



Brussels, 27.04.2018
C(2018) 2435 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of 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, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
--	--	--

**Subject: State Aid SA.49335 (2017/N) and SA.49336 (2017/N) – Italy
Italian Motorways investment plan**

Sir,

1. PROCEDURE

- (1) Following several pre-notification exchanges, the Italian authorities (hereinafter also: "Italy") notified the aid measures in object to the Commission by two letters dated 13 October 2017.
- (2) The Commission sent a request for information pursuant to article 5(1) of the Procedural Regulation¹ on 23 November 2017. Following meetings that took place on 22 December 2017 and on 16 January 2018, Italy submitted the information requested on 8 February 2018.
- (3) On 10 January 2018, Italy provided a language waiver whereby Italy waived its rights deriving from article 342 TFUE, in conjunction with Article 3 of

¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the TFEU (Text with EEA relevance), OJ L 248, 24.9.2015, p. 9–29.

S.E. On. Angelino ALFANO
Ministro degli Affari esteri e della Cooperazione Internazionale
P.le della Farnesina 1
I - 00194 Roma

Regulation No 1/1958, in order to allow the Commission to adopt and notify the decision in English.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The Italian motorways network. Regulatory context.

- (4) The largest part of the Italian motorways network has been built in the second half of XX century. To date, the Italian motorways network covers about 6800 kilometres and is managed by different operators, both public and private ones.
- (5) Private operators manage about 5800 kilometres of network under concession. By means of such a concession, the public conceding authority entrusts a private operator with the execution of works and/or with the subsequent provision and management of services on the constructed highway(s). The entrustment involves the transfer to the concessionaire of the relevant construction and/or operating risk. The conceding authority supervising the construction and operation of the motorways that make the object of the present notification is currently the Ministry of Transport ("MIT").
- (6) Construction and operation of motorways is regulated by a legal framework including laws, decrees and decisions of the *Comitato Interministeriale per la Programmazione Economica* ("CIPE") as well as by the concession contracts approved on the basis of this framework.
- (7) An operator entrusted with the execution of works and/or provision and management of services related to a motorway has to comply with several obligations that derive essentially from the importance of this type of infrastructure for the public. In this respect, relevant changes in the legal framework regulating the construction and operation of motorways occurred in particular in 2006². The aim of this reform was to give more certainty and transparency to the concession relationship, and to better regulate the allocation of risks, the remuneration of the capital invested and the tariff updates.
- (8) Moreover, recent relevant legal provisions are to be found in Legislative Decree of 18 April 2016 N. 50³, as amended, transposing Directives 2014/23/UE, 2014/24/UE and 2014/25/UE concerning concessions and public contracts.
- (9) Under the regulatory framework in place, there are a number of different regulatory and tariff systems that aim at ensuring the financial equilibrium of the concessions. Despite some differences between concessions, mainly due to

² Law Decree 3 October 2006, N. 262, amended and converted into law by Law 24 November 2006, N. 286, further modified by Article 1 paragraph 1030 of Law 27 December 2006, N. 296. Article 2, sets out that all provisions concerning motorway concessionaires need to be included in a "*Convenzione Unica*", that such schemes and amendments (through "*Atti Aggiuntivi*") need to be approved by CIPE within 45 days, through specific deliberations, formalized in an interministerial decree, after hearing the "*Nucleo di consulenza per l'attuazione delle linee guida sulla regolazione dei servizi di pubblica utilità*" (NARS), set out with delibera 8-5-1996, N. 81 (Gazzetta Ufficiale N. 138/1996) .

³ Legislative Decree of 18 April 2016, N. 50 (*Codice dei contratti pubblici*), GU N.91 of 19 April 2016 – Suppl. Ordinario N. 10 and subsequent amendments by Legislative Decree 56/2017 as well as Law 205/2017.

differences in their history, the financing of the investments is normally based on a financial plan under which the expected revenues (through an increase in toll tariffs or other additional revenues) rebalance the investment costs and remunerate the invested capital of the concessionaire. Following this system, *ceteris paribus*, there is a direct relation between the investment and the tariffs that consumers will have to pay to use the motorway.

2.2. The Motorways Investment Plan

- (10) Italy has approached the European Commission services in August 2014 with an initial plan to merge a series of motorway concessions and grant prolongations for a number of years, in order to carry out a series of investments whilst including a cap on the increase in toll tariffs, so as to keep them socially sustainable (hereinafter "the original proposal")⁴.
- (11) After a series of exchanges, Italy revised the original proposal. The revised plan concerns motorways related to three operators: Autostrade per l'Italia SpA ("ASPI"), Società Iniziative Autostradali e Servizi Spa ("SIAS") and Strada dei Parchi SpA. The part of the plan relating to Strada dei Parchi SpA has eventually not been notified, as the technical assessment of the file at national level is still ongoing.
- (12) The present decision therefore concerns only ASPI (for the whole network (SA.49336)), and two motorways run by concessionaires belonging to the SIAS group (SA.49335), A4 Torino-Milano ("SATAP A4") and A33 Asti-Cuneo ("ATCN").
- (13) Italy presented an investment plan that, in its view, allows the completion and modernization of the motorway network whilst keeping sustainable tolls for users. To achieve this objective, the prolongation of the motorway concessions concerned is proposed (through amendments to the concessions and implementing acts - *Convenzioni, Atti Aggiuntivi* and *Piani Economici e Finanziari*): this will allow recouping the costs of the investments to be undertaken over a longer period of time than envisaged in the original concession contracts, whilst keeping the tariffs socially sustainable.
- (14) The aim of the plan notified by Italy (hereinafter simply "the Plan") is twofold. *First*, Italy aims at developing a modern and efficient motorway network, notably by completing ongoing investments and through additional investments to undertake. Italy recalls that the creation, operation and development of a modern and efficient motorways network system is a priority of the transport and infrastructure policy, not only at national but also at the European level. In this respect, the Plan is considered necessary to complete the infrastructure connected to the Trans-European Transport network. Furthermore, Italy maintains that the

⁴ Italy approved in 2014 a provision, within Decreto-legge n.133 of 12 September 2014, converted into Law 11 November N.164, so-called *decreto Sblocca-Italia*, ("Unblock Italy"). The provision, thereafter abolished by the subsequent *Codice dei contratti pubblici*, above quoted, allowed motorway concessionaires to propose modifications of the existing concessions to ensure the necessary investments for the upgrade, structural, technologic and environmental adaptation of the national motorway concessions, to ensure compliance with highest safety requirements imposed by EU law, as well as to ensure a service based on most favourable tariff and access conditions to users.

motorway concessions investment and prolongation plan will be crucial in more widely incentivizing economic activity, growth and employment. According to Italy, the largest part of the investments concerned by this decision has been already approved by the authorities concerned, but the relevant works have not been completed or, in some cases, have not even started, for reasons non-imputable to the concessionaire. *Second*, Italy does not consider it sustainable to impose excessive tariff increases on motorway users, which, via toll tariffs, bear the burden of motorway investments under the current concession regime, also in view of the economic constraints that those users had to bear in recent crisis years. Indeed, the remuneration of both ongoing and additional investments in the framework of the existing concessions would require the imposition of unsustainable tariff increases. Based on the data provided by Italy, if the investments that make the object of the Plan were to be realized under the current contractual regime, the cumulated tariff increases would reach, for ASPI, 46% for the period 2017-2028, and for the two SIAS concessions an average of 58% for the period 2017-2026.

- (15) Since competition in this area is only *for* the market, as concessions foreclose entry *on* the market for their entire duration, prolongations are to be carefully considered both under competition and public procurement law. Therefore, Italy commits to amend the concessions so as to introduce elements aiming at alleviating competition concerns: limiting the duration of the envisaged prolongations; reducing the duration of the existing ATCN concession; limiting the takeover value so as to reduce the financial burden for the potential newcomer; tendering out a series of concessions in the short term; reducing the risk of overcompensation for the concessionaires; setting limited levels of remuneration as compared to what originally was foreseen in the original proposal for certain works; defining the costs of the envisaged construction works and accepting to fix the costs of those works in time, as well as by ensuring that the majority of works will be tendered out.
- (16) In this light, Italy notified a Plan whose most relevant factors are: (a) the amount and cost of works to be undertaken; (b) the cap envisaged to limit the toll increase to a sustainable figure; (c) the rate at which the concessionaire should be remunerated and (d) the years of prolongation and/or the takeover value needed to balance the previous factors.
- (17) The notified Plan consists of two legs.
- SATAP A4 Torino-Milano and A33 Asti-Cuneo (ATCN)*
- (18) SATAP A4 and ATCN are two motorways under concession, managed by two companies controlled by SIAS Spa⁵, namely SATAP Spa – Tronco A4 and Autostrada Asti-Cuneo Spa.
- (19) The concession for the construction and operation of the Torino-Milano motorway to Autostrada Torino-Milano Spa (transformed thereafter into SATAP Spa) dates back to 1989. The concession agreement has been modified over the

⁵ SIAS owns 65% of ATCN. The remaining shares of ATCN are detained by ANAS SpA, the Italian public entity operating in the road sector. The Annual Report on Motorways realised by the MIT for the year 2016 indicates SIAS owns 99.87% of SATAP A4 shares.

years and the version in force is the *Convenzione Unica* of 10 October 2007, as amended by the *Atto Aggiuntivo* of 27 December 2013. The current concession expiry date is set at 31 December 2026.

- (20) The concession for the construction and operation of the ATCN has been awarded, by means of a public tendering procedure, in 2005⁶. The entrusting act of the concession is the *Convenzione Unica* signed on 1 August 2007 by Società di Progetto Asti-Cuneo Spa (transformed thereafter into Autostrada Asti-Cuneo Spa), which stipulates that the concession should last for 23,5 years from the date of completion of the works.
- (21) Italy indicates that, due to a series of delays non-imputable to the concessionaire⁷, but related to delays in administrative authorisations, the construction works for the motorway have not been completed and the costs have increased, for several different reasons⁸. As a consequence, to date, the motorway is only partially build and thus accessible to users only for a limited stretch of 55 kilometres. Income from tolls is thus not sizeable. In light of these constraints and of the need to revise traffic estimates, Italy observes that it is not possible for the ATCN concessionaire to complete its investments under the current concession regime, unless a very high tariff burden is placed on users. At the same time, Italy maintains that revoking the concession is not a feasible option, first, because of the need to urgently construct this link, which is awaited since at least 2003-2005 and, second, because revocation would risk implying a high compensation burden for the State and further delays⁹.

⁶ On 5 July 2003, ANAS S.p.A. published a call for tender for the entrustment, completion of planning, realisation and management of the highway Asti - Cuneo. The call was adjudicated on 29 September 2005 by a temporary association of enterprises constituted by SALT S.p.A., GRASSETTO LAVORI S.p.A. and ITINERA S.p.A. On 1 March 2006 these enterprises established the Società di Progetto Autostrada Asti – Cuneo S.p.A. which subscribed the concession contract (*Convenzione*) on 1 August 2007. With the stipulation of the *Convenzione*, ANAS S.p.A. entrusted to the concessionaire the management of 39 km of infrastructure already completed. Later on, the concessionaire realized the lots 1.4/3 and 1.5 and the lot 2.1a, that became operative on 20 February 2012 (1.4/3 and 1.5) and on 24 July 2012 (2.1a) completing 55 km of the 90 foreseen in the contract. Originally the concession contract foresaw that the works should have been completed in 48 months, which became 72 after an update of the *Cronoprogramma* requested by ANAS on 16 July 2008. As clarified by Italian authorities, based on the new economic and financial plan presented to the MIT on 2014, taking into account administrative delays which would postpone the completion of the works, the concession shall end by 2043.

⁷ Italy has confirmed that, given the absence of finding of a breach of contract by the concessionaire, neither contractual penalties nor termination have ever been activated.

⁸ Italy maintains that costs have increased as a consequence of mandatory works required in the *progetto definitivo* (due, among others, to new legal requirements, handling of archaeological evidence and increased safety costs), of increased prices and of compensatory works requested by local municipalities. As clarified by Italy, due to the circumstance that costs of the investments considerably increased from the initial 988 million EUR and that traffic forecasts attached to the concession contract changed significantly as a consequence of the crisis, MIT (according to article 11(9) of the *Convenzione*) asked the concessionaire to present a proposal for a new financial plan.

