



2025/440

14.3.2025

COMMISSION DECISION (EU) 2025/440

of 8 July 2024

on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Campania for Caremar and its acquirer SNAV/Rifim

(notified under document C(2024) 4656)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 5 October 2011, following several complaints ⁽²⁾ and exchanges with the Italian authorities ⁽³⁾, the Commission opened the formal investigation procedure in respect of various measures adopted by Italy in favour of the companies of the former Tirrenia Group ('the 2011 Opening Decision') ⁽⁴⁾. By decision of 7 November 2012, as amended on 19 December 2012 ('the 2012 Extension Decision') ⁽⁵⁾, the Commission extended the formal investigation to certain additional public support measures adopted in favour of those companies.

⁽¹⁾ OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.

⁽²⁾ On 23 March 2009, 9 December 2009, 21 December 2009, 6 January 2010, 27 September 2010 and 12 October 2010, the Commission received six complaints concerning various support measures adopted by the Italian State in favour of the companies of the former Tirrenia Group, which consisted of the shipping companies Tirrenia di Navigazione S.p.A. ('Tirrenia'), Adriatica S.p.A. ('Adriatica'), Caremar – Campania Regionale Marittima S.p.A. ('Caremar'), Saremar – Sardegna Regionale Marittima S.p.A. ('Saremar'), Siremar – Sicilia Regionale Marittima S.p.A. ('Siremar'), and Toremar – Toscana Regionale Marittima S.p.A. ('Toremar').

⁽³⁾ As regards Caremar, on 29 July 2010, the Italian authorities had notified to the Commission the public service compensation paid in 2009 and 2010 by the Italian State to Caremar. The notification and the subsequent exchanges with the Italian authorities, extending among others the notification to the compensation paid until the end of 2011, were registered under case number N 338/2010. However, the measure was subsequently registered as non-notified aid under case numbers SA 32014, SA 32015 and SA 32016 since the State support was put in place before the Commission could take a position on its compatibility with the internal market. On 28 September 2011, Italy informed the Commission of the intention to privatise the regional companies of the former Tirrenia Group, including Caremar.

⁽⁴⁾ The 2011 Opening Decision was published in the *Official Journal of the European Union* (OJ C 28, 1.2.2012, p. 18). The Commission invited interested parties to submit their comments on the measures under investigation.

⁽⁵⁾ The 2012 Extension Decision was published in the *Official Journal of the European Union* (OJ C 84, 22.3.2013, p. 58). The Commission invited interested parties to submit their comments on the measures under investigation.

- (2) The above-mentioned formal investigation procedure has been already closed by the Commission in relation to Tirrenia, Saremar, Siremar, Toremar and Laziomar by means of separate decisions adopted for each of these companies of the Tirrenia Group ⁽⁶⁾.
- (3) As regards Caremar, the 2011 Opening Decision concerned the following measures:
- the compensations granted for the operation of a number of maritime routes between 1 January 2009 and 31 December 2011;
 - the berthing priority laid down by Decree Law No 135 of 25 September 2009 ('Decree-law 135/2009') converted into Law No 166 of 20 November 2009 ('Law 166/2009');
 - the measures laid down by Decree-Law No 125 of 5 August 2010 ('Decree-law 125/2010') converted into Law No 163 of 1 October 2010 ('Law 163/2010'); and
 - the privatisation process of Caremar.
- (4) Italy submitted comments on the measures covered by the 2011 Opening Decision on 15 November 2011, 30 November 2011 and 16 March 2012. By letter dated 19 July 2012, the Italian authorities provided additional information on the privatisation of Caremar. This information, which included a detailed description of the conditions imposed by the latter on potential bidders, had not been made available to the Commission at the time when the 2011 Opening Decision was adopted. The Italian authorities provided further information on 4 October 2012, following a request for information sent by the Commission on 18 July 2012.
- (5) Caremar submitted comments on the 2011 Opening Decision on 19 and 21 March 2012, which were forwarded to Italy on 26 March 2012. On 26 April 2012, Italy confirmed that it shared Caremar's observations.
- (6) The Commission also received from several companies comments as well as complaints about the compensation granted to Caremar for the provision of services in the Gulf of Naples. These complaints were treated by the Commission as comments from interested parties in the context of the formal investigation procedure since they concerned the same subject matter covered by the 2011 Opening Decision.
- (7) On 28 February 2012, the company Alilauro S.p.A. ('Alilauro') submitted a complaint alleging unlawful State aid to Caremar as a result of the prolongation of the Initial Convention. On 7 March 2012, Alilauro submitted its comments on the 2011 Opening Decision.

⁽⁶⁾ By Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22), the Commission closed the formal investigation procedure as concerns some measures adopted by the Sardinian Region in favour of Saremar. By Commission Decision (EU) 2022/756 of 30 September 2021 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Sardinia in favour of Saremar (OJ L 138, 17.5.2022, p. 19), the Commission closed the formal investigation procedure as concerns the remaining measures granted to Saremar. By Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45), the Commission closed the formal investigation procedure as concerns the measures granted to Tirrenia and its acquirer Compagnia Italiana di Navigazione for the period 2009-2020. By Commission Decision (EU) 2022/348 of 17 June 2021 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Tuscany for Toremar and its acquirer Moby (OJ L 64, 2.3.2022, p. 6), the Commission closed the formal investigation procedure as concerns the measures granted to Toremar and its acquirer Moby S.p.A. for the period 2009-2023. By Commission Decision (EU) 2022/448 of 17 June 2021 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Siremar and its acquirer Società Navigazione Siciliana (OJ L 97, 24.3.2022, p. 1), the Commission closed the formal investigation procedure as concerns the measures granted to Siremar and its acquirer Società Navigazione Siciliana for the period 2009-2028. By Commission Decision (EU) 2022/1328 of 30 September 2021 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy and the Region of Lazio for Laziomar (OJ L 200, 29.7.2022, p. 154), the Commission closed the formal investigation procedure as concerns the measures granted to Laziomar and its acquirer Compagnia Laziale di Navigazione S.r.l. for the period 2011-2024.

- (8) On 29 February 2012, the Commission received comments from the companies Medmar Navi S.p.A. ('Medmar') and Navigazione Libera del Golfo S.r.l. ('NLG'), on 1 March 2012 from the company SNAV S.p.A. ('SNAV') and the association Associazione Cabotaggio Armatori Partenopei ('ACAP'), on 5 March 2012 from the company Grandi Navi Veloci ('GNV'). On 16 March 2012, the Commission forwarded to Italy the comments provided by NLG, SNAV, ACAP and GNV, to which Italy did not react, despite a reminder sent to the Italian authorities on 1 October 2012. On 19 March 2012, the Commission forwarded Medmar's comments to Italy, to which the latter replied on 24 April 2012.
- (9) On 7 November 2012, by means of the 2012 Extension Decision, the Commission extended the investigation procedure in respect of the public service compensation paid to all companies of the former Tirrenia Group until the completion of the privatisation process. As regards Caremar, the extension concerned the following measures:
- the compensation granted to Caremar as from 1 January 2012 under the same conditions as in 2011;
 - the compensation to be paid for the operation of the public service under the new public service contract; and
 - the conditions imposed by the Italian authorities on potential bidders in the procedure for the sale of Caremar.
 - Italy submitted its comments on the 2012 Extension Decision by letters of 7 December 2012 and 13 December 2012.
- (10) The Commission received comments also from GNV on 3 December 2012, Medmar on 29 February 2013 and 5 March 2013, NLG on 5 March 2013, and Alilauro on 13 March 2013.
- (11) On 26 February 2013, 12 March 2013 and 12 April 2013 the Italian authorities submitted additional information concerning the compensation and Caremar's privatisation.
- (12) On 20 June 2014, the Italian authorities transmitted a copy to the Commission of the decision of 28 May 2014 of the Regional Administrative Court for Campania annulling the tendering procedure for the privatisation of Caremar. The Italian authorities informed the Commission that an appeal against that decision of the Regional Administrative Court for Campania was pending before the Italian Council of State. On 10 February 2015, the Italian Council of State annulled the decision of 28 May 2014 of the Regional Administrative Court for Campania and confirmed the final award of Caremar's business to SNAV/Rifim S.r.l. ('SNAV/Rifim').
- (13) On 15 July 2015, Marworld Ship Management and Service S.p.A. ('Marworld') submitted to the Commission a complaint concerning the privatisation procedure of Caremar⁽⁷⁾. As the complaint concerned a subject matter covered by the 2011 Opening Decision and by the 2012 Extension Decision, the Commission treated it as comments from interested parties in the context of the formal investigation procedure.

(7) The complaint was registered by the Commission under case SA.42685.

- (14) Between 2014 and 2019, the Commission focused on the formal investigation procedure concerning the other companies of the Tirrenia Group, giving priority to the companies Saremar ⁽⁸⁾ and Tirrenia ⁽⁹⁾, as requested by the Italian authorities. The investigation led to the adoption in the period 2014 – 2022 of the final decisions concerning the companies Saremar, Tirrenia, Siremar, Toremar and Laziomar (see recital 2). In parallel, on 2 March 2020, the Commission concluded the investigation on the Tirrenia Group companies other than Tirrenia, including Caremar, for the period 1992-2008 ⁽¹⁰⁾.
- (15) On 25 January 2018, 14 March 2019, 10 August 2021, and 8 December 2022, the Commission requested additional information from the Italian authorities on Caremar. The Italian authorities provided this information on 9 May 2018, 31 May 2019, 14 June 2019, 1 October 2021, 27 December 2022 and 3 February 2023. Furthermore, several informal exchanges by email with the Italian authorities took place during the period October 2022 to May 2023.
- (16) On 29 May 2024, Italy exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958 ⁽¹¹⁾ and to have this Decision adopted and notified in English.
- (17) This Decision closes the formal investigation procedure opened by the 2011 Opening Decision and extended by the 2012 Extension Decision for the part concerning the measures granted to Caremar and its acquirer, i.e. the temporary association of undertakings SNAV/Rifim.

2. BACKGROUND

- (18) Caremar has been providing maritime transport services mostly between mainland Italy (Naples, Sorrento and Pozzuoli) and the islands of the Gulf of Naples (Capri, Ischia, Procida), and, until 1 June 2011, also between mainland Italy (Formia and Anzio) and the islands of Ponza and Ventotene in the Pontino Archipelago.
- (19) These services have been operated by Caremar under public service contracts with public service obligations ('PSO'). This Decision covers the maritime transport services provided by Caremar based on: (i) the public service contract that was set to expire at the end of 2008 (the 'Initial Convention') as prolonged to cover the period from 1 January 2009 to 31 July 2012; and (ii) the new public service contract covering the period from 16 July 2015 to 15 July 2024.

⁽⁸⁾ By letter of 14 May 2013, the Region of Sardinia asked the Commission to separate from the formal investigation procedure opened by the 2011 Opening Decision and extended by the 2012 Extension Decision the measures concerning Saremar and to give priority to these measures, notably in view of the imminent privatisation of the company.

⁽⁹⁾ By note of 2 August 2017, the Italian authorities requested the Commission to prioritise concluding the investigation concerning Tirrenia and its acquirer CIN in light of certain clauses in the sale contract concluded with CIN. In addition, of all the new public service contracts concluded with the acquirers of the companies of the former Tirrenia Group, the contract with CIN was the first to expire.

⁽¹⁰⁾ Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 332, 12.10.2020, p. 1).

⁽¹¹⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

- (20) From 1 August 2012 to 15 July 2015, Caremar provided maritime transport services based on a public service contract signed between the Region of Campania and Caremar on 19 December 2012 (the 'bridge contract') ⁽¹²⁾. That contract provided for the continuation of the services provided by Caremar during the prolongation of the Initial Convention in the Gulf of Naples from 1 August 2012 (i.e. the date when the prolongation of the Initial Convention laid down by Law 163/2010 ceased to apply). The bridge contract was initially due to expire on 31 December 2012 but was first extended until 31 December 2013 and subsequently by various Executive Decisions of the Region of Campania ⁽¹³⁾ until 15 July 2015, i.e. the date of completion of Caremar's privatisation process and of the entry into force of the new public service contract with Caremar's acquirer. The bridge contract does not fall in the scope of the formal investigation covered by the 2011 Opening Decision and the 2012 Extension Decision ⁽¹⁴⁾, and therefore is not assessed by the Commission in this Decision.
- (21) Caremar's activities are limited to the provision of maritime public services entrusted by the Italian authorities, namely those covered by the prolonged Initial Convention first, the bridge contract and later the new public service contract.
- (22) The Tirrenia Group was owned by Italy through the company Fintecna ⁽¹⁵⁾ and initially included six companies, namely Tirrenia, Adriatica S.p.A. ('Adriatica'), Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded with Italy in 1991, in force for twenty years between January 1989 and December 2008. Fintecna held 100 % of the share capital of Tirrenia, which in turn wholly owned the regional companies Adriatica, Caremar, Siremar, Saremar and Toremar. Adriatica, which used to operate several routes between Italy and Albania, Croatia, Greece and Montenegro, was merged with Tirrenia in 2004.
- (23) The purpose of these public service contracts was to guarantee the regularity and reliability of the maritime transport services for the routes covered. To that effect, Italy granted public compensation to the companies of the Tirrenia Group for the services provided under these public service contracts.
- (24) Article 1 of the Initial Convention provided that the ports to be served, the type of vessels to be used and the required frequency of the service entrusted to Caremar had to be detailed by means of five-year plans. The last five-year plan formally approved for Caremar is the one relating to the period 2000-2004, whereas a plan for the period 2005-2008 was drawn up but never formally approved by the competent ministries. The Italian authorities explained that longer-term planning had no longer been possible due to the lack of budgeting of the required funds and that instead *ad hoc* decisions were taken by the government.

⁽¹²⁾ The Region of Campania by Decision No 502 of 21 September 2012 authorised the conclusion of a bridge contract with Caremar and by Regional Executive Decree No 314 of 19 December 2012 approved the bridge contract.

⁽¹³⁾ The bridge contract was extended several times until the completion of Caremar's privatisation process (namely, by Regional Executive Decision No 191 of 18 June 2013, until 31 December 2013; by Regional Executive Decision No 632 of 27 December 2013, until 28 February 2014; by Regional Executive Decision No 60 of 28 February 2014 until 30 April 2014; by Regional Executive Decision No 123 of 29 April 2014 until 30 June 2014; by Regional Executive Decision No 243 of 27 June 2014 until 31 December 2014; by Regional Executive Decision No 697 of 23 December 2014 until 31 March 2015 and by Regional Executive Decision No 161 of 28 March 2015 until 31 July 2015 at the latest). By Law No 228 of 24 December 2012, Italy authorised the payment to the Region of Campania of the resources necessary to guarantee the territorial continuity of the maritime services in the regional area until the completion of Caremar's privatisation process.

⁽¹⁴⁾ See recitals 54 and 55 of the 2012 Extension Decision.

⁽¹⁵⁾ Fintecna (Finanziaria per i Settori Industriale e dei Servizi S.p.A.) is wholly owned by the Italian Ministry of the Economy and Finance and is specialised in managing shareholding and privatisation processes, as well as dealing with projects to rationalise and restructure companies facing industrial, financial or organisational difficulties.

- (25) The Initial Convention between Italy and Caremar has been already assessed by the Commission in its Decision (EU) 2020/1411 ⁽¹⁶⁾ concluding the State aid investigation on the Tirrenia Group companies other than Tirrenia, for the period 1992-2008 ⁽¹⁷⁾. In that decision, the Commission found that the aid granted to Caremar for the provision of maritime cabotage transport services constituted existing aid.
- (26) The maritime cabotage transport services provided are essentially designed to meet the mobility requirements of the local communities and were comparable to a suburban transport network in terms of frequency and timetable, particularly as regards the Gulf of Naples.

3. MEASURES SUBJECT TO THE FORMAL INVESTIGATION

- (27) The formal investigation covered by the 2011 Opening Decision and the 2012 Extension Decision in respect of Caremar concerns the following measures:
- (a) the compensation granted to Caremar for the provision of maritime transport services under the prolonged Initial Convention (i.e. from 1 January 2009 to 31 July 2012);
 - (b) the berthing priority laid down by Law 166/2009;
 - (c) the measures laid down by Law 163/2010;
 - (d) the privatisation of Caremar, including the conditions imposed by the Italian authorities on potential bidders in the procedure for the sale of Caremar;
 - (e) the compensation granted for the provision of maritime transport services under the new public service contract.

3.1. The organisation of Caremar's maritime transport services from 1 January 2009 to 31 July 2012

3.1.1. The PSO

- (28) Article 26 of Decree-law No 207 of 30 December 2008 ('Decree-law 207/2008'), converted into Law No 14 of 27 February 2009 ('Law 14/2009'), laid down the prolongation of the Initial Convention (as well as of the public service contracts entrusted to the other companies of the Tirrenia Group) which was initially due to expire on 31 December 2008 for one year, until 31 December 2009.

⁽¹⁶⁾ Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 332, 12.10.2020, p. 1).

⁽¹⁷⁾ On 6 August 1999, the Commission initiated the procedure laid down in Article 108(2) TFEU in respect of the compensation paid to the six companies of the Tirrenia Group, including Caremar. During the investigation phase, the Italian authorities requested that the Tirrenia Group case be split up so that priority could be given to reaching a final decision concerning Tirrenia. This request was motivated by the Italian authorities' plan to privatise the Group, beginning with Tirrenia, and their intention to speed up the process in relation to that company. The Commission decided that it could accede to the Italian authorities' request, and by Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9) it closed the procedure initiated in respect of the aid awarded to Tirrenia. The aid was declared compatible subject to certain commitments by the Italian authorities. By Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 53, 26.2.2005, p. 29), the Commission declared the compensation granted by Italy to Caremar and to the other companies of the Tirrenia Group companies (with the exception of Tirrenia which was covered by Commission Decision 2001/851/EC) to be partially compatible with the internal market, partially compatible conditional upon the respect of a number of commitments by the Italian authorities, and partially incompatible with the internal market. Decision 2005/163/EC was annulled by the General Court by judgment of 4 March 2009 (joined cases), *Tirrenia di Navigazione SpA (T-265/04), Caremar SpA and Others (T-292/04) and Navigazione Libera del Golfo SpA (T-504/04) v Commission of the European Communities*, ECLI:EU:T:2009:48. To comply with that judgment, the Commission reopened the formal investigation procedure, which was eventually concluded by Commission Decision (EU) 2020/1411.

- (29) Article 19-ter of Decree-law 135/2009, as converted into Law 166/2009, provided that, in view of the privatisation of the Tirrenia Group companies, the shareholding of Caremar would be transferred from the parent company Tirrenia to the Region of Campania, without any consideration being paid. The Region of Campania would subsequently transfer to the Region of Lazio the Caremar's business operating the transport connections with the Pontino Archipelago on a standalone basis under the name Laziomar ⁽¹⁸⁾.
- (30) Article 19-ter of Decree-law 135/2009, as converted into Law 166/2009 also specified that new public service contracts would be agreed between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in draft public service contracts, to be agreed between the regional authorities of Sardinia and Tuscany and Saremar and Toremar, respectively, by 31 December 2009 and between the Region of Campania and Caremar by 28 February 2010. The draft new public service contracts would be put up for tender with the companies themselves and signed with the buyers upon finalisation of the privatisation of each of those companies ⁽¹⁹⁾.
- (31) To that end, as regards Caremar, Article 19-ter of Decree-law 135/2009, as converted into Law 166/2009, further prolonged the Initial Convention from 1 January 2010 until 30 September 2010.
- (32) Article 19-ter of Decree-law 135/2009, as converted into Law 166/2009, also laid down fixed annual compensation ceilings for the operation of the public services as of 1 January 2010 (under the prolongation of the Initial Convention as well as under the new public service contracts). As regards Caremar that ceiling was set at a total of EUR 29 869 832 ⁽²⁰⁾.
- (33) Article 1(5bis) of Decree Law 125/2010 converted into Law 163/2010 laid down the further prolongation of the Initial Convention from 1 October 2010 until the completion of the privatisation processes of Tirrenia and Siremar, which took place on 19 July 2012 and 31 July 2012 respectively. Therefore, as regards Caremar, the prolonged Initial Convention applied until 31 July 2012.
- (34) The PSO routes operated by Caremar under the prolonged Initial Convention were:
- (a) in the period from 1 January 2009 to 31 July 2012, eight routes in the Gulf of Naples (Capri/Sorrento, Capri/Naples, Ischia/Procida/Naples, Ischia/Naples, Ischia/Procida, Ischia/Procida/Pozzuoli, Procida/Naples, Procida/Pozzuoli) – in that period the PSO imposed on Caremar had only very marginal changes in terms of frequencies and timetables (as summarised in recital 39); and
 - (b) in the period from 1 January 2009 to 31 May 2011 ⁽²¹⁾, three routes in the Pontino Archipelago (Ponza/Formia, Ponza/Anzio, Formia/Ventotene) – in that period the PSO imposed on Caremar for these routes did not change.

⁽¹⁸⁾ This transfer was formalised on 1 June 2011.

⁽¹⁹⁾ Article 19-ter, paragraph 10, of Law 166/2009.

⁽²⁰⁾ Out of which EUR 19 839 226 from Campania and EUR 10 030 606 from Lazio.

⁽²¹⁾ As of 1 June 2011, these routes were operated by the newly constituted Laziomar. The Commission has assessed the compensation granted to Laziomar for the operation of these routes from 1 June 2011 to 14 January 2024 in its decision of 30 September 2021 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy and the Region of Lazio for Laziomar (OJ L 200, 29.7.2022, p. 154), see footnote 6.

Figure 1

Routes operated by Caremar in the Gulf of Naples in the period 2009–2012

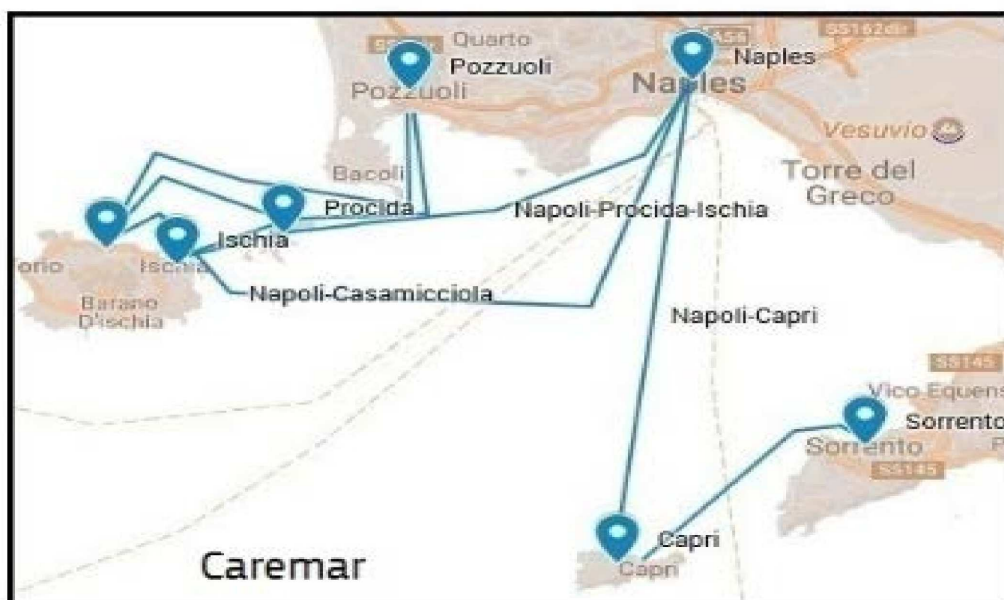
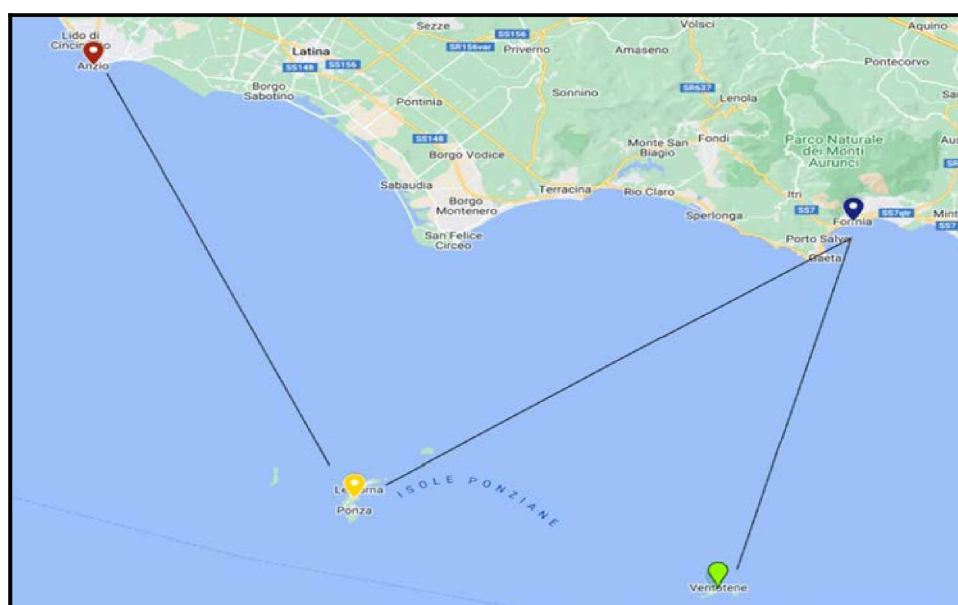


Figure 2

Routes operated by Caremar in the Pontino Archipelago in the period 2009–2011



- (35) The obligations attached to the routes mentioned in recital 34 were the same as those imposed on Caremar under the Initial Convention and remained almost unchanged, with the exception of some variations in terms of frequencies and timetables which were introduced by the Region of Campania over the years in the berthing frameworks ('quadri accosti'), approved and published by the Region of Campania, to adjust the offer to user's demand, as explained below.

- (36) On 1 January 2009, i.e. at the time of the first prolongation of the Initial Convention ⁽²²⁾, the PSO imposed on Caremar in terms of type of vessels, frequencies and timetables were the same as those that had been defined under the Initial Convention ⁽²³⁾. In particular:
- (a) On the route **Capri/Sorrento**, Caremar had to provide throughout the year eight daily mixed services (i.e. taking passenger, vehicles and postal effects) by fast ferry ('TMV' ⁽²⁴⁾) ⁽²⁵⁾.
 - (b) On the route **Capri/Naples**, Caremar had to provide throughout the year to/from Naples (Calata Massa) ⁽²⁶⁾ six daily mixed services by TMV (50 minutes travel) / ferry (1h20 travel) ⁽²⁷⁾. In addition, Caremar had to provide eight additional mixed services in summer: seven by TMV/ferry over the entire summer period ⁽²⁸⁾ and a further additional one by TMV only in the period from 1 June to 30 September ⁽²⁹⁾.
 - (c) On the route **Ischia/Naples**, Caremar had to provide throughout the year three daily mixed services by ferry to Naples (Calata Massa) ⁽³⁰⁾ and four daily passenger services by hydrofoil to/from Naples (Beverello) ⁽³¹⁾.
 - (d) On the route **Ischia/Procida/Naples**, Caremar had to provide throughout the year fourteen daily mixed service by ferry to/from Naples (Calata Massa) ⁽³²⁾ and eight daily passenger services by hydrofoil to/from Naples (Beverello) ⁽³³⁾.
 - (e) On the route **Ischia/Procida/Pozzuoli**, Caremar had to provide throughout the year six daily mixed services by ferry ⁽³⁴⁾.
 - (f) On the route **Ischia/Procida**, Caremar did not have to provide any service in addition to those already provided on the route Ischia/Procida/Pozzuoli.
 - (g) On the route **Procida/Pozzuoli**, in addition to the sailings to be provided on the route Ischia/Procida/Pozzuoli, Caremar had to provide throughout the year two daily passenger services by hydrofoil ⁽³⁵⁾.

⁽²²⁾ Laid down by Decree-law 207/2008 converted into Law 14/2009, see recital 28.

⁽²³⁾ Regional Executive Decision No 548 of 1 April 2007.

⁽²⁴⁾ TMV is the acronym of 'Traghetto Motonave Veloce'.

⁽²⁵⁾ Namely, from Capri to Sorrento (25 minutes travel) at **7:00 am, 8:40 am, 13:40, and 18:15**; and from Sorrento to Capri (20 minutes travel) at **7:45 am, 9:25 am, 14:30; and 19:00**.

⁽²⁶⁾ The port of Naples has several piers, the most important ones being the Calata Massa pier (for TMVs and ferries) and the Beverello pier (for hydrofoils).

⁽²⁷⁾ Namely, from Naples to Capri at **5:40 am (by TMV), 17:00 (by TMV), and 18:40 (by ferry)**; and from Capri to Naples at **14:50 (by ferry), 15:40 (by TMV), and 19:50 (by TMV)**.

⁽²⁸⁾ Namely, from Naples to Capri at **7:35 am (by ferry), 12:15 am (by TMV), 12:55 (by ferry)**; and from Capri to Naples at **5:45 am (by ferry), 9:30 am (by ferry), 10:25 (by TMV), 20:05 (by TMV)** which was moved to 22:20 in the period between 1 June to 30 September).

⁽²⁹⁾ Namely, from Naples to Capri at **21:10**.

⁽³⁰⁾ Namely, from the port of Ischia to Naples (1h25 travel) at **9:00 am, 13:50 and 20:10**.

⁽³¹⁾ Namely, from the port of Ischia to Naples (45 minutes travel) at **6:50 am and 8:50 am**; from Naples to the port of Ischia (45 minutes travel) at **7:50 am and 18:15**.

⁽³²⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h40 duration) at **6:25 am (with departure from Procida at 7:30 am), at 8:55 am (with departure from Procida at 10:00 am) at 10:40 am (with departure from Procida at 11:55 am), at 14:30 from Naples to Procida (with departure from Procida at 15:35), at 15:40 (with departure from Procida at 16:45), at 17:30 (with departure from Procida at 18:35), at 19:20 (with departure from Procida at 20:25); and at 21:55 (with departure from Procida at 23:00)**. From Ischia to Procida and subsequently to Naples (total 1h35 duration) at **6:45 am (with departure from Procida at 7:15), at 12:30 am (with departure from Procida at 12:55), at 15:20 (with departure from Procida at 16:50), at 17:15 (with departure from Procida at 17:45), at 19:30 (with departure from Procida at 20:00)**.

⁽³³⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h10 travel) at **9:55 am (with departure from Procida at 10:35 am), at 13:10 (with departure from Procida at 13:50), at 15:10 (with departure from Procida at 15:50) and at 20:20 (with departure from Procida at 20:55)**.

From Ischia to Procida and subsequently to Naples (total 1h10 travel) at **12:00 am (with departure from Procida at 12:10 am), at 14:15 (with departure from Procida at 15:05), at 16:15 (with departure from Procida at 16:25), at 19:10 (with departure from Procida at 19:20)**.

⁽³⁴⁾ Namely, from Ischia to Procida and subsequently to Pozzuoli (total 1 hour travel) at **8:30 am (with departure from Procida at 8:50), at 11:20 am (with departure from Procida at 11:40), and at 17:35 (with departure from Procida at 18:00)**.

From Pozzuoli to Procida and subsequently to Ischia (total 1 hour travel) at **9:55 am (with departure from Procida at 10:30), at 13:50 (with departure from Procida at 14:20), at 18:55 (with departure from Procida at 19:30)**.

⁽³⁵⁾ Namely from Procida to Pozzuoli (15 minutes travel) at **8:25 am**, and from Pozzuoli to Procida (15 minutes travel) at **8:50 am**.

- (h) On the route **Procida/Naples**, in addition to the sailings to be provided on the route Ischia/Procida/Naples, Caremar had to provide throughout the year four daily passenger services by hydrofoil ⁽³⁶⁾.
 - (i) On the route **Ponza/Formia**, Caremar had to provide throughout the year two daily mixed services by ferry (2h30 travel), and one daily passenger service by hydrofoil.
 - (j) On the route **Ponza/Anzio**, Caremar had to provide two daily high-speed passenger services in the high season from Monday to Saturday and four daily mixed services on Sundays and holidays.
 - (k) On the route **Formia/Ventotene**, Caremar had to provide throughout the year two daily mixed services by ferry (2 hours travel), and two ⁽³⁷⁾ daily passenger services by hydrofoil (60 minutes trip).
- (37) The abovementioned PSO did not change on 1 January 2010 and 1 October 2010, i.e. at the time of the second and third prolongations of the Initial Convention ⁽³⁸⁾.
- (38) Following a public consultation carried out in November-December 2010, by Regional Executive Decision No 443 of 9 August 2011 and its implementing Executive Decree No 172 of 21 September 2011, the Region of Campania adopted a three-year programme (2011-2013) providing for minimum services in the Gulf of Naples. As regards Caremar, that programme confirmed the routes and obligations historically operated by Caremar under the Initial Convention and introduced some variations in the timetables of the services with effect from 1 October 2011 until 31 December 2013 ⁽³⁹⁾. That programme was marginally modified by the Region of Campania by Regional Executive Decision No 857 of 30 December 2011 (that applied only to Caremar), which introduced some changes to the timetables and frequency of the services outlined in the three-year programme with effect from 16 January 2012. Those changes were decided by the Region of Campania following the requests made by local communities and municipalities to adjust some timetables and frequencies to the needs of commuters ⁽⁴⁰⁾. The three-year programme 2011-2013 was subsequently extended by the Region of Campania until the end of 2015 by means of further legislative acts ⁽⁴¹⁾, and became part of the new public service contract (see recital 83).
- (39) The changes introduced by the Region of Campania to the PSO operated by Caremar in the Gulf of Naples by means of the three-year programme 2011-2013 mentioned in recital 38 can be summarised as follows:
- (a) On the route **Capri/Sorrento**, Caremar still had to provide eight daily mixed services by TMV throughout the year (but the timetable of 2009 mentioned in recital 36(a) was subject twice to minimal time adjustments, a first time from 1 October 2011 ⁽⁴²⁾ and a second time from 16 January 2012 ⁽⁴³⁾).

⁽³⁶⁾ Namely, from Procida to Naples (40 minutes travel) at **6:35** am, and at **9:20** am; and from Naples to Procida (40 minutes travel) at **7:30** am and at **17:45**.

⁽³⁷⁾ Four daily services on Mondays.

⁽³⁸⁾ Laid down respectively by Decree-law 135/2009 converted into Law 166/2009, see recital 31, and by Decree-law 125/2010 converted into Law 163/2010, see recital 33.

⁽³⁹⁾ For a description of the discussions that led to the definition of the three-year programme adopted by Regional Executive Decision No 443 of 9 August 2011, see recitals from 178 to 181.

⁽⁴⁰⁾ In particular, the need to ensure adequate transport services to students living in Ischia but studying in Procida, as explained in the recitals of Regional Executive Decision No 857 of 30 December 2011, which entailed some variations in timetables and a slight increase in the number of connections with the island of Procida.

⁽⁴¹⁾ Namely by Regional Executive Decision No 632 of 27 December 2012 (covering until 30 September 2014) and by Regional Executive Decision No 230 of 5 May 2015 (covering until 31 December 2015)

⁽⁴²⁾ Namely, from Capri to Sorrento (25 minutes travel) at **7:00** am, **8:40** am, **13:35** (instead of 13:40), and at **18:30** (instead of at 18:15); and from Sorrento to Capri (20 minutes travel) at **7:45** am, **9:25** am, **14:25** (instead of at 14:30); and at **19:00** in the summer period (while at 19:15 in the winter period).

⁽⁴³⁾ Namely, from Capri to Sorrento (25 minutes travel) at **7:00** am, **8:40** am, **13:35** (instead of 13:40), and at **18:45** (instead of at 18:30); and from Sorrento to Capri (20 minutes travel) at **7:45** am, **9:25** am, **14:30** (instead of at 14:25); and at **19:25** (instead of 19:00 in summer and 19:15 in winter).

- (b) On the route **Capri/Naples**, Caremar still had to provide throughout the year from/to Naples (Calata Massa) six daily mixed services, with some changes in the timetables as of 1 October 2011 ⁽⁴⁴⁾ and as of 16 January 2012 ⁽⁴⁵⁾ compared to those presented in recital 36(b). The eight additional mixed services to be provided in the summer period (see recital 36(b)) became as of 1 October 2011 (with marginal changes in the timetables as of 16 January 2012): six daily mixed additional services to be provided throughout the year (with different timetables for the summer period ⁽⁴⁶⁾ and the winter period ⁽⁴⁷⁾) and two further additional services to be provided only in the period from 1 June to 30 September ⁽⁴⁸⁾.
- (c) On the route **Ischia/Naples**, Caremar had to provide throughout the year three daily mixed services by ferry (with marginal changes in the timetables mentioned at recital 36(c) as of 1 October 2011 ⁽⁴⁹⁾ and as of 16 January 2012 ⁽⁵⁰⁾). An additional daily mixed services by ferry was included as of 16 January 2012, when Caremar had to provide an additional sailing by ferry to the port of Casamicciola at Ischia ⁽⁵¹⁾. As regards the passenger services by hydrofoil to/from Naples (Beverello), the number of sailings to be provided by Caremar was reduced over time. In fact, from 1 January 2009 to 30 September 2011 Caremar had to provide four daily passenger services by hydrofoil (see recital 36(c)). Those four sailings were not included anymore in the timetable as of 1 October 2011 and only partially reintroduced as of 16 January 2012, with the imposition on Caremar of a daily passenger service by hydrofoil from Naples to the port of Ischia ⁽⁵²⁾.
- (d) On the route **Ischia/Procida/Naples**, Caremar had to provide throughout the year several daily mixed services by ferry to/from Naples (Calata Massa) and daily passenger services by hydrofoil to/from Naples (Beverello). As regards the mixed services, the number of sailings to be provided by Caremar was slightly progressively reduced over time. In fact, the fourteen daily mixed services to be provided by Caremar throughout the year (see recital 36(d)) were reduced to thirteen as of 1 October 2011 ⁽⁵³⁾ (notably one from the port of Casamicciola at Ischia ⁽⁵⁴⁾ and twelve to/from the port of Ischia ⁽⁵⁵⁾), and further reduced to ten as of 16 January 2012 ⁽⁵⁶⁾ (notably one from the port of Casamicciola at Ischia ⁽⁵⁷⁾ and nine to/from the port of

⁽⁴⁴⁾ Namely, from Naples to Capri by TMV: at **5:35** am (instead of 5:40 am), **12:00** am, **17:00**; and from Capri to Naples by TMV: at **10:25** am, **15:30** (instead of 15:40), and **19:55** (instead of 19:50).

