equivalent to a new penalty and that to recover it would compromise both the Adriatica company and the privatisation process.

The investment scheduled in the business plan

(55) The Italian authorities stress that the investment scheduled in the business plan is designed to reduce the cost of services while maintaining a high level of quality. They also contend that the methods for financing the planned investment contain no element of aid in as much as the said investment will be financed partly from the companies' own resources and partly by means of bank loans taken out under normal market conditions.

Preferential fiscal treatment

(56) The Italian authorities have given details of the legal framework governing the fiscal treatment of mineral oils used as fuels for shipping. The information supplied to the Commission shows that, through a general decision of 2 March 1996 taken pursuant to Decree Law No 504/1995, the preferential fiscal treatment provided for by the Decree Law was extended to fuels and lubricants used by any vessel laid up in a port for maintenance operations.

(57) At the same time, Italy lodged an appeal before the Court of Justice against the decision to initiate the procedure, in respect of the part stipulating that the grant of unlawful aid be suspended ([21]).

V. ASSESSMENT OF THE AID

Subsidies paid in respect of public service obligations

Existence of aid

(58) Article 87(1) of the Treaty stipulates that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods must, in so far as it affects trade between Member States, be incompatible with the common market.

([21]) See footnote 3.

(59) The subsidies at issue are clearly granted by the State and through State resources. As for the concept of an advantage, this was interpreted by the Court of Justice in its judgment of 24 July 2003 in the *Altmark Trans* Case [22]. This ruling establishes that a State measure involving compensation for the services provided by the recipient undertakings in order to discharge public service obligations does not fall within the scope of Article 87(1) of the Treaty, in that such undertakings do not enjoy a financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them.

The Court specifies that for such compensation to escape classification as State aid in a particular case, four conditions must be satisfied:

— the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the case of the compensation paid to the Tirrenia Group companies, the Commission finds that the public service obligations imposed on the companies arise simultaneously from the agreements concluded with the Italian State in July 1991, the legal framework (see recitals 30 to 34) and the five-year plans (see recitals 37 to 39). The existence of an actual public service obligation [23] is examined in recitals 84 to 122,

— the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. In the case in question, the Commission notes that Article 5 of the agreements details the economic parameters used to calculate the various cost elements taken into consideration, pursuant to Presidential Decree No 501/1979, to determine the compensation,

— the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. This point is examined in recitals 123 to 148,

— where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. It should be noted here that the Tirrenia Group companies were not chosen as the result of a public procurement procedure. The Commission also notes that neither the applicable legal acts nor the agreements impose conditions ensuring that the compensation does not exceed the costs of a typical undertaking well run and adequately provided with means of transport. Nor do the information and data supplied by the Italian authorities and the recipients serve to establish whether this condition is satisfied.

(60) In view of the above considerations and those set out below concerning the existence of an actual public service requirement, the Commission considers that the annual balancing subsidy granted to the regional companies under the 1991 agreements confers an advantage on those companies over competing companies which provide or could provide comparable services on the relevant market.

(61) In terms of impact on intra-Community trade and distortion of competition, these are evident in the case of transport between Member States, or between Member States and third countries, liberalised by Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [24].

[22] Case C-280/00, not yet published.
[23] Judgment of the Court in Case C-205/1999 *Analir and others* [2001] ECR I-1271.
[24] OJ L 378, 31.12.1986, p. 1. Regulation as amended by Regulation (EEC) No 3573/90 (OJ L 353, 17.12.1990, p. 16).

(62) Although it is cabotage services that are at issue, the Court has noted ([25]) that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any international transport services may none the less have an effect on trade between Member States.

(63) Where a Member State grants a public subsidy to an undertaking, the provision of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State ([26]).

(64) According to the case-law of the Court, the Commission is not required, where aid has been granted unlawfully, to demonstrate the real effect of the aid on competition and on trade between Member States. Indeed, such an obligation would favour those Member States which granted aid in breach of the duty to notify laid down in Article 88(3) of the Treaty over those which did notify aid at the planning stage ([27]).

(65) The fact that this market in cabotage connections with the Mediterranean islands was provisionally exempted, up to 1 January 1999, from the application of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) does not rule out the possibility that the subsidies paid to the regional companies operating on cabotage routes with the Mediterranean islands pursuant to the agreements could have affected trade between Member States and distorted competition.

(66) In any event, even allowing that the aid paid to companies which only operated cabotage transport may not have affected trade or distorted competition prior to 1 January 1999, the situation changed as of that date, when cabotage activity was opened up to all Community operators pursuant to Regulation (EEC) No 3577/92.

(67) In the light of the criteria set out in recitals 58 to 66, it is useful to examine the situation of the regional companies with reference to the markets on which they operate.

— With regard to Adriatica, the Commission would point out that, under the agreement, the company operates not only on the cabotage market but also on international routes on which it faces or has faced competition from other Community operators since the agreement entered into force. The Commission also notes here the risk of cross-subsidies between the services provided by Adriatica on the cabotage market and those provided on the international market, particularly as the company does not keep separate accounts for these different categories of service. In these circumstances, the subsidies paid to Adriatica under the agreement may have affected trade between Member States and distorted competition.

— Regarding the four other regional companies, the Commission notes that only Saremar operates on an international route, between Sardinia and Corsica, and that it does so in competition with a private Italian operator. The fact that this route has been open to potential competition from operators from other Member States since the agreement entered into force suggests that the annual subsidy paid to Saremar to cover the net operating loss of its overall network of connections may, particularly as a result of the lack of separate accounts for the different categories of service, have affected trade between Member States and distorted competition.

([25]) Judgment in *Altmark Trans*, paragraphs 77-82, see footnote 22.

([26]) See here the Court's judgments in Case 102/87 *France v Commission* [1988] ECR 4067, paragraph 19; Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 26, joint Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 40; *Altmark Trans*, cit., paragraph 78.

([27]) Judgments in joined cases T-116/01 and T-118/01 *P&O European Ferries*, paragraph 118, Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 33, and Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 103.

— With particular regard to Siremar, Toremar and Caremar, the Commission has the following comments:

— each of these companies operates solely in one clearly defined segment of the cabotage market with the Mediterranean islands,

— until 1 January 1999, cabotage services between the Mediterranean islands were provisionally exempted from application of the principle of freedom to provide services by virtue of Article 6(2) of Regulation (EEC) No 3577/92 ([28]),

— in these various segments of the cabotage market, the regional companies compete on certain routes with private Italian operators, whose presence often predates the entry into force of the agreement; however, none of these operators operates in markets other than the Italian Mediterranean cabotage market,

— no operator from another Member State was present in these various cabotage market segments prior to 1 January 1999 and none has entered them since the market was opened up.

(68) The fact that a sector has not been liberalised, as in the case of Mediterranean cabotage prior to 1 January 1999, is not always a sufficient condition for ruling out any negative effects on trade between Member States ([29]).

(69) For one thing, the fact that three Tirrenia Group companies (Tirrenia, Adriatica and Saremar) operated in the transport market between Member States or between these and third countries and that they failed to keep separate accounts for the different categories of service suggests that all the aid they received may have affected trade between Member States and distorted competition. Moreover, it cannot be ruled out that such effects were produced by all the subsidies granted to the companies in the Group.

(70) Also, even before the cabotage market was liberalised, operators from the other Member States were free to exercise their right of establishment and provide cabotage services using ships flying the Italian flag.

(71) In any event, the fact that operators from the other Member States were able to provide competing services on the cabotage market in Italy as of 1 January 1999 suggests at least potential effects on trade over the last five years, particularly in the absence of exclusive rights granted to the regional companies under the public service agreements.

(72) In view of the above, and particularly given the fact that for the compensation to confer an advantage which may be regarded as 'aid' it is sufficient for one of the four stipulated conditions not to be satisfied ([30]), the Commission considers that all the annual compensation paid to the regional companies by the Italian authorities constitutes State aid within the meaning of Article 87 of the Treaty. Contrary to what is claimed by the recipient companies, Article 4(3) of Regulation (EEC) No 3577/92 does not prevent the aid in question from being examined. On an exceptional basis, Article 4(3) authorises the continuation of existing contracts concluded before the Regulation entered into force, even if the conditions of the procedure for awarding public services set out in the preceding paragraphs of that Article were not satisfied. The provision in question relates to the common transport policy.

([28]) See footnote 20.
([29]) Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 (OJ L 150, 23.6.2000, p. 50).
([30]) Judgment in *Altmark Trans*, paragraph 94, see footnote 22.

The new aid measure

(73) The Commission does not share the regional companies' view that the aid in question is existing aid. Firstly, it notes that the aid does not predate the entry into force of the Treaty. The annual balancing subsidy scheme was in fact only set up in its present form by Laws No 684/74 and No 169/75. Moreover, it was Decree No 501/79, Law No 856/86 and the 1991 agreements which established in detail various public service obligations, along with the cost elements to be used when calculating the balancing subsidy received by the regional companies.

