



2024/2864

18.11.2024

COMMISSION DECISION (EU) 2024/2864

of 24 November 2023

on SA.32179 (2014/C) – State aid measures in favour of Trenitalia SpA and FS Logistica SpA – Italy

(notified under document C(2024) 7891)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 29 December 2010, the Commission received a complaint regarding the grant of alleged State aid by Italy to Trenitalia S.p.A. ('Trenitalia') through Rete Ferroviaria Italiana S.p.A. ('RFI'). Both Trenitalia and RFI are subsidiaries of Ferrovie dello Stato S.p.A. ('FS') (see Section 2.1). According to the complainant, certain transfers of railway infrastructure assets within the FS Group ⁽²⁾, from RFI to other companies of that group, involved aid. The complaint was registered under number SA.32179 (2010/CP).
- (2) On 11 February 2011, the Commission transmitted that complaint to the Italian authorities and requested information regarding the measures under investigation. On 1 April 2011, Italy provided a partial reply to that request. On 14 June 2011, the Commission sent a reminder to Italy, requesting the missing information. On 12 July 2011, Italy provided further information in response to the Commission's request for information of 11 February 2011.
- (3) On 24 November 2011, the Commission requested additional information from Italy. On 31 January 2012, Italy provided the requested information. On 8 January 2013, Italy submitted further information to the Commission.
- (4) By letter of 28 March 2014, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') (the 'opening decision') with respect to certain transfers of assets from RFI to Trenitalia and FS Logistica S.p.A. (the 'measures under investigation').
- (5) In the opening decision, the Commission also informed Italy that it had decided to initiate the procedure laid down in Article 108(2) TFEU with regard to a compensation granted by Italy to Trenitalia for the discharge of public service obligations in rail freight transport (Case SA.32953). The assessment of that measure under State aid rules is the object of a separate final decision of the Commission.

⁽¹⁾ OJ C 156, 23.5.2014, p. 77.

⁽²⁾ In the present decision, FS and the companies that FS owns and controls, including RFI and Trenitalia, are referred to as 'FS Group'. For a description of the structure of FS Group see Section 2 of the present decision, as well as the official FS Group webpage, available at: <https://fsitaliane.it/content/fsitaliane/en/fs-group/group-companies.html>.

- (6) On 22 April 2014, Italy requested an extension of the time-limit to submit its comments on the opening decision, which the Commission granted on 28 April 2014. On 21 May 2014, Italy requested a further extension of the time-limit to submit comments on the opening decision, which the Commission granted on the following day.
- (7) The opening decision was published in the *Official Journal of the European Union* of 23 May 2014 ⁽³⁾. The Commission invited interested parties to submit their comments on the measures under investigation.
- (8) Between June and July 2014, the Commission received comments on the opening decision from Italy and from three interested parties. Italy provided comments on 24 June 2014. On 13 June 2014, FerCargo, an association of private rail freight operators, requested an extension of the time-limit to submit its comments on the opening decision, which the Commission granted; FerCargo submitted comments on 8 July 2014. On 16 June 2014, FS requested an extension of the time-limit to submit its comments on the opening decision, which the Commission granted; FS provided comments on behalf of the FS Group on 23 July 2014. The Community of European Railways and Infrastructure Companies ('CER') provided comments on 19 June 2014.
- (9) On 20 June and 6 August 2014, the Commission transmitted the interested parties' comments to Italy. On 24 September 2014, Italy requested an extension of the time-limit within which to submit its observations on the comments of the interested parties. The Commission granted such extension on the following day. On 20 November 2014, Italy sent its observations on the interested parties' comments. On 4 November 2015, Italy supplemented its observations with additional information.
- (10) On 20 September 2017, the Commission sent a request for information to Italy, to which Italy replied on 16 and 30 November 2017. On 22 December 2017, the Commission sent a further request for information to Italy, to which Italy partially replied on 31 January 2018. On 21 March 2018 a meeting took place between the Commission services and the Italian authorities. On 3 April 2018, the Commission sent an additional request for information to Italy, to which Italy replied on 23 May 2018. On 17 December 2018, a meeting took place between the Commission services and the Italian authorities, followed by another meeting on 22 January 2019. Additional information was submitted by Italy on 26 April and 28 June 2019.
- (11) On 20 December 2019, the Commission sent a request for information to Italy, to which Italy replied on 31 January 2020.
- (12) In early 2020, the COVID-19 pandemic broke out, causing a major shock to the Union's economies and requiring a coordinated economic response of Member States and Union institutions to mitigate the negative repercussions on the economy of the Union. Under those exceptional circumstances, the Commission endeavoured to respond urgently to notifications of State aid measures granted in the context of the COVID-19 outbreak, and put in place all necessary procedural facilitations to enable a swift Commission approval process ⁽⁴⁾. During the period of the COVID-19 crisis, the Commission had to give priority to COVID-19 State aid measures ⁽⁵⁾; as a consequence, the completion of the formal investigation procedure on the measures under investigation as well as the completion of other procedures has been delayed.

⁽³⁾ See footnote 1.

⁽⁴⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final of 13.3.2020, Section 5.

⁽⁵⁾ A list of the decisions adopted by the Commission in the context of the COVID-19 crisis is available on the website of DG Competition at the following link: https://competition-policy.ec.europa.eu/system/files/2023-05/State_aid_decisions_T_F_and_107_2b_107_3b_107_3c.pdf (last visited on 20.10.2023).

- (13) Moreover, on 24 February 2022 Russia launched a military aggression against Ukraine. The direct and indirect effects of the Russian military aggression had economic repercussions on the entire internal market. That situation required a swift response from the Commission to mitigate the social and economic negative repercussions in the Union. Under those circumstances, the Commission was called to respond urgently to notifications of State aid measures granted in the context of the Ukrainian crisis ⁽⁶⁾. In the course of 2022 and 2023, the Commission had to give priority to the examination of those State aid measures ⁽⁷⁾, with consequent further delay in the completion of the formal investigation procedure on the measures under investigation.
- (14) On 17 October 2023, Italy exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation No 1/1958 ⁽⁸⁾ and to have this Decision adopted and notified in English.

2. DESCRIPTION OF THE FS GROUP AND THE CONTEXT OF THE MARKET OPENING

2.1. The reorganisation of the FS Group

- (15) Ferrovie dello Stato, Società di Trasporti e Servizi per azioni ('old FS'), was the fully vertically integrated Italian railway operator and the only legal entity in charge of public transport by rail, both for passengers and freight, until its restructuring initiated in the late 1990s. Old FS owned the entirety of the assets that were necessary to carry out its duties and was owned at 100 % by the Italian Ministry of Economy and Finance ('MEF').
- (16) Between 1998 and 2001, Italy reorganised old FS by creating new subsidiaries responsible for different business areas, to which old FS transferred the totality of its assets and activities. In particular, Italy created a new holding company controlled at 100 % by the MEF, namely FS, which owns and controls all the companies active in the different business areas, including the following:
- (a) Trenitalia, established in June 2000, which was put in charge of providing transport services by rail (previously provided by the Passenger, Regional Transport and Cargo Divisions and by the Rolling Stock Technology Unit of old FS);
 - (b) RFI, established in July 2001, which became the sole owner and manager of the railway infrastructure. RFI temporarily owned and managed also the assets subject to the measures under assessment, until those assets were further allocated to other entities of the FS Group – see Section 3.1).

Trenitalia and RFI as well as the holding company FS and those controlled by it, constitute the FS Group, entirely owned by the MEF.

- (17) In the context of the reorganisation referred to in recital (16), all the assets necessary to carry out the respective activities were to be transferred to Trenitalia and to other newly created entities referred to in recital (18), such as FS Logistica but also other entities which are not covered by the present investigation. However, the transfer of certain real estate assets was hindered by legal and technical complications ⁽⁹⁾, which slowed down the completion of the reorganisation.

⁽⁶⁾ Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 131 I, 24.3.2022, p.1).

⁽⁷⁾ A list of the decisions adopted by the Commission under the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia is available on the website of DG Competition at the following link: https://competition-policy.ec.europa.eu/state-aid/temporary-crisis-and-transition-framework_en (last visited on 16.10.2023).

⁽⁸⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

⁽⁹⁾ In particular, Italy notes that the necessary cadastral, administrative and accounting documents related to the assets to be transferred to Trenitalia had to be gathered, categorised and verified before the reallocation took place. Thus RFI, having received all the infrastructure facilities from old FS, maintained the temporary ownership thereof, including those to be transferred to Trenitalia and FS Logistica.

- (18) According to Italy, within the context of the reorganisation process of the FS Group referred to in recital (16), FS Board approved the 2007-2011 Business Plan on 17 May 2007 ⁽¹⁰⁾. In the context of substantial financial losses of the FS Group (over EUR 2 bn in 2006), FS adopted an internal restructuring plan to restore the financial viability of the FS Group. In addition to cost-cutting measures, the FS Group decided to increase its operational income, notably through the rationalisation of the real estate and facilities scattered in the various entities of the FS Group. This entailed the creation of dedicated subsidiaries to which the assets used to carry out specific activities were transferred:
- (a) logistics services; to that end, a new operator named FS Logistica S.p.A. ('FS Logistica') was founded in 2007 to offer integrated logistics services, following the example of other European incumbents (DB Schenker in Germany and the SNCF-owned Geodis in France). On 1 January 2017, FS Logistica was renamed Mercitalia Logistics S.p.A. ('Mercitalia Logistics') ⁽¹¹⁾;
 - (b) mobility services and real estate management; for that purpose, a new subsidiary named FS Servizi Urbani S.p.A. was created on 27 February 2008 to maximise the value of the real estate owned by FS;
 - (c) engineering services in foreign markets; these services were operated by Italferr S.p.A.
- (19) According to Italy, the implementation of the 2007-2011 Business Plan helped restore FS's financial situation, as set out in Table 1:

Table 1

Key income statement, balance sheet and financial data of FS

(EUR/million)

	2006	2007	2008	2009	2010	2011	2012	2013
Main income statement data								
Operating revenue	6 703	7 685	7 816	7 491	7 985	8 265	8 228	8 329
Operating costs	(7 353)	(7 222)	(6 781)	(6 525)	(6 312)	(6 461)	(6 310)	(6 299)
Gross operating margin	(650)	463	1 035	966	1 673	1 804	1 918	2 030
Operating income (EBIT)	(1 354)	(575)	106	143	507	664	719	818
Net income (loss)	(2 115)	(409)	16	44	129	285	381	460
Main Equity and Financial Information								
Net invested capital	45 461	42 757	45 420	45 948	46 483	45 178	45 804	45 834
Shareholder's equity	36 444	36 016	36 210	36 245	36 509	36 846	36 736	37 342
Net financial position	9 017	6 741	9 210	9 703	9 974	8 332	9 068	8 492
Debt/equity	0,25	0,19	0,25	0,27	0,27	0,23	0,25	0,23

⁽¹⁰⁾ In the present decision the 2007-2011 Industrial Plan (in Italian «Piano industriale 2007-2011» will also be referred to as '2007-2011 Business Plan'.

⁽¹¹⁾ Source: FS 2017 Annual report, p. 13 (Relazione finanziaria annuale).

	(EUR/million)							
	2006	2007	2008	2009	2010	2011	2012	2013
Technical investment in the period	7 263	6 864	6 096	5 250	4 143	3 808	3 891	3 895

Source: information submitted by the Italian authorities in their observations of 23 July 2014.

Note:

The data for the period 2007-2008 are shown in accordance with the ITA GAAP national accounting principles, while the data for the period 2009-2013 are based on the IFRS (International Financial Reporting Standards).

2.2. Description of FS subsidiaries concerned by the Commission investigation

- (20) Three FS subsidiaries (RFI, Trenitalia and FS Logistica) are concerned by the measures under investigation, which are described in Section 3.

2.2.1. RFI

- (21) RFI is in charge of rail infrastructure management in Italy by way of a 60-year concession granted by Decree of the Ministry of Transport and Navigation in 2000 ⁽¹²⁾. As such, RFI enjoys a legal monopoly for the construction, maintenance and operation of the rail infrastructure, for railway safety and for the allocation of paths to railway undertakings. According to its Statute, RFI may also carry out on the market all activities or operations that are deemed necessary or appropriate for the accomplishment of its missions ⁽¹³⁾.

- (22) The company's main asset is the railway infrastructure itself. The main activities of RFI are the following:

- (a) design, construction, commissioning, management and maintenance of the national railway infrastructure, and management of the control and safety systems for train circulation;
- (b) promotion of the integration of rail infrastructures and cooperation with other rail infrastructure managers;
- (c) other tasks entrusted to the infrastructure manager pursuant to the relevant legislation, such as managing the access to infrastructure and services, and collection of the charges for the use of the infrastructure payable by railway companies.

- (23) As the Italian rail infrastructure manager, services provided by RFI encompass granting access to the rail infrastructure to railway undertakings, maintaining and developing the infrastructure, ensuring the respect of the security and safety standards, and issuing security certificates ⁽¹⁴⁾.

⁽¹²⁾ The old FS was appointed as infrastructure manager by the Italian State by means of Decreto del Ministro dei Trasporti e della Navigazione n. 138T of 31 October 2000. In July 2001, RFI succeeded as infrastructure manager to the old FS.

⁽¹³⁾ Those missions include the following: buying or selling real estate, developing commercial, industrial or financial activities linked with the object of the company; acquiring shares in other companies whose purpose is similar or related or instrumental to its own purposes, provide collateral and guarantees in favour of third parties, etc.

⁽¹⁴⁾ Programme Contract 2001-2007, Article 4.

- (24) RFI's revenues consist mainly of revenues from infrastructure services (network use charges, sale of electric traction, ferry service and State contributions for network maintenance). The financial situation of RFI during the period 2006-2013 is set out in Table 2:

Table 2

Key income statement, balance sheet and financial data of RFI

(EUR/million)

	2006	2007 (*)	2008	2009	2010	2011	2012	2013
Main income statement data								
Operating revenue	2 302	2 549	2 507	2 555	2 613	2 541	2 663	2 676
Operating costs	(2 413)	(2 427)	(2 454)	(2 397)	(2 345)	(2 302)	(2 287)	(2 159)
Gross Operating Margin	(111)	122	54	159	268	240	377	517
Operating income (EBIT)	(161)	(175)	(119)	65	135	113	246	387
Net income	(197)	17	39	9	92	98	160	270
Main Equity and Financial Information								
Net invested capital	34 489	32 474	33 452	34 077	36 720	35 413	35 343	35 350
Shareholder's equity	33 298	33 565	33 075	33 153	33 521	33 358	33 033	33 295
Net financial position	1 191	(1 091)	377	924	3 199	2 054	2 310	2 055
Debt/equity	0,04	(0,03)	0,01	0,03	0,10	0,06	0,07	0,06

Source: information submitted by the Italian authorities in their observations of 23 July 2014.

Note:

The data for the period 2006-2008 are shown in accordance with the ITA GAAP national accounting principles, while the data for the period 2009-2013 are based on the IFRS (International Financial Reporting Standards).

(*) In 2008 a new principle was applied for the first time concerning the cost of use of rolling stock (depreciation). Thus, the data for 2007 have been harmonised also with regard to the spin-off of the 'rail yard/manoeuvring sector' to RFI.

2.2.2. Trenitalia

- (25) Trenitalia was established in 2000 as a fully controlled subsidiary of FS. At the time of the adoption and implementation of the measures under investigation as well as on the date of the opening of the formal investigation, Trenitalia was active in both passenger and freight transport by rail. Trenitalia is currently the largest rail operator in Italy, operating long-distance, local and regional trains for passengers; since January 2017, freight services are provided by Mercitalia Rail.

- (26) Trenitalia's financial situation during the period 2006-2013 is set out in Table 3.

Table 3

Key income statement, balance sheet and financial data of Trenitalia

(EUR/million)

	2006	2007 (*)	2008	2009	2010	2011	2012	2013
Main income statement data								
Operating revenue	4 931	5 517	5 772	5 759	5 708	5 708	5 498	5 498
Operating costs	(5 504)	(4 984)	(4 854)	(4 624)	(4 437)	(4 298)	(4 148)	(4 113)
Gross Operating Margin	(573)	533	919	1 136	1 270	1 411	1 350	1 385
Operating income (EBIT)	(1 211)	(244)	187	315	342	496	418	432
Net income	(1 989)	(263)	(42)	16	73	156	207	181
Main Equity and Financial Information								
Net invested capital	6 850	6 850	6 981	7 833	8 001	7 673	8 248	8 332
Shareholder's equity	925	1 173	1 169	1 529	1 657	1 819	1 913	2 091
Net financial position	5 925	5 677	5 812	6 304	6 344	5 854	6 335	6 241
Debt/equity	6,40	4,84	4,97	4,12	3,83	3,22	3,31	2,98

Source: information submitted by the Italian authorities in their observations of 23 July 2014.

Notes:

The data for the period 2006-2008 are shown in accordance with the ITA GAAP national accounting principles, while the data for the period 2009-2013 are based on the IFRS (International Financial Reporting Standards).

(*) In 2008 a new principle was applied for the first time concerning the cost of use of rolling stock (depreciation). Thus, the data for 2007 have been harmonised also with regard to the spin-off of the 'rail yard/manoeuvring sector' to RFI.