⁽⁴⁵⁾ Namely, from Naples to Capri by TMV: at **5:35** am (instead of 5:40 am), **12:00** am, **17:25** (instead of 17:00); and from Capri to Naples by TMV: at **10:20** am (instead of 10:25 am), **15:35** (instead of 15:30), and **20:15** (instead of 19:55).

⁽⁴⁶⁾ Namely, from Naples to Capri by ferry: at **7:35** am, **13:00**, **18:40**; and from Capri to Naples at **5:45** am, **9:20** am, **14:50**. As of 16 January 2012, the timetable was: from Naples to Capri by ferry: at **7:25** am, **13:00**, and **18:35**; and from Capri to Naples by ferry: at **5:40** am, **9:20** am, and **14:50**.

⁽⁴⁷⁾ Namely, from Naples to Capri by ferry: at **9:05** am and **14:20**; and from Capri to Naples by ferry: at **6:45** am, **11:00** am, **16:15**, **20:10**. As of 16 January 2012, the timetable was: from Naples to Capri by ferry: at **9:00** am, **14:20**; and from Capri to Naples by ferry: at **6:45** am, **11:00** am, **16:15**, and **20:10**.

⁽⁴⁸⁾ Namely, from Naples to Capri by TMV: at **21:20** and from Capri to Naples by TMV at **23:30**. As of 16 January 2012, the timetable was: from Naples to Capri by TMV at **21:35** and from Capri to Naples by TMV at **23:50**.

⁽⁴⁹⁾ Namely, from Ischia to Naples (1h25 travel) at **8:45** am; and from Naples to Ischia (1h20 travel) at **16:05** and **20:25**.

⁽⁵⁰⁾ Namely, from Ischia to Naples (1h25 travel) at **8:45** am; and an additional one at **13:50**; and from Naples to Ischia (1h20 travel) at **20:15** (instead of 20:25 and the one at 16:05 was suppressed).

⁽⁵¹⁾ Namely, from Naples to Ischia (1h15 travel) at **15:45**.

⁽⁵²⁾ Namely, from Naples to Ischia (1h05 travel) at **14:45**.

⁽⁵³⁾ The sailing at 15:40 from Naples to Procida and subsequently to the port of Ischia was suppressed.

⁽⁵⁴⁾ Namely, from Ischia to Procida and subsequently to Naples (total 1 hour travel) at **12:55** am from the port of Casamicciola (with departure from Procida at 13:35).

⁽⁵⁵⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h35 duration) at **6:25** am (with departure from Procida at 7:30 am), at **9:10** am (instead of at 8:55, with departure from Procida at 10:20 am); at **10:45** am (instead of 10:40 am, with departure from Procida at 11:45), at **15:15** (instead of at 14:30, with departure from Procida at 16:15), at **17:45** (instead of at 17:30, with departure from Procida at 18:45), at **19:30** (instead of at 19:20, with departure from Procida at 20:30); and at **22:15** (instead of at 21:55, with departure from Procida at 23:15). From Ischia to Procida and subsequently to Naples (total 1h35 duration) at **7:00** am (instead of 6:45 am, with departure from Procida at 7:30), at **13:55** (instead of at 12:30 am, with departure from Procida at 14:35), at **15:30** (instead of at 15:20, with departure from Procida at 16:15), at **17:25** (instead of at 17:15, with departure from Procida at 18:05), at **19:55** (instead of at 19:30, with departure from Procida at 20:30).

⁽⁵⁶⁾ The sailings at 7:00 am and at 13:55 from Ischia to Procida and subsequently to the port of Ischia were suppressed.

⁽⁵⁷⁾ The timetable remained the same (i.e. departure at **12:55** am from the port of Casamicciola (Ischia), see footnote 54).

Ischia)⁽⁵⁸⁾, but with the addition of two daily mixed services in the period from 15 June to 15 September⁽⁵⁹⁾. As regards the passenger services, the number of sailings to be provided by Caremar was slightly increased over time. In fact, the eight daily passenger services to be provided by Caremar throughout the year (see recital 36(d)) were increased to ten as of 1 October 2011⁽⁶⁰⁾, with the further addition of two sailings in the period from 1 June to 30 September⁽⁶¹⁾. As of 16 January 2012, the daily passenger services to be provided by Caremar were reduced to nine throughout the year⁽⁶²⁾, while the additional two sailings in the period from 1 June to 30 September were kept in place with marginal time adjustments⁽⁶³⁾.

- (e) On the route **Ischia/Procida/Pozzuoli**, Caremar had to provide throughout the year six daily mixed services by ferry. The six mixed services described in recital 36(e)) had some changes in the timetables as of 1 October 2011 and as of 16 January 2012. In fact, as of 1 October 2011 Caremar had to provide one sailing to the port of Casamicciola at Ischia⁽⁶⁴⁾ and five sailings to/from the port of Ischia⁽⁶⁵⁾; whereas, as of 16 January 2012, Caremar had to provide two daily mixed services from/to the port of Casamicciola at Ischia⁽⁶⁶⁾ and four to/from the port of Ischia⁽⁶⁷⁾. In addition, as of 16 January 2012, Caremar had to provide two additional mixed services by ferry in the period from 16 September to 14 June (school period)⁽⁶⁸⁾.
- (f) On the route **Ischia/Procida**, from 1 January 2009 to 30 September 2011 Caremar did not have to provide any service in addition to those already provided on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples (see recital 36(f)). This did not change between 1 October 2011 and 15 January 2012. As of 16 January 2012, Caremar had to provide throughout the year one daily passenger service by hydrofoil to the port of Ischia⁽⁶⁹⁾ in addition to those already provided on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples.

⁽⁵⁸⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h35 duration) at **6:25** am (with departure from Procida at 7:30 am), **10:45** am (with departure from Procida at 11:50), at **15:10** (instead of at 15:15, with departure from Procida at 16:20), restored at **17:30** (instead of at 17:45, with departure from Procida at 18:35), at **19:30** (instead of at 19:20, with departure from Procida at 20:30); and at **21:55** (instead of at 22:15, with departure from Procida at 23:00). From Ischia to Procida and subsequently to Naples (total 1h35 duration) at **15:20** (instead of at 15:30, with departure from Procida at 15:50), at **17:20** (instead of at 17:25, with departure from Procida at 17:50), at **19:25** (with departure from Procida at 20:30).

⁽⁵⁹⁾ Namely, from Ischia to Procida and subsequently to Naples (total 1h35 duration) at **7:00** am (with departure from Procida at 7:25); and from Naples to Procida and subsequently to Ischia (total 1h35 duration) at **9:25** am (with departure from Procida at 10:30 am).

⁽⁶⁰⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h10 travel) at **8:50** am (instead of at 9:55, with departure at 9:30 am from Procida), at **11:45** am (with departure at 12:25 from Procida), at **13:10** (with departure at 13:50 from Procida), at **15:10** (with departure from Procida at 15:50), and at **18:15** (with departure at 18:55 from Procida). From Ischia to Procida and subsequently to Naples (total 1h10 travel) at **7:30** am (with departure from Procida at 7:55 am), at **10:10** am (with departure at 10:35 from Procida), at **13:05** (instead of at 12:00 am, with departure at 13:30 from Procida), at **14:30** (instead of at 14:15, with departure at 14:55 at Procida), at **16:30** (instead of at 16:15, with departure at 16:55 from Procida).

⁽⁶¹⁾ Namely, from Ischia to Procida and subsequently to Naples at **19:35** (with departure at 20:00 from Procida); and from Naples to Procida and subsequently to Ischia at **20:55** (with departure at 21:30 from Procida).

⁽⁶²⁾ Namely, from Naples to Procida and subsequently to Ischia (total 1h10 travel) at **8:40** am (instead of at 8:50, with departure at 9:30 am from Procida), at **11:45** am (with departure at 12:25 from Procida), at **13:10** (with departure at 13:50 from Procida), and at **18:15** (with departure at 18:55 from Procida).

From Ischia to Procida and subsequently to Naples (total 1h10 travel) at **6:45** am (instead of 7:30, with departure at 7:05 am from Procida), at **10:15** am (instead of at 10:10 am, with departure at 10:35 from Procida), at **13:00** (instead of at 13:05 am, with departure at 13:15 from Procida), at **14:30** (instead of at 14:15, with departure at 14:55 from Procida), at **16:25** (instead of at 16:30, with departure at 16:45 from Procida).

⁽⁶³⁾ Namely, from Ischia to Procida and subsequently to Naples at **19:35** (with departure at 20:00 from Procida); and from Naples to Procida and subsequently to Ischia at **21:05** (instead of 20:55, with departure at 21:50 from Procida).

⁽⁶⁴⁾ Namely, from Pozzuoli to Procida and subsequently to Ischia (total 1h15 travel) at **10:20** am (with departure at 10:55 am at Procida).

⁽⁶⁵⁾ Namely, from Ischia to Procida and subsequently to Pozzuoli (total 1 hour travel) at **8:30** am (departure from Procida at 9:10 am), at **11:30** am (instead of at 11:20, with departure from Procida at 12:10 am), at **18:00** am (instead of 17:35, with departure from 18:35 at Procida). From Pozzuoli to Procida and subsequently to Ischia (total 1h15 travel) at **13:50** (with departure from Procida at 14:20); and at **19:15** (instead of 18:55, with departure from Procida at 19:45).

⁽⁶⁶⁾ Namely, from Pozzuoli to Procida and subsequently to Ischia at **10:15** am (with departure from Procida at 10:55 am); and from Ischia to Procida and subsequently to Pozzuoli at **17:30** from the port of Casamicciola (with departure from Procida at 18:00).

⁽⁶⁷⁾ Namely, from Ischia to Procida and subsequently to Pozzuoli at **8:35** am (with departure from Procida at 9:00 am), at **11:30** am (with departure from Procida at 11:55 am); from Pozzuoli to Procida and subsequently to Ischia at **14:00** (with departure from Procida at 14:30), and at **18:55** (with departure from Procida at 19:35).

⁽⁶⁸⁾ Namely, from Ischia to Procida and subsequently to Pozzuoli at **7:20** am (with departure from Procida at 7:50 am); and from Pozzuoli to Procida and subsequently to Ischia at **9:00** am (with departure from Procida at 9:40).

⁽⁶⁹⁾ Namely, from Procida to Ischia (20 minutes travel) at **15:30**.

- (g) On the route **Procida/Pozzuoli**, in addition to the sailings to be provided on the route Ischia/Procida/Pozzuoli, Caremar had to provide throughout the year two passenger services by hydrofoil (see recital 36(g)), these sailings had marginal changes in the timetables as of 1 October 2011 ⁽⁷⁰⁾ and as of 16 January 2012 ⁽⁷¹⁾.
- (h) On the route **Procida/Naples**, in addition to the sailings to be provided on the route Ischia/Procida/Naples, Caremar had to provide throughout the year four daily passenger services by hydrofoil to/from Naples (Beverello) ⁽⁷²⁾ (see recital 36(h)), with marginal changes in the timetable between 1 October 2011 and 16 January 2012 ⁽⁷³⁾.
- (40) Under Article 1 of the prolonged Initial Convention, Caremar had to satisfy the above schedule in line with the obligations of continuity and frequency, regularity, punctuality.
- (41) As regards the number, type and capacity of the vessels assigned to the maritime routes operated, Article 1 of the prolonged Initial Convention refers to the content of the five-year plans.
- (42) As regards the fares, under Article 4 of the prolonged Initial Convention, Caremar had to present (and justify) to the competent Italian authorities on a yearly basis the level of tariffs that it intends to apply.
- (43) The prolonged Initial Convention did not have provisions about the quality of the service.
- (44) Article 12 of the prolonged Initial Convention detailed the penalties applied to Caremar for failure to comply with the PSO unless Caremar proves that the failure is not attributable to it as a result of *force majeure*. Under the prolonged Initial Convention, the penalty could vary from EUR 800 to EUR 40 000 depending on the gravity of the breach.

3.1.2. The compensation

- (45) For the maritime transport services operated in the period from 1 January 2009 to 31 July 2012, Caremar was granted a total amount of public compensation of EUR 97 835 927.
- (46) Table 1 shows the annual compensation paid to Caremar for the period from 1 January 2009 to 31 July 2012 under the prolonged Initial Convention:

⁽⁷⁰⁾ Namely from Procida to Pozzuoli (15 minutes travel) at **8:10** am (instead of at 8:25 am), and from Pozzuoli to Procida (15 minutes travel) at **8:55** am (instead of at 8:50 am).

⁽⁷¹⁾ Namely from Procida to Pozzuoli (15 minutes travel) at **8:10** am (instead of at 8:25 am), and from Pozzuoli to Procida (15 minutes travel) at **8:50** am (instead of at 8:55 am).

⁽⁷²⁾ Namely, from Procida to Naples (40 minutes travel) at **6:35** am, and at **9:20** am; and from Naples to Procida (40 minutes travel) at **7:30** am and at **17:45**.

⁽⁷³⁾ Namely, from Procida to Naples (40 minutes travel) at **6:35** am, and at **9:25** am (instead of 9:20 am); and from Naples to Procida (40 minutes travel) at **7:30** am and at **17:30** (instead of at 17:45).

Table 1

Compensation paid for the period 1 January 2009–31 July 2012

(EUR)

Year	Compensation
2009	32 474 450
2010	29 869 832
2011	24 018 645
2012 (January – July)	11 473 000

(47) The amount of the yearly compensation granted to Caremar for the provision of the maritime service contracts was determined as follows:

- for the period from 1 January 2009 to 31 December 2009 based on the same legislative provisions applicable under the Initial Convention (see recitals from 48 to 52); and
- for the period from 1 January 2010 to 31 July 2012, based on a new methodology laid down in Deliberation No 111 of *Comitato Interministeriale per la Programmazione Economica* of 9 November 2007 ⁽⁷⁴⁾, titled ‘Criteria for the definition of the public service obligations and the fare dynamics in the sector of maritime cabotage of public interest’ (‘Deliberation 111/2007’) (see recital 53).

3.1.2.1. Compensation granted from 1 January 2009 to 31 December 2009

(48) Presidential Decree No 501 of 1 June 1979 (‘Decree 501/79’) specified the various elements (revenues and costs) to be taken into consideration in the calculation of the subsidy paid to maritime public service operators for the provision of PSO. Furthermore, Law No 856 of 5 December 1986 (‘Law 856/86’) provided for certain alterations to the system of maritime PSO in Italy. Regarding the connections with major and minor islands, Article 11 thereof amended the criteria for the calculation of the public service compensation. Indeed, the subsidy had to be calculated based on the difference between the revenues and the costs of the service as determined with reference to average and objective parameters and had to include a reasonable return on invested capital. The same article also laid down that the public service contracts had to include the list of the subsidised routes, the frequency and the types of ships to be used. The subsidies were to be approved by the responsible Ministers.

(49) The principles laid down in Decree 501/79 and Law 856/86 were reflected in the Initial Convention.

(50) As a result, in 2009, the compensation for the discharge of SGEI was calculated in accordance with the methodology laid down by the Initial Convention. In particular, the compensation corresponded to the accumulated net loss on the services operated under the public service regime, to which a variable amount corresponding to the return on invested capital was added.

(51) The various cost elements taken into consideration in order to calculate the compensation defined by the public authorities were the following: commission costs, advertising costs, costs for services to passengers on-board, loading, unloading and manoeuvring costs, cost of shore administrative personnel, ship maintenance costs, administrative costs, insurance costs, rent and leasing costs, fuel, taxes and depreciation costs.

⁽⁷⁴⁾ *Deliberazione 9 Novembre 2007 - Criteri per la determinazione degli oneri di servizio pubblico e delle dinamiche tariffarie nel settore dei servizi di cabotaggio marittimo di pubblico interesse (‘Deliberazione n. 111/2007’)* (Gazzetta Ufficiale della Repubblica Italiana, Serie Generale No 50 del 28.2.2008).

- (52) As regards the yearly payments, the Initial Convention provided for the annual public service compensation to be paid as follows: an initial advance payment to be made by 30 March of each year, equivalent to 70 % of the compensation paid the previous year. A second payment, to be made by 30 June, equal to 20 % of the compensation in the previous year. The difference between the amounts paid and the shortfall between operating costs and revenue during the year in progress, as estimated based on the results of the previous years, constituted the balance to be paid by 30 November. If it turned out that Caremar had received a sum higher than the net cost of the services provided (revenue minus losses), Caremar was required to reimburse the difference ⁽⁷⁵⁾.

3.1.2.2. Compensation granted from 1 January 2010 to 31 July 2012

- (53) As from 1 January 2010 until 31 July 2012, the compensation for the operation of maritime PSO was determined by the application of a new methodology laid down in Deliberation 111/2007.
- (54) According to its preamble, Deliberation 111/2007 was issued in view of the privatisation of the public companies operating maritime services under a public service regime ⁽⁷⁶⁾. The provisions of Deliberation 111/2007 were applied in respect of the services provided by the companies of the Tirrenia Group as of 2010, including Caremar, even prior to the entry into force of the respective new public service contracts following the respective privatisations.
- (55) Under Deliberation 111/2007, the level of PSO compensation was based on the net cost necessary to discharge the PSO plus an appropriate return. That level of return was determined *ex ante* for the entire regulatory period covered by the public service contract. The total amount of compensation granted was in any event also capped to the level of public resources allocated by law to the relevant public service contract, if lower than the level of compensation quantified based on the net cost methodology.
- (56) The net cost necessary to discharge the PSO was quantified based on the difference between the costs and the revenues registered by the company for the operation of the maritime public service. In particular, the costs and revenues are to be identified per route and the costs common to public service activities and commercial activities (if any) are to be allocated transparently based on the *ex ante* criteria annexed to the relevant public service contract and described in a dedicated report.
- (57) The rate of return on capital is calculated on the basis of the weighted average cost of capital ("WACC"). The required return to equity ⁽⁷⁷⁾ is to be calculated using the Capital Asset Pricing Model. On the basis of this model, the cost of equity is derived as a function of: (i) the risk-free rate; (ii) the Beta (an estimate of risk profile of the company relative to equity market); (iii) the equity risk premium assigned to the equity market.
- (58) In particular, the cost of equity was calculated by applying a premium for bearing extra risk to the rate of return on risk-free activities. This premium is to be calculated as the risk premium of the market multiplied by its Beta, which measures how risky a specific activity is relative to the market.
- (59) According to Deliberation 111/2007, the rate of return on risk-free activities corresponds to the average gross yield on benchmark ten-year bonds with reference to the previous twelve months for which available data exists.

⁽⁷⁵⁾ Under Article 3(10) of the Initial Convention, any amount of overcompensation resulting from the certified accounts of the company has to be repaid by the company within 15 days from the approval of the company's balance sheets for the relevant year.

⁽⁷⁶⁾ Pursuant to Article 1, point 999, of Law No 296 of 27 December 2006 and Article 1, point e), of Legislative Decree No 430 of 5 December 1997.

⁽⁷⁷⁾ The desired rate of return for an equity investor given the risk profile of the company and associated cash flows.

- (60) Deliberation 111/2007 sets a 4 % market risk premium. Moreover, in case of a service which is operated on a non-exclusive basis, the presumably greater risk borne by the operator is remunerated by the addition of an extra 2,5 % to the market risk premium.
- (61) In practice, the amount of compensation paid to Caremar can however not exceed the ceiling of EUR 29 869 832 ⁽⁷⁸⁾ per year as laid down by Law 166/2009 (see recital 32). Although Law 166/2009 caps the annual compensation paid to all Tirrenia companies for the operation of the maritime services subject to the public service regime, Deliberation 111/2007 also contains certain safeguards that enable those operators to sufficiently cover their operating costs.
- (62) In particular, according to Deliberation 111/2007 the scope of the services, the maximum fares set out by the public service contract and the compensation actually granted must be defined *ex ante* such as to grant the service provider coverage of the entirety of the costs for the operation of the SGEL. The following formula is applicable:

$$VA(RSP) + VA(AI(X)) = VA(CA)$$

where:

$VA(RSP)$ is the discounted value of the compensation for the discharge of the PSO;

$VA(AI(X))$ is the discounted value of other revenue (fare receipts and other);

$VA(CA)$ is the discounted value of the admissible operating costs, debt repayment and return on invested capital.

- (63) If *ex post*, during the operation of the PSO service, it appeared that the compensation granted was lower than what necessary to cover the eligible operating costs, taking into account the other revenues, the company could not rely on any retroactive automatic revision of the amount of PSO compensation neither ask for such revision during the regulatory period covered by the contract, but could only ask the competent Italian authorities to adopt one of the following measures for the future: the scope of the subsidised activities could be reduced, or alternatively the service organisation (e.g. type of ships) could be reviewed, or the maximum fares could be modified.
- (64) Furthermore, the fare ceiling applicable to each service, net of taxes and port dues, is adjusted every year on the basis of a price-cap formula as follows:

$$\Delta T = \Delta P - X$$

where:

ΔT is the annual percentage change in the fare ceiling;

ΔP is the rate of inflation for the year of reference;

X is a real annual rate of adjustment of the fare ceiling, laid down in the Convention, which remains constant over the duration of the Convention.

- (65) Deliberation 111/2007 also specifies that the fare ceiling may be adjusted to reflect variations in fuel costs, taking standard publicly available prices as reference.
- (66) As regards the yearly payments, the same principles applicable under the prolongation of the Initial Convention as detailed in recital 52 continued to apply in the period from 1 January 2009 to 31 July 2012.

⁽⁷⁸⁾ Out of which EUR 19 839 226 from Campania and EUR 10 030 606 from Lazio.

3.2. The privatisation of Caremar

- (67) By Decision No 444 of 9 August 2011, the Regional Executive of the Region of Campania laid down the implementing guidelines for the execution of the restricted procedure ⁽⁷⁹⁾ for the privatisation of Caremar, and the award to Caremar's acquirer of a public maritime cabotage service contract for the provision of maritime transport services over a period of nine years in exchange for public service compensation.
- (68) By Executive Decree No 202 of 12 July 2012 laying down the preliminary procedures, the Region of Campania launched the restricted procedure, whereby the chosen award criterion was that of the best price.
- (69) The call for initiating the procedure was published in the Supplement to the *Official Journal of the European Union* on 17 July 2012, and in *Gazzetta Ufficiale della Repubblica Italiana* No 86 of 25 July 2012, as well as on the website of the Region of Campania.
- (70) There were no technical requirements for access to the tender. In fact, even though the original draft call for tenders for Caremar included certain technical and financial requirements (i.e. pre-determined volumes of nautical miles and turnover in the maritime transport sector) that would have made it possible only for shipping companies to take part in the tender procedure, following the exchanges between the Italian authorities and the Commission of 26 October 2011, 22 December 2011 and 14 March 2012 subsequent to the 2011 Opening Decision, the Italian authorities amended the final call for tenders by eliminating from the scoring the technical criteria and replacing them by financial requirements concerning adequate economic and financial capacity, evidenced by either a confirmation by at least two financial institutions of an economic and financial capacity of EUR 6 million or net assets of at least EUR 6 million.
- (71) Following the publication of the call for tenders, on the expiry of the deadline of 21 September 2012 for the submission of expressions of interest, ten parties expressed an interest in participating in the tender procedure (namely: Alilauro Gruson S.p.A. ('Aligruson'), Delcomar S.r.l., Moby, NLG, Palumbo Shipyard, Rifim, SNAV, TTT lines S.p.A, Vetur, Usticalines S.p.A.)
- (72) By Executive Decree No 34 of 21 February 2013, the Region of Campania approved the results of the investigation during the pre-qualification phase, allowing all but Vetur admission to the next stage (the bidding stage).
- (73) By Executive Decree No 78 of 17 May 2013, the nine eligible candidates were invited to submit a tender ⁽⁸⁰⁾. The invitation to submit a tender contained the new draft nine-year contract to be signed between the successful bidder and the Region of Campania and more detailed information concerning the tendering procedure ⁽⁸¹⁾. In particular, the invitation letter indicated that the award criterion would be:

⁽⁷⁹⁾ The restricted tender procedure referred to in Article 55(6) of the Italian Code of Public Contracts – Legislative Decree No 163/2006 (*il Codice dei Contratti pubblici*) was a two-stage process where only those operators that have been invited to the bidding stage may submit tenders.

⁽⁸⁰⁾ Executive Decree No 78 of 17 May 2013 was published in the Official Journal of the Region of Campania No 28 of 27 May 2013 as well as on the website of the Region of Campania. In parallel, the Region of Campania published on its website also clarifications to the invitation to submit tender in the form of replies to frequently asked questions.

⁽⁸¹⁾ In addition to the new draft nine-year contract to be signed between the successful bidder and the Region of Campania, that information included the draft contract of sale of Caremar, the draft model of business plan that the parties had to follow for the presentation of their offer, a draft model of offer and a draft model of declaration of commitment that the parties could follow for the submission of their offer and the rules to follow for access to Caremar's premises and the data room). As regards the procedure, the parties were informed among others of the timing and conditions of the: (i) access to the data room of the tender procedure and to the premises of Caremar's business; (ii) submission of the offers; (iii) submission of a guarantee in support of the offer; (iv) award of the tender (including the award criterion); (v) possibility to ask for clarifications about the tender.

'the best price equal to the lowest difference obtained by subtracting from the compensation value sought by the competitor, the price offered for the purchase of the shares in favour of the lowest (x) offer resulting from the application of the following formula:

$$X = (a - Da * 75 \%) - 6$$

where:

- *a* is the amount of consideration for the minimum services on the basis of the invitation to tender referred to in point 2.1 (b);
- *Da* * 75 % is the amount of the discount offered on the basis of the tender multiplied by the corrective factor in order to take account of the 9-year distribution of this reduction; and
- 6 is the amount of the share price referred to in point 2.1 (a) offered upwards.'

- (74) Furthermore, as regards the minimum price for the sale of Caremar, the invitation letter mentioned a sum of at least EUR 6 000 000 ⁽⁸²⁾, whereas for the maximum amount of the public service compensation a sum not exceeding EUR 19 839 226 for each of the nine years the contract's duration.
- (75) At the expiry of the deadline, three offers were received from the following candidates: (i) the temporary association of undertakings SNAV/Rifim S.r.l. ('SNAV/Rifim'); (ii) Aligruson; (iii) TTT Lines S.p.A. in temporary association, setting up with partners Marittima S.r.l., Marworld, Davimar Eolia Navigazione S.r.l. The latter was eventually excluded by the tender committee because it was not able to provide a suitable financial guarantee to back its offer.
- (76) On 4 October 2013, Marworld notified the Region of Campania of an appeal lodged to the Regional Administrative Court for Campania challenging among other things the exclusion decision.
- (77) By Executive Decree No 178 of 29 October 2013, the Region of Campania confirmed the ranking drawn up by the tender committee ⁽⁸³⁾, as set out below, which was determined on the basis of the numerical values expressed by each tender and applying the formula set out in the letter of invitation (see recital 73), SNAV/Rifim offered EUR 111 395 812 (including EUR 6 000 001 for the acquisition of Caremar), whereas Aligruson offered EUR 128 556 568 (including EUR 6 000 060 for the acquisition of Caremar). Following its successful offer in the tender procedure, SNAV/Rifim was awarded the tender.
- (78) By judgment of 5 June 2014, the Regional Administrative Court of the Region of Campania annulled the tender award, considering that none of the three candidates should have been invited to the tender. The Region of Campania appealed that judgment. By judgment of 10 February 2015, the Italian Supreme Administrative Court annulled the judgment of the Regional Administrative Court of the Region of Campania, therefore maintaining the decision of the tender committee.

⁽⁸²⁾ According to the information provided by Italy, Caremar's base auction price for EUR 6 000 000 was calculated by adding to the value of its book net assets at 31 December 2010 (i.e. EUR 4 470 008) the capital gains on the fleet and a generic goodwill component relating to the fact that Caremar was a company with its own know-how and presence rooted in the territory, and that it was a recognised brand on the market in which it operated.

⁽⁸³⁾ That ranking had been made public by the tender committee at its public session of 29 July 2013. On that occasion the tender committee informed that the winning offer would have been sent to the contracting authority (i.e. the Region of Campania) for verification. By Executive Decree No 130 of 2 August 2012, the Region of Campania decided to initiate the discretionary verification procedure under Article 86(3) of Legislative Decree No 136/2006 asking the tender committee to assess the adequacy of the offer submitted by SNAV/Rifim. The tender committee in its session of 16 and 27 September 2013 examined in detail the financial assumptions underlying the offer submitted by SNAV/Rifim and declared the appropriateness and reliability of the offer. The tender committee communicated the results of the verification procedure at its public session of 16 October 2013 where it also confirmed the ranking list made public on 29 July 2013.

- (79) Following the judgment of the Regional Administrative Court of the Region of Campania maintaining the decision of the tender committee to award the tender to SNAV/Rifim, SNAV/Rifim made the execution of its offer subject to the confirmation by the Region of Campania that Caremar's financial conditions had not changed compared to those that had been assessed by the bidders during the tender procedure carried out in 2013. Having ascertained that Caremar's equity on 31 December 2024 was EUR 2 155 008 lower than the level of equity in place when SNAV/Rifim had made their successful offer, the Region of Campania decided to restore Caremar's equity to the level in place at the end of 2013. Therefore, by Regional Decision No 316 of 21 May 2015 ⁽⁸⁴⁾ the Region of Campania granted EUR 2 155 008 to Caremar, subject to its acquisition by the successful tenderer, in order to restore Caremar's financial situation at the value in place at the time of the successful offer for the acquisition of Caremar.
- (80) The sale contract between the Region of Campania and SNAV/Rifim was signed on 16 July 2015 and on that date the ownership of all Caremar's shares was transferred from the Region of Campania to SNAV/Rifim for the fixed price of EUR 6 000 001.
- (81) Since the buyer was a collective entity, Caremar's shares were sold and purchased by SNAV and Rifim, jointly and severally assuming all the contractual obligations, namely, SNAV bought 75 000 shares and Rifim the remaining 75 000 shares, equal thus 50 % each of the total share capital of Caremar.

3.3. The new public service contract

3.3.1. The PSO

- (82) On 16 July 2015, the Region of Campania and Caremar signed the new public service contract for the provision of maritime transport services. This public service contract has been in force for nine years (i.e. until 15 July 2024 included).
- (83) The PSO imposed on Caremar (and hence its acquirer SNAV/Rifim) concern the provision of scheduled maritime transport services of passengers and/or passengers, vehicles (including rescue vehicles) and postal effects, at predetermined rates, by means of ferries and fast vessels (which means TMV in case of mixed services or hydrofoil in case of passengers only services) according to the schedules indicated in the maritime transport programme set out in Regional Executive Decision No 443 of 9.8.2011 of the Region of Campania (provided as Annex D of the new public service contract), as amended by Regional Executive Decision No 857 of 30.12.2011 of the Region of Campania (provided as Annex E of the new public service contract), and their possible subsequent amendments.
- (84) As regards the maritime routes to be operated, Caremar has to provide maritime transport services on the following eight routes according to the schedules indicated in Annexes D and E of the new public service contract: Capri/Naples, Capri/Sorrento, Ischia/Naples, Ischia/Procida/Naples, Ischia/Procida/Pozzuoli, Ischia/Procida, Procida/Pozzuoli and Procida/Naples.
- (85) The details of the PSO in terms of type of vessels (ferry, TMV, hydrofoil), schedule and frequency (annual/seasonal) on each route are the same as those applied under the prolonged Initial Convention as of 16 January 2012, as described in recital 39).
- (86) Under Article 8(4)(d) of the new public service contract, Caremar has to satisfy the PSO in line with the obligations of continuity and frequency, regularity, punctuality. Article 8(4)(l) clarified that compliance with those obligations had to be always ensured, also during the period of ordinary and extraordinary refurbishment of vessels.

⁽⁸⁴⁾ Published in the Official Journal of the Region of Campania No 35 of 8 June 2015. That decision was confirmed by Presidential Decree No 116 of 15 July 2015 published in the Official Journal of the Region of Campania No 45 of 20 July 2015.

- (87) Under Article 8(4)(c) of the new public service contract, as regards mixed services, Caremar has to give priority to the transport of postal effects (within the limit of 12 linear metres) if so required by the universal postal service provider. In addition, under Article 9 of the new public service contract, Caremar is obliged to provide, upon the Region of Campania's request, without additional compensation, up to ten additional journeys per year in order to satisfy extraordinary public service needs.
- (88) As regards the number, type and capacity of the vessels assigned to the maritime routes operated, under Article 8(1), Article 8(4)(m) and Article 8(5) of the new public service contract Caremar is obliged to use at least seven of the vessels indicated in Annex H of the contract (or equivalent in number, technical characteristics, capacity and comfort) and to guarantee at all times the availability of a backup vessel with the characteristics indicated in the said Annex H. In addition, Caremar is obliged to guarantee the efficiency at all times of the vessels indicated in Annex H ⁽⁸⁵⁾.
- (89) As regards the fares, under Article 8(4)(e) and Article 13 of the new public service contract Caremar has to comply with the tariffs laid down by Regional Executive Decision No 183 of 29 April 2011 and Regional Executive Decision No 67 of 7 March 2013, provided as Annexes B and C of the public service contract, and their possible subsequent amendments. Caremar can request on a yearly basis to the Region of Campania the adjustment of the tariffs to inflation, but the Region of Campania may decide not to grant the requested adjustment or to suspend the adjustment already granted ⁽⁸⁶⁾. Moreover, under Article 8(4)(b) Caremar has to provide free of charge the urgent transport of patients with ambulance from the national health service.
- (90) As regards the quality of the service, under Article 8(4)(v) of the new public service contract Caremar had to comply with the quality standards set out in Article 11 of the new public service contract in terms of punctuality, travel comfort and information to users as indicated in Annex O of the new public service contract which also identifies the applicable penalties in case of failure to comply with those standards. In addition, under Article 8(4)(f), Caremar has to satisfy the quality levels laid down by the Region of Campania in the 'Carta di Servizio' adopted under Regional Executive Decision No 3 of 16 March 2012.
- (91) In addition to the penalties laid down in Annex O for failure to comply with the minimum quality standards identified in Article 11 of the new public service contract, Article 25 of the new public service contract details additional penalties for failure to comply with the PSO imposed on Caremar (e.g. obligations of continuity and regularity ⁽⁸⁷⁾, punctuality ⁽⁸⁸⁾, tariffs ⁽⁸⁹⁾) unless Caremar proves that the failure is not attributable to it as a result of *force majeure*.

⁽⁸⁵⁾ Article 8(4)(m) of the new public service contract.

⁽⁸⁶⁾ Article 13(4) and 13(5) of the new public service contract.

⁽⁸⁷⁾ E.g. Article 25(1)(A) of the new public service contract sets a penalty of EUR 80/mile for every journey not carried out and an additional penalty of EUR 5 000 is foreseen in case the same journey is not carried out for more than seven times in one month. If in a three-month period Caremar fails to carry out the same journey twice for more than seven times in one month, then the entrustment of the public service contract is revoked.

⁽⁸⁸⁾ E.g. Article 25(1)(B) of the new public service contract sets a penalty of EUR 150 for each missed reasoned communication within 24 hours of delays above 30 minutes. For every delay above 30 minutes, the penalty is EUR 500 if the delay concerns a journey which had already suffered a delay above 30 minutes in the same month.

⁽⁸⁹⁾ E.g. Article 25(1)(I) of the new public service contract provides a penalty of EUR 1 500 in case of two written complaints in a trimester about the violation of tariffs, the penalty increases to EUR 5 000 in case of a third complaint within the same trimester.