(74) The Commission also notes that it has not approved the aid in question. The Commission's Decision of 6 July 1990 to close proceedings C 12/89 (formerly N 444/88) concerning the aid Italy had decided to grant to cover the losses of the Fincantieri company in 1987 and 1988 and concerning Law No 234/89 regulating aid to the shipbuilding industry in Italy [31], as referred to by the recipient companies, only concerned aid to shipyards and not the subsidies covered by the present Decision. In any event, following that Decision, the legal framework for these subsidies was substantially altered by the conclusion of the agreements, which have never been notified.

(75) In particular, by virtue of the judgment in the Lorenz case [32], the fact that the Commission may have had knowledge of the various legislative texts setting up the annual subsidy scheme and of the 1991 agreements does not mean, in the absence of prior notification in accordance with Article 88(3), that tacit authorisation was given to the annual subsidy scheme. The Court recently indicated that the mere communication of a text to the Commission does not constitute notification within the meaning of Article 88(3) of the EC Treaty [33].

(76) The Commission considers, therefore, that the aid to the regional companies constitutes new aid within the meaning of Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [34].

(77) Even supposing that the aid to the Siremar, Toremar and Caremar companies, which only performed cabotage transport, did not constitute State aid at the time it was granted, it in any event became new aid as of 1 January 1999 following the liberalisation of transport pursuant to Regulation (EEC) No 3577/92. Pursuant to Article 1(b)(v) of Regulation (EC) No 659/99, where certain measures become aid following the liberalisation of an activity by Community law, such measures are not to be considered as existing aid after the date fixed for liberalisation.

Appraisal of the compatibility of the aid

(78) The ban on aid laid down in Article 87(1) of the Treaty is not absolute. Article 87(2) and (3) and Article 86(2) of the Treaty provide for exemptions.

(79) None of the exemptions provided for in Article 87(2) of the Treaty apply to the aid awarded to the regional companies by way of the annual subsidy, which is neither aid having a social character, granted to individual consumers, nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas. With particular regard to aid of a social character, the application of Article 87(2) presupposes that the measure benefiting individual consumers does not favour certain undertakings or types of production directly or indirectly. In this respect, the Commission notes that the loss of revenue the regional companies sustain by charging reduced fares for island residents and migrant workers is taken into account in the calculation of the annual compensation. The Italian authorities cover these fare reductions, which benefit individual consumers, only when the consumers concerned travel with the public operator, benefiting the latter *vis-à-vis* its private competitors.

[31] OJ C 239, 25.9.1990, p. 10.
[32] Case 120/73 *Lorenz* [1973] ECR 1471.
[33] Order of the Court of 24 July 2003, Case C-297/01 *Sicilcassa* (not yet published in the ECR).
[34] OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accesion.

(80) Nor does this aid qualify for any of the exemptions listed in Article 87(3) of the Treaty. The aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, as specified at (b), nor is it intended to promote culture and heritage conservation as specified at (d). Nor can this aid be qualified as regional aid, as specified at (a) or (c), as it is not part of a multisectoral aid scheme which is open in a given region to all the undertakings of the sectors concerned ([35]). Moreover, in view of its object and the arrangements for granting it, the aid in question also appears to constitute operating aid, which may exceptionally be allowed only in regions which qualify it for the derogation in Article 87(3)(a) and on condition that the Member State demonstrates the existence and importance of any handicaps the aid is intended to alleviate ([36]). As the Italian authorities have not supplied sufficient information in this respect, the aid cannot be authorised on this basis. Nor can the aid in question be regarded as facilitating the development of certain activities as specified in (c), since this is aid intended to cover the operating costs of a specific maritime operator and does not form part of a general plan enabling the recipient undertaking to become economically and financially efficient without recourse to further aid.

(81) Article 86(2) of the Treaty states that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

(82) In accordance with Community case-law, as this provision lays down a derogating rule it must be interpreted restrictively ([37]). It is not therefore sufficient in this respect that the companies in question have been entrusted by the public authorities with operating a service of general economic interest; the application of the rules of the Treaty, specifically those of Article 87, must also obstruct the performance of the particular tasks assigned to the company and the interests of the Community must not be affected ([38]).

(83) To assess whether the subsidies paid to the regional companies under the 1991 agreements qualify for the derogation specified in Article 86(2) of the Treaty, the Commission must first verify the existence and extent of the public service obligations imposed on the companies in order to appraise the need for a public service and for a subsidy to compensate for its cost.

Existence of public service obligations meeting an actual requirement

Cabotage connections with the minor Italian islands

(84) Cabotage connections fall within the scope of Article 4 of Council Regulation (EEC) No 3577/92 and, for the purpose of examining State aid, the Community guidelines on State aid to maritime transport ([39]). Section 9 of the current version of the guidelines establishes that 'public service obligations (PSOs) may be imposed or public service contracts (PSCs) may be concluded for the services indicated in Article 4 of Regulation (EEC) No 3577/92', i.e. scheduled services to, from and between islands, and for the provision of cabotage services. Compensation for such services is therefore subject to the rules indicated in the quoted provision and to the rules on State aid as laid down by the Treaty and interpreted by the Court of Justice. Point 9 of the previous version of the Community guidelines stipulated that 'public service obligations may be imposed for scheduled services to ports serving peripheral regions of the Community or thinly served routes considered vital for the economic development of that region, in cases where the operation of market forces would not ensure a sufficient service level'. It also results from the case-law that public service obligations may only be imposed if they meet a real need which cannot be met by market forces alone ([40]).

([35]) See the last sentence of point 2 of the Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).
([36]) Point 4.15 of the Guidelines, see footnote 35.
([37]) Judgment of the Court of First Instance in Case T-106/95 *Fédération française des sociétés d'assurances (FFSA et al.) v Commission* [1997] ECR II-229, paragraph 173 of the grounds.
([38]) See also the judgment of the Court in Case C-179/90 *Merci convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 26.
([39]) Commission Communication C(2004) 43 — Community guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3) and, for the previous period, the 1997 guidelines (OJ C 205, 5.7.1997, p. 5) and, where applicable, the 1989 guidelines (SEC (89) 921 def. of 3 August 1989).
([40]) Judgment in *Analir and others*, see footnote 23.

(85) Pursuant to the legal acts and agreements described above, the regional companies serving the minor islands are subject, on all their routes, to a series of obligations regarding ports to be served, voyage frequencies, times of departure and arrival, types of vessel to be used and fares to be charged, all of which obligations the companies would not take on (or would not take on to the same extent or under the same conditions) if they could act solely in their own commercial interest.

(86) The purpose of these obligations is to guarantee that the principle of territorial continuity is upheld and that a sufficient number of scheduled maritime services is provided to carry passengers and goods to and from the minor Italian islands, so as to meet the mobility requirements of the local populations and the social and economic development requirements of these island regions. Fulfilment of these obligations during the lifetime of the agreements is ensured by the payment of sureties. The fact that temporary adjustments may be made to service timetables and frequencies during the course of the year, under the control of the public authorities, does not alter the fact that an obligation to provide the said services has been imposed. The rules in question thus oblige the recipient companies to perform a service of general economic interest within the meaning of Article 86(2) and a public service within the meaning of Regulation (EEC) No 3577/92.

The international connections

(87) International maritime connections fall within the scope of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [41]. The Regulation does not make express provision for minimum public service obligations to be imposed in order to guarantee maritime connections between Member States or between a Member State and a third country.

(88) However, the 2004 Community guidelines on State aid to maritime transport [42] do allow public service obligations to be imposed or public service contracts concluded if an international transport service is necessary to meet imperative public transport needs (Section 9). They also allow compensation for the performance of such services, provided it is subject to the rules and procedures of the Treaty. Point 9 of the 1997 guidelines also authorised aid intended to compensate for public service obligations.

(89) Accordingly, the Commission finds that the Community legislation in force allows for public service obligations to be introduced on maritime connections other than domestic connections within a Member State. However, this being the international maritime transport market, and thus subject to actual or potential competition from other Community operators, the compensation paid to the concessionary companies looks like operating aid, which may be authorised only by virtue of Article 86(2). Such compensation must also, therefore, be necessary, i.e. it must meet a real need that market forces cannot satisfy, and it must be strictly proportionate to the objective being pursued.

(90) Of the five regional companies of the Tirrenia Group, only Adriatica and Saremar operate on international routes, under the public service agreements. Accordingly, for both of these companies and for each of the international connections concerned, examination is required of the grounds justifying the imposition of the public service obligations on the recipient companies and of whether the compensation paid was eligible for the derogation provided for in Article 86(2) of the Treaty.