- (27) As of January 2017, Trenitalia's cargo activities were transferred to a newly created company, Mercitalia Rail S.r.l. ('Mercitalia Rail'), fully controlled by Mercitalia Logistics⁽¹⁵⁾. Through Mercitalia Logistics, the FS Group provides freight transport services in Italy and abroad using both conventional and combined transport techniques.

2.2.3. FS Logistica

- (28) FS Logistica was set up in 2007 as a result of FS's decision to group in one single dedicated operator all the logistics activities carried out within the FS Group. Until 2017 (when it was renamed Mercitalia Logistics)⁽¹⁶⁾, FS Logistica provided logistics services in the freight sector, involving rail, intermodal transport solutions, storage, handling and all related real estate operations. FS Logistica never qualified as a 'railway undertaking' in the meaning of Article 3 of Council Directive 91/440/EEC⁽¹⁷⁾ because it did not perform traction of trains.

⁽¹⁵⁾ Trenitalia transferred to Mercitalia Rail all its assets and liabilities connected to freight services and logistics. Source: Trenitalia SpA 2017 Annual report, p. 26 and p. 36 (Relazione finanziaria annuale).

⁽¹⁶⁾ See 2017 FS annual report on financial communication, p. 13.

⁽¹⁷⁾ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25).

2.3. Background on the liberalisation of rail transport in the Union and in Italy

2.3.1. In the Union

- (29) At Union level, rail **freight** transport has been liberalised in three successive waves.
- (30) The first legislative initiative in the early 1990s resulted in the adoption of Directive 91/440/EEC, which Member States had to transpose into national law by 1 January 1993. That act initiated the liberalisation of rail transport by introducing a right of access to railway infrastructure for international groupings and railway undertakings operating combined ⁽¹⁸⁾ international freight transport services accompanied by the principle of separation between the activities of infrastructure management and transport. That principle did not apply to structures but to functions, in particular the accounting function. Under that Directive, separation could be achieved by the creation of distinct divisions within a single undertaking or by entrusting infrastructure management to a separate entity. That legal unbundling was however not mandatory.
- (31) Directive 91/440/EEC was amended by Directive 2001/12/EC of the European Parliament and of the Council ⁽¹⁹⁾, which was part of the so-called 'first railway package' ⁽²⁰⁾, that was to be transposed into national law by Member States by 15 March 2003. Article 10(3) of Directive 91/440/EEC, as amended by Directive 2001/12/EC, granted railway undertakings a right of access on a non-discriminatory basis in relation to the following types of services:
- (a) international freight services on the Trans-European Rail Freight Network – TERFN ⁽²¹⁾;
 - (b) international freight services on the entire rail network of the Union, from 15 March 2008.
- (32) With a view to improving safety, interoperability and opening of the rail freight market, Directive 2004/51/EC of the European Parliament and of the Council ⁽²²⁾, which was part of the so-called 'second railway package' ⁽²³⁾, was adopted. That Directive established a right of access for railway undertakings in relation to the following types of services:
- (a) international freight services on the entire rail network of the Union from 1 January 2006 (thereby anticipating the deadline of 15 March 2008 laid down by Directive 2001/12/EC);
 - (b) all types of freight services (including national traffic) from 1 January 2007.
- (33) As a result, the rail freight market was opened to competition as of 15 March 2003 on the Trans-European Rail Freight Network, as of 1 January 2006 for international freight on the entire rail network of the Union and as of 1 January 2007 for rail freight cabotage. Therefore, rail freight transport is considered to have been fully liberalised at Union level since 1 January 2007 for both national and international services.

⁽¹⁸⁾ Combined transport is defined as intermodal transport with a strictly limited road leg, see Article 1 of Council Directive 75/130/EEC of 17 February 1975 on the establishment of common rules for certain types of combined road/rail carriage of goods between Member States (OJ L 48, 22.2.1975, p. 31).

⁽¹⁹⁾ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 75, 15.3.2001, p. 1).

⁽²⁰⁾ The first railway package also included Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ L 75, 15.3.2001, p. 26) and Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29).

⁽²¹⁾ A rail network of approximately 50 000 km, as identified by Article 10a of and Annex I to Directive 2001/12/EC, covering in Italy the rail-connected ports of Ancona, Bari, Brindisi, Civitavecchia, Genoa, Gioia Tauro, La Spezia, Livorno, Naples, Piombino, Ravenna, Salerno, Savona, Taranto, Trieste, Venice.

⁽²²⁾ Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways (OJ L 164, 30.4.2004, p. 164).

⁽²³⁾ The second railway package also included Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways (OJ L 164, 30.4.2004, p. 44), Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system (OJ L 164, 30.4.2004, p. 114), and Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European railway agency (OJ L 164, 30.4.2004, p. 1).

- (34) Directive 91/440/EEC, as amended by Directives 2001/12/EC and 2004/51/EC, was consolidated, and repealed with effect from 17 June 2015, by Directive 2012/34/EU of the European Parliament and of the Council ⁽²⁴⁾. Article 10(1) of Directive 2012/34/EU provides that: 'Railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right to access to the railway infrastructure in all Member States for the purpose of operating all types of rail freight services'.
- (35) As regards **passenger** transport by rail, the 'third railway package' (through Directive 2007/58/EC of the European Parliament and of the Council ⁽²⁵⁾) opened the international passenger transport by rail to competition, with effect on 1 January 2010. The 'fourth railway package' has fully liberalised rail passenger transport:
- Directive (EU) 2016/2370 of the European Parliament and of the Council ⁽²⁶⁾ amending Directive 2012/34/EU has granted railway undertakings access to national rail networks as of 1 January 2019 ⁽²⁷⁾,
 - Regulation (EU) 2016/2338 of the European Parliament and of the Council ⁽²⁸⁾ has introduced the obligation to competitively award public service contracts as of 3 December 2019, with a transition period ending on 24 December 2023 ⁽²⁹⁾.

2.3.2. In Italy

- (36) Italy liberalised rail freight transport services as of 22 October 2003, with the entry into force of Legislative Decree No 188 of 8 July 2003 ('Legislative Decree 188/2003') ⁽³⁰⁾ transposing into national law the first railway package. In relation to national freight services provided on the national railway infrastructure, Article 6 of Legislative Decree 188/2003 granted various access rights to railway undertakings making use of the national rail network, subject to compliance with certain requirements ⁽³¹⁾ and to reciprocity in the case of railway undertakings established abroad.

⁽²⁴⁾ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32).

⁽²⁵⁾ Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315, 3.12.2007, p. 44).

⁽²⁶⁾ Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ L 352, 23.12.2016, p. 1).

⁽²⁷⁾ See Article 3 of Directive (EU) 2016/2370, which provides that, even if the Directive takes effect from 1 January 2019, its provisions regarding access to rail networks only apply for the working timetable starting on 14 December 2020.

⁽²⁸⁾ Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (OJ L 354, 23.12.2016, p. 22).

⁽²⁹⁾ See Article 1(9), point (a).

⁽³⁰⁾ Decreto legislativo 8 luglio 2003, n. 188 – 'Attuazione delle direttive 2001/12/CE, 2001/13/CE e 2001/14/CE in materia ferroviaria' (Gazzetta Ufficiale della Repubblica Italiana, Serie Generale n. 170, 24 July 2003 – Supplemento ordinario n. 118). Legislative Decree 188/2003 replaced two Presidential Decrees (Decreto del Presidente della Repubblica 8 luglio 1998, n. 277 – 'Regolamento recante norme di attuazione della direttiva 91/440/CEE relativa allo sviluppo delle ferrovie comunitarie' – Gazzetta Ufficiale della Repubblica Italiana, Serie generale n. 187, 12.8.1998) and Decreto del Presidente della Repubblica 16 marzo 1999, n. 146 – 'Regolamento recante norme di attuazione della direttiva 95/18/CE, relativa alle licenze delle imprese ferroviarie, e della direttiva 95/19/CE, relativa alla ripartizione delle capacità di infrastruttura ferroviaria e alla riscossione dei diritti per l'utilizzo dell'infrastruttura' – (Gazzetta Ufficiale della Repubblica Italiana, Serie generale n. 119, 24.5.1999) which had transposed Directives 91/440/EC, 95/18/EC and 95/19/EC.

⁽³¹⁾ Railway undertakings that intended to operate national rail freight services in Italy had to possess, in addition to the rail operating licence required under Article 6(1) of Legislative Decree 188/2003, a specific authorisation from the Minister of Infrastructure and Transport (Article 6(2) of Legislative Decree 188/2003) as defined in Article 131(1) of Law No 388 of 23 December 2000. That law justified the need to provide for such authorisation in order for the Ministry of Infrastructure and Transport to contain the increase of rail tariffs and guarantee the economic viability of the rail transport activities in Italy.

- (37) Legislative Decree 188/2003 also partially ⁽³²⁾ opened Italy's domestic passenger rail service market in 2003. However, competition in the market remained *de facto* limited for all domestic operations until the opening to competition of international passenger transport by rail on 1 January 2010, and the entry of Italo – Nuovo Trasporto Viaggiatori S.p.A. into the domestic high speed transport services by rail in 2012. Competition in the market has remained largely closed as most of the public service contracts have been directly awarded to Trenitalia with few exceptions ⁽³³⁾.
- (38) Italy transposed Directive 2004/51/EC into national law by Legislative Decree No 162 of 10 August 2007 ⁽³⁴⁾ (in force as of 23 October 2007). That decree amended Legislative Decree 188/2003 as of 23 October 2007 by granting railway undertakings access to the Italian railway network, under equitable, non-discriminatory and transparent conditions, for operating international freight services and, at the latest from 1 January 2007, access to the railway network for operating all types of rail freight services ⁽³⁵⁾.
- (39) Finally, Italy transposed Directive 2012/34/EU into national law by Legislative Decree No 112 of 15 July 2015 ⁽³⁶⁾ (in force as of 27 July 2015). That decree reaffirmed railway undertakings' right of access to the rail freight and passenger transport market, under equitable, non-discriminatory and transparent conditions, in order to ensure competition in the railway sector ⁽³⁷⁾.

3. DESCRIPTION OF THE MEASURES UNDER INVESTIGATION

3.1. Description of the transfers of assets ('the asset transfers' or 'the measures')

- (40) The measures under investigation cover the transfer from RFI to Trenitalia of 31 assets in September 2009 as well as the transfers from RFI to FS Logistica of 10 assets in December 2007, of 42 assets in December 2008 and of 5 assets in July 2011, under the conditions described in this subsection.
- (41) The decisions to transfer certain railway infrastructure assets from RFI to Trenitalia were taken at FS's Board meeting held on 7 September 2009 and approved at the general meetings of RFI and Trenitalia held on 10 September 2009.
- (42) The asset transfers from RFI to Trenitalia were carried out as follows:
- (a) RFI's share capital ('*capitale sociale e patrimonio*') was reduced by EUR 621 106 000 in September 2009 through the cancellation of 621 106 000 ordinary shares worth EUR 1 each; Trenitalia's share capital was simultaneously increased by EUR 621 106 000 through the issue of 1 242 212 ordinary shares worth EUR 500 each (nominal);
 - (b) FS has remained the only shareholder of both Trenitalia and RFI, before and after the changes in the share capital of RFI and Trenitalia described in point (a).

⁽³²⁾ The opening was subject to a reciprocity clause for Italian railway undertakings, which was lifted in 2007.

⁽³³⁾ Concerning the network managed by RFI, in 2019, only two regions granted their service contracts via tender (Valle d'Aosta and Emilia Romagna), while the others assigned service contracts via direct award (apart from Lombardy, the other 17 regions assigned the contract for 9 or 15 years to Trenitalia). As for the remaining part of the infrastructure, which is partly owned by the Ministry of Infrastructure and Transport, Regions, Provinces, municipalities, private entities, and other public bodies, due to historical legacy, specific arrangements apply (source: Handbook on Railway Regulation: Concepts and Practice, edited by Matthias Finger and Juan Montero, Edward Elgar Publishing Limited, 2020, p. 70).

⁽³⁴⁾ Decreto legislativo 10 agosto 2007, n. 162 – 'Attuazione delle direttive 2004/49/CE e 2004/51/CE relative alla sicurezza e allo sviluppo delle ferrovie comunitarie' (Gazzetta Ufficiale della Repubblica Italiana, Serie generale n. 234, 8.10.2007).

⁽³⁵⁾ Article 25(1) of Legislative Decree No 162 of 10 August 2007 amending Article 12(1) of Legislative Decree 188/2003.

⁽³⁶⁾ Decreto legislativo 15 luglio 2015, n. 112 – 'Attuazione della direttiva 2012/34/UE del Parlamento europeo e del Consiglio, del 21 novembre 2012, che istituisce uno spazio ferroviario europeo unico' (Gazzetta Ufficiale della Repubblica Italiana, Serie generale n. 170, 24.7.2015).

⁽³⁷⁾ Article 2(1), point (c) of Legislative Decree No 112 of 15 July 2015.

- (43) The transfers of certain railway infrastructure assets from RFI to FS Logistica were approved by the general meetings of RFI and FS Logistica held on 30 October 2007, 26 November 2008 and 20 December 2010 ⁽³⁸⁾.
- (44) The asset transfers from RFI to FS Logistica were carried out in the form of three specific transactions that took place in 2007, 2008 and 2011:
- (a) RFI's share capital and assets were reduced:
 - (i) by EUR 268 673 758 on 21 December 2007;
 - (ii) by EUR 151 786 267 on 30 December 2008;
 - (iii) by EUR 3 186 760 on 6 July 2011;
 - (b) FS Logistica's share capital and assets were simultaneously increased by the same respective values through the issue of ordinary shares;
 - (c) FS has remained the only shareholder of both FS Logistica and RFI before and after the changes in the share capital of RFI and Trenitalia described in points (a) and (b).
- (45) The transfer decisions approved at the meetings referred to in recital (40) formalise the management decisions taken by FS and its subsidiaries RFI, Trenitalia and FS Logistica since 2007 ⁽³⁹⁾.
- (46) The measures under investigation had been authorised by FS's shareholder, namely the Italian State (more precisely, the MEF). On 7 July 2009, Italy approved by Prime Ministerial Directive ⁽⁴⁰⁾ ('the 2009 Directive') ⁽⁴¹⁾ the transfers of certain railway infrastructure assets, which had been financed with public funds, from RFI to Trenitalia and to other companies of the FS Group active in rail freight transport. In particular, the 2009 Directive provided that:
- (a) RFI was empowered to freely transfer specific freight facilities (not included in Annex 1 of the 2009 Directive ⁽⁴²⁾) to other companies of the FS Group, including Trenitalia, as part of asset growth transactions (Article 1) ⁽⁴³⁾;
 - (b) RFI had to submit to the Italian Ministry of Infrastructure and Transport a proposal specifying the functional specialisation and chargeable services offered for each of the facilities and terminals listed in Annex 1 to the 2009 Directive (Article 1);
 - (c) RFI had to submit to the Italian Ministry of Infrastructure and Transport a plan specifying the function of each of the rolling-stock maintenance facilities owned by RFI, as well as the availability of the facilities to all railway companies or the full use of certain facilities by some of them (Article 2) ⁽⁴⁴⁾;
 - (d) specific rolling-stock maintenance facilities, which were fully used by certain undertakings, were transferred to other companies of the FS Group with the aim of reducing maintenance costs (Article 2).

⁽³⁸⁾ The legal act formalising the transfer was adopted on 6.7.2011.

⁽³⁹⁾ On 19 September 2007, FS CEO M. Moretti sent a letter to the managers of the entire group ('letter of 19 September 2007') to launch the project of asset reallocation as part as the implementation of the 2007-2011 Business Plan. On 23 April 2008, FS board approved the launch of the asset allocation exercise. On 3 June 2008, a special task force was created to steer the FS Group's asset reallocation process.

⁽⁴⁰⁾ In Italian: 'Direttiva del Presidente del Consiglio dei Ministri'.

⁽⁴¹⁾ Direttiva del Presidente del Consiglio dei Ministri, d'intesa con il Ministero delle Infrastrutture e dei Trasporti e con il Ministro dell'Economia e delle Finanze, 7.7.2009.

⁽⁴²⁾ Annex 1 of the 2009 Directive provides a list of freight facilities and terminals owned by RFI.

⁽⁴³⁾ 'Also with a view to reducing the maintenance costs currently borne by the State, RFI, under this Directive, may freely transfer/allocate freight installations not included in the list in Annex 1) to other companies in the FS Group – Trenitalia, among them – in the context of any reorganisation operation and even in the context of capitalisation or capitalisation operations.' (free translation from Italian).

⁽⁴⁴⁾ 'In order to reduce the maintenance and custody costs currently borne by the State and to carry out the capital/capitalisation of Trenitalia, RFI must submit to the Ministry of Infrastructure and Transport, within 60 days of the adoption of this Directive, a plan containing, for each maintenance facility for rolling stock owned by the manager, an indication, in addition to any functional specialisation:

- (a) of its being made available to all railway undertakings accessing the network;
- (b) of its being exclusively used by some of them.

In any event, in the above facilities, the Infrastructure Manager does not provide any service, but is limited to making these assets available.' (free translation from Italian).