3.3.2. *The compensation*

- (92) The annual base remuneration, on the basis of the tender procedure for the compensation under the new contract for the discharging of PSO on the maritime routes identified in recital 84, was set by the Region of Campania at EUR 178 553 034 over the nine years contract period (EUR 19 839 226 annually), subject to downwards revision. The amount offered by SNAV/Rifim, and set as result of the tender, was EUR 97 010 073 (EUR 10 778 897 annually ⁽⁹⁰⁾) with a discount of EUR 81 542 961 over the nine years contract period. For the period 16 July 2015–31 December 2015 the compensation was set at EUR 4 940 327,79 ⁽⁹¹⁾.
- (93) Under Article 16 of the new public service contract, the public service compensation is quantified based on the methodology laid down in Deliberation 111/2007 ⁽⁹²⁾, according to which the compensation cannot exceed what is necessary to cover the net costs incurred for the fulfilment of the PSO (economic-financial balance), including a reasonable profit (see recitals 55 to 66).
- (94) Article 17 of the new public service contract provides that, every three years, the parties must check the conditions for the economic equilibrium of the contract, in accordance with the stability criteria laid down in Deliberation 111/2007. In case of deviations from this contractual equilibrium (e.g. in the case of undercompensation of more than 5 % of the total compensation), Article 17 of the new public service contract provides for a rebalancing mechanism that evaluates all the parameters linked to the payment of the compensation. Should the compensation amount prove insufficient to cover the operating costs incurred in the provision of the service, the new public service contract allows for a revision of the key parameters of the compensation, namely the fare system, a reduction of the scope of the public services offered or the company's material assets for the provision of the services. In case of overcompensation, the Region of Campania has to reduce the compensation paid for the next regulatory period, and recover any overcompensation already paid (see Articles 17(4) and 18).
- (95) The compensation is paid yearly in three instalments: an initial advance payment is made by 30 April of each year, equivalent to 70 % of the compensation; a second payment, made by 30 September, is equal to 20 % of the compensation; the due amount, after deducting deductions and penalties, is paid by 31 January of the following year ⁽⁹³⁾.
- (96) Under Article 18 of the new public service contract, any overcompensation has to be repaid to the Region of Campania within 30 days from the Region of Campania's request. In the period from 16 July 2015 to 31 December 2017, the verification procedure identified that an overcompensation of EUR 835 057 occurred, which was returned to the Region of Campania. For the period 1 January 2018–31 December 2021, the annual compensation of EUR 10 778 897 was reduced to EUR 9 093 983 as a result of the verification process concerning the period until 31 December 2017. Based on the available financial accounts, the verification procedure for the years 2018 to 2021 identified an overcompensation of EUR 1 389 811, which was returned to the Region of Campania.
- (97) Under Article 20 of the new public service contract, the Region of Campania has supervisory powers over the contract and monitors its proper performance, the adequacy and quality of the operator's assets, the compliance with legal obligations and the achievement of the quality objectives during the discharging of the PSO.

⁽⁹⁰⁾ Article 16(2) of the new public service contract states: 'The compensation referred to above may not exceed, for the duration of this service contract, the amount of EUR 10 778 897 for calendar year, in addition to VAT, indicated downwards in the Tender.'

⁽⁹¹⁾ Article 16(3) of the new public service contract.

⁽⁹²⁾ Article 16(1) of the new public service contract.

⁽⁹³⁾ Article 16(5) of the new public service contract. Article 16(6) of the new public service contract specified that the compensation for the period 16 July 2015–31 December 2015 is paid in two instalments: a first instalment of 70 % by 15 August 2015 and the second instalment of 30 % by 31 January 2016.

- (98) Following the periodic revision of the economic equilibrium of the contract under Article 17, the compensation established in advance on the basis of the tendering procedure (EUR 10 778 897) was reduced by the Region of Campania to EUR 9 093 983 for the period 2018-2021 and further reduced to EUR 9 087 149 for the period 2022-2024. Table 2 shows the compensation established in advance and the compensation actually paid to Caremar for the period August 2015-2021.

Table 2

Compensation established and paid to Caremar under the new public service contract 2015-2021

(EUR)

Year	Compensation established	Compensation paid
2015 (from July 2015)	10 778 897	4 961 000
2016	10 778 897	10 778 000
2017	10 778 897	10 778 897
2018	9 093 983	10 363 306
2019	9 093 983	8 462 289
2020	9 093 983	10 365 064
2021	9 093 983	8 593 982

3.4. The berthing priority

- (99) Article 19-ter, paragraph 21, of Decree-law 135/2009 converted into Law 166/2009 provided that, in order to guarantee the territorial continuity with the islands and in order to fulfil their PSO, the companies of the former Tirrenia Group, including Caremar, would keep the berthing already allocated and the priority in the allocation of slots in line with the procedures set forth by the Maritime Authorities as established by Law No 84 of 28 January 1994 and the Italian Maritime Code.

3.5. The measures laid down by Law 163/2010

- (100) Law 163/2010 laid down the possibility for the companies of the former Tirrenia Group, including Caremar, to use, on a temporary basis, the financial resources already committed ⁽⁹⁴⁾ to the upgrade and modernisation of the fleet to cover pressing liquidity new needs instead. The undertakings of the former Tirrenia Group that made use of this possibility were however required to replenish these dedicated funds, so that they could still undertake the necessary upgrades for their ships. These upgrades were necessary to meet new international safety standards following the 1996 Stockholm Agreement ⁽⁹⁵⁾.
- (101) In particular, drawing from two facilities ⁽⁹⁶⁾, EUR 23 750 000 were set aside to pay for the upgrades of the entire Tirrenia Group. Caremar made use of these facilities to upgrade its ships.

⁽⁹⁴⁾ As laid down by Article 19, paragraph 13a, of Decree-law No 78 of 1 July 2009, converted into Law No 102 of 3 August 2009 (Law 102/2009), and by Article 19-ter, paragraph 19, of Law 166/2009.

⁽⁹⁵⁾ These safety standards were then detailed in Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships (OJ L 144, 15.5.1998, p. 1), transposed by Legislative Decree No 45 of 4 February 2000, Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships (OJ L 123, 17.5.2003, p. 18), transposed by Legislative Decree No 52 of 8 March 2005, and Directive 2003/25/EC of the European Parliament and of the Council of 14 April 2003 on specific stability requirements for ro-ro passenger ships (OJ L 123, 17.5.2003, p. 22), transposed by Legislative Decree No 65 of 14 March 2005.

⁽⁹⁶⁾ All the funds (i.e. EUR 7 000 000) provisioned by Article 19-ter, paragraph 19, of Law 166/2009 and EUR 16 750 000 from the funds provisioned by Law 102/2009.

(102) In addition, Article 1 of Law 163/2010 also laid down the following:

- (a) Article 19-ter of Decree-law 135/2009, converted with modifications into Law 166/2009, is amended by the introduction of paragraph 24 bis. According to that paragraph, all official acts and operations in the implementation of the provisions of Article 19-ter, paragraphs 1 to 15, of Law 166/2009 benefit from fiscal exemption. Those paragraphs relate to the liberalisation of the maritime cabotage sector through the privatisation of the Tirrenia group, including its preparatory step, i.e. the transfer of the regional companies to the respective Regions;
- (b) in order to ensure the continuity of the public service and to support the privatisation process of the former Tirrenia group companies, the Regions in question may make use of the resources of the *Fondo Aree Sottoutilizzate* ('FAS') ⁽⁹⁷⁾ pursuant to Deliberation No 1 of *Comitato Interministeriale per la Programmazione Economica* of 6 March 2009 ⁽⁹⁸⁾.

4. INFRINGEMENT PROCEDURE No 2007/4609

(103) On 19 December 2008, following earlier exchanges between the Commission services and Italy, the Commission Director-General responsible for energy and transport sent a request for information to Italy. This request concerned, among other things, an overview of the public service routes at that time and the public service remit that Italy envisaged under the proposed new Conventions. Furthermore, Italy was asked to provide more details about the privatisation plans for the Tirrenia Group.

(104) In its letter of 28 April 2009, Italy provided a detailed reply to the Commission's request of 19 December 2008. In that letter, among other things Italy stated the following:

- (a) the extension of the Initial Convention until 31 December 2009 was necessary to achieve the liberalisation of the maritime cabotage sector in Italy through the privatisation of the Tirrenia Group;
- (b) the public service compensation granted to the Tirrenia Group was necessary to ensure territorial continuity with the islands through maritime links which were not satisfactorily provided by private operators on the market;
- (c) a thorough rationalisation process of the routes had been concluded on 10 March 2009. This process took into account the relevant social, employment and economic aspects, as well as the need to safeguard essential links for territorial continuity and included a consultation of the six Regions concerned. This rationalisation would result in the reduction of the net cost of the public service of approximately EUR 66 million and the redundancy of some 600 crew members for the entire Tirrenia Group. Italy also recalled that the 2009 rationalisation complemented earlier efforts (in 2004, 2006 and 2008) to reduce the services operated by the Tirrenia Group;
- (d) the objectives were: (i) to maintain the links necessary to ensure territorial continuity with and between islands and the mainland, and the right to health, study and mobility; (ii) to rationalise links where there were private operators who provided the same connections over the same time period, with similar guarantees of quality and continuity; (iii) to rationalise summer and high-speed connections which transport only persons;
- (e) in the letter, Italy gave an overview of the routes operated by the companies of the Tirrenia Group during 2008 and the reduced number of routes the Tirrenia Group companies would operate in 2009. According to Italy, the latter routes would form the basis for the new Conventions that were to be concluded with the new owners of the Tirrenia Group companies.

⁽⁹⁷⁾ The Fund for Under-utilised Areas (*Fondo Aree Sottoutilizzate*) is a national fund that supports the implementation of Italian Regional policy. Its resources are mainly earmarked for regions identified as such by the Italian authorities.

⁽⁹⁸⁾ *Gazzetta Ufficiale della Repubblica Italiana* No 137 of 16 June 2009.

- (105) On 21 December 2009, the Commission's Director-General responsible for energy and transport sent a letter to Italy noting *inter alia* that in the light of the radical overhauling of the maritime cabotage sector in Italy, and because of the sizable social impact the privatisation would have entailed, if the tenders were carried out on a simple public service contract basis, tendering out the shipping companies endowed with such contracts was acceptable – in principle and as an exception – for the purpose of ensuring compliance with the criterion of non-discrimination among Union shipowners laid down in Council Regulation (EEC) No 3577/92 ⁽⁹⁹⁾. The Commission noted that Regulation (EEC) No 3577/92 does not require Member States to privatise their maritime transport companies but only to liberalise that specific market.
- (106) On 29 January 2010 ⁽¹⁰⁰⁾, the Commission sent a letter of formal notice regarding the wrong implementation of Regulation (EEC) No 3577/92. In that letter, the Commission recalled that that Regulation requires that, whenever a Member State concludes public service contracts or imposes PSO, it is to do so on a non-discriminatory basis in respect of all Union shipowners. Article 4(3) of that Regulation provides that existing public service contracts may remain in force up to the expiry date of the relevant contract. However, the Commission noted that the companies of the Tirrenia Group continued to operate maritime transport services after the expiry of the respective public service contracts. In particular, those conventions were due to expire at the end of 2008 but were repeatedly prolonged by Italy. Therefore, the Commission invited Italy to present its observations.
- (107) On the same day and separately, the Commission Director-General responsible for energy and transport replied to Italy's letter of 22 January 2010. The Director-General emphasised that his reply only concerned the compliance with Regulation (EEC) No 3577/92 and not State aid issues. Against this background, the Director-General indicated that the justifications provided concerning certain routes were sufficient to remove some of the doubts expressed earlier. The Director-General recalled that public service contracts can only cover routes for which there is market failure.
- (108) On 29 March 2010, Italy replied to the Commission's letter of formal notice of 29 January 2010.
- (109) On 10 September 2010, Italy informed the Commission that the competitive procedure for the contract involving among others the Pontino Archipelago routes operated by Caremar at the time was delayed. Subsequently, Law 163/2010 further prolonged the Initial Convention until the completion of the privatisation processes of Tirrenia and Siremar (see also recital 33).
- (110) In light of these developments, the Commission sent a complementary letter of formal notice on 24 November 2010. In this letter, the Commission stated the following:
- (a) the Initial Convention of among others Caremar was extended automatically and without any competitive procedure;
 - (b) while the public service contracts in question continued to be applied, no competitive procedure had been completed, for Caremar among others;
 - (c) it reserved its right to issue a reasoned opinion if necessary (taking into account any comments Italy might make).
- (111) On 21 June 2012, the Commission adopted a reasoned opinion concerning the prolongations of the PSO entrusted to three companies (Caremar, Laziomar and Saremar) of the former Tirrenia Group. Since the tender procedures for the other three companies (Tirrenia, Toremar and Siremar) had been completed in the course of 2011 ⁽¹⁰¹⁾ these companies were not covered by the reasoned opinion. The Commission noted that Italy had not put in place competitive procedures for the award of a public service contract for maritime cabotage operated by among others Caremar, more than three years after the normal expiry of the respective Initial Conventions. Those Conventions had been extended automatically and indefinitely thereby preventing other Union shipowners from competing for the award of these contracts.

⁽⁹⁹⁾ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

⁽¹⁰⁰⁾ The letter of formal notice was adopted on 28 January 2010 but only notified to Italy the next day.

⁽¹⁰¹⁾ Even if the formal transfer of ownership of Tirrenia, Toremar and Siremar only occurred in 2012.

- (112) On 8 August 2012, Italy replied to the reasoned opinion stating that tender notices for the award of the companies endowed with new public service contracts were or would be published in the *Official Journal of the European Union*. In particular, for Caremar the notice was published on 20 July 2012 and for Laziomar the notice was sent for publication on 1 August 2012.
- (113) On 14 January 2014, CLN became the new owner of Laziomar and signed a ten-year public service contract for links with the Pontino Archipelago.
- (114) On 16 July 2015, SNAV/Rifim took ownership of Caremar, which was entrusted with a nine-year public service contract.
- (115) By letter of 15 July 2016, Italy informed the Commission that the privatisation of all companies of the former Tirrenia Group had been completed. On 8 December 2016, the Commission decided to close the infringement procedure.

5. GROUNDS FOR INITIATING AND EXTENDING THE PROCEDURE

5.1. **The compensation for the provision of maritime transport services from 1 January 2009 to 31 July 2012**

5.1.1. *Existence of aid*

- (116) In its 2011 Opening Decision the Commission took the preliminary view that the definition of the PSO was not sufficiently clear and hence did not allow the Commission to definitely conclude whether it contained manifest errors. In particular, the Commission did not have a complete view on the actual obligations imposed on Caremar for the operation of the routes in the Gulf of Naples and in the Pontino Archipelago as compared to the services offered by competitors on some of those routes (see recitals 194, 203, 205 and 208 of the 2011 Opening Decision). In addition, as regards the routes in the Gulf of Naples, the Commission had doubts as to the legitimacy of considering the permanence in the island ports at night as a genuine public service and invited the Italian authorities to specify if certain pathologies do not allow transportation by helicopter and to provide information about the availability and capacity of alternative medical transportation services (see recital 206 of the 2011 Opening Decision).
- (117) The Commission took the preliminary view that the second criterion of the Altmark judgment⁽¹⁰²⁾ was met as the parameters at the basis of the calculation of the compensation had been established in advance and fulfilled the transparency requirements (see recital 239 of the 2011 Opening Decision). In particular, the Commission noted in recital 240 of the 2011 Opening Decision that these parameters were described in the Initial Convention (for compensation concerning the year 2009) and in Deliberation 111/2007 (for compensation from 2010 onwards).
- (118) The Commission however considered that the third criterion of the Altmark judgment did not seem to be fulfilled and that the operators might have been over-compensated for the performance of the public service tasks (see recital 244 of the 2011 Opening Decision). In particular, the Commission expressed doubts as to the proportionality of the compensation paid to the companies of the former Tirrenia group as from 2009, given the absence of a clear definition of the obligations imposed on those companies (see recital 245 of the 2011 Opening Decision). Likewise, the Commission doubted whether the risk premium of 6,5 %, which applies from 2010 onwards, reflected an appropriate level of risk since *prima facie* Caremar did not seem to assume the risks normally borne in the operation of such services (see recital 247 of the 2011 Opening Decision).

⁽¹⁰²⁾Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, C-280/00, ECLI:EU:C:2003:415.

- (119) The Commission also took the preliminary view that the fourth Altmark criterion was not fulfilled in as much as the prolongation of the Initial Convention had not been tendered out (see recital 249 of the 2011 Opening Decision). The Commission moreover noted that it had not received any evidence to support the argument that Caremar in fact provided the services at the least cost to the community (see recital 251 of the 2011 Opening Decision).
- (120) In the 2011 Opening Decision, the Commission therefore came to the preliminary conclusion that the public service compensation paid to the operators during the prolongation of the Initial Convention constituted State aid within the meaning of Article 107(1) TFEU (see recital 255 of the 2011 Opening Decision). In addition, the Commission took the view that this aid should be considered as new aid (see recital 257 of the 2011 Opening Decision).
- (121) In the 2012 Extension Decision, the Commission expressed the same doubts also in respect to the compensation granted to Caremar from January 2012 until its privatisation (see recitals 42, 180 and 181 of the 2012 Extension Decision).

5.1.2. *Compatibility*

- (122) In the 2011 Opening Decision, the Commission took the preliminary view that the public service compensation for the years 2009, 2010 and 2011 fell outside the scope of both Commission Decision 2005/842/EC⁽¹⁰³⁾ and the Community framework for State aid in the form of public service compensation⁽¹⁰⁴⁾ ('2005 SGEI Framework'). The Commission therefore assessed this measure directly under Article 106(2) TFEU and found that it had doubts on whether the applicable compatibility conditions were fulfilled (see recital 315 of the 2011 Opening Decision).
- (123) In the 2012 Extension Decision, the Commission noted that on 31 January 2012 a new SGEI package consisting of Commission Decision 2012/21/EU⁽¹⁰⁵⁾ and 2011 SGEI Framework had entered into force. The Commission however took the preliminary view that the public service compensation under the prolongation of the Initial Convention could not be considered compatible with the internal market and exempted from the notification requirement under the Decision 2012/21/EU because that prolongation did not comply with Article 4 of Regulation (EEC) No 3577/92 stipulating that whenever a Member State concludes public service contracts or imposes public service obligations it shall do so on a non-discriminatory basis in respect of all Community shipowners (see recital 256 of the 2012 Extension Decision). The Commission did not exclude that the public service compensation granted under the prolonged Initial Convention could fall in principle under the SGEI Framework (see recital 258 of the 2012 Extension Decision), however the Commission did not have sufficient elements to conclude in that respect (see recital 267 of the 2012 Extension Decision).

5.2. **The privatisation of Caremar**

- (124) In the 2012 Extension Decision, the Commission expressed doubts as to whether the tender procedure for the sale of Caremar had been sufficiently transparent and unconditional so as to ensure that the sale took place at market price (see recital 242 of the 2012 Extension Decision). In particular, the Commission considered that the sale of Caremar's business together with the entrustment of the new public service contract might have restricted the number of bidders or influenced the sale price (see recital 243 of the 2012 Extension Decision).

⁽¹⁰³⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽¹⁰⁴⁾ Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

⁽¹⁰⁵⁾ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

- (125) The Commission also considered, on the basis of the information available when issuing its 2012 Extension Decision, that any aid that might have arisen in the course of the privatisation process would be incompatible (see recital 305 of the 2012 Extension Decision).

5.3. The new public service contract

5.3.1. Existence of aid

- (126) In the 2012 Extension Decision, the Commission took the preliminary view that the compensation paid to Caremar did not fulfil the criteria laid down in the *Altmark* judgment and therefore amounted to aid within the meaning of Article 107(1) TFEU. The Commission came to this conclusion since: (i) competitors who seemed to be offering similar services were present at least on certain routes operated by Caremar and there was insufficient information available that would enable the Commission to conclude on whether the SGEI reflected a real public service need which could not be met by market forces alone; (ii) the calculation of the compensation pursuant to Deliberation 111/2007 appeared to have resulted in the operator being overcompensated for the provision of the public service for the same reasons as expressed in the 2011 Opening Decision; (iii) the fourth criterion of the *Altmark* judgment was seemingly not fulfilled, since the public service was tendered out on the condition that the successful bidder would acquire the Caremar company as a whole. The Commission considered that, had the public service contract been tendered out without the purchase requirement, it could have resulted in a lower cost for the community.

5.3.2. Compatibility

- (127) With respect to the compatibility of the compensation to Caremar, in the 2012 Extension Decision the Commission noted that, on the basis of the information provided by the Italian authorities, Decision 2012/21/EU appeared not to be applicable. In any event, the Commission could not conclude on the application of Decision 2012/21/EU because at that stage the signed contract had not been provided (see recital 283 of the 2012 Extension Decision). The Commission did not receive any information (e.g. number of passengers transported in the two previous years to that of the entrustment) to examine the remaining compatibility conditions of Decision 2012/21/EU. The Commission then assessed the aid based on the 2011 SGEI Framework but found that it had doubts on whether the compatibility conditions of that Framework were fulfilled in particular as regards the existence of a genuine SGEI on all routes and the level of the reasonable profit accorded to Caremar (see recitals 298 and 300 of the 2012 Extension Decision).

5.4. The berthing priority

- (128) In the 2011 Opening Decision, the Commission took the preliminary view that, to the extent that the berthing priority was not remunerated, the measure is a regulatory advantage that does not involve any transfer of State resources and cannot therefore qualify as State aid (see recital 278 of the 2011 Opening Decision). If the berthing priority was remunerated, the Commission considered that, to the extent that Caremar provides a genuine SGEI and that this priority is only granted in relation to routes covered by the SGEI, it would not result in an additional economic advantage since it would be intrinsic to the provision of SGEI (see recital 279 of the 2011 Opening Decision). Nevertheless, the Commission invited Italy and third parties to provide further information on this measure (see recital 280 of the 2011 Opening Decision).

- (129) Since it had raised doubts on the legitimacy of the SGEI mission, the Commission could not conclude on the compatibility of the measure if it were to be considered aid (see recital 319 of the 2011 Opening Decision).

5.5. The measures laid down by Law 163/2010

- (130) In recital 289 of the 2011 Opening Decision, the Commission took the preliminary view that all measures laid down by Law 163/2010 constituted State aid in favour of the companies of the former Tirrenia Group, including Tirrenia. These included: (i) the possible use for liquidity purposes of the funds earmarked for the upgrade of the ships; (ii) the fiscal exemptions related to the privatisation process; (iii) the possible use of FAS resources. The Commission invited Italy to clarify if and in what way each of these measures were necessary to provide the public service.
- (131) The Commission also took the preliminary view that these measures likely constituted operating aid reducing the costs that Caremar, and the other companies of the former Tirrenia Group, would otherwise have to bear themselves and thus these measures should be considered as incompatible with the internal market (see recital 320 of the Opening Decision).

6. COMMENTS FROM CAREMAR

6.1. On the PSO and the competitive environment

- (132) Caremar argues that the PSO were precisely defined by acts of the Region of Campania and that the Region of Campania in the definition of the PSO imposed on Caremar had taken in due account the competitive environment of the maritime services provided in the Gulf of Naples and of the maritime transport needs of the local population.
- (133) According to Caremar, the definition of the PSO imposed on Caremar is provided for by the Initial Convention, the five-year plans and the berthing frameworks (*'quadri accosti'*), approved and published by the Campania Region, to adjust the offer to the user demand. As regards to the level of services required, Caremar noted that the PSO did not concern only the route to be serviced but included a number of obligations relating to the continuity and frequency of sailings, regularity and punctuality, fares, and other requirements concerning the capacity and characteristics of the vessels to be used, thereby reflecting a genuine public service need.
- (134) Caremar provided detailed information on the different maritime routes, in order to demonstrate that it operated in accordance with specific requirements designed to meet public service requirements (e.g. the obligation to operate the first sailing in the morning to the mainland, with the consequent need to ensure the overnight stay of the vessels on the island, with additional costs), thereby differentiating its role in relation to its competitors. Caremar explained that, for the purposes of ensuring these obligations, Caremar's crew remains in service for a total of 16 hours per day (the maximum permitted under relevant laws) per vessel.
- (135) Regarding the competitive environment in the Gulf of Naples and the Pontino Archipelago, Caremar stated that it has always been the only operator capable of offering a regular and reliable maritime transport service aimed at ensuring the seamless connection of the islands with the mainland. Caremar pointed out that it plays a key role in ensuring compliance with the principle of territorial continuity because the market forces alone have never been able to meet the expectations and needs of the island communities for regular and direct services to ensure connectivity between the islands and the mainland. In Caremar's view, this is due to the fact that the Gulf of Naples is characterised by a number of islands very densely populated that inevitably reflects on the daily demand for regular connectivity (e.g. for professional or educational purposes).

6.2. On the compliance of the prolongation of the Initial Convention with the Altmark criteria

- (136) Caremar argues that the compensation received during the prolongation of the Initial Convention does not constitute State aid because the four cumulative conditions laid down in the Altmark case-law have been met.
- (137) As regards the first Altmark criterion, Caremar argues that it has been entrusted with the discharge of clearly defined PSO and that therefore the first criterion is fulfilled (see comments provided under Section 6.1).

- (138) As regards the second Altmark criterion, Caremar recalls that the criteria for calculating the compensation have been established in advance (i.e. in the initial Convention and Deliberation 111/2007) in an objective and transparent manner, hence the second Altmark criterion is also satisfied.
- (139) As regards the third Altmark criterion, Caremar argues that the compensation provided during the prolongation period did not exceed what was necessary to cover the additional costs generated by the service, considering the relevant receipts and a reasonable profit, and the third Altmark criterion is thus met. In reply to the Commission's doubts that since 2010 Caremar has been overcompensated for the performance of the PSO, Caremar argues that the compensation paid was not sufficient to cover the costs incurred for discharging the PSO, and, in addition, no profit margin was granted.
- (140) Finally, as regards the fourth Altmark criterion, Caremar states that, in the absence of a public tendering procedure, the compensation was determined on the basis of an analysis of the costs of an efficient undertaking (e.g. fully depreciated costs of vessels, optimisation of the ratio between crew and performance, maintenance of lowest fares despite increased fuel costs).

6.3. On the compliance of the prolongation of the Initial Convention with Article 106(2) TFEU

- (141) Caremar states that for the purposes of the compatibility assessment, as stated in recital 308 of the 2011 Opening Decision, three cumulative conditions must be fulfilled:
- (a) the services must constitute SGEL;
 - (b) the services must be adequately entrusted by the State to the beneficiary;
 - (c) the compensation must be proportionate to the cost generated by the provision of SGEL.
- (142) As regards the first condition, Caremar explains that the services are carried out in accordance with specific public requirements, thereby ensuring territorial continuity (see comments provided under Section 6.1).
- (143) Concerning the second condition, Caremar maintains that it performs the maritime services as entrusted to it by the Initial Convention, which lays down in detail the PSO imposed on Caremar.
- (144) Finally, regarding the proportionality condition, Caremar reiterates that it was under-compensated, for example in the years 2010 and 2011, as demonstrated by the company's accounts.

6.4. On the berthing priority

- (145) Caremar argues that the granting of the berthing priority does not confer any economic advantage and that, therefore, this measure cannot be characterised as State aid. Further, Caremar emphasises that the berthing priority is used only for the performance of its obligations under the public service contract.

6.5. On the measures laid down by Law 163/2010

- (146) As regards the financial support measures granted to Caremar under Law 163/2010, Caremar confirms that EUR 2 115 000 were allocated to it for the sole purpose of modernising its fleet. Caremar suggests therefore that the measures provided for in Law 163/2010 do not constitute State aid to it because they are necessary to finance the PSO entrusted to Caremar.

7. COMMENTS FROM CAREMAR'S COMPETITORS

7.1. Comments from Medmar

7.1.1. *On the PSO and the competitive environment*

- (147) Medmar pointed out that the State aid measures covered by the 2011 Opening Decision and the conditions of the market remain the same as those covered by Decision 2005/163/EC. These State aid measures concern: (a) compensation granted each year to Caremar for operating the Naples/Capri route, for which Decision 2005/163/EC ordered the recovery of all grants to Caremar; and (b) compensation granted each year to Caremar for operating the Ischia/Procida route, for which Decision 2005/163/EC ordered Italy to restrict the number of connections operated by Caremar and to compensate only the net operating losses suffered by Caremar. According to Medmar, Decision 2005/163/EC was taken because the private sector was able to offer services comparable to those offered by Caremar, with comparable assets.
- (148) Medmar noted that the Region of Campania entrusted both Caremar and Medmar with PSO to operate the Ischia/Procida, Procida/Naples and Ischia/Procida/Pozzuoli connections. However, unlike Caremar, Medmar did not receive any compensation for operating the said services. No public tender procedure was launched to identify the undertakings capable of providing the PSO at the least cost to the community. Instead, the Region of Campania obliged private undertakings to agree to sign 'submission acts' under which they are required to operate PSO on terms and conditions set out by the Region of Campania (on time-schedule and fares). According to Medmar, should the private undertakings not wish to sign the said 'submission acts', they would be denied authorisation to operate any service in the area.
- (149) Medmar maintained that there was no need for the Region of Campania to entrust Caremar with PSO with compensation, since Medmar could provide the same service without compensation.
- (150) In particular, Medmar explained that it in 2011 it operated daily sailings, as follows:
- Ischia/Naples: seven daily sailings (of which five included a stop in Procida);
 - Ischia/Pozzuoli: 13 daily sailings plus one daily connection to Casamicciola during the summer season.
- (151) On the other hand, according to Medmar, Caremar operated a lower number of sailings on the said routes, as follows:
- Ischia/Naples: 11 daily sailings plus three during summer season;
 - Ischia/ Procida/Pozzuoli: three daily sailings.
- (152) Additionally, Medmar underlined that the quality of the services and the vessels deployed match those of Caremar. Moreover, other private undertakings operate in the same area.
- (153) In those circumstances, Medmar concluded that the entrustment of PSO to Caremar was not necessary and therefore incompatible with the TFEU.
- (154) Should the Commission deem the entrustment of PSO necessary, Medmar argues that this entrustment violates Article 4(1) and (2) of Regulation (EEC) No 3577/92, according to which '[...] whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners' and '[...] any compensation for public service obligations must be available to all Community shipowners'.

- (155) Medmar furthermore argued that Italy failed to provide information on the amounts granted for each connection operated by Caremar.

7.1.2. *On the berthing priority*

- (156) Medmar argues that the berthing priority to Caremar violates Article 4(1) and (2) of Regulation (EEC) No 3577/92 in so far it bestows the best connections at the most economically profitable hours to Caremar, thereby discriminating against Union shipowners and preventing them from exercising their right to provide services in an open market.
- (157) Medmar also refers to the recommendation issued by the Italian Competition Authority, *Autorità Garante della Concorrenza e del Mercato* ('AGCM'), on 13 July 2009 concerning the abrogation of the provision⁽¹⁰⁶⁾ under which Caremar is allowed berthing priority for its services. According to AGCM, this provision threatens to eliminate competition because it prevents private companies from operating connections in hours that are economically profitable.

7.1.3. *On the measures laid down by Law 163/2010*

- (158) Medmar points out that under Law 163/2010 Italy prolonged the Initial Convention until the end of the privatisation process. This prolongation violates Regulation (EEC) No 3577/92 in so far as the undertaking, which was to discharge the PSO, was not chosen pursuant to a public tender procedure, thereby discriminating against Medmar.
- (159) Additionally, according to Article 19 of Law 163/2010, Caremar was granted EUR 2 115 000 for the modernisation of its fleet, an amount that, in Medmar's view, constitutes operating, thus incompatible, aid. Moreover, Law 163/2010 granted Caremar and the other companies of the former Tirrenia group access to EUR 49 000 000 to cover liquidity needs, an amount that, in Medmar's view, constitutes also operating, thus incompatible, aid.
- (160) Finally, Medmar argues that the fiscal exemptions related to the privatisation process of Caremar constitute incompatible aid.

7.2. **Comments from SNAV and ACAP**

- (161) Concerning the entrustment of PSO to Caremar, SNAV and ACAP argued that the Altmark criterion requiring the existence of a genuine SGEI was not met and there was no need for the entrustment in question, because the routes operated by Caremar were also operated by private undertakings. In particular, SNAV operated the following routes:
- Sorrento/Capri: seven daily sailings on weekdays, five sailings on weekends;
 - Naples/Ischia: four daily sailings, three of which via Procida;
 - Procida/Ischia: four daily sailings;
 - Procida/Naples: four daily sailings.
- (162) SNAV and ACAP argue that the entrustment of the SGEI to Caremar and the related compensation constitute incompatible State aid within the meaning of Article 107 TFEU.

7.3. **Comments from GNV**

- (163) GNV's comments concerned the berthing priority and the measures laid down by Law 163/2010.
- (164) As regards the berthing priority, GNV observed that Caremar and the other companies of the Tirrenia Group had been able to benefit the most, in terms of times and berthing, from the passenger transport opportunities offered by the market, choosing the more convenient times for berthing, thus improving their position in the segment of passenger transport to the detriment of competing private companies.

⁽¹⁰⁶⁾ Article 19-ter of Decree-law 135/2009.

- (165) As regards the measures laid down by Law 163/2010, GNV claimed that those measures constituted operating aid thanks to which Caremar, as well as the other companies of the Tirrenia Group, managed to avoid costs which would ordinarily have to be borne by means of their own financial resources.

7.4. **Comments from Alilauro**

- (166) Alilauro claimed that the Region of Campania, prior to the privatisation of Caremar, was abusing its dominant position by coordinating all traffic in the Gulf of Naples through the allocation of PSO and by determining the level of tariffs. According to Alilauro, there was a conflict of interests, which led the Region of Campania not to launch the public tender for the sale of Caremar.
- (167) Furthermore, Alilauro argued that all the routes covered by Caremar were also operated by other private operators, without receiving any public compensation, whereas the allegation for Caremar's aggravation of costs as a result of the mandatory presence of vessels in island ports is unfounded, either because of the presence in the ports of private vessels or because, in case of emergency health services, these could be provided by motorboats specially built for the purpose, as well as by helicopters.

7.5. **Comments from NLG**

- (168) According to NLG, there was no genuine public need on the Naples/Capri route because NLG operated twice as many daily sailings to the island of Capri, which it considered as equivalent to those of Caremar in terms of quality, continuity and comfort of the vessel.
- (169) Furthermore, NLG questioned the fact that the prolongations of the Initial Convention took place without prior public tendering, thereby discriminating against NLG.
- (170) In addition, NLG maintained that the measures laid down by Law 163/2010 constitute unlawful and incompatible aid because of their nature as operating aid, whereas Caremar's berthing priority constituted a further infringement, because it enabled Caremar to benefit from the best routes and time schedules.

7.6. **Comments from Marworld**

- (171) Marworld claimed that the Region of Campania granted aid to Caremar during the privatisation process. In particular, Marworld pointed out that by Regional Decision No 316 of 21 May 2015 the Region of Campania granted EUR 2 155 008 to Caremar, subject to its acquisition by SNAV/Rifim, in order to restore Caremar's financial situation at the value that was in place when SNAV/Rifim had offered EUR 6 000 001 for the acquisition of Caremar.

8. **COMMENTS FROM ITALY**

8.1. **On the PSO and the competitive environment**

- (172) Italy explains that Caremar carries out its activities solely in the performance of PSO and that Caremar has almost exclusive competence in the field of transport of vehicles and freight (e.g. postal effects) from the islands of the Gulf of Naples to the mainland, which is of little commercial interest, while competitors essentially focus on passenger transport (see in particular recitals from 182 to 185).
- (173) According to Italy, the PSO entrusted to Caremar meet a real and current need of communities established on the islands, which are not likely to be provided by the market forces alone, in particular as regards the territorial continuity and frequency of sailings, their regularity and punctuality, as well as a number of requirements concerning the capacity of ships and crew.

(174) To illustrate the existence of genuine demand from users for the maritime services concerned, Italy provided data about Caremar's traffic on the PSO routes covered by the prolonged Initial Convention, by the bridge contract and by the new public service contract.

(175) As regards the routes in the Gulf of Naples, the data concerning Caremar's maritime services on those routes in the period 2009-2021 (see Tables from 3 to 8 below) show that user demand, not only for passenger traffic but also for mixed traffic (i.e. including vehicles and freight), was always present. Moreover, according to Italy, the fact that Caremar's traffic remained stable over the years is a clear indication that Caremar's offer satisfied user demand originating from the local population – which is rather stable as residents need the maritime transport service on a daily basis throughout the year – and was not affected by the fluctuations of touristic traffic.

Passenger traffic

Table 3

Passengers transported in the years 2009 to 2014

Routes	2009	2010	2011	2012	2013	2014
Capri/Sorrento	314 180	330 513	279 657	261 687	272 779	263 354
Capri/Naples	458 399	480 394	416 602	420 772	417 729	463 006
Ischia/Procida/Naples ⁽¹⁾	1 699 501	1 710 889	1 242 689	1 228 687	1 662 685	1 662 737
Ischia/Procida/Pozzuoli ⁽²⁾	316 538	333 832	419 320	415 943	398 620	389 428

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples. Italy provided also the breakdown per segments of Caremar's passenger traffic for the years 2011-2021 that shows that also the traffic per segment remained stable over the years.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli. Italy provided also the breakdown per segments of Caremar's passenger traffic for the years 2011-2021 that shows that also the traffic per segment remained stable over the years.

Table 4

Passengers transported in the years 2015 to 2021

Routes	2015	2016	2017	2018	2019	2020	2021
Capri/Sorrento	249 908	266 393	259 228	259 228	244 645	[100 000 – 200 000]	[100 000 – 200 000]
Capri/Naples	461 000	522 662	577 263	601 251	632 857	[300 000 – 400 000]	[400 000 – 500 000]
Ischia/Procida/Naples ⁽¹⁾	1 653 493	1 835 132	1 990 603	1 981 824	2 093 347	[1 000 000 – 2 000 000]	[1 000 000 – 2 000 000]
Ischia/Procida/Pozzuoli ⁽²⁾	383 164	412 319	400 977	399 792	398 994	[200 000 – 300 000]	[300 000 – 400 000]

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli.