[41] OJ L 378, 31.12.1986, p. 1.
[42] See footnote 39.

(91) With regard to Saremar, the Commission notes that on the Sardinia/Corsica (Santa Teresa/Bonifacio) route the company makes two round trips a day all year round using a mixed ship with a total capacity of 560 passengers and 51 motor vehicles. The information supplied by the Italian authorities shows this to be a short-distance (10 nautical miles) cross-border connection of mainly local interest, both for the Sardinian communities and for the neighbouring Corsican communities. The scheduled connection between Santa Teresa and Bonifacio ensures the mobility of cross-border workers and a regular flow of goods between southern Corsica and northern Sardinia. The information supplied by the Italian authorities shows that this connection was expressly requested by the local Sardinian and Corsican communities.

(92) During the (middle and high) tourist season, Saremar operates in competition with another Italian operator in a position to alter the capacity and frequency of the services it provides in response to the market situation ([43]). Moreover, the operator in question is not consistently present throughout the off-season.

(93) It follows from the above that the objective — which is the expression of a legitimate public interest — of providing a year-round scheduled service between two insular regions of the Community and taking account of the needs expressed by the local and regional authorities concerned could not be met by the free play of market forces.

(94) With regard to the international connections provided by Adriatica, the Commission has the following comments:

(a) the Brindisi/Corfu/Igoumenitsa/Patras maritime connection, which links the central regions of the Community with one of its outlying regions, is of vital importance for commercial and tourist traffic, especially in view of the instability which has made the alternative land links problematic. Moreover, in 1977, at the joint request of the Italian and Greek authorities, the said maritime connection was included in the list of rail routes and motor vehicle and shipping services covered by the International Convention of 7 February 1970 concerning the Carriage of Passengers and Luggage by Rail (CIV). To be able to provide the maritime services offered on this route, Adriatica joined the Eurail Community. In addition, information supplied to the Commission at the meeting of 26 October 2001 (registered under the numbers A/13408/04 and A/13409/04) shows that between 1992 and 1999 Adriatica operated an average of 265 journeys a year on this route, carrying an average of 161 440 passengers, 24 376 vehicles and 104 437 linear metres of cargo. It must also be noted, as indicated by the Italian authorities in a letter dated 17 February 2004 (registered under the number A/13405/04), that between 1996 and 1999 Adriatica's competitors did not provide a service offering the same guarantees in terms of the quality of the ships used and, *inter alia*, the regularity and frequency of service. It should be noted, however, that between 30 October 1990 and July 1994, i.e. part of the period examined for the purposes of this Decision, Adriatica was involved in a pact concerning the prices to be charged for commercial vehicles on the routes from Patras to Bari and Brindisi ([44]). During this period, competition on the route was sufficiently keen and specific for Tirrenia to join an unlawful pact, so that the aid cannot be regarded as having been necessary to guarantee a public service. Despite the clarifications the Italian authorities supplied on this point by fax dated 24 February 2004 (document registered under number A/13970/04), the need for a subsidy to compensate for the obligation to provide services of general economic interest cannot be accepted if the recipient company engages in anti-competitive behaviour prohibited by Article 81 of the EC Treaty. Although the Commission's decision is not yet final, it has been broadly confirmed by the Court of First Instance and in any event enjoys presumption of validity. It is true that the two procedures relating to the competition rules and to State aid respectively are independent, but the case-law requires the Commission to take account of any infringement of the competition rules

([43]) For instance, in 2001 one of this operator's two ships was withdrawn from this market segment and transferred to more profitable connections.

([44]) Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34466 — Greek Ferries) (OJ L 109, 27.4.1999, p. 24), confirmed, as regards the establishment and construal of the facts, by the judgment of the Court of First Instance of 11 December 2003 in Case T-61/99 *Adriatica di Navigazione v Commission* (not yet published).

when assessing the compatibility of State aid, especially if the recipient has contravened those rules ([45]). The link between the breach of the competition rules and the aid is evident, given that the compensation was paid for the very services covered by the pact, quite aside from the question of whether the aid was used to give rise to anti-competitive behaviour. Lastly, a declaration of incompatibility and recovery of the aid would in no case constitute a new penalty, but would simply result from the establishment of the aid recipient's participation in a prohibited pact. Given the type of service provided, which simultaneously caters for commercial vehicles, passengers and cargo, it must be concluded that the company's involvement in a pact designed to establish the prices to be charged for commercial vehicles allows conclusions to be drawn for the connection as a whole. This is all the more evident as the pact was aimed at the very commercial vehicle traffic the Italian authorities wished to ensure through the subsidy. Finally, it should be noted that the connection in question was discontinued in 2000;

(b) the Trieste/Durrës maritime connection between Italy and Albania was the product of a Protocol signed by the Italian and Albanian authorities on 22 October 1983 to develop trading relations between Albania and the countries of Western Europe. Article 5 of the Protocol charges Adriatica di Navigazione and the Albanian company Transship with organising the arrangements for services on the connection. Leaving aside the fluctuations caused by the political situation, traffic on this route has developed considerably since 1991 ([46]). There is no competition on this route;

(c) the other two maritime connections between Italy and Albania — Bari/Durrës and Ancona/Durrës — were not set up by an international agreement;

(d) the maritime connections between Italy and Yugoslavia (the port of Bar in Montenegro) operated from the Italian ports of Ancona and Bari have developed since 1997. They meet a request made by the Montenegro authorities for there to be a permanent maritime connection between the country's one commercial port and the northern and southern ports of Italy. Since 1998, two other operators, one from Montenegro the other Slovenian, have been operating alongside Adriatica on the Bari/Bar route;

(e) operation of the Ancona/Split and Bari/Dubrovnik maritime connections between Italy and Croatia, granted to private operators in 1960, was transferred to Adriatica by Law No 42 of 27 February 1978. The information supplied by the Italian authorities indicates that services were interrupted in 1991, and that they were resumed in 1994 at the express request of the Government of the Republic of Croatia. Despite the fluctuations caused by the Kosovo crisis, traffic has developed considerably since 1994 ([47]). Two shipping companies, one Croatian the other Liberian, compete with Adriatica on this market.

(95) It emerges from the above that, in terms of the services it provides pursuant to an accord or an international agreement, Adriatica was charged with a mission of general interest entailing costs which the company would not have incurred had it acted purely according to its commercial interest. This does not apply to the Brindisi/Corfu/Igoumenitsa/Patras connection for the period from January 1992 to July 1994, during which Adriatica was involved in a pact prohibited by Article 81 of the EC Treaty. Nor does it apply in respect of services on international connections which the company has built up and which do not derive from such an accord or agreement. This is true, in particular, for the Bari/Durrës and Ancona/Durrës connections. In any event, the operating results on these two routes are positive, so that no compensation has been paid to Adriatica in respect of the services provided. Instead, the analytical accounts supplied to the Commission show that the resulting profits help to reduce the size of the annual balancing subsidy paid for the services provided on the loss-making routes.

([45]) Judgment of the Court in Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, paragraphs 41-43.

([46]) In 1991, 20 096 passengers and 24 205 linear metres of cargo were carried; in 2000, 334 639 passengers and 235 542 linear metres of cargo were carried.

([47]) In 1994, 9 866 passengers and 7 494 linear metres of cargo were carried; in 2000, 48 281 passengers and 43 563 linear metres of cargo were carried.

(96) For the obligations imposed on the regional companies to be able to give rise to compensation and for the Commission to be able to verify that the amount of compensation is limited to what is strictly necessary, these obligations need to be specified in advance by the competent public authorities.

(97) In this regard, the Commission notes that the services provided by each regional company are specified in the abovementioned five-year plans. These detail the ports to be used and the frequencies to be observed in the high and low seasons, as well as the type of ship to be assigned to each route. The resulting network of services may nonetheless be adapted in response to changes in demand for transport on the routes in question over each five-year period. The information supplied by the Italian authorities shows that such adaptations are made only at the request of the local communities concerned, which approach the Ministry of Transport, the authority charged with supervising the regional companies, to request a change in frequencies or timetables. Such applications are assessed individually at interministerial level, *inter alia*, with reference to their financial implications for the operating costs of the company concerned. Any alteration to the network of services over the five-year period is therefore covered by a preliminary administrative decision addressed to the concessionary company.

Comparable competition

(98) In verifying the existence of an actual public service requirement ([48]) and the extent of the obligations actually imposed on the regional concessionary companies, as well as the need to compensate the cost of such services, the Commission needs to establish whether or not there are competing operators offering services similar or comparable to those offered by the public operator and which would meet the requirements laid down by the Italian authorities. This can be ascertained by carrying out a comparative examination, route by route, of the overall demand for services and the available supply. It will be useful here to distinguish the situations of the individual regional companies.