- (47) Italy confirmed the list and the features of the asset transferred as described at recital (20) of the opening decision, adding that the legal basis to carry out the transfers was not the 2009 Directive but the Italian Civil Code. Table 4 summarises the asset transfers made by RFI to Trenitalia and FS Logistica that constitute the measures under investigation.

Table 4

List of assets transferred by RFI to Trenitalia and FS Logistica

Date	Beneficiary Company	Description	Value
7 September 2009	Trenitalia	RFI transferred to Trenitalia 11 rolling stock maintenance facilities together with 20 portions of adjacent land	Book value of EUR 621 million ⁽¹⁾
21 December 2007	FS Logistica	RFI transferred to FS Logistica 10 portions of freight terminals	Book value of EUR 268,7 million ⁽²⁾
30 December 2008	FS Logistica	RFI transferred to FS Logistica 41 properties located in Italy (e.g. land plots, warehouses, premises, factories and facilities with freight purposes) and its 43,75 % shareholding in SGT ⁽³⁾	Book value of EUR 151,8 million ⁽⁴⁾
6 July 2011	FS Logistica	RFI transferred to FS Logistica 5 real estate properties (plants, areas and buildings)	Book value of EUR 3,2 million ⁽⁵⁾

Source: information submitted by the Italian authorities.

⁽¹⁾ Source: RFI 2009 Annual report, p. 30 and 31 (Bilancio di esercizio) and Trenitalia 2009 Annual report, p. 46 and 47 (Bilancio di esercizio).

⁽²⁾ Source: RFI 2008 Annual report, p. 27 (Bilancio di esercizio).

⁽³⁾ Società Gestione Terminali Ferro Stradali S.p.A., Italian operator in combined road-rail transport, 53,3 % owned by FS Logistica and 34,5 % by Hupac. According to the act of 30 December 2008 transferring the ownership, the value of the 43,75 % stake in SGT amounts to EUR 491 732.

⁽⁴⁾ Source: RFI 2008 Annual report, p. 27 (Bilancio di esercizio).

⁽⁵⁾ Source: RFI 2010 Annual report, p. 27 (Bilancio di esercizio) and FS 2010 Report on operations, p. 65.

3.2. Description of assets transferred to Trenitalia

- (48) The assets transferred to Trenitalia in September 2009 consist of 31 facilities, notably:

- (a) 11 maintenance facilities including workshops used by various divisions of Trenitalia, totalling 1,6 million m²;
- (b) 20 'ancillary areas' associated with workshops already owned by Trenitalia, totalling 0,6 million m².

- (49) The ancillary areas are essentially the land and manoeuvring areas next to a workshop or building and are necessary in order to use that workshop or building.

- (50) As regards the workshops and other technical facilities, Italy has indicated that they were serving different passenger divisions, as set out in Table 5.

Table 5

Description of the 11 maintenance facilities transferred to Trenitalia

Facility No	Group of assets	Area transferred in 2009 (m ²)	Trenitalia's Division concerned
1)	Bari Centrale Facility	1 30 000	Long Haul Passenger Division
2)	Firenze Osmannoro Facility	340 000	Regional Passenger Division
3)	Firenze Romito Facility	52 000	Regional Passenger Division
4)	Genova Terralba Facility	41 000	Regional Passenger Division
5)	Napoli Smistamento Facility	317 800	Long Haul Passenger Division
6)	Messina Facility	26 000	Regional Passenger Division
7)	Roma Prenestina Facility	105 130	Long Haul Passenger Division
8)	Torino Smistamento Facility	225 000	Long Haul Passenger Division
9)	Cervignano Facility	117 940	Rail freight
10)	Trieste Facility	61 576	Regional Passenger Division
11)	Verona Facility	169 100	Rail freight
	TOTAL	1 585 546	

Source: information submitted by the Italian authorities (in their observations of 24 July 2014).

(51) 9 of the 11 maintenance facilities transferred to Trenitalia in 2009 were used as follows:

- (a) by the 'Long-haul' Passenger Division (4 facilities, totalling 0,8 million m²);
- (b) by the Regional Passenger Division (5 facilities, totalling 0,5 million m²).

(52) The other 2 maintenance facilities, totalling 0,3 million m², were used for first level maintenance of the Cargo Division's rolling stock.

(53) The complexes with the 11 maintenance facilities transferred in 2009 also include the access tracks and the stabling tracks associated with those maintenance facilities, for keeping rolling stock before and after maintenance. Certain of those maintenance facilities include technical areas dedicated to specific work directly linked to first-level maintenance, such as train wash platforms or tunnels, areas for the emptying of chemical toilets and rolling stock inspection pits. According to FS, Trenitalia made substantial investments in those facilities already before the asset transfer, in the period 2003-2008, with the view to improving the efficiency of maintenance operations ⁽⁴⁵⁾.

(54) The 20 ancillary areas detailed in Table 6 include:

- (a) various types of areas adjacent to maintenance facilities already used by Trenitalia mainly for the Long-haul Passenger Division (5 facilities, totalling 0,26 million m²) and the Regional Passenger Division (13 facilities, totalling 0,35 million m²);

⁽⁴⁵⁾ In particular, the maintenance depots had been upgraded to serve the assigned types of rolling stock.

- (b) the remaining complexes are 2 small areas (of 22 500 m² and 14 000 m²) contiguous to the facilities used respectively by the Technical Department for second-level maintenance of Passenger carriages and by the Cargo Division.

Table 6

Description of the ancillary areas transferred to Trenitalia

	Group of assets	Area transferred in 2009 (m ²)	Trenitalia Division using it
1)	Fabiano	19 100	Regional Passenger Division
2)	Ancona	70 070	Regional Passenger Division
3)	Sulmona	16 090	Regional Passenger Division
4)	Lecce Surbo	39 815	Long Haul Passenger Division
5)	Bologna Ravone	14 000	Regional Passenger Division
6)	Pisa S. Ermete	8 100	Regional Passenger Division
7)	Siena	4 140	Regional Passenger Division
8)	Milano Martesana	46 000	Long Haul Passenger Division
9)	Voghera	22 500	Technical Department
10)	Milano Fiorenza	50 000	Regional Passenger Division
11)	Napoli Centrale	45 300	Regional Passenger Division.
12)	Catania	50 065	Regional Passenger Division
13)	Roma S. Lorenzo	53 500	Long Haul Passenger Division
14)	Roma Smistamento	49 000	Regional Passenger Division
15)	Torino Porta Nuova	10 992	Long Haul Passenger Division
16)	Novara	8 500	Regional Passenger Division
17)	Mestre	109 400	Long Haul Passenger Division
18)	Trento	2 300	Regional Passenger Division
19)	Bolzano	9 600	Regional Passenger Division
20)	Torino Orbassano	14 285	Rail freight
TOTAL		642 757	

Source: information submitted by the Italian authorities in their observations of 24 July 2014.

3.3. Description of the assets transferred to FS Logistica

- (55) As pointed out in recitals (18) and (28), the holding company FS decided in 2007 to transfer the share capital and corresponding assets in the logistics business (to the extent that they were owned by RFI but used in the logistics business) into a dedicated company (FS Logistica). Table 7 contains the list of assets transferred to FS Logistica on 21 December 2007, Table 8 contains the list of assets transferred to FS Logistica on 30 December 2008 and Table 9 contains the list of assets transferred to FS Logistica on 6 July 2011.

Table 7

List of assets transferred to FS Logistica on 21 December 2007

	Freight terminals	Warehouses	Offices	Ancillary areas	Connected areas	Shareholding stake
1	Alessandria Smistamento	X	X	X	X	
2	Bari Ferruccio / Bari Lamasinata ⁽¹⁾	X	X	X	X	
3	Bologna S. Donato	X	X	X	X	
4	Brescia	X	X	X	X	
5	Marcianise – Maddaloni			X	X	
6	Milano Smistamento	X				
7	Novara	X	X	X		
8	Padova Campo di Marte	X	X	X	X	
9	Torino	X	X	X	X	
10	Verona	X	X	X	X	

Source: information submitted by the Italian authorities in their observations of 24 July 2014.

⁽¹⁾ No connected areas in Bari Lamasinata terminal.

Table 8

List of assets transferred to FS Logistica on 30 December 2008

	Freight terminals	Warehouses	Offices	Ancillary areas	Connected areas	Shareholding stake
1	Alessandria Smistamento	X	X	X	X	
2	Bari	X	X	X	X	

		Freight terminals	Warehouses	Offices	Ancillary areas	Connected areas	Shareholding stake
3	Casalmaggiore		X	X	X		
4	Cassano D'Adda				X	X	
5	Castelguelfo				X		
6	Catania		X	X	X	X	
7	Cittadella			X	X	X	
8	Conegliano		X		X	X	
9	Fossano						
10	Genova		X	X	X		
11	Grisignano		X		X	X	
12	Indicatore			X	X		
13	Lamezia				X		
14	Legnago		X	X	X	X	
15	Livorno Area Palumbo				X		
16	Livorno Cantiere		X		X	X	
17	Lucca		X				
18	Marcianise Maddaloni	X					
19	Milano smistamento	X					
20	Moncalieri				X	X	
21	Mori		X		X	X	
22	Napoli			X	X		
23	Novara Boschetto				X	X	
24	Novi S. Bovo		X	X	X	X	
25	Ospitaletto TR		X	X	X	X	
26	Padova Interporto	X					

	Freight terminals	Warehouses	Offices	Ancillary areas	Connected areas	Shareholding stake
27	Palermo Brancaccio	X	X	X	X	
28	Pomezia	X				
29	Pontirolo			X	X	
30	Prato Centrale	X	X	X	X	
31	Prosecco	X	X	X	X	
32	Ravenna			X		
33	Ravenna Sapir			X	X	
34	Rezzato	X	X	X	X	
35	Roma Smistamento	X	X	X	X	
36	Rovato	X	X	X	X	
37	S.Stefano Magra	X		X	X	
38	Siracusa	X	X	X	X	
39	Surbo	X	X	X	X	
40	Treviso scalo	X	X	X	X	
41	Verona Porta Nuova	X	X	X	X	
42	Partecipazione SGT S.p.A.					X

Source: information submitted by the Italian authorities in their observations of 24 July 2014.

Table 9

List of assets transferred to FS Logistica on 6 July 2011

	Freight terminals	Warehouses	Offices	Ancillary areas	Connected areas	Shareholding stake
1	Lecco	X	X	X	X	
2	Novara Boschetto	X	X	X	X	
3	Ostiglia			X	X	
4	Piadena			X	X	
5	Rivalta Scrivia			X		

Source: information submitted by the Italian authorities in their observations of 24 July 2014.

- (56) At the time of the transfers, FS Logistica owned logistic infrastructure scattered across the Italian territory and operated through three different Business Units: 'Real Estate Asset Management and Development'; 'Multimodal Transport and Logistics'; 'Omnia express: Transport and Removals'.
- (57) At the time of the transfers, the corporate mission of FS Logistica included the design, implementation, commissioning, acquisition, sale, management and maintenance of logistic structures such as intermodal centres, logistic platforms, distribution centres, terminals and facilities for the handling and storage of freight or Intermodal Transport Units (ITUs). FS Logistica provided integrated logistics services (storage; order handling and management from production plants or warehouses to shipping delivery points). It also managed, improved and developed real estate assets of logistic or industrial nature. As pointed out in recital (28), FS Logistica was renamed Mercitalia Logistics in 2017.

4. GROUNDS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE

4.1. Existence of State aid

4.1.1. State resources

- (58) In the opening decision (recital 70), the Commission took the preliminary view that the transfers of assets referred to in Table 4 constituted State aid within the meaning of Article 107(1) TFEU. The Commission first preliminarily considered that the measures under investigation involved State resources and were imputable to the State. To reach that conclusion, the Commission observed that the assets had been transferred from RFI to Trenitalia and FS Logistica and that these three companies were fully owned subsidiaries of FS, the share capital of which was held entirely by the Italian State. The Commission also held that, as 100 % shareholder of FS, the Italian State appointed the members of its board and therefore had decisive influence over the management of RFI, a fully owned subsidiary of FS, at the time of the transactions in question.

4.1.2. Economic advantage

- (59) As regards the existence of an economic advantage, the Commission doubted as to whether the measures under investigation had been carried out at market price, as the Italian authorities had not provided any *ex ante* market price valuations of the assets transferred, which would have demonstrated that RFI had acted as a market operator when the measures under investigation were taken ⁽⁴⁶⁾. The Commission also doubted that the transactions in question constituted a reallocation of assets within the same corporate group not subject to State aid rules. The Commission noted that the obligation stemming from Directive 91/440/EEC to separate accounts between transport activities and infrastructure management in the rail sector is justified by the fact that transport operations are performed on a competitive market. Accordingly, the Commission considered that a reallocation of assets between corporate entities within the same corporate group from an infrastructure manager to a rail operator without consideration could give rise to an economic advantage for the latter by improving its competitive position as compared to the position of its competitors on the market ⁽⁴⁷⁾.
- (60) More specifically, the Commission preliminarily considered that the assets of Trenitalia and FS Logistica increased significantly without those undertakings having to pay for those assets. In addition, the infrastructure transferred, which could have been sold as former property of the infrastructure manager to other railway companies, could only be used by Trenitalia and FS Logistica. The Commission stressed that this conditional access to infrastructure may have had specific relevance with regard to maintenance facilities, whose access and cost constitute an important competitive factor on the market for rail freight transport services.
- (61) In view of the foregoing, the Commission therefore preliminarily considered that the measures under investigation entailed an economic advantage for Trenitalia and FS Logistica.

⁽⁴⁶⁾ Recital 61 of the opening decision.

⁽⁴⁷⁾ Recital 62 of the opening decision.

4.1.3. *Selectivity*

- (62) In the opening decision, the Commission preliminarily considered that the measures under investigation were selective as only Trenitalia and FS Logistica appeared to have benefitted from them.

4.1.4. *Distortion of competition and effect on trade*

- (63) In the opening decision, the Commission noted that rail freight transport services had been liberalised in Italy since 2003. It also rebutted Italy's claims that the measures under investigation should be considered to constitute part of the initial reorganisation of 2000-2001 of the FS Group, which had taken place before the opening of that market, and that the reallocation of assets which took place in 2009 involved workshops relating essentially to the maintenance of rolling stock for passenger transport, a sector which was liberalised at Union level only as from 1 January 2010.
- (64) The Commission noted that the Italian authorities had not submitted any evidence demonstrating that a decision had already been taken at the time of the initial reorganisation of 2000-2001 regarding the assets transferred between 2007 and 2011, and that the measures under investigation appeared to have been implemented as a consequence of the 2009 Directive ⁽⁴⁸⁾. As regards Italy's claim that the maintenance workshops involved passenger rolling stock, the Commission pointed out that Italy had not demonstrated that those assets were allocated to passenger transport, and that, in any case, Italy had continued to transfer assets after the liberalisation of the passenger market, as the final transfer in question was decided in 2010 and was implemented in 2011 ⁽⁴⁹⁾.
- (65) The Commission therefore took the preliminary view that the measures under investigation had been taken when the Italian rail freight transport market was open to competition, so that those measures were liable to distort competition on that market. Moreover, since the main players on the Italian market for rail freight transport also operated at international level at the time of the transfers, the Commission preliminarily concluded that those measures affected intra-Union trade ⁽⁵⁰⁾.

4.1.5. *Preliminary conclusion*

- (66) Accordingly, the Commission preliminarily considered that the measures under investigation in favour of Trenitalia and FS Logistica constituted State aid within the meaning of Article 107(1) TFEU.

4.2. **Compatibility of aid**

- (67) In the opening decision, the Commission took the initial view that none of the grounds for compatibility with the internal market provided for by Articles 93, 106(2), 107(2) or 107(3) TFEU applied in the present case.
- (68) Consequently, the Commission expressed doubts regarding the compatibility of the measures under investigation with the internal market and invited Italy to submit its observations on possible compatibility grounds.

5. **COMMENTS FROM ITALY**

- (69) Italy puts forward two main arguments:
- (a) Italy complied with Union sectorial rules applicable to vertically integrated companies, notably when the asset transfers were carried out;
 - (b) the measures under investigation described in Table 4 are compliant with the market economy operator test ('MEO' test) and do not entail State aid.

⁽⁴⁸⁾ Recital 67 of the opening decision.

⁽⁴⁹⁾ Recital 68 of the opening decision.

⁽⁵⁰⁾ Recital 69 of the opening decision.