⁹ According to estimates done by Italy, a unilateral revocation of the concession would amount to costs for the State in the range of [500 to 750] (*) million EUR and would further lead to litigation and delay the realization of the works. Leaving the concession as it is, instead, would cause a joint average cumulated tariff increase for ATCN and Satap A4 of about 58% (in the period 2018-2026), almost exclusively attributable to ATCN investment costs.

(*) *Business secret*

- (22) For this reason, Italy proposes to allow completing the investments in ATCN for an amount of 350 million EUR so as to realize a functioning connection¹⁰ (see Table 1), and to allow a cross-subsidization¹¹ of ATCN invested capital plus the outstanding 350 million EUR using revenues from SATAP A4, considered to be a profitable motorway with high and stable traffic levels. The tolls received by SATAP A4 are – at the moment of drafting the present decision - used to cover the costs occurred in the past and for the still on-going investments. Italy indicates that (2017 estimates), besides on-going planned investments for an amount of 109 million EUR (also referred to as "already foreseen investments" or "Old investments"), additional works to be carried out on the SATAP A4 motorway amount to around 44 million EUR (also referred to as "additional investments" or "Other planned investments"). Italy provided a detailed description of the works to be undertaken as well as a comparative analysis of the relevant costs with similar projects. A summary description of the investments is provided in Table 1.

TABLE 1: SIAS WORKS

Motorway	SATAP A4	ATCN
Amount of works	EUR 109 million (already foreseen investments)	EUR 44 million (additional investments)
Typology of works	widening and adding lanes; reducing the environmental impact of the motorway; improving the safety of the motorway; upgrading the toll system; improving the information flow to users; upgrading some administrative premises to be used by the concessionaire	EUR 350 million (already foreseen investment as reduced following revision of the project)
		completing the motorway by building the missing section ("Lotto II.6 Roddi-Diga ENEL"); carrying out extraordinary maintenance works; upgrading the Alba ring road; upgrading the toll system

- (23) As to the timeline of the investments, most of the already foreseen investments have already started and some have been recently completed; all the investments identified under recital (22) should start at the latest by 1 January 2020 and should be realized by the end of the next regulatory period (by the end of 2022). Italy

¹⁰ Originally, the ATCN plan encompassed 90 km of motorway. To date, 55 km have been realized (*Tronco I*: Cuneo-Massimini, Marene-Cherasco and a portion of *Tronco II*: Guarene-Rocca Schiavino), with a total investment of 476 million EUR: Italy plans to resize the remaining portion to build to about 13 km (avoiding digging a tunnel), so as to guarantee a functional link with the existing chunks while containing the costs. Italy clarified that the investments due to complete the motorway, amounting to 589 million EUR, have recently been reviewed and downsized to 350 million, in order to "reduce the overall costs and enable the completion of the works as rapidly as possible with the least impact on final users".

¹¹ For a precedent of cross-subsidization see Commission Decision SA.42783 (2015/N) of 11 December 2015 –*Fusion de la concession du tunnel Maurice-Lemaire et de la concession autoroutière de la société des Autoroutes Paris-Rhin-Rhône SA*, OJ C/104 of 18 March 2016.

will make sure that the rates of return agreed for said investments (see recital (28)) apply irrespective of any delay in the realization of the works with the exception of cases of delay non-imputable to the concessionaire, clearly identified either by way of a judicial ruling or following the acknowledgment by the MIT of their non-imputability to the concessionaire, following a new formal and transparent administrative procedure devised by Italy¹².

- (24) Only where the investments identified under recital (22) could not be realized in the planned regulatory period for a reason non-imputable to the concessionaire, as acknowledged following the procedures mentioned above, may those be subject to an updated rate of return, according to the applicable legal framework.
- (25) To allow for a cross-financing of ATCN without excessively impinging on ATCN and SATAP A4 users, the plan provides for a cap to the toll increase.
- (26) In particular, Italy commits to freeze SATAP A4 toll tariffs for the next four years (2019, 2020, 2021 and 2022 included). Afterwards, SATAP A4 toll tariff increases will be capped at actual inflation (as measured by *ISTAT*) plus 0.5%. For ATCN, possible toll increases will be capped at actual inflation and will only be allowed starting from the date of completion of the motorway, in 2022¹³.
- (27) Capped tariff increases generate missed revenues, i.e. revenues that could have been available for the concessionaire under the original contractual regime, but that become unavailable due to the operation of the Plan. An amended functioning of the cap mechanism has been devised by Italy so as to cater for low inflation contingencies during a certain number of years that might affect the remuneration of missed revenues. Italy indicates that when actual inflation will be below the foreseen long term expectation of 2%, the mechanism envisaged for the deferral of the remuneration of the concessionaire might reduce the expected level of remuneration (as reported in recital ((28))iii). In this case, when actual inflation will be below 2%, it is possible to increase tariffs at a rate higher than actual inflation + 0.5%, but still capped at a maximum level of 2% + 0.5%. This higher rate will apply only if necessary to compensate for the impact of the low inflation on the remuneration: all other risks and their impact on the expected remunerations shall not be compensated by recourse to this higher tariff. In practice, the possible need to apply the rate higher than inflation + 0.5%, when inflation is below 2%, but with a cap at 2.5%, is likely to arise only from 2023,

¹² In order to give such acknowledgment, the MIT will seek the positive opinion of a 3-member permanent committee (*Commissione Permanente*) established within the *Struttura Tecnica di Missione* of the MIT. The members of the *Commissione Permanente* will be appointed by the coordinator of the *Struttura Tecnica di Missione*. The competent Directorate General of the MIT will submit a request for opinion to the *Commissione Permanente* within 30 days of the concessionaire's request and the MIT request will be promptly disclosed on the MIT website, so that interested parties (e.g. other concessionaires, users) will have 20 days from the publication of the request to submit their observations. The *Commissione Permanente* will provide its opinion within the 30 days following the end of the 20-day deadline for interested parties' comments. The opinion expressed by the MIT on the imputability/non-imputability of any delay will be forwarded to the European Commission.

¹³ ATCN does not accrue any missed revenues. The imposition of tolls on ATCN is only allowed to cover operative costs and a portion of the *poste figurative*, amounting to [70-80] million EUR, which cannot be subsidised by SATAP A4.

that is the first year at which inflation is expected to reach a 2% rate according to the Italian simulations underpinning the calculation of the remuneration. When actual inflation is above 2%, the cap in tariff operates normally, as inflation + 0.5%.

- (28) Furthermore, Italy proposes to fix the return for the reduced toll income (missed revenues), as well as the rate of return of the investments (partly derogating from applicable national CIPE rules, which would otherwise enable the concessionaire to yield a higher rate of return):
- i) for the ATCN investments and Regulatory Asset Base (RAB): [8-10] % nominal pre-tax;
 - ii) for the SATAP A4 investments [4-6] % nominal pre-tax. The SATAP A4 RAB will also have a return of [4-6]% nominal pre-tax until 2022 included, subject to variations in the Weighted Average Cost of Capital (WACC) afterwards;
 - iii) for the missed revenues: [7-9]% nominal pre-tax for the whole duration of the concession and prolongation period (assuming a long term inflation of 2%).
- (29) Provided that a toll cap and rates of return defined as above would apply, a financial analysis provided by Italy shows that SATAP A4 would not be able to cover for all the costs to be borne by 2026, which is the current expiry date of the concession. Therefore, in order to ensure a financial equilibrium, Italy proposes to extend the duration of the concession and to introduce the possibility of a takeover value to be paid to the concessionaire at the end of the extended concession. Italy proposes to prolong the SATAP A4 concession by 48 months, i.e. until 2030. The financial equilibrium of the concession is then ensured as the additional revenues from the years of prolongation and – if necessary - a takeover value¹⁴ would compensate the concessionaire for the missed revenues accumulated during the concession, in net present value terms¹⁵.
- (30) The possible takeover value could amount to maximum 1.4 times the EBITDA of SATAP A4 and ATCN taken together¹⁶. Should the potential revision of the economic and financial plan after the end of the next regulatory period determine

¹⁴ Italy calculated that the four years of extension of the concession would yield around [500-700]million EUR (excluding the ATCN investment costs), corresponding to [200-300] million EUR in net present value (NPV, as of the beginning of the current regulatory period). The takeover value would amount to [300-400] million EUR, amounting to [100-200] million in NPV. The overall amount of the compensation would thus be of [300-400] million EUR calculated as of the beginning of the regulatory period.

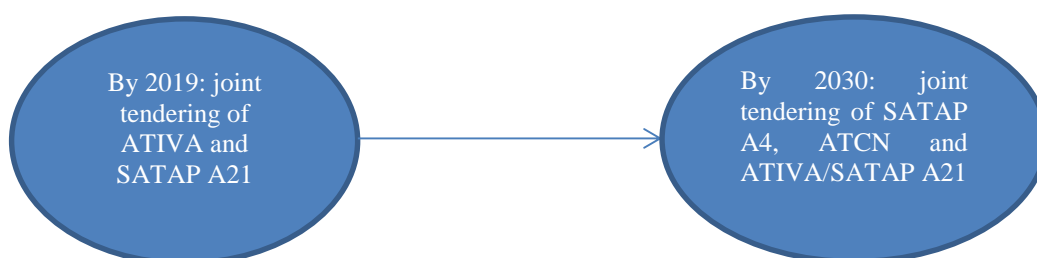
¹⁵ The missing revenues resulting from the capped tariffs would correspond to an amount of [500-700]million EUR until 2026, corresponding to [300-400] million EUR in NPV. This amount corresponds to the expected additional revenues and takeover values expected from the prolongation (described in footnote 14) as to ensure the financial equilibrium of the plan.

¹⁶ The residual takeover value is defined as the amount of capitalized missed revenue not yet recouped by the concessionaire at the end of the prolongation years. The takeover value is then expressed in relative terms with respect to the EBITDA of the concessionaire of the last year of prolongation as to determine a relative cap on the amount of the takeover value.

an increase of the WACC according to CIPE rules, the maximum residual takeover value could be set at 1.6 times EBITDA.

- (31) At the same time, Italy commits to reduce the ATCN concession duration (which otherwise would run for 23,5 years following completion of the works), since it does not need to cover for the costs of the related investments any longer. The ATCN reduced duration will coincide with the duration of the cross-subsidising concession until 2030, so as to allow for a future joint award, by a public tendering procedure, of SATAP A4 and ATCN, as a single concession, together with two other motorway concessions belonging to the SIAS group, the ATIVA and the SATAP A21 concessions. These last two concessions, -expired or about to expire by 2019 - based on commitments made by Italy, will be tendered out together by 2019¹⁷, but the concession duration would not go beyond 2030, so as to allow for a 4-chunk tendering procedure in 2030. See below (Figure 1) the proposed timing of the tendering out of expired/about to expire concessions along with the ones in the current measure.

FIGURE 1: JOINT TENDERING SCOPE AND TIMELINE



- (32) Finally, Italy will require the SATAP A4 concessionaire to tender out at least 80% of both the already foreseen and the additional works mentioned under recital (22), based on the implementing rules set in the D.Lgs 50/2016¹⁸. The tendering out shall be done in an open, transparent and non-discriminatory way.
- (33) As regards the other motorways part of the original proposal, it remains understood that the SALT concession, expiring in 2019, cannot be part of any prolongation project. Italy confirms it will organize the relevant public tendering procedure as soon as possible so as to have the new concession starting no later than 1 August 2019. Regarding CISA, the Commission takes note that the works to complete the 1st Lotto TiBre of CISA, amounting to 460 million EUR from 2017, as well as the junction with Cispadana for 4 Km, will be realized. On the contrary, the Commission notes that Italy dropped the plan of a 2nd Lotto TiBre as well as the envisaged public contribution in kind of 900 million EUR and the State guarantee on the takeover value of 1.7 billion EUR. Lastly, the Commission takes note of Italy's declared intention to organize a joint public tendering procedure for SALT and CISA as of 2031 (SALT and CISA being other two

¹⁷ According to article 4 of the SATAP A21 *Convenzione Unica* of 2007, the duration of the concession is set until 30 June 2017; article 5 sets the procedure to handle the concession during the 2 years following its expiration. Similarly, article 4 of the ATIVA *Convenzione Unica* of 2007 sets the expiration date at 31 August 2015 and article 5 specifies the post-expiration operation.

¹⁸ For the relevant rules and implementation criteria, e.g. the starting date (except for the threshold, which is set at 80%), the national procurement rules set in D.Lgs 50/2016 (*Codice dei contratti pubblici*) will apply.

motorway concessions belonging to the SIAS group) and that CISA will be tendered out, in 2031, with no takeover value.