Adriatica

(99) Adriatica faces competition from other shipping companies on the two international routes in respect of which it was charged with a general interest mission (Ancona/Split and Brindisi/Corfu/Igoumenitsa/Patras) and on a number of cabotage routes in the Tremiti archipelago and two freight routes between the peninsula and Sicily.

The international connections

(100) On the Ancona/Split route Adriatica uses a mixed vessel to make two journeys a week all year round in competition with a Croatian public company and with private ships flying the flags of Barbados and Panama, which are essentially present only during the summer season and do not meet all the service requirements stipulated by the Italian authorities in the agreement.

(101) On the Brindisi/Corfu/Igoumenitsa/Patras route, Adriatica operated in competition with Greek shipowners whose ships fly the Cypriot or Maltese flags and an Italian operator under the Italian flag. The information sent by the Italian authorities (particularly the letter dated 17 February 2004, registered under the number A/13405/04) shows that since 1997 a number of Greek operators have provided services comparable to those offered by Adriatica in terms of regularity of service, capacity, frequency and type of ship. As indicated in recital 94(a), this connection has been of vital importance for intra-Community and international traffic as it connects the Community with one of its outlying regions. The Commission considers that, according to the 1997 Community guidelines, subsidies may be allowed which are intended to cover operating losses in respect of scheduled services to ports serving outlying regions of the Community or routes considered vital for the economic development of the regions concerned in cases where the operation of market forces would not ensure a sufficient service level (Section 9). In view of the services offered by Adriatica in terms of regularity, capacity, frequency and type of ship, the Commission considers that the granting of public subsidies can be justified under Community law. This conclusion cannot be extended to cover the period from January

([48]) Judgment in *Analir and others*, see footnote 23.

1992 to July 1994, during which Adriatica was involved, on this route, in a pact prohibited by Article 81 of the EC Treaty, which fact demonstrates that the aid did not correspond to an actual public service requirement. Finally, it should be noted that the connection in question was discontinued in 2000.

The cabotage connections

(102) On a number of connections with the Tremiti archipelago Adriatica faces competition from private Italian operators, who are present only in the middle and high seasons. Accordingly, none of the latter satisfies the requirements of regularity and year-round provision of services stipulated by the Italian authorities.

(103) Regarding the carriage of freight between the mainland and Sicily, Adriatica faces competition from private Italian operators on the Ravenna/Catania and Genoa/Termini Imerese routes. However, these operators' supply cannot be regarded as comparable to Adriatica's in terms of the regularity, frequency and type of ship stipulated by the Italian authorities in the public service agreement.

Siremar

(104) Siremar operates in competition with private Italian operators in the local markets of the Aeolian and Egadi archipelagos and on the connection between Sicily and the island of Pantelleria.

(105) The network of connections with and between the Aeolian islands is based on five routes on which Siremar provides daily services all year round using mixed (passenger/cargo) ships and high-speed all-passenger craft. One private Italian operator operates as a mixed transport carrier using old ships of modest capacity. However, this competitor fails to satisfy all the requirements stipulated by the agreement, particularly in terms of continuous year-round provision of services on all routes and the type of ships used. The same is true with regard to the market in high-speed connections, on which another Italian operator competes with Siremar but without providing services on all the network routes such as to satisfy the requirements of the agreement, particularly in terms of the profile of the routes operated and the frequency of service. With regard to the network of the Aeolian islands/Milazzo high-speed connection, the private operator does not provide the same services as Siremar in terms of journey frequency and the number of islands served. It appears, in particular, that the operator in question does not operate the Lipari/Salina and Milazzo/Alicudi connections during the off-season.

(106) The network of connections with and between the Egadi islands comprises two routes served by mixed (passenger/cargo) ships and four routes served by high-speed all-passenger craft. Two private Italian operators are present, one in the freight segment and the other in the high-speed (passenger) segment, though neither of them provides services which satisfy all the requirements of the agreement in terms of routes and types of ship.

(107) The information supplied to the Commission indicates that on the Trapani (Sicily)/Pantelleria route Siremar provides daily services all year round in competition with a private Italian operator which only carries vehicles and which for this reason, amongst others, fails to satisfy the service requirements stipulated in the agreement.

(108) Moreover, according to a complaint sent to the Commission on 13 August 1999 (registered by DG Transport on 18 August 1999 under the number D 02.308 64296), it would appear that from 1990 to 1999 the private operators connecting the minor Sicilian islands with Sicily and the mainland received subsidies from the Region to provide that service. These data tend to confirm the need for public subsidies to ensure a satisfactory level of connections with the islands in question.

(109) It should also be borne in mind that the Sicily Region, through Regional Law No 12 of 9 August 2002 (sent to the Commission by letter dated 12 September 2002 and registered under the number A/68547 on 22 October 2002), established that, to reinforce the maritime connections with the Sicilian minor islands and in accordance with the mobility requirements of their inhabitants, maritime connection services with the aforementioned islands were to be awarded by means of a tendering procedure for a period of five years. The Sicilian Regional Department of Transport and Communications subsequently announced an open tendering procedure on 21 October 2002 for the award of maritime connection services of public interest using high-speed passenger craft to and between the Sicilian minor islands.

(110) The Commission therefore finds that some of the scheduled maritime services to and between the Sicilian minor islands are currently being awarded according to objective and transparent criteria pursuant to the competition rules laid down by the Community directives on public tenders. It also considers that this has increased competition in the maritime cabotage market and that, consequently, freedom to provide services is ensured in accordance with Regulation (EEC) No 3577/92.

Saremar

(111) Saremar operates in competition with private Italian operators on three of the four routes it serves.

(112) On the Santa Teresa/Bonifacio route between Corsica and Sardinia, Saremar provides daily connections all year round using a medium-capacity high-speed craft. One private operator provides comparable services though only in the middle and high seasons, and therefore fails to satisfy the requirements of regularity and frequency stipulated by the agreement.

(113) On two of the three routes connecting Sardinia with its minor islands, i.e. the Palau/Maddalena route to the north and the Carloforte/Calasetta route to the south, private Italian operators provide services additional to Saremar's all year round. The schedule of departure times shows that the private operators' services are dovetailed with those of the public operator to ensure greater mobility for the inhabitants of the minor islands. The information supplied by the Italian authorities (registered under the numbers A/13350/04, A/13346/04 and A/13356/04) shows, however, that the ships of the private competitors, which the Italian authorities claim receive aid from the local authorities, are more than 20 years old and therefore fail to satisfy the service obligations stipulated in the agreement. With particular regard to the Carloforte/Calasetta route, it appears that the private operator has been receiving regional subsidies since 1998 for operating the route at night and in the early morning. These data tend to confirm the need for subsidies to ensure a satisfactory public service.

Toremar

(114) Toremar operates in competition with various private Italian operators on two routes connecting the islands of the Tuscan archipelago with the coast, namely Portoferraio/Piombino for the island of Elba and Giglio/Porto San Stefano for the island of Giglio.

(115) On the Portoferraio/Piombino route, Toremar operates between eight and 15 trips a day, depending on the time of the year, using mixed passenger/vehicle ships. The number of trips and the timetable are established to take account of connections with the island's bus network, on the one hand, and the mainland rail and bus networks on the other. One private operator provides daily services all year round at a frequency comparable to Toremar's. The information supplied by the Italian authorities (registered under the number A/12951/04) also shows that the private operator's ships are more than 20 years old, that the public operator is the only one to guarantee the first and last trips of the day and that as of 2000 the operation of this connection has produced profits which have been deducted from the amount of the annual balancing subsidy.

(116) On the connection with the island of Giglio, Toremar operates between three and five trips a day, depending on the time of the year, using a special ship which, in addition to passengers and vehicles, carries energy products. For lack of any local hospital facilities, the Toremar ship is obliged to remain in the island's dock all night to cover the eventuality of a medical emergency. A private operator operates on the route all year round. The information supplied by the Italian authorities nonetheless shows that this operator reduces or suspends its activities during the off-season.

Caremar

(117) Caremar faces competition from private Italian operators on the Capri/Sorrento, Capri/Naples, Ischia/Naples and Procida/Naples routes between the peninsula and the islands of the Gulf of Naples (Capri, Ischia and Procida) and on the two routes, Ponza/Formia and Ventotene/Formia, connecting the small islands of Ponza and Ventotene to the mainland.

(118) On the Capri/Sorrento route, Caremar provides daily connections all year round using a mixed vessel which it also uses to operate the nearby Capri/Naples route. Information supplied by the Italian authorities at the meetings of 26 October 2001 and 16 April 2002 (documents registered under the numbers A/13326/04 and A/13330/04) shows that the private operators present on this route only provide their mixed transport services during the high season and do not therefore satisfy all the requirements stipulated by the Italian authorities in terms of regularity of service.