5.1. Compliance of the asset transfers with Union sectorial rules

- (70) Regarding the first argument, Italy claims that neither Directive 91/440/EEC, as amended, nor Directive 2012/34/EU lay down an obligation for corporate separation for rail transport and infrastructure management. Italy relies on two judgments of the Court of Justice (Case C-556/10 ⁽⁵¹⁾ and Case C-369/11 ⁽⁵²⁾) and notes that, as it already claimed during the proceedings in Case C-556/10, ‘the separation requirement laid down by the EU legislature with regard to the functions of rail transport and infrastructure management is an accounting requirement’ ⁽⁵³⁾. As a consequence, Italy considers that, the Union law does not require Member States to introduce a corporate separation between the businesses relating to the management of infrastructure and transport activities carried out by railway undertakings. Italy also holds that Union law does not prevent railway undertakings or other persons (other than the infrastructure manager) from owning assets that may be described as ‘railway infrastructure’, in accordance with Article 3 of Directive 91/440/EEC.
- (71) According to Italy, this approach is consistent with the very principles of the Union rail legislation, namely the principle of the management and organisational independence of railway groups, in accordance with commercial and market principles (in particular Articles 4 and 5 of Directive 91/440/EEC). Also Directive 2012/34/EU recognises the freedom of integrated groups to organise themselves in sets of companies or divisions as appropriate (see Article 7(1) of Directive 2012/34/EU) ⁽⁵⁴⁾.
- (72) Based on these considerations, Italy argues that Union law gives full freedom to railway undertakings to allocate resources and assets amongst the legal entities that compose a group. This freedom in terms of allocation includes the ability to organise the various activities independently, either in several divisions within a single company or in several companies within a single group. This freedom includes the ability to change the internal organisation of undertakings, by reallocating, where appropriate, their activities and assets between divisions or companies.
- (73) Italy also argued that, in accordance with applicable Union rules, a railway undertaking can be the recipient of a number of assets provided by other companies within the same group, and potentially become the owner of such assets, regardless of whether they had initially been allocated to another undertaking of the group. In addition, Italy points out that, *a fortiori*, the discretion at hand also applies, under Union rules, where the assets being transferred within a group cannot be classified as ‘infrastructure’.
- (74) Consequently, Italy considers that the measures under investigation referred to in the opening decision constitute restructuring operations within the FS Group that are completely legitimate and consistent with the broad discretion granted by Union law to railway groups to organise their structure and activities as they consider appropriate.
- (75) Italy argues that in the present case the relevant reorganisation operations began in the early 2000s but were delayed due to several obstacles (see recital (17)). In addition, Italy refers to the arguments put forward by FS (see Section 6.1.1) to argue that the relevant operations are consistent with an ‘economic and industrial approach’. According to FS and Italy, those operations were designed to optimise the distribution of the group’s resources in relation to the various business areas involved.

5.2. Absence of State aid in the transfer of assets

- (76) In relation to the transfer of assets under investigation, Italy submits that the cumulative conditions set out in Article 107(1) TFEU for a measure to constitute State aid are not met.

⁽⁵¹⁾ Judgment of 28 February 2013, *Commission v Germany*, Case C-556/10, ECLI:EU:C:2013:116.

⁽⁵²⁾ Judgment of 3 October 2013, *Commission v Italy*, Case C-369/11, ECLI:EU:C:2013:636.

⁽⁵³⁾ Judgment of 28 February 2013, *Commission v Germany*, Case C-556/10, ECLI:EU:C:2013:116, paragraph 49.

⁽⁵⁴⁾ According to Italy, this would of course be subject to the requirement of independence of ‘the essential functions’ referred to in Article 7 of Directive 2012/34/EU.

5.2.1. Imputability

- (77) As regards the imputability to the Italian State, Italy indicates that FS is independent in terms of management vis-à-vis its public shareholder (MEF) and that it adopted the measures under investigation without any public interference or involvement, with full commercial autonomy and in a purely business logic. Italy invokes the *Stardust Marine* case-law⁽⁵⁵⁾.
- (78) In the light of the circumstances of the case, Italy considers that the undertakings of the FS Group involved in the asset transfers acted independently vis-à-vis the public shareholder (MEF). Italy states in particular that the 2009 Directive does not put into question the absence of imputability to the Italian State: the 2009 Directive is allegedly 'a legal provision of general scope, with a political aim, adopted in accordance with Law No 400/1988, and as such merely expresses a political will but does not give rise to direct effects'⁽⁵⁶⁾. In the view of the Italian authorities, the non-binding nature of the 2009 Directive is confirmed by the fact that Article 1 of that Directive, which provides for the transfer of certain terminals and freight facilities to Trenitalia, was never implemented by FS or RFI.

5.2.2. State resources

- (79) Italy argues that the measures under investigation had no impact, direct or indirect, on resources in the State budget over which the State had actual control. Italy adds that:
- (a) the operations in question are joint corporate demerger operations taking place within the FS Group: therefore, they were decided, implemented, and produced legal and economic effects, solely within the FS Group;
 - (b) as such, those operations consisted of a reallocation of assets and shares which were already part of the FS Group and which therefore had no impact whatsoever on its overall make-up, which remained unchanged after the operations.

5.2.3. Economic advantage

5.2.3.1. General considerations

- (80) According to Italy, the opening decision wrongly equates the operations in question to a purchase free of charge. The legal and economic nature of the asset transfers concerned by the proceedings is totally different. According to Italy, those are demerger operations within the FS Group, i.e. restructuring operations that are common within public and private groups and are governed by Union and national company law. With specific reference to demergers, Italy points out that operations of this kind are governed at Union level by Council Directive 82/891/EEC⁽⁵⁷⁾. As provided for in that Directive (see Article 2)⁽⁵⁸⁾, 'demergers' involve a transfer of shares of the company that receives assets (as a result of the operation) to the shareholders of the company that loses assets (in the context of that operation). According to Italy, in similar cases, the transfers of assets never occur in exchange for payment of a

⁽⁵⁵⁾ Judgment of 15 May 2002, *France v Commission*, Case C-482/99, ECLI:EU:C:2002:294.

⁽⁵⁶⁾ Judgment of the Council of State of 6 April 2011, delivered in decision RG No 4639/2009 on the extraordinary appeal lodged against the 2009 Directive by various freight rail undertakings.

⁽⁵⁷⁾ Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47).

⁽⁵⁸⁾ According to Italy, Directive 82/891/EEC regulates matters concerning company law. With reference to the Italian legal system, Italy points out that, in accordance with the provisions of the Civil Code, where one and the same parent company owns the company being divided and the company to which assets are transferred, the demerger can be implemented through the simplified process laid down by the combined provisions of Articles 2506-ter and 2505 of the Civil Code. In that case, the provisions set out in Article 2501-ter, first paragraph, point 3 (share-exchange ratio, and any cash payment), point 4 (procedures for the allocation of shares) and point 5 (start date for participation in the profits relating to the shares allocated), do not apply, nor do those of Articles 2501-quinquies (administrative body's report) or 2501-sexies (experts' report) of the Civil Code. In sum, according to Italy, the procedures used for the transfers of the assets in question do not involve any valuation of the assets transferred, since the assets remained in the property of the group (they just became the property of a different company within the group on the basis of the book value), with allocation to the parent company of newly issued shares in line with the increase in the assets of the beneficiary subsidiary.

price, but through the allocation of shares to the partner (and thus these are not transfers of assets against a price, but against shares). Since the operation simply constitutes the implementation of an internal restructuring, it is neutral for the FS Group taken as a whole. A simple repositioning of (certain) assets from one location to another takes place within the same group ⁽⁵⁹⁾.

- (81) According to Italy, the transfers of assets under review are therefore identical in economic terms to reallocations between internal divisions of a single company, do not involve a new capital injection into the FS Group and are limited to a mere internal restructuring: as such, they do not confer advantages and thus do not constitute State aid pursuant to Article 107(1) TFEU. Italy claims that this assessment is confirmed by the Commission's own case practice, in particular in the *Banque Postale* ⁽⁶⁰⁾ and *Chronopost* ⁽⁶¹⁾ cases, as confirmed by the Court of Justice ⁽⁶²⁾.
- (82) Italy complemented its initial observations by submitting three studies from independent experts, demonstrating that the asset transfers are in line with market conditions and, as such, do not confer any economic advantage on the recipient companies, namely FS Logistica and Trenitalia. Section 5.2.3.2 will present the three studies.

5.2.3.2. Studies from independent experts submitted by Italy

- (1) The April 2019 PwC study concerning the transfer of assets to Trenitalia and FS Logistica
- (83) The April 2019 PricewaterhouseCoopers ⁽⁶³⁾ ('PwC') study estimates the profitability of the asset transfers by calculating and then comparing the enterprise value of the three companies participating in the transaction (Trenitalia and FS Logistica, the recipients, and RFI, the original owner), in two scenarios: (i) the actual scenario (with the asset transfers); and (ii) a counterfactual scenario (without the asset transfers). The results show that the enterprise value of the recipients, namely Trenitalia and FS Logistica, is higher in the first scenario than in the second scenario, while it is the opposite for the original owner, namely RFI.
- (84) The enterprise value is the sum of the market value of equity and debt and, as such, it represents the value of the company as a whole, i.e. from the perspective of both debt holders and shareholders. The study estimates the enterprise value through the discounted cash flow method, which consists in calculating the present value of the expected 'free cash flows to the firm' (FCFF) ⁽⁶⁴⁾.
- (85) For each scenario and each company participating in the asset transfers, the April 2019 PwC study uses forecasts of FCFF up to 2017, with the addition of a terminal value to account for the period after 2017. The terminal value, which represents the value of each company participating in the asset transfer after 2017, is the result of the application of the Gordon growth formula ⁽⁶⁵⁾. The Gordon growth formula assumes a perpetual growth rate of the normalised FCFF. The normalisation consists in setting capital expenditure ('capex') equal to depreciation, changes in net working capital equal to zero and assuming the same profit margin as in the last year of the planning period.

⁽⁵⁹⁾ In that regard, Italy points out that certain transfers also concerned assets retroceded to RFI by other companies in FS, namely the transfer of parts of Torino Orbassano and Maddaloni Marcanise terminals that were owned by FS Logistica thus far.

⁽⁶⁰⁾ Commission Decision of 21 December 2005 concerning alleged State aid granted by France to the creation and operation of the Banque Postale, C(2005) 5421 (OJ C 21, 28.1.2006, p. 4).

⁽⁶¹⁾ Commission Decision of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost, C(1997) 3146 (OJ L 164, 9.6.1998, p. 37).

⁽⁶²⁾ Judgment of 1 July 2008, *Chronopost/Ufex and others*, Joined Cases C-341/06 P and C-342/06 P, ECLI:EU:C:2008:375.

⁽⁶³⁾ PriceWaterhouseCoopers is a renowned economic consultancy.

⁽⁶⁴⁾ Free cash flows to the firm (FCFF) are the sum of operating and investment cash flows. They exclude financing cash flows, i.e. interest rate costs, dividends, debt inflows and outflows. As such, FCFF are a measure of profits accruing to the whole firm, namely both debt holders and shareholders.

⁽⁶⁵⁾ The Gordon growth formula is used to determine the value of a certain asset, under the assumption that assets yield a certain profit which is constantly growing at a certain fixed rate in perpetuity.

The Gordon growth formula is $TV = NCF \times \frac{g}{WACC - g}$, where TV is the terminal value, NCF is the normalised cash flow (pointed out in recital (85)), g is the perpetual growth rate of the cash flows and WACC is the weighted average cost of capital.

Finally, for each scenario, the study calculates the enterprise value of each company participating in the asset transfer as the sum of the present values of the FCFF and of the terminal value, using a company-specific weighted average cost of capital ⁽⁶⁶⁾ (WACC) as a discount rate.

- (86) The difference in the cash flows in the scenario with and without the transfers represents the synergies that the FS Group could expect from the measures under investigation. With regard to the transfers from RFI to Trenitalia, these transfers deprive RFI of a profit equal to the rents on the assets that it leased to Trenitalia, net of the related costs, i.e. property taxes and depreciation. RFI's foregone profits accrue to Trenitalia after the transfer. After the transfer, Trenitalia also benefits from the return on the investments aiming at the improvement of the assets, which would not have been undertaken had RFI remained the owner of those assets (see, e.g. recitals (98) and (99)). These investments aim at rationalising the maintenance process of Trenitalia's rolling stock and include, inter alia, structural modifications to the maintenance workshops, changes to their layout, costs for automation and adaptation to new types of rolling stock. In total, the study puts forward that the asset transfer would have allowed Trenitalia to undertake EUR 205 million more investments than in the scenario with RFI ownership of the assets. These additional investments, over the period 2010-2017 ⁽⁶⁷⁾, would have returned a total of EUR 382,55 million of maintenance cost savings compared to the scenario with RFI ownership of the assets. Therefore, at FS level, the synergy stemming from the asset transfer from RFI to Trenitalia is the return on the investments aiming at the improvement of the assets.
- (87) With regard to the transfers from RFI to FS Logistica, these transfers deprive RFI of a profit equal to the rents on the assets that it leased to FS Logistica, net of the related costs, i.e. property taxes and depreciation. At the same time, the transfers generate benefits for FS Logistica, which originate from investments aiming at the improvement of the assets and higher revenues from renting those assets to the market. With regard to the investments, they aim at increasing the surface available for rent to the market (e.g. extraordinary maintenance of existing assets, construction of new warehouses, joint ventures for the construction of new terminals) and amount to EUR 38,2 million over the period 2010-2017. Overall, according to the study, the benefits to FS Logistica more than compensate the losses by RFI, because the former is able to extract more value from the transferred assets being a company specialised in the logistics business.
- (88) The study finds that, in the scenario with the asset transfers carried out in favour of Trenitalia and FS Logistica, the estimated enterprise value is EUR 4 639 million for Trenitalia, EUR 82 million for FS Logistica and EUR 2 206 million for RFI. In the counterfactual scenario (without the asset transfers), the study finds an enterprise value of EUR 4 315 million for Trenitalia, EUR 56 million for FS Logistica and EUR 2 234 million for RFI. Taken together, the effects of the asset transfers consist of a EUR 325 million increase in the enterprise value of Trenitalia and EUR 26 million for FS Logistica as well as a EUR 28,3 million reduction in the enterprise value of RFI. The study also shows that, out of the total reduction in the enterprise value of RFI (EUR 28,3 million), EUR 16,4 million is attributable to the transfer to Trenitalia and the rest to the transfers to FS Logistica ⁽⁶⁸⁾.
- (89) Overall, the April 2019 PwC study concludes that, as a result of the synergies stemming from the asset transfers, the increase in enterprise value for the recipients (EUR 325 million for Trenitalia and EUR 26 million for FS Logistica) outweighs the loss for RFI (EUR 28,3 million). It follows that, at the level of the FS Group, the measures under investigation increased the enterprise value by EUR 322,7 million.

⁽⁶⁶⁾ The WACC is determined as a weighted average of the cost of equity and the after-tax cost of debt, with weights equal to the capital structure of the companies participating in the transfers.

⁽⁶⁷⁾ Both investments and cost savings are sums over the years 2010-2017, with no discounting.

⁽⁶⁸⁾ In other words, the April 2019 PwC study estimates that the enterprise value of RFI would have been EUR 2 222,1 million in the scenario with the asset transfers only in favour of FS Logistica, whereas RFI's enterprise value would have been EUR 2 217,6 in the scenario with asset transfers only in favour of Trenitalia.

(2) The December 2019 PwC study concerning the transfer of assets to Trenitalia

- (90) The December 2019 PwC study is a further assessment of the profitability of the asset transfers from RFI to Trenitalia. Like the April 2019 PwC study, the December 2019 PwC study compares the profitability of RFI and Trenitalia in the scenarios with and without the asset transfer. The main difference between the two studies is that the December 2019 PwC study considers profitability in terms of equity value instead of enterprise value. While the enterprise value considers the company as a whole, i.e. the value accruing to both debt and shareholders, the equity value only reflects the value of the company from the perspective of shareholders.
- (91) The December 2019 PwC study estimates the equity value by using the 'discounted cash flow to equity model', which consists in the present value of the free cash flows available to shareholders (FCFE). Those cash flows are the sum of the free cash flows to the firm, which are those used to calculate the enterprise value (see recital (84)), and the financing cash flows, i.e. the total cash inflow from new debt financing, net of the cash outflows as interest expenses and debt repayments⁽⁶⁹⁾. As such, FCFE allow to measure how much cash is available for a potential dividend distribution to shareholders. Finally, the equity value results from calculating the present value of the free cash flows to equity by using the cost of equity as a discount rate.
- (92) For both RFI and Trenitalia, and for both scenarios with and without the asset transfer, the December 2019 PwC study obtains the free cash flows to equity by adding the forecasted financing cash flows to the free cash flows to the firm of the April 2019 study. The December 2019 PwC study also includes a terminal value of equity at the end of the business plan period, which is 2018. That terminal value is an application of the Gordon growth formula, which assumes a perpetual growth of free cash flows to equity at a constant rate, starting from a normalised level of those cash flows. The normalisation of the free cash flow to the firm coincides with that calculated in the April 2019 PwC study (recital (85)), while that of financing cash flows consists in setting financial expenses to a slightly lower value than in the last year of the business plan period and debt repayments and issuances equal to zero. Finally, the December PwC 2019 study obtains RFI's and Trenitalia's value of equity as the present value of the respective company's free cash flows to equity in each scenario, using the respective company's cost of equity as a discount rate.
- (93) The December 2019 PwC study estimates the value of equity of Trenitalia and RFI at EUR 1 102,3 and EUR 3 813,7 million, respectively, in the scenario with the asset transfer, and at EUR 964,2 and EUR 3 830,4 million, respectively, in the counterfactual scenario. Those estimates imply that the asset transfer from RFI to Trenitalia generated shareholder value at group level, as it created EUR 138,1 million of additional equity in Trenitalia and destroyed only EUR 16,7 million of equity in RFI. As such, the December 2019 PwC study provides another quantification, in addition to the April 2019 PwC study, of the advantage of transferring assets from RFI to Trenitalia from the perspective of the FS Group.