Vehicles

Table 5

Vehicles transported in the years 2009 to 2014

Routes	2009	2010	2011	2012	2013	2014
Capri/Sorrento	8 473	10 617	11 246	11 041	16 555	16 532
Capri/Naples	20 513	20 659	20 541	19 435	23 601	24 417
Ischia/Procida/Naples ⁽¹⁾	74 733	68 959	71 065	64 208	76 738	77 773
Ischia/Procida/Pozzuoli ⁽²⁾	48 110	46 674	49 568	59 461	71 879	69 451

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples. Italy provided also the breakdown per segments of Caremar's traffic for the years 2013-2021 that shows that the number of vehicles transported by Caremar on each segment remained stable over the years.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli. Italy provided also the breakdown per segments of Caremar's traffic for the years 2013-2021 that shows that the number of vehicles transported by Caremar on each segment remained stable over the years.

Table 6

Vehicles transported in the years 2015 to 2021

Routes	2015	2016	2017	2018	2019	2020	2021
Capri/Sorrento	16 650	18 587	17 578	18 110	18 679	[10 000 – 20 000]	[10 000 – 20 000]
Capri/Naples	24 397	24 503	25 920	26 348	27 528	[20 000 – 30 000]	[20 000 – 30 000]
Ischia/Procida/Naples ⁽¹⁾	93 769	90 080	83 052	74 932	79 265	[70 000 – 80 000]	[90 000 – 100 000]
Ischia/Procida/Pozzuoli ⁽²⁾	65 930	70 001	65 724	64 840	64 554	[40 000 – 50 000]	[60 000 – 70 000]

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli.

Freight (linear metres)

Table 7

Freight transported (linear metres) in the years 2009 to 2014

Routes	2009	2010	2011	2012	2013	2014
Capri/Sorrento	82 930	91 218	95 889	99 318	122 742	109 932
Capri/Naples	228 310	222 050	221 238	216 563	238 656	238 602
Ischia/Procida/Naples ⁽¹⁾	268 111	243 034	218 932	189 496	323 259	306 694
Ischia/Procida/Pozzuoli ⁽²⁾	86 664	80 566	76 346	118 274	124 758	120 259

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples. Italy provided also the breakdown per segments of Caremar's traffic for the years 2013-2021 that shows that the linear metres of freight transported by Caremar on each segment remained stable over the years.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli. Italy provided also the breakdown per segments of Caremar's traffic for the years 2013-2021 that shows that the linear metres of freight transported by Caremar on each segment remained stable over the years.

Table 8

Freight transported (linear metres) in the years 2015 to 2021

Routes	2015	2016	2017	2018	2019	2020	2021
Capri/Sorrento	107 316	112 092	110 778	110 454	112 212	[80 000 – 90 000]	[100 000 – 200 000]
Capri/Naples	229 044	252 138	254 826	253 680	261 906	[200 000 – 300 000]	[200 000 – 300 000]
Ischia/Procida/Naples ⁽¹⁾	306 439	293 423	292 172	295 761	283 142	[200 000 – 300 000]	[300 000 – 400 000]
Ischia/Procida/Pozzuoli ⁽²⁾	209 392	196 346	185 996	189 423	126 693	[80 000 – 90 000]	[90 000 – 100 000]

⁽¹⁾ Traffic on this route also included traffic on the segments Ischia/Procida and Procida/Naples and on the direct route Ischia/Naples.

⁽²⁾ Traffic on this route also included traffic on the segment Procida/Pozzuoli.

(176) As regards the routes in the Pontino Archipelago, which were operated by Caremar only between 1 January 2009 and 31 May 2011 ⁽¹⁰⁷⁾, Italy provided the number of passengers serviced by Caremar on those routes in the years 2009 and 2010 and the number of vehicles carried on those routes in the years 2009, see Table 9. According to Italy, those data, though partial ⁽¹⁰⁸⁾, allow to consider that user demand on those routes was present and stable on those routes.

Table 9

Passengers and vehicles transported in the years 2009 and 2010

Routes	2009		2010	
	Passengers	Vehicles	Passengers	Vehicles
Anzio/Ponza	31 494	2 808	32 202	N/A
Formia/Ponza	157 055	13 926	165 370	N/A
Formia/Ventotene	99 087	3 063	106 886	N/A

(177) As regards the application of the SNCM judgement's criteria ⁽¹⁰⁹⁾ to the maritime transport situation in the Gulf of Naples, Italy argues that those criteria are not appropriate insofar they define a purely quantitative analysis based on the comparison of transport supply and demand, which does not consider the specific characteristics of the public service needs of the local population.

⁽¹⁰⁷⁾ As of 1 June 2011, the routes in the Pontino Archipelago were serviced by Laziomar.

⁽¹⁰⁸⁾ According to Italy, the remaining data concerning passenger traffic in 2011, vehicles transported in 2010 and 2011, and freight traffic in the years 2009-2011 could no longer be retrieved.

⁽¹⁰⁹⁾ Judgment of 1 March 2017, *Société nationale maritime Corse Méditerranée (SNCM) v Commission*, T-454/13, ECLI:EU:T:2017:134, paragraphs 130 and 134.

- (178) As regards the definition of users' demand and market offer, Italy explained that the choices made by the Region of Campania in terms of frequencies and timetables of the services to be provided by Caremar on the routes covered by the prolonged Initial Convention were based on the needs expressed by the local authorities and followed discussions with the shipping companies operating in the Gulf of Naples about their ability to provide the services at market terms or under unilaterally imposed PSO.
- (179) In particular, Italy explained that the procedural framework for the definition by the Region of Campania of the PSO in the maritime transport sector is set by Article 17 of the Regional Law No 3 of 28 March 2002 according to which the Region of Campania has to consult the service users and the service providers before defining the scope of the PSO. Moreover, according to the same article, the scope of the PSO has to be verified, and if necessary revised, every three years. As far as the prolonged Initial Convention is concerned, the PSO provided by Caremar from 1 January 2009 to 30 September 2011 were based on a public consultation carried out by the Region of Campania in 2006-2007⁽¹¹⁰⁾. The scope of the PSO, in terms of frequencies and timetables (the PSO routes themselves remained unchanged), was revised in 2011 by Regional Executive Decision No 443 of 9 August 2011 based on a public consultation carried out in 2010-2011 (it was launched in November 2010).
- (180) Italy provided the details of the works leading to the adoption of Regional Executive Decision No 443 of 9 August 2011 whereby the Region of Campania adopted a three-year programme (2011-2013) of minimum services in the Gulf of Naples (see recital 38) which entered into force on 1 October 2011. That programme concerned all maritime service operators in the Gulf of Naples. As regards Caremar, by Regional Executive Decision No 857 of 30 December 2011 the Region of Campania introduced some marginal changes to the timetables and frequencies to be operated by Caremar with effect as of 16 January 2012.
- (181) Italy explained that, following the public consultation carried out in November-December 2010, at the beginning of 2011, the Region of Campania invited the representative of the municipalities of the Gulf of Naples to technical meetings to discuss the public needs identified by the public consultation, in view of the revision of the programme of maritime transport services in the Gulf of Naples⁽¹¹¹⁾. On 22 July 2011, the Region of Campania met with the shipping companies operating in the Gulf on Naples (NLG, Alilauro, Aligruson, SNAV, ACAP) to discuss the public service needs identified by the Region together with the local authorities and verify the availability of the market to provide sufficient services to satisfy those needs. The discussion confirmed that the market alone would not have provided all services identified by the Region of Campania as necessary to satisfy the public need. On 28 July 2011, the Region of Campania met again with the representatives of the islands of the Gulf of Naples to define with them the technicalities of the three-year programme (2011-2013) in terms of frequencies and timetables⁽¹¹²⁾. Following

⁽¹¹⁰⁾ By Regional Executive Decision No 548 of 2 April 2007.

⁽¹¹¹⁾ For instance, on 25 February 2011, the Region of Campania invited the representatives of the municipalities of Ischia to a technical meeting of 2 March 2011 on the definition of the programme of maritime transport services between Naples/Pozzuoli and Ischia. During that meeting, the representatives of the municipalities of Ischia stressed the need to ensure connections to/from Ischia: (a) at the very beginning of the day and during night-time to allow for the procurement of goods; (b) between 6:30 am and 9:00 am to allow the daily commuting of students and workers towards Naples/Pozzuoli and between 12:30 am and 15:00 to allow their commuting back to Ischia; (c) between 9:00 am and 12:30 am, and between 15:00 and 18:00, to allow the population of Ischia to carry out activities on the mainland during the day and revert back to Ischia during the day, moreover these time frameworks allow access to rail and aviation transport services on the mainland without the need of an overnight stay in Naples/Pozzuoli; (d) between 18:00 and 24:00 in order to ensure territorial continuity also over the night and allow the participation of cultural activities.

⁽¹¹²⁾ In that context, for instance, the representative of Ischia asked to postpone the first departure in the morning from Casamicciola from 7:00 am to 7:10 am. The municipality of Capri asked two additional sailings from/to Naples, namely from Naples to Capri at 18:10 and from Capri to Naples at 19:10. The municipality of Procida asked to postpone the journey by hydrofoil from Procida from 6:30 am to 6:40 am, and to have the vessels departing from Ischia at 10:35 am to Naples make a stopover at Procida. The Region of Campania took note of the requests and asked for time to verify their feasibility.

the adoption of a three-year programme (2011-2013) of minimum services in the Gulf of Naples (see recital 38), the municipality of Procida complained not to be sufficiently serviced under the new three-year programme ⁽¹¹³⁾. Therefore, on 7 October 2011, the Region of Campania invited the representatives of the municipalities of the Gulf of Naples to a technical meeting to discuss possible adjustments to the adopted three-year programme.

(182) As regards the competitive environment, Italy considered that the services provided by Caremar's competitors did not meet the needs of the islands' residents in an appropriate manner. Italy explained that the extremely high population density of the islands of Capri ⁽¹¹⁴⁾, Ischia ⁽¹¹⁵⁾ and Procida ⁽¹¹⁶⁾, which together count more than 96 000 residents (i.e. about 3 % of the more than 3 million residents in the Province of Naples to which these islands belong) ⁽¹¹⁷⁾, requires maritime transport to be almost as frequent as local land transport in order to satisfy the needs of students and workers daily commuting to/from the mainland.

(183) Until 2017, the programme of maritime transport services in the Gulf of Naples grouped the maritime transport services under the following three categories:

- (a) Market services – Maritime shipping companies can operate in the Gulf of Naples subject to prior authorisation ⁽¹¹⁸⁾. The timetable and frequency of the service is chosen by the maritime shipping company at the time of its application for the authorisation to operate the route. The market operator is not obliged to provide the service but, if the service or part of it – e.g. at certain hours or at certain days – is not provided for a certain period of time, the authorisation to operate is revoked for the services not provided ⁽¹¹⁹⁾.

⁽¹¹³⁾ Notably, the representatives of Procida observed that out of the 41 journeys programmed from Ischia only 18 journeys were via Procida and asked for a higher number of stopovers in Procida.

⁽¹¹⁴⁾ The island of Capri covers 10,4 square kilometres and consists of two municipalities (Capri and Anacapri) totalling about 13 900 inhabitants. The municipality of Capri has ca. 7 300 residents (meaning a population density of about 1 800 inhabitants per square kilometre) and the municipality of Anacapri has ca. 6 600 residents (meaning a population density of about 1 000 inhabitants per square kilometre). Source: <https://www.italiapedia.it> (last visited on 31.5.2024).

⁽¹¹⁵⁾ The island of Ischia covers 46,3 square kilometres and consists of six municipalities (Barano d'Ischia, Casamicciola Terme, Forio, Ischia, Lacco Ameno, Serrara Fontana) totalling about 61 500 inhabitants and is the third mostly populated island in Italy (after Sicily and Sardinia) despite being only the eighth biggest island in Italy. The municipality of Ischia has ca. 18 600 residents (meaning a population density of about 2 300 inhabitants per square kilometre), the municipality of Barano d'Ischia has ca. 9 800 residents (meaning a population density of about 900 inhabitants per square kilometre), the municipality of Casamicciola Terme has ca. 8 300 residents (meaning a population density of about 1 500 inhabitants per square kilometre), the municipality of Forio has ca. 17 000 residents (meaning a population density of about 1 300 inhabitants per square kilometre), the municipality of Lacco Ameno has ca. 4 600 residents (meaning a population density of about 2 300 inhabitants per square kilometre), the municipality of Serrara Fontana has ca. 3 200 residents (meaning a population density of about 480 inhabitants per square kilometre). Source: <https://www.italiapedia.it> (last visited on 31.5.2024).

⁽¹¹⁶⁾ The island of Procida covers 4,1 square kilometres and consists of one municipality (the municipality of Procida) with about 10 600 residents (meaning a population density of about 2 500 inhabitants per square kilometre). Source: <https://www.italiapedia.it> (last visited on 31.5.2024).

⁽¹¹⁷⁾ Source: <https://www.italiapedia.it> (last visited on 31.5.2024).

⁽¹¹⁸⁾ Italy explained that this authorisation system was based until 9 January 2017 on Regional Executive Decree No 80 of 21 February 2003. Under Article 4 of that decree, the authorisation to operate was given to the shipping companies satisfying the requirements prescribed by the law to operate maritime transport services. As of 10 January 2017, the authorisation system is based on Regional Executive Decision No 442 of 2 August 2016.

⁽¹¹⁹⁾ For instance, by Executive Decree No 269 of 2012, the Region of Campania revoked the authorisation given on 21 September 2011 to Medmar for the operation of the following services on the route Ischia (Casamicciola)/Pozzuoli: from Ischia to Pozzuoli at 6:00 am, at 14:00, at 17:45; and from Pozzuoli to Ischia at 11:00 am, 15:40, and 19:30. The authorisation was revoked because those services had never been operated by Medmar. As regards the sailing from Ischia to Pozzuoli at 20:30, that resulted operated by Medmar only on Friday/Saturday/Sunday from 15 June to 15 September, the authorisation remained in place only for the part of the services effectively provided.

- (b) PSO services without compensation – Maritime shipping companies authorised to operate a route could be subject to PSO (in terms of frequency, regularity, types of vessels used and maximum fares) without compensation ⁽¹²⁰⁾. Those PSO concerned maritime transport services that were identified by the Region of Campania as important to ensure continuity between the mainland and the islands. Yet, as explained by Italy, the Region of Campania had no real control over the effective provision of those services because the maritime operators could stop providing them at their convenience, without any penalty, by giving an advance notice of 45 days. If the service or part of it – e.g. at certain hours or at certain days – was not provided for a certain period of time, the authorisation to operate was revoked for the services not provided. Moreover, Italy explained that Caremar's competitors could always ask the Region of Campania to temporarily suspend all or part the PSO services imposed on them. This happened, for instance, in 2009 when some of Caremar's competitors asked the Region of Campania to reduce the number of PSO services they had to provide in the Gulf of Naples and to increase the maximum fares they could charge for the remaining PSO services, due to the financial difficulties maritime operators were facing because of the economic crisis ⁽¹²¹⁾. On that occasion, the Region of Campania, after having carried out a public consultation on the local needs, decided not to increase the maximum fares on the PSO routes and to allow for a temporary ⁽¹²²⁾ suspension of some of the PSO services provided by Caremar's competitors on some routes ⁽¹²³⁾. Moreover, Italy pointed out that, between the end of December 2010 and 1 October 2011, Caremar, Gestour and Procida Lines happened to be the only companies providing maritime services in the Gulf of Naples under PSO given that all other shipping operators had suddenly refused to continue providing the services under PSO ⁽¹²⁴⁾. In essence, Italy pointed out that that PSO system did not work because the shipping operators accepted to operate the route under the PSO identified by the Region of Campania just to obtain the relevant time slot in the berthing framework approved and published by Region of Campania. In reality, those services were often not provided ⁽¹²⁵⁾ or provided not in accordance with the PSO (in terms of timing and maximum prices ⁽¹²⁶⁾), particularly during the low season. For this reason, Italy stressed that the services offered by Caremar's competitors under PSO were not comparable to those offered by Caremar not only in terms of frequencies but also in terms of reliability (e.g. punctuality, quality and more in general guarantee of operation).

⁽¹²⁰⁾ This non-compensated PSO system remained in force until 9 January 2017. As of 10 January 2017, Caremar has been the only maritime operator subject to PSO in the Gulf of Naples, all other operators remained subject only to the authorisation system.

⁽¹²¹⁾ This point is also mentioned in the recitals of Regional Executive Decree No 374 of 2009 which recalls the letters of 25 March 2009 and of 22 June 2009 sent by Caremar's competitors to the Region of Campania concerning respectively the reduction of the number of PSO services and the increase of the maximum fares that could be charged to users on the remaining PSO routes.

⁽¹²²⁾ From 15 July 2009 to 15 September 2009.

⁽¹²³⁾ The routes concerned were Capri/Sorrento, Capri/Naples, Ischia/Procida/Naples, and Ischia/Naples. The PSO services not provided by Caremar's competitors on those routes have not been considered in the assessment of the competitive environment in the Gulf of Naples.

⁽¹²⁴⁾ By Regional Executive Decree No 402 of 2010 the Region of Campania took note of the situation, suspended the berthing framework in place at that time and adopted an emergency berthing framework which was in force until 30 September 2011. Based on that emergency berthing framework, Caremar was the only maritime operator servicing under PSO the routes Capri/Sorrento, Capri/Naples, Ischia/Naples, Ischia/Procida/Naples, Ischia/Procida/Pozzuoli, Ischia/Procida, and Procida/Naples; whereas Gestour and Procida Lines operated under PSO the route Procida/Pozzuoli.

⁽¹²⁵⁾ The frequent annulment or suspension of the service by Caremar's competitors in the Gulf of Naples was pointed out also by the Italian Competition Authority in its decision No 25295 of 28 January 2015 adopted in case I689C, by which the Italian Competition Authority sanctioned the companies NLG, Alilauro, Alicost S.p.A., Alilauro Gruson S.p.A., Medmar, SNAV, Servizi Liberi Marittimi Giuffrè & Lauro S.r.l., Consorzio Linee Marittime Partenopee in liquidazione, Gescab S.r.l. and Associazione Cabotaggio Armatori Partenopei for having implemented a horizontal agreement restricting competition in the market of maritime transport of passengers in the Gulf of Naples since 1998 (see in particular point 255 of the Italian Competition Authority's decision No 25295 of 28 January 2015).

⁽¹²⁶⁾ Medmar and Alilauro were sanctioned by the Italian Competition Authority in 2012 for commercial practices that prevented the acquisition of tickets at the reduced tariffs for residents (Italian Competition Authority's decision No 23258 of 31 January 2012 in case PS5983 concerning Medmar and Italian Competition Authority's decision No 23264 of 31 January 2012 in case PS7667 concerning Alilauro).

- (c) PSO services with compensation – The services covered by the public service contract concluded with Caremar are subject to PSO in terms of continuity and frequency, regularity, punctuality, quality, types and capacity of the vessels used, and fares, against compensation. Italy explained that these services concerns times of the day when maritime transport is most needed by commuters (early morning, early afternoon, and in the evening) ⁽¹²⁷⁾. The contractual framework, with its system of penalties, was meant to ensure the provision of these services.

(184) Italy explained that Caremar's competitors *de facto* were not providing all sailings mentioned in the berthing frameworks ('*quadri accosti*') approved and published by the Campania Region. This was because, on the one hand, shipping companies operating at market terms were authorised, but not obliged, to operate the time slots identified in that berthing frameworks, and, on the other hand, shipping companies operating under PSO were not effectively sanctioned in case of non-provision of the PSO service ⁽¹²⁸⁾.

(185) Having regard to the berthing frameworks approved and published by the Region of Campania for the relevant years and to the services effectively provided by Caremar's competitors in the period from 1 January 2009 to 31 July 2012, Italy explained that the competitive situation in the Gulf of Naples was the following:

- (a) On the route **Capri/Sorrento**, in addition to Caremar, there were four other shipping companies authorised to operate on the route: Aligruson, NLG, SNAV and, in the years 2009-2010, Ali Maritime Agency S.r.l. ('Alimar'). According to Italy, however, the services provided by those companies did not satisfy the public service need identified by the Region of Campania, which was to ensure over the entire year sufficient connections (mixed services) enabling the residents of Capri to daily commute to the mainland for professional or study reasons (i.e. with the possibility to bring their cars with them) as well as the delivery of goods to the islands (including postal items). In fact, as mentioned in recitals 36(a) and 39(a), Caremar had to guarantee throughout the year from/to Capri by TMV two roundtrip sailings in the morning, one roundtrip sailing in the early afternoon and one roundtrip sailing in the evening. By contrast, Caremar's competitors either provided only maritime passenger transport services (this was the case of NLG ⁽¹²⁹⁾ and Alimar ⁽¹³⁰⁾) or operated also mixed services but only in the summer period (this was the case of SNAV ⁽¹³¹⁾ and Aligruson ⁽¹³²⁾).

⁽¹²⁷⁾ Italy stressed that this kind of timetable requires Caremar to keep a vessel on the island during the night (with additional costs not borne by Caremar's competitors).

⁽¹²⁸⁾ The non-provision of the service over a prolonged period of time, once ascertained by the competent authorities, had only as main consequence the revocation of the authorisation to operate the relevant time-slot (both in case of service operated at market term and in case of service operated under PSO).

⁽¹²⁹⁾ NLG provided two daily sailings in low season and seven daily sailings in high season (three of which under OSP, namely two leaving from Sorrento at 9:40 am and at 13:10, and (as of 2010) one leaving from Capri at 8:55). Italy observed that NLG's services on the Capri/Sorrento route were not really in competition with Caremar's services as it is confirmed by the fact that NLG's comments did not concern the Capri/Sorrento route but only the Naples/Capri route (see recital 168).

⁽¹³⁰⁾ According to Italy, Alimar was authorised to operate two daily passenger sailings, one from Capri to Sorrento at 6:00 am and one from Sorrento to Capri at 22:55 am, but only from 1 July to 31 August.

⁽¹³¹⁾ As regards the mixed services, both under the 2007 and the 2011 maritime transport programmes (i.e. from 2009 onwards) SNAV was authorised to operate ten daily sailings by TMV (six from Capri to Sorrento at 7:35 am, 9:15 am, 12:10 am, 15:55, 17:40, and 18:05; and four from Sorrento to Capri at 8:10 am, 11:25 am, 13:50, 16:35) but only in the summer period (in particular, from 1 April to 3 November).

⁽¹³²⁾ As regards the mixed services, both under the 2007 and the 2011 maritime transport programmes (i.e. from 2009 onwards) Aligruson was authorised to operate four daily sailings (two from Sorrento to Capri at 11:30 am and 14:00; and two from Capri to Sorrento at 12:30 and 18:05) but only in the summer period.

- (b) On the route **Capri/Naples**, in addition to Caremar, there were four other shipping companies authorised to operate on the route: SNAV ⁽¹³³⁾, NLG ⁽¹³⁴⁾, Consorzio Linee Marittime Neapolis ('Neapolis') ⁽¹³⁵⁾ and Metrò del Mare S.c.a.r.l. ('Metrò del Mare') ⁽¹³⁶⁾. All those operators, however, provided only maritime passenger transport services, whereas Caremar had to provide mixed services (see recitals 36(b) and 39(b)). According to Italy, the services provided by Caremar's competitors did not satisfy the public service need identified by the Region of Campania, which was to ensure over the entire year sufficient connections (mixed services) enabling the residents of Capri to daily commute to the mainland for professional or study reasons (i.e. with the possibility to bring their cars with them) as well as the delivery of goods to the islands (including postal items).
- (c) On the route **Ischia/Naples**, in addition to Caremar, there were two other shipping companies authorised to operate on the route: Alilauro (providing only passenger services) and Medmar (providing only mixed services). According to Italy, the services provided by Caremar's competitors were not sufficient to satisfy the public needs of the local population. As regards the passenger services, Alilauro operated mostly during the summer period and the (limited) services provided throughout the year were provided under PSO at different times than those provided by Caremar (see recitals 36(c) and 39(c)). In fact, from 1 January 2009 to 30 September 2011, Alilauro operated 20 sailings by hydrofoil (19 under PSO and 1 at market terms) all in the summer period with the exception of one PSO service ⁽¹³⁷⁾. As of 1 October 2011, Alilauro operated 14 sailings by hydrofoil (five under PSO throughout the year ⁽¹³⁸⁾ and 9 at market terms only in the summer period). As regards the mixed services, Medmar operated mostly during the summer period and the (limited) services provided throughout the year or only in winter were provided under PSO at different times than those provided by Caremar (see recitals 36(c) and 39(c)). In fact, from 1 January 2009 to 30 September 2011, Medmar operated 19 sailings by ferry/TMV (12 under PSO and 7 at market terms) only in the summer period, and not always daily. As of 1 October 2011, Medmar operated 23 sailings by ferry/TMV (17 at market terms, all in the summer period, and six under PSO. Out of the six services operated under PSO, only two sailings were throughout the year ⁽¹³⁹⁾, two sailings were only in winter ⁽¹⁴⁰⁾ and two sailings were only in summer ⁽¹⁴¹⁾).

⁽¹³³⁾ In 2009, 2010 and part of 2011, SNAV provided 12 daily passenger services on the route of which 11 sailings by hydrofoil in summer (in part under PSO and in part under the authorisation regime) and one sailing by hydrofoil throughout the year (from Capri to Naples at 8:10 am, under PSO). As of 1 October 2011, SNAV operated on the route 25 daily passenger services on the route by hydrofoil, of which 13 daily sailings throughout the year, all under PSO (11 of which provided jointly with NLG).

⁽¹³⁴⁾ In 2009, 2010 and part of 2011, NLG provided daily maritime passenger services on the route only in summer (21 sailings by hydrofoil), in part under PSO and in part under the authorisation regime. As of 1 October 2011, NLG operated on the route 34 daily passenger services by hydrofoil, of which 15 daily sailings throughout the year. Two of those 15 daily sailings (namely those from Capri to Naples at 9:35 am and at 11:35 am) were provided at market terms, the remaining 13 under PSO (11 of those PSO services were provided jointly with SNAV).

⁽¹³⁵⁾ Neapolis was a joint venture established on 31 August 2004 between NLG (50 % stake) and SNAV (50 % stake). It operated on the route in the years 2009, 2010 and 2011. In 2009-2010, Neapolis had to provide eight daily sailings by hydrofoil under PSO on the route, notably from Capri to Naples at 6:50 am (throughout the year), 8:50 am (only in summer), 14:10 (throughout the year); 17:25 (only in summer); and from Naples to Capri at 7:55 am (only in summer), 10:00 am (only in summer); 16:05 (only in summer); and 20:05 (only in summer). In 2011, the services were reduced to five and operated throughout the year at market conditions (under the authorisation regime), notably from Capri to Naples at 8:50 am, 14:10, and 17:30; and from Naples to Capri at 10:00 am, 16:05.

⁽¹³⁶⁾ Metrò del Mare was a joint venture established on 20 May 2002 between NLG (20 % stake), SNAV (40 % stake), Alilauro (20 % stake) and Aligruson (20 % stake). It operated on the route in the years 2009 and 2010. In 2009-2010, Metrò del Mare had to provide in summer four (almost daily) sailings by hydrofoil under PSO on the route, notably from Capri to Naples at 10:30 am, and at 10:50 am; and from Naples to Capri at 16:30 and at 17:05.

⁽¹³⁷⁾ Namely, the one from Naples to Ischia at **9:35 am**.

⁽¹³⁸⁾ Namely, from Ischia to Naples at **6:30 am**, **9:25 am** and **19:55**; and from Naples to Ischia at **7:35 am** and **20:10**. As mentioned in recital 39(c), Caremar did not have to provide passenger services on this route in the period 1 October 2011–15 January 2012, and as of 16 January 2012 had to provide only one daily passenger service by hydrofoil from Naples to Ischia at **14:45**.

⁽¹³⁹⁾ Namely, from Naples to Ischia at **8:35 am** and at **14:10**.

⁽¹⁴⁰⁾ Namely, from Ischia to Naples at **16:35** and from Naples to Ischia at **18:30**.

⁽¹⁴¹⁾ Namely, from Ischia to Naples at **17:00** and from Naples to Ischia at **18:30**.

- (d) On the route **Ischia/Procida/Naples**, in addition to Caremar, there were two other shipping companies on the route: Medmar, which was authorised to operate mixed services on the route ⁽¹⁴²⁾ but that, according to Italy, almost never operated; and SNAV, which operated eight daily passenger services with hydrofoil under PSO. According to the Italian authorities, SNAV's services were not comparable to the passenger services to be provided by Caremar. First, as regards the period from 1 January 2009 to 30 September 2011, SNAV's services were all (but one ⁽¹⁴³⁾) concentrated in the summer season, whereas Caremar had to provide all of its services throughout the year (see recital 36(d)). Second, even though as of 1 October 2011 the number of sailings provided by SNAV throughout the year increased to seven ⁽¹⁴⁴⁾ (out of eight ⁽¹⁴⁵⁾) and Caremar added two sailings in the period from 1 June to 30 September (see recital 39(d)), SNAV operated at different times of the day than Caremar.

- (e) On the route **Ischia/Procida/Pozzuoli**, in addition to Caremar, there was only one other shipping company authorised to operate on the route, Medmar, which operated however mixed services mostly without a stopover in Procida. In fact, as regards the period from 1 January 2009 to 30 September 2011, Medmar operated a total of 39 mixed services by ferry between Ischia and Pozzuoli (the majority of which only in the summer period ⁽¹⁴⁶⁾), out of which only three mixed services with a stopover in Procida ⁽¹⁴⁷⁾. As of 1 October 2011, Medmar operated a total of 40 mixed services by ferry between Ischia and Pozzuoli, out of which only four mixed services with a stopover in Procida ⁽¹⁴⁸⁾. According to the Italian authorities, Medmar's services with a stopover in Procida were not comparable to those provided by Caremar in terms of frequencies and timetables (see recitals 36(e) and 39(e)). In particular, as regards the services provided throughout the year, Caremar operated six daily mixed services – three from Ischia (at 8:35 am, 11:30 am and 17:30) and three from Pozzuoli (at 10:15 am, 14:00 and 18:55) – whereas Medmar operated two daily mixed services from Ischia (at 2:30 am and 18:55) and two from Pozzuoli (at 4:10 am and 20:30). As regards the additional services provided by Caremar during the school period as of 16 January 2012, Caremar had to guarantee the services from Ischia at 7:20 am and from Pozzuoli at 9:00 am, whereas Medmar did not provide on the route any sailing with stopover in Procida in that period ⁽¹⁴⁹⁾.

⁽¹⁴²⁾ According to the berthing frameworks, in the period from 1 January 2009 to 30 September 2011, Medmar had to operate throughout the year under PSO two daily mixed services by ferry, namely from Ischia at **22:00** (with departure from Procida at 22:40); and from Naples at **24:00** (with departure from Procida at 1:00 am). From 1 October 2011, Medmar had to operate under PSO two mixed daily services throughout the year, namely from Ischia at **6:25 am** (with departure from Procida at 7:25) and at **10:35 am** (with departure from Procida at 11:15) and one mixed service in the summer period (but not always daily) from Ischia at **22:20** (with departure from Procida at 23:00).

⁽¹⁴³⁾ Namely, the one from Ischia to Procida and subsequently to Naples departing from Casamicciola at **9:45 am** (and from Procida at **10:05 am**).

⁽¹⁴⁴⁾ Namely, from Ischia to Procida and subsequently to Naples departing from Casamicciola at **7:10 am** (and from Procida at **7:30 am**), **9:45 am** (and from Procida at **10:10 am**), **13:50** (and from Procida at **14:15**), **17:40** (and from Procida at **18:05**); and from Naples to Procida and subsequently to Ischia at **8:25 am** (and from Procida at **9:05 am**), **16:20** (and from Procida at **17:00**), **19:00** (and from Procida at **19:40**). All those sailings were operated under PSO.

⁽¹⁴⁵⁾ The only sailing operated only in the summer period was also the only one operated at market terms. In the summer period, SNAV was authorised to operate passenger services by hydrofoil from Ischia to Procida and subsequently to Naples departing from Casamicciola at **11:25 am** (and from Procida at 11:45 am).

⁽¹⁴⁶⁾ Only three sailings out of 39 were provided throughout the year (under PSO) – two on the route Ischia/Procida/Pozzuoli and one on the direct route Ischia (Casamicciola)/Pozzuoli – and one sailing was provided only during the school period (from 16 September to 14 June). The remaining 35 sailings were provided only in the summer period.

⁽¹⁴⁷⁾ Two services under PSO to be provided throughout the year, namely from Ischia (Casamicciola) to Procida and subsequently Pozzuoli at **2:30 am**; and from Pozzuoli to Procida and subsequently Ischia (Casamicciola) at **4:10 am**; and one service at market terms, namely from Ischia to Procida and subsequently to Pozzuoli at **7:30 am** which was however provided only during the school period (from 16 September to 14 June).

⁽¹⁴⁸⁾ These four services were all under PSO to be provided throughout the year, namely from Ischia (Casamicciola) to Procida and subsequently Pozzuoli at **2:30 am** and **18:55**; and from Pozzuoli to Procida and subsequently Ischia (Casamicciola) at **4:10 am** and **20:30**.

⁽¹⁴⁹⁾ Medmar had stopped providing the service from Ischia at 7:30 at market terms during the school period.

- (f) On the route **Ischia/Procida**, in addition to Caremar, there were seven other shipping companies authorised to operate on the route, mostly as part of a broader route (e.g. Ischia/Procida/Naples or Ischia/Procida/Pozzuoli): on the one hand Medmar (as regards mixed services) ⁽¹⁵⁰⁾ and SNAV (as regards passenger services) ⁽¹⁵¹⁾, operating partly under PSO and partly at market terms, and on the other hand, Alilauro ⁽¹⁵²⁾, Ippocampo S.r.l. ('Ippocampo') ⁽¹⁵³⁾, Rumore S.r.l. ('Rumore') ⁽¹⁵⁴⁾, Marine Club S.r.l. ('Marine Club') ⁽¹⁵⁵⁾, and Capitan Morgan S.r.l. ('Capitan Morgan') ⁽¹⁵⁶⁾, operating only at market terms. According to Italy, the services provided by the market were too fragmented, marginal and unstable ⁽¹⁵⁷⁾ to be considered even all together comparable to the PSO services provided by Caremar. This was confirmed by the fact that, following the public consultation held in 2011, the Region of Campania considered necessary as of 16 January 2012 to add to the PSO already provided by Caremar on the route an additional daily passenger service by hydrofoil from Procida to Ischia at 15:30 throughout the year in order to satisfy the commuting needs of the residents on the islands (see recital 39(f)).
- (g) On the route **Procida/Pozzuoli**, in addition to Caremar, there were three other shipping companies authorised to operate on the route: Procida Lines S.r.l. ('Procida Lines'), Gestour S.r.l. ('Gestour') and Ippocampo. According to Italy, however, the vessels used by Caremar's competitors to provide the service were of limited capacity and were not able to carry passengers with reduced mobility or with a wheelchair.

⁽¹⁵⁰⁾ From 1 January 2009 to 30 September 2011, Medmar was authorised to operate four daily mixed services to/from Ischia: three throughout the year under PSO (from Procida at 1:10 am; and from Ischia at 2:30 am and at 22:00) and one only during the school period at market terms (from Ischia at 7:30 am). As of 1 October 2011, Medmar was authorised to operate eight daily mixed services to/from Ischia, six throughout the year (from Procida at 5:00 am, and 21:20) and from Ischia at 2:30 am, 6:25 am, 10:35 am, 18:55) and two only in the summer period (from Procida at 1:30 am and from Ischia at 22:20), all under PSO. Italy explained however that some of the services on the route were almost never operated by Medmar (notably, the services that concerned the segment Ischia/Procida).

⁽¹⁵¹⁾ From 1 January 2009 to 30 September 2011, SNAV operated 14 daily passenger services by hydrofoil to/from Ischia, four throughout the year – notably, 3 under PSO (from Ischia at 7:10 am, 9:45 am, and from Procida at 13:10 am), and one at market terms (from Ischia at 8:30 am) – and 10 only during the summer period – notably, six under PSO (from Procida at 9:00 am, 17:00, 19:05, and 19:20; and from Ischia at 13:35, 17:40) and four at market conditions (from Procida at 7:50 am, 17:50; and from Ischia at 18:30 and 19:45). As of 1 October 2011, SNAV operated 16 daily passenger services by hydrofoil to/from Ischia, nine throughout the year: notably, eight under PSO (from Ischia at 7:10 am, 9:45 am, 13:50, 17:40; and from Procida at 9:05 am, 13:15, 17:00, 19:40), and one at market terms (from Ischia at 8:30 am); and seven only during the summer period at market conditions (from Procida at 7:50 am, 11:00 am, 17:50, 19:20; and from Ischia at 11:25 am, 18:30 and 19:45).

⁽¹⁵²⁾ From 1 January 2009 to 30 September 2011, Alilauro was authorised to provide three daily passenger services by hydrofoil to Ischia, at market terms in the summer period, notably from Procida at 8:35 am, at 12:35 am, and at 18:35. As of 1 October 2011, Alilauro was not authorised anymore to operate the route.