(119) On the Capri/Naples route, Caremar competes with private Italian operators in the high-speed segment. The information supplied by the Italian authorities shows that in this segment of the market the private operators provide services comparable, overall, with those provided by Caremar. The Commission also notes that the Caremar ship is obliged to remain in Capri overnight in case of a medical emergency and that its first journey of the day therefore departs from the island, thus enabling the island's inhabitants to travel to the mainland for professional or study reasons. The information also shows that the operating results of these services have been examined for the purpose of calculating the annual balancing subsidy paid to Caremar.

(120) The islands of Ischia and Procida are connected to the mainland ports of Naples and Pozzuoli by various scheduled mixed and high-speed transport services. Only Caremar operates the Ischia/Procida/mainland (Naples or Pozzuoli) connection. The direct Ischia/Naples and Procida/Naples connections, on the other hand, are operated with high-speed craft by Caremar and various private Italian operators. The information supplied by the Italian authorities shows that on these two direct connections — Ischia/Naples and Procida/Naples — the private operators provide services comparable, overall, with those provided by Caremar. The Commission notes, however, that on the Procida/Naples connection Caremar provides the first daily departure from the island of Procida all year round and the last daily departure from the mainland during the off-season, thus enabling the island's residents to travel for professional or study reasons. The Commission also notes that the operating loss of these services has been examined for the purpose of calculating the annual balancing subsidy paid to Caremar.

(121) In addition, in the light of a complaint sent on 13 August 1999 (registered by DG Transport on 18 August 1999 under the number D 02.308 64296), the Commission has reason to believe that, for the year 1990 at least, the private operators which provided high-speed connection services on a number of routes in the Gulf of Naples, including Naples/Capri, Naples/Ischia, Naples/Sorrento/Capri and Naples/Procida/Ischia, received subsidies from the Campania Region. These data tend to confirm the need for subsidies to ensure a satisfactory level of public service.

(122) On the direct Ponza/Formia and Ventotene/Formia routes, Caremar competes with a private operator in the high-speed segment. The information supplied by the Italian authorities shows that only Caremar operates every day of the week on the Ventotene/Formia route in accordance with the service regularity requirements stipulated in the agreement. In addition, the high-speed service Caremar provides on the Ponza/Formia route solely on Mondays complements the service provided by the private operator on the other days of the week.

Need for compensation

(123) With regard to the services the regional companies provide on routes where there is no competition, the Commission notes that these cover both passenger and freight transport and that the lack of competition applies to the various five-year periods covered by the public service agreements. The lack of competition on these routes over the last decade shows that companies operating according to market rules would be unable to guarantee the transport services which the regional companies are providing in accordance with the agreements. Compensation is therefore necessary to allow these companies to offset the extra costs they incur in supplying these services.

(124) With regard to the services the regional companies provide on the routes examined above on which they do face competition, the Commission notes that in most cases the free play of market forces would not serve to produce the transport services the regional companies provide under the agreements. Here, too, compensation is necessary to allow the companies to offset the extra costs they incur in supplying these services.

(125) In a few rare cases, comparable competition attests to the market's capacity to satisfy the service requirements stipulated in the public service agreements. The presence of any private operators capable, without financial compensation, of satisfying the obligations imposed on the public operator in terms of regularity of service, frequency and type of ship would cast doubt on the need for and proportionality of the compensation paid to the public operator to operate the routes in question. The problem arises in particular in respect of the Naples/Capri and Naples/Ischia high-speed connections Caremar operates in the Gulf of Naples.

(126) In this respect, information sent to the Commission by a number of complainants shows that in March 2002, at the initiative of the Campania Region, the private operators, long present in the Gulf of Naples market, undertook with the regional authorities to provide a year-round service similar to that provided by Caremar, notably on the two routes referred to above, renouncing in advance any financial compensation. The Commission notes, however, that these services are not equivalent to those provided by the public operator in terms of regularity, frequency of connections and type of ship, and that the private operators are entitled to withdraw from their obligations subject to 45 days' notice. It should also be noted that a number of obligations are imposed solely on the public operator (e.g. keeping a ship berthed on the island overnight and operating the first and last journeys of the day) and generate additional costs which need to enter into the calculation of the compensation. Moreover, there is a complementarity between the services provided by Caremar and those supplied by the private operators. In view of these considerations, the need for and proportionality of the compensation cannot be doubted.

(127) To establish whether the annual compensation paid to the regional companies is the minimum needed to provide services which meet the public service requirements laid down by the Italian authorities, the Commission needs to examine all the parameters which cause the public operator to incur additional costs in providing the services. The Commission notes that the compensation calculation mechanism provides for profits made during the high season to help reduce the losses accumulated during the off-season, so that the resulting level of annual compensation is lower overall than it would be if the accumulated losses were simply added together route by route. The Commission also notes that the company's revenue is subject to a dual constraint in terms of fares, namely the preferential fares for certain social categories and the need for the company to obtain the public authorities' approval for any change in fares. The information supplied by the Italian authorities shows that the regional companies are not free to adapt their fares to take account, in particular, of changes in operating costs. This twin constraint, which leads to an appreciable reduction in the concessionary companies' income and affects the level of annual compensation, cannot be described under such circumstances as an aggressive commercial policy, characterised by predatory pricing.

(128) Secondly, the Commission notes that the cost elements taken into consideration in order to calculate the compensation have been defined by the public authorities, leaving the companies with no margin of discretion. These elements reflect all the fixed and variable costs directly linked to providing the services classified by the public authorities as services of general interest and which, as such, are covered by the agreements. The tables below — which use 2000 as the reference year — give a breakdown of each regional company's costs taken into consideration for the purpose of calculating the annual compensation. The cost elements, as determined by the public authorities and annexed to the public service agreements, are the same for all the regional companies and have not altered since 1991.

(in ITL million)

COST ELEMENTS 2000 economic accounts	ADRIATICA	SAREMAR	TOREMAR	SIREMAR	CAREMAR
i) Agency commission/acquisition costs	[…] (*)	[…]	[…]	[…]	[…]
ii) Port taxes/port transit costs and other traffic costs	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]
Total costs	139 893	36 299,6	– 45 675,0	– 102 881,1	70 113,8
Operating revenue	112 424	12 651,4	34 576,9	43 335,1	32 594,3
Result (costs — revenue)	– 27 469	– 23 648,2	– 11 098,1	– 59 546,0	– 37 519,5
Return on capital invested	3 571	828,2	1 993,0	3 940,4	2 290,5
Compensation under Article 7	806				
Annual subsidy	31 846	24 476,4	13 091,1	63 486,4	39 810,0

(*) Business secret.

The operating costs include the cost of the crew, maintenance, insurance, fuel and mineral oils. The 'administration' item essentially includes the cost of shore personnel and administrative premises. The Commission notes that the cost elements used to calculate the annual compensation can all be connected to and are necessary for the operation of the routes served by the regional companies pursuant to the agreements. Regarding ship depreciation, the Commission considers that, to the extent that the ships in question are used exclusively for the services covered by the agreements, this cost element may be regarded as necessary for the provision of those services and may thus legitimately enter into the calculation of the annual compensation. Regarding the cost of fuels and mineral oils used by these ships, the Commission has found no discriminatory element reducing the cost of such fuels and lubricants to the benefit of the regional companies *vis-à-vis* other maritime transport operators.

(129) To enable the Commission to establish that the compensation has been proportional, the Italian authorities supplied it with an analysis of the operating accounts for each of the routes served by the regional companies over the last 10 years.

(130) In this regard, the Commission would note, firstly, that the level of annual compensation is calculated taking account of the operating profits recorded by each of the regional companies on the routes covered by the public service agreements, which are deducted from the losses accumulated on the routes as a whole. This method of calculation serves to limit the amount of subsidy paid to the public companies.

(131) The Commission generally considers that only costs directly linked to charges resulting from the public service obligations laid down by the Italian authorities may be taken into consideration when calculating the annual compensation. In this respect, it notes that the regional companies only provide the scheduled services specified in the various five-year plans in terms of regularity, frequency and capacity.

(132) For services which the regional companies have been shown to have provided in the face of comparable competition, it needs to be checked whether a negative net operating result has been recorded and taken into account in the calculation of the annual compensation paid to the company concerned.

(133) As regards Adriatica, comparable competition from another Community operator can be observed on the Bari/Durrës (Albania) route. However, examination has shown that the company's operating results on this route are positive, with the result that it has received no subsidy for the services it has provided.