(3) The E.CA study

- (94) The June 2019 E.CA study carried out by the economic consultant E.CA⁽⁷⁰⁾ supplements the two abovementioned studies and assesses the robustness of the April 2019 PwC study. In addition, it explains the economic rationale of the transfers and supports the methodological choice of the April 2019 PwC study.

⁽⁶⁹⁾ Financing cash flows consist of interest payments, net of taxes, debt repayments and debt issuance.

⁽⁷⁰⁾ E.CA is a renowned economic consultancy appointed by the FS Group to provide technical expertise in the present case.

- (95) With regard to the methodology, the E.CA study explains why the enterprise value method is appropriate to determine the efficiency gains deriving from the asset transfers, compared to the equity value method. The reason is that the enterprise value method focuses on the revenues and costs generated by the company as a whole, which is where the efficiencies arise. By contrast, the equity value method requires projections of the financing cash flows, which are not expected to be directly affected by the efficiency measures motivating the asset transfers. Therefore, the economic consultant E.CA considers that it is more appropriate to use the enterprise value method to assess the profitability of the asset transfers.
- (96) The June 2019 E.CA study also assesses the assumptions that the April 2019 PwC study makes on the WACC. While the April 2019 PwC study relies on a single value of the WACC to estimate the enterprise value, the June 2019 E.CA study constructs a range of WACC values for each company participating in the asset transfers, by varying the key parameters used to compute the WACC, namely the beta, the equity risk premium and the risk-free rate ⁽⁷¹⁾.
- (97) The June 2019 E.CA study confirms the results of the April 2019 PwC study on the synergies stemming from the asset transfers. It finds that the highest estimate of value loss for RFI, obtained by using the lowest value of the range of RFI's WACC, is EUR 56 million, while the lowest estimate of value gains for Trenitalia and FS Logistica, obtained assuming the highest value of the range of those companies' WACC, amounts to EUR 195 and EUR 24 million, respectively. Overall, even by using conservative WACC values, value creation at FS level would be at least EUR 163 million ⁽⁷²⁾.
- (98) Finally, the June 2019 E.CA study illustrates the rationale of the asset transfers. The economic consultant E.CA considers that the asset transfers from RFI to Trenitalia and FS Logistica led to a decentralisation of the power to make decisions regarding those assets within the FS Group. According to economic theory ⁽⁷³⁾, it is optimal to decentralise decisions concerning non-strategic, relatively small and ordinary business investments, for which subsidiaries or division managers are likely to have better information than their superiors. If those decisions were taken at centralised level, they would not lead to an optimal outcome. The reason is that division managers would not have incentives to share their information, because part of the benefits of those decisions would be shared with their superiors.
- (99) The June 2019 E.CA study considers that the same economic theory applies to the asset transfers from RFI to Trenitalia and FS Logistica. The assets that were transferred to these two companies were used for ordinary operations, such as logistics and maintenance activities, which were not part of RFI's core activities. Therefore, according to the economic consultant E.CA, it is reasonable to assume that RFI did not have the same level of information as Trenitalia and FS Logistica on how to use those assets. According to E.CA, economic theory (see recital (98)) implies that, without the transfers, Trenitalia and FS Logistica would not have made the investments described in recitals (86) and (87), or would not have made the same level of investments, because part of the benefits would have accrued to RFI. The June 2019 E.CA study also considers that, in principle, the FS Group could have set up a bargaining scheme entailing investments by RFI in exchange for a compensation by Trenitalia and FS Logistica, which could have led to the same optimal investment strategy as that resulting from the asset transfers. However, according to the E.CA study, it is reasonable to expect contracting, time inconsistency and hold-up problems to prevent that bargaining scheme from delivering the optimal investment outcome, unless the assets are owned by the agent that would benefit from those investments.

⁽⁷¹⁾ The beta of a stock is a measure of riskiness of the stock, indicating how much the return on a stock varies with the return on the overall stock market. The higher the beta, the higher the riskiness of a stock. The equity risk premium is the difference between the return on a stock market index and the risk-free rate. The risk-free rate is the return on an asset with no default risk. The risk-free rate, the beta and the equity risk premium are necessary to determine the cost of equity.

⁽⁷²⁾ This figure is obtained as follows: EUR 195 million + EUR 24 million – EUR 56 million.

⁽⁷³⁾ See for example: Aghion P, Tirole J., 'Formal and real authority in organizations', *Journal of Political Economy*, 1.2.1997, 105(1), pp. 1 to 29; Milton H, Raviv A., 'Allocation of decision-making authority', *Review of Finance*, 9.3.2005, pp. 353 to 383.

(100) Based on these studies, Italy considers that the asset transfers were in line with market conditions.

5.2.4. *Distortion of competition*

(101) Italy claims that, at Union level, the liberalisation of rail transport markets started in 2007 for freight transport, and in 2010 for passenger transport. State aid rules apply only after those dates and any previous interventions, provided that they meet the other conditions set out in Article 107(1) TFEU, cannot be qualified as 'aid' or, at most, may be qualified as 'existing aid'. On this point, Italy notes that the decision on the asset transfers between 2007 and 2011 had already been taken at the time of the FS Group's restructuring in 2000-2001, and therefore at a time when it is not disputed that the market was not yet liberalised. In addition, Italy recalls that almost all the assets transferred in 2009 are 'dedicated' to passenger rail transport activities that were liberalised only later ⁽⁷⁴⁾.

(102) Italy also refers to the *Chronopost* judgment ⁽⁷⁵⁾. In that case, according to Italy, the Court of Justice allegedly confirmed that asset transfers through corporate operations within a group do not distort or threaten to distort competition.

6. COMMENTS FROM INTERESTED PARTIES

6.1. FS

6.1.1. *Observations regarding the transfer processes*

(103) FS supports Italy's position as summarised in Section 5.2. FS adds that the decision to transfer the assets from RFI to Trenitalia and FS Logistica was adopted long before the actual dates of the transfer. FS adds that the nature of the assets transferred was not instrumental or necessary to the management of Italy's rail infrastructure. According to FS, the transferred assets are composed of: major repairs workshops, workshops and warehouses located outside railway boundaries; plots of land and parking areas located outside railway area boundaries or, if located inside those boundaries, not needed for railway operations; passenger buildings; service buildings, other buildings 'not instrumental to' railway operations, and other buildings 'not instrumental' due to their intended use (such as cafeterias and vocational schools).

(104) FS argues that the transfer of assets from RFI to Trenitalia and FS Logistica in the context of the asset reallocation process was delayed due to legal and technical difficulties, notably technical-cadastral reasons. First, while the assets were present in the company's database as of 1999, it had been necessary to carry out on-site checks in order to identify and define precisely the size of those assets (including their cadastral boundaries) and their value, before allocating them to the different business units. These assets included maintenance workshops, multifunction dynamic facilities, major maintenance workshops, certain freight terminals and other real estate properties.

(105) Second, the process was also slowed down by the regulatory changes in the sector at Union level: within six years, three packages of railway Directives were issued, each of them significantly modifying the legal framework and, consequently, the business plans and management of the undertakings in question.

(106) These complications were resolved initially by simplifying the allocation of assets to the different companies into which the group was organised. RFI maintained in its ownership some real estate, not core to its mission as infrastructure manager (see recitals (16) and (17)). Consequently, certain of the assets referred to in recital (103), despite being clearly associated with the transport operations of the newly-established Trenitalia, were not at the time allocated to Trenitalia, but remained instead temporarily among the assets of RFI.

(107) However, this initial arrangement was understood to be temporary: at the time of the corporate unbundling of 2000, it was already envisaged that those assets would be reallocated at a later date.

⁽⁷⁴⁾ See recital (35).

⁽⁷⁵⁾ See footnote 68.

- (108) FS holds that the reallocation of assets to, respectively, transport operations and infrastructure management was one of the stated aims of the 2007-2011 Business Plan. According to FS, the 2007-2011 Business Plan issued in May 2007 envisaged a rationalisation of operations, to be achieved, *inter alia*, through better management of real estate properties. This would have made it possible to generate value and develop new business areas, including the creation of a new logistics operator (FS Logistica) and of a company specialised in the development of real estate property and the provision of integrated services to cities and surrounding areas (FS Sistemi Urbani).
- (109) The transfer to FS Logistica of 10 sets of facilities located in different freight terminals, which was among the initiatives listed in the 2007-2011 Business Plan, builds on the overall assessment of the freight network and a twofold analysis: on the one hand, the transfers aimed at reducing the number of service points by concentrating them at the facilities having better operational performance and adequate technical equipment; on the other hand, the transfers aimed at reallocating parts of facilities in the major freight terminals in order to identify the sectors serving RFI and the parts no longer strictly necessary for the discharge of its obligations under the infrastructure management concession, taking into account demand forecast scenarios.
- (110) As regards real estate properties, FS argues that the aim pursued with the transfers is to: (i) achieve profitable use of assets (placing them within FS Logistica) which could otherwise not be profitably developed; (ii) develop valuable areas and properties earmarked for uses other than freight or passenger transport by rail (which were assigned to FS Sistemi Urbani, not concerned by the present investigation); (iii) generate resources designed to support corporate programmes.
- (111) According to FS, the method chosen for transferring those assets, i.e. the partial spin-off ⁽⁷⁶⁾, involving the issuance of new shares in the event of capital increases (as the operation involving Trenitalia referred to in Section 3.1), or the assignment to the holding of shares in new companies (as the operation involving FS Logistica referred to in Section 3.3), are typical intra-group reorganisations, routinely implemented in the business world to optimise a company's organisational profile in order to improve its efficiency and performance and, ultimately, to promote value creation. FS argues that the method in question rebalances the capital structure of the FS Group to enable it to make the investments envisaged in the 2007-2011 Business Plan without the injection of new liquidity.

6.1.2. Observations regarding the business rationale of the asset transfers

- (112) FS argues that the development of railway systems historically required the availability of extensive areas for hosting railway facilities. On these areas, in addition to railway tracks, marshalling yards and shunting tracks, buildings were often erected for different purposes associated with railway operations: maintenance of rolling stock, warehouses for infrastructure and rolling stock materials, material testing facilities, coal and fuel depots, electricity substations, passenger stations, freight warehouses, parking areas and access ramps to freight warehouses, rolling stock depots, service buildings for railway personnel (such as cafeterias, changing rooms, 'railway hotels', social meeting facilities, staff lodgings). This type of organisation led the incumbent railway companies to accumulate a large stock of real estate property over the decades. During the second half of the 20th century, the closure of many railway lines and the outsourcing of several services related to the railway sector brought about the accumulation of 'non-instrumental assets' within railway undertakings. The separation of management and accounting induced by Directive 91/440/EEC then required the distribution of all the assets of such undertakings among the different actors into which the railway incumbents were split.

⁽⁷⁶⁾ A company spin-off process is the separation of a certain part or parts of an organisation's business operations from the main company so that it becomes its own entity.

(113) As a consequence, FS management's main objective was to allocate in a more efficient and balanced manner those assets which were not needed by the entity holding them (RFI). FS claims that the reallocation and transfer of maintenance workshops to Trenitalia (through the spin-off implemented in 2009) corresponded to the following business considerations:

- (a) the management of maintenance depots and their ancillary areas did not belong to the ordinary activities of RFI, which did not and could not upgrade and improve those assets to make them more efficient and align them with the needs of their user (namely Trenitalia);
- (b) the transfer of ownership of those assets to Trenitalia, which was the party responsible for handling the entire rolling stock maintenance process, had enabled the launch of actions to rationalise and redesign the network of maintenance facilities, in line with the group's business plan;
- (c) in particular, optimisation of the network of maintenance depots, their reorganisation and the reduction in the number of centres required changes to the layout of the maintenance depots in use, certain of which involved substantial investments;
- (d) the transaction helped to achieve a more balanced distribution of assets among the companies of the group.

According to FS, those transfers led to a higher remuneration of the invested capital and strengthened the industrial position of the group. Moreover, the transfer of assets enabled Trenitalia to better identify the investment areas that were necessary to optimise its services and to steer the investments.

(114) FS holds that the (re)allocation of the maintenance workshops was entirely in line with the nature and purpose of similar transactions carried out by FS's main competitors in the Union. FS puts forward a few examples, namely the corporate reorganisation implemented over the same period by the main Union railway groups, in particular by SNCF Group in France, RENFE in Spain, Deutsche Bahn Group in Germany, and SNCB in Belgium. According to FS, these reorganisation processes were often implemented through corporate transactions, i.e. spin-offs, of the same type as those implemented by the FS Group. Furthermore, the corporate reorganisation transactions carried out by other Union railway groups confirm that the maintenance facilities were allocated directly to the rail transport operator or placed under its control, and were removed from the assets of the infrastructure manager.

(115) FS adds that the transfers of real estate assets to FS Logistica, which is not a railway undertaking, are also in line with the overall business strategy of the group. The assets transferred to FS Logistica are portions of freight facilities, buildings and land intended for logistic activities (handling, freight warehousing and storage) which are fully part of the activities specifically assigned to FS Logistica within the FS Group. FS also claims that the transfers proved to be economically efficient, as shown by the improvements in the remuneration of the capital invested in FS Logistica and of the main economic indicators of the undertaking, as well as by the constant increase in the operating margin of FS Logistica (in relation to property management).

6.1.3. *Observations regarding compliance with EU rules*

(116) According to FS, neither Directive 91/440/EEC, as amended, nor Directive 2012/34/EU require that separate companies perform railway transport activities and railway infrastructure management.

(117) According to FS, the Union legal framework leaves Member States the freedom to establish the structure, organisation and intra-group allocation of assets; furthermore, it places no constraints on the freedom to allocate the different activities, resources and assets within the various companies of a group. FS adds that the freedom granted by Union rules applies all the more since the assets which are the subject of intra-group transfers do not qualify as 'infrastructure'. According to FS, Article 3 of Directive 91/440/EEC does not classify freight terminals or maintenance depots as railway infrastructure. Accordingly, the FS Group could carry out the asset reallocation process in a discretionary manner.

- (118) In addition, FS claims that the asset transfer by means of spin-off from RFI to Trenitalia and FS Logistica complies with the market economy investor principle, as specified by the case-law of the Court of Justice, inter alia in its judgments of 21 March 1991 in Case C-303/88, *Eni-Lanerossi* ⁽⁷⁷⁾ and in Case C-305/89, *Alfa Romeo* ⁽⁷⁸⁾.
- (119) FS argues that proper maintenance is a necessary element for compliance with the conditions set out in the Service Contract concluded between Trenitalia and the Italian Regions ⁽⁷⁹⁾; this confirms that maintenance facilities are an indivisible element of Trenitalia's investment programme.
- (120) FS adds that, at FS Group level, the investments planned in maintenance were expected to improve services and increase turnover and profitability. To support that statement, FS states that the profitability analysis prepared by FS shows a rate of return on invested capital required by the market of about 8 % for Trenitalia and of 5,5 % for RFI, as set out in the following table:

Table 10

Compared profitability of Trenitalia and RFI in 2008

Trenitalia	2008 (in EUR bn)	WACC	% NIC	Weighted WACC
NIC(net invested capital) Medium-long haul	2,870	7,5 %	42 %	3,1 %
NIC Regional	3,334	7,5 %	48 %	3,6 %
NIC Cargo	0,672	8,2 %	10 %	0,8 %
Invested capital	6,876			7,6 %
RFI	2008	WACC	% NIC	Weighted WACC
NIC conventional network	26,149	5,5 %	83 %	4,6 %
NIC High speed/high capacity	5,181	5,5 %	17 %	0,9 %
Invested capital	31,330			5,5 %

Source: FS.

- (121) According to FS, this differentiated profitability confirms that the allocation process was implemented for both strategic and business reasons and to obtain higher return on invested capital at group level.

6.1.4. Observations regarding compliance with company law and accounting rules

- (122) FS argues that the spin-off transactions from RFI to Trenitalia and FS Logistica constitute transactions between companies 'under common control', as both are fully held subsidiaries of FS. The transactions in question were carried out via the transfer within the group of assets at their book value. According to FS, this choice is entirely legitimate from the viewpoint of the parent company FS from both a civil law and an accounting viewpoint.

⁽⁷⁷⁾ Judgment of 21 March 1991, *Italian Republic v Commission* ('Eni-Lanerossi'), C-303/88, ECLI:EU:C:1991:136.

⁽⁷⁸⁾ Judgment of 21 March 1991, *Italian Republic v Commission* ('Alfa Romeo'), C-305/89, ECLI:EU:C:1991:142.

⁽⁷⁹⁾ The Service Contract concluded between Trenitalia and the Italian Regions was a public service contract that established the quantities, quality standards, charges and operational criteria related to the services that Trenitalia had to provide within such Regions as well as the compensation to be paid to Trenitalia.