⁽¹⁵³⁾ From 1 January 2009 to 30 September 2011, Ippocampo was authorised to provide two mixed services at market terms but only in summer and not always daily (mostly on weekends), namely from Ischia at 9:25 am and from Procida at 17:00. As of 1 October 2011, Ippocampo was authorised to provide six mixed services at market terms but only in the summer period and not always daily, namely from Ischia at 9:25 am, 11:40 am, 14:30; and from Procida at 11:00 am, 13:00 and 17:00.

⁽¹⁵⁴⁾ From 1 January 2009 to 30 September 2011, Rumore was authorised to provide four mixed services at market terms, three of which only in the summer period and not always daily (from Procida at 12:20 am and 18:30; and from Ischia at 15:10) and one daily throughout the year (from Ischia at 10:40 am). Rumore's services and time schedule did not change as of 1 October 2011.

⁽¹⁵⁵⁾ From 1 January 2009 to 30 September 2011, Marine Club was authorised to provide one mixed service at market terms on Thursdays in the summer period (from Procida at 12:15). As of 1 October 2011, Marine Club was not authorised anymore to operate the route.

⁽¹⁵⁶⁾ From 1 January 2009 to 30 September 2011, Capitan Morgan was authorised to provide two daily mixed services at market terms in the summer period (from Ischia at 15:10 and from Procida at 18:00). As of 1 October 2011, Capitan Morgan was authorised to provide three daily mixed services at market terms in the summer period (from Ischia at 15:10 and 18:35; and from Procida at 18:00).

⁽¹⁵⁷⁾ For example, smaller shipping operators, such as Ippocampo, Rumore, Marine Club and Capitan Morgan, were using smaller and less powerful vessels than those used by Caremar which, differently from those used by Caremar, could operate only under good weather conditions.

Moreover, the services provided by Caremar's competitors were either provided only in the summer period and not even daily (this was the case of Ippocampo) ⁽¹⁵⁸⁾ or, in any event, were often suspended or cancelled and could not thus provide the same regularity levels as those of Caremar (as in the case of Procida Lines) ⁽¹⁵⁹⁾. As a matter of fact, according to Italy, in the period 2012–2015 only Gestour ⁽¹⁶⁰⁾ was operating throughout the year on the route besides Caremar. However, Italy pointed out that Gestour's services were not comparable to Caremar's services in terms of duration of the maritime journey (Caremar had to provide the service by hydrofoil, 15 minutes travel, whereas Gestour operated by ferry, 50 minutes travel).

- (h) On the route **Procida/Naples**, in addition to Caremar, there were two other shipping company authorised to operate on the route: SNAV ⁽¹⁶¹⁾ (providing passenger services by hydrofoil) and Medmar ⁽¹⁶²⁾ (providing mixed services by ferry). According to Italy, the passenger services provided by SNAV throughout the year were not comparable to those provided by Caremar because provided at different times of the day.

(186) As regards the competitive situation of the maritime routes serviced by Caremar in the Pontino Archipelago in the period 2009–2011, Italy explained the following:

- (a) On the route **Ponza/Formia**, in addition to Caremar, there was only one other shipping company on the route, Vetur S.r.l. ('Vetur') which operated two daily passenger service with hydrofoil throughout the year under PSO (departing from Ponza at 8:30 am and from Formia at 16:00). According to Italy, Vetur's services were not reliable as Vetur often cancelled the sailing, particularly in case of bad weather, and were in any event not comparable to the mixed services provided by Caremar which guaranteed the residents a daily connection throughout the year also for the transport of vehicles and freight. As regards the passenger services, Italy

⁽¹⁵⁸⁾ From 1 January 2009 to 30 September 2011, Ippocampo was authorised to provide four mixed services during the summer period (mostly only on Sundays), namely from Procida at **18:45** and at **20:00** and from Pozzuoli at **19:20** and **20:50**. Those services remained unchanged also in terms of timetables as of 1 October 2011.

⁽¹⁵⁹⁾ From 1 January 2009 to 30 September 2011, Procida Lines was authorised to provide 16 mixed services throughout the year but not always daily, 11 at market terms (from Procida at **5:50 am, 10:45 am, 15:25, 17:30, 19:15**; and from Pozzuoli at **5:05 am, 9:25 am, 13:35, 16:25, 18:25, 20:00**) and five under PSO (from Procida at **4:00 am** (only on Fridays), **7:50 am, 12:40 am**; from Pozzuoli at **7:05 am, 11:50 am**). As of 1 October 2011, Procida Lines was authorised to provide 15 mixed services throughout the year but not always daily, 14 at market terms (from Procida at **4:00 am** (only on Fridays), **7:50 am, 10:45 am, 12:40 am, 15:25, 17:30, 19:15**; and from Pozzuoli at **5:05 am, 7:05 am, 11:50 am, 13:35, 16:25, 18:25, 20:00**) and one under PSO (from Procida at **5:50 am**). Italy explained however that those services were almost never provided in the period 2012–2015. For instance, as regards the service under PSO, once ascertained that Procida Lines was not complying with the PSO, by Executive Decree No 18 of 29 February 2012 the Region of Campania revoked the PSO service from Procida Lines and entrusted it to Gestour until 31 December 2012.

⁽¹⁶⁰⁾ From 1 January 2009 to 30 September 2011, Gestour provided 13 daily mixed services by ferry (50 minutes travel) throughout the year, eight at market terms (from Pozzuoli at **6:00 am, 8:30 am, 10:35 am, 12:55 am**; from Procida at **6:50 am, 9:30 am, 11:20 am, 17:05**) and five under PSO (from Pozzuoli at **15:05, 17:55, 19:50**; from Procida at **14:05, 18:55**). As of 1 October 2011, Gestour provided nine daily mixed services by ferry (50 minutes travel) throughout the year at market terms (from Pozzuoli at **6:00 am, 8:30 am, 10:35 am, 12:55 am, 19:50**; from Procida at **6:50 am, 9:30 am, 11:20 am, 18:55**).

⁽¹⁶¹⁾ From 1 January 2009 to 30 September 2011, SNAV operated nine daily passenger services by hydrofoil under PSO, two throughout the year (namely from Procida at **7:35 am and 10:05 am**) and seven in the summer period (namely from Naples (Beverello) at **8:20 am, 12:30 am, 16:20, 18:40, 18:45**; and from Procida at **13:50 and 18:00**). From 1 October 2011, SNAV operated ten daily passenger services by hydrofoil (20 minutes travel), of which eight throughout the year under PSO (namely from Procida at **7:30 am, 10:10 am, 14:15, 18:05**) and from Naples (Beverello) at **8:25 am, 12:30 am, 16:20, and 19:00**; and two only in summer at market terms (from Procida at **11:45 am** and from Naples (Beverello) at **18:45**).

⁽¹⁶²⁾ From 1 January 2009 to 30 September 2011, Medmar operated daily two mixed services by ferry (60 minutes travel) under PSO throughout the year, namely from Naples (Calata Massa) at **24:00** and from Procida at **22:40**. From 1 October 2011, Medmar operated two mixed services under PSO throughout the year, namely from Naples (Calata Massa) at **00:20 am** and from Procida at **11:15 am**, and one mixed service under PSO in the summer period (not always daily) from Procida at **23:00**.

explained that Caremar was required to maintain the vessels on the island overnight in order to ensure the first sailing of the day (at 5:30 am from Ponza) and guarantee a daily connection with the mainland for study and work reasons (returning to Ponza at 17:30). The availability of vessels on the island overnight was also meant to ensure maritime transport to the mainland in case of a medical emergency that could not be satisfied by emergency air transport (e.g. helicopters).

(b) On the route **Ponza/Anzio**, in addition to Caremar, there was only one other shipping company on the route, Vetor, which operated two daily passenger services with hydrofoil during the high season at market terms, while, during the low season, Vetor operated only two sailings on Saturdays under PSO. According to Italy, Caremar's mixed services were justified on social and economic development grounds and aimed at ensuring passengers with vehicles the possibility to have a roundtrip from/to Ponza throughout the year. As regards passenger services, Italy explained that Vetor's services were not reliable as Vetor often cancelled the sailing, particularly in case of bad weather.

(c) On the route **Formia/Ventotene**, in addition to Caremar, there were two other shipping companies that operated the route: Vetor and *Società Navigazione Arcipelago Ponziano S.r.l.* ("SNAP"). Vetor provided one daily passenger service with hydrofoil during the low season and one passenger service with hydrofoil every Monday during the high season, both under PSO. SNAP provided one daily passenger service during the high season with hydrofoil at market terms. According to Italy, Caremar's services were necessary to allow Ventotene's residents to travel to the mainland for professional or study reasons, as Caremar ensured the first trip of the day from Ventotene by ferry at 5:30 am and a daily passenger service from Ventotene by hydrofoil at 6:45 am. Moreover, as Caremar's vessels remained overnight on the island, they allowed maritime transport to the mainland in case of a medical emergency.

(187) Regarding Medmar's comments (see Section 7.1), Italy qualified as partial and incomplete the conclusions reached by Medmar as to the equivalence of its services with those provided by Caremar. According to Italy, Medmar merely compares its services with those provided by Caremar on certain routes, taking as a reference only the daily frequency of the sailings, whereas no assessment is carried out in view of the timetable, seasonality, types of transport and fares. In particular, as regards the Ischia/Procida/Pozzuoli route, Italy stressed that Caremar was the only company providing sufficiently reliable maritime transport services at the time of the definition of the PSO and that the route has been always essential to meet the students' mobility needs on both islands, as well as the health requirements related to the possibility for Procida's residents to reach Pozzuoli's and Ischia's hospitals.

(188) In reply to Medmar's claim that Caremar did not need any compensation for the services provided as Medmar was also providing some services under PSO without compensation on the same routes, Italy explained that, when entrusting the PSO, it did so pursuant to Regulation (EEC) No 3577/92, which allows to horizontally award PSO to all the interested shipowners. The entrustment of PSO was carried out in two steps. First, Italy imposed PSO to interested operators on certain routes without compensation. Second, in case that companies did not wish to operate the routes without compensation, the Region of Campania would have launched a public tender procedure to identify the undertaking that would be awarded a public service contract and a correlated compensation. Therefore, in the Region of Campania's view, Medmar accepted to operate the PSO without compensation, as stated in the Submission act signed by the company.

- (189) In general, considering the PSO imposed on Caremar and those imposed on its competitors (see recitals from 182 to 186), Italy maintains that the competitors' services that are subject to PSO essentially constitute services that Caremar's competitors accepted to carry out in the context of their respective maritime activities. These PSO were not comparable to those to be provided by Caremar, as the operators could be released by supplying the Region of Campania with a short notice, and furthermore the PSO were not subject to penalties in case of failure to fulfil them. Lastly, the existence of these PSO imposed on Caremar's competitors has not removed the public service contract concluded with Caremar to continue fulfilling the needs of the local authorities for territorial continuity, as the Region of Campania has periodically verified under the revision of the maritime programmes which took into account both the services provided under the PSO and the public service contract concluded with Caremar.

8.2. On the privatisation of Caremar

- (190) Italy states that, following the Commission's request for information of 26 October 2011 and the Commission's comments of 22 December 2011 and 14 March 2012, it amended the invitation to tender for Caremar's privatisation in accordance with the requirements of the Commission aiming at ensuring the transparency and the non-discrimination of the procedure.
- (191) For instance, any discrimination based on the nationality of the economic operator offering the tender was removed. In any event, Italy underlines that there was no condition in the tender specifications implying the maintenance of the staff employed by Caremar, nor any condition relating to the existing employment relationships with the company.
- (192) In addition, Italy modified the eligibility requirement relating to economic and financial capacity, by eliminating the clauses that allowed only shipping companies to participate to the tender procedure, thereby allowing for maximum participation and the best weighting against the economic values of the procedure. As regards the award criterion, Italy confirms that the selection criterion was the highest net price.
- (193) Italy therefore considers that the privatisation process of Caremar, although not conceived as a sale of shares on the stock exchange, should be regarded as transparent, unconditional and non-discriminatory, thereby ensuring maximum participation.

8.3. On the compliance of the new public service contract with the Altmark criteria

- (194) Italy argues that the new public service contract meets the four *Altmark* criteria for the following reasons:
- (a) as regards the first Altmark criterion, Italy argues that the public mission defined in the contract concerns island cabotage routes linking mainland Italy with the ports of the small islands. These routes aim to ensure, in terms of regularity and frequency, a service that is indispensable for the economic development of the islands, while at the same time meeting the essential mobility needs of the island communities, ensuring the effectiveness of the constitutionally guaranteed right to territorial continuity. The new contract, furthermore, clearly identifies the services to be performed, the types of vessels to be used, the time slots to be respected, including evening and night sailings and the fare constraints to be complied with;
 - (b) the second Altmark criterion was not contested by the Commission in its 2011 Opening Decision;
 - (c) with reference to the third Altmark criterion, Italy excludes any possibility for Caremar to have received a compensation exceeding what was necessary to cover the costs incurred in the discharge of PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations. In particular, Italy argues that the new public service contract includes sufficient claw-back clauses because, as provided for instance in Article 18 thereof, titled '*Recovery of overcompensation*', any overcompensation had to be returned by the company within 30 days of the relevant request. This is what happened for the financial years 2015, 2016 and 2017, and 2018 and 2019, where, in accordance with the verification procedure provided for in the contract, an overcompensation was detected for those periods and recovered (see recital 96);

- (d) Italy considers that the fourth Altmark criterion is also fulfilled, since the award of the public service contract was the subject of a transparent and competitive tender procedure, with the participation of several operators, which allowed selecting the tenderer capable of providing the services at the least possible cost. In relation to the Commission's doubts regarding the bundling of the new public service contract with the privatisation of Caremar, Italy clarifies that all necessary adjustments were made, based on the Commission's request, to the draft tender documents in order to bring them in line with the relevant legislative framework.

8.4. On the 6,5 % risk premium laid down in Deliberation 111/2007 as of 2010 and the 10,55 % applied for the new public service contract

- (195) In the 2011 Opening Decision, the Commission took the preliminary view that the risk premium of 6,5 % does not seem to reflect an appropriate level of risk, considering that it would not appear that operators assume the risks normally borne in the operation of maritime transport services (see recital 247 of the 2011 Opening Decision).
- (196) According to Italy, the Commission's preliminary conclusions appear to be based on a misinterpretation of the risk premium's parameter. The risk premium does not constitute a compensation to cover costs which the operator would have to bear anyhow in carrying out its activities, since, in the alternative, the activity would be at a loss. Italy argues that no entrepreneur would ever decide to undertake an activity for the sole purpose of covering its costs. In fact, the third Altmark criterion provides for a reasonable return on capital (profit) that would be required by a typical undertaking in order to assess whether or not to provide the SGEI for the entire duration of the entrustment period. The risk premium in question is therefore the remuneration necessary to discharge the PSO, which accrues to the entrepreneur who incurs and manages the business risk.
- (197) Italy underlines that the risk premium is determined using macroeconomic analyses that attribute an average risk premium to the reference country or area for the sector concerned. According to IESE Business School, 6,4 % would be a suitable country risk premium for Italy. This premium is therefore fully in line with the risk premium of 4 % identified in Deliberation 111/2007, with an increase of 2,5 % for non-exclusive services (risk premium of 6,5 %). Italy clarifies that the risk premium of 6,5 % corresponded also to the rate of return on invested capital enjoyed by Caremar in 2009 during the first year of prolongation of the Initial Convention. Moreover, Italy refers to the Commission Decision of 13 June 2017 concerning fast passenger maritime connection in Italy between Messina and Reggio Calabria, where the calculation methodology, using the fixed 8 % as expected rate of remuneration, was not contested. In particular, in the latter case the Commission accepted a rate of 8 % being comprised of the 6,5 % risk premium referred to in Deliberation 111/2007, in view of the fact that the contract did not involve the award of exclusive rights, plus a further 1,5 % increase, in view of the short duration of the contract.
- (198) The 6,5 % (gross) rate was used until 2015, whereas thereafter, for the new public service contract, the rate of return on invested capital taken into account for the purposes of compensation was set at 10,55 %, which was considered to be a reasonable profit having regard to the risk borne by Caremar in the provision of the PSO services. Italy argues that the rate is higher than the previous contracts — which set a rate of 6,5 % — because of the high entrepreneurial risk to which Caremar is exposed due to the likely undercompensation that might arise over the nine years of duration of the new public service contract (e.g. volatility of fuel prices). Italy points out that under the new public service contract Caremar fully bears any undercompensation equal or lower than 5 % of the total compensation but also is exposed to the risk of undercompensation above 5 % of the total compensation. In fact, the rebalancing mechanism provided in Article 17 of the new public service contract is not mandatory (the revision of the key parameters of the compensation is only 'allowed', which means that the Region of Campania does not necessarily have to accept it) and, given its features (i.e. absence of retroactivity, possibility to adjust the compensation only by means of changes in the parameters of the provision of the service), has only limited effects

on the economic equilibrium of the contract. According to Italy, Caremar (i) bears any undercompensation (even higher than 5 % of the total compensation) incurred in the first three years of contract and in the last three years of the contract given that the rebalancing mechanism tackles only the parameters of compensation linked to the provision of the service and only for the future; (ii) bears any undercompensation equal or lower than 5 % incurred in the remaining six years of the contract; and (iii) might bear an undercompensation above 5 % in all or some the remaining six years of the contract if the rebalancing mechanism is not activated or activated only for three out of the six years.

8.5. **On the compliance of the new public service contract with the 2011 SGEI Framework**

- (199) Italy clarifies that the service was awarded following an open, transparent and non-discriminatory public procurement procedure. The maritime connection service between the islands of the Gulf of Naples ensures territorial continuity, providing mobility for residents who use the service on a daily basis for work and study needs. In such cases, the service provided is not comparable in terms of regularity and frequency of connections, as well as in terms of type of vessel. Moreover, the compensation does not exceed what is necessary to cover the costs incurred in discharging the PSO, taking into account a reasonable profit. Finally, the amount of compensation was established in the context of a tendering procedure, based on the criteria set out in Deliberation 111/2007.
- (200) In this context, Italy maintains that mechanisms have been put in place (e.g. through Article 17 of the public service contract – verification of economic financial equilibrium – and Article 18 of the public service contract – recovery of overcompensation) to prevent Caremar from being overcompensated pursuant to point 49 of the 2011 SGEI Framework.
- (201) Furthermore, concerning the fact whether a public consultation was carried out before concluding the new public service contract pursuant to point 14 of the 2011 SGEI Framework, Italy stresses that the definition of strategic plans for maritime links of regional SGEI in the Region of Campania is the result of a complex decision-making process involving, among others, the local authorities concerned and trade associations. The Region of Campania has regularly checked the market situation and the adequacy of public services with the needs expressed by local authorities and users, by means of in-depth and regularly updated market investigations.

8.6. **On the berthing priority and the measures laid down by Law 163/2010**

- (202) Italy clarified that all ferry operators, including Caremar, pay regular fees to the relevant port authorities for berthing. For the berthing priority, however, Italy acknowledges that Caremar did not pay any additional fee. Italy states that the berthing priority provision has never been applied. The berthing priority is not remunerated; thus, the measure provides a regulatory advantage, which does not involve any transfer of State resources and only refers to routes covered by PSO. Therefore, according to Italy, the measure does not constitute State aid.

- (203) Concerning the measures laid down by Law 163/2010, Italy points out that Caremar received EUR 2 115 000, which were used exclusively to upgrade its ships in order to comply with international safety regulations ⁽¹⁶³⁾ and were never used for liquidity purposes. Furthermore, as regards the tax advantages, Italy clarifies that Caremar did not benefit from those advantages, whereas, as far as FAS funds are concerned, these have not been disbursed to Caremar. In particular, Italy clarified that Article 1, paragraph 5-ter, of Law 163/2010 enabled the Regions to use FAS resources to fund part of the regular public service compensation, and thereby ensure continuity of the maritime public services, in case the budget appropriations proved insufficient and that the FAS resources were not meant as an additional compensation for Caremar or SNAV/Rifim (or any other of the companies of the former Tirrenia Group or their respective acquirers).

9. ASSESSMENT

9.1. Existence of aid within the meaning of Article 107(1) TFEU

- (204) Article 107(1) TFEU provides 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market’.
- (205) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measures constitute State aid within the meaning of Article 107(1) TFEU, all the above-mentioned conditions need to be fulfilled. Namely, the financial support should:
- (a) be granted by a Member State or through State resources;
 - (b) favour certain undertakings or the production of certain goods;
 - (c) distort or threaten to distort competition;
 - (d) affect trade between Member States.
- (206) The Commission notes that the berthing priority is inextricably linked with the performance of SGEI by Caremar and by its acquirer SNAV/Rifim. Therefore, this measure will be assessed jointly with the respective public service compensation granted to these companies (see Sections 9.1.1 and 9.1.2).
- (207) Furthermore, the Commission notes that the new public service contract between Italy and Caremar should be assessed jointly with the privatisation of Caremar. Such joint assessment is appropriate because in essence Italy organised a tender for the new public service contract whereby the winning bidder had to acquire the entire share capital of Caremar in order to discharge the PSO laid down in that public service contract. There was no possibility in the tender to submit separate bids for the privatisation of Caremar and the new public service contract.

9.1.1. *The public service compensation and the berthing priority granted to Caremar from 1 January 2009 until 31 July 2012, under the prolonged Initial Convention*

9.1.1.1. State resources

- (208) Caremar was entrusted by Italy with the operation of maritime transport services on specific routes as detailed by the Initial Convention, as prolonged. The Initial Convention was concluded with the State, and the resulting public service compensation for Caremar was paid by the State and the Region of Campania from their own budget. Therefore, the public service compensation to Caremar is imputable to the State and is given through State resources.

⁽¹⁶³⁾ Caremar allocated EUR 1 410 000 from the said amount to upgrade two of the vessels that were later transferred to Laziomar free of charge (Quirino and Tetide). The remaining amount of EUR 705 000 was used for the upgrade of a vessel still owned by Caremar.

- (209) The Commission takes note that, according to Italy, all ferry operators pay regular fees to the relevant port authorities for berthing, but that Caremar did not pay any additional fee for the berthing priority. Nevertheless, the Commission considers that in principle Italy could have chosen to impose an additional fee for the berthing priority and that by not doing so, it has foregone State revenues. Furthermore, since the berthing priority is granted by law (see recital 99) it is imputable to the State.

9.1.1.2. Selectivity

- (210) In order to be qualified as State aid, a measure must be selective. A measure is selective if it is awarded only to certain undertakings, while other undertakings in a comparable legal and factual situation within the same sector or other sectors (considering that all economic operators should in principle cover their own costs), will not receive the same advantage. The public service compensation for the provision of the maritime services in question is only granted to Caremar, thus it is selective⁽¹⁶⁴⁾. Since the berthing priority was only granted to the companies of the former Tirrenia Group, including Caremar, it is also selective.

9.1.1.3. Economic advantage

- (211) The Commission recalls that public service compensations granted to a company may not constitute an economic advantage under certain strictly defined conditions.

- (212) In particular, in its *Altmark* judgment, the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge PSO, so that those undertakings do not enjoy a real 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, such a measure does not fall within the scope of Article 107(1) TFEU.

- (213) However, the Court of Justice also made clear that for such public service compensation to escape qualification as State aid in a particular case, four cumulative criteria ('*Altmark* criteria'), summarised below, must be satisfied:

- the recipient undertaking must actually have PSO to discharge and these obligations must be clearly defined ('*Altmark* 1');
- the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner ('*Altmark* 2');
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations ('*Altmark* 3');
- where the undertaking which is to discharge PSO, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations ('*Altmark* 4').

- (214) The Commission specified how it applies the *Altmark* criteria in its Communication on the application of State aid rules to compensation granted for the provision of SGEI⁽¹⁶⁵⁾ ('SGEI Communication').

⁽¹⁶⁴⁾ Judgment of 13 December 2017, *Greece v Commission*, T-314/15, ECLI: EU:T:2017:903, paragraph 79.

⁽¹⁶⁵⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

- (215) Since the *Altmark* criteria have to be complied with cumulatively, non-observance of any of these criteria would lead the Commission to the conclusion that the measure under assessment provides an economic advantage to the beneficiary. In this case, the Commission will then first assess observance of *Altmark* 4.
- (216) *Altmark* 4 provides that the compensation must be the minimum necessary in order for it not to qualify as State aid. This criterion is deemed to be fulfilled if the recipient of the public service compensation has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the services at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.
- (217) For none of the prolongations of the Initial Convention in the period from 1 January 2009 to 31 July 2012 was Caremar selected following a public tender procedure which would allow the entrustment of the service at the least cost to the community. Italy merely prolonged the system already in force by means of the prolongations of the Initial Convention, thereby entitling the pre-established operator to continue receiving compensation for the discharge of the PSO.
- (218) Moreover, Italy has not provided to the Commission any proof that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.
- (219) For the compensation provided under the prolonged Initial Convention, Caremar submitted information concerning the application of the *Altmark* criteria. Concerning Caremar's argument that the fourth *Altmark* criterion is met because the compensation has been calculated on the basis of the costs of an efficient undertaking (see recital 140), for the reasons explained in recitals 220 to 222, the Commission considers that the information provided does not suffice to meet the legal standard of the said condition, as elaborated in SGEI Communication (see in particular points 69 to 76).
- (220) First, the fact that Caremar had lower costs compared to its competitors, alone, is not a sufficient criterion for deeming Caremar to be a well-run undertaking. Lower costs may derive also from the depreciation of assets (e.g. vessels) which constitutes an accounting method of calculating the value of a company's assets over time and cannot therefore be used to measure the company's efficiency.
- (221) Second, the allegation that Caremar used its workforce for the maximum hours allowed by the employment contract, thereby optimising the ratio between personnel cost and staff performance, has not been corroborated with any information on analytical ratios representative to productivity, nor has such practice concerning the exploitation of Caremar's workforce been compared to the cost structures of other undertakings in the sector.
- (222) Third, Caremar argues that, despite the considerable fuel price increase during the period of the prolongation of the Initial Convention, it continued to offer the PSO at the lowest fares on the market and without requesting a compensation adjustment. The Commission considers that this argument is not sufficient to deem Caremar an efficient undertaking. Caremar did not provide any additional information showing, for instance, the impact of this practice in the company's financial accounts, nor has it compared its cost structure with the cost structures of other undertakings in the sector. As a result, Caremar did not identify a benchmark, against which the alleged efficient management of its service could be assessed.
- (223) The Commission therefore concludes that *Altmark* 4 has not been complied with in the present case for the prolongation of the Initial Convention.
- (224) Since the four *Altmark* criteria are not cumulatively fulfilled in the present case, the Commission concludes that the compensation for the operation of maritime routes under the prolongation of the Initial Convention provided Caremar with an economic advantage.

- (225) With respect to the berthing priority, the Commission first recalls that AGCM has on at least two occasions considered that this measure has economic value ⁽¹⁶⁶⁾. Nevertheless, Caremar does not pay any fee for the berthing priority. However, the Commission observes that the berthing priority has at least in theory the potential to lower the operator's costs (e.g. because the guaranteed berthing could reduce waiting times in ports and hence result in lower fuel costs) or increase its revenues (e.g. because some timings possibly attract more demand from passengers). Indeed, to the extent that the berthing priority allows for a faster docking procedure, users of the maritime transport service may prefer the operator that benefits from this measure. Even if these effects would only materialise in limited circumstances or would be relatively small, the berthing priority nevertheless constitutes an economic advantage for Caremar.

9.1.1.4. Effect on competition and trade

- (226) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ⁽¹⁶⁷⁾. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ⁽¹⁶⁸⁾.
- (227) In the present case, the beneficiary operates in competition with other undertakings providing maritime transport services in the Union, in particular since the entry into force of Council Regulation (EEC) No 4055/86 ⁽¹⁶⁹⁾ and Regulation (EEC) No 3577/92, liberalising the market of the international maritime transport and maritime cabotage, respectively. Therefore, the compensation for the operation of maritime routes under the prolongation of the Initial Convention is liable to affect Union trade and distort competition within the internal market. For the same reasons that conclusion also holds for the berthing priority.

9.1.1.5. Conclusion

- (228) Since all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the public service compensation granted to Caremar in the period from 1 January 2009 to 31 July 2012, based on the successive prolongations of the Initial Convention, as well as the berthing priority for the public service routes, constitute State aid to Caremar.

9.1.1.6. New or existing aid

- (229) The Commission first notes that the compensation granted to Caremar (at the time) for the operation of maritime PSO until the end of 2008 is not assessed in the present Decision (see recital 17). The assessment of that compensation, and of whether or not it can be classified as existing aid on the basis of Article 4(3) of Regulation (EEC) No 3577/92, is the subject of Decision (EU) 2020/1411 (see recital 25).

⁽¹⁶⁶⁾ Decision (EU) 2020/1412, recital 265.

⁽¹⁶⁷⁾ Judgment of 17 September 1980, *Philip Morris v Commission*, 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 21; Judgment of 29 April 2004, *Italy v Commission*, C-372/97, ECLI:EU:C:2004:234, paragraph 44.

⁽¹⁶⁸⁾ Case of 30 April 1998, *Het Vlaamse Gewest v Commission*, T-214/95, ECLI:EU:T:1998:77.

⁽¹⁶⁹⁾ 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 (OJ L 378, 31.12.1986, p. 1).

- (230) According to Article 1(c) of Council Regulation (EU) 2015/1589 ⁽¹⁷⁰⁾, new aid means ‘all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid’. Furthermore, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision ⁽¹⁷¹⁾. In line with the position of Union Courts ⁽¹⁷²⁾, the Commission considers that amending (i.e. prolonging) the duration of an aid measure that had a clear expiry date (i.e. 31 December 2008) is sufficient to transform it into new aid irrespective of whether or not other characteristics of the measure were changed. This reasoning applies to the prolonged Initial Convention that was meant as legal basis to the temporary prolongations (i.e. until the privatisation of Caremar announced in 2009, see recital 29) of the compensated PSO entrusted to Caremar under the Initial Convention.
- (231) For the above reasons, the Commission considers that, regardless of the fact that the compensation granted to Caremar (at the time) up until end 2008 has been classified as existing aid by Decision (EU) 2020/1411, the public service compensation granted to Caremar from 1 January 2009 to 31 July 2012, on the basis of the successive prolongations of the Initial Convention, should be considered as new aid. This conclusion also applies to the berthing priority applicable during this period.

9.1.2. *The award of the new public service contract bundled with Caremar’s privatisation*

- (232) In order to conclude on whether the award of the new public service contract bundled with Caremar’s privatisation constitutes an advantage to Caremar and its acquirer, within the meaning of Article 107(1) TFEU, the Commission must assess observance of the Altmark criteria (see recital 213).

9.1.2.1. Altmark 1

- (233) The Commission recalls that there is no uniform and precise definition of a service that may constitute an SGEI under Union law, either within the meaning of the first Altmark criterion or within the meaning of Article 106(2) TFEU ⁽¹⁷³⁾. Point 46 of the Communication is worded as follows:

‘In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation. Where specific Union rules exist, the Member States’ discretion is further bound by those rules, without prejudice to the Commission’s duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.’

- (234) National authorities are therefore entitled to take the view that certain services are in the general interest and must be operated by means of PSO to ensure that the public interest is protected when market forces do not suffice to guarantee that they are provided at the level or the conditions required.

⁽¹⁷⁰⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽¹⁷¹⁾ Case of 26 October 2016, *P DEI and Commission v Alouminion tis Ellados*, C-590/14, ECLI:EU:C:2016:797, paragraph 45.

⁽¹⁷²⁾ Judgment of 6 March 2002 (joined cases), *Territorio Histórico de Álava – Diputación Foral de Álava* (T-127/99), *Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA* (T-129/99) and *Daewoo Electronics Manufacturing España, SA* (T-148/99) v *Commission of the European Communities*, ECLI:EU:T:2002:59, paragraph 175.

⁽¹⁷³⁾ Case T-289/03 *BUPA and Others v Commission* [2008] ECR II 81, paragraph 96. See also Opinion of Advocate General Tizzano in Case C-53/00 *Ferring*, ECR I 9069 and Opinion of Advocate General Jacobs in Case C-126/01, *GEMO*, [2003] ECR I 13769.

(235) In the field of cabotage, detailed Union rules governing PSO have been laid down in Regulation (EEC) No 3577/92 and, for the purpose of examining potential State aid to undertakings engaged in maritime transport, in the Community guidelines on State aid to maritime transport ('Maritime Guidelines') ⁽¹⁷⁴⁾.

(236) Article 4(1) of Regulation (EEC) No 3577/92 provides:

'A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands. Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.'

(237) Article 2(3) of Regulation (EEC) No 3577/92 sets out that a public service contract may cover: transport services satisfying fixed standards of continuity, regularity, capacity and quality, additional transport services, transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes and adjustments of services to actual requirements.

(238) In accordance with Section 9 of the Maritime Guidelines, 'public service obligations 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.

(239) It results from established case-law that PSO may only be imposed if justified by the need to ensure adequate regular maritime transport services which cannot be ensured by market forces alone ⁽¹⁷⁵⁾. The Communication on interpretation of Regulation (EEC) No 3577/92 ⁽¹⁷⁶⁾ confirms that 'it is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require PSO. In particular, PSO may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services'. Moreover, Article 2(4) of Regulation (EEC) No 3577/92 defines PSO as obligations, which 'the shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions'.

(240) In line with the case-law ⁽¹⁷⁷⁾, to verify whether there is a real public service need and whether it was necessary and proportional, and hence also whether the first Altmark criterion is met, the Commission will assess:

- (a) whether there was **user demand**;
- (b) whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);
- (c) whether simply having recourse to PSO would have been insufficient to remedy that shortage (**least harmful approach**).

⁽¹⁷⁴⁾ Commission Communication C(2004) 43 – Community Guidelines on State aid to maritime transport (OJ C 13, 17.1.2004, p. 3).

⁽¹⁷⁵⁾ Judgment of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Anafir) and Others and Administración General del Estado*, C-205/99, ECLI:EU:C:2001:107.

⁽¹⁷⁶⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), (COM(2014) 232 final of 22.4.2014).

⁽¹⁷⁷⁾ Judgment of 1 March 2017, *Société nationale maritime Corse Méditerranée (SNCM) v Commission*, T-454/13, ECLI:EU:T:2017:134, paragraphs 130 and 134.

User demand

- (241) Under the new public service contract, Caremar was entrusted with the provision of scheduled maritime transport services of passengers, vehicles (including rescue vehicles) and postal effects, at predetermined rates, by means of ferries and fast vessels (which means TMV in case of mixed services or hydrofoil in case of passengers only services) according to the schedules indicated in the maritime transport programme set out by the Region of Campania, as presented in Section 3.3.1. The PSO imposed on Caremar concerned the ports served, the type of vessels assigned to the maritime connections operated under the public service regime, the frequency, time-schedule and continuity of the service, the quality of the service, and the maximum fares to be charged (see recitals 83 to 91).
- (242) The Commission observes that the PSO imposed on Caremar under the new public service contract are meant to ensure the territorial continuity between the mainland and the islands by satisfying the transport needs of the local population (mainly work and study needs) through regular and reliable maritime transport services (see recital 199). The Commission considers that those are indeed legitimate public interest objectives.
- (243) As regards the needs of the local population, Italy explained that those needs remained substantially unaltered over the years, as shown by the public consultations carried out by the Region of Campania in 2006-2007 and in 2010-2011 (see recital 179) which confirmed that the residents of the islands of the Gulf of Naples relied on maritime transport for their daily commuting to the mainland. In that respect, the Commission observes that the maritime traffic situation in the Gulf of Naples is very peculiar because of the extremely high population density of the islands of Capri, Ischia and Procida, as explained by Italy (see recital 182).
- (244) The above is confirmed by the detailed route-by-route statistics provided by Italy about the passengers, vehicles and freight transported by Caremar in the years from 2009 to 2021, which show that the routes serviced by Caremar were characterised by a significant demand which remained steady over time (see recital 174).
- (245) Considering that user demand was steady over time, including during the two years before Caremar was entrusted with the PSO under the new public service contract, Italy, and in particular the regional authorities concerned, correctly considered that there was a genuine demand for maritime passenger and mixed services on the routes in the Gulf of Naples linking the islands of Capri, Ischia and Procida to the mainland (Naples, Sorrento and Pozzuoli).

Existence of market failure

- (246) According to point 48 of the SGEI Communication, 'it would not be appropriate to attach specific PSO to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions' ⁽¹⁷⁸⁾. Therefore, the Commission must examine whether the service would be inadequate if its provision were left to the market forces alone. Point 48 of the SGEI Communication notes in this respect that 'the Commission's assessment is limited to checking whether the Member State has made a manifest error'.
- (247) As there were other shipping companies operating on the routes covered by the new public service contract (see recital 184), the Commission will assess the competitive situation of each of these routes before the conclusion of the new public service contract to verify whether the services provided by those operators were equivalent to those that Caremar has to provide under the new public service contract and would have been sufficient to ensure territorial continuity between the islands (Capri, Ischia and Procida) and the mainland.

⁽¹⁷⁸⁾ Judgment of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others and Administración General del Estado*, C-205/99, ECLI:EU:C:2001:107.