Autostrade per l'Italia

- (34) Autostrade per l'Italia Spa is a motorway concessionaire that operates about 2850 kilometers of motorway network in Italy, consisting of the sections listed in the following table.

TABLE 2: ASPI NETWORK

Tratte in gestione	Km in esercizio
A1 Milano - Napoli	759,3
A1 Diramazione Roma Nord	22,0
A1 Diramazione Roma Sud	19,0
A1 Raccordo A1 - Tangenziale Est di Milano	3,2
A4 Milano - Brescia	93,5
A7 Serravalle - Genova	50,0
A8 Milano - Varese	45,3
A8 Diramazione Gallarate - Gattico	24,0
A9 Lainate - Como - Chiasso	32,4
A10 Genova - Savona	45,5
A11 Firenze - Pisa Nord	81,7
A12 Genova - Sestri Levante	48,7
A12 Roma - Civitavecchia	65,4
A13 Bologna - Padova	116,7
A13 Diramazione per Padova Sud	4,3
A13 Diramazione per Ferrara	6,3
A14 Bologna - Taranto	744,1
A14 Diramazione per Ravenna	29,3
A14 Diramazione per la Tangenziale di Bari	2,4
A14 Raccordo A1 - A14	5,6
A16 Napoli - Canosa	172,3
A23 Udine - Tarvisio	101,2
A26 Genova Voltri - Gravellona Toce	197,1
A26 Diramazione Predosa - Bettole	17,0
A26 Diramazione Stroppiana - Santhià	30,8
A27 Mestre - Belluno	82,2
A30 Caserta - Nola - Salerno	55,3
A52 Rho - Monza (lotto 3: Variante di Baranzate)	2,9
TOTALE	2.857,5

Source: *Relazione sul settore autostradale in concessione MIT of 2016 and Italian Notification*

- (35) All these sections are part of one single concession¹⁹. The concession for the construction and operation of the motorway network dates back to 1968. In the 90's, the motorway network has been privatized and a new concession agreement entered into effect. The concession agreement has been amended over the years and the version in force is the *Convenzione Unica* of 12 October 2007, as amended by the *Atto Aggiuntivo* of 24 December 2013 (hereinafter "current concession contract"). The current concession expiration date is set at 31 December 2038.

¹⁹ See also MIT, *Relazione sul Settore Autostradale in Concessione 2016*, p. 113. Available at: <http://www.mit.gov.it/node/6211> (last accessed: 27 March 2018)

- (36) Italy observes that it would not be possible for the ASPI concessionaire to complete its investments under the current concession contract unless a very high tariff burden is placed on users, as described in detail in hereunder. Indeed, to date, the concessionaire has still to carry out the investments for the works related to the *Gronda di Genova* (amounting to 4.32 billion EUR from 2017) and to the remaining works of the *IV Atto Aggiuntivo* (amounting to 588 million EUR as from 2017) (collectively hereinafter referred to as "Old investments" or "already foreseen investments"), as well as the other planned investments (e.g. third and fourth lanes/anti-noise barriers, amounting to 3.03 billion EUR from 2017 onwards and referred to, hereinafter, as "Other planned investments" or "additional investments"). Old investments and Other planned investments together amount to approximately 8 billion EUR. Italy provided a detailed description of the works to be undertaken as well as a comparative analysis of the relevant costs for similar projects. A summary description of the investments is provided in the following table.

TABLE 3: ASPI WORKS

ASPI	Typology of works	Amounts of investments
Already foreseen investments ("Old investments")	Motorway bypassing the urban area of Genoa (so-called <i>Gronda di Genova</i>)	EUR 4.32 billion
	additional lanes; building new junctions; implementing anti-noise measures; improving the safety of tunnels	EUR 0.588 billion
	(Total)	EUR 4.9 billion
Additional investments ("Other planned investments")	Building additional lanes ²⁰ ; building new junctions; upgrading existing junctions; building new tollbooths; widening existing bridges; building a new, 247.5 meters long, viaduct over the Arno river; widening existing viaducts; building new overpasses; replacing existing overpasses; widening existing underpasses; prolonging a tunnel (<i>Galleria Bruschetto</i>) by 582 meters; installing anti-noise barriers (" <i>Piano di risanamento acustico</i> ").	EUR 3.03 billion

- (37) In particular, as regards the investments for the *Gronda di Genova*, these are works which were detailed in the *IV Atto Aggiuntivo* of 23 December 2002, as an

²⁰ In particular (per Article 15 of *Atto Aggiuntivo IV* of ASPI):

- i) Extension from two to three lanes: A11 Firenze-Pistoia (*estensione intervento* 26,8 km); A1 Incisa-Valdarno (*estensione intervento* 18,4 km); A13 Ferrara- Bologna (*estensione intervento* 32,5 km); A13 Padova – Monselice (*estensione intervento* 12,3 km); A12 Santa Marinella – Torrimpietra (*terza corsia dinamica con estensione* of about 12 km).
- ii) Extensions from three to four lanes: A14 Diramazione Ravenna – Bologna San Lazzaro (*estensione intervento* 34,5 km); A1 Milano Sud – Lodi (*estensione intervento* 16,5 km).

improvement of a pre-existing project included in the original concession²¹. At that time, the planned intervention would have covered 34.1 km, for a total cost of 1.8 billion EUR. It took the Italian authorities around 15 years to approve the *Progetto Definitivo*²², according to which the definitive version of the *Gronda di Genova* will run for 72 km (81% of which is constituted by tunnels) and will cost about 4.32 billion EUR.

- (38) To avoid imposing excessive tariffs on the users of the ASPI network, Italy maintains that it is necessary that the toll increase is capped at a sustainable level.
- (39) Similarly to the SIAS case, the cap on tariff increases implies that, during the original length of the concession, the concessionaire will generate a lower amount of tolls, thus revenues would not be enough to recoup the investment costs and the remuneration of the invested capital. In order to ensure a financial equilibrium Italy proposes to increase the duration of the concession and to introduce the possibility of a takeover value to be paid to the concessionaire at the end of the extended concession²³. As illustrated in Figure 2, the financial equilibrium is then ensured as the additional revenues from the years of prolongation and the possible takeover value²⁴ would compensate the concessionaire for the missed revenue accumulated during the original length of the concession, in net present value terms²⁵.
- (40) On this basis ASPI toll tariff increases will be capped at actual inflation (as measured by *ISTAT*) plus 0.5% starting from 2019²⁶. As for SIAS, an amended functioning of the cap mechanism, as illustrated in recital (27), has been devised by Italy so as to cater for low inflation contingencies during a certain number of

²¹ The *Gronda di Genova* was the object of an infringement procedure launched by the Commission in 2003 (file NIF 2003/2035) and positively resolved (see recital (122)). In that case the Commission considered that, based on the information provided by the Italian authorities, the *Gronda di Genova* was a mere improvement of a project (Bretella Voltri-Rivarolo) that had been included in the ASPI concession already in 1989).

²² From 2002 to 2009 a public debate (first experiment in Italy) took place. A revised project followed to take on board local instances. In 2011 the revised *Progetto Definitivo*, for an amount of 3.26 billion EUR, was submitted for public approval (*Valutazione di Impatto Ambientale* and *Conferenza dei Servizi*). Following the prescriptions of the public bodies concerned as well as new rules on the way to treat asbestos and on expropriations, the value of the project increased further (circa + 1.10 billion EUR). The *Progetto Definitivo* has been approved in September 2017.

²³ See footnote 16.

²⁴ Italy calculated that the four years of extension of the concession from 2038 until 2042 would amount to cash-flows of around [15-20] billion EUR, corresponding to [2-3]billion EUR in NPV calculated as of 2017, at the capitalization rate of the missing revenues. The takeover value would amount by the end of 2042 to [5-7]billion EUR, corresponding to [0-1]billion EUR in NPV (by 2017). The overall value of the measure, calculated as of 2017 at the mentioned rate, equals [3-4] billion EUR.

²⁵ The overall amount of the missed revenues, deriving from the capped tariffs, amounts to [8-10]billion EUR, corresponding to [3-4]billion EUR in NPV, calculated as of 2017 at the plan capitalization rate for missing revenues. This amount corresponds to the expected additional revenues and takeover values expected from the prolongation (described in footnote 24) as to ensure the financial equilibrium of the plan.

²⁶ For ASPI the cumulated tariff increase with tariff cap 2018-2027: would be of 24%, as compared to the current contract 2018-2027 which would require a 46% increase.

years that might affect the remuneration of missed revenues (as outlined in recital (41)iv).

(41) Furthermore, Italy proposes to fix the return for the missed revenues, as well as the rate of return of the investments (partly derogating from applicable national CIPE rules, which would otherwise enable the concessionaire to yield a higher rate of return) as follows:

i) for the Old investments: [6-8]% real post-tax for the whole duration of the concession (as foreseen in the current contract). for the Other planned investments to be realized, according to the Cronoprogramma (Table 4 below illustrates the timing of the investments), from 2017 and within the end of the next regulatory period (until 2022 included), amounting to 2.49 billion EUR: [4-6]% nominal pre-tax (including also works realized in 2022 and remunerated in 2023);

iii) for the Other planned investments to be realized and remunerated, according to the Cronoprogramma (see Table 4 below), after 2023: [4-6]% nominal pre-tax, subject to variations in the WACC;

iv) for the missed revenues: [6-8]% nominal pre-tax for the whole duration of the concession and prolongation period (assuming a long term inflation of 2%).

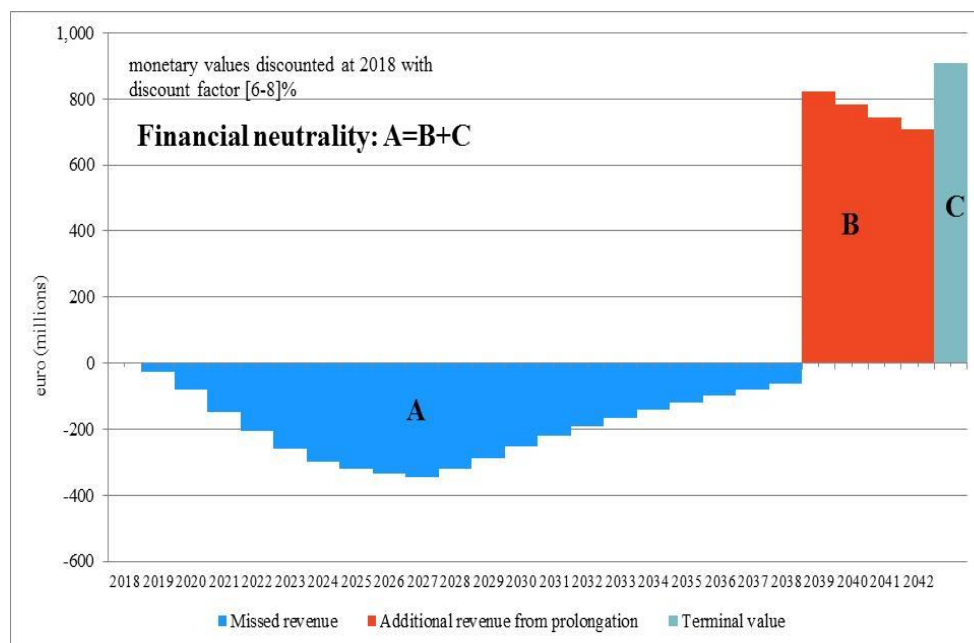
TABLE 4: ASPI OTHER PLANNED INVESTMENTS: CRONOPROGRAMMA

Investimenti remunerati tramite il fattore K																
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Investimenti a K da cronoprogramma	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Variazioni regolatorie	[...]	[...]	[...]	[...]	[...]	[...]										
Totale investimenti a remunerazione K nell'anno	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Italian notification (the years after 2027 are omitted because the value of the Other planned investments from then onwards is always zero)

(42) In presence of the toll cap and the rates of return as defined above, the financial analysis provided by Italy shows that ASPI would not be able to cover for all the costs to be borne by 2038, which is the current expiry date of the concession. Therefore, Italy proposes to prolong the ASPI concession by 48 months, i.e. until 2042.