(134) On the Brindisi/Corfu/Igoumenitsa/Patras route, Adriatica faced comparable competition, overall, from other Community operators until 2000, the year in which it stopped operating the connection. Examination of the operating results shows that the net loss recorded on this route was taken into consideration when calculating the annual compensation. With reference to the need for compensation, the Commission has noted (recital 101) that this is a vital route for the development of the Community's outlying regions in accordance with the Community guidelines of 1997. However, the Commission has already indicated that compensation is not necessary for the period from January 1992 to July 1994, during which Adriatica took part in a prohibited pact.

(135) Regarding Siremar, the Commission has already observed (recital 105) that none of the private Italian operators on the local markets served by the public operator provides comparable services all year round capable of meeting all the public service requirements stipulated in the five-year plans.

(136) For Saremar, the Commission has found (recital 112) that on the Santa Teresa/Bonifacio route the private competitor does not satisfy the requirements of regularity and continuity of service throughout the year as prescribed by the Italian authorities. Moreover, on the two cabotage connections on which there is competition from private Italian operators, the Commission has observed (recital 113) that the ships of Saremar's private competitors fail to satisfy the Italian authorities' requirements in terms of maximum age.

(137) For Toremar, the Commission has noted (recitals 114 to 116) that the private operator which competes with the company on the route between Tuscany and the island of Elba fails to satisfy the Italian authorities' requirements in terms of the age of the ships.

(138) For Caremar, the comparable competition from private Italian operators focuses on the Capri/Naples, Procida/Naples and Ischia/Naples connections, where it is confined to the high-speed passenger transport segment. The information supplied by the Italian authorities shows that these routes, for which the operating results indicate an overall loss, have been taken into account when calculating the annual compensation.

(139) The Commission has also noted that, in the case of the regional companies, the cost of the public service was not determined in the context of a public procurement procedure, which would have allowed an assessment to be made of the additional cost arising from the public service. Consequently, the Commission needs to determine which costs are to be taken into consideration for calculating the compensation, in other words those of the concessionary companies' costs which are directly connected to and strictly necessary for the provision of the public services. The Commission notes in this respect that, as the tables above show, the various cost elements taken into account by the regional companies are the same those taken into consideration by Tirrenia di Navigazione [49]. The cost structure of these companies, as defined by the public service agreements, is therefore identical. In its Decision regarding the Tirrenia di Navigazione company, the Commission acknowledged that these cost elements were directly connected to and strictly necessary for the provision of the public services.

(140) The following tables indicate the evolution over time of the regional companies' costs [50]:

ADRIATICA

Cost elements	1992	1993	1994	1995	1996	1997	1998	1999	2000
i) Agency commission, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ii) Port taxes, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total costs	127 018	124 191	158 533	166 334	170 095	174 331	179 809	151 109	137 255

SAREMAR

Cost elements	1992	1993	1994	1995	1996	1997	1998	1999	2000
i) Agency commission, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ii) Port taxes, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total costs	33 519	35 938	35 295,2	34 605,7	34 972,8	36 653,4	39 602,0	40 218,8	36 300,0

[49] Decision 2001/851/EC, see footnote 5.
[50] Data taken from the PricewaterhouseCoopers study, see footnote 13.

TOREMAR

Cost elements	1992	1993	1994	1995	1996	1997	1998	1999	2000
i) Agency commission, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ii) Port taxes, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total costs	43 511	44 907	47 696,6	47 900	50 516,1	48 900	50 801	47 840,1	45 675

SIREMAR

Cost elements	1992	1993	1994	1995	1996	1997	1998	1999	2000
i) Agency commission, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ii) Port taxes, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total costs	79 543	75 845	78 549,7	80 947,5	85 934,6	97 536,9	106 563,1	110 611,1	102 881

CAREMAR

Cost elements	1992	1993	1994	1995	1996	1997	1998	1999	2000
i) Agency commission, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ii) Port taxes, etc.	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iii) Operating costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
iv) Depreciation	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
v) Net financial charges	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vi) Administration	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
vii) Other costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total costs	59 987	63 737	69 365,7	71 389,6	71 404,1	73 752,0	77 143,0	74 172,0	70 114

(141) The information supplied by the Italian authorities shows that the changes over time in the individual cost elements of the regional companies are due primarily to external factors such as inflation and changes in interest rates, as may be seen from the data in the table below:

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000
Variation in inflation (*)		4,2	3,9	5,4	3,9	1,7	1,8	1,6	
Short-term rates	14,901	14,240	10,940	11,162	9,301	7,836	6,180	3,398	
Medium and long-term rates	11,377	10,926	11,146	11,992	11,324	8,860	6,390	4,259	

(*) Official ISTAT index.

The change over time in the compensation paid to the regional companies relates directly to changes in each company's costs, as shown, and revenue (see tables in recital 43), which in turn reflect external factors (e.g. inflation). In the light of the above tables it may therefore be stated that the increase in the regional companies' costs was smaller, overall, than the cumulative variation in inflation from 1992 to 2000.

(142) For each company, different factors explain the changes in costs and — as a result — in compensation.

(143) For Adriatica, the international connections with Yugoslavia, Croatia and Albania saw significant variations in traffic from one year to another as a result of the political situation in the region. In addition, the discontinuation of the connections with Greece in 1999 brought an appreciable reduction in operating costs ([51]).

(144) For Saremar, the relative stability of operating costs between 1992 and 2000 results from the nature of the services the company provides — essentially cabotage connections between Sardinia and the neighbouring islands — which primarily meet the requirements of the local communities and are therefore not subject to major variations in supply and demand.

(145) The same may be said of Toremar, which operates local connections with the islands of the Tuscan archipelago, again subject to few variations in supply and demand.

(146) As regards Siremar and Caremar, the rise in operating costs has been paralleled by an increase in revenue from the routes operated by the two companies. This increase in revenue, which has been greater in the case of Caremar, has allowed the annual subsidy to be kept at a relatively stable level (see tables in recital 43).

(147) Regarding return on invested capital, the Commission observes that the Community guidelines on State aid to maritime transport ([52]) state that the amount of subsidy awarded as compensation for public service obligations should take account of a 'reasonable return on capital employed', which is applicable in the case under examination. In addition, the case-law acknowledges that operation of a service of general economic interest must have the benefit of economically acceptable conditions ([53]) and that compensation for discharging public service obligations may include a reasonable profit ([54]). In this instance, the Commission notes that the return on invested capital ranges, year on year, from 12,5 % in 1992 to 5,1 % in 2000. The various elements of invested capital are detailed in the agreements and the rates of return are determined with reference to market rates so as to reflect a proper return for each element. In view of the above, it may be concluded that the return has been set at a reasonable level.

([51]) In 1998 a cumulative net loss of ITL 12 216 billion was recorded for the connections with Greece.
([52]) OJ C 205, 5.7.1997, p. 5.
([53]) Judgment of the Court in Case C-320/91 *Corbeau* [1993] ECR I-2533.
([54]) On the concept of State aid, see the *Altmark Trans* judgment, footnote 22.

(148) The change in the regional companies' costs and revenue over time explains the parallel change in the amount of compensation paid under the agreements concluded with the Italian State. Given that, and in view of the considerations outlined above, the Commission considers that the regional companies' net loss corresponds to the amount to be compensated. Consequently, the compensation paid to these companies, corresponding to the net operating loss plus a reasonable return on invested capital, is strictly proportional to the additional cost entailed by the public service task entrusted to them.

Impact on the development of trade

The cabotage connections

(149) For a State aid to be declared compatible with the Treaty in accordance with Article 86(2), it must also be verified that it does not affect the development of trade to an extent contrary to the interests of the Community. The Commission notes that Article 4(3) of Regulation (EEC) No 3577/92 (maritime cabotage) states that public service contracts may remain in force up to the expiry date, in this instance 31 December 2008.

(150) The Commission also notes that, in most cases, the cabotage routes operated by the regional companies connect certain islands to the nearest mainland port and are the only means of ensuring the territorial continuity of the island regions concerned. The markets in question are local markets highly dependent on the mainland port of embarkation and disembarkation. Also, the short journey times and the frequency of trips throughout the day mean that the traffic on these maritime connections can often be compared to a suburban land transport network.

(151) The Commission further notes that, despite the liberalisation of the Italian cabotage market on 1 January 1999, the regional companies are in most cases competing only with other Italian operators on the markets in question, most of whom were already present on those markets before that date.

(152) Given that, the Commission considers that, on the cabotage market, payment of the balancing subsidy to the regional companies has thus far not affected the development of trade to an extent contrary to the interests of the Community. However, this subsidy could in future serve to reinforce the position of the companies in question, enabling them to eliminate existing or potential competition on the market on which they operate. This could come about if the future application of the agreements were to lead to an increase, on the routes where competition from private operators is concentrated, in the capacity offered by the regional companies under the public service agreement arrangements.