6.2. Community of European Railways (CER)

- (123) According to CER ⁽⁸⁰⁾, pursuant to Article 4 of Directive 91/440/EEC, railway undertakings should be independent from the State in their management and administration; in particular 'assets, budgets and accounts are separate from those of the State'. According to CER, Article 5 of that same Directive provides that railway undertakings shall be free to establish their internal organisation without prejudice to the obligation of account separation. That provision does not require establishing two separate companies, and Directive 91/440/EEC should be considered *lex specialis*, prevailing over competition law rules.
- (124) According to CER, pursuant to the relevant Union Directives, railway undertakings are free to allocate assets such as maintenance facilities, freight terminals and other real estate assets that are not included in the definition of railway infrastructure provided by Union Directives (Article 3 of Directive 91/440/EEC and Article 3 of Directive 2012/34/EU), within their organisation and upon their own decision. From an industrial point of view, rolling stock maintenance workshops are normally exploited by a railway undertaking in the large majority of Member States. Lastly, with regard to the transfer of assets within the same group of public undertakings, CER considers that, in the *France Telecom* judgement of 19 March 2013 ⁽⁸¹⁾, the Court of Justice has clarified that the notion of State aid implies to check that there is neither a reduction in the State budget nor an additional financial risk for the State budget. In the case of a transfer of assets within a group composed of several public undertakings, those two conditions are always fulfilled.

6.3. FerCargo

- (125) As indicated in recital (8), FerCargo represents several Italian railway undertakings offering rail freight services ⁽⁸²⁾.

6.3.1. On the asset transfers

- (126) FerCargo points out that the measures under investigation are not easily traceable. RFI's annual reports would allegedly give insufficient account of the number and the nature of the assets transferred to Trenitalia and FS Logistica.
- (127) FerCargo adds that, contrary to what the Italian authorities claim, the transferred assets are essential to the provision of the services contained within the minimum access package and track access to service facilities that railway undertakings are legally entitled to request from Member States as provided for in Article 5 and Annex 2 of Directive 2001/14/EC ⁽⁸³⁾. FerCargo adds that Article 20 of Legislative Decree 188/2003, which transposed that Directive into national law, explicitly provides that international associations of undertakings and railway undertakings have the right to access and use freight terminals, marshalling yards, train formation facilities, storage facilities for rolling stock and goods, maintenance and other technical facilities under non-discriminatory

⁽⁸⁰⁾ According to its website www.cer.be, CER brings together close to 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. CER members represent 71 % of the European rail network length, 76 % of the European freight business and 92 % of rail passenger operations in Europe.

⁽⁸¹⁾ Judgment of 19 March 2013, *Bouygues SA and Bouygues Télécom SA v European Commission and Others and European Commission v French Republic and Others* ('*France Telecom*'), Joined Cases C-399/10 P and C-401/10, ECLI:EU:C:2013:175.

⁽⁸²⁾ Captrain Italia, Compagnia Ferroviaria Italiana, FuoriMuro, GTS General Transport Service, Hupac, Interporto Servizi Cargo, InRail, Linea S.r.l., OceanoGate Italia, Rail Cargo Italia, Rail Traction Company, Sbb Cargo Italia.

⁽⁸³⁾ According to Annex 2 of Directive 2001/14/EC, the minimum access package shall comprise:

- (a) handling of requests for infrastructure capacity;
- (b) the right to utilise capacity which is granted;
- (c) use of running track points and junctions;
- (d) train control including signalling, regulation, dispatching and the communication and provision of information on train movement;
- (e) all other information required to implement or operate the service for which capacity has been granted.

conditions. Article 13 of Legislative Decree 188/2003 provides that the infrastructure manager publishes an annual report titled 'Prospetto Informativo della Rete' (PIR) whereby it lists the essential facilities to which rail undertakings should get access as provided by Union and national law.

- (128) According to FerCargo, the PIRs for the years 2008, 2009 and 2010 show a sharp decrease of those essential facilities from 108 to 71 between 2008 and 2009, which would result from the 2009 Directive. However, technical documents published by Trenitalia indicate that certain of the assets having been transferred and consequently made unavailable to other railway undertakings were still considered as being technically in use for Trenitalia's business partners ⁽⁸⁴⁾.
- (129) FerCargo considers that State aid rules are applicable to the measures under investigation. First, the measure has been implemented after the freight market opening. Second, FerCargo claims that all criteria used to define the presence of State aid are fulfilled:
- (a) *state resources and imputability*: the transferred assets have always been used by RFI itself to provide access to essential facilities. FerCargo notes that the measures are imputable to the Italian State which owns and controls 100 % of FS's capital, appoints all FS Board members and supervised the asset transfer process as well as RFI's activities as infrastructure manager. According to FerCargo, RFI qualifies as a public undertaking within the meaning of Commission Directive 2006/111/EC ⁽⁸⁵⁾;
 - (b) *economic advantage*: the measures under investigation confer an economic advantage on FS's subsidiaries (Trenitalia and FS Logistica) since they entail a free-of-charge transfer of assets to those entities. FerCargo doubts that the measures under investigations constitute a mere intra-group reorganisation (thus economically neutral): according to Article 1(2) of the 2009 Directive, that reorganisation would have taken place in the context of the recapitalisation of FS, while Article 2 would explicitly justify the transfer of the maintenance facilities by the need to recapitalise Trenitalia. Finally, FerCargo holds that the *Banque Postale* case-law ⁽⁸⁶⁾ is irrelevant since that case concerned the set-up of a new company on the basis of assets already earmarked within La Poste for the provision of financial services. On the contrary, the asset transfers, used by RFI acting as infrastructure manager, to Trenitalia and other FS companies equals to a 'present' aimed at recapitalising those companies;
 - (c) *selectivity*: only FS's subsidiaries are beneficiaries of the asset transfers;
 - (d) *distortion of competition*: according to FerCargo, the measures under investigation have distorted competition in several manners. First, competing railway undertakings have been deprived access to key facilities (such as border facilities in Ventimiglia and Trieste) without being consulted by Italy beforehand on the list of facilities to be transferred to Trenitalia; second, the recapitalisation has allowed Trenitalia to get a better access to banking financing, notably for projects falling outside the field of rail freight (e.g. the financing of high-speed operations and acquisition of trainsets ETR 1000 ⁽⁸⁷⁾); third, in the light of the new organisation of essential facilities resulting from the transfer of assets, RFI has substantially modified the organisation of train manoeuvring at the expenses of railway undertakings competing with Trenitalia. FerCargo adds that the facilities should not have been transferred to FS Group's subsidiaries but should have been tendered out. According to FerCargo, the transfers of facilities to FS Group's entities competing with other railway undertakings led to anti-competitive behaviours as well as a non-efficient management of those facilities.

⁽⁸⁴⁾ Uniform distance table for international freight traffic: list of railway stations – list of the railway places of acceptance/delivery (Prontuario unificato delle distanze per il traffico merci internazionale: lista delle stazioni – lista dei punti ferroviari di presa in carico/consegna) prepared by Trenitalia, 1 July 2010, pp. 27, 28 and 29.

⁽⁸⁵⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

⁽⁸⁶⁾ See recital (81).

⁽⁸⁷⁾ ETR 1000 is a high-speed train operated by Trenitalia in the passenger transport segment.

7. OBSERVATIONS FROM ITALY ON THIRD PARTY COMMENTS

7.1. Observations on FerCargo's submission

- (130) Italy holds that FerCargo's comments mostly refer to the management of freight facilities and therefore fall outside of State aid control. Italy holds that FerCargo does not put forward any decisive elements to prove the existence of State aid and has misinterpreted the discretionary power granted by Union law to public companies as regards their internal organisation.
- (131) Italy adds that the imputability criterion is not fulfilled: FS is a corporate structure, completely separate from the State, from a legal, organisational and functional point of view. Therefore, its assets and its accounts are also separate from the State budget; the measures under investigation were adopted by FS, and not by the State; those measures did not lead to any transfer of State resources to FS.
- (132) Italy states that the asset transfers conferred no economic advantage to FS: in accordance with the *Chronopost* case-law⁽⁸⁸⁾, transfer operations implemented through partial intra-group division are irrelevant from the point of view of State aid rules. With these operations, the undertaking, taken as a whole, repositioned asset items from one entity to another within the group, but the number and total value of assets within the group remain unchanged, without conferring any economic advantage to the FS Group. Italy holds that the measures under investigation constituted a typical business measure aiming at optimising the company's organisation in order to improve its efficiency and performance and, ultimately, promote value creation.
- (133) As regards the nature of the assets transferred, Italy explains that the reallocation of assets within FS concerns certain assets that should already have been in Trenitalia's portfolio since its incorporation (maintenance facilities), i.e. assets that were no longer relevant for the infrastructure management. With regard to the alleged impact that the transfers would have had on the operation of the railway undertakings represented by FerCargo, Italy notes that:
- (a) no freight depots and terminals were transferred to Trenitalia;
 - (b) the reduction of facilities open to other railway undertakings has not taken place in the manner described by FerCargo. As can be seen from the PIR edition of December 2009 and subsequent editions available, the reference list of essential facilities made available to other railway undertakings is much broader than that described by FerCargo;
 - (c) all installations referred to by FerCargo were included in the PIRs of 2009, 2010 and subsequent years, which means that (contrary to what FerCargo claims), they were made available to Trenitalia, as to all other railway undertakings;
 - (d) finally, there is evidence that certain railway undertakings, which are also members of FerCargo, have been operating in 2010-2013 in several facilities deemed inaccessible by FerCargo after the asset transfers.

8. ASSESSMENT OF THE MEASURES

8.1. Existence of aid

- (134) Pursuant to Article 107(1) TFEU '[...], any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (135) It follows that, for a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative criteria must be met: (i) it must be granted by the State and through State resources; (ii) it must confer an advantage upon an undertaking; (iii) it must be selective, i.e. favour certain undertakings or the production of certain goods; and (iv) it must distort or threaten to distort competition and it must affect trade between Member States.

⁽⁸⁸⁾ See recital (81).

- (136) According to the established case-law, the intervention of public authorities in the capital of an undertaking, whatever form it may take, could constitute State aid in the sense of Article 107(1) TFEU when the conditions of that Article are met ⁽⁸⁹⁾.
- (137) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention ⁽⁹⁰⁾.
- (138) However, no advantage is conferred when a Member State acts in accordance with the market economy operator principle ('MEO principle') ⁽⁹¹⁾.
- (139) Italy claims that measures under investigation respect the MEO principle, so that it granted no advantage, and therefore the measures don't constitute State aid. The Commission will therefore analyse in Sections 8.1.1.1 and 8.1.1.2 whether Italy acted in accordance with the MEO principle.

8.1.1.1. Applicability of the MEO test

- (140) The Commission will examine the applicability of the MEO principle, to determine whether the State acted as a public authority rather than as economic operator when deciding on the measures under investigation. First the Commission will examine whether the MEO test is at all applicable to the asset transfer measures taken by FS.
- (141) The Commission notes that the existence of public policy reasons is not in itself sufficient to preclude the applicability of the MEO principle. Moreover, in the present case, FS decided to transfer the assets from RFI to Trenitalia and FS Logistica ⁽⁹²⁾ on the basis of the 2007-2011 Business Plan referred to in recitals (18) and (19). That Business Plan was designed to rationalise the management of the FS Group and to generate value to be achieved, inter alia, through better management of real estate properties (see recital (108)).

8.1.1.1.1. Italy did not act as public authority

- (142) The Commission recalls that the Court has considered that the applicability of the MEO test ultimately depends on a State having conferred, in its capacity as an economic operator and not in its capacity as a public authority, an economic advantage to an undertaking ⁽⁹³⁾. Interventions by the State, which are intended to honour its obligations as a public authority cannot be compared to those of a private investor in a market economy ⁽⁹⁴⁾.
- (143) In order to determine whether the measures under investigation represent the exercise of State authority, the Commission must examine: (i) their nature and subject matter; (ii) the context in which they have been taken; (iii) the objective pursued; and (iv) the rules to which they are subject.

8.1.1.1.2. The nature and subject matter of the measures

- (144) In the present case, the measures under investigation consist of asset transfers aiming to rationalise the use of the assets owned by the FS Group in order to increase the FS Group's profitability ⁽⁹⁵⁾.

⁽⁸⁹⁾ Judgment of 14 September 1994, *Spain v Commission*, C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 20 and quoted case-law; and Judgment of 8 May 2003, *Italy and SIM 2 Multimedia v Commission*, C-399/00 and C-328/99, ECLI:EU:C:2003:252, paragraph 36 and the quoted case-law.

⁽⁹⁰⁾ Judgment of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; judgment of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41; and judgment of 19 December 2019, *Arriva Italia e.a.*, C-385/18, ECLI:EU:C:2019:1121, paragraph 46 and quoted case-law.

⁽⁹¹⁾ The terms 'market economy investor' and 'market economy operator' can be used interchangeably; they are described in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), points 73 to 82.

⁽⁹²⁾ See Section 3.

⁽⁹³⁾ In relation to investments, see judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79-82 and 87.

⁽⁹⁴⁾ Judgment of 15 December 2009, *EDF v Commission*, T-156/04, ECLI:EU:T:2009:505, paragraph 228.

⁽⁹⁵⁾ See recitals (112) to (115).

8.1.1.1.3. The objective pursued and the context of the measures

- (145) As regards the objective pursued, it must be underlined that neither the content of the 2007-2011 Business Plan nor the context in which the transfers have been decided point to any public policy objectives underpinning FS's decision to implement the measures under investigation.
- (146) In particular, the measures under investigation and the corresponding 2007-2011 Business Plan do not point to public policy objectives: there is no reference or link made with the special rights that RFI holds as the national rail infrastructure manager or that Trenitalia holds under public service contracts awarded to it. Nor do the measures under investigation relate to the public interest objective to ensure connectivity and 'territorial continuity' within Italy.
- (147) Conversely, the measures under investigation have been decided and implemented under the steer of the holding of the FS Group, FS, acting as the only shareholder, and exclusively driven by financial considerations.
- (148) FS launched and drove the reorganisation process as of 2007. That process materialised with the adoption of the 2007-2011 Business plan (see recital (18)), decided by FS. The adoption of that Business plan triggered the adoption and subsequent implementation of the measures under investigation described in Section 3.1 of this decision. As indicated in recital (18), the 2007-2011 Business plan was adopted in the context of substantial financial losses of the FS Group (over EUR 2 bn), and was instrumental to organise the internal restructuring aimed at restoring financial viability. In addition to cost-cutting measures, FS decided to rationalise the allocation of the real estate and facilities scattered in the various entities of the FS Group. That process entailed the creation of dedicated subsidiaries to which the assets used to carry out specific activities were transferred.
- (149) In addition, the Commission observes that the various steps in the decision-making process that led to the adoption of the individual asset transfer decisions presented in recital (40) reflect the same objective of rationalising the allocation of assets with a view to increase the profitability and efficiency of the FS Group:
- (a) FS launched the project of assets allocation as part of the 2007-2011 Business Plan (18), by means of the letter of 19 September 2007, which refers to the corporate restructuring and the reorganisation process ⁽⁹⁶⁾;
 - (b) on 23 April 2008, FS Board approved the launch of the asset reallocation exercise. FS Board exercised its oversight on the strategic choices to be made through its Investment Committee ⁽⁹⁷⁾. According to the minutes of the FS Board meeting held that day: 'The priority objective of the asset allocation operation is to enable, including through the use of dedicated corporate structures such as FS Logistica and FS Sistemi Urbani, the valorisation or better exploitation of assets that are not closely linked to the activities specific to the infrastructure manager (RFI) or the railway undertaking (Trenitalia)'. The minutes of that board meeting indicate that this objective would be met through a 'strategic analysis and assessment by the holding company of the assets "available" identified by the owning companies. Within the holding company, the Investment Committee will ensure the strategic validity of the asset allocation activity as a whole and decide on the most appropriate allocation of assets';
 - (c) FS implemented the strategic management decision taken on 23 April 2008 by setting up a multidisciplinary task force, tasked to propose the adequate asset allocation, with an emphasis on the financial profitability of the asset reallocation. The guiding principles followed by the task force ⁽⁹⁸⁾ to propose the asset allocation are the following: (i) identification by each operational entity of the FS Group of the assets that could be transferred to another entity; (ii) strategic assessment by FS, which decides on the most appropriate allocation of assets; (iii) preparation and implementation at operational entities' level of the specific asset transfer measures.

⁽⁹⁶⁾ See recital (45). The letter indicates that 'as part of the wider reorganisation and reorganisation process in the course of the group, the objectives set out in the Industrial Plan 2007-2011 are based, inter alia, on maximising effectiveness in the use of all assets owned by the Group. In particular, with regard to real estate assets, this [reallocation] entails the rapid identification, by each [FS] Group company, of all non-business assets, whether non-industrial or industrial in nature, that no longer serve the task assigned to the individual company'.

⁽⁹⁷⁾ See recital (45).

⁽⁹⁸⁾ See the minutes of RFI's Board meeting of 24.11.2008.

(150) Therefore, the actual decisions approving the measures under investigation were taken by FS together with its subsidiaries ⁽⁹⁹⁾. More specifically, those decisions were taken in September 2009 as regards Trenitalia (see recitals (41) and (42)), and in October 2007, November 2008 and December 2010 as regards FS Logistica (see recitals (43) and (44)). That conclusion is not put into question by the adoption of the 2009 Directive. The Commission observes that some of those decisions were taken before the 2009 Directive was adopted. In addition, the 2009 Directive did not prescribe any specific measures, it did not list any precise assets to be transferred, nor did it provide specific financial details on those measures. Articles 1 and 2 of the 2009 Directive merely referred to the general objective of rationalisation of the structure of the FS Group leaving it up to FS and its subsidiaries to decide on the precise measures to be taken and to implement them ⁽¹⁰⁰⁾.