FIGURE 2: ILLUSTRATION OF FINANCIAL NEUTRALITY MECHANISM (ASPI)**



Source: Commission's calculations based on Italian authorities' data

- (43) The possible takeover value for such a concession would amount to maximum 1.3 times the EBITDA of ASPI. Should the potential revision of the K parameter of the tariff after the end of the next regulatory period determine an increase of the WACC according to CIPE rules, or due to variations in inflation rate or traffic²⁷, the maximum takeover value could increase up to maximum 1.5 times EBITDA.
- (44) As to the timeline and rate of return of investments, the investments identified under recital (41)ii) shall start at the latest by 1 January 2020 and should be realized by the end of the next regulatory period. Italy will make sure that the rates of return agreed for said investments apply irrespective of any delay in the realization of the works with the exception of cases of delay non-imputable to the concessionaire, clearly identified either by way of a judicial ruling or following the acknowledgment by the MIT of the concessionaire's non-imputability of delays following the new formal and transparent administrative procedure devised by Italy as illustrated under recital (23) above.
- (45) Only where the investments identified under recital (41)ii) could not be realized in the planned regulatory period for a reason non-imputable to the concessionaire as acknowledged following the procedures mentioned above, may those be subject to an updated rate of return, according to the applicable legal framework.
- (46) Finally, Italy committed to ensure that at least 80% of all the works related to the Old investments as well as to the Other planned investments will be tendered out via public tendering procedures, in an open, transparent and non-discriminatory way, as referred to in recital (32) as regards the timing and procedure being followed.

²⁷ In the notification, Italy recalls that, for the Old investments, the traffic risk is entirely borne by the concessionaire, since the final project (*Progetto Definitivo*) has been approved. Periodical updates of the traffic forecasts might then only have an impact on the investments remunerated with the K parameter of the tariff for which the *Progetto Definitivo* has not been approved.

Commitments/contractual amendments common to both legs of the Plan

- (47) Italy confirms that the commitments underlying the Plan will remain unaffected by the interaction with its current and future regulatory framework and commits to amend any conflicting rule that could hinder the enforcement of the Plan until the end of the concessions. All commitments made by Italy are therefore expected to be transposed into an amended regulatory framework and/or amended concession contracts. The Commission takes note in this respect of the fact that Italy has recently made public on the MIT website the existing concession contracts preceding the commitments undertaken in the Plan.
- (48) The value of the works, as outlined in the Plan, will remain stable, so that the concessionaires could not claim the revision of the agreed parameters in light of increased costs, unless the following specific and detailed circumstances, non-imputable to the concessionaires, occur: a) change of law; b) higher costs awarded/imposed by way of formal and transparent acts by administrative authorities or however recognised by judicial authorities. Outside of such exceptions any increase of costs would be borne by the concessionaires with no consequence as to increase of tariffs or any other compensation²⁸.
- (49) Regarding new works currently not known or otherwise planned, Italy considers that, given current macroeconomic scenarios, no further works will be needed on the interested motorways, beyond the ones contained in the Plan. At any rate, Italy commits to comply with Internal Market rules and approach the Commission, should new works be considered an amendment of the measure as approved by the Commission.
- (50) Furthermore Italy commits to a) insert significant contractual penalties in case of breaches of the Cronoprogramma and missed/delayed realization of the investments imputable to the concessionaire²⁹; b) proportionally revoke the prolongation in relation to the amount of the works (see recitals (22) and (36)), which have not started, for any reason whatsoever, by 1/1/2020³⁰.

²⁸ Only with regard to ASPI, Italy initially represented that, as a consequence of the Plan, a series of investments- "*interventi stralciati*" or discontinued (IV lane A1 Modena Nord- Piacenza Sud; IV lane A1 Cesareo- Colleferro; IV lane A1 Colleferro- Frosinone; III lane A12 Torrimpietra- S.Marinella, connection between Cerveteri-S. Marinella; III lane A11 Pistoia-Montecatini), although approved at the stage of *Progetto Definitivo* had to be discontinued and the project planning costs would be compensated by way of an increase of tariffs (outside of the proposed cap of 0.5% plus inflation). As confirmed in its final reply of 8 February 2018, Italy committed to amend the proposed contractual changes so as to let the definitive planning costs be entirely borne by the concessionaire.

²⁹ See article 18 of draft *Atto Aggiuntivo* ASPI, increasing penalties to 50.000 EUR per month and article 41 of draft *Atto Aggiuntivo* SATAP A4, increasing penalties to 75.000 EUR per month. In its submission of information Italy also recalls the penalties in place under the current contracts.

³⁰ To be noted that one of the Annexes to the draft *Atto Aggiuntivo* and *Convenzione Unica* indicates the pro-rata weighing (in case of revocation of the prolongation) of each investment. Please also note that article 6 of draft *Atto Aggiuntivo* ASPI, which will add article 4bis to the *Convenzione Unica*, states that, shall the works related to the Gronda di Genova and interconnections A7/A10/A12 not start by 1/1/2020, the entire ASPI prolongation will be dropped. On proportional revocation see instead article 7 of draft *Atto Aggiuntivo*, inserting article 4 ter to the *Convenzione Unica*, concerning the other investments under Article 15 of *Convenzione Unica* (let. E of Article 2, alinea 2). For SIAS, article 4.1.6 of the draft *Atto Aggiuntivo* for ATCN will introduce article 43 to the *Convenzione Unica*, while article 5.1.10 of the draft *Atto Aggiuntivo* for SATAP A4 would introduce article 48(1) to the

- (51) Italy undertakes to introduce in the concession contracts, as from the present decision, appropriate/specific clauses integrating existing contractual provisions as well as monitoring safeguards in order to avoid overcompensation of the concessionaires above the agreed rates of return and to avoid exceeding the maximum takeover value (as set out in recitals (30) and 43)³¹. In particular, a monitoring process is put in place so that:
- (a) Every year Italy submits a report to the European Commission in order to outline possible divergences as compared to the Plan assessed by the Commission. In particular, the report will illustrate:
 - The missed revenues accrued by the concessionaire;
 - the advancement of the works included in the plan as well as their cost; the return accrued on the missed revenues;
 - the return accrued on the invested capital (X and K component of the tariff, under the original formula); the toll tariff increase applied;
 - the actual inflation rate; and
 - the actual level of traffic.
 - (b) Every five years, that is, at the end of each regulatory period, Italy updates the forecasts and estimations as concerns:
 - Remuneration for K component of the tariff;
 - Traffic;
 - Inflation rate and related tariff increase;
 - Amount of missed revenues; and
 - EBITDA and takeover value.
- (52) Should these forecasts show possible discrepancies with the Plan, in particular for what concerns (i) the capped tariff increase, (ii) the rate of return allowed and (iii) the maximum takeover value allowed in proportion to the EBITDA (provided that the years of prolongation are a fix parameter), Italy will intervene so as to guarantee that the parameters presented in the Plan are fully complied with.
- (53) Finally, Italy will make sure that any benefit arising from traffic increases and/or delayed/non-realized investments, for any reason whatsoever, i.e. even if non-imputable to the concessionaire, will be used solely to proportionally reduce the takeover value or possibly the prolongation, instead of being set aside for new investments as currently provided for in Italian concession contracts³². By way of

Convenzione Unica. Both new provisions state that shall the works related to ATCN not start by 1/1/2020, the entire Plan for what concerns the SIAS motorways will be dropped. Article 48(2) of SATAP A4 *Convenzione Unica* will also clarify that, shall the additional works on SATAP A4 not start by 1/1/2020, the concession prolongation will be proportionally revoked.

³¹ See in particular article 23 quarter to be included in ASPI *Convenzione Unica* and article 41 to be included in SATAP A4 *Convenzione Unica*, as complemented by Italy's commitment on the reply of 8 February 2018.

³² See e.g. for ASPI article 22.10 of the draft *Convenzione Unica* as amended for the investments planned beyond 2023 and article 23 ter in relation to the compensation of the missing revenues.

example, in the draft ASPI contracts Italy introduced a provision which, in case of increase of revenues due to higher than expected traffic, enables to allocate such funds to reduce the takeover value, contrary to the existing provision which enabled to allocate such funds to reward "other planned investments"³³.

- (54) In the context of pre-notification exchanges, Italy further underlined its intention to streamline and revise future motorway contracts in order to prevent risks of overcompensation.

2.3. Submission from a competitor

- (55) On 16 March 2018 Sacyr SA, a Spanish motorways constructor and operator, submitted allegations that measures rumoured in the press regarding prolongations of motorways concessions in Italy would be contrary to EU law, and asked the Commission to oppose the approval of the Plan.³⁴
- (56) As regards ASPI, Sacyr essentially alleges that the ASPI concession is in fact a bundle of motorway sections and cannot be considered as one concession. Furthermore Sacyr alleges that the *Gronda di Genova* works are new works, which were not part of the ASPI concession before, because i) the works were first mentioned as part of the ASPI concession in the *IV Atto Aggiuntivo* of 23 December 2002, which was not preceded by an open tender procedure; and ii) the 2002 *Atto Aggiuntivo* concerned a different path and entailed lesser costs³⁵. Finally the competitor alleges that the current *Gronda* project costs have been largely overestimated.
- (57) As regards ATCN, according to Sacyr, SIAS won the tender on the basis of optimistic traffic forecasts, which did not eventually materialise. Furthermore, the competitor alleges that the lack of a request for compensation by the State addressed to the concessionaire due to the non-realised works (despite the right to impose penalties and/or revoke the concession based on the current contract) amounts to illegal State aid. Also, Sacyr maintains that the reduced amount of planned works, together with the updated traffic estimates and increased costs of the remaining – reduced - works, modifies the risk profile of ATCN. On top of this, the competitor highlights that the shareholders of ATCN and SATAP A4 are different, so that a cross-subsidisation would imply distortive effects. Finally, the competitor mentions that, as regards ATCN, another motorway, namely SATAP

³³ See for example article 13 of the draft ASPI *Convenzione Unica* (as modified by article 11 of the draft *Atto Aggiuntivo*), which specifies that in case of increase of traffic beyond 1% of the estimates, the revenues between 1 and 1.5%, for the 50% and the revenues beyond 1.5%, for the 75% will be allocated to a fund, which will be used only for the reduction of the takeover value (at the end of the concession). In its previous version of the same article the fund would be allocated to "new investments" to be mutually agreed between the concessionaire and the conceding authority.

³⁴ The submission cannot be considered as a complaint in the sense of Article 24(2) of Regulation (EU) 2015/89 since that provision relates to alleged unlawful aid or alleged misuse of aid, whereas the present case concerns a plan to grant new aid notified to the Commission under Article 108(3) of the Treaty.

³⁵ According to the competitor the *Gronda di Genova* project approved by the Italian authorities in 2017 is substantially different from the *Gronda di Genova* project as first envisaged in 2002 (by the *IV Atto Aggiuntivo*) and then confirmed in 2007 (by the *Convenzione Unica*).

A21, already benefitted from a prolongation justified in view to cross-finance ATCN works.

- (58) Furthermore, the competitor alleges, for both measures, the excessive value of the aid granted (calculated in around 31 billion EUR for ASPI and 2.3 billion EUR for SIAS) as compared to the concessions' value, and the incompatibility of the proposed measures with EU public procurement rules. Finally, the competitor alleges that (i) the *Altmark* criteria (see below paragraphs 66 and following) are not fulfilled, (ii) the Public Services Obligation (PSO) is not well defined and that (iii) some requirements imposed by EU rules on services of general economic interest (SGEI) have not been complied with (namely: transparency, necessity and efficiency). These very same allegations (focused on public procurement rules) were essentially repeated by the same competitor in a letter addressed to the Commission on 23 March 2018.

3. ASSESSMENT OF THE MEASURE

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

- (59) According to Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- (60) It follows that, in order for a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following four cumulative conditions have to be met: i) it has to be imputable to the Member State and granted out of State resources, ii) it has to confer an economic advantage on undertakings, iii) the advantage has to be selective, and iv) the measure has to distort or threaten to distort competition and affect trade between Member States.

3.1.1. Aid imputable to the State and existence of State resources

- (61) According to settled case law, the granting, without tendering, of licences to occupy or use public domain, or of other special or exclusive rights having an economic value, may imply a waiver of State resources and create an advantage for the beneficiaries³⁶. Similarly, any amendment, like for instance a prolongation, of a concession, can only be provided by the State and should therefore be considered as imputable to it.
- (62) In the present case, in particular the prolongation of the concessions' duration implies the attribution of an extended exclusive right to collect toll tariff revenues to the operators concerned for 48 additional months each. As a consequence, the

³⁶ Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraphs 101, 104, 105 and 111; Judgment of the Court of Justice of 16 May 2000, *France v Ladbrooke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraphs 48 to 51. Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraphs 88 et seq.