(153) On this point, as regards the cabotage connections on which the regional companies face competition from private operators, the information supplied by the Italian authorities shows that at the time the cabotage market was liberalised:

— Adriatica held 44 % of the high-speed passenger transport market segment on the connections with and between the islands of the Tremiti archipelago. On the freight routes between the mainland and Sicily, Adriatica provided around 33 % of the overall supply of services on the Genoa/Termini Imerese route ([55]) and 60 % on the Ravenna/Catania route. The Commission notes that, on the latter route, Adriatica's dominant position did not prevent a new private operator from entering the market in 2001,

— Siremar held around 58 % of the passenger transport market in the Aeolian islands archipelago and 52 % of the high-speed market in the Egadi islands archipelago,

— Saremar provided 59 % of all passenger transport services on the La Maddalena/Palau route and 53 % on the Carloforte/Calasetta route,

— Toremar provided 60 % of all passenger transport services on the Piombino/Portoferraio route and 27 % on the Isola del Giglio/Porto Santo Stefano route,

([55]) Comparable to the Genoa/Palermo route operated by the private competitor.

— in the high-speed transport services segment, Caremar carried 17 % of passengers in the Gulf of Naples and 31 % on the connections with the Pontine islands.

The same information shows that, overall, the market shares of the regional companies have remained relatively stable over the last ten years.

The Italian authorities' undertakings

(154) By letter dated 29 October 2003 (registered on 31 October 2003 under the number A/33506), the Italian authorities undertook to make no more payments to Caremar, during the period 2005-2008, of public service compensation to offset its net operating loss on the high-speed Naples/Capri connection. Consequently, that high-speed connection will be withdrawn from the services Caremar supplies.

(155) In the same letter the Italian authorities also undertook, again for the period 2005-2008, to reduce the overall supply of passenger transport services provided by means of high-speed craft (hydrofoils and catamarans) on the Naples/Procida/Ischia route. Pursuant to the Italian authorities' undertakings, the reduction in capacity will consist in reducing the number of places provided on the various ships Caremar uses on this route, from 1 142 260 to 633 200 during the winter season and from 683 200 to 520 400 during the summer season, while maintaining the current number of journeys so as to ensure the mobility of the islands' residents. The Italian authorities estimate the overall reduction in capacity at around 45 % in the winter period and around 24 % in the summer period. By letter dated 17 February 2004 (registered under the number A/13405/04), the Italian authorities also indicated that the reduction concerned the supply of tourist services in respect of which private operators were able to offer comparable services. In the same letter, the Italian authorities further undertook to keep separate accounts for connections involving a public service.

(156) With regard to the undertaking to discontinue the services Caremar provides on the high-speed Naples/Capri connection, the reduction in capacity on the connections with the Parthenopean islands is estimated at 65 % in the winter period and 49 % in the summer period.

(157) As already indicated (recitals 117 to 122), on these two connections Caremar provides services comparable overall to those provided by the private Italian companies long present on the Gulf of Naples market, where they operate without receiving compensation equivalent to that received by Caremar.

(158) The Commission finds that, on the strength of these undertakings, the Italian authorities will introduce a transparent accounting system and will appreciably reduce Caremar's market share of cabotage connections in the Gulf of Naples. In view of these considerations, and given the fact that the private operators' commitments *vis-à-vis* the Campania regional authorities do not take the form of a genuine public service agreement involving a formal obligation to cover the connections in question, the Commission considers that it is not disproportionate for the Italian authorities to maintain a minimum level of service on the routes in question in order to guarantee at all events the territorial continuity of the island regions concerned.

The international connections

(159) The international maritime connections are fully open to competition; in accordance with Council Regulation (EEC) No 4055/86, they are covered by the principle of freedom to provide services. Accordingly, the compensation paid to Adriatica and Saremar under the public service agreements for operating the international connections described above (recitals 90 to 95) is such as to affect current or potential competition from other Community operators. The Commission therefore needs to ascertain whether or not this compensation has affected trade to an extent contrary to the common interest.

(160) On this matter, in the light of the information supplied by the Italian authorities, the Commission notes the following:

— the number of passengers carried by Saremar on the route between Corsica and Sardinia represents 4,4 % of the total number of passengers carried by the company on all the routes it operates and 43 % of the passengers carried on the route in question (the other 57 % are carried by the private competitor). In addition, the market share has remained virtually unchanged since the agreement entered into force.

In view of the features of the connection in question (see recitals 91 to 93), and especially the purely local interest and limited development potential, the Commission considers that the compensation paid to Saremar to operate this route has not affected trade to an extent contrary to the common interest,

— on the Brindisi/Corfu/Igoumenitsa/Patras route, Adriatica made 140 journeys in 1999, the last year in which it operated the connection, carrying 10 % of the passengers travelling on the route. In 1998, Adriatica held 12 % of the mixed transport market on this route.

In view of the features of the connection in question (see recital 94), the Commission considers that the compensation paid to Adriatica to operate this route has not affected trade to an extent contrary to the common interest.

The same may not be said in respect of the period from January 1992 to July 1994, during which Adriatica and its competitors were involved in a pact fixing the tariffs to be applied to commercial vehicles. During this period, the distortion of competition caused by the aid compounded the distortion caused by the pact. Given the type of connection in question, the pact targeting one particular category of tariffs had a distorting effect on all the services being offered. In view of these considerations, and notwithstanding the arguments adduced by the Italian authorities, which have already been refuted (see recital 94(a)), the Commission considers that the aid has affected the development of trade to an extent contrary to the common interest and that, *inter alia*, for this reason, it must be declared incompatible with the common market.

Investment scheduled in the five-year plans and the business plan

(161) With regard to the investment scheduled in the five-year plans, the Commission, in its decision initiating the investigation procedure, expressed doubts regarding the financing arrangements for the investments needed in order to provide the services subsidised under the 1991 agreements. In particular, it wanted to check the extent to which the costs of ship acquisition and depreciation entered into the calculation of the annual compensation. In addition, the fact that the regional companies were guaranteed a subsidy which included the cost of depreciation of their fleet until 2008 could, in the Commission's view, be seen as an implicit guarantee on the part of the Italian State, enabling the public operator not to shoulder the economic risk inherent in any investment.

(162) The first point to be borne in mind is that the agreements require the regional companies to use vessels less than 20 years old on the subsidised routes and stipulate that they must normally own these vessels unless an exemption is expressly granted by the public authorities. This obligation, which constitutes a public service obligation, has led the regional companies to renew a substantial part of their fleet over the last few years, given the age reached by the vessels used on the routes covered by the first five-year plan (1990 to 1994). In addition, the type of ship to be used on each of the various routes served by the companies is laid down by a ministerial decree approving or amending each five-year plan. The acquisition of any new ship, just like the transfer or decommissioning of the oldest ships, has to be authorised by ministerial decree, which will also specify the service to which the vessel is to be assigned. The regional companies' investments must also accord with the strategy for developing the services they provide during the five-year reference period, which strategy is formulated in the five-year plan approved by the public authority.

(163) In view of these specific rules, the Commission has established whether, during the 1990 to 1994 and 1995 to 1999 five-year periods, the costs of acquiring new ships and the depreciation costs of the ships the regional companies used on the public service routes, on the one hand, fulfilled the requirements stipulated by the Italian authorities and, on the other, were taken into account in a proportionate manner when calculating the annual compensation. The information supplied by the Italian authorities shows that, when new vessels have been introduced, older vessels have simultaneously been decommissioned, with the result that there has been no overall increase in capacity linked to the renewal of the regional companies' fleets.

(164) As far as the cost of acquiring new vessels is concerned, the same information shows that these purchases were made partly with each company's own resources and partly by means of bank loans. It also shows that the interest rates charged by the credit institutions involved are in line with rates enjoyed during the same period by companies of comparable size and turnover in other sectors of the economy ([56]). In addition, it shows that the regional companies did not enjoy any direct guarantee from the Italian authorities regarding the repayment of these loans. The Commission acknowledges that the very existence of an agreement with the State assured investors that their commitments would be honoured and enabled the regional companies to modernise their fleets without bearing the economic risks which would have been borne by a commercial operator. This advantage — which could be likened to an implicit guarantee ([57]) and thus constitute State aid within the meaning of Article 87(1) of the Treaty — is, however, intrinsic to the arrangements introduced by the agreements, which were concluded for a twenty-year period before Regulation (EEC) No 3577/92 and the 1997 Community guidelines on State aid to maritime transport ([58]), later replaced by the 2004 Community guidelines ([59]), entered into force. In addition, as already noted, the new vessels acquired by the regional companies under the public service agreements are assigned exclusively to the scheduled services specified in the five-year plans. Consequently, this advantage, which is an integral part of the public service agreement, qualifies for the exemption provided for in Article 86(2) of the Treaty.