- (248) In that respect, first of all, the Commission observes that maritime transport to/from the islands of the Gulf of Naples is used by the residents of those islands as local transport to allow them very frequent connections to the mainland. In fact, as explained by Italy (recital 182), the extremely high population density of the islands of Capri, Ischia and Procida makes them like a mainland district. This situation requires maritime transport to be almost as frequent as local land transport in order to satisfy the needs of students and workers daily commuting to/from the mainland. The assessment of the existence of a market failure has to take this particular feature in due account.
- (249) Table 10 displays the competitive situation of the eight routes operated by Caremar in the period 2012-2015, i.e. before the entrustment of the new public service contract, based on the information provided by Caremar's competitors in their comments (see recitals 150, 151, 161 and 168) and by Italy (see recital 184). In recitals 250 to 259 the Commission provides its assessment of the competitive situation displayed in Table 10.

Table 10

Competitive situation on the routes operated by Caremar in the period 2012-2015

Route	Caremar	Competitors
Capri/ Sorrento	Mixed services by TMV throughout the year: eight daily sailings (from Capri at 7:00 am, 8:40 am, 13:35, and 18:45; and from Sorrento at 7:45 am, 9:25 am, 14:30; and 19:25).	NLG: only passenger services. Aligruson: mixed services but only in the summer period (from Sorrento at 11:30 am and 14:00; and from Capri at 12:30 and 18:05) at market terms. SNAV: mixed services but only in the summer period (from Capri at 7:35 am, 9:15 am, 12:10 am, 15:55, 17:40, and 18:05; and from Sorrento at 8:10 am, 11:25 am, 13:50, 16:35) at market terms.
Capri/ Naples	Mixed services by TMV throughout the year: six daily sailings (from Naples at 5:35 am, 12:00 am, 17:25; and from Capri at 10:20 am, 15:35, and 20:15). Mixed services by ferry in the summer period: six daily sailings (from Naples at 7:25 am, 13:00, 18:35; and from Capri at 5:40 am, 9:20 am, 14:50). Mixed services by ferry in the winter period: six daily sailings (from Naples at 9:00 am, 14:20; and from Capri at 6:45 am, 11:00 am, 16:15, 20:10). Mixed services by TMV from 1 June to 30 September: two daily services (from Naples at 21:35 and from Capri at 23:50).	SNAV: only passenger services. NLG: only passenger services. Neapolis: only passenger services.
Ischia/ Naples	Mixed services by ferry throughout the year: four daily sailings (from Ischia at 8:45 am, 13:50; and from Naples at 15:45 and 20:15). Passenger services by hydrofoil throughout the year: one daily sailing (from Naples at 14:45).	Medmar: only mixed services, mostly during the summer season. Four daily sailings throughout the year (from Naples at 8:35 am, 14:10 and 18:30; and from Ischia at 17:00 (in summer) or 16:35 (in winter)), all under PSO. Alilauro: only passenger services, mostly during the summer season. Only five daily sailings throughout the year (from Ischia at 6:30 am, 9:25 am, 19:55; and from Naples at 7:35 am and 20:10), all five under PSO.

Route	Caremar	Competitors
Ischia/ Procida/ Naples	Mixed services by ferry throughout the year: ten daily sailings (from Naples at 6:25 am (with departure from Procida at 7:30 am), 10:45 am (with departure from Procida at 11:50), 15:10 (with departure from Procida at 16:20), 17:30 (with departure from Procida at 18:35), at 19:30 (with departure from Procida at 20:30); 21:55 (with departure from Procida at 23:00); from Ischia at 12:55 am (with departure from Procida at 13:35); 15:20 (with departure from Procida at 15:50), 17:20 (with departure from Procida at 17:50), 19:25 (with departure from Procida at 20:30)). Mixed services by ferry from 15 June to 15 September: two daily sailings (from Ischia at 7:00 am (with departure from Procida at 7:25); and from Naples at 9:25 am (with departure from Procida at 10:30 am)). Passenger services by hydrofoil throughout the year: nine daily sailings (from Naples at 8:40 am (with departure at 9:30 am from Procida), at 11:45 am (with departure at 12:25 from Procida), at 13:10 (with departure at 13:50 from Procida), 18:15 (with departure at 18:55 from Procida); from Ischia at 6:45 am (with departure at 7:05 am from Procida), 10:15 am (with departure at 10:35 from Procida), 13:00 (with departure at 13:15 from Procida), 14:30 (with departure at 14:55 from Procida), 16:25 (with departure at 16:45 from Procida)). Passenger services by hydrofoil from 1 June to 30 September: two daily sailings (from Ischia at 19:35 (with departure at 20:00 from Procida); and from Naples at 21:05 (with departure at 21:50 from Procida)).	Medmar: mixed services by ferry: — two daily throughout the year under PSO (from Ischia at 6:25 am (with departure from Procida at 7:25 am) and 10:35 am (with departure from Procida at 11:15 am)); and — one (not always daily) in the summer period under PSO (from Ischia at 22:20 (with departure from Procida at 23:00)). According to Italy, however, Medmar almost never provided the services on the Ischia/Procida/Naples route in 2012-2015. SNAV: passenger services by hydrofoil: — seven daily sailings under PSO throughout the year (from Naples at 8:25 am (with departure from Procida at 9:05 am), 16:20 (with departure from Procida at 17:00), 19:00 (with departure from Procida at 19:40); and from Ischia at 7:10 am (with departure from Procida at 7:30 am), 9:45 am (with departure from Procida at 10:10 am), 13:50 (with departure from Procida at 14:15), 17:40 (with departure from Procida at 18:05)); and — one daily sailing at market terms in the summer period (from Ischia at 11:25 am (with departure from Procida at 11:45 am)).

Route	Caremar	Competitors
Ischia/ Procida/ Pozzuoli	Mixed services by ferry throughout the year: six daily sailings (from Pozzuoli at 10:15 am (with departure from Procida at 10:55 am), at 14:00 (with departure from Procida at 14:30), and 18:55 (with departure from Procida at 19:35); and from Ischia at 8:35 am (with departure from Procida at 9:00 am), 11:30 am (with departure from Procida at 11:55 am), 17:30 (with departure from Procida at 18:00)). Mixed services by ferry from 16 September to 14 June: two daily sailings (from Ischia at 7:20 am (with departure from Procida at 7:50 am); and from Pozzuoli at 9:00 am (with departure from Procida at 9:40)).	Medmar: mixed services by ferry mostly without a stopover in Procida. Only four daily sailings with a stopover in Procida (from Ischia at 2:30 am and 18:55; and from Pozzuoli at 4:10 am and 20:30), all under PSO and throughout the year.
Ischia/ Procida	In addition to the services provided on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples, one daily passenger service by hydrofoil throughout the year (from Procida at 15:30).	SNAV: in addition to the eight sailings (passenger services) provided on the route Ischia/Procida/Naples, SNAV provided on the route Ischia/Procida: — one daily passenger service by hydrofoil throughout the year under PSO (from Procida at 13:15); — one daily passenger service by hydrofoil throughout the year at market terms (from Ischia at 8:30 am); — six daily passenger services by hydrofoil in the summer period at market terms (from Procida at 7:50 am, 11:00 am, 17:50, 19:20; and from Ischia at 18:30 and 19:45). Medmar: sailings provided as part of those on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples. Ippocampo/Rumore/Capitan Morgan: mixed services at market terms but mostly in the summer period and not always daily. Service very unstable as these operators were using a type of vessels which could operate only under good weather conditions.
Procida/ Pozzuoli	In addition to the services provided on the route Ischia/Procida/Pozzuoli, two daily passenger services by hydrofoil (15 minutes travel) throughout the year (from Procida at 8:10 am, and from Pozzuoli at 8:50 am).	Gestour: nine daily mixed services by ferry (50 minutes travel) throughout the year at market terms (from Pozzuoli at 6:00 am, 8:30 am, 10:35 am, 12:55 am, 19:50; from Procida at 6:50 am, 9:30 am, 11:20 am, 18:55). Ippocampo: four mixed services at market terms during the summer period, mostly only on Sundays (from Procida at 18:45 and at 20:00 and from Pozzuoli at 19:20 and 20:50). Procida Lines: according to Italy, Procida Lines did not provide operate on the route in the period 2012 – 2015.

Route	Caremar	Competitors
Procida/ Naples	In addition to the services provided on the route Ischia/Procida/Naples, four daily passenger services by hydrofoil (40 minutes travel) throughout the year (from Procida at 6:35 am and 9:20 am; and from Naples at 7:30 am and at 17:45).	SNAV: passenger services by hydrofoil in addition to the services provided on the route Ischia/Procida/Naples: — one daily throughout the year under PSO (from Naples at 12:30 am); and — two daily in the summer period at market terms (from Naples at 18:45). Medmar: mixed services by ferry in addition to those provided on the route Ischia/Procida/Naples: — one daily throughout the year under PSO (from Naples at 00:20 am).

(250) Based on the information provided in Table 10, the Commission considers that the services offered by competitors as of 1 October 2011 on the routes to be operated by Caremar in the Gulf of Naples under the new public service contract are not substitutable to those offered by Caremar due to the significant differences concerning the type, the regularity and the capacity of the services offered, as set out below (see recitals 251 to 259).

(251) As regards the route **Capri/Sorrento**, the Commission observes that Caremar was the only operator providing mixed services on the route throughout the year. In fact, on the one hand, NLG provided only passenger services, while, on the other hand, the operators which provided also mixed services (Aligruson and SNAV) were active only in the summer season. There was no operator ensuring mixed transport services between Capri and Sorrento in winter, leaving residents of the island / shop-owners / students without the possibility to put their own vehicle on the ferry to commute from November to April. As regards the other months of the year, the mixed services provided by Aligruson and SNAV would have left almost uncovered the times of the day most sought-after by commuters (and less interesting for tourists), namely the early mornings⁽¹⁷⁹⁾ and late evenings⁽¹⁸⁰⁾. Moreover, as regards the summer period, the competitors' timetables would have not satisfactorily served the need of daily commuters considering the differences with Caremar's timetables. For these reasons, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.

(252) As regards the route **Capri/Naples**, the Commission observes that Caremar was the only operator providing mixed services on the route. In fact, the three other shipping companies on the route in the period 2012-2015 (SNAV, NLG and Neapolis) provided only passenger services. Those services were not able to satisfy the demand for maritime transport of users with vehicles, leaving residents of the island / shop-owners / students without the possibility to put their own vehicle on the ferry to commute. This includes also the maritime transport of ambulances to cope with any medical or other emergencies in the case of unavailability of emergency air transport by helicopter. In that respect, the Commission notes that helicopters could land / take-off only in areas equipped for that type of air transport and provided that the weather conditions allow it⁽¹⁸¹⁾. In the island of Capri there is only one helipad, it is located in the Municipality of Anacapri and serves also private flights. Helicopters are usually used

⁽¹⁷⁹⁾ As a matter of fact, in the absence of Caremar (which was obliged to serve the first sailing from Capri at 7:00 am and the first sailing from Sorrento at 7:45 am), the first sailing in the morning would have been provided by SNAV only at 7:35 am from Capri and at 8:10 am from Sorrento. Besides those two sailings, users would not have had any other possibility to reach their destination in the early morning considering that the following sailings would have been only at 9:15 am from Capri and 11:25 from Sorrento.

⁽¹⁸⁰⁾ As regards the evening, in the absence of Caremar, the last available sailing of the day would have been from Sorrento at 16:35 (by SNAV) and from Capri at 18:05 (by SNAV and Aligruson), whereas Caremar was obliged to guarantee also a sailing at 19:25 from Sorrento and at 18:45 from Capri.

⁽¹⁸¹⁾ For instance, see news of 15 December 2017 available at the following website: https://www.ilmattino.it/napoli/citta/mareggiata_capri_corsa_straordinaria_traghetto_naiade_caremar_sorrento-3430586.html (last accessed on 5.6.2024), and news of 12 January 2022 available at the following website: <https://caprinews.it/?p=31904> (last accessed on 5.6.2024).

for rescues in areas not easily reachable by ambulances or in case of patients who need urgent transport to hospitals on the mainland. By contrast, in less urgent cases, where the patient can be transferred to the hospital by ambulance or private car, or in the case of too strong wind that does not allow the landing / take-off of helicopters by the helipad in Anacapri, maritime transport by ferry is the most common type of transport to the mainland ⁽¹⁸²⁾. In addition, without Caremar, there would have been no operator servicing the transport of postal effects to/from Capri. The Commission considers that a PSO limited to the transport of vehicles and freight would have not been appropriate because the passenger services provided by the competitors at market terms, alone, were not sufficient to guarantee an adequate level of connectivity between Capri and Naples. As a matter of fact, there were only seven daily passenger services provided throughout the years at market conditions: five sailings by Neapolis (from Capri at 8:50 am, 14:10, and 17:30; and from Naples at 10:00 am, 16:05) and two sailings by NLG (from Capri at 9:35 am and at 11:35 am). No market operator was thus providing services in the early morning, whereas Caremar had to ensure the first sailing in the morning from Capri to Naples (at 5:40 am in the summer period and at 6:45 am in the winter period). The Commission notes that the majority of the sailings provided by Caremar's competitors throughout the year were subject to PSO ⁽¹⁸³⁾, which suggests that in principle the market would not have provided them absent a formal request by the public authorities. Considering that, as explained by Italy (recital 182), the PSO regime in place in the Gulf of Naples did not guarantee the effective provision of the service, the inclusion of passenger services under the PSO imposed on Caremar on this route under the new public service contract was reasonable. For these reasons, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.

- (253) As regards the direct route **Ischia/Naples**, the Commission observes that Caremar provided mixed services by ferry in competition with Medmar and passenger services by hydrofoil in competition with Alilauro, which also provided a number of daily sailings throughout the year. However, the sailings provided by Caremar's competitors on this direct route were, first, at different times of the day than the ones serviced by Caremar ⁽¹⁸⁴⁾, and, second, all subject to PSO. Having regard to the timetables and the frequency of the services to be provided by Caremar throughout the year (as described in Table 10), it is apparent that the PSO imposed on Caremar were meant to guarantee a constant minimum number of daily connections at core times of the day that were not serviced by Caremar's competitors. For this reason, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services and passenger services on this route. This conclusion holds true even when considering the direct connection Ischia/Naples would be substitutable with the one with stopover in Procida, despite the different length of the journey ⁽¹⁸⁵⁾. In fact, as explained in recital 254, the services provided by Caremar's competitors on the route Ischia/Procida/Naples were not sufficient to guarantee sufficient regular connections between Ischia and Naples.

- (254) As regards the route **Ischia/Procida/Naples**, the Commission observes that, in addition to Caremar, also Medmar and Alilauro were authorised to provide sailings on this route. However, as regards the mixed transport services, the market offer was very limited as the only provider of mixed transport services other than Caremar was Medmar, which provided one daily mixed service throughout the year (from Ischia at 10:35 am) and two daily services in the summer period (from Ischia at 22:20 and from Naples at 00:20) which, according to Italy, were almost never

⁽¹⁸²⁾ See for instance news of 12 August 2019 available at the following website: <https://nursetimes.org/capri-lodissea-di-un-turista-brasiliano-soccorsi-lunghi-sei-ore/72139> (last accessed on 5.6.2024).

⁽¹⁸³⁾ Namely, all 13 daily passenger services provided by SNAV on the route throughout the year (11 of which provided jointly with NLG) were under PSO; and out of the 15 daily sailings provided by NLG on this route throughout the year 13 were provided under PSO (11 of which jointly with SNAV).

⁽¹⁸⁴⁾ As regards the mixed services provided throughout the year, from Ischia Caremar operated at 8:45 am and 13:50, whereas Medmar operated at 17:00 in summer and at 16:35 in winter; from Naples Caremar operated at 15:45 and 20:15 whereas Medmar operated at 8:35, 14:10 and 18:30. As regards the passenger services provided throughout the year, from Naples Caremar operated at 14:45, whereas Alilauro operated at 7:35 am and 20:10. Caremar did not operate passenger transport services from Ischia.

⁽¹⁸⁵⁾ As regards the mixed services by ferry, the stopover in Procida adds about 15 minutes to the journey (which is of 1h25 on the direct route Ischia/Naples). As regards the passenger services by hydrofoil, the stopover in Procida adds almost 30 minutes to the journey (which is of 45 minutes on the direct route Ischia/Naples).

provided despite being subject to PSO. It is apparent that Medmar's offer was not sufficient to satisfy users' demand for frequent and regular connections between Ischia, Procida and Naples. As regards the passenger transport services, there was no operator providing maritime passenger services on the route throughout the year at market terms. In fact, the seven daily sailings provided by SNAV throughout the year were subject to PSO. Moreover, SNAV's services and Caremar's services had to be provided at different times of the day⁽¹⁸⁶⁾. The only service provided by SNAV at market terms on this route was a daily sailing from Ischia at 11:25 am in the summer period. It is apparent that that service was targeting mainly touristic demand and was not sufficient to satisfy fully users' demand. For these reasons, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services and passenger services on this route.

(255) As regards the route **Ischia/Procida/Pozzuoli**, the Commission observes that Caremar operated on the route in competition with Medmar, which provided also daily sailings on the route. However, the daily sailings provided throughout the year were all subject to PSO, moreover they were limited in number (two daily sailings from Ischia and two daily sailings from Pozzuoli) and were provided at hours of the day not serviced by Caremar⁽¹⁸⁷⁾. Therefore, not only there was no shipping operator providing services on this route throughout the year at market terms, but also the services provided by Medmar under PSO were not substitutable to Caremar's services which covered different times of the day. For these reasons, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.

(256) As regards the route **Ischia/Procida**, the Commission observes that Caremar is obliged to provide under the new public service contract one daily passenger service by hydrofoil throughout the year (from Procida at 15:30) in addition to the services provided on the route Ischia/Procida/Pozzuoli and Ischia/Procida/Naples. This PSO service was included in the new public service contract by the Region of Campania in reply to an express request from the Municipality of Procida of a higher number of connections from Procida throughout the year (see recital 181). That request was justified by the fact that the majority of connections to Procida provided by the market was in summer and mainly directed to satisfy touristic demand. As a matter of fact, the market provided only one stable⁽¹⁸⁸⁾ connection at market terms throughout the year (from Ischia at 8:30 am, operated by SNAV). As mentioned (recitals 254 and 255), there was no operator providing daily sailings (either passenger services or mixed services) throughout the year at market terms⁽¹⁸⁹⁾ on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples, and the PSO services provided by Caremar's competitors did not ensure passenger connectivity from Procida in the afternoon (between 14:30 and 17:50). For this reason, Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.

⁽¹⁸⁶⁾ From Naples, Caremar had to ensure departures at 8:40 am, 11:45 am, 13:10, 18:15; whereas SNAV had to ensure departures at 8:25 am, 16:20, 19:00. From Ischia, Caremar had to ensure departures at 6:45 am, 10:15 am, 13:00, 14:30 and 16:25; whereas SNAV had to ensure departures at 7:10 am, 9:45 am, 13:50, 17:40.

⁽¹⁸⁷⁾ Medmar operated from Ischia at 2:30 am and 18:55, and from Pozzuoli at 4:10 am and 20:30; whereas Caremar operated from Ischia at 7:20 (only in summer), 8:35 am, 11:30 am and 17:30, and from Pozzuoli at 9:00 (only in summer), 10:15 am, 14:00 and 18:55.

⁽¹⁸⁸⁾ The mixed services provided at market terms by the shipping companies Ippocampo, Rumore and Capitan Morgan were too few and unstable to satisfy the connectivity needs of the local population. As mentioned by Italy (recital 185(f)), not only those operators were using a type of vessels which could operate only under good weather conditions but had also an offer focused mostly on the summer period, and not always daily. As regards the route Ischia/Procida, the Commission observes that Caremar's competitors were mostly operating in the summer season, and not always daily. Only Rumore provided one daily mixed service throughout the year at market terms (from Ischia at 10:40 am).

⁽¹⁸⁹⁾ The services provided by Caremar's competitors on those routes throughout the year were all subject to PSO. On the route Ischia/Procida/Pozzuoli, Medmar provided four daily mixed services throughout the year, all under PSO. On the route Ischia/Procida/Naples, Medmar had to provide one daily mixed service throughout the year under PSO and SNAV seven daily passenger services throughout the year, all under PSO.

- (257) As regards the route **Procida/Pozzuoli**, the Commission observes that Caremar had to provide two daily passenger services by hydrofoil on the route throughout the year in addition to the services provided on the route Ischia/Procida/Pozzuoli, whereas Caremar's competitors (Gestour, Ippocampo and Procida Lines) operated on the route only mixed services by ferry. Those services were much slower than those provided by Caremar (50 minutes travel by ferry against 15 minutes travel by hydrofoil) and therefore not substitutable. In any event, irrespective of the degree of substitutability of passenger services and mixed services, the Commission observes that the services provided by Caremar's competitors throughout the year – only Gestour and Procida Lines ⁽¹⁹⁰⁾ were authorised to provide services throughout the year – were provided at different times of the day than those serviced by Caremar ⁽¹⁹¹⁾, leaving uncovered a timeslot of the day important for daily commuters (between 7:00 am and 9:00 am from Procida and between 9:00 am and 10:00 am from Pozzuoli). For this reason, Italy did not make a manifest error by considering that there was a market failure as regards the provision of passenger transport services on this route.
- (258) As regards the route **Procida/Naples**, the Commission observes that Caremar had to provide four daily passenger services by hydrofoil on the route throughout the year in addition to the services provided on the route Ischia/Procida/Naples, whereas Medmar and SNAV provided respectively only one daily sailing in addition to those provided on the route Ischia/Procida/Naples (Medmar from Naples at 00:20 am and SNAV from Naples at 12:30 am), both under PSO and at times of the day different from those serviced by Caremar ⁽¹⁹²⁾. Moreover, even considering the services provided by SNAV and Medmar on the route Ischia/Procida/Naples, there was no shipping operator providing passenger services on the route at market terms throughout the year and Medmar's and SNAV's PSO passenger services were leaving uncovered some timeslots of the day important to ensure the connectivity of daily commuters (between 6:00 and 7:00 am and between 8:00 am and 10:00 am from Procida; and between 7:00 and 8:00 am and between 17:00 and 18:00 from Naples). For this reason, Italy did not make a manifest error under the new public service contract by considering that there was a market failure as regards the provision of passenger transport services on this route.
- (259) Having regard of the above, the Commission considers that the PSO laid down in the new public service contract with Caremar for the operation of the above eight routes are justified by a genuine public need to ensure territorial continuity. In fact, at the moment of the entrustment of the new public service contract, market forces alone (even with the imposition of PSO) were insufficient to meet the public service needs identified by Italy, in terms of frequency, continuity, regularity.
- (260) That conclusion applies also to the berthing priority enjoyed by Caremar for the provision of the services under the new public service contract. As mentioned above, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime and that it is ancillary to those services to the benefit of their provider ⁽¹⁹³⁾. In fact, under Article 19-ter, paragraph 21, of Law 166/2009 clearly specifies that the berthing priority is necessary to guarantee the territorial continuity with the islands and for the purposes of carrying out the PSO (see recital 99). Indeed, in the absence of berthing priority, Caremar may have to wait its turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the citizens. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, since there are specific time scheduling obligations in the new public service contract for the departure of public service routes, the berthing priority ensures that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its PSO. Against this background, the Commission considers that this measure is awarded to enable Caremar to perform its PSO, which constitute genuine SGEI (see recital 267).

⁽¹⁹⁰⁾ However, according to Italy, Procida Lines did not provide the service in the period 2012-2015.

⁽¹⁹¹⁾ From Procida, Caremar operated throughout the year at 8:10 am, whereas Gestour operated throughout the year at 6:50 am, 9:30 am, 11:20 am and 18:55 (and Procida Lines was supposed to operate at 5:50 am, 7:50 am, 10:45 am, 12:40 am, 15:25, 17:30, 19:15). From Pozzuoli, Caremar operated at 8:50 am, whereas Gestour operated throughout the year at 6:50 am, 9:30 am, 11:20 am and 18:55 (and Procida Lines was supposed to operate at 5:05 am, 7:05 am, 11:50 am, 13:35, 16:25, 18:25, and 20:00).

⁽¹⁹²⁾ From Procida, Caremar provided daily passenger services at 6:35 am and 9:20 am; and, from Naples, Caremar provided daily passenger services at 7:30 am and 17:45.

⁽¹⁹³⁾ For instance, in the case of Laziomar, when the maritime transport services on the three routes in the Pontino Archipelago were transferred from Caremar to Laziomar, the berthing priority related to the ports serviced under those routes was automatically transferred to Laziomar.

Least harmful approach

- (261) Italy has chosen to conclude a public service contract with one operator (Caremar) despite the fact that several operators, as shown in Table 10, were also servicing certain routes under PSO without compensation.
- (262) The Commission considers that the PSO regime without compensation, that was in place only until 2017 in the Gulf of Naples ⁽¹⁹⁴⁾, was in no way comparable to the PSO imposed on Caremar under the new public service contract for the following reasons.
- (263) First, the PSO imposed on Caremar's competitors were different from those covered by the new public service contract because they only concerned frequency, regularity, types of vessels used (i.e. for passengers only or for passengers, vehicles and freight) and maximum fares whereas Caremar was also subject to obligations in terms of punctuality, quality and capacity of the vessel used (see recital 183).
- (264) Second, the PSO imposed on Caremar's competitors were not subject to penalties ensuring the provision of the service in line with the PSO; whereas the new public service contract identifies an articulated system of penalties in case of non-compliance with the PSOs (see recitals 90 and 91). Based on the information provided by Italy (see recital 183), the Commission accepts that users' demand could not have been met by imposing PSO without compensation because on several occasions Caremar's competitors did not comply with the PSO ⁽¹⁹⁵⁾ or did not provide the services under PSO as they were entitled to withdraw from their PSO subject to 45 days' notice, could ask for a suspension of the service or could simply refuse to continue providing the PSO ⁽¹⁹⁶⁾.
- (265) Last, even when provided, those non-compensated PSO alone would not have been sufficient to fully satisfy the public service need identified by Italy – i.e. ensuring the territorial continuity between the mainland and the islands by satisfying the transport needs of the local population (mainly work and study needs) through regular and reliable maritime transport services (see recitals 199 and 242) – as they left uncovered timeslots of the day important for daily commuters.
- (266) In addition, the Commission takes note of Italy's argument that the choice for a public service contract was also necessary in view of the privatisation of Caremar. More specifically, Italy argues that tendering out Caremar together with a new public service contract allowed to ensure continuity of the maritime public service and maximise value for the State. It is for this reason that the Commission agreed (see recital 105) that Italy would tender out Caremar together with a new public service contract. In doing so, the Commission also accepted, and reiterates in the present Decision, that Italy could not rely on further non-compensated PSO that applied to all operators but that it would rather conclude a public service contract with Caremar only.

Conclusion

- (267) On the basis of the above assessment, the Commission concludes that Italy has not made a manifest error when defining the services entrusted to Caremar as SGEI on the routes identified in Table 10. The doubts expressed by the Commission in the 2011 Opening Decision and in the 2012 Extension Decision are hence dispelled.

⁽¹⁹⁴⁾ The non-compensated PSO system remained in force until 9 January 2017. As of 10 January 2017, Caremar has been the only maritime operator subject to PSO in the Gulf of Naples.

⁽¹⁹⁵⁾ See footnote (126).

⁽¹⁹⁶⁾ See footnote (125).

(268) In order to conclude that *Altmark* 1 is complied with, the Commission must still check whether Caremar was entrusted with PSO which were clearly defined and that the requirements of Regulation (EEC) No 3577/92 were complied with. As regards the first point, the Commission notes that PSO are clearly described in the new public service contract and its annexes, which include for instance ship specifications for each route (see recitals 83 to 91). Likewise, the rules regulating the compensation are detailed in the new public service contract, Law 166/2009 and Deliberation 111/2007 (see recitals 92 to 96). The new public service contract also has a clear duration (nine years), identifies Caremar as the public service operator and contains the arrangements for avoiding and recovering any overcompensation (see recital 94). As regards the second point, the Commission observes that the new public service contract was tendered out on a non-discriminatory basis in respect of all Union's shipowners, in line with Article 4(1) of Regulation (EEC) No 3577/92 (see recitals 69 and 70). Therefore, the Commission concludes that the first *Altmark* criterion is fulfilled.

(269) As the berthing priority is a measure ancillary to the PSO services identified under the new public service contract, the berthing priority also complies with the first criterion of the *Altmark* judgment.

9.1.2.2. *Altmark* 2

(270) The Commission recalls that in the 2012 Extension Decision (see recital 205 of the 2012 Extension Decision) it had taken the preliminary view that the second criterion of the *Altmark* judgment is fulfilled.

(271) Against this background, the Commission notes that the parameters at the basis of the calculation of the compensation have been established in advance and comply with the transparency requirements in line with the second *Altmark* criterion. More specifically, the parameters on the basis of which the compensation was calculated are explained in detail in Deliberation 111/2007 and have been applied in the new public service contract (see recital 93). The method of calculation of the compensation, including for instance the cost elements to be taken into account and the rate of return on capital, are detailed in Deliberation 111/2007 (see recital 93). Since the berthing priority does not entail financial compensation for Caremar, the Commission considers that this measure complies with the second *Altmark* criterion.

(272) Therefore, the Commission concludes that the second criterion of the *Altmark* judgment is fulfilled.

9.1.2.3. *Altmark* 3

(273) According to the third *Altmark* criterion, the compensation received for the discharge of SGEI cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(274) Under Article 16 of the new public service contract, the public service compensation is quantified based on the methodology laid down in Deliberation 111/2007⁽¹⁹⁷⁾, according to which the compensation should not exceed what is necessary to cover the net costs incurred for the fulfilment of the PSO (economic-financial balance), including a reasonable profit. As mentioned above (see recitals 55 to 66), according to Deliberation 111/2007 the scope of the services, the maximum fares set out by the public service contract and the compensation actually granted must be defined such as to grant the service provider coverage of the costs linked to the provision of the SGEI, taking into account the other revenues and a reasonable profit.

(275) The *Altmark* ruling does not provide a precise definition of the reasonable profit. According to the SGEI Communication, reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the SGEI for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.

⁽¹⁹⁷⁾ Article 16(1) of the new public service contract.

- (276) In the 2012 Extension Decision, the Commission expressed doubts as to the proportionality of the compensation paid to the companies of the former Tirrenia Group, including Caremar. In particular, as regards the compensation paid as from 2010, the Commission took the preliminary view that the 6,5 % fixed risk premium did not reflect an appropriate level of risk because *prima facie* Caremar did not appear to assume the risks normally borne in the operation of such services. More specifically, the cost elements for the purpose of calculating the compensation include all costs involved in the provision of the service and variations in e.g. fuel prices have been taken into account. As a result, the Commission considered at that stage that Caremar might have been overcompensated.
- (277) The Commission notes that certain aspects of the compensation method, as laid down in the new public service contract, indeed seem to reduce the commercial risk incurred by Caremar. The Commission refers in particular to the following provisions:
- Under Article 13 of the new public service contract Caremar can request on a yearly basis to the Region of Campania the adjustment of the user tariffs to inflation, even though the Region of Campania may decide not to grant the requested adjustment or to suspend the adjustment already granted (see recital 89).
 - Article 17 of the new public service contract aims at maintaining the economic-financial equilibrium of the public service. In particular, in case that the public service compensation were insufficient to cover the cost of the services entrusted by the new public service contract, Article 17 allows to revise the tariff system, the scope of the public services offered or Caremar's maritime assets. According to Article 17 of the contract, every three years the parties shall verify its economic and financial balance conditions in accordance with the criteria laid down in Deliberation 111/2007 and the rules set out in the contract. To this end, Caremar shall send by 30 June of the third year of each regulatory period an updated report with the financial results of the period concerned.
- (278) Although these safeguards seem to reduce the commercial risk incurred by Caremar, the Commission considers that the company remains exposed to the risk that the compensation may not be sufficient to cover the costs of running the service. In fact, as mentioned above (recital 93), the economic and financial balance of the service is only verified every three years and a rebalancing mechanism can be activated only in the case of undercompensation of more than 5 % of the total compensation. If this review shows that the compensation is insufficient to cover the public service cost, then Caremar and Italy can only agree to make changes for the next three-year period. Under Article 17, such changes (if any) are the outcome of a negotiation procedure and, until an agreement is reached, Caremar must continue to operate the public service unaltered. As a result, Caremar remains partially exposed to the risk that the compensation is insufficient to cover the costs of running the service. While Article 17 of the new public service contract can be used to restore the economic and financial balance, this is only done on a forward-looking basis and there is no retroactive correction of the undercompensation possible.
- (279) As regards the reasonable profit allowed under the new public service contract, as pointed out in recital 60, Deliberation 111/2007 provides that a risk premium of 6,5 % would be used to determine the return on capital using the WACC formula.
- (280) Italy underlines that the risk premium was determined using macroeconomic analyses that attribute an average risk premium to the reference country or area for the sector concerned. These analyses identified an average risk premium for Italy of 6,4 %. This premium is therefore fully in line with the risk premium of 4 % identified in Deliberation 111/2007, with an increase of 2,5 % for non-exclusive services (risk premium of 6,5 %). The 6,5 % (gross) rate was used until July 2015, whereas thereafter, for the new public service contract, the rate taken into account for the purposes of compensation was set at 10,55 %. Italy argues that the rate is higher than in the previous contracts — which set a rate of 6,5 % — because of the higher entrepreneurial risk to which Caremar is exposed due to the likely undercompensation that might arise (see recital 198).

(281) In that respect, the Commission notes that the new public service contract does not include any clause enabling a compensation adjustment in case of contractual deviations, other than the provision aimed at modifying the public service scope or the fare system. Therefore, in case of a fuel price increase or a significant reduction in passenger traffic, Caremar is exposed to the risk of cost increase or revenue reduction and subsequent undercompensation. As pointed out in recital 278, the public service contract, in the event of such undercompensation, provides remedies that affect only the future operation of the public service, whereas losses already made cannot be retroactively covered. Furthermore, these contractual remedies only apply for undercompensation of more than 5 % of the total compensation (see recital 277), whereas Caremar bears the risk of incurring itself any undercompensation equal or less than 5 %, which evidently corresponds to a significant amount on an annual basis. This renders the provision of the service particularly risky, as the company cannot retroactively counterbalance that undercompensation by means of an increase in fares (which can only be adjusted for the future), a reduction of the scope of the public services offered or the company's material assets for the provision of the services.

(282) The Commission also observes that the above mechanism exposes Caremar to an undercompensation risk which is higher than the risk borne by other shipping companies on the market in the same period, for which a risk premium of 6,5 % was considered justified. For instance, as regards the companies Compagnia Italiana di Navigazione, i.e. the acquirer of Tirrenia di Navigazione, and Società Navigazione Siciliana, i.e. the acquirer of Siremar, the Commission considered justified a risk premium of 6,5 % under the public service contracts concluded by the competent Italian authorities in 2012 and 2016 with Compagnia Italiana di Navigazione and Società Navigazione Siciliana respectively, having regard to the fact that the shipping operators could request a revision of the economic-financial equilibrium of the contract already in case of undercompensation of more than 3 % of the total compensation ⁽¹⁹⁸⁾. Reasonably, the higher the amount of undercompensation to be borne by the operator, the higher the risk premium that could be allowed.

(283) In addition to the above, to determine whether the return on capital invested of 10,55 % for Caremar is reasonable, the Commission has calculated ⁽¹⁹⁹⁾ the WACC for Western-European companies active in the shipbuilding and maritime sector ⁽²⁰⁰⁾, taking into account the country risk for Italy, for the year 2014 (i.e. the year before Caremar signed the new public service contract). Because both the risk-free rate (proxied by the German 10-year sovereign bond) and the country risk premium for Italy (proxied either by using Moody's country rating or based upon CDS spreads) vary throughout the year, the range in which the WACC moved during 2014 was determined. For this year, the WACC for companies in this sector lay between 10,39 % and 11,84 %. This means that a company operating in the shipbuilding and maritime sector, such as Caremar, would in 2014 have to generate a return within this range to cover its cost of both debt and equity financing. Against this background and taking into account the risks to which Caremar is exposed from an *ex ante* perspective (see above recital 281), the return on invested capital of 10,55 % for Caremar which was selected via an open and competitive tender procedure, was in line with the risks it runs when operating public services under the new public service contract. Therefore, the Commission considers that, in the years before Caremar's entrustment, a 10,55 % return on capital from an *ex ante* perspective was in line with the risks it runs when operating public services under the new public service contract.

⁽¹⁹⁸⁾ As regards Compagnia Italiana di Navigazione, see Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45), recitals 244 and 361. As regards Società Navigazione Siciliana, see Commission Decision (EU) 2022/448 of 17 June 2021 on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy for Siremar and its acquirer Società Navigazione Siciliana (OJ L 97, 24.3.2022, p. 1), recital 362.

⁽¹⁹⁹⁾ To calculate the WACC, the Commission used the datasets published on the website of Aswath Damodaran (Professor of Finance at the Stern School of Business at New York University) and obtained the historical data on German sovereign bonds from www.worldgovernmentbonds.com.

⁽²⁰⁰⁾ The WACC is calculated on the basis of data for publicly listed companies. In this case, the sample consists of 62 European companies active in shipbuilding or the maritime sector that are listed on a stock exchange. This sample is the closest approximation to the sector in which Caremar (which is not publicly listed) operates, namely maritime transport of passengers, vehicles and freight. A private investor would use a similar benchmark group to determine the return he expects from Caremar.