(151) The Commission observes also that Italy submitted three studies ⁽¹⁰¹⁾ which are based on data and information that were available, and developments which were foreseeable, at the time the decisions to transfer the assets were taken. These studies aim to reconstruct the profitability that FS, acting as a shareholder, could expect from the asset transfers. As it will be outlined and demonstrated in Section 8.1.1.2, these studies show that any private investor in the same position as FS would have carried out those transfers, because transferring the assets to Trenitalia and FS Logistica would have generated an increase in these companies' equity value higher than the equity lost by removing the assets from RFI.

8.1.1.1.4. Conclusion on the applicability of the MEO test

(152) Based on the above, the Commission concludes that that FS acted in its capacity as investor/shareholder and that the MEO test is applicable in the present case.

8.1.1.2. Application of the MEO test

8.1.1.2.1. Methodological approach

(153) The Commission has to assess whether the measures under investigation were in line with normal market conditions, namely whether a profit-driven private market operator placed in the same situation as FS would have implemented such measures.

(154) To assess whether the asset transfers were market conform, the Commission takes the perspective of a holding company having to decide whether to inject equity in a subsidiary. The reason is that, by stripping assets off RFI and assigning them to the recipient companies (Trenitalia and FS Logistica), the asset transfers have the effect of increasing the equity of the recipient companies and decreasing that of the original owner of the assets. More specifically, the MEO test consists in calculating the net gains of the holding company FS as a shareholder, i.e. comparing the increase in the value of equity of the recipient companies (Trenitalia and FS Logistica) to the loss in the value of equity of RFI as a result of the asset transfers and assessing whether overall, for FS as sole shareholder of all these companies, the outcome of the transfers in terms of the aggregated value of the equity of these companies is positive.

⁽⁹⁹⁾ See recitals (40) to (45).

⁽¹⁰⁰⁾ Article 1 of the 2009 Directive provides that '[...] In order to reduce the maintenance burden, which is currently borne entirely by the State, RFI is hereby authorised to proceed freely to the transfer/allocation of freight depots not included in the list in Annex 1 to other companies in the FS Group – including Trenitalia – in the context of any reorganisation or capitalisation/asset growth transactions. [...]'].

Article 2 of the 2009 Directive provides that 'In order to reduce the maintenance and safekeeping burden, which is currently borne entirely by the State, and to undertake the asset growth/capitalisation of Trenitalia, RFI shall submit to the Ministry of Infrastructure and Transport within 60 days of the issue of this Directive a Plan, specifying for every rolling stock maintenance facility owned by the Manager its functional specialisation if any [...]'].

⁽¹⁰¹⁾ See Section 5.2.3.2.

- (155) In the opening decision, the Commission raised concerns on the potential economic advantage stemming from the transfers to the recipient companies, as they would receive the assets without consideration (recital (59)). While the transfers did not lead to any cash payment from the recipients, the Commission notes that the asset transfers are akin to an equity injection in kind in favour of the recipient companies. As such, the benefits of the asset transfers might take place in the form of higher profits accruing to the shareholder of the recipient companies, namely FS.
- (156) While the Commission considers the asset transfers similar to an equity injection in kind, it also observes that those assets were already used by subsidiaries of the FS Group. As such, they already contributed to FS Group's business activities and, ultimately, to value creation within FS Group. The transfer of those assets from one subsidiary of the FS Group to another was a decision aimed at increasing the FS Group's value by improving the efficiency of its operations, compared to the 'business as usual' scenario with no change in the ownership of the assets (within the group). Therefore, the Commission considers such scenario as the relevant counterfactual to assess the MEO compliance of the measures under investigation (see Section 8.1.1.2.2). Overall, what is important for the MEO test is whether, at the moment when it decided the asset transfers, FS had grounds to believe that it was a profitable decision at the FS Group level, compared to the status quo scenario (see also recital (154)).
- (157) In the following subsections (8.1.1.2.2-8.1.1.2.4), the Commission will apply the MEO test to assess the measures under investigation, on the basis of the relevant evidence presented in the studies described in Section 5.2.3.2. The Commission will assess whether the measures under investigation comply with the MEO principle.

8.1.1.2.2. MEO test

- (158) In this section, the Commission will carry out the MEO test based on the data of the April and December 2019 PwC studies ⁽¹⁰²⁾. For the purposes of the MEO test, the net gains of the holding company (FS) as a shareholder will be calculated, because the asset transfers determine a change in the value of equity of the recipient companies and of the original owner of the assets transferred (see recital (154)). The Commission will rely on the equity instead of the enterprise value because a private investor injecting equity in a subsidiary is not interested in the increase of the enterprise's value per se, but in the increase of the value of its own equity investment in the capital of the company (see recital (160)).
- (159) To implement the MEO test from the perspective of the holding company (FS) as a shareholder (recital (154)), the Commission will compare the increase in equity value of the subsidiaries receiving the assets (Trenitalia and FS Logistica) to the loss in equity value of the subsidiary from which those assets were removed (RFI) ⁽¹⁰³⁾. The asset transfers comply with the MEO test if the increase in equity value of the subsidiaries receiving the assets is higher than, or at least equal to, the loss of equity value of the subsidiary that originally owned those assets. Therefore, in the case at hand, the measures under investigation will be considered to comply with the MEO test if the following two conditions are met:
- (a) the value of equity of the recipient companies, namely FS Logistica and Trenitalia, is positive;
 - (b) the value of the equity increase at the level of the recipient companies is higher or at least offsets the value of the equity lost at the level of RFI, the original owner of the assets.
- (160) Taken together, the conditions referred to in points (a) and (b) of recital (159) imply that, in order for the asset transfers to comply with the MEO test, it is sufficient that they do not lead to a loss of equity value at the level of the FS Group. Such loss of equity value would occur in either of two scenarios.

⁽¹⁰²⁾ The E.CA study does not provide its own valuation of the transfers. It assesses the robustness of the April 2019 PwC study by examining sensitivities to alternative assumptions based on the financial projections in the April 2019 PwC study.

⁽¹⁰³⁾ It should be noted that the MEO test is conducted separately for the transfers in favour of FS Logistica and Trenitalia. For each of these transfers, the MEO test takes into account all the transferred assets, as referred to in Sections 3.2 and 3.3.

- (161) The first is the scenario where the value of the recipient companies' equity is negative, because their debt is higher than the value of their assets. In such scenario, any additional asset transferred to those companies would be used to repay debt holders, at least in part. Therefore, a positive equity value of the recipient companies (i.e. fulfilment of condition sub (a) in recital (159)) is necessary to demonstrate compliance of the asset transfers with the MEO test, as it ensures that the benefits of the transferred assets accrue to the shareholder of those companies (namely FS) and not to the companies themselves as debt holders.
- (162) The second scenario where there would be an equity loss, and therefore the MEO test would not be complied with, occurs if the recipient companies, being worse than the original owner at using the assets, generate a lower return on those assets. In that scenario, the asset transfers would reduce profits and hence equity value at group level. Therefore, in order for the asset transfers to comply with the MEO test, it is necessary that they do not destroy value (i.e. fulfilment of condition sub (b) in recital (159)). In that scenario, the existence of synergies, i.e. higher returns from assigning assets to the recipient companies rather than leaving them to the original owner, is an additional argument which provides comfort on the profitability incentives driving the asset transfers.
- (163) The Commission notes that the April 2019 PwC study estimates the *enterprise* value of the companies involved in the asset transfers. As pointed out in the E.CA study (see Section 5.2.3.2, sub-section (c)), the enterprise value is an appropriate metric to gauge whether the investments described in recitals (86) and (87), which are made possible by the asset transfers, are profitable. The reason is that those investments bring benefits to the company overall, not to debt holders or shareholders in particular. However, what matters for the MEO test is the perspective of the holding company (FS) as a shareholder (see recitals (158) and (159)). The Commission considers that a private holding injecting equity in a subsidiary (i.e. the benchmark to assess FS holding's behaviour in the case at hand – see recital (154)) is more interested in the increase of the value of its own equity investment in the capital of the subsidiary than in the increase of the subsidiary's enterprise value ⁽¹⁰⁴⁾ per se. The value of such equity stake depends on the enterprise value of the subsidiary as well as on the subsidiary's amount of debt. Therefore, even if the enterprise value of the subsidiary increases as a result of the equity injection, such increase may benefit debt holders rather than the holding if debt is higher than the enterprise value. Thus, the Commission considers that, overall, the enterprise value cannot be directly used to apply the MEO test; instead, the appropriate metric to be used is the *equity* value of the recipient subsidiaries as well as that of the original owner of the assets.
- (164) The Commission notes that in practice it may be possible to calculate the value of equity by subtracting the book value of net debt from the enterprise value, if the book value of debt represents a good approximation of its market value ⁽¹⁰⁵⁾. The book value of debt can be considered a good approximation of its market value if the interest rate that a company pays on the (new and existing) debt reflects the current creditworthiness of that company. For example, the market value of a company's debt is lower than its book value if the company's creditworthiness deteriorated compared to the time when debt was contracted, as the market would charge a higher interest rate on any new debt to such company. The Commission will assess the plausibility of the assumption that the market value of debt is lower than the book value of debt for both FS Logistica and Trenitalia in recitals (165) and (168).
- (165) With regard to the transfer of assets to Trenitalia, the Commission notes that, at the time when the decisions to transfer the assets were taken, Trenitalia was experiencing a period of financial distress, even though it was not a company in difficulty within the meaning of the Rescue and Restructuring Guidelines ⁽¹⁰⁶⁾. Indeed, Trenitalia had been reporting losses in the 5 years preceding the asset transfer ⁽¹⁰⁷⁾ and it was financially struggling and in need of a recapitalisation. For companies in that situation, the book value of debt tends to overestimate the market value of their debt, as the future cash flows associated to debt are riskier and therefore have a lower present value (see recital (164)). Therefore, it would not be appropriate to calculate the value of equity of Trenitalia by subtracting the book

⁽¹⁰⁴⁾ A company's enterprise value is the sum of the value of its equity and debt or, equivalently, the value stemming from the operation of a company's assets.

⁽¹⁰⁵⁾ The market value of a debt instrument is the present value of the future cash flows associated to that debt instrument (namely debt repayments and interest rates), calculated using a discount rate that reflects the riskiness of that instrument and the creditworthiness of the debtor.

⁽¹⁰⁶⁾ Communication from the Commission – Guidelines on State aid for rescuing and restructuring non- financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

⁽¹⁰⁷⁾ Trenitalia posted negative net income (in million EUR) : – 18,7 in 2003, – 327,7 in 2004, – 631,7 in 2005, – 1 989,4 in 2006 and – 402,6 in 2007. Sources: CapitaliQ, FS.

value of net debt from its enterprise value. For companies like Trenitalia at the time the decisions to transfer the assets were taken, the book value of debt is likely to be higher than its market value, leading to an underestimation of the value of equity and hence to a potentially erroneous conclusion on the non-market conformity of the asset transfer.

- (166) Therefore, the Commission will employ the December 2019 PwC study to assess the market conformity of the asset transfer from RFI to Trenitalia. As pointed out in Section 5.2.3.2, that study estimates the value of equity of RFI and Trenitalia by using a discounted cash flow to equity model. Unlike the method referred to in recital (164), the discounted cash flow to equity model requires explicit forecasts of the financing cash flows, i.e. debt issuance, debt repayments and interest rate costs. As such, compared to the method referred to in recital (164), the discounted cash flow to equity model is more appropriate for a company reporting losses such as Trenitalia, as the assumption of a market value of debt at the time the decisions to transfer the assets were taken being similar to the book value is not plausible.
- (167) As pointed out in recital (93), in the scenario with the asset transfers, the December 2019 PwC study estimates a positive value of equity for Trenitalia, which is EUR 138,1 million higher than in the scenario without those transfers. The estimated value of equity of RFI is also positive; that value is EUR 16,7 million lower than in the scenario without the asset transfer. Overall, those estimates indicate a EUR 121,4 million (EUR 138,1 million minus EUR 16,7 million) net creation of shareholder value at FS Group level as a result of the asset transfer from RFI to Trenitalia.
- (168) With regard to the transfer of assets to FS Logistica, the Commission considers the assumptions referred to in recital (164) as plausible for RFI and FS Logistica. The reason is that, at the time the decisions to transfer the assets were taken, those companies were companies in a stable and growing phase, respectively. In this case, calculating the value of equity by using the method referred to in recital (164) is conservative, as it does not take into account the likely debt inflows that are necessary to finance the company's growth.
- (169) Therefore, in order to apply the MEO test to the asset transfers from RFI to FS Logistica, the Commission calculates the value of equity of the two companies by subtracting the book value of their net debt from their enterprise value, as estimated in the April 2019 PwC study.
- (170) Those calculations reveal that the asset transfers from RFI to FS Logistica generated an increase of EUR 14,1 million in the value of equity for the FS Group. That increase results from an equity value creation of EUR 26 million ⁽¹⁰⁸⁾ by FS Logistica and a loss of equity of EUR 11,9 million ⁽¹⁰⁹⁾ by RFI. The Commission notes that this result stems from the higher enterprise value in the scenario with the asset transfers vis-à-vis the scenario with the assets remaining with RFI (see recital (88)). The reasons are that: (i) FS Logistica's equity value is calculated as the difference between its enterprise value and the book value of its net debt; and (ii) the book value of net debt remains the same in the actual and counterfactual scenarios. Overall, this result confirms that the asset transfers from RFI to FS Logistica are market conform, because they were expected to lead to an overall increase in the value of equity of FS Group.

⁽¹⁰⁸⁾ The equity value of FS Logistica is the difference between its enterprise value (i.e. EUR 82 million in the scenario with the asset transfers and EUR 56 million in the scenario without asset transfers – see recital (88)) and its net debt of EUR 12,7 million (source: balance sheet of FS Logistica). This results in an equity value of EUR 69,3 million in the scenario with the asset transfers and EUR 43,3 million in the scenario without asset transfers, implying an increase of EUR 26 million in FS Logistica's equity value due to the transfer of assets.

⁽¹⁰⁹⁾ The equity value of RFI is the difference between its enterprise value (i.e. EUR 2 222,1 million in the scenario with the asset transfers and EUR 2 234 million in the scenario without asset transfers – see recital (88)) and its net debt of EUR - 1 091 million (source: balance sheet of RFI). This results in an equity value of EUR 3 313,1 million in the scenario with the asset transfers and EUR 3 325 million in the scenario without asset transfers, implying a decrease of EUR 11,9 million in RFI's equity value due to the transfer of assets to FS Logistica.

- (171) The values calculated in recital (167) and (170), indicate that the equity value of the recipient companies is positive and it also increased as a result of the asset transfers, due to the better ability of the recipient companies at using the assets (see recitals (86) and (87)). These findings show that the two conditions to comply with the MEO test, outlined in recital (159), are fulfilled. Moreover, the Commission observes that those findings support the conclusion that the increase in the value of equity of the recipient companies and the equity value loss of RFI leads to a positive net effect at FS Group level. As pointed out in recital (159), such increase in the equity value at FS Group level provides an additional indication that FS behaved as a market operator when deciding to implement the asset transfers.
- (172) Finally, to conclude that the asset measures under investigation comply with the MEO test, the Commission needs to assess the credibility of the studies leading to those results. Therefore, in Section 8.1.1.2.3, the Commission will critically assess the assumptions underlying the April and December 2019 PwC studies and conclude on whether the asset transfers comply with the MEO principle.

8.1.1.2.3. MEO test: robustness and sensitivity analyses

- (173) In this section, the Commission will assess the methodologies and the assumptions underlying the April and December 2019 PwC studies. With regard to the methodologies, the Commission observes that the April and December 2019 PwC studies employ well-known and commonly used methodologies to estimate the enterprise and equity value of a company, respectively. As such, the Commission considers that it is reasonable and appropriate to base the MEO test on those methodologies.
- (174) With regard to the assumptions underlying the April and December 2019 PwC studies, they refer to the criteria used to estimate the level of equity of the companies participating in the asset transfers. In particular, the Commission notes that the April and December 2019 PwC studies rely on **financial projections** and make certain assumptions on **valuation parameters** (i.e. discount rate and terminal value). The Commission will assess both in the remainder of this section.
- (175) With regard to the **financial projections**, Italy claims that they have been reconstructed – after the date of the asset transfers – on the basis of the management views and information available, and the developments foreseeable, at the time the decisions to transfer the assets was taken. The Commission has assessed that claim, by examining internal documents of the FS Group and thoroughly investigating how the process of the *ex post* reconstructed financial projections were generated.
- (176) The Commission has found that those projections are based on internal business plans, for the initial years of the projections. More specifically, the 2007-2011 Business Plan of 17 May 2007 ⁽¹¹⁰⁾ contains financial projections for Trenitalia and RFI for the period 2008-2011. Table 11 compares the revenue and profit (as defined by EBITDA, i.e. earnings before interest, taxes, depreciation and amortisation) projections of the 2007-2011 Business Plan to those presented in the December 2019 PwC study (data in EUR millions).