(165) Regarding the depreciation costs of the ships used by the regional companies on the routes covered by the five-year plans, the Commission notes that these are one of the cost elements which, under the terms of Article 5 of the agreement, enter into the calculation of the annual subsidy. Depreciation is calculated linearly over a 20-year period, with the exception of ultra-high-speed vessels, for which the duration is limited to 15 years. As the depreciation of vessels used to serve connections recognised by the Italian authorities as being of general interest is calculated according to criteria laid down in the agreements, and as examination of the analytical accounts of these routes has revealed no element of overcompensation in this respect in the two five-year periods considered, the Commission considers that the mechanism the agreements introduced to take vessel depreciation into account when calculating the annual compensation may be authorised under Article 86(2) of the Treaty. The provision of services recognised as being of general interest presupposes the use of vessels of a type and capacity specified in advance by the public authorities and whose depreciation may thus be taken into account when calculating the annual compensation provided that the vessels in question were acquired by the company under normal market conditions and in order to perform the tasks entrusted to it and are used exclusively for scheduled transport services on the routes covered by the agreement. In the case of the regional companies, the Commission notes that all the vessels in question are used exclusively for scheduled services recognised as being of general interest and that, as a result, their depreciation may be taken fully into account when the annual subsidy is calculated. The same is true for the investments needed to provide the services prescribed by the Italian authorities for the 2000 to 2004 five-year period, which correspond, in terms of type and capacity, to the commitments entered into by those authorities regarding the level of service.

(166) Regarding the additional investments scheduled in the business plan for 1999 to 2002, it should be pointed out that implementation of this plan was suspended following the initiation of the procedure.

([56]) For instance, the acquisition of two high-speed craft was financed via a loan taken out with the Banco di Napoli in 1999 for ITL 160 billion at a variable rate equal to the six-month Euribor rate, raised by 0,40 % and repayable over 10 years. The information supplied by the Italian authorities shows that the same credit institution granted loans at the same time to other large companies under virtually identical conditions.

([57]) See Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

([58]) See footnote 39.

([59]) See footnote 39.

Compatibility with other provisions of Community law

(167) The case-law has consistently indicated that it is clear from the general scheme of the Treaty that the Article 88 procedure must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, the Commission cannot declare State aid, certain conditions of which contravene other provisions of the Treaty, to be compatible with the common market ([60]). The obligation on the part of the Commission to ensure that Articles 87 and 88 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market. When adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market ([61]).

(168) As already pointed out, between January 1992 and July 1994 Adriatica took part in a pact to fix the tariffs for commercial vehicles on the Brindisi/Corfu/Igoumenitsa/Patras route, in contravention of Article 81 ([62]), at the same time as it was receiving aid to operate that route. As already noted, this pact distorted competition in respect of all the services provided. In view of the link between the detected infringement and the aid received, as well as the accumulated distortion of competition produced by these two factors, and notwithstanding the arguments put forward by the Italian authorities, which have already been refuted above (see recital 94(a)), the Commission considers that, *inter alia*, for this reason, the aid in question must be declared incompatible.

Future application of the compensation mechanism

(169) The Commission notes that the current compensation system is due to be applied until the end of 2008. After that, payment of compensation for services provided will be subject to compliance with the obligations arising from Regulation (EEC) No 3577/92 ([63]) and with the provisions of Community law relating to public contracts and service concessions.

(170) For the remaining period of application of the current mechanism, the Commission considers it necessary to impose two conditions designed to ensure the aid's compatibility and facilitate checks. Firstly, it considers that, for the period from 2004 to 2008, all the regional companies need to maintain separate accounts for their public service activities on each of the routes under consideration. With regard to Caremar, the Commission notes that, by letter dated 17 February 2004 (registered under the number A/13405/04), the Italian authorities made an undertaking to that effect. Secondly, any permanent change, whether partial or total, to the services offered by Adriatica, Siremar, Saremar, Toremar or Caremar such as would entail an increase in the aid must be notified to the Commission in advance.

VI. **CONCLUSIONS**

(171) On the basis of the above considerations, the Commission finds that no doubts remain as to the compatibility of the aid paid to the regional companies from January 1992 onwards under the 1991 agreements, except as regards the aid granted to the Adriatica company for the period from January 1992 to July 1994 for the Brindisi/Corfu/Igoumenitsa/Patras connection, which is incompatible with the common market on three counts, each of which is sufficient in itself to justify that conclusion: firstly, it did not meet an actual public service requirement; secondly, it affected the development of trade to an extent contrary to the common interest; thirdly, it was closely connected to a pact prohibited by Article 81 of the EC Treaty. According to consistent practice, and by virtue of Article 14 of Regulation (EC) No 659/99, such aid must be recovered, except where this conflicts with

([60]) See judgments of the Court in Case C-73/79 *Commission v Italy* [1980] ECR I-1533, paragraph 11; Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, paragraph 41; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78.

([61]) *Matra* judgment, paragraphs 42 and 43, see footnote 61.

([62]) Commission Decision 1999/271/EC of 9 December 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34466 — Greek Ferries) (OJ L 109, 27.4.1999, p. 24), confirmed, on this point, by the judgment of the Court of First Instance of 11 December 2003 in Case T-61/99 *Adriatica di Navigazione v Commission* (not yet published).

([63]) As interpreted by the Commission in Communication C(2004)43 def. — Community guidelines on State aid to maritime transport, see footnote 39.

a general principle of Community law. In this instance, the Commission considers that no principle prevents the recovery of the aid and, in particular, that the Adriatica company could not reasonably expect to receive the aid in question while it was involved in a pact with its competitors. Any difficulties arising from the recovery of the aid are not of an exceptional nature. Accordingly, Italy must take all necessary steps to recover the aid from the recipient.

(172) This decision only concerns State aid aspects and is without prejudice to the application of other provisions of the Treaty, particularly regarding the law on public contracts and service concessions,

HAS ADOPTED THIS DECISION:

Article 1

1. Without prejudice to the provisions of paragraph 2, the aid granted by Italy to Adriatica as of 1 January 1992 as compensation for providing a public service is compatible with the common market having regard to Article 86(2) of the Treaty.

2. The aid granted to Adriatica for the period from January 1992 to July 1994 in relation to the Brindisi/Corfu/Igoumenitsa/Patras connection is incompatible with the common market.

3. Italy shall take all necessary steps to recover from Adriatica the aid referred to in paragraph 2 granted to that company unlawfully.

Recovery shall be effected without delay in accordance with the procedures stipulated under Italian law, provided that these permit the immediate and effective execution of this decision.

The aid to be recovered shall yield interest from the date on which it was made available to the recipient to the date on which it is recovered. The interest shall be calculated on the basis of the reference rate used to calculate the equivalent regional aid subsidy on a compound basis, as stipulated in the Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered.

4. As of 1 January 2004, separate accounts must be kept for all the public service activities imposed by Italy on the Adriatica company on each of the routes concerned.

Article 2

1. The aid granted by Italy to Siremar, Saremar and Toremar as of 1 January 1992 as compensation for providing a public service is compatible with the common market having regard to Article 86(2) of the Treaty.

2. As of 1 January 2004, separate accounts must be kept for all the public service activities imposed by Italy on Siremar, Saremar and Toremar on each of the routes concerned.

Article 3

1. The aid granted by Italy to Caremar as of 1 January 1992 as compensation for providing a public service is compatible with the common market having regard to Article 86(2) of the Treaty.

2. Italy shall give an undertaking that, by no later than 1 September 2004, it will:

(a) abolish the aid granted to Caremar for the provision of scheduled high-speed passenger transport services on the Naples/Capri route;

(b) reduce, in terms of places on offer, the capacity of the scheduled high-speed passenger transport services on the Naples/Procida/Ischia route from 1 142 260 to 633 200 places during the winter period and from 683 200 to 520 400 places during the summer period;

(c) limit the aid granted to Caremar for the provision of scheduled high-speed passenger transport services on the Naples/Procida/Ischia route to covering the net operating loss on the services;

(d) have separate accounts kept for all the public service activities imposed by Italy on Caremar on each of the routes concerned.

Article 4

The capacity reduction undertakings specified in Article 3 shall be included in the interministerial decree adapting the regional companies' five-year plan for the period 2005 to 2008.

Article 5

The Commission shall be notified in advance of any permanent change, whether partial or total, to the level of services offered by Adriatica, Siremar, Saremar, Toremar or Caremar such as would entail an increase in the aid.

Article 6

Italy shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 7

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 March 2004.

For the Commission
Loyola DE PALACIO
Vice-President