Member State, owner of the infrastructure, renounces to directly collect the toll revenues during said prolongation period during which it could keep the assets concerned in State hands and exploit them commercially. Such prolongation therefore amounts to a waiving of State resources- imputable to the State- to the benefit of private operators.

3.1.2. *Selectivity*

- (63) The measure under assessment implies the prolongation of the exclusive right to operate motorways to a limited number of identified operators, which are entrusted with the service of building and operating identified motorways by way of a concession contract. As a consequence, the Commission considers that the measure at stake is selective since it favours certain economic operators active in the relevant sector³⁷.

3.1.3. *Economic advantage*

- (64) The measure, implying the prolongation of the two concessions without re-tendering, gives the concessionaires the right to operate motorways for a longer period than was originally agreed in the concession contract, and thus to perceive the economic benefit deriving from operating the motorway for an additional number of years. This constitutes an advantage for the concessionaires³⁸. In this context, it is also to be noted that the two prolonged concessions - ASPI and SATAP A4 - have not been originally subject to public procurement procedure, which reinforces the advantageous character of the current prolongations.
- (65) As already highlighted in recitals (29) and (39), the prolongation and its accompanying amendments to the concession contracts are granted to allow the concessionaires to perform the agreed investments while being subject to an obligation of capped tariffication: namely, ensuring the access to the infrastructure by maintaining motorway tariffs at a socially sustainable level for users through precise tariff caps, whilst performing investments on the network, as described in recitals (22) and (36).
- (66) As alleged by the Italian authorities, the imposition of such public service obligations in line with *Altmark*³⁹ judgment would dispel the advantage element. Therefore, to assess the existence of an advantage in the entrustment of the concessionaires with the operation of the motorways at socially sustainable tariff levels for users for a longer period compared to what was originally foreseen, it shall be assessed whether the measures comply with the *Altmark* judgment, in which the Court of Justice held that where a State measure must be regarded as compensation for the services provided in order to discharge public service obligations, so that the entrusted undertaking does not enjoy a real financial advantage and the measure thus does not have the effect of putting it in a more

³⁷ See in this respect Commission Decision of 28 October 2014 on SA.2014/N 38271, concerning the French *Plan de Relance Autoroutier* (hereinafter "*Plan de Relance*"), paragraphs 46 to 48.

³⁸ See in this respect "*Plan de Relance*", paragraph 39.

³⁹ Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 87 to 95.

favourable competitive position than other undertakings, such a measure is not caught by Article 107(1) TFEU.

- (67) Without at this stage prejudging the issue of the compatibility of the notified measures with the SGEI Framework which will be addressed in recital (76) and following, it needs to be mentioned that the Court of Justice made clear that, for a public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria ('*Altmark*-criteria') summarized below must be satisfied:
1. The recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined.
 2. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
 3. The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
 4. Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means to meet the public service obligations, would have incurred, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (68) In this respect, the companies upon which an obligation is imposed have not been chosen by way of a public tendering procedure for the purpose of providing the service described under the present measure, which is the provision of motorway services according to the conditions set in the Plan by carrying out already foreseen and additional investments at a capped tariff level- in order to guarantee access to the infrastructure at a socially sustainable level for users. Therefore, the fourth *Altmark* criterion is decisive for the assessment.
- (69) Nevertheless, nor during the pre-notification phase neither in the notification did Italy provide a comprehensive costs analysis as the one required under the fourth *Altmark* criterion, notably on the costs of a typical, well-run undertaking. In absence of this element, the Commission concludes that the Italian authorities have not demonstrated that the fourth *Altmark* criterion is fulfilled.⁴⁰ As the conditions set out in the *Altmark* judgment are cumulative, failure to comply with any one of the four conditions necessarily leads to the conclusion that the measure under review grants an economic advantage within the meaning of Article 107(1) TFEU. The Commission considers therefore that the measure at stake provides an advantage to the concessionaires concerned without the Italian authorities having demonstrated to a sufficient degree that the *Altmark* conditions were fulfilled.

⁴⁰ It is for the Member State to prove that the fourth *Altmark* condition is fulfilled (see judgment of the Court of Justice of 18 February 2016, *Germany v Commission*, C-446/14 P, ECLI:EU:C:2016:97, paragraph 38).

3.1.4. Competition distortion and affectation of trade between Member States

With regard to the condition of the distortion of competition, it should be borne in mind that aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition⁴¹. It has been indeed ruled that any grant of aid to an undertaking exercising its activities in the community market is liable to cause distortion of competition and affect trade between Member States⁴².

- (70) In the case at stake, taking into account the nature and international dimension of the sector concerned, which is the construction, maintenance and operation of motorways against tolls, as well as the number of operators active in the sector, the Commission considers that the measure may affect both national and EU trade⁴³.
- (71) Furthermore, since the sector is characterized by competition for the market, i.e. competition to obtain the exclusive right to build and/or operate a motorway, any aid granted in this context, especially when implying the postponement of the next tendering procedure, reinforces the position of the current concessionaires at the detriment of their competitors, also with respect to the potential related downstream market of the attribution of the construction works.
- (72) This is the case of the measure in object, which is capable of affecting trade between Member States because the position of the beneficiaries will be reinforced - their presence in the market being assured until the end of the prolonged concession - as compared to other operators in the sector.

3.1.5. Conclusions on the existence of an aid

- (73) For the reasons set out above, the Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Legality of the aid

- (74) The Commission notes that Italy has not implemented the prolongation of the concessions at stake nor any other element of the Plan, pending approval by the Commission. Italy has thus fulfilled the obligation under Article 108(3) of the TFEU by notifying the measure prior to its implementation and making it subject to Commission approval.

⁴¹ Judgment of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 30 and Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

⁴² Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraphs 11 and 12; and Judgment of the Court of First Instance (Fifth Chamber) of 30 April 1998. *Het Vlaamse Gewest v Commission of the European Communities*, ECLI:EU:T:1998:77, paragraphs 48-50. See also Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 81.

⁴³ See, amongst others, *Plan de Relance*, recital 50.

3.3. Compatibility of the aid

- (75) In light of the foregoing, the measure must be assessed on compatibility grounds. In view of the fact that Italy essentially argues that, should the Commission find that the measure entails aid - in the absence of the fulfilment of the mentioned *Altmark* judgment criteria -, the measure should be assessed under Article 106 (2) of the TFEU, the Commission considers that it should assess whether the conditions for that compatibility basis are fulfilled.
- (76) Article 106(2) of the TFEU provides the legal basis for assessing the compatibility of State aid granted in the framework of the provision of a SGEI. Accordingly, "*undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union*".⁴⁴
- (77) On the basis of the elements brought forward by the Italian authorities on the qualification as an SGEI, also in line with similar measures approved for France⁴⁵, the compatibility of the measure under article 106(2) TFEU must, primarily, be assessed on the basis of the Commission Communication of 11 January 2012 on a European Union framework for State aid in the form of public service compensation (hereinafter: the "SGEI Framework").
- (78) The SGEI Framework sets a series of conditions that a measure has to fulfil in order to be deemed "*necessary for the operation of the service of general economic interest concerned and [...] not affect[ing] the development of trade to such an extent as to be contrary to the interests of the Union*". The Commission will therefore assess the fulfilment of the conditions set in sections 2.2 to 2.10 of the SGEI Framework.
- 3.3.1. *Genuine service of general economic interest as referred to in Article 106 of the Treaty*
- (79) Paragraph 12 of the SGEI Framework requires that the aid must be granted for a genuine and correctly defined SGEI. Paragraph 13 of the SGEI Framework provides that Member States cannot attach specific public service obligations to services that are already provided or can be provided under the same conditions by undertakings operating under normal market conditions. For the latter condition, the Commission assessment is limited to checking whether the Member States did not make a manifest error.
- (80) As outlined in recitals (13) and following and analysed hereunder, Italy argues in a credible manner that the investments at stake are necessary in order to implement a series of objectives ranging from improving mobility, shortening the

⁴⁴ See Commission Communication of 11 January 2012 on a European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15–22, paragraph 5.

⁴⁵ See in this respect also *Plan de Relance*.

duration of travelling on key routes on the Italian network and limiting structural traffic congestion. The Commission also takes note of the fact that the concerned services will constitute key infrastructure components integrated into the Trans-European network, thereby also contributing at European, regional and local level to economic, social and territorial cohesion⁴⁶.

- (81) The SGEI nature of the notified measures derives in particular from the fact that access to the motorway stretches included in the concessions concerned by the notified measures is provided without excessively impinging on users' finances, since this would affect their mobility. In other words, the reason why tariffs should be capped is to maintain the infrastructure effectively accessible to the vast majority of potential users, while enabling the completion of crucial investments (e.g. to complete motorway sections, to by-pass cities, to reduce nuisances). Italy argues that the economic accessibility of a service is a relevant factor under EU law, as demonstrated by various pieces of EU legislation stating this principle⁴⁷. The tariff being the way to finance a concessionaire's investments, no concessionaire operating under normal conditions would undertake the risk of financing the construction of such investments in the network without having a realistic expectation of being able of charging users for the relevant cost.
- (82) The Commission considers that Italy has not made any manifest error in defining the SGEI as granting users access to the mentioned motorways sections under the conditions of the Plan implying the obligation to complete the ongoing and undertake additional investments under a capped tariff regime. Italy has presented sufficient credible justifications showing that realizing investments under a tariff cap regime could not be done without the envisaged public support, since no operator would be interested in making sizeable investments without the prospect of gaining an adequate return on investment. More particularly, the Commission notes that in case the said investments as described in recitals (22) and (36) had been realised without spreading out the related tariff increases over the longer period of time concerned, the tariff increases as foreseen in the concessions contracts in line with current regulatory requirements would have been significantly higher during the next ten years. In particular, for ASPI, during the period 2018-2027, the tariff would have increased by about 46%. For SATAP A4 and ATCN, the joint average tariff increase in the period 2018-2026 would have been about 58%. Such increases would indeed risk making the resulting tariffs unbearable for an important part of the typical users of these motorways.
- (83) Paragraph 14 of the SGEI Framework further requires that Member States should show that they have given proper consideration to the public service needs to be supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account. In this respect the Commission considers that a tariff cap has a direct impact on users' ability to access the

⁴⁶ See also, in this sense, *Plan de Relance*, recital 65.

⁴⁷ Italy makes in particular reference to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States, Article 2; Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, Article 3 and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Article 3.

infrastructure especially in the short term, therefore such capping of the tariffs as compared to the one foreseen in the existing contracts is by definition in the interest of users, so that a public consultation on the tariff cap is unnecessary. In any event, since any possible increase in tariff relates to investments to be financed, the need for a tariff cap is the consequence of a need for investments. As concerns the necessity for the investments that make the object of the Plan, Italy points (for the additional works) at the provisions included in D.Lgs 50/2016 as regards transparency and public consultations (in particular article 22 on the obligation of public consultations for major infrastructures) and at the public debate as regards the works on the *Gronda di Genova*⁴⁸. Similarly, the Commission notes that Italy has a set of rules requiring the approval by the so-called *Conferenza dei Servizi* (gathering all relevant public and municipal entities) for certain projects, including all investments object of the Plan. Finally Italy committed to implement an online platform for each investment - for which the "definitive project" has not yet been approved - which would summarize the main elements of the investments and enable to interact with the users. For the *Gronda di Genova* (which constitutes more than half of the overall investments in the case of ASPI) the public consultation element can be considered as fully satisfied. On the remaining projects, based on the application of article 22 of D.Lgs 50/2016 to the additional investments, on the procedure currently in place for the other investments contained in the Plan (with participation of interested local entities), as well as on the commitment to set up online platform for all investments where a definitive project has not been approved, compliance with the duty to set up public consultations or "*other appropriate measures*", within the meaning of paragraph 14 of the SGEI Framework, is considered to be met.

- (84) Therefore, the public service at stake in the present case is in line with paragraphs 12, 13 and 14 of the SGEI Framework.