- (284) Out of completeness, from an *ex post* perspective, the Commission observes that the compensation granted to Caremar under the new public service contract is capped at EUR 10 778 897 annually, irrespective of the amount of reasonable profit that Caremar is entitled to (see recital 92). In line with point 47 of the 2011 SGEI Framework, the Commission assesses whether there was overcompensation over the whole duration of the contract. As illustrated in Table 11, on the basis of the information provided by Italy, the figures for the period 2015-2021 show that the actual public service compensation received by Caremar in some years exceeded the eligible amount of compensation in those years (with the exception of the amounts for 2015, 2020 and 2021, which were insufficient to cover the net cost of the service hence resulting in undercompensation for those years). As mentioned in recital (96), all overcompensation was detected by the Region of Campania and repaid by Caremar pursuant to Article 18 of the new public service contract.

Table 11

Net cost of the public service operated by Caremar for the period 2015-2021

(EUR)

Caremar	2015	2016	2017	2018	2019	2020	2021	Grand total
Total revenues	12 941 000	28 392 000	29 807 000	31 807 921	32 885 236	[20 000 000 – 30 000 000]	[20 000 000 – 30 000 000]	182 741 669
- Total costs	18 920 000	35 764 000	37 714 000	35 252 016	36 684 806	[30 000 000 – 40 000 000]	[30 000 000 – 40 000 000]	228 957 910
- Amortizations	1 033 000	2 045 000	1 827 000	1 705 330	1 639 441	[1 000 000 – 2 000 000]	[1 000 000 – 2 000 000]	11 380 741
= Net cost of public service	- 7 012 000	- 9 417 000	- 9 734 000	- 5 149 425	- 5 439 011	- [11 000 000 – 12 000 000]	- [9 000 000 – 10 000 000]	- 57 596 982
+ Return on capital (10,5 %)	- 202 000	- 775 000	- 645 000	- 751 680	- 697 858	- [700 000 – 800 000]	- [600 000 – 700 000]	- 4 479 446
= Eligible for compensation	- 7 214 000	- 10 192 000	- 10 379 000	- 5 901 105	- 6 136 869	- [10 000 000 – 20 000 000]	- [10 000 000 – 20 000 000]	- 62 076 428
+ Actual compensation	4 961 000	10 778 000	10 778 000	10 363 306	8 462 289	[10 000 000 – 20 000 000]	[8 000 000 – 9 000 000]	64 301 641
= Over/under compensation	- 2 253 000	586 000	399 000	4 462 201	2 325 420	- [1 000 000 – 2 000 000]	- [1 000 000 – 2 000 000]	2 225 213

- (285) The verification mechanism provided in Article 17 of the new public service contract to ensure the economic and financial balance conditions of the service concerns not only the cases of undercompensation but also of overcompensation (see recital 94). In case of overcompensation, the Region of Campania shall update the compensation paid for the next regulatory period. Article 18 of the new public service contract provides for the recovery of overcompensation for the relevant regulatory period within 30 days from the relevant request.

(286) According to the information provided by Italy, of the aggregated amount of overcompensation identified in Table 11 an amount of EUR 2 224 868 has already been recovered for the entire period 2015 to 2021 (see recital 96). In particular, the verification procedure, based on audited figures for 2015, 2016 and 2017 and on provisional figures for 2018, identified the following:

- for 2015, EUR 2 253 000 (undercompensation);
- for 2016, EUR 586 000 (overcompensation);
- for 2017, EUR 399 429 (overcompensation);
- for 2018, EUR 2 103 400 (overcompensation).

(287) The above verification gave rise to the total overcompensation of EUR 835 058 during the period 2015-2018, which has been recovered by the Region of Campania (see recital 96).

(288) Also, for the period 2018-2021, the verification procedure, based on audited figures for the years 2018, 2019 and 2020 and on provisional figures for 2021 identified the following:

- for 2018, EUR 4 462 201 (overcompensation);
- for 2019, EUR 2 325 420 (overcompensation);
- for 2020, EUR 1 676 056 (undercompensation);
- for 2021, EUR 1 618 352 (undercompensation).

(289) The above verification gave rise to a residual overcompensation of EUR 1 389 811, during the period 2018-2021, which was returned to the Region of Campania (see recital 96) ⁽²⁰¹⁾.

(290) The Commission considers that those measures are sufficient to avoid and detect any possible overcompensation.

(291) For the above reasons, taking into account that the return on capital that Caremar could expect from an *ex ante* perspective was in line with the risks it ran when operating the public services under the new public service contract and that the new public service contract contains a claw-back mechanism ensuring the absence of overcompensation, the Commission concludes that the public service compensation granted to Caremar does not exceed what is necessary to cover the costs incurred in the discharge of its PSO, taking into account the relevant receipts and a reasonable profit.

(292) With respect to the berthing priority and any possible overcompensation that might result from it, the Commission notes that, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts by corresponding lower operating costs or higher revenues. The Commission's analysis confirmed that in the period 2015-2021 Caremar did not retain any overcompensation (see recital 281) and that an appropriate claw-back mechanism is in place to ensure the absence (or recovery) of any overcompensation also in the period 2022-2024 (recital 290).

⁽²⁰¹⁾ Caremar's accounts for 2018, based on the information provided by Italy, showed an overcompensation of EUR 4 462 201. Considering that during the first verification for the period 2015-2018 an amount of EUR 2 103 400 has already been paid back to the Region of Campania for 2018 (in the context of the balance of EUR 835 058), the difference has been calculated at EUR 2 358 801, which, together with the results of the other years (2019, 2020 and 2021) resulted in the total overcompensation of EUR 1 389 811, which was also returned to the Region of Campania. Italy has furthermore submitted that the 2021 financial data are still provisional and will be verified by the Region of Campania, pursuant to Article 17 of the public service contract, in the context of the last regulatory period (2022 to 2024).

- (293) The Commission's doubts concerning compliance of the public service compensation granted to Caremar, including the berthing priority, with the third condition of the *Altmark* judgment are therefore dispelled. This conclusion is not affected by the fact that in 2015 the Region of Campania granted EUR 2 155 008 to Caremar in order to restore Caremar's financial position at the level that was in place at the time of the successful offer for the acquisition of Caremar (recitals 77 and 79). That transfer of resources was conditional to the acquisition of Caremar by the successful tenderer and was strictly limited to cover the drop in value registered by Caremar's equity between the end of 2013 and the end of 2014 due to the national litigation that delayed the tender award. In the case of reduction in the value of what is received compared to the value of what would have been received under a contract, it is common market practice that the creditor of the performance is entitled to a reduction in the price⁽²⁰²⁾. Considering that the restoration of Caremar's financial position has the same effect of a reduction in the price of Caremar, the Commission considers that the measure did not entail any advantage to Caremar and its buyer.

9.1.2.4. Altmark 4

- (294) The fourth *Altmark* criterion is fulfilled if the recipient of the compensation for the operation of an SGEI has been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing SGEI at the least cost to the community or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.
- (295) According to point 63 of the SGEI Communication, the simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council⁽²⁰³⁾ and Directive 2004/18/EC of the European Parliament and of the Council⁽²⁰⁴⁾.
- (296) The Commission observes that, in the present case, the tender procedure was launched before the entry into force of Directive 2014/24/EU of the European Parliament and of the Council⁽²⁰⁵⁾ (which applies to public contracts awarded for the operation of maritime transport services) and Directive 2014/25/EU of the European Parliament and of the Council⁽²⁰⁶⁾. At that time, Directive 2004/17/EC and Directive 2004/18/EC were still in force. However, Directive 2004/17/EC does not apply to maritime transport services, such as those provided by Caremar. Indeed, Article 5 of Directive 2004/17/EC makes clear that only transport services by railway, automated systems, tramway, trolley bus, bus or cable are included in its scope.
- (297) Public contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport fall instead within the scope of Directive 2004/18/EC on the basis of its recital 20. However, water transport services are also listed in Annex II B to that Directive which implies⁽²⁰⁷⁾ that they are only subject to its Articles 23 and 35(4). This means that, under Directive 2004/18/EC, a public contract for maritime transport services is subject only to the obligations concerning technical specifications (Article 23) and to the obligation to publish a contract award notice (after the contract has been awarded and, therefore, at the end, not at the beginning, of the award procedure; see Article 35(4)). All the other rules provided for by Directive 2004/18/EC, including the provisions on the content of notices to be published (Article 36(1)) and the provisions on selection criteria (Articles 45 to 52), are not applicable to public contracts for maritime transport services.

⁽²⁰²⁾ See, for example, Article 9:401 (Right to reduce price) of 'Principles of European Contract Law' (see Lando, O. and Beale, H., Principles of European contract law, Parts I and II, Kluwer Law International, The Hague, 2000); or Article III.-3:601 (Right to reduce the price) of the Draft Common Frame of Reference (see von Bar, C. et al., Principles, Definitions and Model Rules of European Private Law, draft Common Frame of Reference: outline edition, Sellier European Law Publishers, Munich, 2009).

⁽²⁰³⁾ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

⁽²⁰⁴⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽²⁰⁵⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁽²⁰⁶⁾ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁽²⁰⁷⁾ Under Article 21 of Directive 2004/18/EC.

- (298) Furthermore, Directive 2004/18/EC in any case does not apply to service concessions as defined in its Article 1(4) ⁽²⁰⁸⁾. The Commission notes that service concessions (and public contracts) which have certain cross-border interest nevertheless remain subject to the general principles of transparency, non-discrimination and equal treatment. On the basis of the above, the Commission concludes that Directive 2004/18/EC can only apply in case of a public contract but not when it concerns a service concession. In addition, since the present case concerns water transport services subjected to a public service contract, only certain requirements of that Directive, as referred to in recital 305, would be applicable. Against this background, the Commission considers that it cannot rely solely on compliance with the Public Procurement Directives to demonstrate compliance with the fourth *Altmark* criterion.
- (299) For this reason, the Commission assesses below whether the tender procedure used by Italy was competitive, transparent, non-discriminatory and unconditional. To make this assessment, the Commission relies on the relevant guidance set out in its Notion of Aid Communication ⁽²⁰⁹⁾ (in particular points 89 *et seq.*) and the SGEI Communication (in particular points 63 *et seq.*).

Competitive and transparent nature of the tender

- (300) Point 90 of the Notice on the Notion of Aid specifies that a tender procedure has to be competitive ⁽²¹⁰⁾ to allow all interested and qualified bidders to participate in the process. Furthermore, according to point 91 of that Communication, the procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. That point also emphasises that accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure and indicates that a tender has to be sufficiently well-publicised, so that all potential bidders can take note of it.
- (301) In the present case, the call for expression of interest was published in the Supplement to the *Official Journal of the European Union*, in *Gazzetta Ufficiale della Repubblica Italiana*, as well as on the Region of Campania's website (see recital 68). This call invited anyone who could ensure the continuity of the public maritime transport service and territorial continuity with the islands in the Gulf of Naples to express its interest and did not impose any further conditions. Potential bidders were given sufficient time (from 17 July 2012 to 21 September 2012) to adequately express their interests allowing them to then participate in the further process. The Commission therefore considers that the sale of Caremar and award the new public service contract were made available widely in a way reaching all possible bidders.
- (302) Further, bidders need to be provided with all documents and information required for the participation in the bidding process enabling them to properly assess the company put up for sale. Such information has to be made available to potential bidders in a transparent and non-discriminatory manner with all interested participants having equal access to relevant information. For the reasons explained below (recitals 303 to 308), the Commission finds that these conditions are met in the present case.
- (303) First, the call for expressions of interest indicated that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. While the call did not specify how bidders could prove that they met this requirement, apart from meeting certain financial requirements (see recital 308), by default this meant that any appropriate means of evidence could be used. This selection criterion, which was the only one as regards access to the tender procedure, was justified in light of the objective pursued and was made known to all interested bidders.

⁽²⁰⁸⁾ Article 1(4) of Directive 2004/18/EC reads: "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment."

⁽²⁰⁹⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

⁽²¹⁰⁾ In the Notion of Aid Communication, the Commission observes that the Union Courts often refer, in the context of State aid to an 'open' tender procedure. The use of the word 'open', however, does not refer to a specific procedure under the Public Procurement Directives. Therefore, the Commission considers that the word 'competitive' appears more appropriate. In that Communication, the Commission also notes that this is not intended to deviate from the substantive conditions set out in the case-law.

- (304) Second, Law 166/2009 made clear to interested parties that a new public service contract would be concluded upon completion of the tender procedure and that the annual amount of public service compensation had been set at maximum EUR 19 839 226 million per year. In addition, the call for expressions of interest indicated that the objective was to sell Caremar for a price higher than EUR 6 000 000. Furthermore, as confirmed by Italy, all relevant information as regards the scope of the sale, including the draft public service contract to be concluded between the buyer and Italy, was made available to the nine parties that were admitted to the next stage of the tender process. This allowed these parties to decide whether or not to bid and, if so, how much. On this basis, the Commission considers that it was sufficiently clear from the call for expressions of interest that the sale concerned the Caremar business bundled with a new public service contract. After having expressed their interest, parties were given access to all necessary information to decide on a possible bid.
- (305) Third, the Commission considers that the call for expression of interest attracted a substantial number of potential tenderers, ten.
- (306) Fourth, all of the nine companies that were invited to the next stage of the tender process received thereafter detailed information from the Region of Campania about the process (see recital 73).
- (307) Fifth, the call contained the minimum necessary information needed in order to submit an expression of interest (i.e. the continuation of the public service), and it could not have prompted the exclusion of otherwise interested maritime operators. The planning authorities decided to ensure continuity of the public service and connectivity of the islands of the Gulf of Naples with the mainland. This condition was made known in advance, as explained above, to all potential operators expressing an interest to participate in the tender procedure. The Commission also notes that all relevant information on the selection criteria and the further development of the procedure was provided for in the invitation letter sent to all of the nine parties that were admitted to the bidding stage, which was provided by Italy to the Commission.
- (308) Last, as mentioned in the 2012 Extension Decision (points 138 to 144), the original draft call for tenders for Caremar included certain technical and financial requirements (i.e. pre-determined volumes of nautical miles and turnover in the maritime transport sector) that would have made it possible only for shipping companies to take part in the tender procedure. However, as mentioned in recital 70, the published call for tenders did not include anymore those technical criteria which had been replaced by financial requirements concerning adequate economic and financial capacity, evidenced by either a confirmation by at least two financial institutions of an economic and financial capacity of EUR 6 million or net assets of at least EUR 6 million (see recital 70). The Commission considers that the said financial requirements, which are linked to the minimum price set for the sale of Caremar (see recital 74), are necessary to ensure the financial capacity of the tenderers with an interest to buy Caremar and guarantee the continuation of the maritime services in the Gulf of Naples pursuant to the provisions of the new public service contract. Furthermore, as it is evident from the tender process, these requirements did not deter the participation of an adequate number of possible bidders.
- (309) The intention of the Region of Campania to divest the Caremar business and to conclude a new public service contract with a duration of nine years with the winning tenderer was made public in a way reaching all possible bidders in the relevant regional or international market. Furthermore, the Commission takes into account that potential bidders could easily express their interest and did not have to undertake any commitment at that stage. Provided that they could show that they fulfilled the sole selection criterion of guaranteeing the continuity of the service, those parties were then given all necessary information and time to allow them to decide how much they wanted to bid for the Caremar business and the provision of the services.
- (310) Last, the Commission observes that the communication with the interested bidders allowed them to be equally and duly informed at each stage of the tender procedure as described in recitals 67 to 77.
- (311) For these reasons, the Commission considers that, taken as a whole, the tender procedure was competitive and transparent and that its doubts in the 2011 Opening Decision and in the 2012 Extension Decision that the tender procedure was not sufficiently transparent due to possible deficiencies in the call for expressions of interest are dispelled.

Non-discriminatory nature of the tender

- (312) Point 92 of the Notion of Aid Communication highlights that non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. Furthermore, that point specifies that, to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.
- (313) As indicated above (see recital 303), the call for expressions of interest contained the sole condition that bidders needed to be able to 'guarantee the continuity of the maritime transport service'. All 10 parties that responded to the call and expressed an interest were aware of that obligation. The Commission considers that this condition was objective and had been made sufficiently clear to all interested parties in the call for expressions of interest. The invitation letter specified that the award criterion was the best price and specified the methodology to calculate it (see recital 73). That criterion was objective, and it enabled the tenders to be compared and assessed objectively as it was based on the amount of discount offered against the amount of maximum compensation set in the tender invitation and on the price offered for the acquisition of Caremar against the minimum price set in the tender invitation.
- (314) Nine interested bidders that were admitted to the next stage of the tender procedure were then invited to submit a tender having all received the same information (see recital 73). All bidders had the possibility to ask for clarifications before the deadline for the submission of the tender and, to ensure greatest transparency, the Region of Campania also published the most frequently asked questions and their replies ahead of the deadline for the submission of the tenders (see recital 73). The outcome of the selection procedure was made publicly known at the public session held on 29 July 2013 by the tender committee and all bidders were made aware of the discretionary verification procedure initiated by the Region of Campania to verify the appropriateness and reliability of the best offer and of the outcome of that procedure (see recital 73).
- (315) The Commission's doubts in the 2011 Opening Decision that the call for expression of interest may not have been sufficiently transparent and unconditional are therefore resolved. All parties were correctly and equally informed throughout the various steps of the tender procedure enabling them to make a bid with full knowledge of the procedure and requirements. The Commission also considers that the award criteria allowed for an objective comparison and assessment of the tenders.

Ensuring that the services are provided at the least cost to the community

- (316) Point 65 of the SGEI Communication provides that, based on the case-law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at 'the least cost to the community'.
- (317) In the present case, the new public service contract bundled with the Caremar business, rather than only the public service contract itself, has been tendered out on the basis of the lowest price. Italy decided that the price for the sale of the Caremar business should be greater than EUR 6 000 000 (see recital 74), whilst for the new public service contract Italy set a maximum amount for the whole duration of the new public service contract, subject to downwards revisions.
- (318) Point 67 of the SGEI Communication indicates that the lowest price obviously satisfies the fourth *Altmark* criterion.
- (319) The Commission notes that Italy put emphasis on choosing an operator that would provide the service at the lowest price, using the formula described in recital 73. The formula used for the calculation of the highest net price incorporates a certain adjustment rate based on the return on nine-year Government bonds, in order to take into account the duration of the contract. As furthermore mentioned in recital 308, the technical criteria that were submitted in the original tender draft had been removed before the publication of the tender and replaced by financial requirements, thereby ensuring the competitive and transparent nature of the procedure. In addition, the

invitation letter to submit a tender included all necessary information needed in order to fill out the financial and technical offers, as well as an invitation to all tenderers to access the 'data room', where they could consult and copy, where possible, any relevant information concerning Caremar, its industrial plan and the service charter. Therefore, the Commission considers that the use of the lowest price as award criterion for the service concerned bundled with the sale of the Caremar business enabled Italy to create effective competition and obtain a service with the highest possible value at the least cost to the community.

- (320) As far as the bundling of the service with the sale of the Caremar business is particularly concerned, in the 2012 Extension Decision, the Commission took the preliminary view that the tendering of the new public service contract without an obligation to take over the vessels of Caremar necessary to perform the public service would have resulted in a lower cost to the community.
- (321) The Commission has already concluded above that the tender procedure has been sufficiently transparent and non-discriminatory to enable the participation of as many potential tenderers as possible. Indeed, following the widespread publication of the call for expression of interest, ten maritime operators responded affirmatively and nine were admitted to the bidding stage. All relevant information concerning the tender procedure was provided in the invitation letter sent to these nine operators.
- (322) Following the expression of interest stage, three competitive bids were submitted, which the Region of Campania evaluated.
- (323) The mandatory condition to guarantee the continuity of the public service and the bundling of the assets with the PSO are interrelated. In particular, by having bundled the sale of Caremar with a new public service contract, the acquirer, SNAV/Rifim automatically becomes subject to the requirement to ensure the continuity of the public service and is awarded the berthing priority. The Commission considers that the bundling of the Caremar business with the new public service contract and the award of the berthing priority do not result in a lower price than when the assets and this contract would have been sold separately, for the following reasons.
- (324) The Caremar business has been solely associated to the delivery of the public service and ensuring the territorial continuity. That said, all of Caremar's vessels have been and currently are used for the public service. Moreover, Caremar's vessels comply with the technical requirements foreseen in the new public service contract. This means that, thanks to the sale of those vessels together with the entrustment of the new public service contract, any company (even those not equipped with vessels complying with the technical requirements imposed under the new public service contract) would have been able to comply with the conditions of the new public service contract in terms of type of vessels to be used for the provision of the SGEL. It cannot be argued that a private vendor would have obtained a higher price had those or some vessels been sold without the said condition. In fact, the value of Caremar's vessels lied mainly in their suitability to perform the PSO covered by the new public service contract. Absent any link with the new public service contract, Caremar's vessels would attract low commercial demand, unless with a view to purchase for investment, restoration and modernisation over a short time. That said, it seems unlikely that the vessels could have been sold for shipping purposes, other than that including the condition to continue the public service, for a higher price than what they were budgeted for.
- (325) In addition, had the public service contract been tendered separately from the sale of Caremar, the Commission considers it unlikely that potential bidders could have had such significant resources (consisting of nine vessels and industrial and commercial equipment) readily available for redeployment to operate the PSO laid down in the new public service contract. This is particularly true since the new contract contains specific requirements about the vessels to be used on the different public service routes (see recital 88) and penalties in case of not complying with certain minimum quality standards (see recital 83). Any operator who had the required resources would likely have employed them already on other routes and their redeployment in line with the new public service contract would inevitably have led to losing the revenues from their previous use.

- (326) The Commission considers therefore that bundling those ships with the public service contract allowed obtaining a higher price for Caremar's vessels than the price that Italy would have obtained by selling the vessels separately. The fact that, in return for operating the vessels on the public service routes, their acquirer would receive public service compensation for a period of nine years rendered those vessels more attractive from a business standpoint than what they would have been on a standalone basis. On this basis, the Commission concludes that Italy has not attached conditions that were likely to depress the price or which a private seller would not have demanded.
- (327) The Commission concludes that its doubt that tendering out the new public service contract together with the Caremar business could not result in a lower cost to the community is dispelled.
- (328) In view of the above, the Commission considers that the use of the lowest price as award criterion for the new public service contract bundled with the Caremar business resulted in multiple maritime operators expressing their interest to buy the Caremar business and undertake the maritime public service serving the islands of the Gulf of Naples.
- (329) On the basis of the above, the Commission concludes that the Altmark 4 criterion is complied with as regards this measure.

9.1.2.5. Conclusion

- (330) Since the four conditions set out by the Court of Justice in the *Altmark* case are cumulatively met, the Commission concludes that the award of the new public service contract bundled with the Caremar business and the berthing priority to Caremar does not confer an economic advantage on the latter and on its acquirer, SNAV/Rifim.
- (331) Since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the award of the public service contract bundled with the privatisation of Caremar and the berthing priority to Caremar and its acquirer SNAV/Rifim does not constitute State aid within the meaning of Article 107(1) TFEU.

9.1.3. The measures laid down by Law 163/2010

- (332) The Commission took the preliminary view in the 2011 Opening Decision that all measures laid down by Decree-law 125/2010 converted with amendments into Law 163/2010 constitute State aid in favour of the companies of the former Tirrenia Group, including Caremar, to the extent that the respective beneficiaries were able to use these measures to cover liquidity needs and thereby improve their overall financial position.
- (333) Based on the information received during the formal investigation, the Commission considers that the three measures should be assessed separately.

9.1.3.1. Possible use of funds to upgrade ships for liquidity purposes

- (334) State resources: the funds in question were granted by the State from its own budget (see recital 130) and their use for liquidity purposes was enabled by Law 163/2010. The measure is therefore imputable to the State and is given through State resources.
- (335) Selectivity: this measure was only granted to the companies of the former Tirrenia Group, including Caremar, and is therefore selective.
- (336) Economic advantage: according to Italy, Caremar benefited from the funds in question for modernisation work on its fleet to bring it into line with international safety standards. Some of the works involved two units of the Caremar fleet which were transferred free of charge to Laziomar (see recital 203). According to Italy, these funds were never used for liquidity purposes (see recital 203) and the Commission did not find evidence to support the opposite.

- (337) Since Caremar did not use these funds for liquidity purposes in order to avoid costs, which it would ordinarily have to cover itself by means of its own financial resources, the doubts expressed in the 2011 Opening Decision are no longer valid and the Commission considers that no economic advantage has thus been conferred to Caremar through the use of the said funds.
- (338) Conclusion: since not all criteria laid down in Article 107(1) TFEU are fulfilled, the Commission concludes that the measure does not constitute State aid within the meaning of Article 107(1) TFEU.

9.1.3.2. Fiscal exemptions related to the privatisation process

- (339) As described in recital 102(a), pursuant to Article 1 of Law 163/2010, certain acts and operations undertaken to privatise the Tirrenia Group and described in Article 19-ter, paragraphs 1 to 15, of Decree-law 135/2009, converted with modifications into Law 166/2009, are exempt from any taxes ordinarily due on those acts and operations.
- (340) The Commission first notes that two separate sets of transfers have to be assessed: (i) the transfers of Tirrenia's former subsidiaries Caremar, Saremar and Toremar from Tirrenia to the Regions of Campania, Sardinia and Tuscany; (ii) the transfer of Caremar from the Region of Campania to SNAV/Rifim. The taxes exempted are in particular registration duty, land registry and mortgage registration fees, stamp duty, VAT and corporate income tax. The beneficiaries of this aid measure would be the seller, the buyer, or both. This Decision concerns only the second transfer ⁽²¹¹⁾.
- (341) At the outset, the Commission notes that under Presidential Decree No 633 of 26 October 1972, transfers of going concerns or business units to another company are not considered a supply of goods and therefore fall out of the scope of VAT. Therefore, as transactions such as the sale of Caremar to SNAV/Rifim are not subject to VAT, the tax exemption cannot have conferred an advantage to Caremar with regard to VAT. Furthermore, the Commission notes that the sale contract for Caremar clearly states that the purchaser, i.e. SNAV/Rifim, has to bear all costs related to the sale (i.e. registration fees, notarial costs, land registry, mortgage registration fees, stamp duty, etc.), without reference to any exemption enjoyed by SNAV/Rifim on these costs. As regards the exemption from corporate income tax, such tax only applies to the revenue generated by the taxable entity. In the present case, however, SNAV/Rifim purchased Caremar from the Region of Campania, which means that this transaction constituted an expense for SNAV/Rifim and as a result no corporate income tax could be due. Therefore, this measure does not apply to SNAV/Rifim. The Commission, in view of the above, concludes that neither Caremar nor SNAV/Rifim have benefited from these fiscal exemptions.
- (342) For these reasons, none of the aforementioned tax exemptions constitutes State aid within the meaning of Article 107(1) TFEU.

9.1.3.3. Possibility of using FAS resources to meet liquidity needs

- (343) In the 2011 Opening Decision and in the 2012 Extension Decision, the Commission identified the possibility for the (former) Tirrenia Group companies, including Caremar, to use FAS resources ⁽²¹²⁾ in order to meet current liquidity needs. However, in the course of the formal investigation procedure, Italy clarified that FAS resources were not meant as an additional compensation for Caremar or SNAV/Rifim (or any other of the companies of the former Tirrenia Group or their respective acquirers). Instead, these resources were made available to supplement the budget appropriations for the payment of the public service compensations to the companies of the former Tirrenia Group, in case that they proved insufficient. Indeed, Article 1, paragraph 5-ter, of Law 163/2010 enabled the Regions to use FAS resources to fund part of the regular public service compensation and thereby ensure continuity of the maritime public services. In other words, this measure merely concerns an allocation of resources in the Italian State budget for payment of the public service compensations.

⁽²¹¹⁾ The first set of transfers was assessed in Decision (EU) 2020/1412 (see recitals 417 and ff. of that decision).

⁽²¹²⁾ Resources of the *Fondo Aree Sottoutilizzate*, see recital 102(b).

- (344) In light of the above, the Commission concludes that FAS resources are only a funding source to allow the State to pay the public service compensations (granted on the basis of the prolonged Initial Convention) and do not constitute a separate measure which Caremar can benefit from in addition to these public service compensations. Therefore, the possible use of FAS resources does not constitute State aid within the meaning of Article 107(1) TFEU.

9.1.4. Conclusion on the existence of aid

- (345) Based on the assessment above, the Commission finds that:

- the compensation granted to Caremar for the operation of maritime routes in the period from 1 January 2009 to 31 July 2012 (i.e. the prolongation of the initial Convention) and the berthing priority linked to the provision of those services constitute State aid within the meaning of Article 107(1) TFEU;
- the award of the new public service contract for the period from 16 July 2015 to 15 July 2024, bundled with the privatisation of Caremar and the berthing priority linked to the provision of those services, complies with the four *Altmark* criteria and therefore does not constitute State aid within the meaning of Article 107(1) TFEU;
- as Caremar did not use the funds to upgrade ships for liquidity purposes, as enabled by Law 163/2010, that measure does not constitute State aid to Caremar within the meaning of Article 107(1) TFEU;
- the fiscal exemptions related to the privatisation process of Caremar do not constitute State aid to Caremar or SNAV/Rifim within the meaning of Article 107(1) TFEU;
- the possibility to use FAS resources to meet liquidity needs, as laid down by Law 163/2010, does not constitute State aid within the meaning of Article 107(1) TFEU.

9.2. Lawfulness of aid

- (346) The aid measures in scope of this Decision have been put into effect before formal approval by the Commission. Therefore, insofar as these aid measures were not exempted from notification under Decision 2005/842/EC or Decision 2012/21/EU, they were granted by Italy in violation of Article 108(3) TFEU ⁽²¹³⁾.

9.3. Compatibility of the aid

- (347) The compatibility of the public service compensation granted to Caremar under the prolonged Initial Convention and the linked berthing priority must be assessed in the light of Article 106(2) TFEU.

- (348) As already indicated above (Section 3.1.1), the prolongation of the Initial Convention after the end of 2008 was carried out by subsequent legal acts, as follows:

- (a) Decree-law 207/2008, converted into Law 14/2009, laid down the prolongation of the Initial Convention from 1 January 2009 until 31 December 2009;
- (b) Decree-law 135/2009, converted into Law 166/2009, laid down *inter alia* the prolongation of the Initial Convention from 1 January 2010 until 30 September 2010;
- (c) Decree-law 125/2010, converted into Law 163/2010, provided for a further prolongation of the Initial Convention from 1 October 2010 until the end of the privatisation processes of Tirrenia and Siremar.

- (349) Against this background, the Commission notes that those three prolongations pre-date the entry into force on 31 January 2012 of Decision 2012/21/EU and of the 2011 SGEI Framework. However, Article 10 of Decision 2012/21/EU and point 69 of the 2011 SGEI Framework contain rules that provide for their application also to aid granted before their entry into force.

⁽²¹³⁾ The Commission will assess whether this was indeed the case in Section 5.3.1.

- (350) In particular, Decision 2012/21/EU provides in its Article 10(a) that: ‘any aid scheme put into effect before the entry into force of this Decision (i.e. before 31 January 2012) that was compatible with the internal market and exempted from the notification requirement in accordance with the 2005 SGEI Decision shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of two years’. This means that aid which was granted in the period between the entry into force of Decision 2005/842/EC on 19 December 2005 and the entry into force of Decision 2012/21/EU on 31 January 2012 will be considered compatible with the internal market but only from the date on which it was granted until 30 January 2014 included. Article 10(b) furthermore states that: ‘any aid put into effect before the entry into force of this Decision [i.e. before 31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempted from the requirement of prior notification.’.
- (351) As regards the 2011 SGEI Framework, points 68 and 69 specify that the Commission will apply the principles set out in that Framework to all notified aid projects, whether the notification took place before or after 31 January 2012, as well as to all unlawful aid on which it takes a decision after 31 January 2012, even if that aid was granted before 31 January 2012. In the latter case, the provisions of points 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework are not applicable.
- (352) In view of the above, the rules on the application of Decision 2005/842/EC and Decision 2012/21/EU and the 2011 SGEI Framework as described above mean that the public service compensation granted to Caremar in the period from 1 January 2009 to 31 July 2012 during the prolonged Initial Convention can be assessed under Decision 2005/842/EC or, if the aid is not covered by Decision 2005/842/EC, under the 2011 SGEI Framework (without taking into account the provisions of points 14, 19, 20, 24, 39 and 60 of the 2011 SGEI Framework as all prolongations of the Initial Convention were adopted before 31 January 2012) ⁽²¹⁴⁾.
- (353) The Commission notes that both Decision 2005/842/EC and Decision 2012/21/EU are only applicable to State aid in the form of public service compensation for maritime links to islands on which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers.
- (354) The figures presented by Italy (see Tables 3 and 9 in recitals 175 and 176) do not allow to conclude that the average annual passenger traffic during the two financial years preceding each prolongation of the Initial Convention did not exceed 300 000 passengers. In fact, either the data provided are above that threshold ⁽²¹⁵⁾ or are incomplete ⁽²¹⁶⁾.
- (355) Therefore, the Commission will assess whether the public service compensation granted to Caremar for the operation of the maritime routes under the prolonged Initial Convention (i.e. the eight routes in the Gulf of Naples operated in the period 1 January 2009–31 July 2012 and the three routes in the Pontino Archipelago operated in the period 1 January 2009–31 May 2011) complies with the conditions of the 2011 SGEI Framework. As mentioned in recital 351, since aid was granted before 31 January 2012 (i.e. the entry into force of the 2011 SGEI Framework), the 2011 SGEI Framework remains applicable, with the exception of the provisions of points 14, 19, 20, 24, 39 and 60.

⁽²¹⁴⁾ The Initial Convention was prolonged three times: on 30 December 2008 (until 31 December 2009), on 25 September 2009 (until 30 September 2010), and on 5 August 2010 (until 31 July 2012).

⁽²¹⁵⁾ This is the case of passenger traffic on the routes Capri/Sorrento in 2009 and 2010 and Capri/Naples in 2009, 2010, 2011 and 2012.

⁽²¹⁶⁾ As regards the first and second prolongation (30 December 2008 and 25 September 2009), Italy did not provide data for the two years preceding the relevant prolongation. As regards the third prolongation, (5 August 2010), Italy provided data for the years 2009 and 2010, but not for 2008. In any event, for those years the only meaningful data are those concerning the routes Capri/Sorrento and Capri/Naples, whereas for the other routes they were provided in aggregated form, i.e. for the route Ischia/Procida/Naples without separating the segments Ischia/Procida, Procida/Naples and Ischia/Naples, and for the route Ischia/Procida/Pozzuoli without separating the segment Procida/Pozzuoli. As regards 2010, with the exception of the routes Capri/Sorrento and Capri/Naples, data were provided in aggregated form.

9.3.1. *Genuine SGEI*

- (356) According to point 12 of the 2011 SGEI Framework, '[t]he aid must be granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty'. Point 13 clarifies that 'Member States cannot attach specific PSO to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard'. Finally, point 56 of the 2011 SGEI Framework refers to the 'Member State's wide margin of discretion' regarding the nature of services that could be classified as being SGEI.
- (357) The assessment of whether SGEI are genuine must also be performed in light of the SGEI Communication (see recitals 170 and 186), Regulation (EEC) No 3577/92 (see recitals 173, 174 and 175) and the case-law (see recitals 176 and 177). Therefore, the Commission must assess for the prolongation period:
- (a) whether there was **user demand**;
 - (b) whether that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities (**existence of a market failure**);
 - (c) that simply having recourse to PSO was insufficient to remedy that shortage (**least harmful approach**).

User demand

- (358) Under the prolonged Initial Convention, Caremar was entrusted with the provision of scheduled maritime transport services of passengers and vehicles (including rescue vehicles), at predetermined rates, by means of ferries and fast vessels (which means TMV in case of mixed services or hydrofoil in case of passengers only services) according to the schedules indicated in the maritime transport programme set out by the Region of Campania, as presented in Section 3.3.1. The PSO imposed on Caremar concerned the ports served, the type of vessels assigned to the maritime connections operated under the public service regime, the frequency, time-schedule and continuity of the service, the quality of the service, and the maximum fares to be charged (see recitals 40 to 44). The PSO imposed on Caremar at the time of the prolongations (i.e. 1 January 2009, 1 January 2010 and 1 October 2010) were the same as those provided under the Initial Convention (see recital 37).
- (359) The Commission first recalls that Italy has imposed the PSO laid down in the Initial Convention mainly to ensure the territorial continuity between the mainland and the islands and to contribute to the economic development of the islands concerned, through regular and reliable maritime transport services. The Commission already concluded (see recital 242) that these are indeed legitimate public interest objectives.
- (360) As regards user demand, the considerations expressed already at recitals 243 and 244 apply also to the prolonged Initial Convention. In fact, the detailed route-by-route statistics provided by Italy about the passengers, vehicles and freight transported by Caremar in the years from 2009 to 2012 show that the routes serviced by Caremar were characterised by a significant demand which remained steady over time (see recital 174).

Existence of market failure

- (361) As regards the existence of a market failure on the routes serviced by Caremar in the Gulf of Naples, for the reasons explained in recitals from 362 to 366 below, the Commission considers that the conclusion reached by the Commission with regard to the competitive situation existing at the time of entrustment of the new public service contract (see recital 259) applies also to the period 2009–2012, i.e. at the time of the prolongations of the Initial Convention.
- (362) First, the public service routes operated by Caremar during the prolonged Initial Convention in the Gulf of Naples (i.e. in the period from 1 January 2009 to 31 July 2012) were the same as those entrusted to it under the new public service contract (see recitals 34(a) and 84) and that the PSO imposed on Caremar in that period differed only very marginally from those imposed under the new public service contract in terms of frequencies and timetables, as outlined in recital 39. In fact, both under the new public service contract and the prolonged Initial Convention, Caremar was subject to the same obligations of continuity, frequency, regularity, punctuality, obligations concerning the number, type and capacity of the vessels assigned to the PSO routes, tariff obligations, and obligations of quality of the service.