Table 11

Comparison of the EBITDA and revenues forecast under the 2007-2011 Business Plan and the December 2019 PwC study used for the MEO test

Company	Projection	Source	2008	2009	2010	2011
Trenitalia	Revenues	2007-2011 Business Plan	6 048	6 481	7 171	8 110
		December 2019 PwC study	5 772	5 834	5 923	5 995
	EBITDA	2007-2011 Business Plan	710	1 208	1 681	2 319
		December 2019 PwC study	919	1 046	1 246	1 388
RFI	Revenues	2007-2011 Business Plan	2 888	3 003	3 185	3 424
		December 2019 PwC study	2 507	2 363	2 788	2 945
	EBITDA	2007-2011 Business Plan	224	304	423	565
		December 2019 PwC study	54	– 101	359	503

⁽¹¹⁰⁾ See recital (18).

For both Trenitalia and RFI, Table 11 shows that, for both revenues and profit (EBITDA), the projections in the December 2019 PwC study are lower than in the 2007-2011 Business Plan ⁽¹¹¹⁾. For this reason, the Commission considers the projections in the December 2019 PwC study as conservative, as lower revenues and profits imply a lower company's equity value.

- (177) With regard to the years from 2011 to 2018, the April and December 2019 PwC studies rely on assumptions based on the information and management strategies available, and the developments foreseeable, at the time the decisions to transfer the assets were taken. In particular, the Commission notes that the debt repayments in the December 2019 PwC study are consistent with the type of debt obligations reported on the latest balance sheets available before the asset transfers. With regard to revenues, the December 2019 PwC study projects a reduction in 2013-2015 to take into account the entry and expected expansion of a competitor in the Italian high-speed rail market ⁽¹¹²⁾. The Commission considers this a reasonable assumption, which leads to a more conservative equity value compared to the assumption of constant or increasing revenues in the period 2013-2015.
- (178) The Commission observes that, among the criteria to estimate the value of equity of the companies participating in the asset transfers (see recital (173)), there are the **valuation assumptions** underlying the April and December PwC 2019 studies, namely the discount rate and the terminal value. With regard to the April 2019 PwC study, the Commission observes that the WACC and the cost of equity, i.e. the discount rates to obtain the enterprise and equity value, were determined in line with market practice and finance theory ⁽¹¹³⁾. The Commission also considers the methodology to calculate the terminal value to be appropriate, as it relies on the customary Gordon growth formula ⁽¹¹⁴⁾.
- (179) The Commission notes that the discount rates and the terminal value require further assumptions on certain parameters.
- (180) With regard to discount rates, Table 12 reports the parameters to estimate the WACC and cost of equity, which are the relevant discount rates to assess the asset transfers in favour of FS Logistica and Trenitalia, respectively ⁽¹¹⁵⁾. To estimate those parameters, Italy uses the relevant market ⁽¹¹⁶⁾ and company-level data ⁽¹¹⁷⁾ available at the time the decisions to transfer the assets were taken. Given that the discount rates are calculated based on data from appropriate market and company-level sources at the time the decisions to transfer the assets were taken, the Commission considers their value as reasonable.

Table 12

Parameters to determine cost of equity and WACC

Formula	Parameter	Transfers RFI – FS Logistica		Transfer RFI – Trenitalia	
		RFI	FS Logistica	RFI	Trenitalia (*)
H=A+B*C+D	Cost of equity	11,97 %	12,17 %	11,62 %	11,70 %
A	Risk-free rate	5,17 %	4,66 %	4,65 %	4,40 %
B	Beta	0,8	0,9	0,81	1,32

⁽¹¹¹⁾ The only exception is the value of EBITDA in 2008. However, over the 4 years covered by the plan, the sum of the yearly EBITDA values presented in the December 2019 PwC study is EUR 1,3 billion lower than in the 2007-2011 Business Plan.

⁽¹¹²⁾ The company Nuovo Trasporto Viaggiatori S.p.A was founded in December 2006, before the time of the asset transfers.

⁽¹¹³⁾ The WACC is determined as a weighted average of the cost of equity and the after-tax cost of debt, with weights equal to the capital structure of the companies participating in the transfers. The cost of equity is the sum of the risk-free rate, the country risk premium and the product of the stock beta and the equity risk premium. The cost of debt consists of the sum of the risk-free rate and the debt premium, which reflects the riskiness of the companies participating in the transaction.

⁽¹¹⁴⁾ See recitals (85) and (92).

⁽¹¹⁵⁾ As explained in recital (166), the Commission relies on the December 2019 PwC study to assess the **asset transfers from RFI to Trenitalia**. To estimate RFI's and Trenitalia's value of equity, this study employs a discounted cash flow to equity model, for which the cost of equity is the relevant discount rate (see Section 5.2.3.2, sub-section (b)). For the **asset transfers from RFI to FS Logistica**, as explained in recital (169), the Commission took into account the data presented in the April 2019 PwC study. That study estimates RFI's and FS Logistica's enterprise value by using a discounted cash flow to the firm model, for which the WACC is the relevant discount rate (see Section 5.2.3.2, sub-section (a)).

⁽¹¹⁶⁾ Namely the Italian government bond rates, beta and debt premiums of peer companies to estimate, respectively, the risk-free rate, the beta and the cost of debt of the companies participating in the asset transfers.

⁽¹¹⁷⁾ Notably the debt-to-equity ratio, which is used to estimate the weights of debt and equity in the WACC of the companies participating in the asset transfers.

Formula	Parameter	Transfers RFI – FS Logistica		Transfer RFI – Trenitalia	
		RFI	FS Logistica	RFI	Trenitalia (*)
C	Equity risk premium ⁽¹¹⁸⁾	8,43 %	8,43 %	5,24 %	5 %
D	Top-up premium	0,00 %	0,00 %	2,73 %	0,66 %
$I=(A+E)*(1-F)$	Cost of debt	4,33 %	4,66 %		
E	Debt premium	0,80 %	1,74 %		
F	Tax rate	27,50 %	27,50 %		
G	$D/(D+E)$	0,0 %	8,26 %		
$J=(1-F)*G+F*H$	WACC	11,74 %	11,57 %		

(*) Beta and top-up premium are averages of the Cargo and Passenger divisions.

(181) With regard to the terminal value, that value depends on the discount rate, which the Commission assessed in recital (180), and the perpetual growth rate of profits. With regard to the latter, the April and December 2019 PwC studies assume a growth rate of 2 % for the three companies participating in the asset transfers, in line with the inflation target of the European Central Bank ⁽¹¹⁹⁾. The Commission considers such assumption as reasonable, because it is in line with market practice ⁽¹²⁰⁾.

(182) To corroborate its assessment of the parameters of the April and December 2019 PwC studies, the Commission has also verified the sensitivity of the MEO test results by applying alternative assumptions. The purpose of the sensitivity analysis is to determine which values of the discount rates and perpetual growth rate would make the MEO test fail. As pointed out in recital (162), the Commission notes that the measures under investigation would comply with the MEO test even in the extreme scenario without synergies, i.e. where the assets generate the same returns and therefore are worth the same regardless of their ownership, provided that the equity value of the recipient companies is positive. Therefore, the Commission will determine the critical values of the discount rates and perpetual growth rate, namely the values of those parameters in a scenario where the asset transfers are no longer profitable because the value of the equity gains at the level of the recipient companies is lower than the equity losses at the level of RFI. The Commission will then assess whether those critical values are reasonable alternatives to the parameters assumed in the April and December 2019 PwC studies. As it will be explained at recitals (183) to (186), the Commission finds that the critical values are not reasonable alternatives as an indication for assessing the robustness of the two studies.

(183) With regard to the terminal value, the Commission observes that the higher the perpetual growth rate in the Gordon growth formula, the higher the value of equity in the scenarios with and without the asset transfers and the greater the loss of equity of RFI and the increase of equity of the recipient companies ⁽¹²¹⁾. Therefore, considering that the April and December 2019 PwC studies estimate a positive effect of the asset transfers on the profits at FS Group level (recital (171)), the critical level of the perpetual growth rate for which such profits disappear must be lower for

⁽¹¹⁸⁾ In columns 'Transfer RFI-FS Logistica', the equity risk premium is specific to Italy, i.e. it incorporates the country risk premium of Italy.

⁽¹¹⁹⁾ See e.g. <https://www.ecb.europa.eu/mopo/html/index.en.html#:~:text=We%20take%20decisions%20on%20monetary,inflation%20at%20our%20%25%20target.>

⁽¹²⁰⁾ See for example <https://corporatefinanceinstitute.com/resources/valuation/what-is-terminal-growth-rate/> Section 3.

⁽¹²¹⁾ The effect of the perpetual growth rate on the difference in the value of equity in the scenario with and without asset transfers is second order, compared to the effect on the value of equity in each scenario. The reason is that the change in the value of equity is driven by the different long run profitability of the companies in the two scenarios, to which the perpetual growth rate is applied. The perpetual growth rate as such is the same in both scenarios.

the recipient companies and higher for RFI, compared to the assumption made in those studies. Keeping the perpetual growth rate of the recipient companies fixed at 2 %, as assumed in the studies, the Commission's estimates of the critical perpetual growth rates of RFI are the following ⁽¹²²⁾:

- (a) with regard to the asset transfers from RFI to FS Logistica, a rate of 9 % instead of 2 % as assumed in the studies;
- (b) with regard to the asset transfer from RFI to Trenitalia, a rate of 10,9 % instead of 2 % as assumed in the studies.

The Commission considers the critical perpetual growth rates of RFI as unreasonably high at least for two reasons. First, they are higher than the metrics that are normally used in market practice to parametrise the perpetual growth rate, namely the expected growth rate of the Italian gross domestic product and the inflation target of the European Central Bank (recital (181)). Second, even if those high perpetual growth rates were attainable, they would require a higher capital expenditure than that currently assumed in the April and December 2019 PwC studies. Those studies assume that a capital expenditure equal to depreciation is able to support a perpetual growth rate of 2 %. To support a growth rate of 9 % to 10,9 %, a higher capital expenditure would presumably be necessary. Such a higher capital expenditure would decrease the terminal value, counterbalancing the effect of a higher growth rate assumption. Overall, the Commission considers the results of the April and December 2019 PwC studies, which relied on a 2 % perpetual growth rate of RFI instead of 9 % (for the transfer to FS Logistica) and 10,9 % (for the transfer to Trenitalia), as robust.

(184) With regard to the discount rates, the Commission observes that the effect of an increase in their level is the opposite of that of an increase in the perpetual growth rate. That means that the higher the discount rate is, the lower is the value of equity in the scenarios with and without the asset transfers and the lower is also the loss of equity of RFI and the increase of equity of the recipient companies ⁽¹²³⁾. Therefore, by following the same logic as in recital (183), the critical level of the discount rates such that the asset transfers are no longer profitable must be higher for the recipient companies and lower for RFI, compared to the assumption made in the April and December 2019 PwC studies.

(185) The Commission considers the discount rates assumed for the recipient companies, namely FS Logistica and Trenitalia, as conservative estimates. The reason is that those discount rates are higher compared to the value resulting from their textbook definition (see footnote 119), as they included additional parameters. In particular, the WACC to assess the transfers from RFI to FS Logistica factors-in the Italian country risk premium by assuming the rate on Italian government bonds as the risk-free rate as well as adding a country risk premium to the equity risk premium, while it would be sufficient to factor-in only one of those two elements. With regard to the cost of equity used in the assessment of the transfer from RFI to Trenitalia, that includes a top-up risk premium (see Table 12) which does not appear in the textbook definition of cost of equity (see footnote 119). Considering that this approach already represents an upper bound of the WACC for the recipient companies, the Commission will conduct the sensitivity analysis referred to in recital (183) only from the perspective of RFI, by determining the critical discount rate such that its equity losses become equal to the equity gains of the recipient companies. The Commission's estimates of such critical discount rates are the following ⁽¹²⁴⁾:

- (a) with regard to the asset transfer from RFI to FS Logistica, a WACC of 6,8 % instead of 11,74 % as assumed in the studies;

⁽¹²²⁾ To estimate the critical value of the **perpetual growth rate of RFI**, the Commission uses the same financial projections, as well as the same values of the other relevant parameters identified in the April and December 2019 PwC studies, to estimate RFI's value of equity. In addition, the Commission does not change any of the parameters and financial projections determining Trenitalia's and FS Logistica's value of equity. Therefore, those values remain the same as those in the April and December 2019 PwC studies. The critical value of the perpetual growth rate of RFI is the solution to an equation with the equity value of RFI on one side, which depends only on one unknown parameter (i.e. the perpetual growth rate), and the value of equity of Trenitalia/FS Logistica on the other (i.e. the values estimated by the April and December 2019 PwC studies).

⁽¹²³⁾ A higher discount rate reduces the present value of the cash flow losses and gains accruing to RFI and the recipient companies, respectively. Moreover, it reduces the terminal value as calculated using the Gordon growth formula.

⁽¹²⁴⁾ To estimate the critical value of the **discount rate** of RFI, the Commission uses the same financial projections, as well as the same values of the other relevant parameters identified in the April and December 2019 PwC studies, to estimate RFI's value of equity. In addition, the Commission does not change any of the parameters and financial projections determining Trenitalia's and FS Logistica's value of equity. Therefore, those values remain the same as those in the April and December 2019 PwC studies. The critical value of the discount rate of RFI is the solution to an equation with the equity value of RFI on one side, which depends only on one unknown parameter (i.e. the discount rate), and the value of equity of Trenitalia/FS Logistica on the other (i.e. the values estimated by the April and December 2019 PwC studies).

- (b) with regard to the asset transfer from RFI to Trenitalia, a cost of equity of 3,4 % instead of 11,62 % as assumed in the studies.

The Commission considers such critical values of the WACC and cost of equity as unreasonably low for the following reasons. With regard to the cost of equity, the Commission estimates a lower bound of 7 %, which is well above the 3,4 % critical cost of equity. In line with market practice, this estimate of the lower bound is calculated based on the method in footnote 119 and assumes a risk-free rate (plus country risk premium) of 4,4 % ⁽¹²⁵⁾, an equity risk premium of 4,79 % ⁽¹²⁶⁾ and a beta of 0,54 ⁽¹²⁷⁾. With regard to the WACC, the Commission relies on a value of 6,87 %. This value is very close to the critical WACC of 6,8 % in point (a), but it has been estimated under the conservative assumption of a 0 % debt premium ⁽¹²⁸⁾. Therefore, assuming alternative values of the WACC based on market data available at the time the decisions to transfer the assets were taken, the Commission finds that the asset transfers comply with the MEO principle.

- (186) Overall, the Commission considers the financial projections and valuation assumptions underpinning the MEO test as credible and well-justified. Moreover, the Commission notes that the results of the MEO test are robust to alternative, conservative valuation assumptions.

8.1.1.2.4. Conclusion on the application of the MEO test

- (187) Overall, the Commission's assessment of the methodology, the financial projections and the parameters of the April and December 2019 PwC studies, as well as the robustness checks on the underlying assumptions and the results therein, confirm that the asset transfers from RFI to FS Logistica and Trenitalia are market conform.
- (188) As the asset transfers from RFI to Trenitalia and FS Logistica were in line with market conditions, the Commission concludes that any private operator driven only by profitability motives would have implemented such transfers. It follows that the measures under investigation did not confer an economic advantage within the meaning of Article 107(1) TFEU on Trenitalia and FS Logistica.

8.1.1.3. Conclusion on the existence of aid

- (189) As indicated in recital (188), the Commission considers that the asset transfers from RFI to Trenitalia and FS Logistica do not involve an economic advantage in favour of Trenitalia and FS Logistica. Since the conditions of Article 107(1) TFEU are cumulative, it is therefore not necessary to assess whether those transfers involved State resources, whether they were imputable to the Italian State, whether they were selective, whether they distorted or threatened to distort competition, and whether they affected trade between Member States.

9. CONCLUSION

- (190) As indicated in recital (189), the Commission concludes that the asset transfers from RFI to Trenitalia and FS Logistica did not confer an economic advantage on Trenitalia and FS Logistica, and, therefore, do not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The measure consisting in the transfer from Rete Ferroviaria Italiana S.p.A. to Trenitalia S.p.A. of 31 assets in September 2009 does not constitute State aid in favour of Trenitalia S.p.A. within the meaning of Article 107(1) TFEU.

⁽¹²⁵⁾ Interest rate on 10-year Italian government bonds (average of October-December 2007).

⁽¹²⁶⁾ Source: Country risk premiums by Prof Damodaran, available at <https://pages.stern.nyu.edu/~adamodar/pc/archives/ctryprem07.xls>. Answath Damodaran is a Professor of Finance at the Stern School of Business and a leading expert on valuation of equity and other assets.

⁽¹²⁷⁾ Leverage adjusted beta of peer infrastructure managing companies. Source: E.CA study, pages 38 and 39.

⁽¹²⁸⁾ The calculation, which is explained in footnote 119, also assumes a cost of equity of 7 % (i.e. the lower bound of the cost of equity estimated in recital (185)) and the capital structure of RFI as weights for the cost of equity and debt (see Table 12).

Article 2

The measures consisting in the transfer from Rete Ferroviaria Italiana S.p.A. to FS Logistica S.p.A. of 10 assets in December 2007, of 42 assets in December 2008 and of 5 assets in July 2011 do not constitute State aid in favour of FS Logistica S.p.A. within the meaning of Article 107(1) TFEU.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 November 2023.

For the Commission
Didier REYNDEERS
Member of the Commission