3.3.2. *Need for an entrustment act specifying the public service obligations and the methods of calculating compensation*

- (85) Paragraph 16 of the SGEI Framework essentially requires that "*The act or acts must include, in particular: (a) the content and duration of the public service obligations; (b) the undertaking and, where applicable, the territory concerned; (c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority; (d) the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and (e) the arrangements for avoiding and recovering any overcompensation*".
- (86) The entrustment act for the measure at stake is embodied in the concession contracts, as amended by the Plan. In particular, the Plan, as illustrated under Section 2.2, will be reflected in *Atti Aggiuntivi*, incorporated into new *Convenzioni Uniche* and updated Economic and Financial Plans, which will include all the elements listed under paragraph 16 of the SGEI Framework. Italian law in principle requires these contractual amendments to be subject to the

⁴⁸ Italy has described the public consultation procedure set out in the case of the realization of the *Gronda di Genova*. More details are provided in <http://www.urbancenter.comune.genova.it>.

approval of CIPE and to take the form of an interministerial decree⁴⁹. Only after such approval, the amendments will thus become definitive.

- (87) Whereas the definitive version of the *Atti Aggiuntivi* and the amended *Convenzioni Uniche* have not yet been approved, Italy has already produced a draft version along with commitments to amend certain clauses - for example on the tariff cap - in line with the information lastly submitted on 8 February 2018.
- (88) These draft versions already contain and specify the duration and object of the public service obligation, the undertakings, the nature of the exclusive rights, the description of the compensation mechanisms and the relevant parameters (see recitals (27)(28)(40)(41)) as well as the arrangements to avoid and recover any overcompensation, as described under recitals (50), (51) and (53).
- (89) As illustrated above (recital (47)), the commitments underlying the Plan will remain unaffected by the interaction with the Italian current and future regulatory framework, with Italy undertaking to amend any conflicting rule that could hinder the enforcement of the Plan until the end of the concessions. More particularly Italy committed that the definitive versions of the entrustment acts and concessions contracts will not diverge from the versions of the draft contracts as notified, integrated by commitments in the latest submission of 8 February 2018. Furthermore, Italy will submit to the Commission the definitive versions as soon as they are adopted.
- (90) The Commission therefore concludes that the condition set in paragraph 16 of the SGEI Framework is fulfilled.

3.3.3. Duration of the period of entrustment

- (91) According to paragraph 17 of the SGEI Framework, the duration of the period of entrustment should be justified by reference to objective criteria.
- (92) Italy maintains that the duration of the period of entrustment is objectively justified since the concession duration, as prolonged, will allow to realize all the investments planned and to remunerate the concessionaire within the agreed remuneration limits while keeping the tariff increase capped.
- (93) The Commission observes that the duration of the entrustment, corresponding as far as the notified measures are concerned to the extended concession durations, is the result of a detailed method of calculation that factors in the different central parameters of the Plan: (i) tariff cap; (ii) cost of works; (iii) concessionaire's remuneration and (iv) possible takeover value. In particular, as noted above (see recitals (29) and (39)) the method of calculation of the prolongation period and of the possible terminal value enables to guarantee a strict financial equilibrium with the missed revenues deriving from the tariff cap and the ongoing and additional investments object of the Plan.
- (94) In particular the calculation of the prolongation periods can be considered as reasonable and proportionate for both cases, as (i) the tariffs have been capped at a sustainable level by not allowing them to increase in principle beyond inflation

⁴⁹ See footnote 2.

plus 0.5% on a yearly basis, (ii) the costs of the works have been fixed in order to avoid that, by increasing, they would negatively affect the other parameters (e.g. tariff or takeover value), (iii) the remuneration of the concessionaires has been set at reasonable levels and (iv) the takeover value has been capped in order to avoid that amount to constitute an insuperable obstacle to an effective retendering of the concessions.

- (95) The Commission therefore concludes that the condition outlined at paragraph 17 of the SGEI Framework is fulfilled.

3.3.4. *Compliance with the Directive 2006/111/EC*

- (96) According to paragraph 18 of the SGEI Framework, failure to comply with Directive 2006/111/EC⁵⁰, which concerns transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings, implies that the measure is considered to affect the development of trade to an extent that would be contrary to the interest of the Union, within the meaning of Article 106(2) of the Treaty.
- (97) In this respect, Italy confirms that the concessionaires, through the contractual provisions in each *Convenzione Unica*, as per Law N. 262 of 2006 and further CIPE deliberations, are subject to analytical accounting obligations that impose separation of accounts (detailing costs and revenues, construction, operation and maintenance activities) for each motorway section under concession.
- (98) Beyond the general reporting obligations, the one and five-year regulatory monitoring mechanisms (see also recitals (163) and (164)), as well as the approval of the economic and financial plans by CIPE, ensures the control by Italy of the effectiveness of such information.
- (99) The Commission therefore concludes that the condition outlined at paragraph 18 of the SGEI Framework is fulfilled.

3.3.5. *Compliance with Union public procurement rules*

- (100) According to point 19 of the SGEI Framework, “*Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law.*”
- (101) In this regard, Italy put forward in their notification that the modifications to the current concession contracts resulting from the notified measures do not require a new concession award procedure because those modifications comply with the provisions on contract modifications contained in Article 43 (1)(b) of Directive

⁵⁰ OJ L 318 of 17.11.2006, p. 17.

2014/23/EU⁵¹ or, respectively, in Article 43 (1)(e) of Directive 2014/23/EU read in conjunction with Article 43 (4)(a), (4)(b) and (4)(c) of the same Directive.

(102) Directive 2014/23/EU entered into force on 17 April 2014 and its implementation into national law had to take place by 18 April 2016⁵².

(103) In view of the above, the Commission considers that the assessment of whether the contract modifications resulting from the notified measures comply with EU law must be carried out in particular pursuant to the relevant provisions of Article 43 of Directive 2014/23/EU.

(104) The relevant provisions of Article 43 of Directive 2014/23/EU are the following:

“1. Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

(...)

(b) for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire:

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity.

However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value shall not exceed 50 % of the value of the original concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

(...)

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

(...)

4. A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the concession materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be

⁵¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 094 28/3/2014, p. 1).

⁵² See above recital 6 for the implementation into the Italian legal system.

considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;

(b) the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;

(c) the modification extends the scope of the concession considerably;

(...)".

- (105) The measure notified by Italy entails two types of public procurement – relevant contractual changes.
- (106) The first type of contractual changes consists in introducing into the current concession contracts some modifications mainly related to the remuneration of the concessionaire (in particular: a tariff cap, a remuneration for missed revenues, a maximum terminal value and – as regards ASPI and SATAP A4, but not ATCN – a 48-month time extension). These modifications are aimed at facilitating the execution of both already foreseen and additional works without an excessive increase in tariffs.
- (107) The second type of contractual changes consists in introducing into the current concession contracts additional works which are not already foreseen in those contracts.
- (108) The first type of contractual changes has not been provided for in the initial concession documents in precise and unequivocal review clauses. It must therefore be assessed whether such changes comply with Article 43 (1)(e) of Directive 2014/23/EU, according to which concessions may be modified without a new concession award procedure if the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4 of the same Article 43. As a consequence, it is necessary to establish whether the contract modifications at issue are substantial to the extent that, by meeting one or more of the conditions set by Article 43 (4)(a), (4)(b) and (4)(c) of Directive 2014/23/EU, they render the concessions materially different in character from the ones initially concluded.
- (109) As regards the condition set by Article 43 (4)(a), the Commission observes that, since the proposed contract modifications do not change the economic, technical and professional requirements imposed on the participants in the initial concession award procedure, it must be considered that the contract modifications at issue do not introduce conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted. The Commission further observes that, since, for the reasons mentioned in recitals (147) and (148) below, the contract modifications at issue

do not change the economic balance, it must be considered that the contract modifications at issue do not introduce conditions which, had they been part of the initial concession award procedure, would have attracted additional participants in the concession award procedure.

- (110) As regards the condition set by Article 43 (4)(b), the Commission observes that, to the extent that (as explained in recitals (159) and following of the present decision) the contract modifications at issue do not lead to an overcompensation of the incumbent concessionaires, it must be considered that they do not change the economic balance of the concessions in favor of the concessionaires.
- (111) Finally, as regards the condition set by Article 43 (4)(c), the Commission considers that, in assessing whether a contract modification extends considerably the scope of a concession, it is necessary to envisage both the material scope and the time scope of the concession.
- (112) Concerning the material scope, the Commission observes that, to the extent that the contract modifications at issue relate to works which are already foreseen in the current ASPI and SIAS contracts, it must be considered that those contract modifications cannot by nature extend considerably the material scope of the concessions. A dedicated analysis as regards additional works is provided below in recitals (129).
- (113) Concerning the time scope, the Commission observes that prolonging the duration of a contract can be a contract modification incompatible with the principles of equal treatment, non-discrimination and transparency embedded in the TFEU and referred to in Article 3 of Directive 2014/23/EU. However, this is not the case if it is established that the extension in question does not substantially modify the scope of the contract in question. For the reasons explained in recitals 116 and 117 and following, the Commission considers that, in the specific circumstances of the present case, the 48-month time extension at issue does not substantially modify the ASPI and SATAP A4 concessions.
- (114) As regards ASPI, it must first be pointed out that the current end date of the ASPI concession, namely 31 December 2038, was set by the *Convenzione* of 4 August 1997. The Commission considers that prolonging the duration of the ASPI concession by 48 months does not extend considerably the time scope of the concession, for the following cumulative reasons: first, compared to the time span 4 August 1997-31 December 2038, a 48-month prolongation is relatively short; second, this would be the first prolongation made to the ASPI concession since 1997; third, the Commission takes note of the fact that Italy states " (...) on the basis of the current macro-economic forecasts, beyond the works contained in the Plan, there will not be within the concession period, the need of new works subject to specific remuneration, except for those required by subsequent legal obligations".
- (115) As regards SIAS, the Commission considers that prolonging the duration of the SATAP A4 concession by 48 months does not extend considerably the time scope of the concession, because the 48-month time extension of the SATAP A4 concession is accompanied by an estimated 13 year reduction in the duration of the ATCN concession and will lead in 2030 to a public tendering procedure

whereby SATAP A4 and ATCN will be awarded as a single concession (along with ATIVA and SATAP A21)⁵³. The commitment to proceed to a joint tendering in 2030 implies that there will not be further prolongations of the jointly tendered motorways (among which SATAP A4 and ATCN).

- (116) In the light of all the above, the Commission considers that, since the contract modifications at issue do not meet any of the conditions set by Article 43 (4)(a), (4)(b) and (4)(c) of Directive 2014/23/EU, they do not render the concessions materially different in character from the ones initially concluded and are, therefore, not substantial within the meaning of Article 43 (1)(e) of Directive 2014/23/EU.
- (117) Concerning the second set of contractual changes, which consists in including additional works in the scope of the concessions, the Commission observes the following.
- (118) The works to be carried out on the ASPI network concern several motorways operated by ASPI and include both works which are already foreseen in the current ASPI concession contract (“the already foreseen ASPI works”, referred to as “already foreseen investments” under recital (36)) and works which are not already foreseen in the current ASPI concession contract (“the additional ASPI works”, referred to as “additional investments” under recital (36)).
- (119) The already foreseen ASPI works (also called “Old investments” in recital (36) of the present decision) consist in the following: building the so-called *Gronda di Genova* (also known as *Passante di Genova*), i.e. a motorway chunk bypassing the urban area of Genoa; adding lanes; building new junctions; implementing anti-noise measures; improving the safety of tunnels.
- (120) As mentioned above (recital (56)), a third party has alleged that the *Gronda di Genova* works are “new” because the *Gronda di Genova* project was first mentioned as part of the ASPI concession in the *IV Atto Aggiuntivo* of 23 December 2002, which was not preceded by an open tender procedure, and because the *Gronda di Genova* project approved by Italy in 2017 is substantially different from the *Gronda di Genova* project as first envisaged in 2002 (by the *IV Atto Aggiuntivo* of 23 December 2002) and then confirmed in 2007 (by the *Convenzione Unica* of 12 October 2007).
- (121) Concerning the first allegation, the Commission observes that the issue of whether the *Gronda di Genova* project was an additional work, whose award to the ASPI concessionaire should have been preceded by an open tender procedure, was the object of an infringement procedure launched by the Commission in 2003 (file NIF 2003/2035). However, the Commission closed that infringement procedure because it considered that, based on the information provided by the Italian authorities, the *IV Atto Aggiuntivo* of 23 December 2002 did not require an open tender procedure since the *Gronda di Genova* was a mere improvement of a

⁵³ According to the commitments made by Italy, the public tendering procedure to be launched in 2030 will be aimed at awarding SATAP A4 and ATCN as a single concession jointly with other two concessions belonging to the SIAS group, namely SATAP A21 and ATIVA, which Italy has committed to award as a single concession by a public tendering procedure to be completed before the end of 2019.

project (Bretella Voltri-Rivarolo) that had been included in the ASPI concession already in 1989, i.e. before EU public procurement law became applicable to works concessions.