- (363) In terms of frequencies and timetables, the relevant maritime transport programme for Caremar on those routes for the period from 16 January 2012 until 31 July 2012 had been set out by the Region of Campania in Regional Executive Decision No 443 of 9.8.2011 as amended by Regional Executive Decision No 857 of 30.12.2011. That programme was the same as the one on the basis of which the obligations under the new public service contract were imposed (see recitals 83 to 85). Between 1 January 2009 and 15 January 2012, Caremar was subject to the maritime transport programme set out by the Region of Campania in Regional Executive Decision No 548 of 1 April 2007 which had been adopted under the Initial Convention (see recital 36). The Commission observes that the differences between the 2007 programme and the 2011 programme (as outlined in recital 39) were very marginal and dictated by the need to make Caremar's services the closest as possible to the maritime transport needs of the local populations. As explained by Italy (recitals 178 to 181), the procedural framework for the definition by the Region of Campania of the PSO in the maritime transport sector is set by Article 17 of the Regional Law No 3 of 28 March 2002 which provides for a regular verification, and if necessary update, of the scope of the PSO imposed on maritime transport operators, including Caremar. Accordingly, in 2010 the Region of Campania launched a public consultation on the scope of the PSO operated by Caremar under the prolonged Initial Convention, which led to an update of frequencies and timetables, not only of Caremar but also of all PSO service providers in the Gulf of Naples, approved by Regional Executive Decision No 443 of 9 August 2011. That update was further marginally adjusted by Regional Executive Decision No 857 of 30 December 2011 as regards Caremar's services, in order to take in to account further requests commencing from the Municipality of Procida, which considered not to be sufficiently serviced under the maritime transport programme approved by Regional Executive Decision No 443 of 9 August 2011.
- (364) As explained by Italy (see recital 184), the competitive situation of the eight routes operated by Caremar in the Gulf of Naples in the period 1 January 2009–15 January 2012, i.e. at the time of the prolongations of the Initial Convention, was very similar to that in the period 2012–2015, i.e. before the entrustment of the new public service contract, assessed in recitals from 249 to 259. By way of exception, as mentioned by Italy (recital 183), between the end of December 2010 and 1 October 2011, Caremar was the only maritime operator servicing under PSO the routes Capri/Sorrento, Capri/Naples, Ischia/Naples, Ischia/Procida/Naples, Ischia/Procida/Pozzuoli, Ischia/Procida, and Procida/Naples; whereas Gestour and Procida Lines operated under PSO the route Procida/Pozzuoli, given that all other shipping operators refused to provide the services under PSO in that period. In that period, the Region of Campania had to increase the scope of the PSO imposed on Caremar (in terms of frequencies and timetables) in order to cope with the sudden interruption of the services provided by some of Caremar's competitors. That sudden interruption is a clear indication that the PSO services provided by Caremar's competitors could not be fully relied on by the local population.
- (365) Considering the above and based also on the information provided by Caremar's competitors in their comments (see recitals 150, 151, 161 and 168), the Commission observes the following:
- (a) As regards the route **Capri/Sorrento**, in the period 2009–2011 Caremar was the only operator providing mixed services on the route throughout the year. Indeed, Caremar's competitors either provided only maritime passenger transport services (this was the case of NLG and Alimar⁽²¹⁷⁾) or operated also mixed services but only in the summer period (this was the case of SNAV⁽²¹⁸⁾ and Aligruson⁽²¹⁹⁾). Given that the services provided by SNAV and Aligruson remained unchanged over the period 2009–2012 (see recital 185(a)), and that Caremar's services changed only very marginally between 2009 and 2012, mainly due to limited adjustments to the timetables (see recital 39(a)), the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.

⁽²¹⁷⁾ Alimar operated only in 2009 and 2010.

⁽²¹⁸⁾ As regards the mixed services, SNAV was authorised to operate ten daily sailings by TMV (six from Capri to Sorrento at 7:35 am, 9:15 am, 12:10 am, 15:55, 17:40, and 18:05; and four from Sorrento to Capri at 8:10 am, 11:25 am, 13:50, 16:35) but only in the summer period (in particular, from 1 April to 3 November).

⁽²¹⁹⁾ As regards the mixed services, Aligruson was authorised to operate four daily sailings (two from Sorrento to Capri at 11:30 am and 14:00; and two from Capri to Sorrento at 12:30 and 18:05) but only in the summer period.

- (b) As regards the route **Capri/Naples**, in the period 2009–2011 Caremar was the only operator providing mixed services on the route throughout the year. Indeed, Caremar's competitors on the route (SNAV, NLG, Neapolis and Metrò del Mare) provided only maritime passenger transport services and not always throughout the year (see recital 185(b)). As explained in recital 252, the passenger services could not be considered an alternative to the mixed services because they left unserved an important part of users' demand, i.e. demand for transport of vehicles (including ambulances) and for postal services. Moreover, in 2009 and 2010, there were no passenger services provided daily throughout the year at market conditions (only under PSO). In 2011 that market operators started operating some services at market conditions throughout the year, notably five sailings by Neapolis (from Capri at 8:50 am, 14:10, and 17:30; and from Naples at 10:00 am, 16:05) and two sailings by NLG (from Capri at 9:35 am and at 11:35 am), which alone however were insufficient to guarantee continuity between Capri and the mainland. First, none of those services was in the early morning (i.e. between 5:00 am and 8:30 am), which is a time of the day where services are very much needed by commuters. Second, the market services catered mainly for touristic demand as they were at times of the day not suitable for students and workers. As a matter of fact, the majority of the sailings provided by Caremar's competitors throughout the year were subject to PSO, which suggests that in principle the market would not have provided them absent a formal imposition by the public authorities. As explained by Italy, however, even the imposition of PSO did not guarantee the service as it is shown by the fact that, between the end of December 2010 and 1 October 2011, Caremar's competitors had stopped providing the PSO services on several routes, including the route Capri/Naples (see recital 183(b)). Against this background, the Commission considers Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.
- (c) As regards the direct route **Ischia/Naples**, in the period 2009–2011 Caremar provided mixed services by ferry in competition with Medmar and passenger services by hydrofoil in competition with Alilauro. The competitive situation described by Italy (see recital 185(c)) shows that the services provided by Caremar's competitors were not sufficient to satisfy the public needs of the local population. First, Caremar's competitors did not provide any service at market terms on this direct route and the services provided under PSO were either only in summer (this was the case of the mixed services provided by Medmar from 1 January 2009 to 30 September 2011) or in any event at different times of the day than the ones serviced by Caremar⁽²²⁰⁾. For this reason, the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services and passenger services on this route. This conclusion remains valid even when considering the direct connection Ischia/Naples would be substitutable with the one with stopover in Procida, despite the different length of the journey⁽²²¹⁾. In fact, as explained in recital 365(d), the services provided by Caremar's competitors on the route Ischia/Procida/Naples were not sufficient to guarantee sufficient regular connections between Ischia and Naples.
- (d) As regards the route **Ischia/Procida/Naples**, in the period 2009–2011 Caremar was the only shipping operator providing a sufficient number of daily (mixed and passenger) transport services throughout the year on the route. As regards the mixed transport services, there was no shipping company operating on the route throughout the year at market terms; in fact, Medmar, which was the only other company providing mixed services on the route, operated under PSO, and, according to Italy, those PSO, which were in any event at different times of the day than those serviced by Caremar, were not complied with (see recital 185(d)). As regards the passenger transport services, the only other company providing passenger services on the route,

⁽²²⁰⁾ As regards the mixed services provided throughout the year, from Ischia Caremar operated at 8:45 am, whereas (as of 1 October 2011) Medmar operated at 17:00 in summer and at 16:35 in winter; from Naples Caremar operated at 16:05 and 20:25 whereas (as of 1 October 2011) Medmar operated at 8:35, 14:10 and 18:30. As regards the passenger services provided throughout the year, from Naples Caremar operated from 1 January 2009 to 30 September 2011 at 7:50 am and 18:15, whereas Alilauro operated from 1 January 2009 to 30 September 2011 at 9:35 and as of 1 October 2011 at 7:35 am and 20:10; from Ischia, Caremar operated from 1 January 2009 to 30 September 2011 at 6:50 am and 8:50 am, whereas Alilauro did not operate throughout the year from Ischia in the period from 1 January 2009 to 30 September 2011. As of 1 October 2011, when Alilauro started providing PSO services from Ischia to Naples throughout the year, Caremar did not operate passenger transport services from Ischia to Naples.

⁽²²¹⁾ As regards the mixed services by ferry, the stopover in Procida adds about 15 minutes to the journey (which is of 1h25 on the direct route Ischia/Naples). As regards the passenger services by hydrofoil, the stopover in Procida adds almost 30 minutes to the journey (which is of 45 minutes on the direct route Ischia/Naples).

SNAV, provided only one daily sailing throughout the year (all other sailings being concentrated in the summer period), namely, the one departing from Ischia (Casamicciola) at 9:45 am and from Procida at 10:05 am. That service was clearly insufficient to cater for the maritime transport needs of the local population, considering that they were at a time of the day which did not suit the needs of commuters (mainly workers and students) from Ischia and that it was only in one direction. By contrast, as mentioned in recital 39(d), from 1 January 2009 to 31 September 2011, Caremar had to ensure eight daily passenger services throughout the year and as of 1 October 2011 ten daily passenger services throughout the year at times of the day suitable to commuters ⁽²²²⁾, with the further addition of two sailings in the period from 1 June to 30 September ⁽²²³⁾. For this reason, the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services and passenger services on this route.

- (e) As regards the route **Ischia/Procida/Pozzuoli**, in the period 2009–2011 Caremar provided mixed services by ferry in competition with Medmar on that route. The competitive situation described by Italy (see recital 185(e)) shows that the services provided by Medmar with stopover in Procida were not sufficient to satisfy the public needs of the local population given their very limited frequency (once per day throughout the year under PSO, with an additional sailing from Ischia at 7:30 am during the school period at market terms) and their concentration in the early morning, which left totally uncovered the rest of the day ⁽²²⁴⁾. For this reason, the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of mixed maritime transport services on this route.
- (f) As regards the route **Ischia/Procida**, the Commission observes that, in the period 2009–2011 Caremar did not have to provide any service in addition to those already provided on the routes Ischia/Procida/Pozzuoli and Ischia/Procida/Naples (see recital 39(f)). Therefore, there is no need to assess the competitive situation of this segment separately from the competitive situation already described in recitals 365(d) and 365(e) as regards the routes Ischia/Procida/Naples and Ischia/Procida/Pozzuoli.
- (g) As regards the route **Procida/Pozzuoli**, in the period 2009–2011 Caremar provided passenger services by hydrofoil in competition with Procida Lines, Gestour and Ippocampo which operated mixed services by ferry on that route. However, Caremar's services and the services provided by Caremar's competitors were not substitutable given that the sailings by hydrofoil are much faster than those operated by ferry (50 minutes travel by ferry against 15 minutes travel by hydrofoil). In any event, irrespective of the degree of substitutability of passenger services and mixed services, the services provided by Caremar's competitors throughout the year, notably by Gestour and Procida Lines because Ippocampo operated only in the summer period, were provided at different times of the day than those serviced by Caremar ⁽²²⁵⁾ (see recital 185(g)). For this reason, the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of passenger transport services on this route.

⁽²²²⁾ Namely, from Naples at **8:50** am (at 9:55 until 1 October 2011), at **11:45** am, at **13:10**, at **15:10**, and at **18:15**. From Ischia at **7:30** am, at **10:10** am, at **13:05** (at 12:00 am until 1 October 2011, at **14:30** (at 14:15 until 1 October 2011), at **16:30** (at 16:15 until 1 October 2011).

⁽²²³⁾ Namely, from Ischia to Procida and subsequently to Naples at **19:35** (with departure at 20:00 from Procida); and from Naples to Procida and subsequently to Ischia at **20:55** (with departure at 21:30 from Procida).

⁽²²⁴⁾ From 1 January 2009 to 30 September 2011, Medmar provided only one service at market terms, namely from Ischia at **7:30** am during the school period (from 16 September to 14 June) and two services under PSO throughout the year, namely from Ischia (Casamicciola) at **2:30** am; and from Pozzuoli at **4:10** am.

⁽²²⁵⁾ From Procida, Caremar operated throughout the year at 8:25 am (8:10 am as of 1 October 2011), whereas Gestour operated throughout the year at 6:50 am, 9:30 am, 11:20 am; 14:05 (until 30 September 2011), 17:05 (until 30 September 2011) and 18:55, and Procida Lines operated at 5:50 am, 7:50 am, 10:45 am, 12:40 am, 15:25, 17:30, 19:15). From Pozzuoli, Caremar operated at 8:55 am (8:50 am as of 1 October 2011), whereas Gestour operated throughout the year at 6:00 am, 8:30 am, 10:35 am, 12:55 am, 15:05 (until 30 September 2011), 17:55 (until 30 September 2011) and 19:50, and Procida Lines operated at 5:05 am, 7:05 am, 9:25 am (until 30 September 2011), 11:50 am, 13:35, 16:25, 18:25, and 20:00).

- (h) As regards the route **Procida/Naples**, in the period 2009–2011 Caremar provided passenger services by hydrofoil in competition with SNAV and Medmar. However, until 30 September 2011, Medmar did not provide any sailings in addition to those provided on the route Ischia/Procida/Naples, and SNAV provided only one sailing throughout the year in addition to those already provided on the route Ischia/Procida/Naples (from Procida at 7:35 am). From 1 October 2011, Medmar provided one daily sailing in addition to those provided on the route Ischia/Procida/Naples (from Naples at 00:20 am) and SNAV kept providing only one daily sailing throughout the year in addition to those already provided on the route Ischia/Procida/Naples (that time from Naples at 12:30 am). All those sailings were provided under PSO and at times of the day different from those serviced by Caremar ⁽²²⁶⁾ (see recital 185(h)). Moreover, even considering the services provided by SNAV and Medmar on the route Ischia/Procida/Naples, there was no shipping operator providing passenger services on the route at market terms throughout the year and Medmar's and SNAV's PSO passenger services were leaving uncovered some timeslots of the day important to ensure the connectivity of daily commuters (between 6:00 and 7:00 am and between 8:00 am and 10:00 am from Procida; and between 7:00 and 8:00 am and between 17:00 and 18:00 from Naples). For these reasons, the Commission considers that Italy did not make a manifest error by considering that there was a market failure as regards the provision of passenger transport services on this route.

- (366) Having regard of the above, the Commission considers that the PSO laid down in the prolonged Initial Convention for the operation of the routes in the Gulf of Naples are justified by a genuine public need to ensure territorial continuity. In fact, at the moment of the prolongations of the Initial Convention (2009, 2010), market forces alone (even with the imposition of PSO) were insufficient to meet the public service needs identified by Italy, in terms of frequency, continuity, regularity.

- (367) As regards the routes in the Pontino Archipelago, as mentioned above (see recital 34(b)), Caremar provided passenger and mixed services on the routes Ponza/Formia, Ponza/Anzio and Formia/Ventotene until 31 May 2011. The PSO imposed on Caremar on the routes in the Pontino Archipelago concerned the ports served, the type and capacity of the vessels assigned to the maritime connections operated under the public service regime, the frequency of service and the maximum fares to be charged (see recitals 36(d), 36(e), 36(f), and from 40 to 44).

- (368) The Commission notes that, between 1 January 2009 and 31 May 2011, two other operators, Vetur and/or SNAP, offered a passenger service on the routes Ponza/Formia, Ponza/Anzio and Formia/Ventotene. As explained by Italy, however, Vetur's and SNAP's services could not be considered substitutable to those offered by Caremar in terms of continuity and regularity (see recital 186).

- (369) In particular, on the **Ponza/Formia** route, Vetur operated throughout the year a daily passenger service by hydrofoil under PSO; whereas Caremar operated throughout the year not only one daily passenger service by hydrofoil but also two daily mixed services by vessels (see recital 36(d)). The services provided by Vetur were hence not covering the transport of vehicles and freight (e.g. postal effects) which, according to Italy, was essential to ensure a daily connection with the mainland for commuters travelling with their vehicle. As regards passenger services, Italy explained (see recital 185(a)) that Caremar was required to maintain the vessels on the island overnight in order to ensure the first sailing of the day and guarantee a daily connection with the mainland for study and work reasons. The availability of vessels on the island overnight was also meant to ensure maritime transport to the mainland in case of a medical emergency that could not be satisfied by helicopter. Therefore, the Commission concludes that Italy did not make a manifest error by considering that there was a market failure on this route.

⁽²²⁶⁾ Namely, from Procida to Naples (40 minutes travel) at **6:35** am, and at **9:20** am (at 9:25 am between 1 October 2011 and 16 January 2012); and from Naples to Procida (40 minutes travel) at **7:30** am and at **17:45** (at 17:30 between 1 October 2011 and 16 January 2012).

- (370) On the **Ponza/Anzio** route, Vetur operated a daily passenger service by hydrofoil at market terms during the high season and on Saturdays during the low season under PSO, whereas Caremar provided a daily high-speed passenger service in the high season from Monday to Saturday and two daily mixed services throughout the year on Sundays and holidays (see recital 36(e)). Italy explained (see recital 185(b)) that the PSO was justified on social and economic development grounds and aimed at ensuring passenger with vehicles the possibility to have a roundtrip from/to Ponza throughout the year at least on Sundays and holidays (e.g. in order to allow family visits). The Commission observes that the services provided by Vetur were not covering the public service need of transport of vehicles and freight (e.g. postal effects). Moreover, the passenger services provided by Vetur in the high season at market conditions predominantly targeted the tourist sector, whereas Caremar's presence was meant to cover resident's traffic, also by ensuring accessible fares. Therefore, the Commission concludes that Italy did not make a manifest error by considering that there was a market failure on this route.
- (371) On the **Formia/Ventotene** route, Vetur provided one daily passenger service by hydrofoil during the low season and an additional sailing every Monday during the high season, both under PSO; and SNAP provided one daily passenger service during the high season by hydrofoil at market terms. By contrast, Caremar operated two daily mixed services and two ⁽²²⁷⁾ daily passenger services all year-round (see recital 36(f)). The services provided by Vetur and SNAP were not covering the public service need of transport of vehicles and freight (e.g. postal effects) and, as regards the passenger transport, were insufficient to ensure continuity with the mainland given their limited frequency and regularity. As explained by Italy (see recital 185(c)), Caremar's services enabled the residents to travel to the mainland for professional or study reasons. Moreover, as Caremar's vessels remained overnight on the island, they ensured maritime transport to the mainland in case of a medical emergency. Therefore, the Commission concludes that Italy did not make a manifest error by considering that there was a market failure on this route.

Least harmful approach

- (372) The Commission observes that, in light of the planned privatisation of Caremar and in order to ensure the continuity of the public services that were operated under the Initial Convention, Italy decided to extend the Initial Convention unaltered (except for the change in compensation methodology applicable from 2010 onwards).
- (373) The Commission accepts that user demand could not have been met by relying only on the non-compensated PSO imposed on Caremar's competitors for the routes at hand. In fact, for the reasons already mentioned above (recitals from 262 to 265, the PSO regime that was in place in the Gulf of Naples was in no way comparable to the PSO imposed on Caremar under the prolonged Initial Convention. It is worth recalling that, between the end of December 2010 and 1 October 2011, Caremar's competitors (with the exception of Gestour and Procida Lines) stopped providing the services under non-compensated PSO. In the absence of Caremar, most of the routes in the Gulf of Naples would have remained unserved (see recital 183(b)). As regards the routes in the Pontino Archipelago, the Commission observes that the offer provided by the other operators on the routes did not meet (all) the requirements of regularity, continuity, capacity and price and that the operation of most (if not all) routes, especially in the low season, is loss-making so that without public service compensation they would likely not be operated at all. In addition, the Commission accepts that, in view of the process to privatise Caremar, prolonging the Initial Convention was the only way to guarantee the continuity of the public services pending Caremar's privatisation.

Conclusion

- (374) Therefore, the Commission concludes that Italy did not make a manifest error when defining the services entrusted to Caremar as SGEI for the routes identified in recitals 365 and from 367 to 371. The doubts expressed by the Commission in the 2011 and 2012 Extension Decisions are hence dispelled.

⁽²²⁷⁾ Four daily services on Mondays.

9.3.2. *Need for an entrustment act specifying the PSO and the methods of calculating compensation*

- (375) As indicated in the Section 2.3 of the 2011 SGEI Framework, the concept of SGEI within the meaning of Article 106 TFEU means that the undertaking in question has been entrusted with the operation of SGEI by way of one or more official acts.
- (376) These acts must specify, in particular: (a) the precise nature of the PSO and its duration; (b) the undertaking and territory concerned; (c) the nature of the exclusive rights; (d) the parameters for calculating, controlling and reviewing the compensation; and (e) the arrangements for avoiding and repaying any overcompensation.
- (377) In its 2011 Opening Decision and 2012 Extension Decisions, the Commission expressed doubts as to whether the entrustment act provided for a comprehensive description of the nature of Caremar's PSO during the prolongation period. Nevertheless, the Commission also recalled that different elements of the entrustment might be placed in several acts without putting into question the appropriateness of the definition of the obligations. During the extension period, Caremar's entrustment act included the Initial Convention (as amended and extended over time), Regional Executive Decision No 548 of 1 April 2007 identifying the PSO imposed on Caremar in terms of type of vessels, frequencies and timetables until 30 September 2011, by Regional Executive Decision No 443 of 9 August 2011 identifying the PSO imposed on Caremar in terms of type of vessels, frequencies and timetables from 1 October 2011 until 15 January 2012, and by Regional Executive Decision No 857 of 30 December 2011 identifying the PSO imposed on Caremar in terms of type of vessels, frequencies and timetables from 16 January 2012 until 31 July 2012 (see recitals 36 and 38), a series of ad hoc decisions by Italy, Deliberation 111/2007 and Law 166/2009.
- (378) Against this background, the Commission first notes that the prolonged Initial Convention which form Caremar's entrustment act, remained fully applicable until 31 July 2012 (see recital 348).
- (379) According to the prolonged Initial Convention, the five-year plans specify the routes and the ports to be served, the type and capacity of vessels to be used for the maritime connections in question, the frequency of the service and the fares to be paid, including subsidised fares, in particular for residents of island regions. The Commission observes that, in 2007, i.e. before the first prolongation of the Initial Convention, the Region of Campania adopted by means of Regional Executive Decision No 548 of 1 April 2007 the five-year plan for the period 2007-2011, which continued to apply without any changes as regards the scope of the PSO until 30 September 2011. That plan was therefore applicable at the time of the first prolongation of the Initial Convention (in December 2008), of the second prolongation of the Initial Convention (in September 2009) and of the third prolongation of the Initial Convention (in August 2010). The five-year plan for the period 2011-2015 was adopted by the Region of Campania by Regional Executive Decision No 443 of 9 August 2011, and as modified by Regional Executive Decision No 857 of 30 December 2011, covered the period from 1 October 2011 until the end of 2015. The 2011-2015 five-year plan applied without any changes to the period covered by the prolonged Initial Convention from 1 October 2011 until its expiry on 31 July 2012. On this basis, the Commission concludes that the PSO that Caremar had to comply with during the prolongation period were defined in a sufficiently clear way.
- (380) The Commission already noted in recitals 239 and 240 of the 2011 Opening Decision that the parameters necessary for the calculation of the amount of compensation have been established in advance and are clearly described. In particular, for the year 2009 the prolonged Initial Convention (see recitals 48 to 52) contains an exhaustive and precise list of the cost elements to be taken into account as well as the methodology of calculation of the return on invested capital for the operator. For the period from 1 January 2010 to 31 December 2012, the relevant methodology is set out in Deliberation 111/2007 (see recital 53). More specifically, Deliberation 111/2007 details the cost elements taken into account and the return on invested capital. The prolonged Initial Convention ensured that the compensation was based on the actual costs and revenues incurred for the delivery of the public service. In this way, overcompensation could be detected and easily avoided. Where applicable, the State could then recover the overcompensation from Caremar.

- (381) On this basis, the Commission considers that for the period of prolongation of the Initial Convention the entrustment acts laid down a clear definition of the PSO, the duration, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and repaying any overcompensation, as required under the 2011 SGEI Framework.

9.3.3. *Duration of the period of entrustment*

- (382) As indicated in point 17 of the 2011 SGEI Framework, '[...] the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.'
- (383) The Commission observes that the prolongations of the Initial Convention were necessary to ensure the continuity of the public service pending the completion of the privatisation.
- (384) Considering that the duration of the prolongations of the Initial Convention was justified by the need to privatise Caremar and that those prolongations did not make the duration of the period of entrustment of the SGEI exceed the period required for the depreciation of the vessels used by Caremar for the provision of the SGEI (which can exceed 25 years), the Commission concludes that both the prolonged Initial Convention complies with point 17 of the 2011 SGEI Framework.

9.3.4. *Compliance with Directive 2006/111/EC*

- (385) According to point 18 of the 2011 SGEI Framework, '[...] aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ⁽²²⁸⁾'.
- (386) Furthermore, point 44 of the 2011 SGEI Framework requires that: 'Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31.'
- (387) Italy has confirmed that Caremar has only been active in providing the public services under the prolonged Initial Convention. Therefore, Caremar does not qualify as 'undertaking required to maintain separate accounts' under Directive 2006/111/EC ⁽²²⁹⁾ and the transparency requirements provided under Article 1(2) of Directive 2006/111/EC do not apply as they concern only undertakings that carry also other activities than the services of general economic interest with which an undertaking is entrusted.
- (388) As regards the transparency requirements provided under Article 1(1) of Directive 2006/111/EC, the Commission observes that from the prolonged Initial Convention emerge clearly the amount of public funds made available by the public authorities to Caremar and the use to which those public funds were actually put.

⁽²²⁸⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

⁽²²⁹⁾ Under Article 2(1)(d) of Directive 2006/111/EC, 'undertaking required to maintain separate accounts' means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) [106(1)] of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) [106(2)] of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities.

- (389) Therefore, the Commission considers that point 18 of the SGEI Framework is satisfied and that point 44 of the 2011 SGEI Framework is not applicable.

9.3.5. Amount of compensation

- (390) Point 21 of the 2011 SGEI Framework states that '[...] the amount of the compensation must not exceed what is necessary to cover the net cost ⁽²³⁰⁾ of discharging the public service obligations, including a reasonable profit'.

- (391) In the case at hand, in particular as far as the prolongation of the Initial Convention is concerned, since the compensation constitutes illegal aid granted before its entry into force, point 69 of the 2011 SGEI Framework specifically provides that, for the purpose of the State aid assessment, the use of the net avoided cost methodology pursuant to point 24 of the 2011 SGEI Framework is not required. Instead, alternative methods for calculating the net cost necessary to discharge the PSO, such as the methodology based on cost allocation, can be used. Under the latter methodology, the net cost would be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the PSO, as specified and estimated in the entrustment act. Points 28 to 38 of the 2011 SGEI Framework set out in more detail how this methodology should be applied.

- (392) In its 2011 Opening Decision and 2012 Extension Decision, the Commission expressed doubts regarding the risk premium of 6,5 %, which applied from 2010 onwards. In particular, the Commission questioned whether this premium reflects an appropriate level of risk, taking into account that *prima facie* Caremar did not seem to assume the risks normally borne in the operation of such services. More specifically, the cost elements for the purpose of calculation of the compensation include all costs involved in the provision of the service and variations in e.g. fuel prices have been taken into account. As a result, the Commission considered at that stage that Caremar might have been overcompensated.

- (393) As regards the level of the reasonable profit, the Commission observes that the return on capital was calculated based on a risk premium of 6,5 % using the WACC formula ⁽²³¹⁾. As already observed (see recital 280) this risk premium is fully in line with the risk premium of 6,4 % that was determined by the Member State for the sector using macroeconomic analyses.

- (394) Moreover, the Commission has compared the return on capital invested of 6,5 % that has been applied to Caremar with the median return on capital generated by a benchmark group in 2008 and 2011 (the years before Caremar's separate entrustments). The benchmark group consists of selected ferry operators that offered maritime connections within Italy or between Italy and other Member States ⁽²³²⁾, which the Commission considers to be sufficiently representative of the market situation. The analysis shows that the return on capital applied to Caremar is similar to the median return generated by the companies in the benchmark group. Therefore, a 6,5 % return on capital from an *ex ante* perspective was also in line with the risks it ran when operating public services under the prolonged Initial Convention.

⁽²³⁰⁾ In this context, the net cost means the net cost as determined in accordance with point 25 of the 2011 SGEI Framework or costs minus revenues where the net avoided cost methodology cannot be applied.

⁽²³¹⁾ The risk premium added to the risk-free rate gave the value of the cost of risk capital which is necessary to determine the rate of return on capital calculated on the basis of the WACC.

⁽²³²⁾ In particular, it concerns Minoan Lines Shipping, La Méridionale, Moby, Grandi Navi Veloci, Libertylines, Grimaldi Group, Corsica Ferries and Caronte & Tourist. Other companies of the former Tirrenia Group (e.g. CIN, Laziomar, Siremar and Toremar) have been excluded from the benchmark group.

- (395) As regards the question whether this premium reflects the level of risk borne by Caremar in the operation of the SGEI, the Commission observes that variations in fuel prices could be taken into account only by means of a possible annual adjustment of the fare ceiling. Therefore, the calculation of the compensation not necessarily covered an increase in fuel prices if that increase had not been translated in higher fares. This is confirmed by the fact that, as shown in Table 12, Caremar was undercompensated in 2011 and 2012, as a result of a significant increase of the fuel cost and a reduction in passenger traffic resulting from the economic crisis in those years. Therefore, Caremar was exposed to risks during the relevant period which did not enable it to benefit from any profit margin in practice.
- (396) The Commission finally notes that the submitted Deliberation 111/2007 takes into account certain market values applicable in the maritime cabotage sector. It prescribes the eligible costs for the purposes of PSO, as well as the calculation principles concerning the rate of return on capital on the basis of the information, conditions and risks relevant for this particular sector.
- (397) In view of the above, the Commission considers that the 6,5 % return on capital is reasonable.
- (398) In this context, on the basis of the route-by-route accounts submitted by Italy and as aggregated in Table 12, the Commission verified that for the periods 2009 to July 2012 (Initial Convention) the actual public service compensation paid to Caremar did not exceed the eligible compensation including the 6,5 % return on capital. Actually, Caremar's operating results as audited for the whole period (2009 to 2012) show a negative result:

Table 12

Net cost of the public service operated by Caremar for the period 2009-July 2012

(EUR)

Caremar	2009	2010	2011	2012	Grand total
Total revenues	26 854 000	26 139 000	24 362 000	13 348 000	90 703 000
- Total costs	54 349 000	52 773 000	47 166 000	24 908 000	179 196 000
- Amortizations	2 445 000	2 060 000	1 817 000	827 000	7 149 000
= Net cost of public service	- 29 940 000	- 28 694 000	- 24 621 000	- 12 387 000	- 95 642 000
+ Return on capital (6,5 %)	- 924 105	- 547 000	- 425 000	- 314 000	- 2 210 105
= Eligible for compensation	- 30 864 105	- 29 241 000	- 25 046 000	- 12 701 000	- 97 852 105
+ Actual compensation	32 474 450	29 869 832	24 018 645	11 473 000	97 835 927
= Over/under compensation	1 610 345	628 832	- 1 027 355	- 1 228 000	- 16 178

- (399) Point 49 of the 2011 SGEI Framework requires Member States to ensure that the compensation granted for operating SGEI does not result in undertakings receiving overcompensation (as defined in point 47 of that Framework). Among others, Member States must provide evidence upon request from the Commission. Furthermore, they must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. This ensures that the amount of compensation does not exceed the net costs of the service (to which in principle a return on capital is added).

- (400) Italy confirmed, upon Commission's request, that the amount of compensation granted to Caremar was verified, pursuant to Deliberation 111/2007 that sets a verification mechanism at the end of each regulatory period of three years, for the financial years 2010, 2011 and 2012 (until 1 August 2012). Furthermore, Italy submitted that the 2009 financial year was also verified, for reasons of transparency and accountability, although Deliberation 111/2007 did not apply yet. Following these verifications, Italy detected undercompensation, as shown in Table 12.
- (401) In view of the above, the Commission considers that those measures are sufficient to avoid and detect any possible overcompensation. Therefore, the amount of compensation granted to Caremar during the prolongation of the Initial Convention has not led to overcompensation pursuant to Section 2.8 of the 2011 SGEI Framework.

9.3.6. *The berthing priority*

- (402) Article 19-ter, paragraph 21, of Law 166/2009 clearly specifies that the berthing priority was necessary to guarantee the territorial continuity with the islands and in light of the PSO of the companies of the former Tirrenia Group, including Caremar. Indeed, if there were no priority berthing for companies entrusted with PSO, these may have to wait their turn before docking and thereby incur delays, which would defeat the purpose of ensuring reliable and convenient connectivity to the consumers. A regular timetable is indeed necessary to satisfy mobility needs of the islands' population and to contribute to the economic development of the islands concerned. Furthermore, the berthing priority is necessary to ensure that ports allocate the berths and berthing times in such a way to enable the public service operator to respect its PSO.
- (403) Against this background, the Commission considers that this measure was awarded to enable Caremar to perform its PSO, which constitute a genuine SGEI (see section 9.3.1). Furthermore, Italy has confirmed that the berthing priority is only applicable to services provided under the public service regime.
- (404) The Commission has already assessed in detail the compatibility of the SGEI and the related compensation for Caremar during the prolongation of the Initial Convention (see Sections 9.3.1 to 9.3.5). The Commission hence considers that its compatibility assessment of the berthing priority can be limited to establishing whether or not this measure could result in overcompensation.
- (405) The Commission considers that any possible monetary advantage from the berthing priority would be limited (see recital 225). As a result, also the risk of overcompensation stemming from the measure would be limited. In addition, to the extent that this measure would reduce the operating costs or increase the revenues of the public service operator, these effects would be fully reflected in the operator's internal accounts. Therefore, the overcompensation checks that have been applied to Caremar as described in Section 9.3.5 are also fit to detect any possible overcompensation resulting from the berthing priority.
- (406) The Commission therefore concludes that the berthing priority, which was inextricably linked with the public service performed by Caremar during the prolongation of the Initial Convention, is compatible with the internal market on the basis of Article 106(2) TFEU and the 2011 SGEI Framework.

9.3.7. *Conclusion on the compatibility*

- (407) Based on the assessment in recitals 347 to 406, the Commission concludes that the compensation granted to Caremar for the provision of the maritime services under the prolonged Initial Convention in the Gulf of Naples in the period from 1 January 2009 to 31 July 2012 and in the Pontino Archipelago from 1 January 2009 until 31 May 2011, together with the berthing priority, complies with the applicable conditions of the 2011 SGEI Framework and is therefore compatible with the internal market under Article 106 TFEU.

10. CONCLUSION

(408) On the basis of the foregoing assessment, the Commission has decided that the public service compensation granted to Caremar under the prolonged Initial Convention is compatible with the internal market under Article 106 TFEU. Furthermore, since the berthing priority is inextricably linked with the performance of the SGEI by Caremar, this measure is also compatible with the internal market under Article 106 TFEU.

(409) Further, the Commission finds that the following measures do not constitute State aid within the meaning of Article 107(1) TFEU:

- the compensation granted to Caremar for the provision of maritime services under the new public service contract for the period from 16 July 2015 to 15 July 2024, bundled with the Caremar business and the berthing priority to Caremar, because it complies with the four *Altmark* criteria;
- Caremar's possible use of funds to upgrade ships for liquidity purposes, since Caremar did not make use of these funds for the said purposes;
- the fiscal exemptions related to the privatisation process of Caremar and the possibility to use FAS resources in order to meet liquidity needs as laid down by Law 163/2010,

HAS ADOPTED THIS DECISION:

Article 1

The compensation to Caremar and the berthing priority for the provision of maritime services under the prolongation of the Initial Convention in the period from 1 January 2009 to 31 July 2012 constitute State aid within the meaning of Article 107(1) TFEU. Italy has implemented the aid to Caremar in violation of Article 108(3) TFEU. This aid is compatible with the internal market.

Article 2

The award of the new public service contract for the period from 16 July 2015 to 15 July 2024, including the public service compensation paid on the basis of the latter, bundled with the sale of Caremar business and the berthing priority, does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 3

The possibility to use, on a temporary basis, the financial resources already committed to the upgrade and modernisation of the fleet, to cover pressing liquidity needs, as laid down by Law 163/2010, was not availed of as far as Caremar is concerned. Therefore, it does not constitute State aid to Caremar within the meaning of Article 107(1) TFEU.

Article 4

The fiscal exemptions related to the privatisation process of Caremar as laid down by Law 163/2010 do not constitute State aid to Caremar and its acquirer within the meaning of Article 107(1) TFEU.

Article 5

The possibility to use resources of the *Fondo Aree Sottoutilizzate* to meet liquidity needs, as laid down by Law 163/2010, does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 8 July 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President