- (122) Concerning the second allegation, the Commission observes that, while the *Gronda di Genova* 2017 project- as definitively approved in September 2017 - is more sizeable than the 2002-2007 *Gronda di Genova* project, there is however no reason to consider that the 2017 project has a different economic and technical function from the 2002-2007 project, since both projects consist in a motorway bypass to the north of the city of Genoa. The Commission further observes that, based on the available information, the differences between the 2002-2007 project and the 2017 project are the direct consequence of the public consultations and relevant procedures launched by the local municipalities to reduce the impact of the planned bypass motorway on inhabited areas. The Commission notes that such procedures are also relevant in the context of the assessment of the measure under the SGEI Framework (see recital (84)).
- (123) In light of the above, the Commission considers that the *Gronda di Genova* project belongs to the already foreseen ASPI works.
- (124) The additional ASPI works (also called “Other planned investments” in recital (36) of the present decision) consist in the following: building additional lanes; building new junctions; upgrading existing junctions; building new tollbooths; widening existing bridges; building a new, 247.5 meters long, viaduct over the Arno river; widening existing viaducts; building new overpasses; replacing existing overpasses; widening existing underpasses; prolonging a tunnel (*Galleria Bruschetto*) by 582 meters; installing anti-noise barriers.
- (125) The works to be carried out on the SIAS network concern both SATAP A4 and ATCN. While the works concerning ATCN are already foreseen in the current ATCN concession contract, the works concerning SATAP A4 include both works which are already foreseen in the current SATAP A4 concession contract (“the already foreseen SATAP A4 works”, also referred to as "already foreseen investments" in recital (22)) and works which are not already foreseen in the current SATAP A4 concession contract (“the additional SATAP A4 works”, also referred to as "additional investments" in recital (22)).
- (126) The ATCN works, all of which are already foreseen in the current ATCN concession contract, consist in the following: carrying out extraordinary maintenance works; completing the motorway by building the missing section; upgrading the Alba ring road; upgrading the toll system.
- (127) The already foreseen SATAP A4 works consist in the following: widening and adding lanes; reducing the environmental impact of the motorway; improving the safety of the motorway; upgrading the toll system; improving the information flow to users; upgrading some administrative premises to be used by the concessionaire.
- (128) The additional SATAP A4 works consist in the following: improving the safety of the motorway by installing safety barriers and by upgrading the lighting system; upgrading tollbooths; improving the information flow to users; improving the safety of some premises used by the motorway police.

- (129) As regards the additional ASPI and SATAP A4 works (see respectively recitals (36) and (22) of the present decision), the Commission observes that, since these are works which have not been provided for in the initial concession documents, in precise and unequivocal review clauses⁵⁴, it is necessary to assess whether their inclusion in the concessions complies with the first and second paragraphs of Article 43(1)(b) of Directive 2014/23/EU.
- (130) According to Article 43(1)(b), first paragraph, of Directive 2014/23/EU, concessions may be modified without a new concession award procedure for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession, if a change of concessionaire (i) cannot be made for economic or technical reasons, and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.
- (131) The Commission observes that the additional ASPI and SATAP A4 works must be carried out in the framework of the current concessions. In fact, these works have become necessary to operate the ASPI and SATAP A4 concessions, insofar as they are aimed at facing an increase in traffic, at solving safety problems or at reducing the environmental impact of the motorway sections concerned in line with EU law⁵⁵. In this respect, the notification specifies in the technical annexes, for each work, the reasons underlying the intervention.
- (132) Contrary to the competitor's allegations the Commission further observes that, making the additional ASPI and SATAP A4 works the object of an autonomous concession would be technically and economically impossible, and would cause significant inconvenience or substantial duplication of costs for the contracting authority, because all these works, on the one hand, relate to existing motorway sections which are already operated by the ASPI and SATAP A4 concessionaires and, on the other hand, do not consist in building new motorways or new motorway sections⁵⁶. In any event, the Commission notes the commitment to

⁵⁴ For ASPI the *Convenzione Unica* had foreseen only the request by the conceding authority to provide provisional planning for investments in a series of third and fourth lanes, subject to further final decision (see Article 15 of the *Convenzione Unica*). For SIAS the additional investments are listed in Article 2.2 bis of the *Convenzione Unica*.

⁵⁵ The Commission considers that Directive 2002/49/EC ("the Environmental Noise Directive") must be respected in this regard. The present state aid decision is without prejudice to any proceedings launched by the Commission under Article 258 of the TFUE in the context of this Directive, taking in particular into account the Reasoned Opinion (Infringement No. 2013/2022) that was sent to Italy since it has failed to draw up all the necessary action plans on noise, including, *inter alia*, 858 major roads.

⁵⁶ The additional ASPI and SATAP A4 works are such that making these works the object of an autonomous concession would be impossible and would cause significant inconvenience for the contracting authority. For example, the additional lanes to an existing motorway cannot be operated separately from the motorway to which they are added: foreseeing a separate concession for just the additional lanes would cause considerable legal, administrative and practical difficulties for both the contracting authorities and the several concessionaires operating different lanes of the same motorway. The same consideration applies, not only to additional lanes, but also to junctions, tollbooths, overpasses, underpasses, anti-noise barriers, safety barriers, lighting systems, information systems. As regards tunnels, bridges and viaducts, these are works that can in principle be the object of autonomous concessions in the case of a new tunnel, bridge or viaduct whose length would make it economically viable to operate an autonomous concession. However, the additional works in the present case do not include the construction of new tunnels (but only the prolongation of an already

tender out the execution of 80% of the works included in the Plan (with the exclusion of the works on ATCN).

- (133) Therefore, the Commission concludes that including the additional ASPI and SATAP A4 works in the scope of the concessions complies with Article 43(1)(b), first paragraph, of Directive 2014/23/EU.
- (134) According to Article 43(1)(b), second paragraph, of Directive 2014/23/EU, in the case of concessions for certain activities such as the construction and operation of motorways, any increase in the value of a concession, due to contract modifications consisting in additional works or services not included in the initial concession, must fulfil two requirements: under the first requirement, the value of each one of those modifications shall not exceed 50 % of the value of the original concession; under the second requirement, consecutive modifications shall not be aimed at circumventing the Directive.
- (135) As regards the first requirement set by Article 43(1)(b), second paragraph, of Directive 2014/23/EU, the Commission observes the following.
- (136) As regards ASPI, the Italian authorities have provided the value of the ASPI concession in 1999 (when the concession was privatized). The available data show that the cumulative value of all the additional ASPI works represents only [1-5] % of the value of the ASPI concession in 1999, very much below the 50 % threshold⁵⁷. The Commission observes that, because works concessions first became subject to Community public procurement law in 1990 following the adoption of Directive 89/440/EEC⁵⁸, and because the first modification to the ASPI concession after 1990 was made in 1997 (by the *Convenzione* of 4 August 1997), the value of the original concession, for the purposes of the 50 % threshold at issue, should be the value of the ASPI concession in 1997. However, since the cumulative value of all the additional ASPI works represents only [1-5]% of the value of the ASPI concession in 1999, and since – according to the information available to the Commission – the value of the ASPI concession in 1997 cannot have been much smaller than the value of the ASPI concession in 1999, it is clear that, whatever was the exact value of the ASPI concession in 1997, the cumulative value of all the additional ASPI works represents only a marginal percentage of that 1997 value, much below the 50 % threshold.
- (137) As regards SATAP A4, the Italian authorities have provided the value of the SATAP A4 concession in 1994. The available data show that the cumulative value of all the additional SATAP A4 works represents only [1-5]% of the value

existing tunnel by 582 meters), do not include the construction of new bridges (but only the widening of already existing bridges), and include the construction of a new viaduct which is only 247.5 meters long.

⁵⁷ The additional ASPI works are worth EUR 3.03 billion. According to the information which the Italian authorities provided in the notification, the value of the ASPI concession in 1999 was EUR [85-95 billion]. Therefore, the additional ASPI works represent [1-5] % of the value of the ASPI concession in 1999.

⁵⁸ Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ L 210, 21/07/1989, p. 1). Directive 89/440/EEC became applicable in Italy on 19/7/1990.

of the SATAP A4 concession in 1994, much below the 50 % threshold⁵⁹. The Commission observes that, because works concessions first became subject to Community public procurement law in 1990 following the adoption of Directive 89/440/EEC⁶⁰, and because the first modification to the SATAP A4 concession after 1990 was made in 1999 (by the *Convenzione* of 28 July 1999), the value of the original concession, for the purposes of the 50 % threshold at issue, should be the value of the SATAP A4 concession in 1999. However, since the cumulative value of all the additional SATAP A4 works represents only [1-5]% of the value of the SATAP A4 concession in 1994, and since – according to the information available to the Commission – the value of the SATAP A4 concession in 1999 cannot have been much greater than the value of the SATAP A4 concession in 1994, it is clear that, whatever was the exact value of the SATAP A4 concession in 1999, the cumulative value of all the additional SATAP A4 works represents only a marginal percentage of that 1999 value, much below the 50 % threshold.

- (138) As regards the second requirement set by Article 43(1)(b), second paragraph, of Directive 2014/23/EU, it must be observed that, as shown above, the contract modifications notified by Italy comply with the relevant provisions of Article 43 of Directive 2014/23/EU.
- (139) Therefore, the Commission concludes that awarding the not already foreseen ASPI and SATAP A4 works to the incumbent concessionaires also complies with Article 43(1)(b), second paragraph, of Directive 2014/23/EU.
- (140) In the light of all the above, the Commission considers that the conditions set by point 19 of the SGEI Framework are fulfilled.

3.3.6. *Absence of discrimination*

- (141) Paragraph 20 of the SGEI Framework requires that, where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking.
- (142) Italy maintains that the concessionaires that benefit from the aid have not been discriminated against, since the same underlying principles, objectives, main parameters and methods of calculation of the compensation apply to both legs of the Plan. Moreover, the Commission notes that the entrustment is specific for each concessionaire and linked to the specific circumstances of that concession. For that reason, each SGEI has to be assessed on its own merits and the SGEIs cannot be considered as the same.
- (143) As Italy has indeed applied the same methodology of calculation of the compensation, tariff cap and take-over value and given that the SGEI measures cannot be considered equivalent, the Commission therefore concludes there is no

⁵⁹ The additional SATAP A4 works are worth EUR 44 million. According to the information which the Italian authorities provided during the pre-notification dialogue with the Commission, the value of the SATAP A4 concession in 1994 was EUR [2-3 billion]. Therefore, the additional SATAP A4 works represent [1-5]% of the value of the SATAP A4 concession in 1994.

⁶⁰ Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ L 210, 21/07/1989, p. 1). Directive 89/440/EEC became applicable in Italy on 19/7/1990.

discrimination between concessionaires. Thus the condition outlined at paragraph 20 of the SGEI Framework is met.

3.3.7. Amount of compensation

- (144) Paragraph 21 of the SGEI Framework establishes that "*The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.*" Paragraph 22 further clarifies that "*The amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset, in accordance with paragraphs 40 and 41.*"

Methodology

- (145) The methodology followed by Italy identifies the cost of discharging the public service obligation as the cost for not receiving the revenues that would have accrued under the operation of the initial concession contract. Thus, the concept of missed revenues is the pillar of the methodology used by Italy. Missed revenues are calculated as the difference between the expected revenues, assuming certain traffic forecasts, under the contractual tariff increases minus the revenues expected under the tariff cap measure provided for in the Plan.
- (146) Once that element is defined, the model calculates:
- The value of the missed revenues arising from the tariff cap and the ongoing and additional investments object of the Plan;
 - The number of years of prolongation and the additional revenues that the concessionaire accrues during these years of extension of the concession, net of the costs to be borne (including the concession fee to the State);
 - A possible takeover value (not exceeding the maximum takeover value set in the Plan) that allows to compensate for the capitalized missed revenues that might not be compensated by the additional revenue of prolongation;
 - The economic neutrality, in net present value terms, whereby missed revenues equal: (i) revenues during the years of extension (ii) plus- if necessary- a takeover value.
- (147) As detailed in recitals (29) and (39), the methodology consists in comparing the cash-flows originating from the initial concession contract with the cash-flows resulting from the amended concession with capped tolls, adding the revenues of the forty-eight months of prolongation. This exercise is conducted on a prospective basis, based on a series of estimated parameters (pre-set investment levels, long term inflation level at 2%, stable costs of the works, estimated traffic data) and an appropriate rate of return, for the missed revenues. The methodology is complemented by a yearly and a five-year based monitoring exercises to take into account the actual levels of the different parameters (e.g. traffic, inflation, realized investments).
- (148) Since the methodology calculates the compensation as the difference between expected revenues and expected costs, to be updated in the future at regular intervals on the basis of actual costs and actual revenues, it can thus be concluded

that it consists of a combination of the two methods mentioned in paragraph 22 of the SGEI Framework.

- (149) Figure 2 above illustrates how the financial neutrality mechanism proposed by Italy operates.
- (150) Based on these elements of the measure, along with the commitments, the Commission considers that the methodology devised by Italy is in line with the SGEI Framework as it maintains a strict equilibrium between the new charges and limitations imposed on the concessionaire, on the one hand, and the limited prolongation of the concession, on the other hand.

Reasonable profit

- (151) The compensation of the concessionaire plays a role in the above described methodology. To define adequate rates of return that would not entail overcompensation of the concessionaire, Italy applied the following approach: the rate of return for already foreseen and for additional investments is set either at the value foreseen in the original contracts or at a lower value, especially for what concerns the additional investments to undertake until 2023. This lower value is set following the methodology of the WACC. The rate of return for the remuneration of the missed revenues is also set following the methodology of the WACC albeit on a more long term perspective, given that this parameter is not revised during the course of the concession. The Commission has conducted a benchmarking exercise on the proposed WACC parameters including their sub-components (e.g. risk free rate, equity risk premium, gearing, and cost of debt). The Commission has also conducted a benchmarking exercise on the overall expected return for the concessionaire taking into account the remuneration of the investments and the interplay with the remuneration of the missed revenue.
- (152) Based on the benchmarking exercise the Commission considers the proposed remuneration parameters to be within a range of reasonable values taking into account the specificity of the industry, the type of works concerned, the construction and traffic risk involved and the current and expected macro-economic conditions. For the benchmarking exercise on the WACC the Commission considered the following parameters: a range of risk free rate related to investment in Italy (e.g. yield on Italian BTP with maturity of 10 or 30 years); a range of equity risk premia usually adopted for motorway concessions in Italy and in other regulated sectors in Italy; a range of Beta (a measure of the volatility of a stock's returns relative to the equity returns of the overall market) related to companies active in the same sector; a range of parameters for the cost of debt reflecting the actual cost of debt of the involved companies and the cost of debt derived by market based benchmarks. In conclusion, on the basis of the benchmarking exercise, the rates of return used in the present measure can be considered as reasonable and thus as in line with the SGEI Framework.

Efficiency Incentives

- (153) Paragraph 39 of the SGEI Framework requires that "*in devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.*"

- (154) Italy maintains that a tariff cap, as such, is already an efficiency incentive, since it discourages operative inefficiencies that might increase the costs of running the operation of the concessions concerned. Furthermore, the presence of clauses (referred to in recitals (50) and (53) above) enabling the revocation/reduction of the prolongation in case of missed or delayed starting or realization of the committed investments, constitutes a further efficiency incentive as this guarantees that, should the investments be delayed or reduced in the scope as compared to what was originally planned, the prolongation would be either annulled or reduced. Also a maximum takeover value (combined with the clauses as described in recitals (48)(50)(51)(53) is to be considered as an efficiency incentive, because it reduces the possibilities for the concessionaires to be compensated for extra-costs.
- (155) Finally Italy argues that specific efficiency incentives are already included in the initial contracts, which set out specific performance levels, services quality indicators and penalties (see recital 50).
- (156) The Commission considers that for these reasons the measure is in line with the SGEI Framework.

Provisions applicable to undertakings also carrying out activities outside the scope of the SGEI or providing several SGEIs

- (157) The Commission notes that costs and revenues associated with the SGEI are clearly separately accounted for both in the yearly monitoring exercise (where level of capped tariff and missed revenues are outlined, see recitals (163) and (164)) and, more generally, in the analytical accounts (see recital (98)), in compliance with points 44 to 46 of the SGEI Framework.

Overcompensation

- (158) Paragraph 49 of the SGEI Framework requires that "*Member States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with the requirements set out in this section. They must provide evidence upon request from the Commission. 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. For aid granted by means other than a public procurement procedure with publication, checks should normally be made at least every two years*".
- (159) Italy clarified and increased the level of controls as compared to the ones foreseen in the current concession contracts.
- (160) As regards the level of financial penalties, Italy has committed to increase those in certain circumstances, for example in case of a delayed realization of works. In this scenario, the Plan also reinforces existing mechanisms to neutralise financial benefits (see recitals (50) and (53)), by providing for automatic revocation of the prolongations in certain circumstances and by making sure that any benefit arising from traffic increases and/or delayed/non-realized investments, for any reason whatsoever, will be used solely to proportionally reduce the takeover value or possibly the prolongation, instead of being set aside for new investments.

- (161) As regards monitoring mechanisms to ensure the equilibrium of the Plan, Italy has introduced a yearly monitoring and a monitoring that operates on a five-year basis.
- (162) The yearly monitoring will serve to measure and follow: (i) the advancement of the works and the relative costs, (ii) the accrued revenues, (iii) the applied tariffs, (iv) the actual level of traffic, (v) the actual inflation rate and (vi) the capitalised amount of missed revenue. Italy will compare the resulting figures with those underlying the Plan and verify the presence of any deviation.
- (163) Every five years (consistently with the regulatory periods), the Italian authorities will calculate the prospective tariffs, the updated traffic forecasts, the assumed inflation rate, the expected capitalised amount of missed revenue, the updated WACC where applicable, the expected EBITDA and the likely takeover value to assure the respect of the financial equilibrium among the parameters as outlined in the Plan notified to the Commission and on the basis of which the present decision is taken. Whenever necessary, Italy will take all the actions needed to ensure that the remuneration and the takeover value will be coherent with the parameters outlined in the notification. Italy will not increase the takeover value above the values set at recitals (30) and (43) and will revise the takeover value downwards if it is necessary to guarantee financial neutrality and, in presence of a negative value, will proceed to a reduction of the prolongation.
- (164) This monitoring exercise will produce a yearly report and a 5-year report which will be made available to the Commission.
- (165) Based on the above elements, the Commission considers that the condition outlined in point 49 of the SGEI Framework is met.

3.3.8. Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union

- (166) Based on section 2.9 of the SGEI Framework, points 52 and 53, there can be exceptional circumstances in which *"serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union. In such a case, the Commission will examine whether such distortions can be mitigated by requiring conditions or requesting commitments from the Member State"*.
- (167) Italy specifies that, in order to reduce as much as possible the risk of competition distortions, it commits to ensure that the concessionaires tender out 80% of the works to be done under the Plan (with the exception of the works relating to ATCN where the original concession has been tendered out).
- (168) Furthermore, Italy commits to tender out, as of 2019, a series of concessions (ATIVA and SATAP A21) and, as of 2030, an entire block of concessions geographically connected (along with the two object of the present measure, SATAP A4 and ATCN).
- (169) Based on these commitments, which relate both to the downstream works' sector and the concessions' market, the Commission observes that there should not be other serious competition distortions affecting the internal market, which remain

unaddressed. Therefore the aid measures at stake do not affect trade to such an extent as would be contrary to the interest of the Union.

- (170) The Commission further notes that the capped takeover value limits foreclosure effects, since it avoids the accrual of an excessive residual financial burden to be borne by the new concessionaire.
- (171) Therefore, the Commission concludes that the condition outlined in points 52 and 53 of the SGEI Framework is fulfilled.

3.3.9. Transparency

- (172) Based on point 60 of the SGEI Framework "(...) *the Member State concerned must publish the following information on the internet or by other appropriate means:*

(a) the results of the public consultation or other appropriate instruments referred to in paragraph 14;

(b) the content and duration of the public service obligations;

(c) the undertaking and, where applicable, the territory concerned;

(d) the amounts of aid granted to the undertaking on a yearly basis.

- (173) Italy confirmed that it would publish online both the results of the public consultation or other appropriate instruments, as well as the specificities related to the public service obligation.
- (174) As to the other element sub c), as mentioned in recital (47), Italy proceeded to the online publication of the original contracts and amendments.
- (175) Since the yearly aid amounts correspond to the prolongation years (and corresponding revenues), such information will be published online by Italy as a consequence of the publication of the amended concession contracts.
- (176) Based on such elements, compliance with the transparency section of SGEI Framework is fulfilled.

3.3.10. Conclusions as concerns the compatibility of the Plan

- (177) In light of the above, the Commission concludes that the Plan fulfils all the conditions set out in the SGEI Framework.

4. ASSESSMENT OF THE THIRD PARTY ALLEGATIONS

- (178) The competitor's claims can be dismissed based on facts and arguments outlined in Section 2 and 3 of the present decision.
- (179) As regards ASPI, the argument that ASPI concession is a bundle of distinct concessions is inaccurate. ASPI's concession (currently regulated by the 2007 *Convenzione Unica*, as amended) is one and covers several motorways, grouped under the very same concession and subject to the same rules, regarding, among

others, duration, tariff and takeover value. In this respect, the Plan does not diverge from the existing regulatory concession regime.

- (180) As to the allegations on the nature of *Gronda di Genova* works, the Commission refers to the detailed assessment provided under section 3.3.5 *Compliance with Union public procurement rules*, which outlines, amongst others, the fact that these works are included in the scope of the existing ASPI concession. On the alleged cost overestimates for the *Gronda* project, the Commission notes that Italy has provided a detailed technical and procedural description as well as a benchmarking analysis of the *Gronda* project as compared to other similar projects. The allegations of the third party are not anyhow based on detailed technical allegations or demonstrations.
- (181) Regarding the allegations related to ATCN, recital (21) outlines the detailed reasons put forward by Italy on the project delays, the cost-increases and the need for the cross-subsidization, which is the object of the present decision. Regarding the competitor's allegation that, since the ATCN works have been downsized compared to the works foreseen at the time of the tendering procedure, the incumbent ATCN concessionaire is obtaining an undue advantage, the Commission notes that the alleged downsizing has been decided in order to reduce the otherwise overall increased costs and thus to minimize the need for any cross-financing or prolongation and costs borne by users. Finally the Commission observes that the measure notified by Italy includes a reduction of the duration of the ATCN concession by about 13 years.
- (182) On the alleged different shareholding of ATCN and SATAP A4, the Commission notes that SIAS has a large majority shareholding in both companies. The Annual Report on Motorways realised by the MIT for the year 2016⁶¹ indicates that ATCN shareholding is divided between ANAS (public operator) and SIAS for an amount of, respectively, 35% and 65%. SATAP A4 shares are said to be for 99.87% in the ownership of SIAS. This setup implies that SIAS, in its capacity of majority shareholder, cannot derive any disproportionate benefit from the different shareholdings as its share in the cross-financed entity is smaller than its share in the cross-financing entity.
- (183) The allegations concerning SATAP A21 fall outside the scope of the present decision, focussing on the notified measures. In any event, the Commission notes that SATAP A21 is subject to a specific commitment by the Italian authorities to tender out that concession in the next future, i.e. by 2019. The Commission finally observes that the current ATCN concession does not contain any mechanism allowing that concession to benefit from any financing stemming from SATAP A21 revenues.
- (184) The Commission further notes that, as regards both legs of the Plan, Italy provided benchmarking cost analysis of the works subject to the Plan.
- (185) Lastly, as regards the allegations on the compliance with the *Altmark* criteria, concerning the public procurement rules and the SGEI requirements, the

⁶¹ MIT, *Relazione Attività 2016*, p. 418 and p. 593, available at: <http://www.mit.gov.it/node/6211> (last accessed: 27 March 2018).

Commission notes that it has conducted its assessment of the measure under this legal framework, therefore reference is made to Section 3 above.

- (186) The Commission concludes that the issues raised by the competitor are all addressed by the measures notified by Italy and by its related commitments. These allegations do not raise serious new issues and the Commission therefore considers that they have been exhaustively dealt with in the context of the present decision.

5. CONCLUSION

In light of the commitments undertaken by Italy, the Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 106 paragraph 2 of the Treaty on the Functioning of the European Union.

The Commission notes that Italy has agreed that the present decision would be adopted, notified and published in the English language.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION